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List of Abbreviations

ECCC	Extraordinary Chambers in the Court of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
JCE	Joint criminal enterprise
NGO	Non-governmental organisation
OPCD	Office of Public Counsel for the Defence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNMIK	United Nations Mission in Kosovo
VWS	Victims and Witnesses Section

Foreword

From Nuremberg to the International Criminal Court, international criminal law has seen an extraordinary evolution in recent years. The creation of the international tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively marked the beginning of a new era in combating impunity for genocide, war crimes and crimes against humanity. Since their inception, these tribunals have issued groundbreaking decisions, which contributed to defining international crimes and the principles of criminal responsibility.

The establishment of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and the International Criminal Court, the first permanent institution of this kind, illustrates that international criminal justice is not only here to stay, but is likely to play an increasingly important role in the future. The growing demand for justice for victims of the most serious crimes fuels the need for legal professionals who possess the skills and knowledge to try alleged perpetrators of mass atrocities and ensure that proceedings respect fair trial standards.

Since its beginnings in 1995, the International Bar Association's Human Rights Institute (IBAHRI) has been actively involved in building capacities of judges and lawyers and offering training of the highest standards in human rights and international criminal law. In accordance with its mission to promote, protect and enforce human rights under a just rule of law, the IBAHRI works to raise awareness among legal professionals and the general public. Benefiting from the International Bar Association's (IBA) strong network of 30,000 individual lawyers and over 195 bar associations and law societies, the IBAHRI brings together experts to facilitate training for judges, prosecutors and defence counsel in jurisdictions across the world.

The IBA has always expressed its support to the international criminal tribunals and has closely followed their work. The creation in 2005 of the IBA's International Criminal Court Monitoring and Outreach Programme based in The Hague further strengthened our activities in the field of international justice. The monitoring component of the Programme follows and reports on the work and proceedings of the International Criminal Court, while the outreach component works with the legal profession to disseminate information and promote debate about the Court in different jurisdictions across the globe.

As the jurisprudence of the international tribunals has enriched international criminal law, it has also made it an increasingly complex and technical area. Legal professionals involved in these proceedings need to master not only the basic principles, but also to understand the implications of the latest developments in the field. From its latest training experience with Cambodian lawyers in July 2008, the IBAHRI realised the need for a complete and extensive training tool that could be used in future training programmes and could become a reference document for legal professionals.

The present manual has been made possible through a grant from the Presidential/Grants Passive of the Open Society Institute. Principal author Dr Miša Zgonec-Rožej and consultant John RWD Jones have successfully put together a thorough yet accessible text, which will provide users with a deeper understanding of the topic, as well as practical examples. Earlier versions of the manual have been

reviewed by a panel of experts, as well as members of the IBA's War Crimes Committee, who have kindly provided their comments. International criminal law is a growing and constantly evolving field, and is the subject of much discussion and scholarly debate. We therefore invite readers to contact the IBAHRI with feedback on the manual.

After the Second World War, the world pledged that 'never again' would such atrocities occur. However, as Srebrenica, Rwanda, Darfur and the Democratic Republic of Congo, among others, have sadly illustrated, history seems to repeat itself. We firmly believe that the best way to break this tragic cycle is to systematically hold perpetrators accountable. In the fight against impunity, knowledge is crucial, particularly amongst legal professionals whose duty it is to uphold the rule of law. We hope that this manual will contribute to building a well informed legal profession whose members will not hesitate to raise their voice and take action to ensure justice is done.

Juan E Méndez **Martin Šolc**

Co-Chairs of the International Bar Association's Human Rights Institute

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Chapter 1 – International Criminal Law: General Introduction

Learning objectives

To ensure participants acquire a basic understanding of the notion of international crimes and international criminal law.

To facilitate understanding of the scope of international criminal law, particularly its relation to human rights and transnational criminal law.

To familiarise participants with the application of international criminal law at the international as well as domestic level and to make them aware of the important role played by the legal professions in this respect.

Questions

Why did you want to join the course?

Why is international criminal law important in general?

Has your country been involved in a conflict, either of an international or internal character?

Why is international criminal law important in the country where you are professionally active?

How do you, as judges, prosecutors and/or lawyers, see your role in promoting understanding of international crimes and how should they be tried in the exercise of your professional duties?

What specific problems, if any, do you face with regard to bringing to justice perpetrators of international crimes?

Are there any alternatives to international criminal law?

Introduction

International criminal law is a relatively new field of law. It emerged particularly in the last century, following the two World Wars and the Holocaust and the untold suffering that those conflicts wrought. In the aftermath of the Second World War came the Nuremberg and Tokyo tribunals, as well as a host of international legal instruments, in particular the Genocide Convention and the Geneva Conventions of 1949, designed to ensure there would be no repetition of the horrific crimes witnessed in the first half of the century – or, at least, if such crimes were committed, they would not go unpunished.

There was, however, little normative development in the following 50 years, due largely to the Cold War, which stalled the millennial project to establish a permanent international criminal court. With the end of the Cold War, and the break-up of former communist countries, and in particular the former Yugoslavia with its wars of dissolution, international consensus was again possible on the need to repress international crimes. The establishment of the International Criminal Tribunal for the

former Yugoslavia (hereinafter ICTY) in 1993 and the International Criminal Tribunal for Rwanda (hereinafter ICTR) in 1994 gave a renewed impetus to the establishment of an International Criminal Court, which eventually took place with the signing of the Rome Statute of the International Criminal Court (hereinafter ICC) in 1994. In the same period, mixed international and national war crimes courts and tribunals have come into existence, in particular to render post-conflict justice in Sierra Leone, Cambodia, East Timor, Kosovo and, most recently, Lebanon.

Consequently, international criminal law has moved from obscurity into headline news, and it is an area of law which not only touches everyone's lives but about which everyone needs increasingly to be, to some extent, knowledgeable.

The objective of the present Manual is therefore to convey a basic knowledge of, and skills in, the implementation of international criminal law to judges, prosecutors and lawyers – legal professions without which there can be no truly efficient implementation of international criminal law at the domestic level. To this end, the present Chapter will provide a general introductory survey of the basic notions of international criminal law, while the following chapters will contain more detailed information and analyses of the particular concepts and institutions involved in administering international criminal law.

What is international criminal law?

International criminal law is a body of international rules prescribing international crimes and regulating principles and procedures governing the investigation, prosecution and punishment of these crimes. International criminal law imposes on perpetrators direct individual criminal responsibility for international crimes. States are under the obligation to prosecute and punish at least some of those crimes.

> *Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. . .[1]

Individuals accused of international crimes would ordinarily be tried before domestic courts; however, more recently, international criminal courts and tribunals have been set up to prosecute international crimes. Although there is no single, unified international criminal procedure, there are consistent procedural rules emerging from the practice and jurisprudence of the international criminal tribunals.

1 Preamble of the Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, para (6) (hereinafter ICC Statute).

The body of rules of international criminal law can therefore be divided into *substantive* and *procedural* criminal law.

The rules on ***substantive*** international criminal law determine the following:[2]

- acts which amount to international crimes;
- subjective or mental elements of international crimes;
- the circumstances which may excuse the accused from individual criminal liability;
- the conditions under which the States may or must, under international rules, prosecute persons accused of international crimes.

The rules on ***procedural*** international criminal law regulate various stages of international trials (investigation, prosecution, trial, appeal, sentencing, enforcement of judgments) and other related matters such as admission of evidence and the protection of victims and witnesses.

General characteristics of international criminal law

International criminal law is a relatively new branch of international law and its development is on-going. Although the most important, 'core' crimes, such as war crimes, genocide, crimes against humanity and crimes against peace emerged before or just after the Second World War, international criminal law as a body of law arguably evolved after the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda.

International criminal law is a hybrid of international law and national criminal law. The sources of international criminal law are the same as the sources of international law. However, international criminal law is also based on principles which derive from national criminal law. These principles predominantly emerged from the two major world legal systems, the common law or adversarial system and the civil law or inquisitorial system. These are sometimes referred to as two different legal 'traditions', given that there is not one single common law or civil law system.

States are involved in the commission of international crimes when the perpetrators act as State agents. Aggression will in fact always be a crime of State, committed by State officials. In such cases, the responsibility of a State for the commission of an internationally wrongful act may be invoked. However, international criminal law deals with the responsibility of individuals regardless of whether they are acting as agents of a State or in their private capacity.

In the past, treaties or customary rules, such as rules of international humanitarian law, merely prohibited certain conduct, for example the killing of civilians. These rules, however, did not determine the criminal nature of violations of such prohibitions or the conditions for their criminal repression and punishment. International criminal law moved to criminalise some of the prohibited acts.[3] For example, some of the prohibitions of international humanitarian law were criminalised in war crimes.

2 Antonio Cassese, *International Criminal Law* (1st ed Oxford University Press, Oxford 2003) 15.
3 Ibid 17.

At present there is no uniform, worldwide criminal code which lists all of the international crimes. Each international court or tribunal provides in its Statute a list of international crimes in order to determine its jurisdiction. There is also no truly universal court; the existing international courts and tribunals all have limited jurisdictions.

The enforcement of international criminal law is shared between international and domestic courts. In practice, international courts conduct criminal trials of persons responsible for international crimes when domestic criminal courts for various reasons, including political ones, have failed or were unable or unwilling to bring to justice persons responsible for international crimes. The ICC is based on the principle of complementarity and it thereby only adjudicates upon cases when national courts are unwilling or unable to do so (*see* Chapter 5 and 6).

The rules of international criminal law remain, in many ways, rudimentary and imprecise. As a new area of law, which has emerged from customary law and treaties such as the Geneva Conventions of 1949 whose primary purpose was not to provide a criminal code, it has had to be sculpted in recent years by international lawyers and judges into a serviceable body of law and procedure. Nevertheless, lawyers coming to international criminal law for the first time will often be struck by how vague and flexible international criminal law appears to be compared to domestic law.

General characteristics of international criminal law

- is a relatively new body of law;
- is a combination of international law and domestic criminal law;
- deals with individual criminal responsibility;
- criminalises acts prohibited under international law;
- there is no uniform codification of international criminal law;
- there is no truly universal court;
- is comprised of rudimentary rules which are still in the process of formation.

At present the competence to enforce international criminal law is shared between international and domestic criminal courts.

What is an international crime?

There is no universally accepted definition of an international crime nor general criteria for determining the scope and the content of an international crime. Nevertheless, various attempts have been made to define the general characteristics of international crimes:

General characteristics of international crimes

- crimes which violate or threaten fundamental values or interests protected by international law and which are of concern to the international community as a whole;
- criminal norms emanating from an international treaty or from customary international law, without requiring intermediate provision of domestic law;
- criminal norms which have direct binding force on individuals and therefore provide for direct individual criminal responsibility;
- crimes which may be prosecuted before international or domestic criminal courts in accordance with the principle of universal jurisdiction;
- a treaty provision or a rule of customary international law establishing liability for an act as an international crime binds all (or a great majority of) States and individuals.[4]

In its Preamble, the ICC Statute refers to the most serious crimes that are of concern to the international community as a whole and recognises that such crimes threaten the peace, security and well being of the world.

Recognising that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,. . . [5]

In accordance with the above general criteria for defining an international crime, the following crimes have been regarded as genuine or 'core' international crimes:

- genocide;
- war crimes;
- crimes against humanity; and
- crime of aggression (also referred to as crimes against peace).[6]

4 M Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in M Cherif Bassiouni (ed), I *International Criminal Law* (Transnational Publishers Incorporated, New York 1999) 3, 98; Hans-Heinrich Jescheck, 'International Crimes', in 2 *Encyclopaedia of Public International Law* (Rudolf Bernhardt (ed), North Holland Publishing Co, Amsterdam 1995)1119, 1120; Cassese (n2) 23; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007) 2; Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd ed Routledge, Oxford 2007) 6.

5 ICC Statute (17 July 1998) UN Doc A/CONF.183/9, paras (3)–(4).

6 According to Cassese, torture (as distinct from torture as one of the categories of war crimes or crimes against humanity) and some extreme forms of terrorism (serious acts of State-sponsored or -tolerated international terrorism) also fall within the (narrower) definition of international crimes. Cassese (n2) 24. Jescheck, on the other hand, considers piracy as one of the crimes in light of the narrow definitions (in addition to the core crimes). Jescheck, 'International Crimes' (n4) 1122.

The international courts and tribunals, including the ICTY, ICTR and ICC, have been given jurisdiction over these crimes. For that reason they are also referred to as 'core' crimes or international crimes in the narrow sense (*strictu sensu*). In a broader sense, however, other crimes may also be considered as international crimes. The common denominator of these 'non-core' crimes is the existence of an international treaty which obliges States parties to criminalise certain acts in their domestic laws.[7]

Without purporting to be exhaustive the list of international crimes in the broader sense – also referred to as 'treaty crimes' – includes the following:

- piracy;[8]
- torture;
- terrorism;
- slavery;
- international trafficking with illicit drugs;
- certain offences committed on board of aircraft and certain unlawful acts against air traffic security;
- trading in women and children;
- excessive fishing;
- pollution of the seas;
- offences against submarine cables and pipelines;
- offences against persons protected by international law;
- serious apartheid offences;
- international hostage taking;
- international postal offences;
- circulation and trafficking in obscene materials;
- falsification and counterfeiting.[9]

During negotiations on establishing the ICC, there were discussions about including terrorist offences, drug trafficking offences and individual acts of torture within the ICC jurisdiction.[10] Although terrorist acts and international trafficking of illicit drugs were considered as extremely serious crimes, they were not included within the Court's jurisdiction since it proved impossible to reach agreement on the definitions of these two crimes. The Statute of the ICC, however, provides for

7 Cryer et al (n4) 2; Bantekas and Nash (n4) 6.

8 Piracy was traditionally a crime under customary international law, but it has now been included in the United Nations Convention on the Law of the Sea (10 Dec 1982) 1833 UNTS 3.

9 M Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', *in* I *International Criminal Law* (n4) 32, 33, 62–69 (M Cherif Bassiouni ed, 1999); Bantekas and Nash (n4); Jescheck (n4) 1122.

10 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998), UN Doc A/CONF.183/10, Res E.

a review mechanism, which allows for an expansion in future of the jurisdiction of the Court.[11]

The core international crimes and some other serious international crimes, such as terrorism and torture, will be analysed in Chapter 3.

Sources of international criminal law

Since international criminal law is a branch of international public law, its legal sources and their hierarchy derive from Article 38 of the Statute of the International Court of Justice (hereinafter ICJ).[12] Although the classification of the sources in this provision is somewhat inadequate and outdated, since the provision fails to acknowledge the importance of other instruments which serve as sources of international criminal law, for example binding resolutions of the United Nations (hereinafter UN) Security Council adopted under Chapter VII of the UN Charter, it can be used as a starting point and provides useful guidance.

According to Paragraph 1 of Article 38 of the ICJ Statute, the sources of international law are, in order:[13]

- international conventions;
- international custom, as evidence of a general practice accepted as law;
- general principles of law recognised by the community of nations;[14]
- judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for the determination of rules of law.

The next section will set forth the essential characteristics of the main sources of international criminal law. However, it should be noted at the outset that in international criminal law judicial decisions take on special relevance in understanding the meaning and the scope of the rules of international criminal law. In addition, resolutions of the UN Security Council which provided the Statutes of international courts and tribunals, such as the ICTY and the ICTR Statutes, are also important sources of international criminal law.

International treaties

TREATIES

One of the most important sources of international criminal law is treaty law. An international treaty is a legally binding consensual agreement between two or more subjects of international law (such as States and international organisations) determining their rights and duties. It is usually concluded in a written form and may be embodied either in a single instrument or in two or more related instruments.[15] Treaties may have different names, such as convention, covenant, pact, agreement, accord, or protocol, but the legal effects are the same. At the international level, the consent of

11 Ibid.
12 Statute of the International Court of Justice (26 June 1945), 3 Bevans 1179, 59 Stat 1055 (hereinafter ICJ Statute).
13 Ibid.
14 Article 38(1)(c) of the ICJ Statute refers to 'civilized' nations which is now out of place and should be replaced by the 'community of nations'.
15 Article 2(1)(a) of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

a State to become bound by a treaty is usually expressed by ratification, acceptance, approval or accession, and, exceptionally, by signature alone.[16]

Once a treaty has entered into force and is binding upon the State parties, the States must perform the treaty obligation in good faith.[17] A party cannot avoid responsibility under international law by invoking the provisions of its internal laws to justify its failure to perform a treaty.[18] For the interpretation of international treaties, the rules of the Vienna Convention on the Law of Treaties of 1969 apply, particularly Articles 31 to 33.[19] The general rule of interpretation provides that 'a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[20]

International treaties which codify international humanitarian law serve as an important source of international criminal law. International humanitarian law covers both 'Hague' law and 'Geneva' law applicable in armed conflicts. The Hague law determines the rights and duties of belligerents in their conduct of operations and limits the choice of methods and means of injuring the enemy in an international armed conflict. It is based on the Hague Conventions of 1899 and 1907 adopted during the Hague Peace Conferences held in 1899 and 1907, particularly the Hague Regulations Respecting the Laws and Customs of War on Land (hereinafter 1907 Hague Regulations).[21]

Geneva law is intended to protect the victims of war and aims to provide safeguards for armed forces personnel placed *hors de combat* and persons not taking part in the hostilities. It is based on the Geneva Conventions of 1864, 1906 and 1929.[22] These conventions were succeeded by the four Geneva Conventions of 1949 and the two Additional Protocols to those conventions of 1977.[23] The four Geneva Conventions of 1949 regulate the status of the groups of persons who enjoy special protection during the armed conflict, namely wounded and sick on land, wounded, sick and shipwrecked at sea, prisoners of war, and civilians.

The International Court of Justice has held that Hague and Geneva Law 'have become so closely interrelated that they are considered to have gradually formed one single complex system known today as international humanitarian law.'[24] The two Additional Protocols of 1977 'give expression and attest to the unity and complexity of that law'.[25] The two Additional Protocols supplement the 1949 Geneva Conventions without repealing them. The Hague law has been incorporated into the Additional Protocols of 1977 where it has also been further developed. As far as they were not

16 Ibid Articles 11 and 12.
17 Ibid Article 26.
18 Ibid Article 27.
19 Ibid.
20 Ibid Article 31.
21 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para (75). Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (18 Oct 1907), 36 Stat 2277, 1 Bevans 631. For other documents see Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents* (3rd ed Nijhoff, Dordrecht 1988).
22 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 Aug 1862); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906); Geneva Convention relative to the Treatment of Prisoners of War (27 July 1929); all the conventions are reprinted in Schindler & Toman (n21) 279–283, 301–312, 339–366.
23 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 35; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 Aug 1949) 75 UNTS 81; Geneva Convention relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (8 June 1977) 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) (8 June 1977) 1125 UNTS 609.
24 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para (75).
25 Ibid.

incorporated therein, the Hague provisions are still in force.[26]

There are also other international treaties which serve as sources of international criminal law, such as the Convention on Prevention and Punishment of the Crime of Genocide of 1948,[27] the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954,[28] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,[29] the International Convention against the Taking of Hostages of 1979,[30] and international treaties on terrorism (*see* Chapter 3).

STATUTES OF THE INTERNATIONAL COURTS AND TRIBUNALS

Another important source of international criminal law is the Statutes of the international courts and tribunals. For example, the London Agreement of 8 August 1945 sets out the substantive and procedural law of the International Military Tribunal at Nuremberg.[31] The Rome Statute of the ICC, which lists the international crimes falling within the Court's jurisdiction, general principle of international criminal law, and the procedure before the Court, was also adopted as an international treaty.[32]

The Statutes of the ICTY and the ICTR were adopted not by treaty but by the UN Security Council in its resolutions 872 (2003) and 955 (2004), respectively.[33] The establishment of these two international criminal tribunals was therefore, ultimately, based in a treaty, namely the UN Charter, since they were created by resolutions of the UN Security Council acting under Chapter VII of the UN Charter. Pursuant to Article 25 of the UN Charter these resolutions are legally binding on all members of the UN.

RULES OF PROCEDURE AND EVIDENCE

The basic stages of international criminal proceedings are generally set out in the Statutes of the international courts and tribunals. However, they are usually further elaborated in the Rules of Procedure and Evidence. In some cases, such as the ICTY and ICTR, the Rules are adopted by the judges of the tribunals.[34] The bases for their adoption are the Statutes of the tribunals which were adopted, as mentioned, in the form of UN Security Council resolutions pursuant to the UN Charter which is itself an international treaty.

26 Karl Josef Partsch, 'Humanitarian Law and Armed Conflict', in 2 *Encyclopaedia of Public International Law* (Rudolf Bernhardt (ed), North Holland Publishing Co, Amsterdam 1995) 933, 935.
27 Convention on Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.
28 Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) 249 UNTS 240.
29 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.
30 International Convention against the Taking of Hostages (17 Dec 1979) 1316 UNTS 205.
31 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 Aug 1945) 82 UNTS 279 (Annex).
32 ICC Statute (17 July 1998) UN Doc A/CONF.183/9.
33 Statute of the International Criminal Tribunal for the former Yugoslavia, SC Res 827, UN Doc S/RES/827 (25 May 1993) (hereinafter ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, SC Res 955, UN Doc S/RES/955 (8 Nov 1994) (hereinafter ICTR Statute).
34 Ibid, Article 15 of the ICTY Statute; Article 14 of the ICTR Statute. The latest versions of the Rules of Procedure and Evidence of the ICTY and ICTR are available at <http://www.icty.org> (ICTR) accessed on 30 November 2009.

In the case of the ICC, the Assembly of States parties adopts the Rules of Procedure and Evidence by a two-thirds majority.[35] In urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of the States parties.[36] The basis for the adoption of the ICC Rules is the ICC Statute which is an international treaty.

Customary international law

When the treaty law fails to provide rules on a certain matter, thereby leaving gaps, resort must be had to customary international law and general principles of law. Customary international law may also be referred to in order to clarify the content and the scope of the treaty provisions.[37] International customary legal obligations binding upon States are created when there is evidence of both:

- acts amounting to a 'settled practice' of States; and
- a 'belief that this practice is rendered obligatory by the existence of a rule of law requiring it' (*opinio juris*).[38]

A judge, when deciding whether there is a rule of customary international law, will therefore have to assess the existence of one *objective* element, consisting of the general practice, and one *subjective* element, namely that there is a belief among States as to the legally binding nature of this practice.[39] Both elements, the practice and *opinio iuris*, are closely intertwined. Arguably, however, the objective element is not always required in the formation of a customary rule.[40]

The task of ascertaining the content of customary law may be very difficult when the norm of customary law is unwritten. It may be easier when the customary international law originates with a treaty or other written instrument, such as UN General Assembly resolutions. Although not legally binding *per se*, General Assembly resolutions may be generally accepted as reflecting custom. An example of such a resolution is the Definition of Aggression, namely Paragraph 3(g), adopted in the General Assembly resolution 3314 (XXIX) of 14 December 1974.

Courts and tribunals, both domestic and international, play an important role in recognising rules of customary international law.[41]

International customary law is binding upon all States except the States that have consistently objected to the formation of the respective customary rule throughout the entire process of its creation. However, such objections are not allowed with regard to *jus cogens* or peremptory norms of international law. These are the norms accepted and recognised by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[42] Examples of *jus cogens*

35 Article 51(1) and (2) of the ICC Statute (17 July 1998) UN Doc A/CONF.183/9. ICC Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A) (9 Sept 2002) (hereinafter ICC Rules of Procedure and Evidence).
36 Article 51(3) of the ICC Statute (17 July 1998) UN Doc A/CONF.183/9.
37 *Prosecutor v Kupreškić et al* (ICTY) Case No IT-95-16-T, Trial Judgment (14 January 2000) para (591).
38 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands & Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 44.
39 Ibid.
40 See *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) (Merits) [1986] ICJ Rep 14 para (186); *Prosecutor v Tadić* (ICTY) Case No IT-94-1-A, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para (99).
41 See *Prosecutor v Furundžija* (ICTY) Case No IT-95-17/1-T, Trial Judgment (10 December 1998) paras (168)–(169).
42 Article 53 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

norms are the prohibitions on genocide and torture.

A useful example of a court seeking to ascertain whether a norm has attained the status of customary international law is provided by the *Galić* case at the ICTY where the Trial Chamber, in its Judgement of 5 December 2003, decided that the prohibition on committing acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva conventions of 1949, was part of customary law and a breach of the prohibition entailed individual criminal responsibility.

General principles

General principles are resorted to when international treaties and customary law provide an insufficient basis for a court to take a decision. General principles can be found both in international law and also in domestic legal systems of States. The general principles of international law are principles which may be inferred from the international legal system, such as *bona fide*s or *pacta sunt servanda*. As regards the principles emanating from municipal law only the principles that are common to all major legal systems qualify as generally accepted principles, such as the principle of legality.[43] Although the principles do not have to be recognised by all legal systems, they have to be common to most major legal systems.[44]

The Rome Statute of the ICC provides that the general principles of law derived from the national laws of legal systems of the world can be applied as a last resort. The Court can use them when the first category of law, namely the Statute, Elements of Crimes and the Rules of Procedure and Evidence, or the second category of law, namely applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict, provide no basis for a decision. Paragraph 1(c) of Article 21 of the Statute of the ICC states that the Court shall apply

> 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 (the) Statute and with international law and internationally recognised norms and standards.[45]

In practice, international courts and tribunals apply principles taken from national legal systems only when no other sources of international law are available. However, the ICTY and the ICTR, for example, have sometimes been criticised for using the principles emanating only from common or civil law systems, thereby neglecting other legal systems such as those of the Islamic world and African continent.[46]

Subsidiary means

JUDICIAL DECISIONS

Generally, judicial decisions are subsidiary means for the determination of international rules and therefore do not per se constitute a source of international law. However, in international criminal

43 *Prosecutor v Furundžija* (n41) paras (177–178).
44 Bantekas and Nash (n4) 4.
45 ICC Statute (17 July 1998), UN Doc A/CONF.183/9.
46 Bantekas and Nash (n4) 5.

law, judicial decisions often play a much more important role. They help in ascertaining the existence of the rules of customary law and serve as means for establishing the most appropriate interpretation to be placed on a treaty rule.[47] It should be pointed out that there is not only reliance upon the international judgments, but also judicial decisions taken by domestic courts. The ICTY and ICTR, for example, have had reference not only to international judgments but also to domestic case law.[48]

Paragraph 2 of Article 21 of the Statute of the ICC provides that the Court may apply 'principles and rules of law as interpreted in its previous decisions'.[49] The Court is therefore not bound by its previous decisions and has thereby not adopted the doctrine of precedent or *stare decisis*. Under this doctrine, which traditionally applies in common law jurisdictions, it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.[50]

Through the development of their case-law, the ICTY and ICTR are now guided by the doctrine of precedent, although their statutes did not specifically provide for it.[51] The ICTY Appeals Chamber decided in *Aleksovski* that 'in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice'.[52] The ICTY thus applies a 'soft' doctrine of precedent which is analogous to precedent:[53]

> 107. The Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.
>
> …
>
> 109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.
>
> …
>
> 111. Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.[54]

With regard to the question whether the decisions of the Appeals Chamber are binding on Trial Chambers, the Appeals Chamber in *Aleksovski* considered that 'a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers.'[55] With regard to the question whether decisions of the Trial Chambers are binding on each other the Appeals Chamber held that

47 Cassese (n2) 37.
48 See, eg, *Prosecutor v Tadić* (ICTY) Case No IT-94-1-A, Appeal Judgment (15 July 1999) paras (255)–(270).
49 ICC Statute (17 July 1998) UN Doc A/CONF.183/9.
50 Bryan A Gardner (ed) *Black's Law Dictionary*, (West Group, St Paul, Minnesota 2000), 1137.
51 See Cryer et al (n4) 9.
52 *Prosecutor v Aleksovski* (ICTY) Case No IT-95-14/1-A, Appeal Judgment (24 March 2000) para (107).
53 See further John R W D Jones and Steven Powles, *International Criminal Practice* (3rd ed OUP, Oxford 2003) 139–141.
54 *Prosecutor v Aleksovski* (ICTY) (n52) paras (107)–(111).
55 Ibid para (24).

> [t]he Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.[56]

JURISPRUDENCE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS

An additional question which should be addressed is whether and to what extent the international criminal tribunals are bound by the case law of other tribunals, for example, the International Court of Justice. As regards the relationship between the ICJ and the ICTY, the Appeals Chamber in *Delalić et al* judgment held that despite the ICJ's status as the principal judicial organ within the UN system to which the ICTY belongs, there is no hierarchical relationship between the two courts.[57] The ICTY is an autonomous body and therefore not bound by the ICJ's rulings. The same principle applies with regard to other international courts and tribuals.

However, international criminal tribunals have taken into account the decisions of other international courts, where they are relevant.[58] In *Tadić*, for example, the Trial Chamber referred to the judgment of the European Court of Human Rights (hereinafter ECtHR) in *Loizidou v Turkey* and the ICJ's judgment in the case of *United States Diplomatic and Consular Staff in Teheran.*[59] The Statute of the Special Court of Sierra Leone codifies this approach with regard to ICTY and ICTR jurisprudence, providing that '[t]he judges of the Appeals Chamber shall be guided by the decisions of the Appeals Chambers of the International Tribunals for the former Yugoslavia and for Rwanda.'[60]

The Appeals Chamber stated in its judgment in the *Delalić et al* case that although it would take into consideration other decisions of international courts as much as possible so as to ensure consistency and predictability, it may, after careful consideration, come to a different conclusion.[61] Indeed, in its first case, *Prosecutor v Tadić*, the ICTY famously departed from a previous ICJ ruling in the *Nicaragua* case, in relation to the legal criteria for establishing when, in an armed conflict which is *prima facie* internal, armed forces may be regarded as acting on behalf of a foreign power, thereby rendering the conflict international.[62] The Appeals Chamber did not find the 'effective control' test formulated by the ICJ in the *Nicaragua* case persuasive and instead ruled in favour of an 'overall control' threshold.[63]

56 Ibid para (114).

57 *Prosecutor v Delalić* et al (ICTY) Case No IT-96-21-A, Appeal Judgment (20 February 2001) para (24).

58 Ibid para (24).

59 *Prosecutor v Tadić* (ICTY) (n48), paras (128, 133). See also *Prosecutor v Aleksovski* (n52) (ICTY) para (95), where the Appeals Chamber relied upon the *Cossey* case by the European Court of Human Rights.

60 Article 20(3) of the Statute of the Special Court for Sierra Leone, Enclosure to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 2178 UNTS 138 (16 Jan 2002). Judge Bankole Thompson of the Special Court, however, stated that 'the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals. . . [o]n contrary, the special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the locus of the Court.' *Prosecutor v Kallon* (SCSL) Case No SCSL-2003-07-PT, Trial Chamber Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-public Disclosure (23 May 2003) para (12).

61 *Prosecutor v Delalić* et al (ICTY) (n57) para (24).

62 See also the initial different approaches to the definition of rape under the ICTR and ICTY as reflected in: *Prosecutor v Akayesu* (ICTR) Case No ICTR-96-4-T, Trial Judgment (2 September 1998) paras (597)–(598) to be compared with *Prosecutor v Kunarac et al* (ICTY) Case No IT-96-23-T and IT-96-23/1-T, Trial Judgment (22 February 2001) para (412).

63 The Appeals Chamber held that 'in order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.' *Prosecutor v Tadić* (ICTY) (n48) para (131); see also paras (115)–(130).

To conclude, although international courts and tribunals are not formally bound by the jurisprudence of other international courts and tribunals, they may refer to it when the cases involve similar issues. However, they are free to depart from such precedents when they deem fit, particularly if there are compelling reasons for so doing.

OPINION OF SCHOLARS

Opinions of scholars can also serve as subsidiary sources to determine the rules of law, but they are not in themselves the sources of international criminal law. The opinions can in some situations contribute to an improved understanding of the law and its practical implementation.[64] One should not, however, rely upon the scholars' personal views of how the law should be, but could only rely upon the scholars' statements which establish the law as it stands.[65] It is therefore advisable to be careful before relying on views, statements, and articles of scholars, since they may not correctly reflect the status of the law to be interpreted and applied.[66]

The scope of international criminal law

Although international criminal law is a separate branch of public international law, it relates to other areas of international law and domestic criminal law. In order to understand the scope and the limits of international criminal law, it is necessary to examine its relationship with rules of international law governing State responsibility, domestic criminal law, human rights, transnational criminal law and international humanitarian law.

INTERNATIONAL LAW: STATE RESPONSIBILITY

International criminal law is a branch of public international law, a system of rules governing the rights and duties of States and other subjects of international law. International criminal law imposes criminal liability only upon individuals, but not States. However, most of the acts prescribed by international criminal law as international crimes are regarded by international law as serious violations by States.[67] If an agent of a State (an individual not acting in a private capacity) commits an international crime, the act in question may be attributable to the State, in which case that State may also be internationally responsible.[68]

International crimes that may trigger a dual responsibility: on the one hand, criminal responsibility of an individual not acting in a private capacity under international criminal law and, on the other hand, the responsibility of a State under rules of international law regulating the matter include rules prohibiting the crime of genocide, crimes against humanity and war crimes. Both responsibilities may be invoked for the same offence. For example, Bosnia and Herzegovina instituted proceedings against Serbia for genocide before the International Court of Justice while at the same time the ICTY had jurisdiction to prosecute individuals responsible for the crime of genocide.

64 *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* <www.ibanet.org/images/downloads/hri/Human_Rights_Training_Manual.pdf> accessed 10 August 2009.
65 Cryer et al (n4) 9. See, eg, *Prosecutor v Krstić* (ICTY) Case No IT-98-33-A, Appeal Judgment (19 April 2004) para (10); *Prosecutor v Stakić* (ICTY) Case No IT-97-24-T, Trial Judgment (31 July 2003) para (519).
66 *Human Rights in the Administration of Justice* (n64).
67 Antonio Cassese, 'International Criminal Law', in Malcolm D Evans (ed), *International Law* (Ashgate, Farnham 2003) 721, 724.
68 Cryer et al (n4) 11.

CRIMINAL LAW

Criminal law defines the duties which an individual owes to society, breaches of which are subject to penal sanction by a State. International criminal law partly derives its origin from and draws upon national criminal law and is 'largely the result of the gradual transposition onto the international plane of rules and legal conducts proper to national criminal law or to national trial proceedings'.[69] Since there is no uniform system of criminal law, international criminal law combines elements of both common and civil law systems. International courts and tribunals have often referred to, and borrowed from, domestic criminal law in order to interpret and elaborate the provisions of substantive and procedural international criminal law.

TRANSNATIONAL CRIMINAL LAW

Although international criminal law and transnational criminal law are considerably intertwined, they can, strictly speaking, be distinguished from each other. International criminal law in the broad sense may be regarded as an umbrella term comprising both international criminal law in the narrow sense and transnational criminal law. Transnational criminal law covers crimes of international concern or so-called treaty crimes, referred to above as international crimes in the broad sense. International criminal law in the narrow sense covers the so-called 'core crimes' falling within the jurisdiction of the international courts and tribunals. Although the origin of treaty crimes is international, penal prescription is national.[70]

Unlike international criminal law, which provides for individual criminal liability for the violations of the 'core crimes', even in the absence of a domestic prohibition, transnational criminal law does not create individual criminal responsibility under international law. Transnational criminal law is 'an indirect system of interstate obligations generating national penal laws. The suppression conventions impose obligations on states parties to enact and enforce certain municipal offences. . . [I]n contrast to the core crimes, the authority to penalize comes from national law and individual criminal liability is entirely in terms of national law.'[71]

Transnational criminal law encompasses the provisions which determine the field of application of national criminal law where there is some transnational aspect of a crime. It also provides methods and procedures for mutual assistance and cooperation among States with respect to crimes involving a foreign element. In this framework, it comprises conventions on extradition of offenders by one State for prosecution in another State, as well as the transfer of prisoners to enable them to serve their sentences in their home countries. A number of international treaties impose on States the obligation to criminalise certain activities by creating criminal offences in domestic law and to prosecute the offenders found on their territory or extradite them to States that will prosecute (*aut dedere aut judicare*).[72]

69 Cassese (n67) 723–724.
70 Neil Boister, 'Transnational Criminal Law' (2003), 14 EJIL 953, 955.
71 Ibid at 962 (footnotes omitted).
72 Cryer et al (n4) 3–4; Dietrich Oehler, 'Criminal Law International', in 1 *Encyclopaedia of Public International Law* (Rudolf Bernhardt (ed), North Holland Publishing Co, Amsterdam 1992) 877, 877–881.

LAW OF HUMAN RIGHTS

International criminal law has been greatly influenced by the law of human rights. Both areas have a common base as they developed in response to atrocities and gross human rights violations committed during the two World Wars. Similarily, the ad hoc tribunals were established in order to halt mass abuses of human rights by States against their own citizens or others within their territory.[73]

The main difference between law of human rights and international criminal law is that the prohibitions contained in human rights law are primarily addressed to States, as opposed to international criminal law which imposes responsibility on individuals. It is within the States' discretion to decide on how to implement the human rights obligation. Where applicable, States usually criminalise the prohibited activities arising from their human rights obligations at the domestic level.[74] Although they are separate areas of law, international criminal law and the law of human rights overlap to a certain extent. 'Almost every international crime would be a violation of human rights law, but the converse does not apply.'[75]

The ICTY and ICTR Stautes do not specifically refer to international human rights law, except in relation to the relevant qualifications and experience required for the election of judges.[76] In the SCSL Statute, specific provision is made for the treatment of offenders who were between 15 and 18 at the time of the alleged commission of the crime 'in accordance with international human rights standards, in particular the rights of the child'.[77] However the right of the accused to a fair trial at all the international courts and tribunals is determined by international human rights law, the relevant provisions being based on the International Covenant on Civil and Political Rights (hereinafter ICCPR).[78] The Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea makes an explicit reference to Articles 14 and 15 of the ICCPR, to which Cambodia is a party.[79]

The ad hoc international tribunals, although they are not formally bound by any international and regional human rights treaties, have frequently referred to international human rights law. They have used international human rights law and the decisions of international bodies applying that law in determining the content of substantive and procedural international criminal law.[80] In *Kunarac et al*, the Trial Chamber explained that the ICTY has often had recourse to instruments and practices developed in the field of human rights in order to determine the content of customary international law in the field of humanitarian law.[81]

For example, in *Furundžija,* the ICTY Trial Chamber held that 'international humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition.'[82] Consequently, the Trial Chamber turned to human rights law to determine the definition of torture under customary international law, in particular the UN Convention Against Torture and Other

73 Cryer et al (n4) 9.
74 Cryer et al (n4) 9–11; Bantekas and Nash (n4) 18–19.
75 Cryer et al (n4) 10.
76 Article 13 of the ICTY Statute; Article 12 of the ICTR Statute.
77 Article 7(1) of the SCSL Statute.
78 See, eg, Article 21 of the ICTY Statute; Article 20 of the ICTR Statute; Article 16 of the STL Statute; Article 17 of the SCSL Statute; Articles 12–13.
79 Articles 12–13 of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea 6 June 2003, 2329 UNTS 117 (Annex).
80 Cryer et al (n4) 10.
81 *Prosecutor v Kunarac et al* (n62) para (467).
82 *Prosecutor v Furundžija* (n41) para (159).

Cruel, Inhuman or Degrading Treatment or Punishment of 1984.[83] The Trial Chamber shared the view of the Trial Chamber in *Delalić* that the definition set out in Article 1 of the Torture Convention 'reflects consensus which is considered to be representative of customary international law'.[84] The Trial Chamber, however, pointed out that it should 'identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts.'[85]

The ICTR has used human rights jurisprudence on hate speech and freedom of expression to assist in defining the crime of direct and public incitement of genocide. In *Nahimana et al*, the Trial Chamber referred to the definition of freedom from discrimination and freedom of expression provided in the ICCPR and the relevant jurisprudence of the UN Human Rights Committee. The Trial Chamber also refered to the relevant provisions of the International Convention on the Elimination of all Forms of Racial Discrimination and analysed extensive jurisprudence of the European Convention on Human Rights (hereinafter ECHR) on the proper balancing of the right to freedom of expression and the right to restrict such freedom.[86]

The ICC Statute does not explicitly refer to the applicability of international human rights law. The Statute does, however, recognise, as discussed above, that the Court should apply 'applicable treaties and the principles and rules of international law'.[87] Human rights law is codified in various treaties; widely ratified treaties may be viewed as evidence of 'rules and principles of international law.'[88] Therefore, human rights law will undoubtedly be a significant source of law for the ICC, as well as the basis for ensuring procedural fairness and the rights of the accused. Furthermore, the ICC is, by its own Statute, bound to apply and interpret law in a manner 'consistent with internationally recognised human rights'.[89]

LAW ON USE OF FORCE

There is a distinction between the rules of international law which govern the legality of resort to force by a State, so-called *ius ad bellum*, and the laws of war which apply once the decision to resort to force has been taken and fighting has started, the so-called *ius in bello*. Waging aggressive war is prohibited under international law.[90] The UN Charter enacts the prohibition of war in Article 4 (2) providing that

83 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.

84 *Prosecutor v Furundžija* (n41) paras (160)–(161); *Prosecutor v Delalić et al* (ICTY) Case No IT-96-21-T, Trial Judgment (16 November 1998) para (459). See also *Prosecutor v Kunarac et al* (n62) paras (468), (472).

85 *Prosecutor v Furundžija* (n41) para (162); *Prosecutor v Furundžija* (ICTY) Case No IT-95-17/1-A, Appeal Judgment (21 July 2000) para (111). See also *Prosecutor v Kunarac et al* (n62) para (468), (472).

86 *Prosecutor v Nahimana et al* (ICTR) Case No ICTR-99-52-T, Trial Judgment (3 December 2003) paras (983)–(1010).

87 Article 21(1)(b) of the ICC Statute (17 July 1998) UN Doc A/CONF.183/9.

88 Alain Pellet, 'Applicable Law' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), I *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 1051, 1067–1072, 1077–1082.

89 Article 21(3) of the ICC Statute (17 July 1998) UN Doc A/CONF.183/9.

90 The right of States to resort to war was first limited by the Covenant of the League of Nations in 1920. The efforts to fill the 'gaps' in Covenant resulted in the Kellogg-Briand Pact signed in 1928 (General Treaty for the Renunciation of War). This treaty, to which almost all the States of the world became parties, provided for the renunciation of war as an instrument of national policy. However, there is some dispute on whether the Kellogg-Briand Pact of 1928 already marks a general acceptance of the prohibition of the use of force in the absolute sense in which it was laid down in Article 2(4) of the UN Charter. Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th revised ed Routledge, Oxford 2002) 308–309.

> [a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

States may resort to force only in the exercise of their inherent right of individual or collective self-defence (Article 51 of the UN Charter) or as part of military sanctions authorised by the Security Council (Articles 43 to 48 of the UN Charter). Waging aggressive war or use of force in violation of international law is considered an international crime of aggression, also referred to as a crime against peace. In addition to the responsibility of a State for aggression, individual criminal responsibility may be invoked by virtue of international criminal law, for a crime of aggression (*see* Chapter 3).

INTERNATIONAL HUMANITARIAN LAW (LAW OF WAR OR LAW OF ARMED CONFLICTS)

The modern 'law of war' is nowdays referred to as the 'law of armed conflict' or 'international humanitarian law'. The notion of 'war' has been replaced by the concept of 'armed conflict' which is broader than the traditional concept of 'war'. Generally, it includes armed conflicts in which the parties to the conflict have not declared war and do not recognise themselves as being at war with one another.[91] A fundamental principle of the law of war is that it applies equally to all the parties to an armed conflict, irrespective of who is the aggressor.

International humanitarian law constitutes a reaffirmation and development of the traditional international 'laws of war'.[92] It now encompasses rules contained in the Hague Conventions of 1899 and 1907 governing methods and means of warfare as well as the governing of occupied territories.[93] In addition, international humanitarian law now includes rules drawn principally from the four Geneva Conventions of 1949 and their two Additional Protocols of 1977[94] designed to regulate the treatment and protection of individuals.[95]

International humanitarian law thus covers most of that which, according to a traditional view, belongs to the 'law of war'. All three expressions, the law of war, the law of armed conflicts and international humanitarian law, may be regarded as equivalents. However, strictly speaking, some parts of the law of war fall outside the scope of international humanitarian law since their primary purpose is not humanitarian. These parts include the law of neutrality, the impact of a formal state of war on the diplomatic and treaty relations of the parties to a conflict and the rules regarding economic warfare.[96]

The relationship between international humanitarian law and international criminal law can be described as two partly overlapping circles. While international humanitarian law is one of the main

91 According to the *Encyclopaedia of International Law*, the concept of international armed conflict includes: (i) the use of force in a warlike manner between States, whether they recognise themselves as being at war or not; (ii) all measures short of war, whether they are compatible with Article 2(4) of the UN Charter or not; and (iii) wars of national liberation as set out in Article 1(4) of Protocol I. Karl Josef Partsch, 'Armed Conflict, Fundamental Rules', in 1 *Encyclopaedia of Public International Law* (Rudolf Bernhardt (ed), North Holland Publishing Co, Amsterdam 1992) 249, 251.

92 Christopher Greenwood, 'Historical Development', in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (OUP, Oxford 1999) 8.

93 The Hague Conventions of 1899 and 1907 are reprinted in Schindler and Toman (n21).

94 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 35; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 Aug 1949) 75 UNTS 81; Geneva Convention relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (8 June 1977) 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) (8 June 1977) 1125 UNTS 609.

95 Greenwood, 'Historical Development' (n92) 9.

96 Ibid; Partsch, 'Humanitarian Law and Armed Conflict' (n26) 933.

sources of international criminal law, there are large parts of it (*eg* the rules regarding the registration of prisoners of war) which have nothing to do with international criminal law. Conversely, there are parts of international criminal law (*eg* concerning drug-trafficking or terrorism) which have nothing to do with international humanitarian law (*see* further Chapter 3). The area of overlap occurs where a part of international humanitarian law has been criminalised as war crimes.

International humanitarian law, as such, is addressed to States and belligerents. International criminal law, on the other hand, is addressed to individuals, and criminalises parts of international humanitarian law, as well as genocide and other crimes which do not form part of international humanitarian law, with the attendant sanctions of the criminal law, in particular, imprisonment.[97]

TRANSITIONAL JUSTICE

Definition

Transitional justice refers to the full range of processes and mechanisms associated with societies' attempts to come to terms with legacies of large-scale human rights abuses, mass atrocities, or other forms of severe social trauma, including genocide and civil war, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuses. These transformations may happen suddenly or they may take place over many decades.[98]

The aim of transitional justice is to address and endeavour to heal divisions within a society that have arisen as a result of human rights violations and to contribute to the healing process for victims and witnesses. Transitional justice seeks to afford justice to victims and determine the legal accountability of perpetrators and to establish an accurate historical record. Transitional justice's further goal is to restore the rule of law, reform institutions to promote democratisation and respect for human rights, and ensure violations are not repeated. The ultimate aim of transitional justice, therefore, is to promote a stable and sustainable peace.[99]

Transitional justice involves judicial and non-judicial mechanisms in which there may be elements of international involvement. These include individual prosecutions undertaken domestically or internationally, and the establishment of truth commissions to investigate the past in order to determine the full extent and the nature of human rights abuses, such as the South African Truth and Reconciliation Commission. Other mechanisms include: reparations programmes which endeavour to redress the material and moral damage of past wrongs through material and symbolic gestures to victims; gender justice to ensure women are guaranteed equal access to redress for human rights violations and can challenge impunity for gender based violence; the reform of abusive state institutions, such as security services, the police or military; and memorialising and remembering the victims.[100]

97 See also Marco Sassòli, 'Humanitarian Law and International Criminal Law', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 109, 109–120.

98 See the definitions available at <http://www.gsdrc.org/go/topic-guides/justice/transitional-justice> accessed 6 October 2009; <www.ictj.org/static/TJApproaches/WhatisTJ/ICTJ_WhatisTJ_pa2008_.pdf> accessed 6 October 2009.

99 Sanam Naraghi Anderlini, Camille Pampell Conaway and Lisa Katos, 'Transitional Justice and Reconciliation', available at <www.huntalternatives.org/download/49_transitional_justice.pdf > accessed 6 October 2009.

100 Louis Bickford, 'Transitional Justice', in 3 *The Encyclopedia of Genocide and Crimes Against Humanity* (Dinah Shelton (ed), Thomson/Gale, Detroit, Michigan 2004) 1045, 1045. See also <www.ictj.org/en/tj/> accessed 6 October 2009.

Example: gacaca courts

An example of a mechanism of transitional justice established in the aftermath of the genocide in Rwanda in 1994 are the so-called 'gacaca' courts. After the conflict in 1994, the Rwandan legal system was devastated and unable to prosecute and try the approximately 120,000 detained suspects. For the purpose of a more expeditious means of delivering justice, Rwanda introduced the 'gacaca' court system.[101] 'Gacaca', which means 'justice on the grass', evolved from traditional conflict resolution mechanisms used to settle minor offences such as theft or family disputes at the community level. They were constituted as village assemblies, presided over by elders, which would convene all parties to meditate a solution.[102] The main objectives of gacaca courts are to reveal the truth about what has happened, to speed up the trial, eradicate the culture of impunity, and to achieve reconciliation.[103]

The gacaca courts system coexists and functions in parallel with Rwandan domestic courts. The formal courts try individuals classified in the first category of offenders in the Rwandan genocide as laid down by Rwandan law, which include the planners, organisers, instigators, supervisors of the genocide; the leaders at the national, provincial or district level, within political parties, army, religious denominations or militia; the well-known murderers, torturers and those who committed rape or acts of sexual torture. The gacaca courts try individuals falling within the lesser categories, such as those accused of killings or serious assults (second category) and those who committed offences against property (third category).[104] The gacaca courts are organised at three levels each with different competencies and may impose prison sentences of up to 30 years.[105]

Role of the legal profession in bringing to justice perpetrators of international crimes

As international criminal law has entered the mainstream, so lawyers have had to learn about this area of law. The *Pinochet* case in the United Kingdom, for example, taught a whole generation of United Kingdom lawyers about the prohibition on torture in international criminal law. No lawyer can afford to ignore this growing body of law.

Lawyers of all descriptions will increasingly be involved in the implementation of international criminal law: politicians who decide what laws to enact to combat impunity, legislative draftsmen who grapple with the minutiae of legal provisions, prosecutors and investigators considering whether to seek to bring perpetrators of international crimes to justice, judges who must sit in judgment on such crimes and be familiar with the wide range of applicable legal concepts and tools, and defence lawyers seeking to ensure a fair trial for their clients. All have a role to play.

Moreover, international criminal law increasingly impacts on other areas of law, in particular asylum and immigration law and extradition law.

101 See Organic Law No 40/2000 of 26 January 2001, setting up 'Gacaca Jurisdictions' and organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994; Organic Law No 33/2001 of 22 June 2001 modifying and completing Organic Law No 40/2000 of 26 January 2001. These laws were revised by the Organic Law No 16/2004 of 19 June 2004 and by the Organic Law No 28/2006 of 27 June 2006. All the laws are available at <www.inkiko-gacaca.gov.rw/En/EnLaw.htm> accessed 24 October 2009.

102 Cécile Aptel, 'Gacaca', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 329, 329.

103 See the official website of the 'National Service of the Gacaca Jurisdiction', available at <www.inkiko-gacaca.gov.rw/En/EnObjectives.htm> accessed 24 October 2009.

104 Article 51 of the Organic Law No 16/2004 of 19 June 2004, available at <www.inkiko-gacaca.gov.rw/En/EnLaw.htm> accessed 24 October 2009.

105 Article 72 of the Organic Law No 16/2004 of 19 June 2004, available at <www.inkiko-gacaca.gov.rw/En/EnLaw.htm> accessed 24 October 2009.

It is the professional role and duty of judges, prosecutors and lawyers throughout the world, who have the single most important role to play in applying international criminal law, to help to ensure the progressive development of international criminal law, and to ensure it is at all times applied with the utmost regard for the rights of the accused.

These themes will be explored in subsequent chapters.

Concluding remarks

The present Chapter introduced the main characteristics of international criminal law as a relatively new branch of public international law and addressed the issues regarding the definition of an international crime. Further, it provided the main sources of international criminal law. In order to understand the meaning and the scope of international criminal law, which is considered a mixture between international law and criminal law, the present Chapter explained its relation to both these areas of law. In addition, it underlined the areas of overlap between international criminal law, on the one hand, and transnational criminal law, the law of human rights, the law on use of force and international humanitarian law on the other hand. We shall now turn to the historical development of international criminal law and the establishment of international criminal courts and tribunals.

Exercises and case studies

Case study

Stania was a federal country comprising three republics, Astania, Bestania, and Cestania. Each republic had minorities from other republics living in the respective border areas which often caused tensions between the majority population and the minorities. These tensions culminated in armed conflict taking place in various parts of Stania. Consequently, Stania broke apart and the three republics became the independent States of Astania, Bestania and Cestania. The formerly republic borders became the State borders among the new States. After independence, a substantial minority of Bestanians who lived in the eastern part of Astania complained about the discriminatory treatment of the members of their minority by the Astanian authorities. They called for greater autonomy and active participation in the government of Astania.

Astania, however, refused to accommodate the requests of the Bestanian minority. They argued that their minority was sufficiently represented by two members of the parliament whose seats were permanently reserved for their minority. As a result, the Bestanian minority asked Bestania to intervene on their behalf and to try to convince Astania to grant the Bestanian minority more rights. Bestania first held diplomatic negotiations with Astania, which did not however produce any results. During that period, members of the Bestanian minority set up their own governmental authority with an aim to secede from Astania and join Bestania. They also organised a rebel army which carried out attacks on army bases, police stations and other buildings belonging to Astanian authorities which were located in the eastern part of Astania, which was predominantly populated by the members of Bestanian minority.

During these attacks, rebels killed and injured hundreds of Astanian civilians. Astanian authorities reacted by launching an armed attack against the rebel army. During the attack, the Astanian army

forces destroyed a number of villages occupied by the rebel forces, including houses belonging to Bestanian civilians, schools and churches. Colonel Butel was a commander of a unit whose task was to capture the rebels in the largest town in the east part of Astania, called Sidea. He declared that the conflict would never end if the entire ethnic Bestanian group was not destroyed. Consequently, his soldiers gathered all the members of Bestanian minority in Sidea and executed them. The commander also seized a radio station and hired a speaker who called upon Astanian civilians to destroy all members of the Bestanian minority.

In response to the conflict, Bestania sent its armed troops to Astania in order to assist Bestanian rebel forces and to protect the Bestanian minority. Bestanian armed forces entered Astania in order to expel all army forces from the east part of Astania where the Bestanian minority was situated. Bestanian armed forces captured a number of members of the Astanian army. As a result of mistreatment, many Astanian soldiers died or were seriously injured by members of Bestanian army. Bestanian armed forces also helped the rebels to transfer and deport everyone who was not of Bestanian ethnicity from the eastern area of Astania; those of Astanian origin were transferred to other parts of Astania and those of Cestanian origin were deported to neighbouring Cestania. Astania, in response, declared war on Bestania.

In a village called Selia located in the east of Astania, the Bestanian minority constituted half of the village population. All the Bestanian men from the village of Selia supported the Bestanian rebel groups. One night a group of Bestanian locals from Selia wearing civilian clothes entered a house of an elderly man of Astanian origin and kidnapped his two sons both in their twenties. Their bodies were found two days later in a nearby stream. The post-mortem examination revealed that they had sustained a number of fatal injuries. After this incident, the local police, who were of Astanian origin, gathered all Bestanian men from Selia village and marched them to an abandoned house at the edge of the village. They pushed them into the house, locked the doors and set the house on fire. Only a few men managed to escape; the rest died in the fire.

Astania armed forces launched a massive air attack against a variety of locations in Bestania. Some of these locations were training camps of the Bestanian rebel army and others were weapons stores. There was also a large-scale attack on the Bestanian capital, in which an estimated 15,000 civilians were killed. Following the air attacks, the Astanian armed forces launched a ground offensive. They invaded Bestania and laid siege to the capital, Bestanian City, surrounding it for 100 days, cutting off food and water, and terrorising the population with constant shelling and sniping. In the course of the invasion there was widespread use of chemical weapons. These were primarily directed against the Bestanian forces, but an estimated 8,000 civilians were killed or injured by the chemical weapons.

After 100 days, the Astanian forces captured Bestanian City and arrested the military leadership of Bestanian forces. All captured military commanders were taken into prison camps in Astania. They joined other prisoners who were captured by the Astanian forces after the government launched a regime of terror against those suspected of supporting Bestanian rebel forces. Astanian officials interrogated thousands of suspects, many of whom subsequently disappeared and were never seen again. Some of the guards would occasionally kick the prisoners, take them out and beat them. The prisoners were kept in very crowded conditions. There was limited water, and the prisoners were fed thin soup twice a day. Many became ill, but the doctor only came occasionally. Guards would also take imprisoned women out of the prison cells; some of them alleged they were raped or sexually assaulted.

Back in Astania, the government reinforced its operation in the eastern part of the country. Due to enlarged military operations which were now extended from the east of Astania to Bestania, the attacks by the Astanian forces were assisted by local informal militia groups. These often included 'soldiers' who were under 18 years of age, and in many cases under 15 years of age. It was well known that these children were targeted by the local militia groups for recruitment, and that substantial sums of money were paid to their families in return for their joining up. Some of these boys were forced to take addictive drugs in order to render them dependent on the commanders of the units. The militia groups received financial support from the Astanian government.

In one village in the eastern part of Astania, Kleptopia, an Astanian villager called Bata entered the house of his neighbour of Bestanian origin, Zeba, while he was away. He used force to enter and destroyed the lock on the doors. After entering, he took some money from the bedroom and groceries from the kitchen and left. At the time, Zeba was meeting his cousin from Bestania who had crossed the Astanian border in order to hand over to Zeba a parcel containing illicit drugs. Zeba's task was then to travel to Cestania and hand the parcel to another person who would subsequently sell the package to local drug dealers. When Zeba tried to cross the border to Cestania, the customs police officer stopped him. When the police officer tried to search his car, Zeba pulled out a gun, shot the officer and fled.

Questions

What kind of crimes were committed in the conflict:

- by Astanian army forces;
- by Bestanian army forces;
- by Bestanian rebel army;
- by Bata;
- by Zeba.

Who can be held responsible for the crimes committed during the conflict?

Does it matter for the prosecution of war crimes if a person acts as an agent of State (in an official capacity) or in a private capacity?

Does the declaration of war render armed conflict legally justified? Can the declaration of war prevent prosecution for the crime of aggression?

Which court would be competent to try each of the crimes above?

Would domestic courts of the States in armed conflict be competent to try war criminals? If so, under what conditions?

What was the nature of the conflict? Does international criminal law apply only to international conflicts or does it also cover internal conflicts?

Chapter 2 – Historical Development and the Establishment of the International Courts and Tribunals

Learning objectives

To familiarise participants with the historical background of international criminal law, attempts to bring war criminals to justice and successful conduct of international war crimes trials.

To provide a basic understanding of the achievements of the first military tribunals, the efforts in creating ad hoc criminal tribunals and the advancement of the permanent international criminal court.

Questions

How was your country involved or affected by the two World Wars?

Was your country involved in any other armed conflict of an international or internal nature?

Who has competence to prosecute and conduct trials for perpetrators of international crimes?

Have the achievements of the first international military tribunals been reflected in your country's criminal legal systems?

Has your country participated in the creation of the ICC?

Is your country a party to the Rome Statute of the ICC?

Have you worked at any of the international, mixed or internationalised courts or tribunals? If so, what was your function and what lessons did you take from the experience?

Introduction

The idea of setting up an international criminal court to try individuals responsible for international crimes can be traced back to 1474, when the earliest recorded genuine international trial for war crimes took place.

However, until the establishment of the Nuremberg and Tokyo military tribunals in the aftermath of the Second World War, war crime prosecutions were generally conducted by national courts and were largely ineffective, particularly when the persons responsible were still in power or where there was a reluctance to bring the perpetrators to justice. In addition, the trials were rarely impartial. After the First World War, the efforts of the victorious powers to prosecute war criminals before an international tribunal failed to materialise.

The establishment of the Nuremberg and Tokyo military tribunals was, therefore, an important landmark. Having a great influence on the evolution of international criminal law, these two military tribunals, especially the Nuremberg Tribunal, paved the way for the establishment of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda. Although the idea

of establishing a permanent international criminal court is more than 50 years old, sustained efforts towards its establishment were only finally rewarded in 1998 with the signing of the Statute of the ICC.

Compelled by emergencies in post-conflict situations, new forms of criminal tribunals were developed to bring to justice persons responsible for atrocities. So-called 'mixed' or 'hybrid' tribunals were set up on request or with the support of the governments involved in the conflicts. These tribunals were often comprised of both domestic and international judges and had as their aim the organising of trials free from partiality and domestic bias. Some of these courts, also referred to as 'internationalised' courts, remain in operation in order to help in the reconciliation process. While they were initiated and are maintained with international support, they are entirely domestic in structure.

This Chapter will briefly introduce the modern history of international criminal prosecution starting with the early attempts between 1919 and 1945, followed by the Nuremberg and Tokyo tribunals (1945–1947). It will continue with the establishment of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda and discuss the creation of the ICC, including the work of the International Law Commission. This Chapter will present various mixed or internationalised tribunals and conclude with alternatives to criminal prosecution, particularly Truth Commissions and amnesties. The institutional aspects of the tribunals will be discussed in the following Chapter.

Early history (1919–1945)

The earliest recorded genuine international trial for war crimes is that of Peter von Hagenbach who was appointed by Charles the Bold, Duke of Burgundy, a governor of the city of Breisach on the Upper Rhine. Von Hagenbach was tried in 1474 for crimes committed during the occupation of Breisach when he subjected the inhabitants of the city to violence, terror and brutality. At the end of the occupation, von Hagenbach was captured and charged with war crimes. For his trial an ad hoc international tribunal was set up composed of 28 judges of the allied collation of States and towns. Von Hagenbach was found guilty of charges by the tribunal and he was subsequently executed by beheading.[106]

At the end of the First World War, there were a number of attempts to punish war criminals; however, these attempts were ultimately unsuccessful. The Allied Powers established the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' to investigate the responsibility for starting the war and for violations of the law of war and to recommend action with regard to the prosecution of war crimes perpetrators. In its report of March 1919, the commission determined the Central Powers were responsible for the start of the war and that there were violations of the laws of war and humanity. The commission suggested establishing a tribunal composed of judges from all of the Allied countries to try violations of the laws and customs of war and the laws of humanity.[107]

106 Georg Schwarzenberger, 2 *International Law as Applied by International Court and Tribunals, The Law of Armed Conflict* (Stephen & Sons, London 1968) 463; Eduardo Greppi, 'The Evolution of Individual Criminal Responsibility under International Law' (1999) 81 Int'l Rev Red Cross 85, 531–553. Available at <www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ2X> accessed 1 November 2008.

107 'Report of the Commission to the Preliminary Peace Conference' (1920) reprinted in 14 AJIL 95.

The Peace Treaties concluded after the First World War between the Allied and Associated Powers and the Axis countries signed in 1919 and 1920[108] contained provisions relating to individual criminal responsibility for war crimes and provided for the prosecution of war criminals before international tribunals. However, due to the fact that these provisions were not implemented, there was a failure to bring the leading war criminals to justice. Consequently, no international tribunals were ever established to conduct international war crimes in respect of war crimes committed during the First World War.

Under Article 227 of the Treaty of Versailles of 28 June 1919, the Allied and Associated Powers publicly arraigned William II of Hohenzollern, formerly German Emperor, for a supreme offence against 'international morality and the sanctity of treaties'. The same provision envisaged the establishment of a special court to try the accused, composed of five judges, who were to be appointed by the United States, Great Britain, France, Italy and Japan. However, Article 227 was never implemented and the trial of the Emperor William II never took place. The Netherlands, who had given William II refuge, refused to surrender him for trial.

Following the failure to set up the courts to try German nationals responsible for committing war crimes as envisaged in the Treaty of Versailles, the Allied Powers consented to the trial of accused Germans before the German Supreme Court sitting in Leipzig. Of the 894 Germans accused of war crimes by the Allied Powers, only 12 were actually tried before the Leipzig Supreme Court under German law, and of those half of them were acquitted. Although the Leipzig trials in general proved to be unsatisfactory, they produced two useful judgments, namely *Llandovery Castle* and *Dover Castle* cases, involving the sinking of hospital ships.[109]

Similarly, the Treaty of Sèvres led to unsuccessful Allied attempts to bring to justice the 'Young Turks' responsible for the Armenian genocide of 1915. Turkey refused to ratify the treaty and as a result no international trials were undertaken. The Treaty of Sèvres was replaced by the Treaty of Lausanne of 1923. The latter contained a Declaration on Amnesty which granted the Turks amnesty for their crimes committed between 1914 and 1922. However, some trials in Istanbul conducted by the Turkish courts under national laws did take place.[110]

In 1920, the Advisory Committee of Jurists appointed by the Council of the League of Nations, with the task of preparing the project for the Permanent Court of International Justice, proposed that the High Court of International Justice be established. The jurisdiction of the court should extend to crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations. The Assembly of the League of Nations rejected the proposal as being premature. Thereafter, the draft statutes of an international criminal court were adopted merely by non-governmental organisations and scholarly bodies.

108 Peace Treaties of Versailles, St Germain-en-Laye, Neuilly-sur-Seine, Trianon and Sèvres. Lawrence Martin; *The Treaties of Peace, 1919-1923*, (Carnegie Endowment for International Peace, New York 1924) available at <www.avalon.law.yale.edu/subject_menus/versailles_menu.asp> accessed 30 November 2009.

109 Claude Mullins, *The Leipzig Trials, An Account of the War Criminals' Trials and a Study of German Mentality* (HF & G Witherby, London 1921).

110 See Vahakn N Dadrian, *The History of the Armenian Genocide* (Berghahn Books, Oxford 1995).

The Nuremberg and Tokyo Tribunals (1945–1947)

Introduction

After the Second World War, in response to the horrors and atrocities committed by Nazi Germany in Europe and the Japanese in Asia, the Allies organised, for the first time in history, trials of major war criminals of the Axis countries before international military tribunals established in Nuremberg and Tokyo, respectively. Although the trials were criticised as 'victor's justice', their contribution to the development of international criminal law is undoubtedly significant.

The Nuremberg Tribunal: International Military Tribunal (IMT)

At the outbreak of the Second World War, the Allied Powers, displeased with the unsuccessful attempts to conduct international war crimes after the First World War, pledged to prosecute and punish the German political and military leaders who were responsible for the atrocities committed during the war. On 8 August 1945, the four major Allies: the United Kingdom; France; the United States; and the Soviet Union – concluded the London Agreement in which they decided to establish an International Military Tribunal (hereinafter IMT) sitting in Nuremberg for the trial of the most notorious Nazi war criminals. The constitution, jurisdiction and functions of the IMT were provided in the Charter annexed to the London Agreement (hereinafter Nuremberg Charter).[111]

> *Article 1 of the London Agreement:*
>
> 'There shall be established after consultation with the Control Council of Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities.'

The IMT consisted of four members, each with an alternate. Each of the major Allies (France, the Soviet Union, the United Kingdom and the United States) was to appoint one member and one alternate.[112] The Charter precluded any challenges to the jurisdiction or the composition of the IMT.[113] A conviction and sentence could only be imposed by affirmative votes of at least three members of the Tribunal.[114] Each Signatory was to appoint one of four Chief Prosecutors who acted as a committee in designating the major war criminals to be tried by the Tribunal and in approving the indictments. They were also responsible for drafting and recommending to the Tribunal for its approval draft rules of procedure.[115]

In Article 6, the Nuremberg Charter defined the jurisdiction of the IMT by providing the three major categories of crimes for which the defendants were individually responsible:

111 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 Aug 1945) 82 UNTS 279 (Annex).
112 Ibid Article 2.
113 Ibid Article 3.
114 Ibid Article 4.
115 Ibid Article 14.

(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 labour 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.

With regard to individual criminal responsibility, the Charter provided that leaders, organisers, 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.[116] It also made clear that 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.[117]

The tribunal was not bound by technical rules of evidence, but it could admit any evidence which it deemed to be of probative value.[118] The Nuremberg Charter guaranteed certain fundamental rights of the defendants in order to ensure a fair trial.[119] It also provided for trial in absence of the accused.[120] The tribunal had a right to impose upon a defendant, on conviction, any punishment it considered just, including the death penalty.[121] The judgments were final and not subject to review.[122] The procedure provided a combination of elements of the Continental European inquisitorial system and the Anglo-American adversarial system to create an international procedure acceptable to Signatories representing both systems.[123]

The IMT operated from 14 November 1945 to 1 October 1946. After a trial that lasted 284 days, 19 of the 24 indicted German leaders were convicted (two acquitted). The tribunal sentenced 12 of the major war criminals to death by hanging. The great value of the IMT for posterity was that it set a precedent for prosecuting international crimes:

116 Ibid Article 6.
117 Ibid Article 7.
118 Ibid Article 19.
119 Ibid Article 16.
120 Ibid Article 12.
121 Ibid Article 27.
122 Ibid Article 26.
123 Virginia Morris and Michael P Scharf, 1 *The International Criminal Tribunal for Rwanda* (Transnational Publishers, New York 1998) 6.

> '"The power of the precedent," Mr Justice Cardozo has said, "is the power of the beaten path." One of the chief obstacles to the Nuremberg trial was the lack of a beaten path. A judgement such has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction.'
>
> (***Mr Justice Jackson***, in his Report to the President of 7 October 1946 on the Judgment of the IMT at Nuremberg.)

In order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the IMT, the Allied Powers enacted Control Council Law No 10.[124] The order provided for the domestic prosecution and punishment of persons guilty of war crimes, crimes against peace and against humanity. Pursuant to this order, the four major Allies, as occupying authorities, prosecuted through their own occupation courts sitting in Germany, in their respective zones of occupation, the crimes committed by lower-ranking defendants.[125]

The Tokyo Tribunal: International Military Tribunal for the Far East (IMTFE)

On 26 July 1945, the four major Allies issued the Potsdam Declaration, announcing their intention to prosecute the Japanese leaders for the same crimes as were prosecuted at Nuremberg. On 19 January 1946, the Supreme Commander of the Allied Powers in Japan proclaimed, as an executive order, the Charter of the International Military Tribunal for the Far East (hereinafter Tokyo Charter).[126] The Tokyo Charter, which provides the structure, jurisdiction and functions of the International Military Tribunal for the Far East (hereinafter IMTFE), was predominantly modelled on the Nuremberg Charter. The main difference concerned the structure of the tribunal and the charges brought against the defendants.

The Tokyo trial took place from 3 May 1946 to 12 November 1948. However, the Tokyo Charter and the judgment are considered less authoritative than that of the Nuremberg Tribunal, due to, for example, the involvement of politics in the indictment process, flaws in the trial and bias of the judges. In a trial that lasted nearly two and a half years, 28 Japanese military and political leaders were tried before the tribunal. Seven of those were sentenced to death, 16 to life imprisonment, two died of natural causes during the trial and two received finite sentences.

There were numerous trials in the Pacific undertaken by the Allied Forces, including the United Kingdom, United States, Australia, China and the Philippines. Those trials were based on domestic war crimes provisions, such as the United Kingdom Royal Warrant of 1946. The most famous trial is the prosecution of General Yamashita by the United States which relied on the principle of command responsibility (*see* below Chapter 4).

124 Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Allied Control Council for Germany, (1946) No 3 *Official Gazette* 50 (20 December 1945).

125 In the United States zone 12 trials took place in Nuremberg, including the trials of Nazi doctors and judges, and members of the German High Command. In the British zone of Germany the trials were carried out under the Royal Warrant of 1946. There were also proceedings in the French and Soviet zones of Germany. Cryer et al (n4) 100.

126 Charter of the International Military Tribunal for the Far East (19 Jan 1946), TIAS No 1589. See also Neil Boister and Robert Cryer (eds), *Document on the Tokyo International Military Tribunal: Charter, Indictment and Judgements* (OUP, Oxford 2008).

Concluding remarks

The Nuremberg and Tokyo tribunals were not standing courts. They were ad hoc tribunals convened by the Allies to deal with a single trial on indictment. The judges of the Nuremberg and Tokyo tribunals served full time on the single trial of the 'major war criminal' which they were constituted to try. Upon completion of the trial, the Tribunals were dissolved. The remaining Axis criminals were tried by other national and international courts, tribunals, and courts-martial. The Nuremberg and Tokyo tribunals were essentially extensions of the State apparatus of each of the Allied Powers, rather than independent, international organisations.[127]

Criticism of the Nuremberg and Tokyo trials:

- imposition of victors' justice
- lack of independence of the judges – bias against the accused
- plea of '*tu quoque*': although similar acts were committed by the prosecuting State(s), they were not being prosecuted
- violation of the principle of *nullum crimen sine lege* (crimes against peace and crimes against humanity)
- insufficient due process guarantees for the accused – lack of fair trial

Legacy / achievements of the Nuremberg and Tokyo trials:

- conducted first trial before international judicial body
- contributed to the historical record of the Second World War
- established individual responsibility for crimes
- established responsibility of a commander
- excluded the defence of superior orders
- excluded the act of State defence
- contributed to the establishment of two sorts of crimes:
  a) crimes against humanity
  b) crimes against peace
- guaranteed certain fundamental rights to ensure fair trials

127 John R W D Jones, 'Composition of the Court', in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 235, 238.

The principles of international law recognised in the Nuremberg Charter and the Nuremberg judgment were affirmed by the UN General Assembly in its resolution 95(I).[128] On the other hand, the Tokyo Charter and the judgment were only mentioned in the resolution but not confirmed. In 1947, the General Assembly requested the International Law Commission to formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and the judgment.[129] The International Law Commission completed its task in 1950 by providing a draft of 'Nuremberg Principles'.[130] Although they were never endorsed by the General Assembly in the form of a binding legal instrument, the principles played an important role in the development of international criminal law.

Nuremberg Principles

PRINCIPLE I

Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

PRINCIPLE II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

PRINCIPLE III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

PRINCIPLE IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

PRINCIPLE V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

128 Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950) GA Res 95(I), UN Doc A/1316 (11 Dec 1950); 44 AJIL 126.
129 GA Res 177(II) (21 Nov 1947).
130 ILC, 'Report of the International Law Commission to the General Assembly' 5 UN GAOR Supp No 12, at 11, UN Doc A/1316 (1950), reprinted in 2 Ybk Int'l Commn (1950) UN Doc A/CN.4/SER.A/1950/Add.1.

PRINCIPLE VI

The crimes hereinafter set out are punishable as crimes under international law:

a) Crimes against peace**:**

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b) War crimes:

Violations of the laws or customs of war include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of 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:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

PRINCIPLE VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

The ad hoc international criminal tribunals

Introduction

In the aftermath of the Cold War, two ad hoc international criminal tribunals were set up by the UN Security Council in response to ethnic cleansing and other atrocities, which occurred during the conflicts in the former Yugoslavia and Rwanda. At that time, the efforts to establish a permanent international criminal court were still under way but not yet completed. The Security Council decided to establish the two tribunals as a measure adopted under Chapter VII of the UN Charter. Both tribunals were set up outside of the territory in conflict, namely, the ICTY in The Hague, the Netherlands, and the ICTR in Arusha, Tanzania.

International Criminal Tribunal for the former Yugoslavia (ICTY)

In 1991, the Socialist Federal Republic of Yugoslavia broke apart, leading to the eruption of armed conflicts in the area. These conflicts resulted in widespread and flagrant violations of international humanitarian law, including mass killings, massive, organised and systematic detention, rape and other sexual violence, and the practice of ethnic cleansing. The Security Council, the main organ of the UN responsible for the maintenance of international peace and security, took a series of steps which culminated in the creation of the ad hoc international criminal tribunal for the former Yugoslavia.

In 1992, the Security Council expressed concern over reports of continuing violations of international humanitarian law in the former Yugoslavia. It determined that persons who committed or ordered these violations were individually responsible for them and called on the international community to cooperate in the collection of evidence.[131] The Security Council established a 'Commission of Experts' to investigate the allegations of international crimes in the territory of the former Yugoslavia. The Commission concluded that serious war crimes and crimes against humanity had been committed in the former Yugoslavia and joined with other international bodies in recommending the creation of an ad hoc tribunal to prosecute and punish the individuals who were responsible for the atrocities.[132]

In 1993, the Security Council, acting under Chapter VII of the UN Charter, determined that the situation in the former Yugoslavia constituted a threat to international peace and security. In order to put an end to the crimes and take effective measures to bring to justice the persons responsible for the crimes, the Security Council decided to establish, in principle, an international tribunal. The tribunal would be competent for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The Security Council requested the UN Secretary-General to prepare a report on how such an international tribunal would be established and on what legal basis.[133]

The UN Secretary-General recommended that the Security Council create a tribunal by a decision on the basis of Chapter VII as a measure to maintain or restore international peace and security. The idea of creating the tribunal by treaty was rejected because it would take too long and there was a need for effective and expeditious implementation of the decision to establish a tribunal. In addition, there was no guarantee that all the relevant States would ratify it, particularly the former Yugoslavian Republics. The UN Secretary-General emphasised that the tribunal would be an organ of a judicial nature, performing its functions independently of the political considerations. The tribunal would not be subject to the authority or control of the Security Council.[134] The UN Secretary-General's report annexed a draft Statute of the tribunal.

In resolution 827 (1993), the Security Council approved the report of the UN Secretary-General and established an ad hoc international tribunal under Chapter VII of the UN Charter as an enforcement measure to ensure violations of international humanitarian law should be halted and effectively

131 SC Res 764, UN Doc S/RES/764 (13 July 1992); SC Res 771, UN Doc S/RES/771 (13 Aug 1992).
132 SC Res 780, UN Doc S/RES/780 (6 Oct 1992). See Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), paras (27), (56), (58), (74). UN Doc S/25274 (1993), Annex.
133 SC Res 808, UN Doc S/RES/808 (22 Feb 1993).
134 Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993) paras (18)–(28).

redressed.[135] As a result of this decision, all States were now under the binding obligation to take whatever action might be required to carry out the decision. It was the view of the Security Council that given the particular circumstances of the former Yugoslavia, the establishment by the Council of the international tribunal as an ad hoc measure and the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the restoration and maintenance of international peace and security.

The Statute of the ICTY was adopted by the Security Council resolution 827 (1993).[136] According to the Statute, the ICTY has jurisdiction over war crimes, crimes against humanity and genocide committed on the territory of the former Yugoslavia after 1 January 1991, thereby leaving the temporal jurisdiction open-ended. With regard to the laws of war, the tribunal's jurisprudence extends to grave breaches of the Geneva Conventions of 1949, which only apply in international armed conflicts, and violations of the laws or customs of war, which apply to international as well as non-international armed conflict. The tribunal and the national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law. However, the tribunal has primacy over national courts and may, at any stage of the proceedings, request national courts to defer the competence to the tribunal.

Jurisdiction of the ICTY as defined in its Statute

- ***Personal*** (*ratione personae*): only natural persons
- ***Subject-matter*** (*ratione materiae*):
  a) war crimes:
     (i) grave breaches of the 1949 Geneva Conventions
     (ii) violations of the laws or customs of war
  b) genocide
  c) crimes against humanity
- ***Temporal*** (*ratione temporis*): crimes committed after January 1991 (open ended)
- ***Territorial*** (*ratione loci*): the territory of the former Yugoslavia
- ***Relationship to national courts***:
  a) concurrent jurisdiction with national courts
  b) primacy over national courts

135 SC Res 827, UN Doc S/RES/827 (25 May 1993).
136 ICTY Statute, SC Res 827, UN Doc S/RES/827 (25 May 1993).

International Criminal Tribunal for Rwanda (ICTR)

In 1994, the Security Council established another ad hoc international criminal tribunal, this time for Rwanda. Taking into account widespread and systematic massacres and killings of civilians, internal displacement and the massive exodus of refugees to neighbouring countries, which resulted in a humanitarian crisis of enormous proportions, the Security Council determined that the situation in Rwanda constituted a threat to peace and security in the region.[137] It has been estimated that from 500,000 to one million people, predominantly Tutsi civilians, were killed in the course of three months during the genocide in Rwanda.[138]

The Security Council also established a 'Commission of Experts' to investigate the allegations of crimes committed in the territory of Rwanda, including the evidence of possible acts of genocide.[139] The Commission concluded that there were serious breaches of international humanitarian law and acts of genocide committed in Rwanda and recommended that the individuals responsible for these atrocities be brought to justice before an independent and impartial international criminal court.[140]

After receiving reports that genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda, the Security Council decided to set up an international tribunal.[141] The tribunal's competence extends to prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and to Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, in the period between 1 January 1994 and 31 December 1994. The ICTR has its seat in Arusha, Tanzania.

The Statute of the ICTR was closely modelled on the ICTY Statute and was attached to the Security Council resolution 955 (1994) creating the tribunal.[142] Rwanda, which was then a member of the Security Council, initially supported the establishment of the tribunal but finally voted against it. Nevertheless, the Security Council established the tribunal as an enforcement measure under Chapter VII which would ensure violations were halted and effectively redressed and would contribute to the process of national reconciliation and to the restoration and maintenance of peace and security.

The ICTR prosecutes 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. Like the ICTY, the ICTR's jurisdiction covers war crimes, crimes against humanity and genocide. However, the definition of crimes against humanity has an additional requirement of discrimination, and the jurisdiction of the ICTR over war crimes is limited to those committed in non-international armed conflicts. The ICTR has primacy over domestic courts in the same way as the ICTY.

137 SC Res 918, UN Doc S/RES/918 (17 May 1994); SC Res 929, UN Doc S/RES/929 (22 June 1994).
138 Report on the Situation of Human Rights in Rwanda submitted by René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of the Commission Resolution S-3/1 of 25 May 1994, UN Doc E/CN.4/1995/7 (1994).
139 SC Res 935, UN Doc S/RES/935 (1 July 1994).
140 UN Doc S/1994/1125 (1 Oct 1994). See also the Commission's final report UN Doc S/1994/1405 (9 Dec 1994).
141 SC Res 955, UN Doc S/RES/955 (8 Nov 1994).
142 ICTR Statute, SC Res 955, UN Doc S/RES/955 (8 Nov 1994).

Jurisdiction of the ICTR as defined in its Statute

- ***Personal*** (*ratione personae*): only natural persons
- ***Subject-matter*** (*ratione materiae*):
  a) genocide (Article 2)
  b) crimes against humanity (Article 3)
  c) war crimes: violations of Article 3 common to the Geneva Conventions and of Additional Protocol II of 1977
- ***Temporal*** (*ratione temporis*): crimes committed between 1 January and 31 December 1994
- ***Territorial*** (*ratione loci*):
  a) crimes committed in the territory of Rwanda
  b) crimes committed by Rwandans in neighbouring States
- ***Relationship to national courts***:
  a) concurrent jurisdiction with national courts
  b) primacy over national courts

In 2000, the Security Council publicly acknowledged the responsibility of the UN for not having succeeded in halting the 1994 genocide, while making recommendations on how to deal with further atrocities. The Security Council agreed that the UN lacked the determination before the genocide to prevent it and failed to intervene once the massacres had begun. The main reasons for the international community's failure to act were, purportedly, lack of resources to deal with the situation and the lack of political will to stop the killings.[143]

Challenges to lawfulness of establishment of the ICTY and ICTR

The ICTY and ICTR are the only tribunals established by the Security Council acting under Chapter VII of the UN Charter. Consequently, the tribunals' legality and the lawfulness of their establishment were questioned by the first accused who were brought before the tribunals. The main question raised was whether the Security Council has competence to establish an ad hoc tribunal as an enforcement measure under Chapter VII of the UN Charter in order to restore and maintain peace and security. It has been argued that the establishment of an ad hoc tribunal was never a measure contemplated by Chapter VII, including Article 41 of the UN Charter which provides:

143 UN Doc S/1999/1257 (19 Dec 1999).

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The ICTY and ICTR both rejected this argument in *Tadić* and *Kanyabashi*, respectively, holding that the tribunals had been lawfully established. They ruled that although the establishment of an international criminal tribunal was not expressly mentioned among the enforcement measures provided for in Chapter VII, it fell within the powers of the Security Council under Article 41 of the UN Charter as a possible measure to be taken in response to a threat to the peace. The tribunals held that Article 41 of the UN Charter is clearly not exhaustive but indicates some examples of possible measures which do not involve the use of force.[144]

Concluding remarks

By mid October 2008, out of the 161 individuals indicted by the ICTY, proceedings have been concluded with respect of 116 accused; ten accused were acquitted, 57 accused were convicted and sentenced, 13 accused were referred to national courts in the former Yugoslavia (ten to Bosnia and Herzegovina, two to Croatia, one to Serbia) and in respect of 36 accused, the indictments were withdrawn or the accused died. Forty-five accused are currently in ongoing proceedings, out of which two remain at large.[145] As of April 2007, the ICTR rendered altogether 27 judgments involving 33 accused. Eleven trials are in progress and nine detainees are awaiting the commencement of their trials. Eighteen accused remain at large.[146]

Since the ICTY and the ICTR were set up as ad hoc institutions, they prepared a completion strategy which was subsequently endorsed by the UN Security Council in resolution 1503 (2003). The completion timetable envisages the completion of all investigations by the end of 2004, all trials by 2008 and all work by 2010. The Tribunals are concentrating on the most senior leaders and transferring other cases to national jurisdictions. For that purpose, Bosnia and Herzegovina, Croatia and Serbia have each taken a significant step toward effective war crimes prosecutions by creating special mechanisms for the adjudication of war crimes. However, it remains to be seen whether the tribunals will be able to achieve those deadlines.

The achievements of the ICTY and ICTR are significant, the most important one being spearheading the shift from impunity to accountability. The jurisprudence of the ad hoc tribunals has significantly contributed to the development of the international criminal law and to strengthening the rule of law. In addition, it has paved the way for the creation of a new body of rules, namely international criminal procedure. The tribunals' case-law has been widely used by other international and mixed tribunals and also domestic criminal courts. However, the tribunals have also been criticised for, among other things, being too expensive and bureaucratic and for having trials that take too long.

144 *Prosecutor v Tadić* (ICTY) Case No IT-94-1-A, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) paras (33)–(36); *Prosecutor v Kanyabashi* (ICTR) Case No ICTR-96-15-A, Appeals Chamber Decision on the Defence Motion on Jurisdiction (18 June 1997).

145 Key Figures of the ICTY Cases, updated on 14 October 2008, available at <www.icty.org> accessed 29 November 2009.

146 Status of cases is available at <www.ictr.org> accessed 29 November 2009.

International Criminal Court (ICC)

Introduction

In the aftermath of the Nuremberg and Tokyo war crimes trials, the international community acknowledged a need to establish a permanent international criminal court. In 1948, the International Law Commission (hereinafter ILC) was assigned to work on this project. The results of the ILC's work laid the foundation for the formulation of the Statute of the ICC (hereinafter ICC Statute).[147] At the same time, the international community was learning from the two ad hoc criminal tribunals whose experience assisted in the creation of the Statute.

The work of the International Law Commission (ILC)

After the Nuremberg and Tokyo war crimes trials, the UN started a process towards the creation of a permanent international criminal court. A proposal to establish a permanent international criminal court was discussed during the negotiations on the 1948 Genocide Convention. In the end, Article VI of the Genocide Convention only envisaged the future establishment of an 'international penal tribunal':[148]

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The UN efforts towards the creation of a permanent international criminal tribunal encompassed, on the one hand, the codification of international crimes, and on the other hand, the elaboration of a draft statute for the establishment of an international court. The main body involved in the drafting process was the ILC, a body of experts, nominated by the General Assembly, charged with the codification and progressive development of international law.[149] In 1947, the ILC was asked by the General Assembly to prepare, together with the Nuremberg Principles, a Draft Code of the Offences Against the Peace and Security of Mankind.[150]

The final version of the code, with 20 draft Articles constituting the Code of Crimes ('Offences' were replaced by 'Crimes') Against the Peace and Security of Mankind, was adopted by the ILC only in 1996.[151] The delay was caused by a disagreement on the definition of aggression. Upon receiving the first final version of the Draft Code in 1954, the General Assembly postponed the consideration of the Draft Code until further work was done on this question.[152] The ILC continued its work on the Draft Code after the definition on aggression was adopted by consensus by the General Assembly in 1974.[153] However, the process resumed at the General Assembly's request only in 1981.[154]

147 ICC Statute (17 July 1998) UN Doc A/CONF.183/9.
148 Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.
149 GA Res 174(II) of 17 November 1947.
150 GA Res 177(II) (21 Nov 1947); GA Res 177(II) (21 Nov 1947); GA Res 488(V) (12 Dec 1950).
151 ILC Draft Code Commentary, UN Doc A/51/10 (1996).
152 GA Res 897(IX) of 4 December 1954.
153 GA Res 3314(XXIX) of 14 December 1974.
154 GA Res 36/106 of 10 December 1981.

In 1950, the General Assembly set up the special ILC Committee on International Criminal Jurisdiction consisting of the representatives of the 17 Member States of the UN. The Committee's task was to prepare concrete proposals for the establishment of an international criminal court that could administer the Code of Crimes Against the Peace and Security of Mankind, which the ILC was simultaneously drafting. The ILC produced the first Draft Statute for an ICC in 1951 that was revised in 1953.[155] The Draft Statute was permanently shelved due to the lack of progress of the definition on aggression and the Draft Code.[156]

In 1989, towards the end of the Cold War, the General Assembly once again requested the ILC to address the question of establishing an international criminal court.[157] The General Assembly's decision to revive the idea of an international criminal court followed the initiative by Trinidad and Tobago to establish a special criminal court to deal with the problem of drug trafficking. In 1994, the ILC adopted the final version of the draft Statute for an ICC.[158] The draft only dealt with procedural and organisational matters, thereby leaving the definitions of crimes and the associated legal principles to the Code of Crimes adopted by the ILC in 1996.

The ILC recommended the General Assembly to convene an international conference of plenipotentiaries to study the Draft Statute and to conclude a convention on the establishment of an international criminal court. Subsequently, the General Assembly decided to establish an Ad Hoc Committee, open to all members of the UN, with the mandate to review the major substantive and administrative issues arising out of the Draft Statute and to consider, in the light of that review, arrangements for the convening of a diplomatic conference. The Committee met twice in 1995 and was then succeeded by the Preparatory Committee established by the General Assembly in 1995.

Both instruments the draft Statute of 1994 and the draft Code of Crimes of 1996 played an influential role in the preparation of the ICC Statute. The Draft Statute of 1994 formed the initial working document first for the work of the Ad Hoc Committee, and later Preparatory Committee, in the years 1995–1998. As for the Code of Crimes of 1996, it was not fully incorporated in the Draft Statute but it was used by the Preparatory Committee as appropriate.[159]

The Statute of the ICC

In 1995, the General Assembly decided to convene a Preparatory Committee, inviting participation of Member States of the UN, non-governmental organisations and various international organisations. Its mandate was to discuss further the major substantive and administrative issues arising out of the Draft Statute prepared by the ILC. The Preparatory Committee held a number of meetings between 1996 and 1998 which resulted in the formulation of a Draft Statute. Only a few provisions of the ILC's original Draft Statute remained intact after that process.

155 ILC, 'Report of the Committee on International Criminal Jurisdiction' UN GAOR 7th Session Supp No 12, at 21, UN Doc A/2645 (1954).
156 *United Nations, The Work of the International Law Commission* 30 (5th ed 1996).
157 GA Res 44/39 of 4 December 1989.
158 ILC, 'Report of the International Law Commission on the Work of its 46th Session' (2 May–22 July 1994) UN GAOR 49th Session Supp No 10, UN Doc A/49/10 (1994).
159 Adriaan Bos, 'From the International Law Commission to Rome Conference (1994-1998)', *in* Antonio Cassese, Paola Gaeta and John R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 35, 52.

The Preparatory Committee's Draft Statute was submitted to the Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC convened by the General Assembly on 15 June 1998 in Rome. The most controversial questions discussed at the conference were the role of the Security Council, the list of core crimes over which the court would have inherent jurisdiction, and the scope of its jurisdiction over persons who were not nationals of States parties. After finding a compromise, the Statute was adopted on 17 July 1998 by 120 in favour, with 21 abstentions and seven votes against.[160]

In addition to the Statute, the Diplomatic Conference adopted a Final Act, providing for the establishment of a Preparatory Commission by the UN General Assembly whose mandate was to draft a number of documents crucial to the operation of the ICC.[161] The main task of the Commission was to draft the ICC Rules of Procedure and Evidence[162] and the ICC Elements of Crimes[163] which the Commission accomplished within its deadline of 30 June 2000 when they were also adopted by general agreement among States. The Assembly of States parties formally adopted these two documents at the first session held on 3 – 10 September 2002.[164]

The ICC Statute entered into force on 1 July 2002, the first day of the month after the 60th day following the date of deposit of the 60th instrument of ratification. Before ratifying the Statute, most States needed to modify their domestic constitutions and laws in order to comply with the obligations imposed upon them by the Statute. Particularly, States were required to provide for cooperation with the Court in terms of investigation, arrest and transfer of suspects. However, many States' constitutions prohibited the extradition of their nationals which is incompatible with the requirements of the Statute. Many States decided to bring their substantive criminal law in line with the Statute.[165]

The ICC is a permanent criminal court. It has jurisdiction over core crimes under international law, namely genocide, crimes against humanity and war crimes, and will exercise jurisdiction over the crime of aggression once a provision is adopted.[166] The ICC is a prospective court and it can exercise jurisdiction only over crimes committed after the entry into force of the Statute, which is 1 July 2002. In the case of States that become parties to the Statute subsequent to its entry into force, the Court has jurisdiction over crimes committed after the entry into force of the Statute with respect to that State.[167]

The ICC exercises jurisdiction over nationals of a State party who are accused of crimes, regardless of where the acts are perpetrated, and over crimes committed on the territory of States parties, regardless of the nationality of the offender.[168] The ICC is complementary to national criminal jurisdictions. Proceedings before the ICC might be initiated by a referral by a State party to the ICC Statute, referral by the UN Security Council acting under Chapter VII of the UN Charter or upon the initiation of an investigation by the Prosecutor acting on his own initiative (*ex officio*).[169]

160 The States that voted against the Statute were the United States, Libya, Israel, Iraq, China, Syria and Sudan.
161 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) UN Doc A/CONF.183/10.
162 ICC Rules of Procedure and Evidence, ICC-ASP/1/3 (part II-A) (9 Sept 2002).
163 ICC Elements of Crimes, ICC-ASP/1/3/ (part II-B) (9 Sept 2002) (hereinafter ICC Elements of Crimes).
164 Documents relevant to the adoption of the Rome Statute and the establishment of the International Criminal Court are available at <www.untreaty.un.org/cod/icc/index.html> accessed 1 November 2008.
165 William A Schabas, *An Introduction to the International Criminal Court* (3rd ed CUP, Cambridge 2007) 22–23.
166 Articles 5, 6, 7 and 8 of the ICC Statute.
167 Article 11 of the ICC Statute.
168 Article 12 of the ICC Statute.
169 Article 13 of the ICC Statute.

Jurisdiction of the ICC as defined in its Statute

- ***Personal*** (*ratione personae*): nationals of States parties, regardless of where the acts were perpetrated
- ***Subject-matter*** (*ratione materiae*)
  a) genocide
  b) crimes against humanity
  c) war crimes
  d) aggression (lack of definition)
- ***Temporal*** (*ratione temporis*): crimes committed after the entry into force of the Statute – 1 July 2002
- ***Territorial*** (*ratione loci*): crimes committed on the territory of States parties, regardless of the nationality of the offender
- ***Relationship to national courts***: ICC is complementary to national jurisdictions

Concluding remarks

The ICC represents a watershed in the development of international criminal law, as the first permanent international criminal court. The Court has, for understandable reasons, got off to a slow start. By November 2008, only three situations had been referred to the Court by States parties concerning situations on their own territories, namely the Democratic Republic of Congo, the Central African Republic and Uganda. A fourth situation, in Darfur, Sudan, was referred to the Court by the UN Security Council, acting under Chapter VII of the UN Charter.[170]

While the Statute permits the Prosecutor to begin an investigation on his own initiative, he has not yet done so. However, the Prosecutor has publicly indicated that he is looking into situations concerning Colombia, Georgia, Afghanistan, Côte d'Ivoire and Kenya. Altogether there are 11 ongoing proceedings against accused before the Court (four Democratic Republic of Congo, one Central African Republic, four Uganda, two Sudan). However, the Court still faces a number of challenges, including the opposition of the United States.

170 For updates see the official website of the ICC, available at <www.icc-cpi.int/> accessed 1 November 2009.

Mixed or internationalised criminal courts or tribunals

Introduction

Following recent conflicts involving serious violations of international criminal law, several States decided not to try persons responsible for atrocities before their domestic court nor international courts, but preferred to resort to a criminal court combining national and international structures and laws. These courts are called 'mixed' or 'internationalised' courts or tribunals. There exists a variety of mixed or internationalised courts, each of them having their own unique characteristics. The differences concern the political background, the legal bases for their establishment, their structure and jurisdiction. The common characteristic of all mixed and internationalised tribunals is the existence of an international element, which varies in scope and intensity.

The mixed or internationalised tribunals can be divided into several groups. The first group consists of the tribunals established by an agreement between the UN and the government of the State where the conflict occurred. The Special Court for Sierra Leone (hereinafter SCSL) was the first mixed tribunal to sit in the country where the crimes were committed and supported by that country's government. This was also the first tribunal to combine international and local judges applying international and domestic law. The Special Tribunal for Lebanon (hereinafter STL) was initially established on the basis of a similar agreement between Lebanon and the UN, but due to Lebanese Parliament's inability to ratify the agreement and make it binding under international law as a treaty, the UN Security Council intervened and gave binding force to the terms of the agreements by a resolution adopted under Chapter VII of the UN Charter. Another example of a mixed tribunal is the Extraordinary Chambers in the Court of Cambodia (hereinafter ECCC), although unlike the SCSL and the STL, the ECCC forms part of the national court system and is staffed by a majority of local, not international, judges.

The second group of mixed or internationalised tribunals are tribunals established by UN international administrations which temporarily assume authority over territories in conflicts of self-determination in order to assist them in the transition to self-governance, such as East Timor and Kosovo. The War Crimes Chamber in Bosnia, established by the Office of the High Representative following the Dayton Peace Agreement, also falls within this group.

The third group represents courts which, although domestic in nature and established by a State, did receive some form of international support, such as the Iraqi High Tribunal and the War Crimes Chamber in Serbia.

This section will also discuss the Lockerbie trial, which is another example of dealing with a particular, unique incident at the international level. Finally, the alternatives to criminal prosecution will be addressed in brief, particularly Truth Commissions and amnesties.

The Special Court for Sierra Leone (SCSL)

For a decade or so following 1991, Sierra Leone suffered from a civil war triggered by a rebel group, the Revolutionary United Front (RUF) which entered Sierra Leone from neighbouring Liberia in order to overthrow the regime in Sierra Leone. After 1996, the conflict continued between the newly

elected democratic government and Civil Defence Forces (CDF) against the RUF, and later, against the Armed Forces Revolutionary Council (AFRC) and the RUF. The conflict was characterised by massive and widespread violence, including all forms of gross human rights violations, mass rape and abduction of women, the use of child soldiers and widespread mutilation of civilians by amputation of various limbs. In 2000, the RUF leaders and other rebels were arrested for having conducted attacks on both governmental forces and the civilian population.

In 2000, the President of Sierra Leone declared a plan to ask the UN Security Council to set up a tribunal for Sierra Leone, either by creating a special court or by extending the mandate of the ICTR to its territory.[171] In response, the UN Security Council adopted resolution 1315 (2000) requesting the UN Secretary-General to enter into negotiations with Sierra Leone to create an independent special court. An agreement between the Government of Sierra Leone and the UN Secretary-General was concluded on 16 January 2002.[172] The Statute of the SCSL was attached to the agreement.[173] Sierra Leone had to ratify the agreement and adopt implementing legislation before the Court became functional and started to work in July 2002.[174]

The new Court was therefore not created by a resolution of the Security Council, like ICTY and ICTR, but by the bilateral agreement between the UN and the Sierra Leone Government. It is therefore not a subsidiary organ of the Security Council but a separate international institution. The Court has been described as a treaty-based *sui generis* court of mixed jurisdiction and composition. According to Sierra Leonean implementing legislation, the Court is not part of the domestic legal system. The majority of the judges are international judges appointed by the UN Secretary-General, and a minority of judges are appointed by the Government of Sierra Leone. The UN also appoints the Prosecutor and the Registrar, and Sierra Leone a Deputy Prosecutor.[175]

Like the ICTY and ICTR, the SCSL and national courts have concurrent jurisdiction, but the SCSL has primacy over national courts.[176] The Court has jurisdiction to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, when the Abidjan Peace Agreement between the Sierra Leone Government and RUF was signed.[177] The Court is funded entirely from voluntary contributions.

The Court's subject-matter jurisdiction covers crimes against humanity and war crimes committed in internal conflict, namely violations of Article 3 common to the Geneva Conventions and of Additional Protocol II of 1977. The jurisdiction of the Court extends to some other serious violations of international humanitarian law, such as conscripting or enlisting children into armed forces, and to crimes under Sierra Leonean law, particularly offences relating to the abuse of girls and wanton destruction of property. The Court, however, does not have jurisdiction over the crime of genocide.[178]

171 The latter proposal was rejected by Richard Holbrooke, the then US permanent representative to the UN.
172 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annex to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 2178 UNTS 138 (16 Jan 2002).
173 Statute of the Special Court for Sierra Leone, Enclosure to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 2178 UNTS 138 (16 Jan 2002) (hereinafter SCSL Statute).
174 The Agreement, the Statute, Ratification Act and other relevant documents are available at the official website of the SCSL available at <www.sc-sl.org> accessed 3 November 2009.
175 Articles 12, 13, 15 and 16 of the SCSL Statute.
176 Article 8 of the SCSL Statute.
177 Article 1 of the SCSL Statute.
178 Articles 2, 3, 4 and 5 of the SCSL Statute.

Jurisdiction of the SCSL as defined in its Statute

- ***Personal*** (*ratione personae*): only natural persons who bear the greatest responsibility for serious violations of international humanitarian law
- ***Subject-matter*** (*ratione materiae*):
  a) crimes against humanity
  b) war crimes: violations of Article 3 common to the Geneva Conventions and of Additional Protocol II of 1977
  c) other serious violations of international humanitarian law
  d) crimes under Sierra Leonean law
- ***Temporal*** (*ratione temporis*): crimes committed since 30 November 1996
- ***Territorial*** (*ratione loci*): crimes committed in the territory of Sierra Leone
- ***Relationship*** to national courts:
  a) concurrent jurisdiction with national courts
  b) primacy over national courts

Thirteen indictments were issued by the SCSL Prosecutor in 2003. Two of those indictments were subsequently withdrawn in December 2003 due to the deaths of the accused. The trials of three former leaders of the Armed Forces Revolutionary Council (AFRC) and of two members of the Civil Defence Forces (CDF) have been completed, including appeals. Trial of three former Revolutionary United Front (RUF) leaders has been completed and the case is now on appeal.[179] The former President of Liberia, Charles Taylor, who surrendered to the SCSL in 2006, is being tried at the premises of the ICC in The Hague for security reasons.[180] The Court expects to fulfil its mandate by 2011.

The Extraordinary Chambers in the Court of Cambodia (ECCC)

In 1975, the Khmer Rouge seized power in Cambodia, which then became known as the Democratic Kampuchea, and ruled there until 1979 when the regime was overthrown by Vietnamese forces. The Khmer Rouge were forced from power and retreated to rural areas of the country where they continued to control the area near the border with Thailand from where they continued a guerrilla resistance. During their reign under the direction of Pol Pot, the Khmer Rouge systematically executed all of the middle and professional classes, as well as other perceived enemies of the revolution. They also transferred the urban population to rural areas where they were forced into hard labour. It has been estimated that 1 to 1.5 million people out of Cambodia's 7 million died by execution, starvation and forced labour during 1975 and 1979.

179 Information about the cases is available at <www.sc-sl.org> accessed on 3 November 2008.
180 SC Res 1688, UN Doc S/RES/1688 (16 June 2006).

In 1997, the Cambodian Government requested the UN to assist it in bringing members of the Khmer Rouge to justice. Thereafter, the UN Secretary-General established a three-member Group of Experts to investigate the situation in Cambodia and make recommendations for achieving accountability for past crimes. The Group of Experts recommended the establishment of an ad hoc international tribunal under the aegis of the UN, but the Cambodian Government immediately rejected the exclusion of its judiciary from the process. In 2002, further negotiations between the Cambodian Government and the UN broke down with the withdrawal of the UN Secretary-General from the process due to lack of independence, impartiality and objectivity of the envisaged Cambodian court.

In 2001, during the negotiations on possible collaboration with the UN, Cambodia unilaterally passed the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. In May 2003 the UN General Assembly adopted an agreement between the UN and Cambodia which was ratified by the Cambodian Government in 2004.[181] The agreement was a result of negotiations triggered by the General Assembly resolution which urged the Secretary-General to make the UN an active participant in the trials.[182] The contentious Cambodian law served as a basis for negotiations on domestic Chambers.

The ECCC are regulated by the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.[183] The ECCC form a part of the domestic system of Cambodia and apply municipal law. The Chambers are of mixed composition: in each case Cambodian judges will make up the majority and international judges the remainder. The decisions are taken by a qualified majority. Due to the civil law origin of Cambodian criminal procedure, investigations are undertaken by Co-Investigative judges, one international and one Cambodian. Similarly, the prosecution is conducted by Co-Prosecutors, one international and one Cambodian. All the judges and prosecutors are appointed by the Cambodian Supreme Council of Magistracy.[184]

The ECCC are competent to try senior leaders of Democratic Kampuchea and those most responsible for the crimes and violations of Cambodian criminal law, international humanitarian law and custom, and international conventions recognised by Cambodia. The temporal jurisdiction is restricted to the period between 17 April 1975 and 6 January 1979. The subject matter jurisdiction consists of genocide under the 1948 Genocide Convention, crimes against humanity,[185] grave breaches of the Geneva Conventions, and certain other crimes under Cambodian law.[186] In addition, the ECCC has competence to prosecute persons responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict and for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations.[187]

181 On 13 May 2003 the General Assembly adopted a resolution 57/228, GA Res 57/228 B, UN Doc A/RES/57/228 B (22 May 2003), with the attached Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (6 June 2003) 2329 UNTS 117 (Annex).

182 GA Res 57/228 A, UN Doc A/RES/57/228 B (18 Dec 2002).

183 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as amended by NS/RKM/1004/006 (27 Oct 2004) available at <www.ecc.gov.kh> accessed 5 November 2008 (hereinafter Law on the Establishment of the ECCC).

184 Ibid.

185 The definition of crimes against humanity provided in Article 5 of the Law on the Establishment of the ECCC closely tracks the definition provided in the ICTR Statute.

186 Articles 3–6 of the Law on the Establishment of the ECCC.

187 Article 7 and 8 of the Law on the Establishment of the ECCC.

Jurisdiction of the Extraordinary Chambers of the Court of Cambodia

- ***Personal*** (*ratione personae*): only natural persons – senior leaders and those most responsible for the crimes
- ***Subject-matter*** (*ratione materiae*):
  a) domestic crimes: homicide, torture, religious persecution
  b) genocide
  c) crimes against humanity
  d) grave breaches of the 1949 Geneva Conventions
  e) destruction of cultural property during an armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property
  f) crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations
- ***Temporal*** (*ratione temporis*): crimes committed between 17 April 1975 and 6 January 1979
- ***Territorial*** (*ratione loci*): no explicit provision

According to the agreement, the Cambodian Government is not entitled to request amnesties or pardons and the Chambers are to decide the scope of a previously granted pardon. This provision is very important because amnesties had been previously granted to members of the Khmer Rouge to encourage them to refrain from violence against the State.

The ECCC became fully operational in May 2007 and the first trial started in 2009.

Special Tribunal for Lebanon (STL)

In response to the killing of the former Lebanese Prime Minister Rafiq Hariri and 22 others in a bomb attack in Beirut in February 2005, the Security Council established a Commission to assist the Lebanese authorities in their investigation of the assassination, including the links to neighbouring Syria.[188] In subsequent months, the Commission's mandate was extended to cover technical assistance to the Lebanese authorities in the investigation of 20 other attacks that took place in Lebanon since October 2004.

In December 2005, the Lebanese Government requested the UN to establish a tribunal of an international character to try all those alleged responsible for the Hariri attack and related killings. Thereafter, the Security Council requested the UN Secretary-General to negotiate an agreement with the Government of Lebanon on a tribunal of an international character based on the highest international standards of criminal justice.[189]

188 SC Res 1595, UN Doc S/RES/1595 (7 April 2005).
189 SC Res 1664, UN Doc S/RES/1664 (29 March 2006).

The negotiations between the UN and the Lebanese Government produced a draft agreement which was signed at the beginning of 2007 by UN and the Lebanese Republic. However, the agreement failed to be formally ratified by the Lebanese Parliament because although the majority of the Parliamentarians expressed their support for the tribunal, they were never called to a vote by the Parliament's speaker. As a result, the Lebanese Prime Minister requested the Security Council to put the tribunal into effect as a matter of urgency.

The Security Council, acting under Chapter VII of the UN Charter, adopted a resolution 1757 (2007) in which it decided that the provisions of the agreement on the establishment of a Special Tribunal that was annexed to the resolution,[190] and the tribunal's Statute attached to the agreement,[191] would enter into force on 10 June 2007, unless the Government of Lebanon notified the UN that the legal requirements for entry into force had been complied with before that date. Since the Government of Lebanon failed to send a notification on ratification of the agreement before the deadline set by the Security Council, the agreement and the Statute of the Special Tribunal entered into force on 10 June 2007.[192]

The jurisdiction of the Special Tribunal covers the prosecution of persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons, but could be extended if the Tribunal finds that certain other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005. Crimes that occurred after 12 December 2005 may also be included in the Tribunal's jurisdiction under the same criteria if it is so decided by the Government of the Lebanese Republic and the UN and with the consent of the Security Council.[193]

The STL and the national courts of Lebanon have concurrent jurisdictions and, within its jurisdiction, the Tribunal has primacy over the national courts of Lebanon.[194] Lebanon also has an obligation to cooperate with the Tribunal in the investigation and prosecution of crimes within the Tribunal's jurisdiction.[195]

The Special Tribunal sits in the Netherlands and became operational on 1 March 2009, the date set for its commencement by the UN Secretary-General and the day after the UN Commission that had been assisting the Lebanese authorities' investigations closed its doors. The Tribunal has a majority of international judges, an international pre-trial judge, an international Prosecutor, Registrar and Head of Defence Office. It has a minority of Lebanese judges and a Lebanese Deputy-Prosecutor.

The STL has jurisdiction over the acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences. In defining terrorism and other crimes within the jurisdiction of the Tribunal, the judges will apply the provisions of the Lebanese Criminal Code.[196] Both Lebanese and international forms of responsibility apply to these crimes and

190 Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, SC Res 1757, UN Doc S/RES/1757 (30 May 2007) (Annex).
191 Statute of the Special Tribunal for Lebanon, SC Res 1757, UN Doc S/RES/1757 (30 May 2007) (Attachment) (hereinafter STL Statute).
192 The documents relating to the STL are available at <www.stl-tsl.org> accessed 30 November 2009.
193 Article 1 of the STL Statute.
194 Article 4 of the STL Statute.
195 Article 15 of the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, SC Res 1757, UN Doc S/RES/1757 (30 May 2007) (Annex).
196 Article 2 of the STL Statute.

both Lebanese and international practice are relevant to sentencing, although the death penalty and hard labour sentences available under Lebanese law are excluded.[197]

East Timor: the Serious Crimes Panels

East Timor was a non-self-governing territory under the control of Portugal beginning a process of decolonisation and self-determination when it was invaded and occupied by the Indonesian military in 1975. Indonesia annexed East Timor and declared it as its 27th Province on 17 July 1976. The Indonesian occupation, which lasted around 24 years, was characterised by continuous repression and violence carried out predominantly by militias – armed groups of mostly East Timorese irregulars supported by members of Indonesian military.

In a referendum in 1999, 78.5 per cent of the East Timorese population had voted in favour of independence. This led to the militias launching a brutal campaign of widespread violence, including murder, rape, disappearances, torture, displacement and the systematic destruction of property, which was ended only when Indonesia allowed the intervention of the UN-authorised forces. Indonesia also agreed to cede control of the territory to the UN. Consequently, the Security Council established the United Nations Transitional Administration for East Timor (hereinafter UNTAET) responsible for the temporary administration of East Timor.[198]

One of the tasks of the UNTAET, which exercised governmental authority in East Timor, was to uphold the rule of law and establish an effective judicial system. UNTAET set up a court system of East Timor by establishing District Courts and a Court of Appeal in Dili, all with jurisdiction in both criminal and civil cases.[199] The jurisdiction over 'serious crimes' was reserved for the Dili District Court. The appeals were to be heard by a panel established within the Court of Appeal in Dili.[200] Soon thereafter, the Serious Crimes Panels of the District Court of Dili, with exclusive jurisdiction over such crimes, were created, each consisting of two international and one East Timorese judge.

The 'serious crimes', which fell within the jurisdiction of the Serious Crimes Panels, included genocide, war crimes and crimes against humanity, as well as domestic crimes, namely murder, sexual offences, and torture.[201] The jurisdiction extended to crimes in East Timor, or elsewhere if committed by or against an East Timorese citizen, during the period from 1 January to 25 October 1999.[202] The Panels applied UNTAET regulations setting out the elements and definitions of the international crimes and general principles of criminal law and penalties.[203] In addition, the Panels applied domestic criminal law applicable in East Timor, and, where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of international law of armed conflict.[204]

197 Article 2, 3 and 24 of the STL Statute.
198 Information about the UNTAET is available at <www.un.org/peace/etimor/etimor.htm> accessed 5 November 2008.
199 Section 4 of the UNTAET Regulation 2000/11, UNTAET/REG/2000/11 (6 March 2000) (amended by UNTAET Regulation 2001/18, UNTAET/REG/2001/18 (21 July 2001), and UNTAET Regulation 2001/25, UNTAET/REG/2001/25 (14 Sept 2001).
200 Section 10 UNTAET Regulation 2000/11, UNTAET/REG/2000/11 (6 March 2000) (amended by UNTAET Regulation 2001/18, UNTAET/REG/2001/18 (21 July 2001) and UNTAET Regulation 2001/25, UNTAET/REG/2001/25 (14 Sept 2001); Section 1 of the UNTAET Regulation 2000/15, UNTAET/REG/2000/15 (6 June 2000).
201 Section 1 of the UNTAET Regulation 2000/15, UNTAET/REG/2000/15 (6 June 2000).
202 Ibid Section 2.
203 Ibid Sections 4–9.
204 Ibid Section 3.

Jurisdiction of the Serious Crimes Panels in East Timor

- ***Personal*** (*ratione personae*): only natural persons
- ***Subject-matter*** (*ratione materiae*):
  a) genocide
  b) war crimes
  c) crimes against humanity
  d) domestic crimes
- ***Temporal*** (*ratione temporis*): crimes committed between 1 January and 25 October 1999
- ***Territorial*** (*ratione loci*): crimes committed in the territory of East Timor, or elsewhere if committed by or against an East Timorese citizen

In 2002, the UN handed over its authority to the new democratic institutions of East Timor established after general and presidential elections were held. The Serious Crimes Panels continued to function until May 2005 when their operations were suspended. The prosecution of international crimes is now in the hands of ordinary, domestic courts.

Kosovo judicial system under the UN Mission in Kosovo (UNMIK)

The ICTY's territorial jurisdiction covers crimes committed in Kosovo, since Kosovo is part of the territory of the former Yugoslavia. However the local courts in Kosovo also have to deal with a broader range of crimes committed there. The situation in Kosovo, which used to be an autonomous region within the Socialist Federal Republic of Yugoslavia, was characterised by ethnic tensions between Kosovo Albanians and Serbs. These tensions culminated in the conflict between government forces and the Kosovo Liberation Army. In 1999, NATO launched a bombing campaign against the Federal Republic of Yugoslavia as a response to the 'ethnic cleansing' campaign being waged by Serb forces against Kosovo Albanians.

Serious atrocities were committed on both sides during the conflict in Kosovo. The ICTY dealt with some of the more high-profile cases involving crimes committed in Kosovo.[205] There were also local proceedings carried out under the auspices of the UN Mission in Kosovo (hereinafter UNMIK), which was established by the UN Security Council as the interim administration of the territory.[206] UNMIK assumed executive and legislative authority in Kosovo, including the administration of justice. An initial proposal for the establishment of a Kosovo War and Ethnic Crimes Court was not realised, largely due to a lack of resources. Instead, UMNIK introduced international judges and prosecutors into local courts of Kosovo.

205 See, eg, *Prosecutor v Slobodan Milošević* (ICTY) Case No IT-02-54; *Prosecutor v Milutinović et al* (ICTY) Case No IT-05-87, Trial Judgment (26 Feb 2009).

206 Information on UNMIK is available at <www.unmikonline.org> accessed 5 November 2009.

UMNIK's goal was to build and establish an independent, impartial and multi-ethnic judiciary through UN intervention. For that purpose it had to rebuild local judicial institutions, set out a new body of law based on the existing one, appoint new judges under a new mandate and act within the framework of international human rights standards and principles of non-discrimination in the local prosecution of war and ethnic crimes and other serious violations of international law. However, the newly re-established local criminal courts with newly appointed domestic judges and prosecutors did not succeed in quelling the perception of bias and handling increasing numbers of crimes.

UNMIK decided to launch a process of internationalisation by introducing international judges and prosecutors. It appointed international judges to work with local judges and created a formal structure within which the local judges could examine and try cases appropriate to their jurisdiction and refer more serious cases on to the ICTY.[207] The judges worked exclusively on criminal cases, mostly sensitive cases involving alleged war crimes or other serious crimes and inter-ethnic violence. However, the placement of international judges and prosecutors into the Kosovo justice system did not entirely guarantee justice to minority accused and victims, because the international judges and prosecutors would be frequently out-voted or overruled by Kosovo Albanian judges.

UNMIK adopted regulation 2000/64 which allowed the prosecutors and defendants to petition the UNMIK Department of Judicial Affairs to assign an international prosecutor, and an international investigative judge, or a court panel with three judges including at least two international judges to a particular case, when this was necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.[208] These panels are domestic courts and apply municipal law. UNMIK later introduced new legislation, particularly the new Provisional Criminal Code and the new Provisional Criminal Procedural Code.[209]

The War Crimes Chamber in Bosnia and Herzegovina

During the armed conflict in Bosnia and Herzegovina between 1992 and 1995 grave violations of human rights including mass killings, rapes, widespread destruction and displacement of the population took place. The ICTY was established by the Security Council to bring to justice persons responsible for the atrocities committed in the former Yugoslavia, including Bosnia and Herzegovina. However, the tribunal has been focusing on a small number of the most senior official and high level perpetrators of the war crimes. In order to enable effective war crimes prosecution in Bosnia, the War Crimes Chamber of the State Court was established.[210]

The War Crimes Chamber, located in Sarajevo, emerged from a joint initiative of the ICTY and the Office of the High Representative, whose task is to oversee the civilian aspect of the Dayton Peace Agreement on behalf of the international community. Officially it began its operations on 9 March 2005. The Chamber plays the role of a domestic court to which the ICTY can refer cases against the lower to mid- level perpetrators, but it also tries cases initiated locally.[211] The Chamber operates

207 See UNMIK regulation 2000/6, UNMIK/REG/2000/6 (15 Feb 2000); UNMIK regulation 2000/34, UNMIK/REG/2000/34 (27 May 2000).
208 UNMIK regulation 2000/64, UNMIK/REG/2000/64 (Dec 15, 2000) (amended by UNMIK regulation 2001/34, UNMIK/REG/2001/34 (15 Dec 2001); UNMIK regulation 2005/50, UNMIK/REG/2005/50 (12 Dec 2005); UNMIK regulation 2006/60, UNMIK/REG/2006/60 (23 Dec 2006); UNMIK regulation 2007/21, UNMIK/REG/2007/21 (29 June 2007).
209 See UNMIK regulation 2003/25, UNMIK/REG/2003/25 (6 July 2003); UNMIK regulation 2003/26, UNMIK/REG/2003/26 (6 July 2003).
210 The War Crimes Chamber was established in one of the entities of Bosnia and Herzegovina, namely Federation of Bosnia and Herzegovina (BiH).
211 Law on the Transfer of Cases from ICTY to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH, Official Gazette of Bosnia and Herzegovina, No 61/04, available at <www.subbih.gov.ba> accessed 5 November 2009.

within the Criminal Division of the State Court of Bosnia together with the Organised Crime and General Crime Chambers. The Chamber is considered essentially as a domestic institution although it contains a significant international component.

The Chamber operates under domestic law, including new criminal and criminal procedure codes introduced by the Office of the High Representative in 2003.[212] The criminal code defines genocide, crimes against humanity, war crimes and general criminal law principles. The Chamber's jurisdiction covers only the most serious war crimes in Bosnia, while other cases remain with the district or cantonal courts. The Chamber has international judges and prosecutors, defence counsels and other supporting personnel. The Office of the Prosecutor has a Special Department for War Crimes. Each judicial panel comprises two international judges and one local judge. According to the transitional strategy, the international judges will gradually be phased out and by the end of 2009 there will no longer be any international judges with the Chamber.

The War Crimes Chamber in Serbia

In 2003, Serbia established a specialised War Crimes Chamber of the Belgrade District Court together with a War Crimes Prosecutor's Office to prosecute and investigate crimes against humanity and serious violations of international humanitarian law as defined in Serbian law.[213] Although the Chamber was created with international assistance, especially the Organisation for Security and Cooperation in Europe, it remains entirely a national institution. The Chamber consists of two panels of three judges each selected from the Belgrade District Court or seconded from other courts, and two investigative judges. The president of the Belgrade District Court is also president of the War Crimes Chamber. The Chamber's jurisdiction extends to crimes committed anywhere in the former Yugoslavia, regardless of the citizenship of the perpetrators or victims. The ICTY has also referred some cases to the Chamber as part of its completion strategy.

The Iraqi High Tribunal

Saddam Hussein's rule in Iraq, lasting for over 35 years, was characterised by fierce violence and suppression against Iraq's ethnic and religious communities, including, for example, destruction of their villages, forcible transfers of ethnic minorities, executions and killing of civilians by using bombardments and chemical weapons. During that time Iraq was involved in a war with Iran and Kuwait, the latter being subjected to Iraqi occupation. In these wars Iraqi forces allegedly violated international humanitarian law, particularly using chemical weapons in indiscriminate attacks and carrying out other atrocities such as summary executions, torture, rape, forced disappearances and large-scale appropriation of property.

In 2003, Saddam Hussein's regime was removed from power when the United States and Coalition forces invaded and occupied Iraq following an armed conflict. The Coalition Provisional Authority, authorised by the UN Security Council, took over the administration of Iraq.[214] The Coalition

212 Criminal Code and Criminal Procedure Code of BiH, Official Gazette of Bosnia and Herzegovina, No 03/03, available at <www.subbih.gov.ba> accessed 5 November 2009.

213 Law on Organization and Competence of Government Authorities in War Crimes Proceedings, Official Gazette of Republic of Serbia, No 67/2003.

214 SC Res 1483, UN Doc S/RES/1483 (22 May 2003); Coalition Provisional Authority Regulation Number 1, CPA/REG/16 May 2003/01 (16 May 2003).

Provisional Authority appointed 25 Iraqis to the so-called Iraq Governing Council[215] and gave the Council legislative authority to formulate a law establishing the tribunal for the most serious crimes perpetrated by Saddam Hussein's regime since it seized power in 1968.[216] On 10 December 2003, the Iraqi Governing Council approved the Statute establishing the Iraqi Special Tribunal.[217]

When a new elected government was formed in Iraq in 2005, the Iraqi Transitional National Assembly adopted a new Statute for the tribunal and renamed it the Iraqi High Criminal Court, commonly referred to as the Iraqi High Tribunal.[218] The tribunal's jurisdiction covers certain crimes committed by Iraqi nationals or residents in Iraq or elsewhere between 16 July 1968, after the Ba'athist's coup d'état, and 1 May 2003, at the end of the major hostilities. The subject matter jurisdiction covers genocide, crimes against humanity,[219] war crimes and some crimes under Iraqi law relating to abuse of power.[220] The definitions of the first three categories are almost identical to the ones provided in the Statute of the ICC. The tribunal has concurrent and primary jurisdiction over other Iraqi courts.[221]

The tribunal is integrated into the domestic judicial system and is considered as a domestic court. The judges and prosecutors of the Iraqi High Tribunal are all Iraqi nationals. However, the tribunal does have some international elements. The Statute allows the appointment by a national authority of non-Iraqi judges.[222] International advisers, observers and defence co-counsel are also allowed to work in the tribunal.[223] Moreover, coalition members are providing financial support, training, security and personnel.[224] The first and the most important trial before the Tribunal was that of Saddam Hussein, who was sentenced to death for crimes against humanity and hanged on 30 December 2006.

The Lockerbie *trial*

On 21 December 1988, Pan Am flight 103 exploded above the village of Lockerbie in Scotland. In the explosion, all 259 passengers and crew were killed as well as 11 residents of Lockerbie. As a result of investigations, the United States and the United Kingdom demanded that Libya surrender the two Libyan agents suspected of causing the explosion so that they could stand trial in either of the two countries. They also requested Libya to accept its responsibility for the incident, reveal all information and pay appropriate compensation. Following Libya's refusal to respond to the requests of the two governments, the UN Security Council, acting under Chapter VII, called upon Libya to fulfil these requests and imposed certain sanctions against Libya.[225]

In 1998, ten years after the explosion, the United States, the United Kingdom and Libya reached a compromise envisaging a trial in a neutral country rather than Scotland. However, the trial was to be held before a Scottish court applying Scottish law. Subsequently, the Netherlands agreed to

215 Coalition Provisional Authority Regulation Number 6, CPA/REG/13 July 2003/06 (13 July 2006).
216 Coalition Provisional Authority Order Number 48 on delegation of authority regarding an Iraqi Special Tribunal with Appendix A containing the Statute of the Iraqi Special Tribunal, CPA/ORD/9 Dec 2003/48 (9 Dec 2003).
217 Statute of the Iraqi Special Tribunal, CPA/ORD/9 Dec 2003/48 (9 Dec 2003) (Appendix A).
218 Law on the Iraqi High Criminal Court, Law No 10 of 2005, Official Gazette of the Republic of Iraq No 4000 (18 Oct 2005).
219 Article 1(2) of the Law on the Iraqi High Criminal Court.
220 These crimes are intervention in the judiciary, wastage of national resources and pursuit of policies that threaten a war of aggression against an Arab country. Articles 1(2) and 14 of the Law on the Iraqi High Criminal Court.
221 Article 29 of the Law on the Iraqi High Criminal Court.
222 Article 4 of the Law on the Iraqi High Criminal Court.
223 See Articles 7–9 and 13 of the Law on the Iraqi High Criminal Court.
224 Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (CUP, Cambridge 2007) 2; Bantekas and Nash (n4) 161.
225 SC Res 748, UN Doc S/RES/748 (31 March 1992); SC Res 883, UN Doc S/RES/883 (11 Nov 1993).

host a trial on its territory.[226] On 5 April 1999, Libya surrendered the accused to the Netherlands. In response, the UN Security Council lifted all sanctions against Libya.[227] The criminal proceedings were held at Camp Zeist before the Scottish High Court composed of three Scottish judges. On 31 January 2001, the High Court rendered its judgment convicting one and acquitting one of the accused.[228]

On 14 March 2002, the judgment was upheld by the Appeal Court of the High Court which consisted of five Scottish judges.[229] In 2007, the Scottish Criminal Cases Review Commission allowed Abdelbaset Al Megrahi to lodge a second appeal against his conviction on the basis of its finding that a miscarriage of justice may have occurred. However, before the start of the second appellate proceedings, on 12 August 2009, Megrahi dropped his appeal. On 20 August 2009, after serving eight and a half years of his life sentence, the Scottish Government released Megrahi on compassionate grounds due to his medical condition.[230] Megrahi returned to Libya on the same day.

The Lockerbie trial offered yet another unique ad hoc solution aimed at fighting impunity and bringing to justice persons responsible for crimes of international concern. It should be pointed out, however, that the Scottish High Court did not deal with international crimes but domestic ones, since the accused were indicted for murder and the Bench applied domestic law in considering the charges. Although the trial before the High Court was thus not an international trial, it was organised at the international level.

Alternatives to criminal prosecution

Truth Commissions

As an alternative to criminal prosecution before judicial bodies, some States have chosen to deal with crimes committed during a war or civil turmoil through Truth and Reconciliation Commissions. The main purpose of these commissions is to assist in the enforcement of justice, reconstruction and reconciliation of societies by investigating and recording atrocities and crimes in a particular country, establishing accountability of perpetrators, providing redress for the victims and making proposals for reform. They can be used as the sole venue to address the violations or they can complement criminal proceedings held before domestic or internationalised tribunals, such as the Truth and Reconciliation Commission in Sierra Leone. Setting up these commissions might prove useful especially in a situation where there are too many perpetrators and it would be too costly and time-consuming to hold trials in respect of all the perpetrators.

The South African Truth and Reconciliation Commission is often considered the paradigm Truth Commission. It was established in 1993 pursuant to the Promotion of National Unity and Reconciliation Act. It was composed of three committees, members of which were people of high reputation. The Committee on Human Rights Violations investigated human rights abuses that occurred between 1960 and 1994. The Committee on Amnesty was competent to grant amnesties to perpetrators of politically motivated crimes provided that the perpetrator made full disclosure of the

226 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Concerning a Scottish Trial in the Netherlands (1999) (18 Sept 1998) 38 ILM 926.
227 SC Res 1192, UN Doc S/RES/1192 (27 Aug 1998).
228 *Her Majesty's Advocate v Abdelbaset Ali Mohamed Al-Megrahi and Al Amin Khalifa Fhimah*, Decision of the High Court of Justiciary at Camp Zeist (2001) Case No 1475/1999, 40 ILM 611.
229 *Al-Megrahi v Her Majesty's Advocate*, Opinion in Appeal against Conviction, 14 March 2002 (Appeal No C104/01).
230 According to medical reports Megrahi had terminal prostate cancer and had less than three months to live.

relevant facts. The Committee on Reparations and Rehabilitation considered requests for reparation and formulated policy proposals on rehabilitation of survivors. Truth Commissions of various forms had been set up in several countries, for example El Salvador, Chile, East Timor, Liberia, Argentina, Sierra Leone and South Korea.

Amnesties

A controversial alternative to criminal prosecutions following conflict situations involves the granting of amnesties. Purportedly in order to promote reconciliation, States have on occasion granted amnesties by a law that prevents criminal proceedings against perpetrators. The granting of amnesties, often by Truth Commissions, has been criticised for creating impunity by allowing crimes to go unpunished. Although the amnesties might be an effective tool in the process of reconciliation, it is generally considered that they should not be used for serious international crimes, such as genocide, torture, or serious violations of international humanitarian law, such as grave breaches of the Geneva Conventions of 1949.

Amnesties are further discussed in Chapters 4 and 5.

Concluding remarks

In the last 50 years, international criminal law has undergone progressive development especially with regard to the setting up of criminal courts and tribunals.

Main goals of international criminal courts and tribunals

- to fight impunity and establish accountability;
- to bring to justice the most senior leaders responsible for international crimes;
- to restore and maintain peace and security;
- to help in the process of reconciliation and peace-building;
- to conduct independent and impartial trials with full fair trial guarantees;
- to render justice to the victims and give them a voice;
- to deter further crimes;
- to provide for a historical record of events and crimes;
- to strengthen the rule of law;
- to assist in reforming or setting up national judiciaries.

The legacy of the Nuremberg Trial and judgment, particularly the formulation of the Nuremberg principles, influenced the development of international criminal law and practice which resulted in the creation of a permanent international criminal court. The two ad hoc tribunals established by

the UN Security Council to provide a quick and effective response to conflicts of an international and domestic nature, respectively, proved to be relatively successful experiments, producing valuable jurisprudence of substance and procedure. The ICTY's Statute was used as a model for the ICTR's Statute which in turn provided the basis for the Statute of the SCSL. The Statutes of the ad hoc tribunals, and later of the ICC, together with general principles of international criminal law, were copied by other mixed and internationalised courts and tribunals.

The establishment of mixed tribunals in post-conflict situations is an effective means to bring to trial those responsible for serious crimes, especially where there is a non-functional, corrupt or biased judiciary and lack of political will or funding to establish an international tribunal. Using the domestic judiciary under international supervision and support may prove beneficial for the development of the domestic judicial system, ensuring more expeditious and less expensive trials and transferring knowledge and skills to the local judiciary and bar. Dealing with past atrocities in the territories where the crimes have been perpetrated may help victims and local population in a reconciliation and peace-building process.

> 'Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand.'
>
> (***Mr Antonio Cassese***, former President of the International Criminal Tribunal for the former Yugoslavia in November 1995, upon the conclusion of the Dayton Peace Agreement.)

Exercises and case studies

Why do we need international tribunals and what is their role and purpose?

What is the legacy of the post Second World War trials?

What is the importance of the UN General Assembly's affirmation of the principles of the Nuremberg Charter and the judgment?

What are the possible ways to establish an international tribunal and what circumstances warrant each modality?

Why were the ad hoc tribunals for the former Yugoslavia and Rwanda established by Security Council resolutions?

What is the main challenge with regard to the establishment and the lawfulness of the ICTY and the ICTR?

What are the main differences between the ICTY and ICTR and their relationship to the national courts?

What are the main differences between the ad hoc tribunals and the ICC?

What is the ICC's jurisdiction and its relationship with the national courts?

What are the main characteristics of the 'internationalised' tribunals?

What forms of the 'internationalised' tribunals exist and what are their characteristics?

Is a State or a Truth Commission entitled to grant amnesties to serious crimes perpetrators?

What are the main goals of the international criminal courts and tribunals?

Case study

The conflict between Astania and Bestania is still ongoing. The international community is considering how to end the conflict and bring to justice the perpetrators of international crimes. Both States deny any responsibility for the crimes committed during the armed conflict. Both of them seem reluctant to transfer their nationals suspected of being involved in the commission of the war crimes for the prosecution to other criminal courts or tribunals, either national or international. However, Astania is a party to the Statute of the ICC. Bestania is not a Party to the Statute although it expressed, before the start of the conflict, its intention to become bound by the Statute of the ICC.

In May 1999, as a part of the efforts to bring about peace in Astania and Bestania, Colonel Butel was granted an amnesty from prosecution for any offences committed during the conflict.

Questions

Consider how the crimes committed during the conflict might be dealt with. Would you consider domestic prosecution, establishment of an ad hoc international criminal tribunal or an international tribunal of hybrid nature? Please provide arguments for your choice.

Does the ICC have jurisdiction over the crimes committed in the conflict? If so, which crimes could be prosecuted before the ICC from the perspective of personal and territorial jurisdiction?

If, hypothetically, Bestania became a Party to the ICC Statute, would that change the ICC jurisdiction with regard to the crimes committed during the conflict?

Can the amnesty granted to Colonel Butel be challenged? How?

Chapter 3 – Substantive Law on International Crimes: Definitions

Learning objectives

To familiarise participants with the substantive law of international crimes, particularly with the definitions of war crimes, crimes against humanity, genocide, aggression and other international crimes such as torture and terrorism.

To provide a basic understanding of the mental and physical elements of international crimes and other elements which need to be proved in order to establish individual responsibility for the crimes.

Questions

Have you, in the exercise of your professional activities as judges, prosecutors or lawyers, ever been involved in criminal proceedings alleging the commission of international crimes?

Were the proceedings before an international court or a tribunal or a domestic court?

What substantive law applied to the criminal proceedings?

In case of a domestic trial, did you refer to any international instruments or case-law of the international courts or tribunals defining international crimes?

Did you encounter any problems regarding the substantive law of international crimes, ie gaps or imprecision in their definitions?

What was the outcome of the case?

Introduction

It is easier to provide a list of international crimes than to provide an all-encompassing definition. The core international crimes are aggression, genocide, crimes against humanity and war crimes. These are the crimes which are prosecuted (with some exceptions) at the international courts and tribunals referred to in the previous Chapter. Aggression, due to its political nature, is by the far the most controversial of the core crimes and consequently it is much less commonly prosecuted than the other international crimes.

While it is relatively easy to list the core international crimes, it is more difficult to define them. In order fully to understand these terms, it is necessary to set out the historical background to the development and elaboration of each of the crimes. In so doing, we need to consider the concepts of international humanitarian law (*jus in bello)*, *jus ad bellum,* international human rights law and international criminal law, to understand their sources and to see how these areas of law interrelate and overlap.

To give an example of such overlap, war crimes and crimes against humanity may overlap, in that a mass killing of civilians during an armed conflict could constitute both a war crime and a crime

against humanity. However, there are important differences between the two types of crimes. In particular, unlike war crimes, crimes against humanity may also occur in the absence of armed conflict. On the other hand, crimes against humanity must be committed as part of widespread or systematic attack, whereas a single isolated offence can constitute a war crime. Crimes against humanity concern actions directed primarily against a civilian population, whereas war crimes regulate conduct even on the battlefield and against military objectives.[231]

Genocide is a relatively modern concept, having been coined in 1945. At its inception, genocide was regarded as a subset of crimes against humanity, namely a crime against humanity committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. It was thus an *aggravated* form of crime against humanity. In the subsequent half century, however, the definition of genocide evolved its own autonomous meaning to the point where now its elements differ to some extent from those of crimes against humanity. However, both types of crimes remain closely related.

This section will also discuss torture and terrorism as international crimes. Torture and terrorism are currently not regarded as 'core crimes' and they do not per se fall within the jurisdiction of international courts and tribunals. However, torture and acts of terrorism may be prosecuted at the international tribunals as the underlying crime in a prosecution for one of the core crimes (crimes against humanity and war crimes), even if they may not be prosecuted in their own right. In this Chapter, the elements of torture and terrorism as distinct international crimes will be considered.

Thus the purpose of this Chapter is to set out and analyse the elements of international crimes, with particular emphasis on the elaboration of these crimes in the Statutes and case-law of the ICTY, ICTR, SCSL and ICC (including the ICC Elements of Crimes), and to examine some of the (difficult) problems posed by the prosecution of these crimes.

War crimes

Introduction

War crimes can be understood as serious violations of the laws and customs of armed conflict, or international humanitarian law.[232] In other words, the rules of international humanitarian law, at least part of it, are criminalised in the law of war crimes. Given this link to international humanitarian law, this section will begin with an introduction to international humanitarian law. This will be followed by a historical account of the emergence and development of the concept of war crimes. Finally, the law of war crimes, along with the requisite elements relating to the concept and the specific/underlying offences will be discussed. Throughout this section particular emphasis will be placed on the approach taken by the ICC.

231 Cryer et al (n4) 190.
232 Cryer et al (n4) 221; Antonio Cassese, *International Criminal Law* (2nd ed OUP, Oxford 2008) 81.

International humanitarian law

WHAT IS INTERNATIONAL HUMANITARIAN LAW?

As discussed in Chapter 1, international humanitarian law, also known as the law of war or law of armed conflicts (*jus in bello*), is the body of rules which seeks, for humanitarian reasons, to limit the suffering caused by warfare and to alleviate its effects by protecting and assisting its victims as far as possible. International humanitarian law, however, does not regulate whether and when a State may actually resort to the use of force (*jus ad bellum*). Therefore, the question of whether the resort to force was unjustified or illegal has no bearing on the application of international humanitarian law to an armed conflict.

What is international humanitarian law (IHL)?

- IHL is a set of rules which place ***restrictions on the use of weapons and methods of warfare***;
- IHL ***protects people*** who are not, or are no longer, participating in hostilities;
- IHL aims to ***protect human dignity*** and to ***limit suffering*** during times of war.

Historically, combatants have always been restricted in the manner in which they conduct armed conflict; for instance, through treaties or agreements, national laws or religious edict, or by time-honoured customs. However, these rules and customs varied greatly throughout the ages, as there were no universally recognised set of norms or rules governing armed conflict. Universal codification of international humanitarian law began in the 19th century. Since then, States have agreed to a series of practical rules, which aim to strike a balance between humanitarian concern, on the one hand, and military reality, on the other.

HUMANITARIAN LAW AND HUMAN RIGHTS

Humanitarian law pursues the same purpose as the law of human rights, which is to protect the fundamental rights of individuals, particularly the lives, health and dignity of individuals. Humanitarian law only applies in situations of armed conflict, whereas human rights generally protect the individual at all times, in war and peace alike. However, some human rights treaties permit governments to derogate from certain rights in situations of public emergency. No derogations are permitted under international humanitarian law because it was conceived for emergency situations, namely armed conflict.[233]

In its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the International Court of Justice held[234]

> the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant

233 International Committee of the Red Cross, *International Humanitarian Law: Answers to your Questions* (International Committee of the Red Cross, Geneva 2004) 36.

234 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) [2004] ICJ Rep 136, para (106).

> on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

Accordingly, human rights law and humanitarian law overlap. They both apply in time of armed conflict, although human rights also apply during peacetime. However, humanitarian law is a specialised body of human rights law and therefore is applied as *lex specialis*. An important difference between the two branches of law is that international humanitarian law requires a degree of reciprocity in that a laws of war treaty applies only between those States which are parties to it, whereas a human rights treaty binds any State which is a party to it, irrespective of what other States do.[235]

SOURCES OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law is contained in agreements between States (treaties or conventions), in customary rules (which consist of State practice considered by them to be legally binding), and in general principles.

The first modern attempt to codify the existing laws and customs of war was made by Francis Lieber, a law professor at Columbia University in New York. However, the Code, known as the 'Lieber Code' did not have the status of a treaty, as it was intended solely for the Union soldiers fighting in the American Civil War (1861–1865). President Abraham Lincoln promulgated the text, as revised by a board of officers, as 'Instructions for the Government of Armies of the United States in the Field', General Orders No 100, of 24 April 1863. Although they were binding only on the forces of the United States, they corresponded to a great extent to the laws and customs of war existing at that time.[236]

A year later, in 1864, the first treaty on the protection of military victims of warfare was drawn up and signed in Geneva, entitled the Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field.[237] Important progress in the development of international humanitarian law was accomplished during the First and Second Peace Conferences at The Hague in 1899 and 1907. The Conferences produced one of the most comprehensive codifications, namely the Hague Conventions of 1899 and 1907, respectively, providing restrictions on the means and methods by which belligerent States conducted warfare.[238]

The Geneva Convention of 1864 was further reviewed and developed by the Geneva Conventions adopted in 1906 and 1929 and the Geneva Protocol of 1925.[239] As a result of the atrocities that took place during the First and Second World Wars, the Geneva Conventions were updated by four further Conventions in 1949 to include further protections:

235 Christopher Greenwood, 'The Law of War (International Humanitarian Law)', in Malcolm D Evans (ed), *International Law* (Ashgate, Farnham 2003) 789, 790–791.

236 Dietrich Schindler and Jiří Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and other Documents* (3rd ed Nijhoff, Dordrecht 1988) 3–23.

237 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, (22 Aug 1862), reprinted in Schindler and Toman (n236) 279–283.

238 The Hague Conventions of 1899 and 1907 are reprinted in Schindler and Toman (n236) 279–283, 301–312, 339–366.

239 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906); Geneva Convention relative to the Treatment of Prisoners of War (27 July 1929); Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (17 June 1925); the conventions and the protocol are reprinted in Schindler and Toman (n236) 301–312, 339–366, 115–127.

- Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I);[240]
- Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II);[241]
- Treatment of Prisoners of War (Geneva Convention III);[242]
- Protection of Civilian Persons in time of War (Geneva Convention IV).[243]

The Geneva Conventions were further updated by two protocols in 1977, which strengthened the protection of victims of international armed conflicts (Additional Protocol I),[244] and non-international armed conflict (Additional Protocol II).[245]

In sum, international humanitarian law, also known as the law of armed conflict or law of war, can be divided into two branches:

Two branches of international humanitarian law

- ***'Geneva Law'***, which is designed to protect military personnel who are no longer taking part in the fighting (ie wounded, shipwrecked and sick combatants) and people not actively involved in hostilities (ie civilians, medical and religious military personnel);
- ***'Hague Law'***, which establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means (ie weapons) and methods (ie military tactics) of warfare.

Geneva Law is the body of law comprised of the Geneva Conventions of 1864, 1906 and 1929, and their successors, the four Geneva Conventions of 1949. The two Additional Protocols of 1977 supplement the 1949 Conventions without repealing them.

Hague Law is the body of law comprised of the Hague Conventions of 1899 and 1907, in particular the 1899 Convention (II) with respect to the Laws and Customs of War on Land and the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land with the Regulations annexed thereto.[246] The great part of The Hague Law has been incorporated into the Additional Protocols of 1977 where it has also been further developed. As far as they were not incorporated therein, the Hague provisions are still in force.[247]

240 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 35.
241 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 Aug 1949) 75 UNTS 81.
242 Geneva Convention relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135.
243 Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287.
244 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (8 June 1977) 1125 UNTS 3.
245 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) (8 June 1977) 1125 UNTS 609.
246 The 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land; The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land; both conventions are reprinted in Schindler and Toman (n236) 63–98.
247 Karl Josef Partsch, 'Humanitarian Law and Armed Conflict', in 2 *Encyclopaedia of Public International Law* (Rudolf Bernhardt (ed), North Holland Publishing Co, Amsterdam 1995) 933, 934–935; International Committee of the Red Cross, *International Humanitarian Law: Answers to your Questions* (International Committee of the Red Cross, Geneva 2004) 5, available at <www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0703> accessed 30 November 2009.

Geneva Law and Hague Law are *interwoven* with each other and as a result they have merged into a *single, complex system called international humanitarian law.* This inter-relationship finds expression in the provisions of the Additional Protocols of 1977, which combine both branches of international humanitarian law.

The provisions of the Hague Conventions of 1899 and 1907 and much of the Geneva Conventions of 1949 have come to be recognised as customary law and therefore they apply regardless of whether parties to the conflicts have ratified those conventions. As regards the 1977 Additional Protocols, only some provisions have obtained recognition as being part of customary law.[248]

Other conventions and protocols have been adopted to strengthen the protection afforded by international humanitarian law and the prohibition or regulation of certain weapons, including: [249]

- the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;[250]
- the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction;[251]
- the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (hereinafter CCW),[252] and its three Protocols;[253]
- the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction;[254]
- the 1995 Protocol Relating to Blinding Laser Weapons (Protocol IV to the 1980 CCW);[255]
- Protocol on Prohibition or Restrictions on the Use of Mines, Booby Traps and Other Devices as Amended on 3 May 1996 (Protocol II (revised) to the 1980 CCW);[256]
- the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction;[257]
- the 1998 ICC Statute;[258]

248 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP, Oxford 1989) 41–78.
249 International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions* (n247) 10–11.
250 Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) 249 UNTS 240.
251 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction (10 April 1972) 1015 UNTS 163; 11 ILM 309 (1972).
252 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (10 Oct 1980) (hereinafter CCW). 19 ILM 1823 (1980).
253 Protocol on Non-Detectable Fragment (10 Oct 1980) 1342 UNTS 168, 19 ILM 1529 (1980); Protocol on Prohibition or Restrictions on the Use of Incendiary Weapons (10 April 1981); Protocol on Explosive Remnants of War (28 Nov 2003).
254 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (13 Jan 1993) 1974 UNTS 45; 32 ILM 800 (1993).
255 Protocol Relating to Blinding Laser Weapons (13 Oct 1955) 35 ILM 1218 (1996).
256 Protocol on Prohibition or Restrictions on the Use of Mines, Booby Traps and Other Devices as Amended on 3 May 1996 (5 May 1996) 35 ILM 1209 (1996).
257 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (18 Sept 1997) 2056 UNTS 241; 36 ILM 1507 (1997).
258 Rome Statute of the International Criminal Court (17 July 1998) (hereinafter ICC Statute). UN Doc A/CONF.183/9.

- the 1999 Protocol to the 1954 Convention on Cultural Property;[259]
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;[260]
- Amendment to Article I of the CCW.[261]

SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law will generally apply only to armed conflict. International humanitarian law, therefore, 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. With regard to armed conflict, international humanitarian law distinguishes between international and non-international armed conflict (or civil wars).

International armed conflict: fighting between the armed forces of at least two States. Wars of national liberation, as defined in Article 1 of Protocol I, are classified as international armed conflicts.

Non-international armed conflict: fighting on the territory of a State between the regular armed forces and identifiable armed groups, or between armed groups fighting one another. To be considered a non-international armed conflict, fighting must reach a certain level of intensity and extend over a certain period of time.

Internal disturbances: serious disruption of internal order resulting from acts of violence which nevertheless do not constitute an armed conflict (riots, struggles between factions or against the authorities, for example).[262]

International humanitarian law applicable to international armed conflicts differs from that applicable to non-international armed conflicts. Determining which laws or principles apply will, therefore, depend on the classification of the conflict. International armed conflicts are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I. A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions ('common Article 3') as well as in Additional Protocol II. It should be noted that the conditions of application of Protocol II are stricter than those of common Article 3.[263]

International humanitarian law will come into effect *once a conflict has commenced*, and will *apply equally to each side.*

259 Protocol to the 1954 Convention on Cultural Property (14 May 1954) 249 UNTS 358.
260 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, Annex I, UN Doc. A/54/49 (25 May 2000).
261 Amendments to Article 1 of the CCW (21 Dec 2001).
262 International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions* (n247) 5.
263 Ibid at 16.

International humanitarian law comes into effect once a conflict has commenced. Whether a conflict has commenced is a question of fact. Thus a formal declaration of war is not necessary to trigger the application of international humanitarian law as long as an armed conflict in fact exists. Furthermore, international humanitarian law applies equally to the parties in conflict irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just. The rules of international humanitarian law have to be respected in all circumstances and with regard to all persons protected by those rules, without any discrimination.

GENERAL PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

The general principles may be summarised as follows:[264]

- **Protection of non-combatants:** non-combatants must be spared from various forms of harm; the prohibition extends to civilians and military personnel rendered *hors de combat* because they are wounded, sick, shipwrecked, detained or have surrendered;
- **Principle of distinction**: combatants must distinguish between military and non-military objectives (ie civilian and civilian property) and attack only military objectives;
- **Principle of proportionality**: combatants must endeavour to avoid or minimise collateral civilian damage, and are prohibited from engaging in acts which would cause excessive civilian damage (including, for example, long-term damage to the environment);
- **Principle of humanity and necessity:** there are restrictions on the means and methods of warfare in order to reduce or eliminate unnecessary injury or suffering (ie banning the use of biological or chemical weapons).

In 1899, Fyodor de Martens, a prominent jurist and Russian delegate to the 1899 Hague Peace Conference, laid down the following principle, for cases not covered by humanitarian law, designed to fill in any gaps between the express provisions of treaty law and basic precepts of humanity:[265]

Martens Clause

'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.'

This principle, which is considered a part of customary law, was incorporated in Article 1(2) of Additional Protocol I of 1977.

264 Cryer et al (n4) 223.

265 The text was first included in the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and then repeated in the edited version in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land. See the Preamble to the Hague Conventions on Land Warfare 1899/1907. The conventions are reprinted in Schindler and Toman (n236) 79.

Additional Protocol of 1977, Article 1(2)

'In cases not covered by this Protocol or by other international agreements, civilians and combatants must remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'

THE MOST BASIC RULES OF INTERNATIONAL HUMANITARIAN LAW

Seven fundamental rules form the basis of the Geneva Conventions and the Additional Protocols:[266]

- Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
- It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat.*
- The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transport and equipment. The emblem of the Red Cross or the Red Crescent is the sign of such protection and must be respected.
- Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
- Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act that he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
- Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
- Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

266 International Committee of the Red Cross, *Basic Rules of the Geneva Conventions and their Additional Protocols* (2nd ed International Committee of the Red Cross, Geneva 1988).

The development of the notion of war crimes

As discussed above, a number of rules have been developed in international humanitarian law concerning the appropriate behaviour of belligerents during armed conflict. However, this does not mean that every violation of international humanitarian law will amount to a war crime. That is, war crimes only deal with the criminal responsibility for serious violations of international humanitarian law. In this light, war crimes are secondary rules, which criminalise a segment of the primary set of rules concerning behaviour that is prohibited during armed conflict.[267] The question then is: which violations amount to war crimes?

An overview of the history of the notion of war crimes serves as a useful starting place for understanding which violations amount to criminal misconduct. This section will therefore provide a review of the key developments relating to the notion of war crimes, with a particular emphasis on the different attempts to codify the concept. In this context, this section will also present a description of the types of acts that have, throughout history, constituted war crimes. This will be followed by a discussion of the main elements of war crimes, according to international law.

FIRST WORLD WAR: TREATY OF VERSAILLES

The early development of the concept of war crimes in international law can be traced back to the First World War. Though the war witnessed countless atrocities by all sides of the conflict, criminalisation of the atrocities was, under the Peace Treaty of Versailles, limited to the actions of the German and Austro-Hungarian forces and their allies. Accordingly, Article 228 of the Treaty of Versailles provided that the German Government recognised the right of the Allied and Associated Powers to bring, before military tribunals, 'persons accused of having committed acts in violation of the laws and customs of war':

> The German Government recognises the right of the Allied and Associated Powers to bring before military tribuals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.[268]

The Allies urged the prosecution of nearly 900 enemy military personnel for violations of the laws and customs of war; however, in the end only a small number of them were actually convicted (*see* Chapter 2).

The Treaty of Versailles marks the first significant attempt to criminalise, under international law, acts which violate the laws and customs of armed conflict. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land[269] had formed the basis in international law for the offences in the Treaty of Versailles. Further, Article 228 of the Treaty of Versailles was also highly significant in its attempt to apply international laws and treaties as a source for individual criminal responsibility, particularly since it is unlikely that the drafters of the 1907 Hague Convention envisaged the provisions as going beyond State responsibility.

267 Michael Bothe, 'War Crimes', in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 379, 381.

268 See Peace Treaty of Versailles (28 June 1919) signed by Germany and the Allied powers at the Palace of Versailles, Carnegie Endowment for International Peace, New York (1924) available at <http://avalon.law.yale.edu/subject_menus/versailles_menu.asp> accessed 1 November 2008.

269 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (18 Oct 1907) 36 Stat 2277, 1 Bevans 631.

A major critique of the Treaty of Versailles, however, is that it did not set out a precise definition of which violations were deemed to be criminal. It is accordingly difficult to identify with certainty which violations of the laws and customs of war actually amounted to criminal acts under the Treaty. Nonetheless, Article 228 of the Treaty of Versailles made it clear, for the first time, that certain violations of the laws of armed conflict would, under international law, amount to crimes of war, and would thus attract individual criminal responsibility.[270]

SECOND WORLD WAR: NUREMBERG AND TOKYO CHARTERS

The notion of war crimes was revisited as a result of the events of the Second World War. The drafters of the Nuremberg Charter of the IMT and the Tokyo Charter of the IMTFE, included war crimes within the jurisdiction of crimes attracting individual responsibility. Article 6(b) of the Nuremberg Charter, defined war crimes as follows:

> **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 labour 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.[271]

The Tokyo Charter included war crimes in Article 5(b):

> *Conventional war crimes*: namely violations of the laws or customs of war;[272]

While the two Charters, like the Treaty of Versailles, refrained from providing a precise definition of the violations that would constitute a breach of the laws of war, they did provide examples of prohibited acts. However, even with the examples of impugned acts contained in Article 6 of the Nuremberg Charter, it remained unclear as to what constituted a war crime. For instance, although murder was listed as an example of a prohibited act, it is unclear from the words of the Nuremberg Charter when a murder would amount to a war crime. That is, it could not be the case that every intentional killing in the course of war was a violation, particularly since certain intentional killings were permitted in accordance with the laws and customs of war. It was ultimately left to the Military Tribunals to give substance to the war crimes provisions in the two Charters.[273]

One of the main criticisms of Article 6 of the Nuremberg Charter and Article 5 of the Tokyo Charter was that they did not reflect international law. In particular, the main contention was that the Hague and Geneva Conventions only governed the actions of States, and did not create individual criminal responsibility. In rejecting this view, the Military Tribunals referred back to the primary rules of the laws of war, noting that the provisions of the 1907 Hague Conventions represented a declaration of existing laws and customs of war, and that breaches of these rules were traditionally punished.[274]

270 See Yusef Aksar, *Implementing International Humanitarian Law* (Routledge, Oxford 2004) 72.
271 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 Aug 1945) 82 UNTS 279 (Annex).
272 Charter of the International Military Tribunal for the Far East (19 Jan 1946) TIAS No 1589.
273 Bothe, 'War Crimes' (n267) 383.
274 See the Hostages Trial (Trial of Wilhelm List and others, Case VII) and the Wehrmacht High Command Trial (Trial of Wilhelm von Leeb and others, case XII), Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 20, Vol X, XII; also see Bothe, 'War Crimes' (n267) 383.

The Nuremberg Tribunal thus held that the war crimes defined in Article 6 of the Nuremberg Charter formed a part of customary law, and that violations of this provision were punishable.[275] Again, this was highly significant; given that the Hague Regulations did not explicitly state that breaches of their provisions would give rise to criminal responsibility. The Nuremberg and Tokyo Judgments accordingly reinforced the view emerging at the time that certain acts constituted a breach of the primary rules of the laws of war, and that individuals would be accountable for violations – though the definition of what constituted a war crime was still somewhat unclear.[276]

THE GENEVA CONVENTIONS OF 1949 AND THE ADDITIONAL PROTOCOLS

The atrocities committed during the Second World War inspired the development of the Geneva Conventions of 1949, four further conventions for the protection of victims of armed conflicts. Each Geneva Convention sets out a definition of 'protected persons', which are those individuals whom the provisions of the particular Convention seeks to protect. For example, Conventions I, II, and III define protected persons as members of the armed forces of a party to the international armed conflict who are no longer engaged in hostilities due to injury or capture; whereas under Convention IV, protected persons are defined as persons who are in the hands of a party to the conflict of which they are not nationals.[277]

The Geneva Conventions of 1949 represent a highly significant development in the attempt to codify the concept of war crimes. However, the Geneva Conventions do not use the term 'war crimes', but instead refer to 'grave breaches'. Only Article 85(5) of the Additional Protocol I of 1977 to the Geneva Conventions states that 'grave breaches' are to be regarded as 'war crimes'.[278] Taken cumulatively, the four Conventions define grave breaches to the Geneva Convention to include any of the following acts on protected persons or property:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[279]

275 See the Hostages Trial (Trial of Wilhelm List and others, Case VII) and the Wehrmacht High Command Trial (Trial of Wilhelm von Leeb and others, case XII), Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10, Vol X, XI.

276 See Bothe, 'War Crimes' (n267) 383.

277 See further Articles 13, 24, 25, 26 (protected persons), and 19 and 33 to 35 (protected objects) of the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 35; Articles 13, 36, 37 (protected persons) and Articles 22, 24, 25 and 27 (protected objects) of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 Aug 1949) 75 UNTS 81; Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; Article 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57, etc (protected property) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287.

278 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (8 June 1977) 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) (8 June 1977) 1125 UNTS 609.

279 For the provisions of the Geneva Conventions defining grave breaches see Article 50 of the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 35; Article 51 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 Aug 1949) 75 UNTS 81; Article 130 of the Geneva Convention relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; and Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287.

War crimes are therefore only the most severe atrocities suffered by civilians and non-combatants. Article 85 of the 1977 Additional Protocols I (which relates to international armed conflict) provides greater precision to the concept of war crimes, by including an additional list of acts that are deemed to be grave breaches, including:

- making the civilian population or individual civilians the object of attack;
- launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- making non-defended localities and demilitarised zones the object of attack;
- making a person the object of attack in the knowledge that he is *hors de combat*;
- the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognised by the Conventions or this Protocol.

Article 85 of the Additional Protocol I has, however, limited the application of these prohibited acts by requiring that the breaches be committed wilfully, and that they cause death or serious injury to body or health. Importantly, the grave breaches provisions under the Geneva Conventions, and the Additional Protocol I of 1977, are mainly concerned with breaches committed against civilians or non-combatants, and appear, based on the language in the drafting, to be limited to armed conflicts of an international nature. Accordingly, these provisions are generally regarded as not applying to non-international conflicts.[280]

The main international humanitarian law treaty provision relating to conflicts of a non-international character is common Article 3 of the four Geneva Conventions of 1949 ('common Article 3'), which provides basic norms recognised to apply even in non-international conflicts. Regulation of internal armed conflict in common Article 3 was expanded by Additional Protocol II of 1977.

Common Article 3 provides that:

> 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, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Common Article 3 goes on to stipulate that, to this end, the following acts are and shall remain prohibited in respect of non-international conflicts:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- taking of hostages;

280 See William A Schabas, *An Introduction to the International Criminal Court* (3rd ed CUP, Cambridge 2007) 41.

- outrages upon personal dignity, in particular humiliating and degrading treatment;
- the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

Common Article 3 is regarded as a 'treaty in miniature' or 'mini-Convention'. The rules contained in common Article 3 are considered as part of customary law and represent a minimum standard from which the belligerents must never depart.[281] It is important to note that, historically, the provisions under common Article 3, and Additional Protocol II, contained no 'grave breaches' provisions. Therefore, they were only perceived as primary rules of international humanitarian law, and were not thought to entail individual criminal responsibility.[282] However, this view has recently begun to change, as will be discussed further below.

AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

ICTY

Some of the most significant developments in the concept of war crimes have occurred within the last 15 years, with the advent of the ad hoc international criminal tribunals. The Statutes of the ICTY and ICTR included provisions relating to war crimes. In particular, Articles 2 and 3 of the Statute of the ICTY provide as follows:

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.

281 International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions* (n247) 17.
282 Cryer et al (n4) 230.

The UN Secretary-General, in his Report on the ICTY Statute submitted pursuant to Security Council resolution 808 (1993), noted the customary law status of Article 2 of the ICTY Statute:

> 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 Victims. . . [283]

Specific elements which must be satisfied for a conviction on the basis of the grave breaches of the Geneva Conventions will be discussed below. It will suffice to note here that an international armed conflict is required for Article 2 of the ICTY Statute to apply, ie a conflict involving two or more States, and not a civil war.[284]

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.

At first glance, it appears that Article 3 relates solely to Hague Law, particularly the 1907 Hague Convention Respecting the Laws and Customs of War on Land (IV) and the Regulations annexed thereto. However, the Security Council, when adopting the ICTY Statute, indicated that Article 3 of the ICTY Statute would encompass common Article 3 and Additional Protocol II of 1977, both of which apply to internal armed conflict.[285] The ICTY Appeals Chamber subsequently accepted that Article 3 of the ICTY Statute covers not only Hague Law but also extends to Geneva Law. The Chamber further held that Article 3 of the ICTY Statute was of a residual nature:[286]

> 87.…Article 3 may be taken to cover *all violations* of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions falling under Article 2…

283 Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993).
284 See *Prosecutor v Tadić* (ICTY) Case No IT-94-1-A, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para (84).
285 UN Doc S/PV.3217 (25 May 1993), 15. See also *Prosecutor v Tadić* (n284) para (88).
286 See *Prosecutor v Tadić* (n284) paras (87), (89), (91)–(92).

> 89.…Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law…
>
> 91. Article 3 thus confers on the International Tribunal jurisdiction over *any* serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any 'serious violation of international humanitarian law' must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.
>
> 92.…Thus, if correctly interpreted, Article 3 fully realises the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

Further, the ICTY Appeals Chamber laid down conditions that must be fulfilled for a violation to be subject to Article 3 of the ICTY Statute:[287]

Conditions for the application of Article 3

- The violation must constitute ***an infringement of a rule of international humanitarian law***;
- The rule violated must be ***customary*** in nature, or be part of an ***applicable treaty***;
- The violation must be ***serious***, that is, it must constitute a breach of a rule protecting important values, and the breach must involve ***grave consequences for the victim***; and
- The violation of the rule must entail, under customary or conventional law, the ***individual criminal responsibility*** of the person breaching the rule.

Therefore, not all violations of international criminal law will amount to war crimes, although they may give rise to state responsibility. In particular, the questionable act must be serious in nature, with grave consequences for the victim. Accordingly, a combatant who simply appropriates a loaf of bread from a village might be regarded as a violating a basic principle in the 1907 Hague Regulations;[288] namely, that private property must be respected by the occupying army. However, this conduct would not amount to a serious violation of international humanitarian law.[289] The ICC Statute also reflects this requirement, as only serious or grave breaches of the prohibitions detailed in Article 8 of the ICC Statute will constitute war crimes.

287 Ibid para (94).
288 See Article 46(1) of Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (18 Oct 1907) 36 Stat 2277, 1 Bevans 631.
289 See *Prosecutor v Tadić* (n284) para (94).

The ICTY Appeals Chamber thus concluded in relation to Article 3 of the ICTY Statute:[290]

> It follows that it ***does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict***, as long as the requirements set out above are met.

The ICTY Appeals Chamber then turned to examine the existence of customary international rules governing internal conflict and the question of whether the violation of such rules may entail individual criminal responsibility. The ICTY Appeals Chamber strikingly held that the stark distinction between international and internal conflicts was becoming more blurred, and international legal rules have increasingly emerged to regulate internal armed conflict.[291] In particular, the Appeals Chamber held that

> [t]he emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[292]

After having established that the rules of customary law have developed to govern internal conflict,[293] the ICTY Appeals Chamber held that serious breaches of customary rules and principles on internal conflicts entailed individual criminal responsibility despite the fact that, for example, common Article 3 contains no explicit reference to criminal liability for violation of its provisions. The ICTY Appeals Chamber reached this conclusion after examining a wealth of material, including national case-law, military manuals, national legislation designed to implement the Geneva Conventions, and resolutions of the UN Security Council.[294]

The Statute of the ICTR also reflects the view taken in *Tadić,* in particular recognising that violations of common Article 3 and Additional Protocol II of 1977 constitute crimes punishable within its jurisdiction. Despite this approach being ground-breaking and far-reaching in its effects, it was accepted during the negotiations on the ICC Statute; the majority of the States supported the inclusion in the ICC Statute of the category of war crimes committed during the course of an internal armed conflict. Consequently, Article 8 of the ICC Statute – the provision on war crimes – includes serious breaches of common Article 3 as well as a limited list of other fundamental war crimes in internal conflicts.

290 Ibid para (94).
291 Ibid para (97).
292 Ibid para (126).
293 Ibid para (127).
294 Ibid paras (128)–(134).

The ICTY Appeals Chamber in the *Tadić* Jurisdiction Decision never addressed the question of whether the enumerated provisions in Article 3 of the ICTY Statute, which constitute classic examples of Hague Law, were violations committed in internal or international armed conflict. Consequently, it never stated that the Hague Law in those provisions applied irrespective of the nature of the conflict. Interestingly, the great majority of the war crimes charges brought by the ICTY, including in the *Tadić* case itself, under Article 3 of the ICTY Statute (ie *not* grave breaches) concern breaches of common Article 3 – an offence not specifically enumerated under Article 3 of the ICTY Statute.[295]

In sum, the following four categories of war crimes appear to fall within the ambit of Article 3:

- violations of Hague Law;
- non-grave breaches of the Geneva Conventions;
- violations of common Article 3 of the Geneva Conventions;
- violations of customary law.

ICTR

Unlike the former Yugoslavia, the conflict in Rwanda was widely accepted to be a non-international armed conflict. The UN Security Council contributed to the development of war crimes law in internal conflicts by adopting a Statute for the ICTR in which the rules of international humanitarian law which apply to non-international conflicts were set out. The Security Council concluded that the rules which apply to non-international armed conflict are common Article 3 and Additional Protocol II of 1977. Accordingly, Article 4 of the ICTR Statute[296] empowers the Tribunal to prosecute violations of those two provisions.

> *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;

295 John R W D Jones and Steven Powles, *International Criminal Practice* (3rd ed OUP, Oxford 2003) 257.
296 Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994 (hereinafter ICTR Statute).

(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 judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

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

THE ICC STATUTE

Article 8 of the ICC Statute[297] marks the most ambitious attempt to codify the concept of war crimes. The drafters of the ICC Statute generally sought to reflect customary international law, rather than create new laws. Although Article 8 purports to be reflective of the existing sources of war crimes law, many provisions from previous instruments were excluded because of a lack of consensus on their customary law status, for example, the prohibition on the use of chemical or biological weapons.[298] Article 8 also represents a progressive development over earlier codifications of the concept, particularly since it covers non-international armed conflicts, as well as defining the crimes in considerably more detail than in previous attempts.[299]

Article 8 of the ICC Statute sets out approximately 50 offences, and defines war crimes by reference to two sets of primary rules, namely the Geneva Conventions, (Paragraphs (2) (a) and (c)), excluding the Additional Protocols, and international humanitarian law generally (Paragraphs (2) (b) and (e)), including the Additional Protocols. The second division of the lists is that relating to the type of the conflict to which they apply, ie international or non-international conflict.[300]

Accordingly, the definition of war crimes under Article 8 of the ICC Statute includes four lists:

- a list of violations of the Geneva Conventions of 1949 during an international armed conflict (Article 8(2)(a));
- an additional list of 26 prohibited acts under general international humanitarian law relating to international armed conflicts (Article 8(2)(b));
- a list of serious violations of common Article 3 of the Geneva Conventions during a non-international armed conflict (Article 8(2)(c));
- a list of an additional 12 prohibited acts under general international humanitarian law relating to non-international armed conflicts (Article 8(2)(e)).

297 Rome Statute of the International Criminal Court, (17 July 1998) UN Doc A/CONF.183/9.
298 Cryer et al (n4) 228–229.
299 See Schabas, *An Introduction to the International Criminal Court* (n280) 115.
300 See Bothe, 'War Crimes' (n267) 386.

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 sterilisation, 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 recognised 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 sterilisation, 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 organised 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.

As mentioned, despite being extensive, the ICC list of war crimes does not include all of the war crimes under customary law or treaty law, in particular in relation to war crimes in internal conflicts. It has been said that, 'half of the provisions from international conflicts were transplanted to internal conflicts in the ICC Statute. For other provisions, there was no consensus that they were so fundamental that customary law at that point recognised them in internal conflicts.'[301] It should be noted, however, that Article 10 of the ICC Statute provides that '[n]othing in the ICC Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.' Thus war crimes under customary law continue to exist, and develop, alongside the list of war crimes in the ICC Statute.

301 Cryer et al (n4) 229, 231.

OTHER COURTS AND TRIBUNALS

Since the conflict in Sierra Leone is also generally regarded as non-international, Article 3 of the SCSL Statute contains an identical provision to Article 4 of the ICTR Statute. However, Article 4 of the SCSL Statute adds 'other serious violations of international humanitarian law', namely:

- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- 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 UN, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

The definition of the war crimes which fall under the jurisdiction of the Special Panel for Serious Crimes in East Timor and the Iraqi High Tribunal conforms with the definition provided in the ICC Statute.[302]

The ECCC, by contrast, have jurisdiction to prosecute grave breaches of the 1949 Geneva Conventions, which are defined in the same terms as Article 2 of the ICTY Statute. This suggests that the conflict in Cambodia is regarded as international, at least in part. In addition, the ECCC have competence to bring to trial those suspected of bearing the greatest responsibility for the destruction of cultural property during an armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict.

The elements of war crimes

As the above discussion has shown, the law of war crimes has developed to criminalise a number of prohibited acts under international humanitarian law; however, it is important to note that commission of the underlying acts alone will not suffice to constitute a war crime. That is, in order to establish that a person is guilty of a war crime, it is necessary to satisfy the tribunal or court that certain elements are met. In this regard, we shall proceed to distinguish between:

- the general/common or *chapeau* requirements – elements which must be satisfied in order to turn a specific offence into a war crime; and
- the physical (*actus reus*) and mental (*mens rea*) elements of a specific or so-called underlying offence.

Generally, determining the elements of a war crime requires scrutiny of the relevant Statute (ie ICTY, ICTR or ICC), as well as reference to the primary source of the crime in international humanitarian law (ie the Geneva Conventions of 1949). In respect of the approach taken in the ICC, it is important also to refer to the ICC Elements of Crimes, a document that assists the Court in defining and applying the Crimes under its jurisdiction. This document, which is reflective of the primary rules of international humanitarian law, sets out the requisite mental and physical elements for each of the acts listed under Article 8.[303]

302 Section 6 of the UNTAET Regulation 2000/15, UNTAET/REG/2000/15 (6 June 2000); Article 13 of the Law on the Iraqi High Criminal Court.

303 See Article 8 of the ICC Elements of Crimes, 14–44.

For instance, grave breaches, such as wilful killing of protected persons under the Geneva Conventions, is a war crime. Accordingly, it is necessary to refer to the relevant provisions of the applicable Geneva Convention in order to identify the context in which a grave breach applies (ie international armed conflict), what types of acts it includes, as well as to whom or what objects it must be committed against (ie protected persons and objects). In this regard, it becomes clear that to be found guilty of this particular war crime, it must be shown that the crime was committed against a protected person (as defined under the Geneva Conventions), and in the context of an international armed conflict.

The ICTY and ICTR have defined through their case law the elements of crimes falling within their respective jurisdictions. The Elements of Crimes adopted by the ICC now exhaustively sets out the elements of all the crimes within the ICC Statute. This section will therefore first set out the general requirements that are common to war crimes, such as the existence of an armed conflict and the nexus between the crimes and that armed conflict, and then set out the ICC elements pertaining to specific underlying offences.

GENERAL OR CHAPEAU REQUIREMENTS

The nexus between the crime and the armed conflict

The essential element for any war crime is the connection between the criminal act and the armed conflict, whether it be an international or non-international conflict. Genocide and crimes against humanity are distinct from war crimes in that they do not need to be committed in times of armed conflict. This requirement is reflective of the approaches taken by both the ICTY and ICTR tribunals, as well as in the ICC Statute. Accordingly, the ICTY held in the *Tadić* case that for a crime to fall within the tribunal's jurisdiction, a sufficient nexus must be established between the alleged offence, and the armed conflict which gives rise to the applicability of international humanitarian law.[304]

This principle entails two requirements:

- there is an armed conflict, and
- there is a sufficient connection between the crime and the conflict.

Requirement of armed conflict

The ICTY Appeals Chamber in the *Tadić* decision on jurisdiction defined armed conflict as existing:

> whenever there is a resort to armed force between States, or protracted armed violence between governmental authorities and armed groups, or between armed groups within a State. International humanitarian law will therefore apply from the start of an armed conflict, and will extend beyond the cessation of hostilities until a general conclusion of peace; or, in the case of internal conflicts, peaceful settlement, is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[305]

In cases of internal armed conflict, it is necessary to establish that the conflict falls within the definition of an armed conflict, as opposed to a simple riot, unorganised and short-lived

304 See *Prosecutor v Tadić* (ICTY) Case No IT-94-1-T, Trial Chamber Opinion and Judgment (7 May 1997) para (572).
305 See *Prosecutor v Tadić* (n284) para (70).

insurrections, terrorist activities or other situation of internal disturbances, which are not subject to international humanitarian law. Accordingly, the issue will generally be determined based on (1) the intensity of the conflict; (2) and the level of military organisation of the parties.[306] Crimes committed anywhere in the territory under the control of a party to a conflict, until a peaceful settlement of the conflict is achieved, fall within the jurisdiction of the tribunal.[307]

In light of this, Article 8(2)(f) of the ICC Statute adopts a test similar to the test formulated in the *Tadić* jurisdiction decision. It defines an internal armed conflict as armed conflict that take place in the territory of a State when there is 'protracted armed conflict between the governmental authorities and organised groups, or between such groups.' Article 8(2)(d) of the ICC Statute clarifies that the ICC Statute does not apply 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 similar nature.[308] Additional factors, such as the involvement of government forces on one side or the exercise of territorial control by the rebel forces, are not indispensable for the determination of an armed conflict.[309]

The determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis.[310] For example, in assessing the intensity of a conflict the following factors have been considered: seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the UN Security Council, and, whether any resolutions on the matter have been passed.[311] In assessing the organisation of the parties to the conflict the factors that have been considered include: the existence of headquarters, designated zones of operation, and the ability to procure, transport and distribute arms.[312]

Nexus with armed conflict

The ICTY Trial Chamber in *Tadić* stated that '[t]he existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crimes committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.'[313] This criterion is meant to exclude, for example, domestic crimes.[314]

306 See *Prosecutor v Tadić* (ICTY) Case No IT-94-1-T, Trial Chamber Opinion and Judgment (7 May 1997) para (562).
307 See *Prosecutor v Tadić* (n284) para (70). *Prosecutor v Kunarac et al* (ICTY) IT-96-23 and IT-96-23/1-A, Appeal Judgment (12 June 2002) para (57); *Prosecutor v Limaj et al* (ICTY) Case No IT-03-66-T, Trial Judgment (30 November 2005) para (84).
308 See also Article 8(2)(f) of the ICC Statute.
309 *Prosecutor v Limaj et al* (n307) para (87).
310 *Prosecutor v Rutaganda* (ICTR) Case No ICTR-96-3, Trial Judgment (6 December 1999) para (93); *Prosecutor v Limaj et al* (n307) para (90).
311 Ibid.
312 Ibid.
313 *Prosecutor v Tadić* (n306) para (572).
314 Ibid paras (527)–(576).

In this regard, the Appeals Chamber in the *Tadić* jurisdiction decision established that 'it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.'[315] On the other hand, it is not necessary to prove that a crime was committed in the course of, or as part of the hostilities in an area controlled by one of the parties, or in furtherance or to take advantage of, the situation created by the fighting. Furthermore, it is not necessary to show that the criminal act was part of State policy or practice that is officially endorsed, tolerated, or in the interest of one of the parties to the conflict. In addition, it is not a requirement to establish that armed conflict was occurring at the exact time and place as the alleged acts occurred, nor is it necessary that the crime alleged took place during the combat.[316]

Appeals Chamber in *Kunarac et al* held that the armed conflict need not have been causal to the commission of the crime charged, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit that crime.[317] In determining whether such nexus exists the Chamber may take into account, *inter alia*, whether the perpetrator is a combatant, whether the victim is a non-combatant, whether the victim is a member of the opposing party, whether the act may be said to serve the ultimate goal of a military campaign, and whether the crime is committed as part of or in the context of the perpetrator's official duties.[318]

The ICC Elements of Crimes require that the conduct be committed in the context of, and associated, with an armed attack.[319]

The perpetrator

The perpetrators of war crimes may not only be members of armed forces but also civilians. The nexus with an armed conflict will play a particularly important role when the offence is committed by a civilian. Accordingly, a civilian can be guilty of a war crime against other civilians where the criminal act was committed in association with the armed conflict, and was therefore not of a private or interpersonal character (eg a crime of domestic violence). In the absence of such a link, the violation merely constitutes an ordinary criminal offence under the law applicable in the relevant territory.[320]

The ICC Elements of Crimes identify another requirement for war crimes, namely the awareness of the existence of an armed conflict. Accordingly, a perpetrator can be convicted as a war criminal only if he or she was aware of the factual circumstances that established the existence of an armed conflict.[321] However, 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 internal. 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'.[322]

315 See *Prosecutor v Tadić* (n284) para (70).
316 See *Prosecutor v Tadić* (n306) para (573).
317 *Prosecutor v Kunarac et al* (n307) para (58).
318 Ibid para (59).
319 Article 8 of the ICC Elements of Crimes, 14.
320 Cassese (n232) 83.
321 See, eg, Article 8(2)(a)(i), War crime of wilful killing, 14–15, requiring under para (5) that '[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict'.
322 See Article 8 (n319) 14.

The victim and object of the crime

The definitions of many war crimes include certain criteria regarding the victim or object of the crime. The grave breaches of the Geneva Conventions can only be prosecuted when perpetrated against persons or property regarded as 'protected' by the Geneva Conventions under the strict conditions set out by the Conventions themselves.[323] Accordingly, each of the four Geneva Conventions sets out the conditions under which a person or object is protected by its provisions:

- Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I;
- Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II;
- Article 4 of Convention III on prisoners of war; and
- Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57, etc (protected property) of Convention IV on civilians.

Common Article 3 identifies the protected persons as 'persons no longer taking active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or other cause'. Other serious violations of laws and customs of war identify the object of the attack, for example, civilian population, civilian objects, personnel involved in humanitarian assistance, buildings dedicated to religion or education.[324] Some serious violations of law and customs of war protect combatants as victims of crime.[325]

Seriousness or gravity of the crime

As mentioned above, not every violation of international humanitarian law will amount to a war crime. The international courts and tribunals, namely the ICTY, ICTR and ICC, have jurisdiction only over 'serious' violations of international humanitarian law. For example, Article 2 of the ICTY Statute limits the tribunal's jurisdiction to 'grave breaches' of the Geneva Conventions. As regards 'the violations of the laws or customs of war' under Article 3 of the Statute, the ICTY Appeals Chamber in *Tadić* established that it covers 'serious violations of international humanitarian law' other than grave breaches of the Geneva Conventions which are already covered in Article 2 of the ICTY Statute.[326]

Similarly, the ICC's jurisdiction does not cover all violations of international humanitarian law but it only extends to 'grave breaches' of the Geneva Conventions of 1949, serious breaches of common Article 3 and other serious violations of the laws or customs applicable in international and non-international armed conflict. The main difference between the ICTY and ICTR, and the ICC, is that the ICC Statute provides exhaustive lists of the crimes which qualify as 'serious'.

Additionally, Article 8(1) of the ICC Statute provides that the ICC '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'. This requirement, however, does not qualify as an additional element of a war crime. In this regard, it should be noted that even a single isolated act can constitute a war

323 See *Prosecutor v Tadić* (n284) para (81).
324 See Article 8(2)(b) of the ICC Elements of Crimes, 19.
325 See, eg, Article 8(2)(b)(xi) of the ICC Elements of Crimes, 26.
326 See *Prosecutor v Tadić* (n284) para (90).

crime, unlike crimes against humanity which must be, even if committed as a single act, part of widespread or systematic attack against civilian population. Nevertheless, it constitutes a requirement which guides the ICC in determining its jurisdiction.[327]

Mental elements (*Mens rea*)

In order to be guilty of committing a war crime, it is not enough that a person's action resulted in the commission of the crime; it must also be established that the perpetrator possessed the necessary mental element of the crime also referred to as *mens rea*. Article 30 of the ICC Statute sets out the requisite mental elements pertaining to all crimes under its jurisdiction.

> *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.

Accordingly, in order to establish that a person is guilty of a crime within the ICC Statute, it must be shown that the prohibited act was carried out with *intent* and *knowledge*. With respect to the definition of intention, Article 30(2) of the ICC Statute provides that:

- a person has intent with respect to a prohibited conduct when that person means to engage in that conduct;
- a person has intent with respect to a consequence when that person means to cause the consequences, or is aware that it would occur in the ordinary course of events.

Knowledge is defined by Article 30(3) of the ICC Statute as 'awareness that a circumstance or a consequence will occur in the ordinary course of events'.

It should be pointed out, however, that Article 30 is not the only article within the ICC Statute which has provisions on the requisite mental elements. Article 30 of the ICC Statute merely outlines the general requirements and basic concepts of intent and knowledge; other mental states or variation with regard to the degree of subjective responsibility may be found within the specific definition of

327 Cryer et al (n4) 241.

crimes or general principles of criminal law. With regard to war crimes, some of the prohibited acts listed under Article 8 of the ICC Statute also include the requisite mental element of the crime within the substantive provision. For example, Article 8(2)(b)(ii) stipulates that a person is guilty of a war crime where he or she '*intentionally* directs attacks against civilian objects'. In addition, for many of the war crimes, Article 8 of the ICC Statute requires that they be carried out '*wantonly*', '*wilfully*' or even '*treacherously*'.[328]

With regard to the knowledge required in relation to the specific war crimes, the ICC Elements of Crimes provide that the requirement of knowledge is not concerned with the perpetrators' legal assessment of the circumstances, but rather with his or her factual awareness. For instance, as war crimes occur within the context of internal or international armed conflict, it must therefore be established that the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.[329] It is not, however, necessary to show that the perpetrator was aware that the circumstances legally constituted an armed conflict, or whether the conflict was of an internal or international character.[330] This principle also applies in respect of some other requisite mental elements relating to war crimes under the ICC Statute.

For example, Article 8(2)(a) provides that any act against persons or protected property in the Geneva Convention will constitute a war crime. As noted above, the Geneva Conventions specifically set out the meaning of 'protected persons' to which the grave breaches apply. In the case of Geneva Convention IV, this includes persons in the hands of the party to the conflict or Occupying Power, in respect of which they are not nationals. Accordingly, it is necessary to demonstrate that the perpetrator was aware of the factual circumstances establishing the protected status.[331] With regard to nationality, it is not necessary to demonstrate that the perpetrator had knowledge of the nationality of the victim, but simply that he/she knew that the victim belonged to an adverse party to the conflict.[332]

The details of the physical as well as mental elements required for particular crimes listed under Article 8 of the ICC Statute – as set out in the ICC Elements of Crimes are set out below.

Specific (underlying) offences

The ICC Elements of Crimes describe the requisite elements of the specific acts listed in Article 8 of the ICC Statute. In order to establish the commission of a war crime, in addition to the general requirements common to war crimes described above, one of the specific acts listed in Article 8 must be carried out. The following section sets out the specific elements pertaining to each of the underlying offences, without repeating the general or *chapeau* elements common to all war crimes (as discussed above).

328 Requirement of 'wantonly' is found in Article 8(2)(a)(iv), 'wilfully' in Article 8(2)(a)(i), (iii) and (vi), and 'treacherously' in Article 8(2)(b)(xi) and e(ix) of the ICC Statute. See further Albin Eser, 'Mental Elements – Mistake of Fact and Mistake of Law', in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), I *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 889, 898–899.
329 See Article 8 of the ICC Elements of Crimes (Introduction), 14.
330 See Cassese, Gaeta and Jones (eds), Vol I and II (n328) 389.
331 See Article (8) (2) (a) (i) (n231) 14.
332 Ibid n33.

GRAVE BREACHES OF THE GENEVA CONVENTIONS

Article 8(2)(a) of the ICC Statute sets out specific acts which, along with the requisite elements relating to war crimes generally (described above), must be established to have been committed against persons or property protected under the Geneva Conventions. This section sets out the specific acts relating to each crime, and therefore does not reproduce the common elements relating to war crimes under the Geneva Conventions (ie that they be committed against protected persons or property within the context of an international armed conflict).

War crime of wilful killing

The relevant element of the war crime of wilful killing provided in Article 8(2)(a)(i) of the ICC Statute is that the perpetrator killed one or more persons.

The ICC Elements of Crimes notes that the term 'killed' is interchangeable with the term 'caused death'.

War crime of torture

The relevant elements of the war crime of torture provided in Article 8(2)(a)(ii)-1 of the ICC Statute are that:

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

War crime of inhuman treatment

The relevant element of the war crime of inhuman treatment provided in Article 8(2)(a)(ii)-2 of the ICC Statute is that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

War crime of biological experiments

The relevant elements of the war crime of biological experiments provided in Article 8(2)(a)(ii)-3 of the ICC Statute are that:

- The perpetrator subjected one or more persons to a particular biological experiment.
- The experiment seriously endangered the physical or mental health or integrity of such person or persons.
- 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.

War crime of wilfully causing great suffering

The relevant element of the war crime of wilfully causing great physical or mental pain or suffering provided in Article 8(2)(a)(iii) of the ICC Statute is that the perpetrator caused great physical or mental pain or suffering to, or serious injury to the body or health of, one or more persons.

War crime of destruction and appropriation of property

The relevant elements of the war crime of destruction and appropriation of property provided in Article 8(2)(a)(iv) of the ICC Statute are that:

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

War crime of compelling service in hostile forces

The relevant element of the war crime of compelling service in hostile forces provided in Article 8(2)(a)(v) of the ICC Statute is that the perpetrator coerced one or more persons, by acts or threats, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.

War crime of denying a fair trial

The relevant element of the war crime of denying a fair trial provided in Article 8(2)(a)(vi) of the ICC Statute is that 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.

War crime of unlawful deportation and transfer

The relevant element of the war crime of unlawful deportation and transfer provided in Article 8(2)(a)(vii)-1 of the ICC Statute is that the perpetrator deported or transferred one or more persons to another State or to another location.

War crime of unlawful confinement

The relevant element of the war crime of unlawful confinement provided in Article 8(2)(a)(vii)-2 of the ICC Statute is that the perpetrator confined or continued to confine one or more persons to a certain location.

War crime of taking hostages

The relevant elements of the war crime of taking hostages provided in Article 8(2)(a)(viii) of the ICC Statute are that:

- The perpetrator seized, detained or otherwise held hostage one or more persons.
- The perpetrator threatened to kill, injure or continue to detain such person or persons.
- The perpetrator intended to compel a State, an international organisation, 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.

OTHER SERIOUS VIOLATIONS IN INTERNATIONAL ARMED CONFLICT

Article 8(2)(b) of the ICC Statute provides a further list of war crimes in international armed conflict. The offences listed in Article 8(2)(b) require that, in addition to the listed acts, the general requisite elements relating to war crimes of an international nature be established (ie that they took place in the context of an international conflict). Accordingly, the common elements relating to war crimes in general are not reproduced.

War crime of attacking civilians

The relevant elements of the war crime of attacking civilians provided in Article 8(2)(b)(i) of the ICC Statute are that:

- The perpetrator directed an attack.
- The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
- The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

War crime of attacking civilian objects

The relevant elements of the war crime of attacking civilian objects provided in Article 8(2)(b)(ii) of the ICC Statute are that:

- The perpetrator directed an attack.
- The object of the attack was civilian objects, that is, objects which are not military objectives.
- The perpetrator intended such civilian objects to be the object of the attack.

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

The relevant elements of the war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission provided in Article 8(2)(b)(iii) of the ICC Statute are that:

- The perpetrator directed an attack.
- 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 UN.
- The perpetrator intended such civilian objects to be the object of the attack.
- 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.
- The perpetrator was aware of the factual circumstances that established that protection.

War crime of excessive incidental death, injury, or damage

The relevant elements of the war crime of excessive incidental death, injury or damage provided in Article 8(2)(b)(iv) of the ICC Statute are that:

- The perpetrator launched an attack.
- 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.
- 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 an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

The ICC Elements of Crimes notes that 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 of 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.

The ICC Elements of Crimes further notes in relation to the third element (the knowledge requirement) that, as opposed to the general rule set forth in paragraph 4 of the General Introduction of the ICC Elements of Crimes, this knowledge element requires that the perpetrator make the value judgment as described therein, namely that the damage caused was clearly excessive. An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time.

War crime of attacking undefended places

The relevant elements of the war crime of attacking undefended places provided in Article 8(2)(b)(v) of the ICC Statute are:

- The perpetrator attacked one or more towns, villages, dwellings or buildings.
- Such towns, villages, dwellings or buildings were open for unresisted occupation.
- Such towns, villages, dwellings or buildings did not constitute military objectives.

The ICC Elements of Crimes notes that 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.

War crime of killing or wounding a person *hors de combat*

The relevant elements of the war crime of killing or wounding a person *hors de combat* provided in Article 8(2)(b)(vi) of the ICC Statute are that:

- The perpetrator killed or injured one or more persons.
- Such person or persons were *hors de combat*.
- The perpetrator was aware of the factual circumstances that established this status.

War crime of improper use of a flag of truce

The relevant elements of the war crime of improper use of a flag of truce provided in Article 8(2)(b)(vii)-1 of the ICC Statute are that:

- The perpetrator used a flag of truce.
- 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.
- The perpetrator knew or should have known of the prohibited nature of such use.
- The conduct resulted in death or serious personal injury.
- The perpetrator knew that the conduct could result in death or serious personal injury.

The ICC Elements of Crimes notes that the term 'prohibited nature' denotes illegality.

War crime of improper use of a flag, insignia or uniform of the hostile party

The relevant elements of the war crime of improper use of a flag, insignia or uniform of the hostile party provided in Article 8(2)(b)(vii)-2 of the ICC Statute are that:

- The perpetrator used a flag, insignia or uniform of the hostile party.
- The perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.

- The perpetrator knew or should have known of the prohibited nature of such use.
- The conduct resulted in death or serious personal injury.
- The perpetrator knew that the conduct could result in death or serious personal injury

The ICC Elements of Crimes again notes that the term 'prohibited nature' denotes illegality.

War crime of improper use of a flag, insignia or uniform of the UN

The relevant elements of the war crime of improper use of a flag, insignia or uniform of the UN provided in Article 8 (2) (b) (vii)-3 of the ICC Statute are that:

- The perpetrator used a flag, insignia or uniform of the UN.
- The perpetrator made such use in a manner prohibited under the international law of armed conflict.
- The perpetrator knew of the prohibited nature of such use.
- The conduct resulted in death or serious personal injury.
- The perpetrator knew that the conduct could result in death or serious personal injury.

The ICC Elements of Crimes notes that 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.

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

The relevant elements of the war crime of improper use of the distinctive emblems of the Geneva Conventions provided in Article 8(2) (b) (vii)-4 of the ICC Statute are that:

- The perpetrator used the distinctive emblems of the Geneva Conventions.
- The perpetrator made such use for combatant purposes in a manner prohibited under the international law of armed conflict.
- The perpetrator knew or should have known of the prohibited nature of such use.
- The conduct resulted in death or serious personal injury.
- The perpetrator knew that the conduct could result in death or serious personal injury.

The ICC Elements of Crimes notes that 'combatant purposes' in these circumstances means purposes directly related to hostilities and not including medical, religious or similar activities.

War crime of 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

The relevant elements in respect of this war crime provided in Article 8(2)(b)(viii) of the ICC Statute are that the perpetrator:

- Transferred, directly or indirectly, parts of its own population into the territory it occupies; or
- Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

The ICC Elements of Crimes notes that the term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law.

War crime of attacking protected objects

The relevant elements of the war crime of attacking protected objects provided in Article 8(2)(b)(ix) of the ICC Statute are that:

- The perpetrator directed an attack.
- 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.
- 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.

The ICC Elements of Crimes notes that 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.

War crime of mutilation

The relevant elements of the war crime of mutilation provided in Article 8(2)(b)(x)-1 of the ICC Statute are that:

- 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.
- The conduct caused death or seriously endangered the physical or mental health of such person or persons.
- 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.
- Such person or persons were in the power of an adverse party.

The ICC Elements of Crimes notes that 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 point also applies to the same element for Article 8(2)(b)(x)-2.

War crime of medical or scientific experiments

The relevant elements of the war crime of medical or scientific experiments provided in Article 8(2)(b)(x)-2 of the ICC Statute are that:

- The perpetrator subjected one or more persons to a medical or scientific experiment.
- The experiment caused death or seriously endangered the physical or mental health or integrity of such person or persons.
- 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.
- Such person or persons were in the power of an adverse party.

War crime of treacherously killing or wounding

The relevant elements of the war crime of treacherously killing or wounding provided in Article 8(2)(b)(xi) of the ICC Statute are that:

- 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.
- The perpetrator intended to betray that confidence or belief.
- The perpetrator killed or injured such person or persons.
- The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
- Such person or persons belonged to an adverse party.

War crime of denying quarter

The relevant elements of the war crime of denying quarter provided in Article 8(2)(b)(xii) of the ICC Statute are that:

- The perpetrator declared or ordered that there shall be no survivors.
- 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.
- The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.

War crime of destroying or seizing the enemy's property

The relevant elements of the war crime of destroying or seizing the enemy's property provided in Article 8(2)(b)(xiii) of the ICC Statute are that:

- The perpetrator destroyed or seized certain property.
- Such property was property of a hostile party.
- Such property was protected from that destruction or seizure under the international law of armed conflict.
- The perpetrator was aware of the factual circumstances that established the status of the property.
- The destruction or seizure was not justified by military necessity.

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

The relevant elements of the war crime of depriving the nationals of the hostile power provided in Article 8(2)(b)(xiv) of the ICC Statute are that:

- The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions.
- The abolition, suspension or termination was directed at the nationals of a hostile party.
- The perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party.

War crime of compelling participation in military operations

The relevant elements of the war crime of compelling participation in military operations provided in Article 8(2)(b)(xv) of the ICC Statute are that:

- 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.
- Such person or persons were nationals of a hostile party.
- The conduct took place in the context of and was associated with an international armed conflict.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

War crime of pillaging

The relevant elements of the war crime of pillaging provided in Article 8(2)(b)(xvi) of the ICC Statute are that:

- The perpetrator appropriated certain property.
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.

- The appropriation was without the consent of the owner.

The ICC Elements of Crimes notes that, as indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

War crime of employing poison or poisoned weapons

The relevant elements of the war crime of employing poison or poisoned weapons provided in Article 8(2)(b)(xvii) of the ICC Statute are that:

- The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
- The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

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

The relevant elements of the war crime of employing prohibited gases, liquids, materials or devices provided in Article 8(2)(b)(xviii) of the ICC Statute are that:

- The perpetrator employed a gas or other analogous substance or device.
- 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.

The ICC Elements of Crimes notes that nothing in element two shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

War crime of employing prohibited bullets

The relevant elements of the war crime of employing prohibited bullets provided in Article 8(2)(b)(xix) of the ICC Statute are that:

- The perpetrator employed certain bullets.
- The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
- The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

War crime of employing weapons, projectiles or materials or methods of warfare listed in the annex to the Statute

With regard to this crime, which is provided in Article 8(2)(b)(xx) of the ICC Statute, the ICC Elements of Crimes notes that the '[e]lements will have to be drafted once weapons, projectiles or material or methods of warfare have been included in an annex to the Statute'.

War crime of outrages upon personal dignity

The relevant elements of the war crime of outrages upon personal dignity provided in Article 8(2)(b)(xxi) of the ICC Statute are that:

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

The ICC Elements of Crimes notes that 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.

War crime of rape

The relevant elements of the war crime of rape provided in Article 8(2)(b)(xxii)-1 of the ICC Statute are that:

- The perpetrator invaded 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.
- 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.

The ICC Elements of Crimes notes that the concept of 'invasion' is intended to be broad enough to be gender-neutral.

It further notes that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

War crime of sexual slavery

The relevant elements of the war crime of sexual slavery provided in Article 8(2)(b)(xxii)-2 of the ICC Statute are that:

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

The ICC Elements of Crimes notes that 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.

It further notes that 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.

War crime of enforced prostitution

The relevant elements of the war crime of enforced prostitution provided in Article 8(2)(b)(xxii)-3 of the ICC Statute are that:

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

War crime of forced pregnancy

The relevant element of the war crime of forced pregnancy provided in Article 8(2)(b)(xxii)-4 of the ICC Statute is that 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.

War crime of enforced sterilisation

The relevant elements of the war crime of enforced sterilisation provided in Article 8(2)(b)(xxii)-5 of the ICC Statute are that:

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

The ICC Elements of Crimes notes that the deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

It further notes that it is understood that 'genuine consent' does not include consent obtained through deception.

War crime of sexual violence

The relevant elements of the war crime of sexual violence provided in Article 8(2)(b)(xxii)-6 of the ICC Statute are that:

- 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.
- The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

War crime of using protected persons as shields

The relevant elements of the war crime of using protected persons as shields provided in Article 8(2)(b)(xxiii) of the ICC Statute are that:

- 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.
- The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
- The conduct took place in the context of and was associated with an international armed conflict.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

The relevant elements of the war crime of destroying attacking objects or persons using the distinctive emblems of the Geneva Conventions provided in Article 8(2)(b)(xxiv) of the ICC Statute are that:

- 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.
- The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.

War crime of starvation as a method of warfare

The relevant elements of the war crime of starvation as a method of warfare provided in Article 8(2)(b)(xxv) of the ICC Statute are that:

- The perpetrator deprived civilians of objects indispensable to their survival.
- The perpetrator intended to starve civilians as a method of warfare.

War crime of using, conscripting or enlisting children

The relevant elements of the war crime of using, conscripting or enlisting children provided in Article 8(2)(b)(xxvi) of the ICC Statute are that:

- 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.
- Such person or persons were under the age of 15 years.
- The perpetrator knew or should have known that such person or persons were under the age of 15 years.

ARTICLE 8(2)(C): ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER, SERIOUS VIOLATIONS OF COMMON ARTICLE 3

Article 8(2)(c) of the ICC Statute sets out specific acts which constitute crimes in non-international armed conflicts. The offences listed in this category require, in addition to the specific act, general requisite elements relating to war crimes which take place in non-international armed conflicts (ie that they are acts against non-combatants in a non-international armed conflict). Accordingly, the common elements relating to war crimes in general are not reproduced here.

War crime of murder

The relevant element of the war crime of murder provided in Article 8(2)(c)(i)-1 of the ICC Statute is that the perpetrator killed one or more persons.

War crime of mutilation

The relevant elements of the war crime of mutilation provided in Article 8(2)(c)(i)-2 of the ICC Statute are that:

- 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.
- 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.

War crime of cruel treatment

The relevant element of the war crime of cruel treatment provided in Article 8(2)(c)(i)-3 of the ICC Statute is that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

War crime of torture

The relevant elements of the war crime of torture provided in Article 8(2)(c)(i)-4 of the ICC Statute are that:

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

War crime of outrages upon personal dignity

The relevant elements of the outrages upon personal dignity provided in Article 8(2)(c)(ii) of the ICC Statute are that:

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

The ICC Elements of Crimes notes that 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.

War crime of taking hostages

The relevant elements of the war crime of taking hostages provided in Article 8(2)(c)(iii) of the ICC Statute are that:

- The perpetrator seized, detained or otherwise held hostage one or more persons.
- The perpetrator threatened to kill, injure or continue to detain such person or persons.
- The perpetrator intended to compel a State, an international organisation, 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.

War crime of sentencing or execution without due process

The relevant elements of the war crime of sentencing or execution without due process provided in Article 8(2)(c)(iv) of the ICC Statute are that:

- The perpetrator passed sentence or executed one or more persons.
- There was no previous judgment pronounced by a court, or the court that rendered judgment was not 'regularly constituted', that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgment did not afford all other judicial guarantees generally recognised as indispensable under international law.

- The perpetrator was aware of the absence of a previous judgment or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial.

The ICC Elements notes that 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 ICC Statute.

It further notes that with respect to the last two elements, 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.

ARTICLE 8(2)(E): ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER, SERIOUS VIOLATIONS OF COMMON ARTICLE 3

Article 8(2)(e) of the ICC Statute sets out further acts relating to non-international armed conflicts. Similarly to the offences under Article 8(2)(c), the offences listed in this category require, in addition to the specific act, general requisite elements relating to war crimes which take place in non-international armed conflicts (ie that they are acts against non-combatants in a non-international armed conflict). Accordingly, the common elements relating to war crimes in general are not reproduced here.

War crime of attacking civilians

The relevant elements of the war crime of attacking civilians provided in Article 8(2)(e)(i) of the ICC Statute are that:

- The perpetrator directed an attack.
- The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
- The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

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

The relevant elements of the war crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions provided in Article 8(2)(e)(ii) of the ICC Statute are that:

- 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.
- The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.

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

The relevant elements of the war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission provided in Article 8(2)(e)(iii) of the ICC Statute are that:

- The perpetrator directed an attack.
- 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 UN.
- The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
- 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.
- The perpetrator was aware of the factual circumstances that established that protection.

War crime of attacking protected objects

The relevant elements of the war crime of attacking protected objects provided in Article 8(2)(e)(iv) of the ICC Statute are that:

- The perpetrator directed an attack.
- 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.
- 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.

The ICC Elements of Crimes notes that 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.

War crime of pillaging

The relevant elements of the war crime of pillaging provided in Article 8(2)(e)(v) of the ICC Statute are that:

- The perpetrator appropriated certain property.
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
- The appropriation was without the consent of the owner.

The ICC Elements of Crimes notes that as indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

War crime of rape

The relevant elements of the war crime of rape provided in Article 8(2)(e)(vi)-1 of the ICC Statute are that:

- The perpetrator invaded 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.
- 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.

The ICC Elements of Crimes notes that the concept of 'invasion' is intended to be broad enough to be gender-neutral.

The ICC Elements of Crimes further notes that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This point also applies to the corresponding elements in Article 8(2)(e)(vi)-3, 5 and 6.

War crime of sexual slavery

The relevant elements of the war crime of sexual slavery provided in Article 8(2)(e)(vi) of the ICC Statute are that:

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

The ICC Elements of Crimes notes that given the complex nature of this crime, it is recognised that its commission could involve more than one perpetrator as a part of a common criminal purpose.

It further notes that 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.

War crime of enforced prostitution

The relevant elements of the war crime of enforced prostitution provided in Article 8(2)(e)(vi)-3 of the ICC Statute are that:

- 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.

- 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.

War crime of forced pregnancy

The relevant elements of the war crime of forced pregnancy provided in Article 8(2)(e)(vi)-4 of the ICC Statute are that:

- 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.

War crime of enforced sterilisation

The relevant elements of the war crime of enforced sterilisation provided in Article 8(2)(e)(vi)-5 of the ICC Statute are that:

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

The ICC Elements of Crimes notes that the deprivation is not intended to include birth-control measures which have a non-permanent effect in practice. It further notes that it is understood that 'genuine consent' does not include consent obtained through deception.

War crime of sexual violence

The relevant elements of the war crime of sexual violence provided in Article 8(2)(e)(vi)-6 of the ICC Statute are that:

- 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.
- The conduct was of a gravity comparable to that of a serious violation of Article 3 common to the four Geneva Conventions.
- The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

War crime of using, conscripting and enlisting children

The relevant elements of the war crime of using, conscripting and enlisting children provided in Article 8(2)(e)(vii) of the ICC Statute are that:

- 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.
- Such person or persons were under the age of 15 years.
- The perpetrator knew or should have known that such person or persons were under the age of 15 years.

War crime of displacing civilians

The relevant elements of the war crime of displacing civilians provided in Article 8(2)(e)(viii) of the ICC Statute are that:

- The perpetrator ordered a displacement of a civilian population.
- Such order was not justified by the security of the civilians involved or by military necessity.
- The perpetrator was in a position to effect such displacement by giving such order.

War crime of treacherously killing or wounding

The relevant elements of the war crime of treacherously killing or wounding provided in Article 8(2)(e)(ix) of the ICC Statute are that:

- 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.
- The perpetrator intended to betray that confidence or belief.
- The perpetrator killed or injured such person or persons.
- The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
- Such person or persons belonged to an adverse party.

War crime of denying quarter

The relevant elements of the war crime of denying quarter provided in Article 8(2)(e)(x) of the ICC Statute are that:

- The perpetrator declared or ordered that there shall be no survivors.
- 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.
- The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.

War crime of mutilation

The relevant elements of the war crime of mutilation provided in Article 8(2)(e)(xi)-1 of the ICC Statute are that:

- 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.
- The conduct caused death or seriously endangered the physical or mental health of such person or persons.
- 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.
- Such person or persons were in the power of another party to the conflict.

The ICC Elements of Crimes notes that the 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 point also applies to the similar element in Article 8(2)(e)(xi)-2.

War crime of medical or scientific experiments

The relevant elements of the war crime of medical or scientific experiments provided in Article 8(2)(e)(xi)-2 of the ICC Statute are that:

- The perpetrator subjected one or more persons to a medical or scientific experiment.
- The experiment caused the death or seriously endangered the physical or mental health or integrity of such person or persons.
- 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.
- Such person or persons were in the power of another party to the conflict.

War crime of destroying or seizing the enemy's property

The relevant elements of the war crime of destroying or seizing the enemy's property provided in Article 8(2)(e)(xii) of the ICC Statute are that:

- The perpetrator destroyed or seized certain property.
- Such property was property of an adversary.
- Such property was protected from that destruction or seizure under the international law of armed conflict.

- The perpetrator was aware of the factual circumstances that established the status of the property.
- The destruction or seizure was not required by military necessity.

Crimes against humanity

Historical development

The modern concept of crimes so heinous that they offend the laws of humanity and civilisation began to appear in international discourse in the early 20th century. The 1899 and 1907 Hague Conventions provided that even in war, the inhabitants and belligerents remained under the protection of 'the laws of humanity' and 'the dictates of public conscience'.[333] Following the Turkish massacres of the Armenian population, the French, British and Russian governments issued the Declaration of 28 May 1915, declaring that the Turkish authorities would be 'held responsible' for its 'crimes against humanity and civilisation'. This declaration was not, however, followed by further action.[334]

The 1919 Report of the Commission on the Responsibility of the Authors of the War and Enforcement of Penalties formulated by representatives from several States and presented to the Paris Peace Conference also referred to "offences against . . . the laws of humanity."[335] However, although the concept of crimes against humanity was recognised long before Nuremberg, it was first prosecuted as a punishable individual criminal offence following the Second World War. Article 6(c) of the Nuremberg Charter provided the first definition of crimes against humanity as:[336]

> **Crimes against humanity**: murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, 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.

Article 5(c) of the Tokyo Charter defined crimes against humanity in identical terms to Article 6(c) of the Nuremberg Charter.[337]

However, the Nuremberg Tribunal did not treat crimes against humanity as a self-standing crime, since Article 6(c) of the Nuremberg Charter required that crimes against humanity be committed in connection with another crime within the jurisdiction of the tribunal – that is war crimes or crimes against peace.

333 See Martens Clause included in Preamble of the 1899 Hague Conventions (II) with Respect to the Laws and Customs of War on Land and the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, reprinted in Schindler and Toman (n236) 63–98.

334 See Vahakn Dadrian, *The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus* (Berghahn Books, Oxford 1995).

335 Report of the Commission to the Preliminary Peace Conference, reprinted in 14 AJIL 95 (1920).

336 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 Aug 1945) 82 UNTS 279 (Annex).

337 Charter of the International Military Tribunal for the Far East (19 Jan 1946) TIAS No 1589. See Bernard Victor Aloysius Röling (ed), *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity Press, Cambridge 1993).

It should be noted that Article II(1)(c) of Control Council Law No 10, which defined crimes against humanity, no longer linked the concept of crimes against humanity with an armed conflict and did not require that the crimes against humanity be committed in execution of or in connection with war crimes or crimes against peace:

> Crimes against Humanity, Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or nor in violation of the domestic laws of the country where perpetrated.

Crimes against humanity truly took hold as a separate basis of individual criminal responsibility with the new definition in Article 5 of the ICTY Statute and its subsequent judicial elaboration.[338]

ICTY Statute

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.

Although the ICTY Statute restricted crimes against humanity to those 'committed in armed conflict, whether international or internal in character', thus retaining a link to armed conflict, crimes against humanity nonetheless took on an independent existence as a distinct category of crime.

The definition of crimes against humanity in the ICTR Statute follows the ICTY Statute, with the following modifications:[339]

338 Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to SC Resolution 827, UN SCOR, 48th Session, 3217th Meeting, UN Doc S/RES/927 (1993) (hereinafter ICTY Statute).

339 ICTR Statute, annexed to SC Resolution 955, UN SCOR, 49th Session, 3453rd Meeting, UN Doc S/RES/955 (1994).

- there is no requirement of an armed conflict;
- there is an explicit requirement that the attack be 'widespread or systematic';
- there is an additional requirement that the underlying crimes be committed on discriminatory grounds.

ICTR Statute

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.

The definition of crimes against humanity in Article 2 of the SCSL closely tracks ICTR Article 3, albeit without the reference in the latter to the attack being 'on national, political, ethnic, racial or religious grounds'. The Law on the Establishment of the ECCC closely tracks the definition in the ICTR Statute, despite the fact that the Agreement between the UN and the Government of Cambodia provides that the subject matter of the ECCC shall be 'crimes against humanity as defined in the 1998 ICC Statute of the International Criminal Court'.[340]

The most recent, and arguably the most comprehensive, definition of crimes against humanity appears in Article 7 of the Statute of the ICC as follows:

340 Article 9 of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (6 June 2003) 2329 UNTS 117 (Annex); Article 5 of the Law on the Establishment of the ECCC.

Article 7(1) of the ICC Statute:

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 sterilisation, 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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The ICC Statute expanded the list of acts by adding forced transfer of population, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, enforced disappearance and the crime of apartheid. The ICC Statute did not include the requirement of armed conflict and the requirement of discriminatory grounds. Article 7(2) of the ICC Statute also included further definitions in an attempt to clarify the elements of particular offences.

This Chapter will primarily discuss crimes against humanity under Article 7 of the ICC Statute, with reference to prior jurisprudence where it serves to guide interpretation of this provision.

The elements of crimes against humanity

Article 7(1) of the ICC 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***

The definition of crimes against humanity can be divided into two categories:

- general requirements, also referred to as contextual or *chapeau* requirements; and
- physical (*actus reus*) and mental (*mens rea*) elements relating to specific or so-called underlying offences.

The contextual or *chapeau* elements constitute general requirements which must be fulfilled before a specific act or underlying offence constitutes a crime against humanity. Generally, they provide the context in which the conduct must take place in order to qualify as a crime against humanity. For that reason these requirements, which are common to all listed offences, are called contextual or *chapeau* elements. The ICC Statute provides the following general requirements:

General requirements for crimes against humanity (ICC Statute)

- there must be an attack;
- the attack must be widespread or systematic;
- the attack must be directed against a civilian population;
- the perpetrator's conduct was part of a widespread or systematic attack;
- the perpetrator was aware of the link between his acts and a widespread or systematic attack.

As mentioned above, the Statutes of the ad hoc tribunals and some internationalised courts provide additional requirements that must be satisfied before a specific act or underlying offence qualifies as a crime against humanity. In particular, Article 5 of the ICTY Statute contains an additional requirement that the offences be committed in armed conflict, either international or internal. Moreover, the ICTR Statute and the Law on the Establishment of the ECCC, unlike the ICTY or ICC Statutes, require that the attack be based on discriminatory grounds.[341]

The physical and mental elements for the specific or underlying offences are set out in Article 7(2) of the ICC Statutes and further elaborated in the ICC Elements of Crimes. With regard to the mental elements of specific offences, Article 30 of the ICC Statute provides that unless a particular *mens rea* is specified,[342] all acts must be committed with intent and knowledge. In relation to an act, a person has

341 Article 3 of the ICTR Statute; Article 5 of the Law on the Establishment of the ECCC.
342 This is discussed below under 'The Underlying Acts'.

intent if they mean to engage in the conduct. In relation to a consequence, a person has intent if they mean to cause that consequence or are aware that it will occur in the ordinary course of events.[343] Knowledge means that a person is aware that a circumstance exists or that a consequence will occur in the ordinary course of events.[344]

In the following, the contextual or *chapeau* elements will be presented. Then the elements of each specific or underlying offence will be set out.

CONTEXTUAL OR CHAPEAU ELEMENTS

Existence of an attack

> *Article 7(2)(a) of the ICC Statute*
>
> '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 organisational policy to commit such attack;

The notion of an 'attack' is not used in the same terms as in the law of war crimes. The attack does not have to be a part of the armed conflict and it does not need to involve the use of armed force. An attack rather encompasses any mistreatment of the civilian population.[345] An attack may consist of non-violent acts, such as instituting apartheid or exerting pressure on the population to act in a particular way.[346]

An 'attack directed against any civilian population' is defined in Article 7(2)(a) of the ICC Statute as 'a course of conduct involving the multiple commission of acts [enumerated in Article 7(1)] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'.[347] The reference to 'the multiple commission of acts' in Article 7(2)(a) indicates that an attack may consist of either the repeated commission of the same type of act, or the commission of different types of acts, such as murder, rape and deportation.[348]

The ICC Elements of Crimes explain that 'the acts need not constitute a military attack'. In addition, it is understood that 'policy to commit such attack' requires that the State or organisation actively promote or encourage such an attack against a civilian population.[349] It can therefore be concluded that random acts of individuals do not constitute crimes against humanity, but that there must be some underlying State or organisational policy directing, instigating or encouraging the crimes in order for the crimes to constitute crimes against humanity.

The Elements of Crimes further explain that the policy which has a civilian population as the object

343 Article 30(2) of the ICC Statute.
344 Article 30(3) of the ICC Statute.
345 *Prosecutor v Kunarac et al* (n307) para (86).
346 *Prosecutor v Akayesu* (ICTR) Case No ICTR-96-4-T, Trial Judgment (2 September 1998) para (582); *Prosecutor v Rutaganda* (ICTR) (n310) para (70); *Prosecutor v Musema* (ICTR) Case No ICTR-96-13-T, Trial Judgment (27 January 2000) para (205).
347 Article 7(2)(a) of the ICC Statute.
348 *Prosecutor v Kayishema & Ruzindana* (ICTR) Case No ICTR-95-1-T, Trial Judgment (21 May 1999) para (122).
349 See Article 7 of the ICC Elements of Crimes (Introduction) 5, para (3).

of the attack must be implemented by State or organisational action. In exceptional circumstances, such a policy may 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 organisational action.[350]

According to ICTY case-law, where the policy requirement for crimes against humanity, has been considered, the policy need not be endorsed by an organ of the State or government. The reference to an 'organisational' policy includes powerful non-State organisations such as large criminal gangs or militia.[351] The policy need not come from the highest level of the State or organisation, nor need it be formalised or officially announced.[352] It need not be expressly stated or precisely formulated. A policy may be found even where it is expressly denied by the State or organisation.[353]

However a consistent body of ICTY case-law has, in fact, rejected the idea that there even is a policy requirement for crimes against humanity.[354] The Appeals Chamber in *Kunarac* held that neither the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan'. While the existence of a policy or a plan may be relevant and useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, 'the existence of a policy or plan. . . is not a legal element of the crime'.[355]

Widespread or systematic

The attack directed against a civilian population must be widespread or systematic in order to constitute a crime against humanity.[356] Although the ICTY Statute, unlike the ICTR and ICC Statutes, contains no explicit requirement that crimes against humanity be 'widespread or systematic', the UN Secretary-General, in his Report on the ICTY Statute, stated that:[357]

> 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.

The ICTY has thus come to recognise this criterion as a requirement for crimes against humanity. Through its case law, the ICTY has adopted part of the above definition, incorporating the 'widespread or systematic' requirement, but not the part of the definition relating to a discriminatory intent.

The reason for introducing the requirement of a widespread or systematic attack is to distinguish crimes against humanity from isolated or unconnected crimes against individuals.[358] This element therefore elevates the crimes that might otherwise fall only under national jurisdictions, such as murder, to crimes of concern to the international community as a whole, such as murder as a crime against humanity. An individual may be liable for crimes against humanity if he or she commits one

350 Article 7 (n349) 5, para (3) n6.
351 *Prosecutor v Blaškić* (ICTY) Case No IT-95-14-T, Trial Judgment (3 March 2000) para (205).
352 *Prosecutor v Blaškić* (n351) paras (202)–(205).
353 *Prosecutor v Kupreškić et al* (ICTY) Case No IT-95-16-T, Trial Judgment (14 January 2000) paras (551)–(555).
354 Cryer et al (n4) 197–198.
355 *Prosecutor v Kunarac et al* (n307) para (98); See also *Prosecutor v Blaškić* (n351) paras (203)–(204).
356 *Prosecutor v Blaškić* (ICTY) Case No IT-95-14-A, Appeal Judgment (29 July 2004) para (101).
357 The Report of the UN Secretary General to the Security Council containing the Statute of the ICTY, S/25704, para (48) (emphasis added).
358 *Prosecutor v Tadić* (ICTY) Case No IT-94-1-T, Appeal Judgment (15 July 1999) para (248).

or more inhumane acts within that broader context.[359]

The attack must be widespread or systematic, but need not be both.[360] This does not mean the accused must themselves have acted in a widespread or systematic manner; only the attack, not the individual acts of the accused, must be widespread or systematic.[361] Under established ICTY jurisprudence, 'widespread' refers to the large-scale nature of the attack and the number of targeted persons.[362] The ICTR appears to have adopted a higher standard as it has defined 'widespread' as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[363]

In the ICTY's jurisprudence, the phrase 'systematic' refers to the organised nature of the acts of violence and the improbability of their random occurrence.[364] Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.[365] The ICTR, however, has defined 'systematic' as 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a State. There must however be some kind of preconceived plan or policy'.[366]

Directed against any civilian population

The term 'civilian population' must be given a broad definition. It includes not only the general population but also members of armed forces who have surrendered or have been rendered *hors de combat* due to wounds, illness, detention or other cause.[367] In times of peace, the civilian population includes all persons except those who have the duty to maintain public order or the legitimate means to use force.[368] It can therefore be concluded that the victims of crimes against humanity must be non-combatants, which would include, under Geneva law, prisoners of war and the wounded, sick and shipwrecked.[369]

The civilian population need only be 'predominantly civilian in nature' since the 'presence of certain non-civilians in their midst does not change the character of the population'.[370] The presence of military personnel within an intentionally targeted civilian population does not change its civilian character.[371] The essence of crimes against humanity is that a population is targeted precisely because of its civilian character. The presence of others who may or may not also be targets is irrelevant.

359 Cryer et al (n4) 187.
360 *Prosecutor v Tadić* (ICTY) Case No IT-94-1-T, Trial Judgment (7 May 1997) paras (646)–(647).
361 *Prosecutor v Kunarac et al* (n307) para (96); *Prosecutor v Blaškić* (n351) para (101).
362 *Prosecutor v Kunarac et al* (n307) para (94); *Prosecutor v Blaškić* (n351) para (101).
363 *Prosecutor v Akayesu* (n346) para (580).
364 *Prosecutor v Kunarac et al* (n307) para (94); *Prosecutor v Blaškić* (n351) para (101); *Prosecutor v Tadić* (ICTY) Case No IT-94-1-T, Trial Judgment (7 May 1997) para (648).
365 *Prosecutor v Kunarac et al* (n307) para (96); *Prosecutor v Blaškić* (n351) para (101).
366 *Prosecutor v Akayesu* (n346) para (580).
367 *Prosecutor v Tadić* (n360) paras (626), (641)–(644); *Prosecutor v Tadić* (ICTY) Case No IT-94-1-A, Appeal Judgment (15 July 1999) paras (636)–(643); *Prosecutor v Blaškić* (n351) paras (208)–(210), (214); *Prosecutor v Akayesu* (n346) para (582).
368 *Prosecutor v Kayishema & Ruzindana* (n348) para (127).
369 Jones and Powles (n295) 257; *Prosecutor v Blaškić* (n351) para (214); *Prosecutor v Tadić* (n360) paras (626), (641)–(644); *Prosecutor v Tadić* (n367) paras (636)–(643).
370 *Prosecutor v Tadić* (n360) para (638).
371 Ibid para (638); *Prosecutor v Kayishema & Ruzindana* (n348) para (128); *Prosecutor v Rutaganda* (n310) para (70); *Prosecutor v Kupreškić et al* (n353) para (549); *Prosecutor v Musema* (ICTR) Case No ICTR-96-13-A, Trial Judgment (27 January 2000) para (207); *Prosecutor v Blaškić* (n351) paras (211), (214).

The use of the phrase '*any* civilian population' clearly indicates that crimes against humanity may be directed against a civilian population of any nationality as well as stateless civilians.[372] The law of war crimes therefore protects not only enemy nationals, but also covers crimes committed against a State's own nationals. This is in contrast to war crimes prohibitions which do not protect civilians of the same nationality as the perpetrator, nationals of allied States and stateless persons. The nationality of the victim is, therefore, irrelevant to crimes against humanity.

Finally, it is not necessary that the entire population be targeted. The ICTY has held that the reference to a 'population' is 'intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity'.[373]

The link between the perpetrator's conduct and the attack

The specific act of the accused or so-called underlying offence must be part of the widespread or systematic attack. The ICTY Appeals Chamber in *Tadić* held that 'to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related'.[374] In other words, 'the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have *known* that his acts fit into such a pattern'.[375] However, 'a nexus between the accused's acts and the armed conflict is *not* required'.[376]

It is not necessary that the acts of the accused are committed in the midst of that attack in order to be regarded as part of that attack. An offence which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack.[377] As mentioned, in certain circumstances, a single act may comprise a crime against humanity when it occurs as a part of the attack. The offence must not, however, be an isolated act. An offence would be regarded as an 'isolated act' when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[378]

The accused need not be an architect of the attack, need not be involved in the formation of any policy, and need not be affiliated with any State or organisation nor even share in the ideological goals of the attack.[379] As explained above, the ICC includes a policy requirement; namely that the attack is committed pursuant to or in furtherance of a State or organisational policy to commit such attack. This requirement, however, applies to the acts forming an attack in general. It is, therefore, not necessary to show that the act of the accused, or the specific (underlying) offences were in any way directed, instigated or encouraged.[380]

372 *Prosecutor v Tadić* (n360) para (635).
373 Ibid para (644).
374 *Prosecutor v Tadić* (n367) para (271)
375 Ibid para (248) (footnote omitted).
376 Ibid para (251).
377 *Prosecutor v Kunarac et al* (n307) para (100).
378 Ibid; *Prosecutor v Kupreškić et al* (n353) para (550).
379 Cryer et al (n4) 199.
380 Ibid.

Mental elements (*Mens rea*)

The additional element which raises a domestic offence to the international level is the perpetrator's knowledge of the broader context in which that offence occurs.[381] In other words, the perpetrator must be aware of the circumstances which make the offence a crime against humanity. First, the accused must know that there is a widespread or systematic attack on a civilian population. Second, he must know that his acts comprise part of that attack. Alternatively, he must at least take the risk that his acts were part of the attack. This requirement, however, does not entail knowledge of the details of the attack.[382]

The mental element does not refer to the motive of the accused, but only to his knowledge of the context. The motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons. Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.[383]

The ICC Elements of Crimes define the mental element as requiring that:

> The perpetrator knew that the conduct was part of or intended the conduct to be part of widespread or systematic attack against a civilian population.

The ICC Elements of Crimes further clarify that the requirement of knowledge of a widespread or systematic attack against a civilian population 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 organisation. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[384]

381 *Prosecutor v Tadić* (n360) para (656).
382 *Prosecutor v Kunarac et al* (n307) paras (99), (102); *Prosecutor v Blaškić* (n356) paras (124)–(125).
383 *Prosecutor v Kunarac et al* (n307) para (103).
384 See Article 7 (n349) 5, para (2).

ADDITIONAL REQUIREMENTS

The nexus with armed conflict (ICTY)

Crimes against humanity can be committed either during an armed conflict or in times of peace. Although Article 5 of the ICTY Statute requires crimes against humanity to be committed in armed conflict, the requirement serves to define the jurisdiction of the ICTY and is not a part of the definition of the offence. The later Statutes of the ICTR, ICC, SCSL and Serious Crimes Panels do not require a link between crimes against humanity and an armed conflict. It is safe to conclude that today a nexus with armed conflict is no longer required as a matter of customary international law. Indeed the ICTY itself held that the requirement provided in its Statute is a deviation from customary law.

In particular, Trial Chamber in *Tadić* stated that the requirement of an armed conflict is similar to that of Article 6(c) of the Nuremberg Charter which limited the Nuremberg Tribunal's jurisdiction to crimes against humanity committed 'before or during the war', although in the case of the Nuremberg Tribunal jurisdiction was further limited by requiring that crimes against humanity be committed 'in execution of or in connection with' war crimes or crimes against peace.[385] The *Tadić* Trial Chamber further held that the inclusion of the requirement of an armed conflict, nevertheless, deviates from the development of the doctrine after the Nuremberg Charter, beginning with Control Council Law No 10, which no longer links the concept of crimes against humanity with an armed conflict.[386]

The Trial Chamber referred to the Appeal Chamber decision in its *Tadić* jurisdiction decision which held:

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. . . [387]

Accordingly, with regard to crimes against humanity within the ICTY Statutes, the existence of armed conflict must be proved, as well as the link between the act or omission charged and the armed conflict.[388]

Where there is an armed conflict, some confusion may arise between conduct which is permissible under the laws of war, and conduct prohibited as crimes against humanity. As a hypothetical example, imagine a village in which a military camp has been set up. Remaining in this village are a few civilian families of an ethnicity which has been the target of a widespread attack. The village is attacked and both civilians and soldiers are killed. Under international humanitarian law, the village may be a legitimate military target if the military objective gained is proportionate to the civilian casualties suffered. Whether this conduct is permissible under international law seems to depend on the intention of the attacker.

385 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (n271).
386 *Prosecutor v Tadić* (n360) para (627).
387 *Prosecutor v Tadić* (n284) para (141).
388 *Prosecutor v Tadić* (n360) para (627).

A Trial Chamber of the ICTY briefly noted that 'if it is demonstrated that the perpetrator of the acts of violence had the primary intention of inflicting injury upon a civilian population, he could be found guilty of a crime against humanity even if the attack caused military casualties as well as civilian victims'.[389] Thus, if the attacker's intention was to eliminate a military target and the killing of the civilians was merely a necessary and proportionate consequence, then no crime has been committed. However, if civilians were the target of the attack, and the soldiers killed incidentally, then the attack may constitute a crime against humanity. The killing of a lone civilian in a location swarming with military activity may, therefore, constitute a crime against humanity where that civilian is the target of the attack (if the other conditions for crimes against humanity are met).

Discrimination requirement (ICTR and ECCC)

Article 3 of the ICTR Statute adds an additional element of 'discriminatory grounds', requiring that crimes against humanity be committed on 'national, ethnic, racial or religious grounds'. However, the ICTY Appeals Chamber in *Tadić* concluded that 'customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity'.[390] 'Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5(h) [of the ICTY Statute], concerning various types of persecution.'[391]

The Appeals Chamber in *Akayesu* endorsed this interpretation and held that 'except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity'. It further held that 'though such is not a requirement for the crime *per se,* all crimes against humanity, may, in actuality, be committed in the context of a discriminatory attack against a civilian population'.[392] The additional 'element' included in the ICTR Statute was explained by the Appeals Chamber as an intention by the UN Security Council to limit the ICTR's jurisdiction over crimes against humanity solely to cases where they were committed on discriminatory grounds.[393]

The requirement of a discriminatory intent is also incorporated in the Law on the Establishment of the ECCC.[394] Other Statutes, such as the ICC and SCSL Statutes, did not include a discrimination requirement. Thus, it is safe to conclude that although crimes against humanity have traditionally been associated with ethnic or religious persecution, discriminatory or persecutory intent is not a necessary element, except for crimes against humanity falling under the ICTR's jurisdiction. A persecutory or discriminatory motive is only relevant where it is part of the *mens rea* for the underlying offence, for example where the underlying offence is persecution under Article 7(1)(h) of the ICC Statute.

389 *Prosecutor v Blaškić* (n351) para (209) n401.
390 *Prosecutor v Tadić* (n367) para (292).
391 Ibid para (305).
392 *Prosecutor v Akayesu* (ICTR) Case No ICTR-96-4-A, Appeal Judgment (1 June 2001) para (464) (footnote omitted).
393 Ibid para (464).
394 Article 5 of the Law on the Establishment of the ECCC.

SPECIFIC (UNDERLYING) OFFENCES

Crimes against humanity consist of any of the specified acts, set out below, committed in the circumstances outlined above. It is important to note that the acts may be committed either by positive action or by omission.[395] The accused must have committed at least one of the acts enumerated in Article 7(1) of the ICC Statute.[396] Even a single act against a single victim can qualify as a crime against humanity if the act formed part of a widespread or systematic attack,[397] or if the act had a widespread effect.[398]

The acts enumerated in Article 7(1) of the ICC Statute are sometimes referred to as 'underlying offences'. Many of these offences, such as murder and rape, have their equivalents in domestic law. For the purposes of crimes against humanity, these offences take on an international definition and *not* the definition that they may have under the domestic law of the State in which they were committed or of the accused's State of nationality. For example, a sexual act may be rape for the purposes of Article 7(1) even though under local domestic law the act was not unlawful because the victim failed actively to resist.

The following section will analyse specific elements pertaining to each specific or underlying offence without repeating the general or *chapeau* elements, common to all crimes against humanity which have been discussed above. It should be noted that the ICC Elements of Crimes enumerate all the elements of particular crimes against humanity, general and specific. In this section, however, we will only deal with the specific ones.

Murder

Murder, for the purposes of crimes against humanity, may be defined as 'an unlawful, intentional killing of a human being'.[399]

As regards the physical elements, it has to be proven that:

- the victim is dead;
- the death of a victim resulted from an unlawful act or omission of the perpetrator.[400]

The mental element is satisfied if the perpetrator:

- intended to kill the victim; or
- intended to inflict serious injury or grievous bodily harm in reckless disregard of human life.[401]

The ICC Statute does not provide a definition of murder in Article 7(1)(a). However, the ICC Elements of Crimes provide the following element in addition to the contextual or *chapeau* elements: '[t]he perpetrator killed [or caused the death of] one or more persons'.

395 *Prosecutor v Kambanda* (ICTR) Case No ICTR 97-23-S, Trial Judgment and Sentence (4 September 1998) paras (39)–(40).
396 The elements of these acts will be further discussed below under 'The Underlying Acts'.
397 *Prosecutor v Tadić* (n360) para (649); *Prosecutor v Kupreškić et al* (n353) para (550).
398 *Prosecutor v Blaškić* (n351) para (206).
399 Article 7(1)(a) of the ICC Elements of Crimes, 5; *Prosecutor v Akayesu* (n346) para (589)
400 *Prosecutor v Akayesu* (n346) para (589).
401 *Prosecutor v Kupreškić et al* (n353) para (560); *Prosecutor v Akayesu* (n346) para (589).

It should be noted that the physical element of murder as a crime against humanity and wilful killing as a war crime is the same, but that the two crimes differ in regard to the contextual or *chapeau* elements.

Extermination

> *Article 7(2)(b) of the ICC Statute*
>
> '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;

The Elements of Crimes under the ICC Statute provide two key elements for the definition of extermination.[402] First, the perpetrator, through conduct including through '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' must have directly or indirectly killed one or more persons.[403] Second, the conduct must have constituted, or taken place as part of, a mass killing of members of a civilian population.[404] The term 'as part of' includes the initial conduct in a mass killing.

The ICTY and ICTR Appeals Chamber has defined the requisite *actus reus* of extermination as 'the act of killing on a large scale'. The *actus reus* also includes 'subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death'. The *mens rea* for extermination is defined as 'the accused's intent, by his or her acts or omission, of their killing on a large scale, or the subjection of a widespread number of people, to conditions of living that would lead to their deaths'.[405]

The number of people killed by an individual accused is not important. The accused may be guilty of extermination even if he causes the death of only one person provided that he is aware that his acts form part of a 'mass killing event'. An 'event' exists where the mass killings have close proximity in time and place.[406] Thus in *Akayesu* the accused was found guilty of extermination in relation to the killings of 16 people, because he was aware that those killings were connected to others.[407] By contrast, in *Vasiljević* the accused was found not guilty of extermination after killing seven people because he only intended to kill those seven people and was unaware that his acts formed part of a systematic extermination.[408]

The notion of a 'mass killing' is not clearly defined, however both the ICTY and ICTR have indicated that extermination involves a 'large number' of deaths.[409] The ICTR Appeals Chamber in *Ntakirutimana* held that 'the expressions "on a large scale" or "large number"' do not, however,

402 Article 7(1)(b) of the ICC Elements of Crimes, 6.
403 Article 7(2)(b) of the ICC Statute.
404 Article 7(1)(b) (n402).
405 *Prosecutor v Stakić* (ICTY) Case No IT-97-24-A, Appeal Judgment (22 March 2006) para (259); *Prosecutor v Ntakirutimana* (ICTR) Case No ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment (13 December 2004) paras (516), (522).
406 *Prosecutor v Kayishema & Ruzindana* (n348) para (147).
407 *Prosecutor v Akayesu* (n346) paras (735)–(743).
408 *Prosecutor v Vasiljević* (ICTY) Case No IT-98-32, Trial Judgment (29 November 2002) para (232).
409 *Prosecutor v Ntakirutimana* (ICTR) Case No ICTR-96-10-T and ICTR-96-17-T, Trial Judgment (21 February 2003) para (813); *Prosecutor v Vasiljević* (ICTY) Case No IT-98-32-T, Trial Judgment (29 November 2002) para (222).

suggest a numerical minimum.[410] This was confirmed by the ICTY in *Krajišnik* where the Trial Chamber found incidents of extermination ranging from 17 to 154 deaths.[411]

The ICTY Trial Chamber in *Krstić* held that there must be evidence 'that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population'.[412] However, it is not necessary that the victims were targeted on national, ethnic, racial or religious grounds.[413] The position of the ICTY therefore is that no discriminatory element is required for extermination. The additional discriminatory element also does not appear in the ICC Statute.

The main difference between murder and extermination is that extermination requires an element of mass killing which is not required for murder.[414] In short, extermination is defined as killing on a large scale. However, extermination remains different from genocide in that it does not require the intent to destroy a protected group.[415]

Enslavement

Article 7(2)(c) of the ICC Statute

'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;

The ICC Elements of Crimes under the ICC Statute define enslavement as 'the exercise of 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'.[416] 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'.[417]

Practices similar to slavery under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 include debt bondage, serfdom, or a situation in which a woman is given in marriage without her consent in return for payment to her family, is liable to be transferred by her husband to another person, or is liable to be inherited by another person upon her husband's death.[418]

410 *Prosecutor v Ntakirutimana* (n405), para (516) (footnote omitted); *Prosecutor v Stakić* (n405), para (260); *Prosecutor v Krajišnik* (ICTY) Case No IT-00-29-T, Trial Judgment, (27 September 2006) para (716).
411 *Prosecutor v Krajišnik* (n410), paras (716), (720).
412 *Prosecutor v Krstić* (ICTY) Case No IT-98-33-T, Trial Judgment (2 August 2001) para (503).
413 Ibid para (499). Whilst the ICTR in *Akayesu* held the opposite, this can be attributed to the specific requirement of discrimination on national, political, ethnic, racial or religious grounds in the *chapeau* of the crimes against humanity provision in that Statute: *Prosecutor v Akayesu* (n346) para (583).
414 *Prosecutor v Ntakirutimana* (n409), para (813).
415 *Prosecutor v Akayesu* (n346) para (591).
416 Article 7(1)(c) of the ICC Elements of Crimes, 6.
417 Ibid.
418 Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 Sept 1956) 226 UNTS 3.

The ICTY elaborated the definition of enslavement in the *Foča* Trial Judgment.[419] It held that 'enslavement as crime against humanity consisted of the exercise of any or all of the powers attaching to the right of ownership over a person'. The *mens rea* of enslavement requires the 'intentional exercise of a power attaching to the right of ownership'.[420] The details of the definition of enslavement are set out in the following paragraph from the judgment:

> Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socioeconomic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The 'acquisition' or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.[421]

It is also important to note that it is not necessary to prove either pecuniary benefits to the accused or ill-treatment of the victim.[422]

According to the ICTY Appeals Chamber in *Kunarac et al*, lack of consent does not have to be proved as an element of the crime. However, consent may be relevant from an evidential point of view as is relevant to the question of whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. Circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.[423]

With regard to *mens rea*, the ICTY Appeals Chamber in *Kunarac et al* held that '[i]t is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts'.[424] The ICC Elements do not set out a specific *mens rea* requirement for enslavement beyond the *chapeau* requirement that, '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'.

419 *Prosecutor v Kunarac et al* (ICTY) Case No IT-96-23-T and IT-96-23/1-T, Trial Judgment (22 February 2001) paras (539)–(542).
420 Ibid paras (539)–(540). See also *Prosecutor v Kunarac et al* (n307), paras (119)–(122).
421 *Prosecutor v Kunarac et al* (n419), para (542). See also *Prosecutor v Kunarac et al* (ICTY) Case No IT-96-23 and IT-96-23/1A, Appeal Judgment (12 June 2002) para (119).
422 *Prosecutor v Kunarac et al* (n307), para (123).
423 Ibid para (120).
424 Ibid para (122).

Deportation or forcible transfer of population

Article 7(2)(d) of the ICC Statute

'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

The ICC Elements of Crimes outline the following elements of deportation or forcible transfer of population: [425]

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

The ICC Elements of Crimes explain that the term 'forcibly' is not restricted to physical force but extends to threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power or taking advantage of a coercive environment.[426] 'Deported or forcibly transferred' is interchangeable with 'forcibly displaced'.[427]

According to the ICTY jurisprudence, deportation and forcible transfer both consist of the underlying offence 'forced displacement'. The *actus reus* of forced displacement is the displacement of persons by expulsion or other coercive acts from an area in which they are lawfully present without grounds permitted under international law. The *mens rea* of forcible displacement is that is it performed with the intent to remove the persons. The *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis.[428]

The difference between deportation and forcible transfer is that deportation refers to forcible displacement of persons *beyond* internationally recognised State borders. By contrast, forcible transfer consists of forced displacement from one part of the country to another *within* State borders.[429] The *actus reus* of deportation therefore refers to forcible transfer across a *de jure* State border to another country, or in certain circumstances, a *de facto* border, whereas the *actus reus* of forcible transfer refers to internal displacement.[430]

425 Article 7(1)(d) of the ICC Elements of Crimes, 7.
426 Article 7(2)(d) of the ICC Statute.
427 Article 7(1)(d) of the ICC Elements of Crimes, 7, fns 12 and 13.
428 *Prosecutor v Stakić* (n405), para (278); *Prosecutor v Krstić* (n412), para (519)–(532).
429 *Prosecutor v Stakić* (n405), para (278).
430 Ibid paras (278), (289); *Prosecutor v Krstić* (n412), para (521).

The Appeals Chamber held in *Stakić* that '[c]ustomary international law also recognises that displacement from "occupied territory", as expressly set out in Article 49 of Geneva Convention IV and as recognised by numerous Security Council resolutions, is also sufficient to amount to deportation'. Additionally, 'the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law'.[431]

Deportation and forcible transfer occur when the displacement of the civilian population is unlawful. Article 49 of the Geneva Convention IV and Article 17 of Protocol II allow total or partial evacuation of the population if the security of the population or imperative military reasons so demand. Article 49 however specifies that persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. Thus, if displacement of the civilian population takes place for those reasons and the population is transferred back to their homes after hostilities have ceased, the offences of deportation or forcible transfer will not be made out.[432]

In this regard the ICTY Trial Chamber in *Stakić* held that '[a]lthough displacement for humanitarian reasons is justifiable in certain situations. . . it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity'.[433]

It is essential for both deportation and forcible transfer that the displacement take place under coercion. The essential element in establishing coercion is that the displacement be involuntary in nature, and the relevant persons had no genuine choice.[434] It is the absence of 'genuine choice' that makes a given act of displacement unlawful.[435] In this context, the ICTY Appeals Chamber in *Krnojelac* held that 'it is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value.'[436]

According to the ICTY jurisprudence, a lack of genuine choice may be inferred from, inter alia, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of – or the threat to commit – other crimes 'calculated to terrify the population and make them flee the area with no hope of return'.[437]

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

The ICC Elements of Crimes set out the following elements of this offence:[438]

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.

431 *Prosecutor v Stakić* (n405), para (300) (footnotes omitted).
432 *Prosecutor v Krstić* (n412), paras (524)–(527).
433 *Prosecutor v Stakić* (n405), para (287).
434 *Prosecutor v Krstić* (n412), para (528); *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-T, Trial Judgment (1 September 2004) para (543); *Prosecutor v Krnojelac* (ICTY) Case No IT-97-25-T, Trial Judgment (15 March 2002) para (475); *Prosecutor v Krnojelac* (ICTY) Case No IT-97-25-A, Appeal Judgment (17 September 2003) para (233); *Prosecutor v Stakić* (n405) para (279).
435 *Prosecutor v Krnojelac* (n434), para (229); *Prosecutor v Stakić* (n405), para (279).
436 *Prosecutor v Krnojelac* (n434), para (229).
437 *Prosecutor v Simić* (ICTY) Case No IT-95-9-T, Trial Judgment (17 October 2003) para (126); *Prosecutor v Krstić* (n412), para (126).
438 Article 7(1)(e) of the ICC Elements of Crimes, 7.

3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

Similarly, the ICTY *Kordić & Čerkez* Trial Judgment defined imprisonment 'as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population'. Accordingly, a Chamber considering an allegation of 'imprisonment' will have to determine 'the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population'.[439]

Based on the aforementioned definition, the imprisonment of civilians will be unlawful where:[440]

- civilians have been detained in contravention of Article 42 of Geneva Convention IV, *i.e.*, they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary;
- the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified; and
- they occur as part of a widespread or systematic attack directed against a civilian population.

Article 7(1)(e) of the ICC Statute refers to 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'. Thus, this provision prohibits imprisonment only where it is contrary to international law and draws a distinction between lawful and unlawful imprisonment. Article 7(1)(e) of the ICC Statute has broadened the scope of 'imprisonment' to include 'other severe deprivations of physical liberty'.[441]

Torture

Article 7(2)(e) of the ICC Statute

'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;

The ICC Elements of Crimes provide the following elements or torture as a crime against humanity:[442]

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.

439 *Prosecutor v Kordić & Čerkez* (ICTY) Case No IT-95-14/2, Trial Judgment (26 February 2001) para (302).
440 Ibid para (303) (footnote omitted).
441 Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed, Kluwer Law International, The Hague 1999) 362–363.
442 Article 7(1)(f) of the ICC Elements of Crimes, 8.

Torture is prohibited by both conventional and customary international law and constitutes a norm of *jus cogens*.[443] Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 defines torture as:

> 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 or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[444]

The ICTY in the *Foča* Trial Judgment defined torture as a crime against humanity. It concluded that 'the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law'. In particular, the Trial Chamber held that 'the presence of a State official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law'.[445]

In light of that finding, the *Foča* Trial Chamber held that, in the field of international humanitarian law, the elements of the offence of torture under customary international law are as follows:

1. The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
2. The act or omission must be intentional.
3. 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.446

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires, as part of the definition of torture, that the acts of torture be carried out for a certain purpose, such as obtaining information or a confession, punishing the victim for an act which he, or a third person, has committed or is suspected of having committed, or intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind.[447] Under the ICC Statute, no such specific purpose is required, however, curiously, the ICC Elements of Crimes adopted the 'purpose' requirement with respect to the war crime of torture but not with respect to torture as a crime against humanity.

The ICC Statute makes no mention of participation by public officials as a definitional requirement of torture. However, it adds a requirement that the victim be in the custody or under the control of the perpetrator.[448] In the context of previous definitions, this omission is significant and must mean that no participation by public officials is required. The ICC Elements of Crimes also do not set out any requirement that acts of torture be committed for any specific purpose.[449]

443 *Prosecutor v Delalić et al* (Čelebići case) (ICTY) Case No IT-96-21-T, Trial Judgment (16 November 1998) para (454).
444 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.
445 *Prosecutor v Kunarac et al* (ICTY), Trial Judgement (n419), para (496); *Prosecutor v Kunarac et al* (ICTY), Appeal Judgement (n307), para (148).
446 *Prosecutor v Kunarac et al* (ICTY), Trial Judgement (n419) para (497); *Prosecutor v Kunarac et al* (ICTY), Appeal Judgement (n307) para (142).
447 Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.
448 Article 7(1)(f) of the ICC Elements of Crimes, 8.
449 Ibid.

Sexual offences

Article 7(1)(g) of the ICC Statute

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;

Rape

The ICC Elements of Crimes provide the following elements of rape:[450]

1. The perpetrator invaded 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.

It should be noted that the concept of 'invasion' is intended to be broad enough to be gender-neutral. It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.[451] The ICC definition appears to be broader than those developed at the ICTY and ICTR.

In the *Akayesu* Trial Judgement, the ICTR Trial Chamber defined rape as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'. In the same paragraph, the Chamber defined sexual violence, which includes rape, as 'any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact'.[452]

Subsequently, the Trial Chamber ruling in the *Furundžija* Trial Judgment provided a more mechanical definition of rape (although not in the context of crimes against humanity):

450 Article 7(1)(g)-1 of the ICC Elements of Crimes, 8.
451 Ibid 8, n15–16.
452 *Prosecutor v Akayesu* (n346) paras (687)–(688).

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.[453]

The ICTR Trial Chamber ruling in *Musema* preferred the *Akayesu* approach to the *Furundžija* approach, stating that it 'concurs with the conceptual approach set forth in the *Akayesu* Judgement for the definition of rape, which recognizes that the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion'.[454]

The ICTY Trial Chamber in *Foča* reexamined the definition of rape in considerable depth and concluded, on the basis of a review of national case-law and legislation, that what was important in terms of the absence of consent was the serious violation of sexual autonomy which rape involved, rather than the accomplishment of intercourse 'by coercion or force or threat of force against the victim or a third person'; the element emphasised by the *Furundžija* Trial Chamber.[455] The *Foča* Trial Chamber therefore set out the following definition of rape:

> the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[456]

The more detailed definition given in the *Furundžija* and *Foča* cases is arguably to be preferred to the *Akayesu/Musema* definition in that the former better respects the principle of legality by clearly setting out the elements of the offence, thus enabling the citizenry to know beforehand what conduct is prohibited and to model their conduct accordingly. Indeed, the ICC seems to have endorsed the *Furundžija/Foča* approach by setting out a detailed, 'mechanical', definition.[457]

Sexual slavery and enforced prostitution

The crime of sexual slavery under the ICC Statute has no equivalent in any other international criminal statute.

The ICC Elements of Crimes provide the following elements of sexual slavery:[458]

453 *Prosecutor v Furundžija* (ICTY) Case No IT-95-17/1-T, Trial Judgment (10 December 1998) para (185).
454 *Prosecutor v Musema* (n371), paras (226)–(229).
455 *Prosecutor v Kunarac et al* (n419), paras (436)–(459).
456 Ibid para (460).
457 Jones and Powles (n295) 209.
458 Article 7(1)(g)-2 of the ICC Elements of Crimes, 9.

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 similar deprivation of liberty.

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

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.[459]

Although sexual slavery is listed as a separate offence, it is considered as a particular form of enslavement. The first element under the ICC Elements of Crimes is therefore identical to enslavement. Sexual slavery also encompasses situations where women and girls are forced into marriage, domestic servitude or other forced labour that ultimately involves sexual activity, including rape by their captors.[460]

Given the complex nature of this crime, it is recognised that its commission could involve more than one perpetrator as a part of a common criminal purpose.[461]

The ICC Elements of Crimes provide the following elements of enforced prostitution:[462]

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.

Enforced prostitution is distinguished from sexual slavery by the pecuniary benefit which the accused or another person gained or expected to obtain in exchange for, or in connection with, the victim's sexual acts.[463] Enforced prostitution covers situations that do not amount to slavery or enslavement but in which a person is compelled to perform sexual acts in order to obtain something necessary for survival or to avoid further harm. Such situations might also not be covered by rape if they do not meet the requirement of an element of coercion or force or threat of force.[464]

In contrast to the crime of rape, sexual slavery constitutes a continuing offence, whereas enforced prostitution can either be a continuing offence or constitute a separate act. The continuing offences could also encompass crimes of rape and other forms of sexual violence. To prove sexual slavery or enforced prostitution as a continuing offence, there is no need to prove rape.[465]

459 Article 7(1)(g)-2 of the ICC Elements of Crimes, 9, n18.
460 Machteld Boot, 'Article 7(1)(g) Rape… or any other form of sexual violence of comparable gravity', in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos, Baden Baden, 1999) 139, 143.
461 Article 7(1)(g)-2 of the ICC Elements of Crimes, 9, n17.
462 Article 7(1)(g)-3 of the ICC Elements of Crimes, 9.
463 Ibid.
464 Machteld Boot (n460) 143.
465 Ibid at 144.

Forced pregnancy

Article 7(2)(f) of the ICC Statute

'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;

The ICC Elements of Crimes define the elements of forced pregnancy as:[466]

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.

The reference to grave violations of international law includes, for instance, biological experiments. The reason for adding the clause that the definition of enforced pregnancy is not to be in any way interpreted as affecting national laws relating to pregnancy was to ensure that the concept did not restrict the ability of States to regulate abortion and birth control.

Enforced sterilisation

The ICC Elements of Crimes define the elements of enforced sterilisation as:[467]

1. The perpetrator deprived one or more persons of biological reproductive capacity.
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.

Enforced sterilisation involves the deprivation of biological reproductive capacity. It does not include non-permanent birth control measures which have a non-permanent effect in practice.[468] The sterilisation must not be justified by either medical or hospital treatment, nor carried out with the genuine and informed consent of the victim.[469] Genuine consent does not include consent obtained through deception.[470]

Other sexual violence of comparable gravity

According to the ICC Elements of Crimes, this catch-all provision contains the following elements:[471]

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.

466 Article 7(1)(g)-4 of the ICC Elements of Crimes, 10.
467 Article 7(1)(g)-5 of the ICC Elements of Crimes, 10.
468 Article 7(1)(g)-5 of the ICC Elements of Crimes, 10, n19.
469 Article 7(1)(g)-5 of the ICC Elements of Crimes, 10.
470 Article 7(1)(g)-5 of the ICC Elements of Crimes, 10, n20.
471 Article 7(1)(g)-6 of the ICC Elements of Crimes, 10–11.

2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1(g), of the Statute.

The first element covers acts against the victim as well as forcing the victim to perform a sexual act. It covers sexual acts 'inflicted upon the physical and moral integrity of a person. . . in a way that is degrading and humiliating for the victim's dignity'.[472] Sexual violence is not limited to physical penetration, invasion or contact and therefore includes examples of forced nudity. For example, the ICTR held in *Akayesu* that forcing a female victim to undress and perform gymnastics naked in front of a crowd constituted grave sexual violence.[473]

Persecution

Persecution as a crime against humanity is a crime that can encompass a variety of underlying offences.

Article 7(1)(h) of the ICC Statute

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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

Article 7(2)(g) of the ICC Statute

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

The ICC Elements of Crimes define the elements of persecution as: [474]

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

2. The perpetrator targeted such person or persons by reasons 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 recognised as impermissible under international law.

4. The conduct was committed in connection with any act referred to in article 7, paragraph 2, of the Statute or any crime within the jurisdiction of the Court.

…

472 *Prosecutor v Furundžija* (n453), para (186).
473 *Prosecutor v Akayesu* (n346), para (688).
474 Article 7(1)(h) of the ICC Elements of Crimes, 11.

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.

The ICTY defined persecution as an act or omission that discriminates in fact, and which denies or infringes upon a fundamental right laid down in customary international law or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[475] With regard to the rights, persecution involves not only rights relating to physical and mental integrity, but also proprietary, economic and judicial rights.[476] However, not every denial or infringement of a fundamental right is sufficient to qualify as persecution as a crime against humanity.

The denial or infringement of rights must be so gross or blatant as to reach the same level of gravity as other crimes against humanity listed under the ICTY Statute.[477] When considering the gravity requirement to determine whether particular acts constitute persecution, acts should not be considered in isolation but rather should be examined in their context and with consideration of their cumulative effect. Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.[478]

With regard to the gravity requirement, the ICC definition requires that there be a severe deprivation of fundamental rights. However, the ICC Statute contains an additional requirement, not found in the ICTY or ICTR Statutes, namely that the denial of fundamental rights must have occurred, either (a) 'in connection with' any of the other acts underlying crimes against humanity, or (b) any other crime within the jurisdiction of the Court.[479] This requirement was added because of the concern of several States that any practices of discrimination would be labelled as 'persecution'.[480] It has been opined that this requirement is 'more restrictive than is necessary under customary international law'.[481]

The *mens rea* for persecutions 'is the specific intent to cause injury to a human being because he belongs to a particular community or group'. The Appeals Chamber in *Blaškić* clarified that in order to satisfy the mental element of persecution as a crime against humanity, it is not necessary to establish that the perpetrator possessed 'persecutory intent' over and above a discriminatory intent. For example, the perpetrator does not have to posses a particular intent to implement a particular plan or policy such as the removal of targeted persons from society or humanity.[482]

The fundamental element of persecution is that it be committed on discriminatory grounds. A discriminatory intent therefore exists where a person is targeted on the basis of political, racial or religious considerations, ie for his or her membership of a certain victim group that is targeted by the perpetrator. While the ICTY and ICTR Statutes only refer to political, racial or religious grounds, the ICC expands the list of discriminatory grounds by adding national, ethnic, cultural, gender or other grounds that are universally recognised as impermissible under international law.[483]

475 *Prosecutor v Krnojelac* (n434), para (185).
476 *Prosecutor v Blaškić* (n351), para (233); *Prosecutor v Kupreškić et al* (n353), paras (610)–(614); *Prosecutor v Tadić* (n360), paras (704), (708)–(710).
477 *Prosecutor v Kupreškić et al* (n353), para (621); *Prosecutor v Krnojelac* (n434), paras (199), (221).
478 *Prosecutor v Kupreškić et al* (n353), paras (615(e)), (622); *Prosecutor v Krnojelac* (ICTY) Case No IT-97-25-T, Trial Judgment (15 March 2002) para (434).
479 Article 7(1)(h) of the ICC Statute.
480 Cryer et al (n4) 199.
481 *Prosecutor v Kordić & Čerkez* (n439), para (197).
482 *Prosecutor v Blaškić* (n356), para (165); *Prosecutor v Kupreškić et al* (n353), para (625).
483 Article 7(1)(h) of the ICC Statute.

With regard to the element requiring that the conduct was committed 'in connection' with any act referred to in Article 7, paragraph 2, of the Statute or any crime within the jurisdiction of the Court, the ICC Elements of Crimes explain that 'it is understood that no additional mental element is necessary for this element other than that inherent in element 6'.[484] Therefore, this requirement is merely objective and no mental element is required.

Discriminatory intent is not only required for persecution but also for genocide. However, genocide requires a more specific discriminatory intent, namely an intent to destroy a national, ethnic, racial or religious group. Therefore, the difference between the two is that, while in both cases the perpetrator chooses the victim because they belong to a specific community, in the crime of persecution the perpetrator does not necessarily seek to destroy the community as such.[485]

With regard to acts amounting to other crimes against humanity, they can constitute persecution if the requirement of discriminatory intent is met. Acts amounting to war crimes can also constitute persecution provided they meet the contextual elements for crimes against humanity and the element of discriminatory intent required for persecution.

Examples of acts which have been found to amount to persecution include:

- deportation, forcible transfer and forcible displacement;[486]
- destruction of property, including religious buildings;[487]
- attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns and villages;[488]
- detention of civilians who were killed, used as human shields, beaten, subjected to overcrowding, physical or psychological abuse and intimidation, inhumane treatment, and deprived of adequate food and water;[489]
- humiliating and degrading treatment;[490]
- any sexual assault short of rape which embraces all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity;[491]
- denial of fundamental rights such as the rights to employment, freedom of movement, proper judicial process and proper medical care;[492]

484 Article 7(1)(h) of the ICC Elements of Crimes, 11, n22.
485 *Prosecutor v Jelisić* (ICTY) Case No IT-95-10-T, Trial Judgment (14 December 1999) para (79).
486 *Prosecutor v Blaškić* (n356), para (153); *Prosecutor v Brđanin* (n434), para (1025).
487 *Prosecutor v Blaškić* (n356), para (149); *Prosecutor v Brđanin* (n434), para (1023).
488 *Prosecutor v Blaškić* (n356), para (159).
489 *Prosecutor v Blaškić* Ibid para (155); *Prosecutor v Brđanin* (n434), para (1005).
490 *Prosecutor v Brđanin* (n434), para (1014).
491 Ibid para (1012).
492 Ibid para (1049).

- forced labour, ie not work required in the ordinary course of lawful detention which is not regarded as forced, but forced labour assignments which require civilians to take part in military operations or which result in exposing civilians to dangerous or humiliating conditions amounting to cruel and inhumane treatment.[493]

Enforced disappearance

The ICC Statute includes a crime against humanity of enforced disappearance. The definition in the ICC Statute is based on the UN Declaration on the Protection of All Persons from Enforced Disappearance of 1992 and the Inter-American Convention on the Forced Disappearance of Persons of 1994.

> *Article 7(2)(i) of the ICC Statute*
>
> 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The ICC Elements of Crimes define the elements of enforced disappearance of persons as:[494]

1. The perpetrator:
   (a) Arrested, detained or abducted one or more persons; or
   (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:
   (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; 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 authorisation, support or acquiescence of, a State or a political organisation.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or

493 *Prosecutor v Simić et al* (n437), para (996); *Prosecutor v Krnojelac* (n434), para (200).
494 Article 7(1)(i) of the ICC Elements of Crimes, 11–12.

whereabouts of such person or persons was carried out by, or with the authorisation or support of, such State or political organisation.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

In sum, enforced disappearance under the ICC Statute has three key elements: first, the arrest, detention or abduction of a person by, or with the authorisation, support or acquiescence of, a State or political organisation; second, a subsequent refusal to acknowledge the deprivation of freedom or a refusal to give information as to the fate or whereabouts of that person; and third, an intention to remove that person from the protection of the law for a prolonged period of time.

The ICC Elements of Crimes explain that, given the complex nature of this crime, it is recognised that its commission will normally involve more than one perpetrator as part of a common criminal purpose.[495] The word 'detained' would include a perpetrator who maintained an existing detention.[496] It is understood that under certain circumstances an arrest or detention may have been lawful.[497]

The *means rea* elements require that the perpetrator was aware that the deprivation of liberty would be followed in the ordinary course of the events by a refusal to acknowledge that deprivation or to give information on the fate or whereabouts of arrested, detained or abducted persons.[498] It is understood that, in the case of a perpetrator who maintained an existing detention, these elements would be satisfied if the perpetrator was aware that such a refusal had already taken place.[499] Alternatively, the perpetrator must be aware that such refusal was preceded or accompanied by that deprivation of freedom.[500]

Additionally, the crime of enforced disappearance requires a particular intention, namely to remove a person from the protection of the law for a prolonged period of time.[501] Enforced disappearance may involve other crimes such as killing, torture or arbitrary imprisonment. However, the essence of this crime is uncertainty about the victim's fate, namely whether the person concerned is alive or dead.[502]

Apartheid

Apartheid has been recognised as a crime against humanity in instruments such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes of 1968[503] and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 (hereinafter Apartheid Convention).[504]

495 Ibid 11, n23.
496 Ibid 11, n25.
497 Ibid 11, n26.
498 Ibid 12.
499 Ibid 11, n28.
500 Ibid 12.
501 Ibid 12.
502 Cryer et al (n4) 218.
503 Article 1(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, GA Res 2391 (XXIII), Annex, UN Doc A/7218 (26 Nov 1968); 754 UNTS 73; 18 ILM 68.
504 International Convention on the Supression and Punishment of the Crime of Apartheid (30 Nov 1973) 1015 UNTS 243.

Article 7(2)(h) of the ICC Statute

'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 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;

The ICC Elements of Crimes define the elements of apartheid as:[505]

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.
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 institutionalised regime of systematic oppression and dominated by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.

Apartheid therefore consists of any of the inhumane acts listed under Article 7(1) of the ICC Statute. In addition, other acts of a similar character to those in Article 7(1) of the ICC Statute, committed in the context of an institutionalised racial regime of systematic oppression and domination by one racial group over any other racial group and committed with the intention of maintaining that regime, may also amount to apartheid. The ICC Elements of Crimes clarify that 'character' refers to the nature and gravity of the acts. These acts must therefore be of a similar nature and gravity to the other inhumane acts listed under Article 7(1) of the ICC Statute.

As the ICC Statute closely follows the definition of apartheid in the Apartheid Convention, this may provide a guide to identifying acts of a 'similar character'. Article II of that Convention lists acts such as deprivation of the right to life and liberty of person, imposition of living conditions calculated to bring about the destruction of the racial group, imposition of measures calculated to prevent participation of members of the group in political, social, economic and cultural life, imposition of measures to divide the population along racial lines, and exploitation or forced labour.

Other inhumane acts

This catch-all provision has existed since Article 6(c) of the Nuremberg Charter to ensure that there is no lacuna in the law. The ICTY Trial Chamber in *Blaškić* explained that the reason for inclusion of the general residual clause, 'or other inhumane acts', in the ICTY Statute was that it is impossible to anticipate the imagination of future perpetrators of appalling crimes and the forms which their crimes might take. Paradoxically, the more that one attempts to draw up a specific and complete list of all the crimes against humanity, the more restrictive the notion becomes.[506] Hence the need for a catch-all.

505 Article 7(1)(j) of the ICC Elements of Crimes, 12–13.
506 *Prosecutor v Blaškić* (n351), para (237).

The ICC Elements of Crimes define the elements of other inhumane acts as follows:[507]

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

2. Such act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute.

3. The perpetrator was aware of the factual circumstances that established the character of the act.

According to the ICTY and ICTR's jurisprudence, other inhumane acts include those crimes against humanity that are not otherwise specified but are of comparable seriousness or gravity. The ICTY and ICTR have therefore set out the elements of the crime of inhumane acts as follows:[508]

- There was an act or omission of similar seriousness to the other acts listed as crimes against humanity;
- The act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity;
- The act or omission was performed intentionally by the accused, or by a person or persons for whose acts and omission the accused bears criminal responsibility.

In order to assess the seriousness of an act or omission, consideration must be given to all the factual circumstances of the case. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, gender and health, and the physical, mental and moral effects of the act or omission upon the victim.[509]

The intention to inflict inhumane acts is satisfied where the offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or where he knew that his or her act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.[510] According to the ICC Elements of Crimes, the perpetrator must be aware of the factual circumstances establishing the nature and gravity of the acts, but he does not need to consider his acts inhumane.[511]

In comparison to the ICC Statute, the Statutes of the ICTY and ICTR provide more restricted lists of prohibited acts which may amount to crimes against humanity. For example, those Statutes do not expressly include forced disappearance, sexual violence, forced prostitution or forcible transfer of population.[512] However, the ICTY's jurisprudence has found that each of these crimes fall under 'other inhumane acts'. Other acts that have been defined as inhumane acts include mutilation, infliction of severe bodily harm, serious physical and mental injury, inhumane or degrading treatment falling short of the definition of torture, imposing inhumane condition in concentration camps, and forced nudity.[513]

507 Article 7(1)(k) of the ICC Elements of Crimes, 13.

508 *Prosecutor v Galić* (ICTY) Case No IT-98-29-T, Trial Judgment and Opinion (5 December 2003) para (152); *Prosecutor v Kayishema & Ruzindana* (n348), paras (149), (150)–(151), (154); *Prosecutor v Akayesu* (n346), para (585); *Prosecutor v Krnojelac* (n434), para (130).

509 *Prosecutor v Galić* (n508), para (153); *Prosecutor v Krnojelac* (n434), para (131).

510 *Prosecutor v Galić* (n508), para (154); *Prosecutor v Krnojelac* (n434), para (132).

511 Article 7(1)(k) of the ICC Elements of Crimes, 13.

512 *Prosecutor v Akayesu* (n346), para (688); *Prosecutor v Stakić* (n405), para (317); *Prosecutor v Kupreškić et al* (n353), para (566).

513 *Prosecutor v Akayesu* (n346), paras (685)–(697); *Prosecutor v Tadić* (n360), para (730); *Prosecutor v Blaškić* (n351), (3 March 2000) paras (239)–(240); *Prosecutor v Kvočka et al* (ICTY) Case No IT-98-30/1, Trial Judgment (2 November 2001) paras (206)–(209); *Prosecutor v Delalic et al (Čelebići trial)* (n443), paras (554)–(558); *Prosecutor v Kupreškić et al* (n353), para (566); *Prosecutor v Krstić* (n412), para (523); *Prosecutor v Simić et al* (n437), para (78).

Genocide

Introduction

Mass atrocities have occurred throughout time, but the use of the term 'genocide', legally speaking, is a fairly recent development. While the term has gained prevalence in the global media and politics, it is critical to note that the concept remains relatively nascent, having entered the international scene only in 1944. There is considerable debate over its definition and the implications of declaring an atrocity as genocide – a word that is supposed to 'connote a practice so horrid and so irreparable that the very utterance of the word would galvanise all who heard it'.[514] Instead, time has shown that creating a genocide label does not mean that governments and courts readily apply it; on the contrary. Inconsistent interpretations of the definition of genocide, and its controversial nature, have directly impinged upon the international community's ability to prosecute and punish the crime of genocide, an act that 'belongs at the apex of the pyramid' of criminality.[515]

Historical development

In 1944, Raphael Lemkin, a Polish lawyer, coined the term 'genocide', in *Axis Rule in Occupied Europe*, to describe the deliberate plan of the Nazis and their satellites to exterminate entire groups, mainly the Jews and the Gypsies, but also other ethnic groups, and to create a word that could not be associated with anything other than the highest of crimes. Lemkin fashioned the term by combining the ancient Greek word genos, meaning 'race, nation or tribe', with the Latin suffix *cide* originating from the term *caedere*, which means 'to kill'.[516] Lemkin defined genocide as:

> A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion and the economic existence of national groups and the destruction of personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[517]

Genocide is not, however, a phenomenon restricted to this century, but sadly, a recurrent feature of human history. Groups have regularly been decimated through the violent action of other groups. While the Holocaust of Jews and Gypsies perpetrated by the Nazis during the Second World War may be the most infamous and abominable example of genocide in the 20th century, other instances abound in modern history: the extermination of Tasmanian and Australian Aboriginals in the 19th century, the forced removal and elimination of American Indians in the United States, the German *Vernichtungsbefehl*, or extermination order, and subsequent annihilation of the Herero in Namibia in 1904, the Turkish extermination of the Armenians in 1915 and contemporary massacres of Rwandan Tutsi in 1994 and Bosnian Muslims in 1992–1995.[518]

514 Samantha Power, *A Problem from Hell: America and the Age of Genocide* (Basic Books, New York 2002) 43.
515 William A Schabas, *Genocide in International Law* (CUP, Cambridge 2000) 9.
516 Ibid 25; Jones and Powles (n295) 143.
517 Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Carnegie Endowment for International Peace, Washington 1944) 79.
518 Jones and Powles (n295) 143–144.

Despite the fact that the term originated from Lemkin's observation of the Holocaust, the term and concept of genocide was not utilised in the incrimination of the Nazis at the Nuremberg Tribunal.[519] The Nuremberg Charter did not include a crime of genocide within the jurisdiction of the Nuremberg Tribunal because the offence was created *ex post facto*.[520] Therefore, to incriminate the crimes of the Holocaust as genocide would be a violation of the *nullum crimen sine lege* principle, which establishes that 'no one shall be held guilty on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'.[521] Therefore, to prosecute and criminalise the Nazis, the Nuremberg Tribunal had to connect the acts committed to crimes already within the jurisdiction of the Tribunal.[522] Particularly, the Nuremberg Tribunal described some Nazi crimes against humanity as acts of genocide.[523]

Genocide was established as an internationally recognised specific crime on 11 December 1946 by the UN in General Assembly resolution 96(1). The resolution, however, failed to endorse the principle of universal jurisdiction over genocide which would allow its prosecution even by States with no direct link to the crime through either territory or nationality. On the other hand, the resolution succeeded in eliminating the limitation of the crime of genocide to situations of armed conflict. Genocide would therefore constitute a crime even if it were committed in time of peace. Interestingly, the definition of genocide in the resolution included political groups, which was later omitted in the 1948 Genocide Convention.

96(I). The Crime of Genocide

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

The punishment of the crime of genocide is a matter of international concern.

519 Cryer et al (n4) 166–167.
520 *Prosecutor v Kambanda* (n395) para (14).
521 International Covenant on Civil and Political Rights (16 Dec 1966) 999 UNTS 171.
522 Article 6(c) of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 Aug 1945) 82 UNTS 279 (Annex).
523 See the Judgment of 30 September and 1 October 1946. Jones and Powles (n295) 114.

The General Assembly, therefore,

Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable;

Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime;

Recommends that international cooperation be organised between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end;

Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the

General Assembly.

Fifty-fifth plenary meeting,

11 December 1946.

UN General Assembly resolution 96(I) mandated the UN to prepare a convention on genocide, and this process was completed two years later, in December 1948. The Sixth Committee of the UN General Assembly created the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 (hereinafter Genocide Convention), which came into force on 12 January 1951.[524] The definition of genocide, as stated in Article II of the Genocide Convention,[525] has become the standard definition.

Convention on the Prevention and Punishment of the Crime of Genocide (1948)

Article II

In the present Convention, 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 groups;

(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;

524 Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.
525 Ibid Article II.

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Article III

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.

The Genocide Convention endorsed Lemkin's pledge that it is important 'not to overlook the fact that genocide is a problem not only of war but also of peace'.[526] In Article I of the Genocide Convention, the contracting parties also agreed with Lemkin that genocide, 'whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.[527] This point underscores the fact that genocide can also occur outside the realm of armed conflicts.[528] The Genocide Convention therefore extends to mass murder and extermination of a civilian population by its own government, whether committed in time of war or peace.[529]

Convention on the Prevention and Punishment of the Crime of Genocide (1948)

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

However, due to the historical context surrounding the adoption of the Genocide Convention, and the rationale for its adoption, other instances of brutal mass crimes, including political purges in the USSR, China, Cambodia or Latin America, do not qualify as genocide, because political and economic groups are excluded from the ambit of the Genocide Convention, as is cultural genocide which refers to the destruction of the language and culture of a group.[530] The Genocide Convention therefore confined itself to the physical destruction of 'relatively stable groups' to which persons belong often by birth. However, the four classes of protected groups are not defined in the Genocide Convention, nor are criteria for their definition provided.[531]

526 Lemkin (n517) 93.
527 Article I of the Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.
528 Cryer et al (n4) 167.
529 Jones and Powles (n295) 144.
530 Ibid 145.
531 Cassese (n232) 130–131.

In 1951, the ICJ announced the prohibitions of the Convention as part of customary international law.[532] In its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ established that the principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation. It was intended that the Convention would be universal in scope.[533] Customary rules on genocide form part of *jus cogens* – a body of peremptory norms from which no derogation is permitted.[534]

> *Article VI of the Genocide Convention*[535]
>
> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

In addition to domestic prosecution by the national courts of the State in the territory in which the act of genocide was committed, Article VI of the Genocide Convention contemplates the creation of an international court which could try genocide. This first occurred in the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994, respectively.[536] The first international conviction for genocide did not occur until 2 September 1998, when Jean-Paul Akayesu was convicted of genocide by the ICTR.[537] Other important judgments include those in the *Kayishema & Ruzindana* cases at the ICTR and the *Krstić* and *Jelisić* cases at the ICTY.[538]

Relation to crimes against humanity

The definition of crimes against humanity bears a strong resemblance to the definition of genocide. Both categories of crimes are closely related to each other and have the same origin. Genocide was first envisaged as a sub-category of crimes aganst humanity. In this context, genocide can be considered as the most aggravated form of crime against humanity. Indeed large-scale massacres of ethnic and religious groups were the first to be criminalised as a subclass of the category of crimes against humanity. However, after the adoption of the Genocide Convention of 1948, genocide became a separate 'category of crimes *per se*, with its own specific *actus reus* and *mens rea*'.[539]

532 Cryer et al (n4) 167.
533 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15.
534 Antonio Cassese, 'Genocide', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 332, 332–333.
535 Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.
536 Cryer et al (n4) 167.
537 *Prosecutor v Akayesu* (n346).
538 *Prosecutor v Kayishema & Ruzindana* (n348); *Prosecutor v Krstić* (n412); *Prosecutor v Jelisić* (n485).
539 Cassese (n232) 144.

With regard to the physical elements of genocide and crimes against humanity, the two crimes form overlapping circles. For example, killing the members of an ethnic group or religious group or causing serious bodily or mental harm to members of a racial or religious group may fall under both categories. However, crimes against humanity have a broader scope because they encompass acts that do not fall within the definition of genocide. For example, imprisonment and torture, as such, do not come within the purview of genocide unless they amount to acts inflicting on members of a group conditions of life calculated to bring about the physical destruction of the group. On the other hand, at least according to some commentators, there might be acts of genocide that do not fall within the crimes against humanity, such as killing detained military personnel belonging to a particular religious or racial group on the basis of their membership in that group.[540]

The most distinguishing factor between the two categories of crimes is the mental element, namely the intent. In the case of crimes against humanity, the perpetrator must have the intent to commit the underlying offence plus knowledge of the widespread or systematic practice constituting the general context of the offence. For genocide, the perpetrator must have committed the acts with the specific intent (*dolus specialis*) to destroy, in whole or in part, a national, ethnical, racial or religious group, in addition to possessing the intent to commit the underlying offence. The intent to commit the underlying offence can be shared by both categories in the case of the same underlying offence. For example, in the case of a murder, the intent to kill is required by both categories. However, genocide additionally requires the intent to destroy a group.[541] Genocide and persecution as a crime against humanity both have the intent of seriously discriminating against members of a particular group. However, genocide requires a particular intent to destroy a group, in whole or in part.[542]

Another difference between the two crimes is that the crime of genocide is not based on any requirement of scale.[543] On the other hand, a crime against humanity is an act 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[544] The required element for crimes against humanity therefore includes 'an objectively existing situation of scale and gravity in which civilians are at risk. In contrast, the gravity of genocide is primarily marked not by an objective circumstantial element but by the subjective mens rea, the intent to destroy a national, ethnic, racial or religious group as such'.[545] As noted above, this marks a departure in the notion of genocide from its origins as an aggravated crime against humanity.

Genocide in the international criminal courts and tribunals

The provisions of the ICTY and ICTR Statutes dealing with genocide are drawn verbatim from Articles II and III of the Genocide Convention.[546]

540 Ibid 145.
541 Ibid 45.
542 Ibid *Prosecutor v Jelisić* (n485), para (79).
543 Cryer et al (n4) 168.
544 Article 7 of the ICC Statute.
545 Cryer et al (n4) 168.
546 Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.

Article 4 of the ICTY Statute/Article 2 of the ICTR Statute

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.

The ICC Statute reproduces Article II of the Genocide Convention in its Article 6. However, the drafters of the ICC Statute decided not to include the terms of Article III of the Genocide Convention, which sets out five different forms of punishable, genocidal acts (see Chapter 4). Instead, the forms of participation which attract individual criminal responsibility for genocide are the same as those set out for all other offences under the ICC Statute and enumerated in Article 25 of its Statute. It should, however, be noted that Article 25 of the ICC Statute omits conspiracy to commit genocide as an offence.

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 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.

The ICC Statute also refers to genocide in its Article 33, which relates to superior orders. Article 33(2) states that orders to commit genocide are 'manifestly unlawful'. Accordingly superior orders can never be a defence to this crime.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

   (b) The person did not know that the order was unlawful; and

   (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

The ECCC also included the Genocide Convention definition of genocide in its applicable law.[547]

547 Article 9 of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (6 June 2003) 2329 UNTS 117 (Annex).

Law on the Establishment of the Extraordinary Chambers

Article 4

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

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

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of genocide.

Yet, for punishable acts, the ECCC did not include 'direct and public incitement to commit genocide' in Article III(c) and 'complicity in genocide' in Article III(e) of the Genocide Convention in its applicable law, and changed the wording of Article III(a) of the Genocide Convention to say, 'participation in acts of genocide', instead of referring simply to 'genocide'.[548]

The Serious Crimes Panels in East Timor were also given jurisdiction over genocide. Regulation No 2000/15 of the UNTAET on the establishment of panels with exclusive jurisdiction over serious criminal offences reproduced Article II of the Genocide Convention in its Section 4. The Regulation follows the ICC Statute in that instead of reproducing Article III of the Genocide Conventions for the determination of the forms of participation, it reproduces Article 25 of the ICC Statute in its Section 14, International Criminal Responsibility.[549]

Even though the definition of genocide, as set down in the Genocide Convention, has subsequently been reproduced in essentially the same form in the Statutes of the international courts and tribunals, its interpretation is still highly contested and has been the subject of much debate. The emergence of hybrid tribunals and their acceptance of the Genocide Convention definition, such

548 Article 4 of the Law on the Establishment of the ECCC.
549 Section 4 of the UNTAET Regulation 2000/15, UNTAET/REG/2000/15 (6 June 2000).

as the ECCC and the Serious Crimes Panels in East Timor, have further integrated the term into international and domestic law. But the inclusion of such a term does not mandate the international community or individual States to respond to it. That is where the question of State sovereignty and global responsibilities arises, where international and domestic law either coalesces or diverges.

International v domestic law

Lemkin claimed that the occurrence of genocide would lead to international disturbances, and therefore urged for its repression to be based 'not only on international and constitutional law but also on the criminal law of the various countries'.[550] Article V of the Genocide Convention, requires that contracting parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons found guilty of genocide or any other acts enumerated in Article III.[551]

Although stated quite clearly, the actual incorporation of the Genocide Convention provisions into domestic law is not a simple task. States do have the discretion of using their own interpretations of the definition domestically, but this also means that various definitions of genocide can exist between separate States. States are entitled to use broader definitions of genocide such as adopting a wider formulation of the protected groups in their domestic laws. However, States are not mandated to accept the individual definitions established by other States.[552] On the other hand, many States have incorporated, either verbatim or more generally, the provisions of the Genocide Convention into their domestic law.[553]

There have been several domestic trials for genocide. The most famous case after the Second World War was the trial of Adolf Eichmann in Israel in 1961 for 'crimes against the Jewish people'. Under Israeli law this offence incorporated all the elements of the definition of genocide in Article II of the Genocide Convention.[554] After the establishment of the ICTY and the ICTR, some national courts began to institute criminal proceedings against persons accused of serious crimes in the former Yugoslavia. For example, German courts have pronounced on some cases of genocide.[555] Another domestic trial for genocide is the case of *Special Prosecutor v Col Mengistu Hailamariam et al* brought before the Ethiopian Federal High Court.[556] Domestic genocide, crimes against humanity, and war crimes trials are further discussed in Chapter 5.

The elements of genocide

The crime of genocide is comprised of material elements (*actus reus*) and mental elements (*mens rea*) which can be divided into:

550 Lemkin (n17) 93.
551 Article V of the Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 227.
552 Cryer et al (n4) 170.
553 Schabas (n515) 351.
554 Schabas (n280) 93; Cassese (n232) 131.
555 Cassese (n232) 132; Kai Ambos and Steffen Wirth, 'Genocide and War Crimes in the former Yugoslavia Before German Criminal Courts', in H Fischer, C Kress and S R Lüder (eds), *International and National Prosecution of Crimes Under International Law* (Berlin Verlag Arno Spitz, Berlin 2001) 783–797.
556 Tiba Firew Kebede, 'The Mengistu, Genocide Trial in Ethiopia', (2007) 5 J Int'l Crim Justice 513, 514.

- The common physical element: victims must belong to a particular national, ethnical, racial or religious group;
- An additional contextual element with regard to the ICC: 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 the group's destruction;
- The common mental element: specific intent of the crime of genocide. The perpetrator intended to destroy, in whole or in part, the national, ethnical, racial or religious group, as such;
- The physical (*actus reus*) and mental (*mens rea*) elements required for each specific or so-called underlying offence.

NATIONAL, ETHNICAL, RACIAL OR RELIGIOUS GROUPS

Not all groups are protected by the Genocide Convention. The list of protected persons is limited to 'national, ethnical, racial and religious' groups and that list is exhaustive. During negotiations on the Genocide Convention, there was much debate over the specificity of this list and many argued that other groups should be included as well, such as social and political groups. Subsequently, the arguably narrow definition of the protected groups has been criticised and various definitions have been proposed that would widen the range of the protected groups.[557] For example, during the negotiations at the ICC, some delegates proposed including social and political groups in order to fill any gap in the definition. However, once again, all attempts to expand the scope of protected groups were met with strong resistance and the definition remained the same in the ICC Statute.[558]

In the case of Cambodia and the mass atrocities committed by Pol Pot and the Khmer Rouge regime from 1975 – 1979, it has been argued that these acts do not amount to the crime of genocide because the victims do not fall within the category of either national, ethnical, racial or religious groups.[559] On the other hand, there is the argument that the Khmer national group was persecuted, which then qualifies the victims as victims of genocide under the General Assembly resolution 96(1) definition.[560] Another argument is that the 'Khmer Rouge committed genocide against substantial "parts" of Cambodia's majority Khmer Buddhist community and of ethnic minorities such as the Vietnamese, Chinese, and Cham Muslims'.[561] The ECCC have jurisdiction over genocide.[562]

While the list of groups remains confined to national, ethnical, racial or religious classifications, there is still uncertainty as to how group membership is determined and who should make such determinations. There is no internationally recognised definition of any of the terms used by the Genocide Convention. Even the ICC Elements of Crimes make no attempt to clarify the meaning of these terms. The most developed case law on the question of groups has come from the ICTR, confronted from the outset with the problem of how and whether to classify the Tutsi as a national, ethnical, racial or religious group. In addition, ICTY case-law has contributed to clarifying the definition of the terms in question.

557 Cryer et al (n4) 166–167.
558 Payam Akhavan, 'The Crime of Genocide in ICTR Jurisprudence', (2005) 3 J Intl Crim Justice 989, 999.
559 Ben Kiernan, 'The Cambodian Genocide and Imperial Culture, in 90 Years of Denial', Aztag Daily 20–21 (April 2005).
560 Schabas (n515) 118.
561 Ben Kiernan, 'The Cambodian Genocide and Imperial Culture, in 90 Years of Denial' (n559).
562 Article 4 of the Law on the Establishment of the ECCC.

In *Akayesu* the Trial Chamber attempted an objective examination of the existence of an ethnic group. The Trial Chamber had to conclude that, strictly speaking, the Tutsi did not fall within any of the groups protected by the definition of genocide. The Chamber therefore adopted an expansive interpretation of the object of the Genocide Convention in order to find that genocide had been committed in Rwanda. The Chamber found that 'other relatively stable groups besides the four specified categories' could also fall within the scope of the crime of genocide without doing violence to the spirit of the Genocide Convention.[563]

> 511. On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

> 516. Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.

Conversely, in *Krstić*, the Trial Chamber recognised that the list is exhaustive but that the four groups were not given distinct and different meanings in the Genocide Convention:[564]

> 555. National, ethnical, racial or religious groups are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous. European instruments on human rights use the term 'national minorities', while universal instruments more commonly make reference to 'ethnic, religious or linguistic minorities'; the two expressions appear to embrace the same goals. In a study conducted for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, F Capotorti commented that 'the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided, in 1950, to replace the word "racial" by the word "ethnic" in all references to minority groups described by their ethnic origin'. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. The preparatory work on the Genocide Convention also reflects that the term 'ethnical' was added at a later stage in order to better define the type of groups protected by the Convention and ensure that the term 'national' would not be understood as encompassing purely political groups.

563 *Prosecutor v Akayesu* (n346) paras (511), (516) (footnote omitted); Jones and Powles (n295) 167.
564 *Prosecutor v Krstić* (n412) paras (555)–(556) (footnotes omitted). See also Schabas (n515) 109–114.

> 556. The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the second word war, as 'national minorities', rather than to refer to several distinct prototypes of human groups. To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention.

The Trial Chamber in *Akayesu* held that the Tutsi came within the definition of a group protected by the Genocide Convention because they were classified as an 'ethnic' group in a 'stable way'. As a supplementary basis for the finding that the Tutsi comprised a stable and permanent group, the Akayesu Trial Chamber had to adopt a partially subjective approach, which relied on self-conceptions of ethnicity:[565]

> 702. In the light of the facts brought to its attention during the trial, the Chamber is of the opinion that, in Rwanda in 1994, the Tutsi constituted a group referred to as 'ethnic' in official classifications. Thus, the identity cards at the time included a reference to '*ubwoko*' in Kinyarwanda or '*ethnie*' (ethnic group) in French which, depending on the case, referred to the designation Hutu or Tutsi, for example. The Chamber further noted that all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity. Accordingly, the Chamber finds that, in any case, at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all.

However, in the *Kayishema & Ruzindana* case, the Trial Chamber took a more flexible approach, at least as concerns ethnic groups, taking account of subjective elements such as the perception of the members of the group itself, or of others, including the perpetrators of the crimes:

> A National, Ethnical, Racial or Religious Group
>
> 98. The intent must exist to 'destroy a national, ethnical, racial or religious group, as such'. Thus, the acts must be directed towards a specific group on these discriminatory grounds. An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs. [566]

Faced with the choice between a 'stable groups' test and the more 'subjective' approach, the *Kayishema & Ruzindana* Trial Chamber equivocated, although a closer analysis shows its preference for the latter approach. In the *Rutaganda* Trial Judgment, the Chamber considered that, 'for the purpose of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept'. Nevertheless, it accepted that a subjective test was not sufficient on its own, as 'the Convention was presumably intended to cover relatively stable and permanent groups'.[567] Due to the absence of generally accepted definitions of these groups, each of them has to be assessed 'in the light of particular political social and cultural context'.[568]

565 *Prosecutor v Akayesu* (n346) para (702); Jones and Powles (n295) 168.
566 *Prosecutor v Kayishema & Ruzindana* (n348) para (98).
567 *Prosecutor v Rutaganda* (ICTR) Case No 96-3-T, Trial Judgment and Sentence (6 December 1999) paras (55)–(57).
568 Ibid; See also *Prosecutor v Jelisić* (n485) para (80); Jones and Powles (n295) 168.

The subjective approach has subsequently been endorsed by the case-law of both the ICTR and ICTY. For example, in the *Jelisić* Trial Judgement, the Chamber applied a subjective test – focusing primarily on the perceptions of the perpetrators – to determine whether the victims of the accused's acts 'belonged to a group' protected by the Genocide Convention:[569]

> 69. Article 4 of the Statute protects victims belonging to a national, ethnical, racial or religious group and excludes members of political groups. The preparatory work of the Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting 'stable' groups objectively defined and to which individuals belong regardless of their own desires.
>
> 70. Although the objective determination of a religious group still remains possible, 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. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators. This position corresponds to that adopted by the Trial Chamber in its Review of the Indictment Pursuant to Article 61 filed in the *Nikolić* case.

Similarly, while recognising the objective and subjective aspects of the question, the *Bagilishema* Trial Chamber concluded that the perception of the perpetrators should be determinative of the group membership. The Chamber stated that 'perpetrators of genocide may characterise the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purpose of genocide'.[570]

However, the identification of a group cannot be solely subjective but the group must have some form of objective existence in the first place otherwise the Genocide Convention could be used to protect entirely fictitious national, ethnic, racial or religious groups.[571] Consequently, in some cases, the tribunals have adopted an approach that combines both the subjective and objective approach. The combined approach was adopted, for example, by the *Semanza* Trial Chamber which held that the question of whether a group is a protected one should be 'assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators'.[572]

569 Jones and Powles (n295) 169. *Prosecutor v Jelisić* (n485) paras (69)–(70).
570 *Prosecutor v Bagilishema* (ICTR) Case No ICTR-95-1A-T, Trial Judgment (7 June 2001) para (65).
571 Cryer et al (n4) 173.
572 *Prosecutor v Semanza* (ICTR) Case No 97-20-T, Trial Judgment and Sentence (15 May 2003) para (317); *Prosecutor v Rutaganda* (n567) paras (55)–(58); *Prosecutor v Brđanin* (n434) paras (683)–(684).

Furthermore, the Trial Chamber in *Jelisić* made a distinction between the stigmatisation of a group by virtue of 'positive' or 'negative' criteria. Applying 'positive' criteria, the authors of the crime distinguish the group by virtue of what they consider to be the group's particular national, racial, religious or ethnical characteristics. Applying 'negative' criteria, the perpetrators identify members of the group as not belonging to the group to which the authors of the crime believe they, the authors, belong, for example the group of 'non-Serbs'. It is now well-established that a group cannot be defined purely by 'negative' criteria, ie by identifying persons not sharing the group characteristics of the perpetrators.[573] The reason is that the offence requires intent to destroy a collection of people who have a particular group identity.

CONTEXTUAL ELEMENT (ICC)

A question that has not been clearly resolved in the jurisprudence of the tribunals is whether it could amount to genocide when an isolated individual acts with the intent to destroy a group in the absence of any wider plan or context. Although the definition of genocide 'contains no formal requirement that the punishable acts be committed as part of a widespread or systematic attack, or as part of a general or organised plan to destroy the group', it seems, however, that this would 'be an implicit characteristic of the crime of genocide'.[574]

However, in *Jelisić*, the Trial Chamber stated that killings committed by a single perpetrator could amount to genocide:

> Such a case is theoretically possible. The murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused harboured the plan to exterminate an entire group without this intent having been supported by any organisation in which other individuals participated. In this respect, the preparatory work of the Convention of 1948 brings out that premeditation was not selected as a legal ingredient of the crime of genocide, after having been mentioned by the ad hoc committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text and that such precision would only make the burden of proof even greater. It ensues from this omission that the drafters of the Convention did not deem the existence of an organisation or a system serving a genocidal objective as a legal ingredient of the crime. In so doing, they did not discount the possibility of a lone individual seeking to destroy a group as such.[575]

This view has been broadly criticised. The critics of this view argue that 'to include in the scope of genocide an isolated crime, committed in the absence of any attack or genocidal context, even if legally possible, risks overly expanding the concept of genocide, and effacing the profound stigma and mobilising power of the term'.[576] The Trial Chamber in *Krstić* confirmed that it is assumed that several protagonists were involved in the crime of genocide:

573 *Prosecutor v Stakić* (ICTR) Case No IT-97-24-T, Trial Judgment (31 July 2003) para (512); *Prosecutor v Stakić* (n405) para (19).
574 Schabas (n280) 94–95.
575 *Prosecutor v Jelisić* (ICTY) Case No IT-95-10-5, Trial Judgment (14 December 1999) para (100) (footnotes omitted).
576 Cryer et al (n4) 168.

> As a preliminary, the Chamber emphasises the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators. It is then necessary to establish whether the accused being prosecuted for genocide shared the intention that a genocide be carried out. [577]

This view was also shared by the ICTR Trial Chamber in *Kayishema & Ruzindana* which stated that

> [i]t is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation. Morris and Scharf note that 'it is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime'. They suggested that 'it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy'. The Chamber concurs with this view. [578]

In *Jelisić*, the ICTY Appeals Chamber confirmed that 'the existence of a plan or policy is not a legal ingredient of the crime'. However, the Appeals Chamber held that 'in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime'.[579]

The collective nature of genocide can be examined in the context of the special intent requirement. According to this view, there must be an organised and widespread plan to exterminate a group and the perpetrator must act with knowledge that the commission of the individual act would, or would be likely to, further the implementation of the plan. In other words, the special intent requirement should be satisfied if the accused participated in the implementation of a plan to exterminate a group by committing any of the underlying offences with intent and the knowledge that the commission of those acts would further the implementation of the genocidal plan.[580]

The critical element of the special intent in the crime of genocide is typically proven by inference from the material acts perpetrated. Therefore, it will be easier to infer a genocidal intent where there has been a greater destruction of members of a group. If there are only a few victims, the inference may not be so clear. In the latter situation, the prosecution may not be able to rely on the quantity of victims as a proof of genocidal intent and may instead have to rely on other evidence.[581]

Alternatively, this issue can be covered by adding another element to *actus reus*, referred to as 'the contextual element'. The contextual element was adopted by the ICC Elements of Crimes and it requires that the conduct for which the defendant is on trial takes place in the context of 'a manifest pattern of similar conduct' or is of itself capable of destroying the group or part of it.[582]

577 *Prosecutor v Krstić* (n412) para (549).
578 *Prosecutor v Kayishema & Ruzindana* (n348) para (94) (footnote omitted).
579 *Prosecutor v Jelisić* (ICTY) Case No IT-95-10-A, Appeal Judgment (5 July 2001) para (48); *Prosecutor v Krstić* (ICTY), Case No IT-98-33-A, Appeal Judgment (19 April 2004), para (225).
580 John R W D Jones, 'Whose Intent is it Anyway?', in Lal Chand Vohrah et al (eds), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (Kluwer Law International, The Hague 2003) 469; See further Jones and Powles (n295) 156–162.
581 Schabas (n515) 234.
582 Cryer et al (n4) 169.

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.

In the introduction to Article 6, Genocide, the ICC Elements of Crimes provide the following explanation of the terms appearing in the 'contextual element':[583]

> 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 recognising 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.

The first part of the element therefore envisages a situation where an individual accused is acting within a broader context in which others are also committing acts of genocide against the targeted group. The second branch contemplates a situation where the conduct could itself effect such destruction. This alternative captures situations where a group is particularly small or where the accused has access to powerful means of destruction, such as nuclear or biological weapons, which could be used with genocidal intent. It can also be relevant for the prosecution of ringleaders and instigators.[584]

SPECIFIC INTENT OF GENOCIDE (DOLUS SPECIALIS)

Genocide is considered to be the 'crime of crimes'[585] because of the mental (*mens rea*) element of special intent, *dolus specialis* or aggravated criminal intention.[586] The specific or underlying offences in Article II of the Genocide Convention do not constitute international crimes alone, but require the specific intent, that is 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. This is what differentiates and elevates genocide in relation to other international crimes. To prove the prerequisite of specific intent, it is necessary to show that the perpetrator clearly intended the result, indicating a psychological connection between the physical outcome and the perpetrator's mental state.[587]

583 Article 6 of the ICC Elements of Crimes (Introduction), 2.
584 Cryer et al (n231) 177–178.
585 *Prosecutor v Kambanda* (n395) para (16).
586 Cassese (n232) 137.
587 Payam Akhavan, 'The Crime of Genocide in ICTR Jurisprudence' (n558) 989, 992.

In *Akayesu*, the first international judgment involving charges for genocide, the ICTR explained the concept as follows:[588]

> 518. Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterised by a psychological relationship between the physical result and the mental state of the perpetrator.
>
> …
>
> 521. In concrete terms, for any of the acts charged under Article 2 (2) of the [ICTR] Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.

Specific intent v normal intent

First, it is critical to note the difference between 'normal' intent (*dolus generalis*) and specific intent (*dolus specialis*). Under normal intent, which is laid out in Article 30 of the ICC Statute, a person can be held criminally responsible within the jurisdiction of the Court if that person means to engage in the prohibited conduct. In relation to a consequence, the perpetrator must mean to cause the consequence or is aware that that it will occur in the ordinary course of events.[589] Normal intent is less rigid than specific intent because it only requires an awareness of the conduct and the general course of events – not the clear intention to commit genocide. For that reason the intent requirement of Article 30 will therefore not be applicable in the ICC to genocide cases, but it will apply to some other forms of liability in relation to genocide.[590]

It is always open to an accused to claim that he did not possess the requisite specific intent for the alleged crimes. For example, in *Krstić* case before the ICTY, the defence argued that 'the killings in Srebrenica were not to destroy the group as such, but to remove a military threat and this was evidenced by the fact that men of military age had been targeted'.[591] Despite this argument, the Trial Chamber still found the events of Srebrenica in July of 1995 to amount to genocide, holding that 'the Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group'. It further held that:

> Furthermore, the Bosnian Serb forces had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society, an impact the Chamber has previously described in detail. The Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would

588 *Prosecutor v Akayesu* (n346) paras (518), (521) (footnotes omitted).
589 Article 30(2) of the ICC Statute.
590 Cryer et al (n4) 182.
591 Ibid.

> inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. Intent by the Bosnian Serb forces to target the Bosnian Muslims of Srebrenica as a group is further evidenced by their destroying homes of Bosnian Muslims in Srebrenica and Potocari and the principal mosque in Srebrenica soon after the attack.[592]

Consequently, the Trial Chamber found that, in these circumstances, the massacres of the men were carried out with the intent to destroy the Bosnian Muslims of Srebrenica. Finding that the Bosnian Muslims of Srebrenica were a 'substantial part' of the Bosnian Muslim group, the Trial Chamber concluded that the killing of the military aged men of Srebrenica constituted genocide within the meaning of Article 4 of the ICTY Statute.[593]

Prosecutor v Radislav Krstić[594]

ICTY, Case No IT-98-33

Radislav Krstić (born 15 February 1948) was Chief of Staff, and later Commander, of the Drina Corps of the Bosnian Serb Army ('VRS') in July 1995, when Bosnian Serb forces took over the Bosnian Muslim enclave of Srebrenica in Bosnia and Herzegovina. He was charged with crimes committed in connection with the takeover of the enclave, including the execution of approximately 7,000 men and boys.

In 1993, the UN Security Council established Srebrenica as a so-called 'safe area', which Serb forces would be prohibited from attacking. Following the takeover of the town by Bosnian Serb forces, thousands of civilians in Srebrenica fled to the UN compound located at Potočari village seeking protection within the compound. By the evening of 11 July 1995, approximately 20,000 to 25,000 Bosnian Muslim refugees were gathered in Potočari. At the same time, a group of mostly male residents of Srebrenica (between 10,000 and 15,000 men) formed a column and attempted to breakthrough towards government-held territory in Tuzla. On 12 July 1995, Bosnian Serb forces attacked the column, capturing a large number of men, many of whom were transferred to Bratunac and detained. Only the head of the column eventually managed to break through to government-held territory. On 12 and 13 July 1995, Bosnian Serb forces transferred the 25,000 Bosnian Muslim women, children, and the elderly out of Potočari by sending them by bus to government-held territory. The men in Potočari who had not joined the column were separated from the group and transported to various detention sites in the neighbouring municipality of Bratunac. Between 13 and 18 July 1995 Bosnian Serb forces carried out a series of mass executions of the Bosnian Muslim male detainees, killing approximately 7,000 of them.

592 *Prosecutor v Krstić* (n412) para (595).
593 Ibid paras (595)–(598), (634).
594 *Prosecutor v Krstić* (n412); *Prosecutor v Krstić* (n579)

Krstić was charged on the basis of individual criminal responsibility under Article 7(1) of the ICTY Statute (planning, instigating, ordering, committing or aiding and abetting) as well as superior criminal responsibility under Article 7(3) of the ICTY Statute.[595]

- genocide and complicity to commit genocide;
- extermination; murder; persecutions on political, racial and religious grounds; deportation; and other inhumane acts (forcible transfer) as crimes against humanity;
- murder as a violation of the laws and customs of war.

The Trial Chamber found that Krstić participated in two separate, but related, joint criminal enterprises (see Chapter 4):

(i) initial joint criminal enterprise implemented at Potočari on 12 and 13 July 1995, the objective of which was to permanently remove the Bosnian Muslim population from Srebrenica; and

(ii) joint criminal enterprise with the intent to commit the crime of forcible transfer of the Bosnian Muslim civilians out of Srebrenica.[596]

Krstić was found to be a key participant in the forcible transfer, working in close cooperation with other military officials of the VRS Main Staff and the Drina Corps.[597] Although the Trial Chamber was not able to conclude that the murders, rapes, beatings and abuses committed against the refuges at Potočari formed part of the objective of the joint criminal enterprise, they were a natural and foreseeable consequence of the ethnic cleansing campaign. The Trial Chamber held that Krstić must have been aware that an outbreak of these crimes would be inevitable under the circumstances. These crimes therefore met the requirements of the third category of joint criminal enterprise liability. Krstić was therefore found liable of inhumane acts (forcible transfer) and persecution (murder, cruel and inhumane treatment, terrorisation, destruction of personal property and forcible transfer) as crimes against humanity.[598]

As of 13 July 1995, the original objective of joint criminal enterprise to ethnically cleanse the area of Srebrenica evolved to include the plan of killing all of the military-aged Bosnian Muslim men of Srebrenica. The Trial Chamber concluded that the campaign to kill all the military aged men was conducted to guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica and therefore constituted genocide. Upon Krstić's appointment by General Mladić as Commander of the Drina Corps on the evening of 13 July 1995, the entire Corps recognised him as Commander, even though his position was not formalised until 15 July 1995.[599] The Trial Chamber found that Krstić participated in the joint criminal enterprise to kill the Bosnian Muslim military-aged men from Srebrenica. Although this genocidal plan was found to have originated with General Mladić and other VRS officers,

595 *Prosecutor v Krstić* (ICTY) Case No IT-98-33-PT, Amended Indictment (27 October 1999).
596 *Prosecutor v Krstić* (n412) paras (614)–(615).
597 Ibid para (612).
598 Ibid paras (617)–(618).
599 Ibid paras (330)–(331), (461).

the Trial Chamber concluded that, as of the point at which Krstić learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men.[600]

In his role as a Chief-of-Staff and then as a Commander of the Drina Corps, the Trial Chamber found that Krstić must have known about the conduct of the VRS military operation named 'Krivaja 95' which aimed at reducing the 'safe area' of Srebrenica to its urban core and was a step towards the larger VRS goal of plunging the Bosnian Muslim population into humanitarian crisis and ultimately, eliminating the enclave.[601] Furthermore, Krstić ordered the procurement of buses for the forcible transfer of the Bosnian Muslim individuals from Potočari.[602] Although there was no evidence that Krstić was personally present at any of the execution sites, the Trial Chamber found that Krstić must have known of the plan to execute all the military aged Bosnian men of Srebrenica captured in the area of the former enclave and of the involvement of Drina Corps subordinate units in the mass executions.[603] As of 16 July 1995, Krstić was informed of matters relating to the executions through the chain of command and was supervising and monitoring the activities of his subordinate officers who were participating in the executions.[604] Although he was aware that men under his command had participated in the executions of Bosnian Muslim men between 14 and 19 July 1995, Krstić failed to punish any of them.[605]

The Trial Chamber concluded that Krstić was responsible for killing and causing serious bodily and mental harm as a co-perpetrator to commit genocide. While the objective of the joint criminal enterprise in which Krstić participated was the actual killing of the military aged Bosnian Muslim men of Srebrenica, the terrible physical and mental suffering of the few survivors was a natural and foreseeable consequence of the enterprise. Krstić must have been aware of this possibility and he therefore incurred responsibility for these crimes as well.[606] The Trial Chamber held that since Krstić was an essential participant in the genocidal killings he should therefore be considered a principal perpetrator of genocide under Article 7(1) and 4(3)(a) of the ICTY Statute.[607] The Trial Chamber also found Krstić responsible for the crimes of extermination, murder and persecution as crimes against humanity, and murder as a violation of the laws or customs of war.[608] Although the Trial Chamber found Krstić responsible for killings on the basis of superior responsibility, it decided not to enter a conviction under Article 7(3) of the ICTY Statute because in its view Krstić's responsibility for the participation of his troops in the killings was sufficiently expressed in a finding of guilt under Article 7(1).[609]

600 Ibid paras (631)–(633).
601 Ibid paras (121), (429).
602 Ibid paras (347), (464).
603 Ibid paras (471)–(473).
604 Ibid paras (404), (475).
605 Ibid paras (418), (477).
606 Ibid paras (635)–(636).
607 Ibid paras (644)–(645).
608 Ibid para (653).
609 Ibid paras (647)–(652).

Applying the rules of cumulative convictions, the Trial Chamber entered convictions for the crimes committed in Potočari of murder, persecution through murder, terrorising the civilian population, destruction of personal property and cruel and inhuman treatment. As regards the killings of Bosnian Muslim men, the Trial Chamber entered convictions for murder and genocide. On the basis of these convictions, the, Trial Chamber sentenced Krstić to 46 years' imprisonment.[610]

The Prosecution and the Defence appealed against the judgment of the Trial Chamber. The Appeals Chamber overturned a number of factual findings by the Trial Chamber relating to the use of Drina Corps units in the executions. The Appeals Chamber also overturned the Trial Chamber's conclusion that Krstić possessed the requisite specific intent to commit genocide.[611] The Appeals Chamber found that the evidence could only establish that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings.[612] The Appeals Chamber held that Krstić was not guilty of genocide as a principal co-perpetrator in the joint criminal enterprise but that he was responsible as an aider and abettor to genocide.[613] As regards cumulative convictions, the Appeals Chamber found that extermination and persecution were not impermissibly cumulative with genocide.[614] In relation to the executions of Bosnian Muslim men, the Appeals Chamber therefore found Krstić responsible as an aider and abettor of the crimes of genocide, murder, extermination and persecution.[615] The Appeals Chamber, however, confirmed Krstić's conviction as a co-perpetrator of murder and persecution in relation to the Potočari crimes.

The Appeals Chamber reduced Krstić's sentence to 35 years' imprisonment.[616]

Proof of specific intent

Since explicit manifestations of genocidal intent are often unavailable, the tribunals have inferred special intent from circumstantial evidence including the actions and words of the perpetrators.[617] In the *Karadžić & Mladić* Rule 61 Decision, the Trial Chamber made the following observations:[618]

> The intent which is peculiar to the crime of genocide need not be clearly expressed. . . the intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also 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.

610 Ibid paras (677), (686)–(688), (727).
611 *Prosecutor v Krstić* (n579) paras (64)–(133).
612 Ibid paras (134)–(135).
613 Ibid paras (135)–(144).
614 Ibid paras (219)–(229).
615 Ibid para (144).
616 Ibid at 87 (disposition).
617 Cryer et al (n4) 183; *Prosecutor v Gacumbitsi* (ICTR) Case No ICTR-2001-64-A, Appeal Judgment (7 July 2006) paras (40)–(41).
618 *Prosecutor v Karadžić & Mladić* (ICTY) Case No IT-95-5-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence (11 July 1996) para (94).

Therefore, in the absence of direct explicit evidence, the special intent may be inferred from the surrounding circumstances which may include the general context in which the crimes occur, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.[619]

Other culpable acts directed at the targeted group from which intent can be inferred have included mass forcible transfer or sexual assault of members of the group. Additional factors that may be relevant in inferring intent include the general political doctrine that gave rise to the acts, the use of derogatory language toward the members of the targeted group and the weapons employed.[620]

Does specific intent always need to be proved?

In prosecutions for genocide, the special intent requirement is rendered even more problematic when the charge is brought on the basis of command or superior responsibility. According to this mode of liability, a commander may be held responsible for a crime committed by his subordinates if he knew or had reason to know that his subordinates were about to commit the crime or were in the course of commiting it or had done so and the commander failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[621] Under command or superior responsibility, the commander may be criminally liable not only when he knew but also when he 'ought to have known' of the crimes.[622]

Since the crime of genocide requires the prosecution to establish specific intent (*dolus specialis*) it is questionable whether there is any scope for the application of the principle of superior or command responsibility. The ICTY Appels Chamber has held that superior criminal liability is a form of criminal liability that does not require proof of intent to commit a crime on the part of a superior before criminal liability can attach.[623] It is therefore necessary to distinguish between the *mens rea* required for the crime perpetrated by the subordinates and that required for the superior. In order to be held responsible for genocide on the basis of superior responsibility, it must be proven that the superior knew or had reason to know that his subordinates were about to commit or had committed genocide and that the subordinates possessed the requisite specific intent.[624]

The ICTY Appeals Chamber held that in addition to command responsibility, aiding and abetting and the 'third category' of joint criminal enterprise also fall within the forms of criminal liability which do not require proof of the accused's intent to commit a crime.[625] Accordingly, an accused may be held criminally responsible as an aider and abettor of the crime of genocide where the accused is aware of the criminal act, and that the criminal act was committed with genocidal intent on the part of the physical perpetrator, and that with that knowledge the accused made a substantial contribution to the commission of that crime by the principal perpetrator. Therefore, in order to be convicted for aiding and abetting genocide it need not be proven that the accused

619 *Prosecutor v Jelisić* (n579), para (47); *Prosecutor v Rutaganda* (ICTR) Case No ICTR-96-3-A, Appeal Judgment (26 May 2003) para (525); *Prosecutor v Kayishema & Ruzindana* (n348) paras (533)–(535).
620 *Prosecutor v Akayesu* (n346) paras (523)–(524); *Prosecutor v Krstić* (n579) para (31); *Prosecutor v Kayishema & Ruzindana* (n348) para (93).
621 Article 7(3) of the ICTY Statute; Article 6(3) of the ICTR Statute; Article 28 of the ICC Statute.
622 Schabas (n515) 362.
623 *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-A, Decision on Interlocutory Appeal (19 March 2004) para (7).
624 *Prosecutor v Brđanin* (n434) paras (720)–(721).
625 *Prosecutor v Brđanin* (n623) paras (6)–(7).

shared the physical perpetrator's specific intent for genocide, only that the accused knew about the principal perpetrator's intent.[626]

Similarily, an accused may be convicted of genocide through the 'third category' of joint criminal enterprise ('JCE') even where the accused's specific intent has not been proven.[627] This mode of liability holds an accused responsible for a crime outside the JCE's common purpose if, in the circumstances of the case, it was foreseeable that such a crime might be perpetrated by one or other members of the group and the accused willingly took that risk (*dolus eventualis*).[628] Specifically, an accused may be held responsible for genocide under this mode of liability if it was reasonably foreseeable from the JCE's common purpose that an act specified in Article 4 of the ICTY Statute/ Article 2 of the ICTR Statute would be committed with genocidal intent and the accused was aware of this possibility when he or she participated in the JCE.[629]

In the Krstić case, the Trial Chamber (as described above), found the accused guilty of genocide through his participation in a joint criminal enterprise, the objective of which was to ethnically cleanse Srebrenica. Although the genocidal plan was found to have originated with General Mladić and other VRS officers, the Trial Chamber concluded that, as of the point at which Krstić learned of the widespread and systematic killings and became involved in their perpetration, he shared the genocidal intent.[630] However, the Appeals Chamber reversed the Trial Chamber's judgment, finding that Krstić did not share the specific intent for genocide, although he was aware of the genocidal intent of members of the VRS Main Staff:[631]

> 133. Finally, the Trial Chamber referred to the evidence of a Defence witness that on 13 July 1995 he had a conversation about the Bosnian Muslim column with Krstić, who had expressed the view that the VRS [Bosnian Serb Army] should allow the column to pass so that the situation could be 'ended as it should'. The Trial Chamber relied on the evidence as indicating awareness on the part of Radislav Krstić that attempts were being made to capture the men from the column. The evidence, however, indicates that Krstić harboured no genocidal intent. His own particular intent was directed to a forcible displacement. Some other members of the VRS Main Staff harboured the same intent to carry out forcible displacement, but viewed this displacement as a step in the accomplishment of their genocidal objective. It would be erroneous, however, to link Krstić's specific intent to carry out forcible displacement with the same intent possessed by other members of the Main Staff, to whom the forcible displacement was a means of advancing the genocidal plan.
>
> 134. As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator.

626 *Prosecutor v Krstić* (n579) para (140); *Prosecutor v Blagojević & Jokić* (ICTY) Case No IT-02-60-A, Appeal Judgment (9 May 2007) paras (119)–(124). See also *Prosecutor v Krnojelac* (n434) para (52); *Prosecutor v Brđanin* (n623), paras (8)–(10).
627 *Prosecutor v Brđanin* (n623) paras (5)–(9).
628 *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-A, Appeal Judgment (3 April 2007) para (365).
629 *Prosecutor v Brđanin* (n623) para (6).
630 *Prosecutor v Krstić* (n412) paras (631)–(633).
631 *Prosecutor v Krstić* (n579) paras (133)–(134).

The Appeals Chamber concluded that the form of liability which most accurately expressed Krstić's participation was aiding and abetting genocide.[632] There was no evidence that Krstić ordered any of the murders, or that he directly participated in them. All the evidence was able to establish is that he knew that those murders were occuring and that he permitted the Main Staff to use the personnel and resources under his command to facilitate the crimes. In these circumstances, the Appeals Chamber found Krstić responsible for murders, extermination and perscution as an aider and abettor, and not of a principal co-perpetrator in the context of joint criminal enterprise.[633]

For further discussion on specific intent in the context of superior responsibility, aiding and abetting, and JCE see Chapter 4.

Components of the specific intent to commit genocide

'To destroy'

In this sense, 'to destroy' speaks of physical or biological destruction, but the prohibited acts can fall short of causing the deaths of individuals.[634] The ICTY determined that not providing detention camp inmates with adequate food, sufficient medical care and subjecting them to poor conditions could be a breach of Article II(c) of the Genocide Convention namely 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[635] Yet in committing these acts, the special intent of destroying the group, in whole or in part, must be evident.

Other forms of destruction, such as social assimilation of a group into another or attacks on cultural characteristics which give a group its own identity, can constitute genocide only if they are related to physical or biological destruction.[636] An attack on the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not by itself fall under the definition of genocide.[637] When the killing of the men of a group has severe procreative implications for the community, potentially consigning it to extinction, this will constitute physical destruction. If the perpetrators were aware of these consequences when they committed the killings then they will have the requisite intent to destroy.[638]

The Trial Chamber in *Blagojević* held that the term'destroy' in the definition of genocide can encompass the forcible transfer of a population. In particular, the Trial Chamber found that 'the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group was'. It further explained that 'the reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical and biological destruction'.[639]

632 Ibid para (137).
633 *Prosecutor v Krstić* (n579) para (144).
634 Cryer et al (n4) 179; *Prosecutor v Kayishema & Ruzindana* (n348) para (95).
635 Schabas (n515) 244.
636 Cryer et al (n4) 179.
637 *Prosecutor v Krstić* (n412) para (580); *Prosecutor v Krstić* (n579) paras (25)–(26).
638 *Prosecutor v Krstić* (n579) paras (28)–(29).
639 *Prosecutor v Blagojević & Jokić* (ICTY) Case No IT-02-60-T, Trial Judgment (17 January 2007) paras (665)–(666).

The Trial Chamber in *Blagojević* thus seemingly departed from the ruling in *Krstić* that the genocide is limited to those acts seeking the physical or biological destruction of all or part of the group.[640] In the *Bosnia and Herzegovina v Serbia and Montenegro* case, concerning the application of the Genocide Convention, the ICJ endorsed the finding in the Blagojević Trial Judgment.[641]

'In whole or in part'

This part of the special intent raises a question of how broadly or narrowly the protected group is considered and what constitutes a part of that group. The question therefore is how to determine what constitutes the whole or part of a group.

There is no clear-cut method for determining what is a 'whole' and how much would constitute a substantial 'part' of this whole. The 'whole' can be interpreted as the population of a village, a State, a region or all of the global community. Generally, the 'relevance of this consideration increases in proportion to the perpetrator's position in the hierarchy of authority: the more limited his or her sphere of control, the more limited the geographical area or total population that may be included in determining the appropriate threshold of scale'.[642]

In the *Kayishema & Ruzindana* case, the ICTR Trial Chamber held that the term 'in part' 'impl[ies] a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. Hence both proportionate scale and total number are relevant'.[643]

The complication of discerning the whole and the substantial part of the targeted group is highlighted in the *Krstić* case. Both the Trial and Appeals Chamber in that case concluded that the relevant group was the group of Bosnian Muslims and that 'the Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group'.[644] The Appeal Chamber confirmed this approach, stating that[645]

> 12. The intent requirement of genocide under Article 4 of the Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.

640 *Prosecutor v Krstić* (412) para (580); *Prosecutor v Krstić* (n579) paras (25)–(26).
641 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn & Herz v Serb & Mont*), 2007 ICJ para (294) (26 Feb).
642 Akhavan (n587) 989, 998.
643 *Prosecutor v Kayishema & Ruzindana* (n348) para (96).
644 *Prosecutor v Krstić* (n412) para (560).
645 *Prosecutor v Krstić* (n579) paras (12)–(14) (footnote omitted).

> 13. The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis.
>
> 14. These considerations, of course, are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case.

The description of 'in whole or in part' of a group is vital in that it helps to show whether special intent was involved in the execution of the crime. The larger the scale, the more indisputable it becomes that there was a clear plan to carry out genocide. For example, in Rwanda, 'there is little room for ambiguity as to whether this requirement is satisfied' due to the 'overwhelming scale of the anti-Tutsi extermination campaign'.[646]

It should be noted that the term 'in whole or in part' refers to the intended scope of destruction and not whether or not this is actually achieved.[647] The fact that the group is actually destroyed in whole or in part can constitute a basis for establishing the specific intent requirement and prove to be the difference between establishing the commission of the offence as opposed to an attempt to commit it.[648]

'As such'

The term 'as such' was added to the definition of genocide as a compromise, in the absence of agreement concerning the inclusion of the motive as a constitutive element of the crime. Indeed, while the phrase may be interpreted as introducing considerations of motive, most writers have seen it as simply reinforcing the fact that the individuals are selected as victims due to their membership of a group.[649]

The concepts of intent and motive are not equivalent and must be distinguished from each other. While individuals may commit crimes intentionally, they can do so for a variety of motives.[650] For example, the personal motive of the perpetrator of the crime of genocide may be to obtain personal economic benefit, political advantage or power. The existence of a personal motive does not preclude the perpetrator from also possessing the specific intent to commit genocide.[651] The fact that an accused took 'pleasure' in killings does not detract in any way from his or her intent to perform such killings, as this is a matter that goes to motivation.[652] Similarly, the evidence that an accused was acting in the quest of a personal goal, such as vengeance, enrichment or for the elimination of a business competitor, may explain their motivation but does not preclude a finding of specific intent.[653]

646 Akhavan (n587) 989, 998.
647 *Prosecutor v Brđanin* (n434) para (700).
648 Ibid para (697).
649 Jones and Powles (n295) 155.
650 Schabas (n280) 97.
651 *Prosecutor v Jelisić* (n485) para (49).
652 Ibid para (71).
653 *Prosecutor v Kayishema & Ruzindana* (ICTR) Case No ICTR-95-1-A, Appeal Judgment (1 June 2001) para (161).

Thus, the Appeals Chamber in *Niyitegeka* held that:

> [t]he words 'as such', however, constitute an important element of genocide, the 'crime of crimes'. It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favour of and against including a motivational component as an additional element of the crime. The term 'as such' has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term 'as such' clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting 'as such' to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.[654]

Even if the existence of personal motives may not be raised as a defence to genocide, on the basis that such motives exclude the *mens rea*, nonetheless it can be urged in mitigation at the sentencing stage, if appropriate.[655] However, a plea that a person committed genocide, for example for motives of personal enrichment, may not be the most deserving ground for mitigation.

SPECIFIC (UNDERLYING) OFFENCES

Beyond the mandatory requirement of special intent and other common elements, each underlying offence also has its own physical (*actus reus*) and mental (*mens rea*) elements. As regards *mens rea*, Article 30 of the ICC Statute sets out the requisite mental elements pertaining to all crimes under its jurisdiction by requiring that the prohibited act be carried out with intent and knowledge. For further discussion on *mens rea* see the section 'War Crimes: Mental Elements (*Mens Rea*)', above.

Article 30 of the ICC Statute

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.

654 *Prosecutor v Niyitegeka* (ICTR) Case No ICTR-96-14-A, Appeal Judgment (9 July 2004) para (53) (footnotes omitted).
655 Schabas (n515) 255–256.

The question may be posed whether genocide would be committed if a prohibited act, such as killing, were carried out against only one member of a protected group, on the assumption that the perpetrator acted with the requisite *mens rea*. In *Akayesu*, the Trial Chamber held that there may be genocide even if one of the acts prohibited is committed 'against one' member of a group.[656] This interpretation, however, does not seem to be consistent with the definition of genocide provided in the Statutes of the international courts and tribunals and the Genocide Conventions which speak instead of 'members of a group'.[657] The interpretation also does not appear to be consistent with the origin of genocide as an aggravated crime against humanity, involving mass atrocities, or the notion that it is 'the crime of crimes'.

Genocide by killing

The ICC Elements of Crimes provide the following elements of genocide by killing:[658]

1. The perpetrator killed 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.

According to the ICC Element of Crimes, the term 'killed' is interchangeable with the term 'caused death'.[659]

Within the meaning of the Genocide Convention, 'killing' must be interpreted as 'homicide committed with the intent to cause death'.[660] In Brđanin, the Trial Chamber held that the offence of killing members of a group has the same elements as wilful killing as a grave breach of the Geneva Conventions, murder as a war crime and murder as a crime against humanity. The only additional requirement for killing members of a group for the purpose of genocide is that the killing must be of members of a targeted national, ethnical, racial or religious group.[661]

The essential elements of 'killing' are:

- the victim is dead;
- the death resulted from an unlawful act or omission of the accused or a person or persons for whose acts or omissions the accused bears criminal responsibility;
- the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he or she bears criminal responsibility, with an intention to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[662]

656 *Prosecutor v Akayesu* (n346) para (521).
657 See also Cassese (n534) 333.
658 Article 6(a) of the ICC Elements of Crimes, 2 (footnote omitted).
659 Ibid 2, n2.
660 *Prosecutor v Bagilishema* (n570) para (57).
661 *Prosecutor v Brđanin* (n434) paras (381), (689).
662 Ibid paras (381)–(382).

The *mens rea* for murder and wilful killing does not require premeditation. Both *dolus direct* and a *dolus eventualis* are sufficient to establish the crime of murder. The threshold of *dolus eventualis* entails the concept of recklessness, but not that of negligence or gross negligence. To satisfy the *mens rea* for murder and wilful killing, it must be established that the accused had an intention to kill or to inflict grievous bodily harm or serious injury in the reasonable knowledge that it would likely lead to death. The *mens rea* may be inferred either directly or circumstantially from the evidence in the case.[663]

Genocide by causing serious bodily or mental harm

The ICC Elements of Crimes provide the following elements of genocide by causing serious bodily or mental harm:[664]

1. The perpetrator caused serious bodily or mental harm to 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.

The ICC Elements of Crime explain that this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.[665]

According to the ICTR, 'serious bodily or mental harm' includes, but is not limited to torture, inhumane or degrading treatment and persecution. The ICTR, through the *Akayesu* case, has included sexual violence and rape as genocide:

> Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[666]

The ICTR also held that serious harm entails more than minor impairment of mental or physical faculties, but it need not amount to permanent or irremediable harm.[667]

663 Ibid para (386); *Prosecutor v Stakić* (n573) paras (587), (747).
664 Article 6(b) of the ICC Elements of Crimes, 2 (footnote omitted).
665 Ibid 2, n3.
666 *Prosecutor v Akayesu* (n346) para (731).
667 *Prosecutor v Bagilishema* (n570) para (59); *Prosecutor v Rutaganda* (n567) para (51).

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

The ICC Elements of Crimes provide the following elements of genocide by deliberately inflicting conditions of life calculated to bring about physical destruction:[668]

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.
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.

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.[669]

The offence of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction' refers to methods of destruction by which the perpetrator of genocide 'does not immediately kill the members of group' but which ultimately seek the physical destruction the group, for example 'subjecting a group of people to a subsistence diet, the systematic expulsion from homes and the reduction of essential medical services below minimum requirements'.[670]

In the *Kayishema & Ruzindana* Trial Judgment, the Chamber said that the conditions of life contemplated would include 'rape, the starving of a group of people, reducing medical service below minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part'.[671] In *Brđanin*, the Trial Chamber included 'the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion'.[672]

The trial of Adolf Eichmann in the District Court of Jerusalem clarified that the offence of purposefully inflicting certain conditions of life calculated to bring about the group's destruction does not require proof of result. In the District Court, Eichmann's charge of imposing destructive living conditions upon the Jewish people could only be applied to Jewish victims who had survived the Holocaust because those who were killed were already the subject of the charge of physical destruction.[673]

It should be noted that ethnic cleansing meaning the forcible expulsion of persons from a territory does not suffice to amount to genocidal conduct.[674]

668 Article 6(c) of the ICC Elements of Crimes, 3 (footnote omitted).
669 Ibid 2, n4.
670 *Prosecutor v Akayesu* (n346) paras (505)–(506).
671 *Prosecutor v Kayishema & Ruzindana* (n348) para (116).
672 *Prosecutor v Brđanin* (n434) para (691).
673 *Attorney-General of the Government of Israel v Adolf Eichmann* (Case No 40/61) Dist Ct Jer (12 Dec 1961) 36 ILR 5 (1968) para (196); Schabas (n515) 192.
674 Cassese (n534) 333.

Genocide by imposing measures intended to prevent births

The ICC Elements of Crimes provide the following elements of genocide by imposing measures intended to prevent births:[675]

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.

This prohibition stems from forced sterilisations during the Holocaust and from sexual and reproductive abuses from the Rwandan genocide.[676] Not only can this qualify as a physical offence, but it can also be considered mental abuse. In *Akayesu*, the ICTR Trial Chamber stated that the measures intended to prevent births within the group include:[677]

> sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages. 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.

> Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. 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.

Genocide by forcibly transferring children

The ICC Elements of Crimes provide the following elements of genocide by imposing measures intended to prevent births:[678]

1. The perpetrator forcibly transferred 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 transfer was from that group to another group.

675 Article 6(d) of the ICC Elements of Crimes, 3.
676 Cryer et al (n4) 176.
677 *Prosecutor v Akayesu* (n346) paras (507), (508). See also *Prosecutor v Kayishema & Ruzindana* (n348) para (116); *Prosecutor v Rutaganda* (ICTR) Case No ICTR-96-3-T, Trial Judgment (6 December 1999) para (53).
678 Article 6(e) of the ICC Elements of Crimes, 4 (footnote omitted).

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.

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.[679]

An example of this type of offence is to be found in the forced assimilation of Aboriginal children into non-Aboriginal society.[680] This can be viewed as a form of cultural genocide, but the Genocide Convention did not want to go as far as to make such a provision explicit.

According to the ICTR, this offence would apply not only to forcible transfer of children by the perpetrator of genocide but also to 'threats or trauma which would lead to the forcible transfer of children from one group to another'.[681]

It should be noted that, as a question of pure interpretation, it would not seem necessary that the transfer of children be carried out with the intention of destroying those children actually transferred. Such transfer would constitute an act of genocide as long as the intention was to destroy the group to which the children belonged (at least in part), even if the intention was to save those children from destruction by transferring them.[682]

Other forms of participation in genocide

As a result of the transposition of Article III of the Genocide Convention directly into the definition of genocide in the ICTY and ICTR Statutes, both Statutes incriminate additional four forms of participation in genocide:

- conspiracy to commit genocide;
- direct and public incitement to commit genocide;
- attempted genocide;
- complicity in genocide.

It should be noted that (i) conspiracy to commit genocide, (ii) direct and public incitement to commit genocide, and (iii) attempt to commit genocide are inchoate offences rather than forms of responsibility, whereas compicity in genocide is a form of responsibility. Inchoate crimes are discussed together with various forms of responsibility for genocide and other crimes in Chapter 4, dealing with individual criminal responsibility.

679 ICC Elements of Crimes, Article 6(e), 4, n5.
680 Cryer et al (n4) 177.
681 *Prosecutor v Akayesu* (n346) para (50).
682 Jones and Powles (n295) 153.

The ICC Statute, on the other hand, regulates other forms of genocide in its general article on individual criminal responsibility, Article 25 of the ICC Statute, which applies to all of the crimes within its jurisdiction. This Article does not include conspiracy to commit genocide; however, it does include liability for direct and public incitement in cases of genocide.[683] Conspiracy to commit genocide was omitted as a form of liability because of resistance by civil law countries, to which the notion of conspiracy was alien. This gap, however, may be filled by the Statute's provision on contribution to a common purpose.[684]

Aggression

Historical development of the crime of aggression

The first international trial for aggression was held after the Second World War before the IMT at Nuremberg.[685] International aggression was first criminalised under the name 'crimes against peace' in Article 6(a) of the Nuremberg Charter:

> 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.[686]

Article 5(a) of the Charter for the Tokyo IMTFE included a comparable definition of crimes against peace:

> the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[687]

The Tokyo Charter, unlike the Nuremberg Charter, defined crimes against peace by referring to a 'declared or undeclared war of aggression'. The UN War Crimes Commission concluded that the differences in the definition contained in the two charters were 'purely verbal and that they did not affect the substance of the law governing the jurisdiction of the Far Eastern Tribunal over crimes against peace in comparison with the Nuremberg Charter'.[688] A similar provision was also included in Article II(1)(a) of Control Council Law No. 10, which defined crimes against peace as the:

683 Ibid at 179.
684 Cryer et al (n4) 185.
685 Ibid at 262; Although the trial before the Nuremberg IMT was the first to actually prosecute aggression, it was not the international community's first attempt at establishing a special tribunal to prosecute persons responsible for waging war in violation of treaties. As described in Chapter 2, the closest precedent was provided by the establishment of a special tribunal to try Kaiser Wilhelm who was supposed to be tried for 'supreme offence against international morality and the sanctity of treaties'. Ultimately, Kaiser Wilhelm sought refuge in the Netherlands, which refused to extradite him to stand trial. See Article 227 of the Peace Treaty of Versailles (28 June 1919) signed by Germany and the Allied powers at the Palace of Versailles, Carnegie Endowment for International Peace, New York (1924), available at <http://avalon.law.yale.edu/subject_menus/versailles_menu.asp> accessed 1 November 2008. See also Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, reprinted in 14 AJIL 95, 116–117 (1920), which discusses personal responsibility and the case of Kaiser Wilhelm.
686 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 Aug 1945) 82 UNTS 279 (Annex).
687 Charter of the International Military Tribunal for the Far East (19 Jan 1946) TIAS No 1589.
688 Historical Review of Developments Relating to Aggression, Prepatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, April 18–19, 2002, UN Doc No PCNICC/2002/WGCA/L1 (24 Jan 2002) para (269).

> Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[689]

Although the criminalisation of aggression in the Nuremberg Charter paved the way for equivalent provisions in both the Tokyo Charter and Control Council Law No 10, the accomplishments of the Nuremberg Tribunal were not easily obtained. For instance, the accused objected that the Nuremberg Charter created new law and that the IMT applied law *ex post facto*, thereby violating the principle of nullum *crimen sine lege*.[690] The accused primarily objected to counts one and two of the indictment. Count one of the indictment charged 'the defendants with conspiring or having a common plan to commit crimes against peace' and count two charged 'the defendants with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States'.[691] As a result, the principal challenge facing the prosecution was to establish the legitimacy of the crime of aggression.[692] The Nuremberg Tribunal rejected defence claims of retroactivity,[693] holding that aggressive war had been a crime under international law since the 1928 Kellogg-Briand Pact:[694]

> In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.[695]

The Nuremberg Tribunal further declared that initiating a war of aggression was 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[696] After the Nuremberg Judgment, prosecutors at Tribunals established pursuant to Control Council Law No 10 continued to pursue charges against defendants for crimes against peace in occupied Germany.[697] Four out of 12 trials conducted from 1946 to 1949, dealt with charges of crimes against peace.[698] The Tribunals that succeeded the Nuremberg Tribunal considered themselves bound by the jurisprudence of the IMT on crimes against peace and built upon the foundation provided by the Nuremberg Charter and Judgment.[699]

689 Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Allied Control Council for Germany, (1946) No 3 Official Gazette 50 (20 Dec 1945).
690 Cryer et al (n4) 263.
691 'Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence', 41 AJIL 172–333, 186 (1947).
692 Noah Weisbord, 'Prosecuting Aggression', (2008) 49 Harv Intl LJ 161, 164.
693 Ibid.
694 Cryer et al (n4) 263. However, Cryer further explains that the Kellogg-Briand Pact 'had not intended to give rise to individual criminal responsibility'. Cryer et al (n4) 93–94; See also Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed CUP, Cambridge 2005) 120, which further discusses the Kellogg-Briand Pact.
695 'Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence' (n691) 172, 218.
696 Ibid at 186.
697 Weisbord (n692) 161–214, 165.
698 Specifically, the *IG Farben* case, the *Krupp* case, the *High Command* case, and the *Ministries* case. Further, France also established the General Tribunal of the Military Government for the French Zone of Occupation in Germany and prosecuted crimes against peace in the *Roechling* case. Historical Review of Developments Relating to Aggression, Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, April 18–19, 2002, UN Doc No PCNICC/2002/WGCA/L1 (24 Jan 2002) paras (119)–(120).
699 Ibid para (121).

The Tokyo Tribunal also prosecuted crimes against peace. The prosecutors at the Tokyo Tribunal indicted 28 defendants, with 52 of the 55 counts in the indictment relating to crimes against peace.[700] Importantly, the Tokyo Tribunal rejected the defendants' arguments that aggressive war was an act of State for which there was no individual responsibility under international law and that the Charter provisions were *ex post facto* legislation and therefore illegal.[701] The Tokyo Tribunal further supported the opinion of the Nuremberg Tribunal when it concluded that 'aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam'.[702]

It is important to note that the crime of aggression was not universally considered to form part of customary international law prior to its inclusion in article 6(a) of the Nuremberg Charter.[703] However, once the Nuremberg Judgment found article 6(a) to be declaratory of modern international law,[704] it provided a precedent, which eventually resulted in the crime of aggression becoming indisputably part of customary international law.[705] The description of aggression in the ILC draft 'Nuremberg Principles' mirrored the description of aggression found in the Nuremberg Charter. The ILC's draft principles and code of offences, however, were never adopted by the General Assembly (see Chapter 1).

Separate attempts by States had also been made to develop a definition of aggression. For instance, in 1950, an attempt had been made during the San Francisco negotiations over the drafting of the UN Charter. In that same year, the USSR submitted a proposal for a definition of aggression. On 17 November 1950, the UN General Assembly passed resolution 378(B)(V) which referred the proposal to the ILC, so that the ILC could formulate a definition of aggression.[706] However, the ILC never reached an agreement on the definition of aggression,[707] with the Special Rapporteur stating that the notion of aggression 'by its very essence, is not susceptible of definition'.[708]

On 20 December 1952, the General Assembly recognised the 'complexity' of defining aggression and decided to establish a Special Committee, consisting of 15 States,[709] to draft definitions of aggression or draft statements of the notion of aggression.[710] However, the Special Committee and three subsequent Special Committees created in 1954,[711] 1957[712] and 1967[713] never adopted a definition of aggression, due in part to prolonged negotiations 'made difficult by the tensions of the Cold War in which they were conducted'.[714]

700 Ibid para (271).
701 Ibid para (288).
702 Ibid; Judgment of the International Military Tribunal for the Far East (4–12 November 1948) 25–26; However, despite upholding the principles of the *Nuremberg* Judgment, the *Tokyo* Judgment still faced criticism, as there were three significant dissenting judgments from Justices Bernard, Pal and Roling. See also Cryer et al (n4) 263 and Gerry Simpson, *Law, War & Crime* (Polity Press, Cambridge 2008) 144–150, for additional discussion on this topic.
703 Dinstein (n694) 120.
704 Ibid at 119–121; Yoram Dinstein and Mala Tabory, *War Crimes in International Law* (Martinus Nijhoff Publishers, Boston 1996) 2.
705 Cryer et al (n4) 263; Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford 1991)191–94.
706 GA Res 378B (V), UN GAOR, 5th Session (17 Nov 1950).
707 Elizabeth Wilmshurst, 'Definition of Aggression', available at <http://untreaty.un.org/cod/avl/ha/da/da.html> accessed 30 November 2009.
708 Second Report of the ILA on a Draft Code of Offences against the Peace and Security of Mankind, UN Doc A/CN.4/44, para 165 (1951), reprinted in [1951] 2 Ybk Int'l L Com.
709 Benjamin B Ferencz, 'The United Nations Consensus Definition of Aggression: Sieve or Substance?' (1975) 10 J Intl L & Econ 701, 708.
710 GA Res 688 (VII), UN Doc A/2361 (20 Dec 1952).
711 GA Res 895 (XI), UN Doc A/2890 (4 Dec 1954).
712 GA Res 1181 (XII), UN Doc A/3805 (29 Nov 1957).
713 GA Res 2330 (XXII), UN Doc A/6988 (18 Dec 1967).
714 Elizabeth Wilmshurst, 'Definition of Aggression' (n707); Cryer et al (n4) 364.

Approximately 22 years after the establishment of the first Special Committee, the General Assembly finally adopted a definition of aggression on 14 December 1974 through resolution 3314(XXIX).[715] The adoption of the definition has been described as a historic moment.[716] Although the definition was regularly cited throughout the Cold War, it was never relied upon to prosecute a defendant in a criminal trial and it was never cited by the UN Security Council.[717]

DEFINITION OF AGGRESSION UNDER GENERAL ASSEMBLY RESOLUTION 3314(XXIX)

Under General Assembly resolution 3314(XXIX), aggression is defined as:[718]

> *UN General Assembly Resolution 3314(XXIX)*
>
> *Article 1*
>
> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Article 1 of this definition is very broad and relies heavily on article 2(4) of the UN Charter. Article 3 of the definition provides a list of specific acts, which may qualify as acts of aggression. However, this list is not exhaustive, as the UN Security Council may determine additional acts of aggression. Article 5(2) differentiates between 'a war of aggression', which is a crime against international peace and 'aggression', which gives rise to international responsibility. Accordingly, not every act of aggression can be considered a crime against peace. In differentiating between war of aggression and acts of aggression, the drafters of this definition clearly indicated that only a war of aggression constitutes a crime against peace due to the intent element, whereas acts of aggression that fall short of war only lead to State responsibility.[719] The various articles within this definition illustrate the compromises made by States in order for a consensus to be reached.[720]

Although the General Assembly's definition is considered the most recent and widely accepted,[721] it has also been criticised as being vague and overly state-centric, in that it makes it difficult to prosecute individuals for acts of aggression. In addition, the definition also leaves the determination of aggression to a decision of the UN Security Council. Therefore, some States, unwilling to accept legal restrictions on their sovereignty, contend that that the definition was only designed as guidance to the UN Security Council, as opposed to serving as a basis of prosecution.[722] Although the definition of aggression was originally intended to be part of a universally binding international code, the agreement on this definition and its significance was more or less ignored. It is important to note that General Assembly resolution 3314(XXIX) is a formally non-binding recommendation to the

715 GA Res 3314 (XXIX), UN Doc A/RES/3314 (14 Dec 1974).
716 Ferencz (n709) 701, 708.
717 Weisbord (n692) 168.
718 GA Res 3314 (XXIX) (n715).
719 Dinstein (n694) 125.
720 Wilmshurst (n707).
721 Dinstein (n694) 126.
722 Weisbord (n692) 168.

UN Security Council, which lacks legislative authority. However, even though General Assembly resolutions are non-binding, they are still significant in that they can be evidence of developing trends and progress in customary law. For instance, as explained below, the Special Working Group on the Crime of Aggression relied on resolution 3314(XXIX) in drafting its own definition of aggression.

THE ROLE OF THE ILC IN DEFINING AGGRESSION

On 10 December 1981, the General Assembly revived the ILC's earlier mandate by requesting that the ILC resume work on the draft Code of Offences against the Peace and Security of Mankind.[723] In 1996, the ILC adopted a draft Code of Crimes Against the Peace and Security of Mankind,[724] which contained Article 16 on the Crime of Aggression:

> An individual who, as leader or organiser, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.[725]

Interestingly, the ILC's commentary on Article 16 identifies the Nuremberg Charter and Judgment as the primary sources of authority for individual criminal responsibility stemming from acts of aggression,[726] but it neglects to mention the 1974 UN General Assembly definition, discussed above.[727] The commentary also explains that the ILC did not address the question of the definition of aggression by a State because this definition was beyond the scope of the Code.[728] Governments have not implemented the ILC's Code as their attention then turned to negotiating the Statute of the ICC.[729]

THE ROLE OF THE ICC IN DEFINING AGGRESSION

The crime of aggression, which had been described as the 'supreme international crime',[730] was completely excluded from the subject-matter jurisdiction of the ICTY, ICTR and the various hybrid tribunals. Thus none of these institutions have ever indicted or prosecuted a defendant for crimes against peace or the crime of aggression. The ICC Statute was the first Statute, since the drafting of the Statutes for the Nuremberg and Tokyo Tribunals, to include the crime of aggression within the jurisdiction of the court.

723 UN GAOR 36/106, 36th Session, UN Doc A/36/51 (1981).
724 Cryer et al (n4) 265.
725 ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) UN Doc A/51/10.
726 Ibid.
727 Weisbord (n692) 170.
728 ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) UN Doc A/51/10.
729 Cryer et al (n4) 265.
730 'Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence' (n691) 172, 218.

In 1994, the ILC had produced a draft Statute[731] and international negotiations on the ICC began on the basis of this draft. Under article 20(b) of the draft Statute, the ILC listed the crime of aggression as falling within the jurisdiction of the ICC.[732] The ILC's inclusion of the act of aggression within the draft Statute was controversial, as opinion was divided on whether to include the crime of aggression, how to define the crime of aggression and whether the UN Security Council's role would be included in the Statute.[733] With respect to defining the crime of aggression, some States wanted to rely on the General Assembly's definition of 1974.[734] However, other States contended that this definition was unsuitable as the list of aggressive acts found within this definition was only meant to be illustrative and was never meant to be a basis for criminal prosecution.[735] The various proposals on the definition of aggression were raised during the Rome Conference, as many developing countries, members of the Arab group, and industrialised countries such as Canada, Germany and Japan insisted on having the definition of aggression included in the Statute of the ICC,[736] whereas the United States and United Kingdom opposed its inclusion.[737] However, during the conference, a definition of aggression was never achieved and the role of the UN Security Council was never defined.[738] During the closing hours of the conference, a compromise was achieved, as the crime of aggression was included in the jurisdiction of the ICC under Article 5(1)(d).[739] Article 5 of the ICC Statute reads:

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.

However, unlike the other crimes over which the ICC has jurisdiction, the crime of aggression was not defined in the ICC Statute. Article 5(2) of the ICC Statute explains that the definition will be decided upon in the future:

731 ILC, 'Report of the International Law Commission on the Work of its 46th Session' (2 May–22 July 1994) UN Doc A/49/10.
732 Ibid at 38.
733 Cryer et al (n4) 265.
734 GA Res 3314 (XXIX), UN Doc A/RES/3314 (14 Dec 1974).
735 Cryer et al (n4) 265–266.
736 Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (3rd ed OUP, Oxford 2008) 668.
737 Weisbord (n692) 170.
738 Cryer et al (n4) 266.
739 Weisbord (n692) 171.

> (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.

Consequently, the ICC is not able to indict or prosecute a defendant for the crime of aggression until the States parties to the Statute have agreed upon a definition of aggression and have amended the Statute accordingly. Articles 121 and 123 of the ICC Statute entail the amendment and review procedure for the ICC Statute. Article 121 stipulates that amendments to the Statute cannot occur earlier than seven years after the Statute's entry into force. Any amendment to Article 5 of the ICC Statute, including in respect of the crime of aggression, will only enter into force for those States parties which have accepted the amendment one year after its ratification. The ICC will not exercise jurisdiction over the crime covered in the new amendment for those States parties which have not accepted the amendment. Article 123 details the review procedure for the Statute and explains that seven years after the ICC Statute has entered into force, the UN Secretary-General will convene a Review Conference to consider any amendments to the Statute. Additionally, at any point after the first seven years, a State party, who has the majority approval of the other State parties, may request the UN Secretary-General to convene another Review Conference.

Agreeing upon a definition of aggression and the conditions under which the ICC would exercise its jurisdiction has proven difficult. Initially, the Rome Conference delegated the duty of formulating a definition for aggression to a Preparatory Commission.[740] Then, in September 2002, the Assembly of States parties to the Court, which is the management oversight and legislative body of the ICC and consists of one representative from each State party, established a Special Working Group on the Crime of Aggression.

740 Ibid.

The crime of aggression and ius ad bellum

Unlike war crimes, crimes against humanity and genocide, which fall under *ius in bello*, the crime of aggression developed from the principles governing recourse to conflict among States, known as *ius ad bellum*. *Ius ad bellum* is the law relating to the use of force and defines the legitimate reasons under which a State may engage in war. *Ius in bello*, on the other hand, which is based on the concept of proportionality and other humanitarian principles designed to reduce unnecessary suffering, is the law which regulates the effects of war by regulating the practices through which wars are fought (see Chapter 1).

The modern legal theory of *ius ad bellum* developed after the First World War. After the destruction and devastation of this war, the international community came together to analyse the criminality of war. Although the Assembly of the League of Nations worked towards prohibiting the unlawful use of force as a tool of foreign policy,[741] in actuality, it did little to advance the restrictions on the use of force.[742] However, the signing of the Kellogg-Briand Pact in 1928,[743] was considered a 'much more significant event'[744] with respect to prohibiting the unlawful use of force. The main provisions of the Kellogg-Briand Pact are Articles I and II:[745]

Kellogg-Briand Pact

ARTICLE I

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

ARTICLE II

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Significantly, the Kellogg-Briand Pact, which remains a binding international law treaty, was treated as a factor to be considered in international affairs[746] and the Pact was frequently raised during debates in the League of Nations.[747] By condemning recourse to war as an extension of foreign policy, the Kellogg-Briand Pact left a significant legacy, as is illustrated in the Nuremberg Tribunal's reliance upon the Pact as the legal basis for criminalising crimes against peace. Further, the

741 Keith A Petty, 'Sixty Years in the Making: The Definition of Aggression for the International Criminal Court', (2008) 31 Hastings Intl & Comp L Rev 533–534.

742 Richard L Griffiths, 'International Law, the Crime of Aggression and the Ius Ad Bellum', (2002) Intl Crim L Rev 301, 304.

743 Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (27 Aug 1928) 46 Stat 2343, 94 LNTS 57.

744 Griffiths (n742) 304.

745 Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (27 Aug 1928) 46 Stat 2343, 94 LNTS 57.

746 See Griffiths (n742) for examples of how the Kellogg-Briand Pact was taken into consideration in international affairs. He states: 'An example occurred in 1929 when, following hostilities between China and the USSR, the United States sent both countries notes reminding them of their obligations under the Treaty'.

747 Ibid at 304–305.

principles of the Pact were later embodied in Article 2(4) of the UN Charter,[748] which prohibits the threat or use of force:

Article 2(4) of the UN Charter

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4) of the UN Charter has been deemed a fundamental legal principle governing the use of force and a part of customary international law.[749] However, Article 2(4) does not provide a complete prohibition on the use of force by States, as there are certain instances under which use of force is deemed admissible. Article 51 of the UN Charter states:

Article 51 of the UN Charter

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 of the UN Charter clearly indicates that use of force is permitted when a State is acting in self-defence. In addition to the self-defence exception, use of force is also permitted when the UN Security Council acts under its Chapter VII powers.[750] Article 39 under Chapter VII of the UN Charter provides:

Article 39 of the UN Charter

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

748 Petty (n741) 31.
749 *Nicaragua v USA* (n40) paras (188)–(190).
750 Articles 39–51 of the UN Charter.

The significance of Article 39 is that it provides the UN Security Council with the power to determine the existence of any threat to the peace, breach of the peace or act of aggression. In response to a threat to the peace or act of aggression, the UN Security Council may authorise the use of force, either through UN peace-keeping missions or by coalitions of forces of States in order to restore international peace and security.

Although the UN Security Council has the responsibility of determining an act of aggression in order to maintain or restore international peace and security, it is important to note that this is not considered an 'exclusive' responsibility. The UN Charter clearly indicates that the General Assembly also has the responsibility to be concerned with international peace and security.[751] The General Assembly, in accordance with the UN Charter, 'may discuss any questions relating to the maintenance of international peace and security brought before it by any member of the United Nations, or by the Security Council, or by a state which is not a member of the United Nations' and it may also 'call the attention of the Security Council to situations which are likely to endanger international peace and security'.[752] Further 'the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations'[753] so long as the UN Security Council is not dealing with the same matter, unless the Security Council has requested the General Assembly to make recommendations.[754]

In addition to highlighting the self-defence and Chapter VII of the UN Charter exceptions to the use of force, it is also important to mention the issue of humanitarian intervention. Opinion is divided as to whether use of force, without Chapter VII authorisation, is permitted to prevent a humanitarian disaster.[755]

Elements of the crime of aggression

PHYSICAL ELEMENTS

Perpetrators

Determining who should be held accountable for the crime of aggression is vital, as it is imperative to punish those individuals who are responsible for waging an aggressive war. However, at the same time, the criteria used to identify the perpetrators of aggression must be narrow enough to ensure the appropriate individuals are brought to justice. The crime of aggression is considered to be a 'leadership crime'.[756] For instance, Article 16 of the ILC's draft Code of Crimes Against the Peace and Security of Mankind refers to 'an individual, who as leader or organiser, actively participates in the planning, preparation, initiation or waging of aggression'.[757]

The case law also illustrates that crimes of aggression are leadership crimes. For instance, in the *United States of America v Wilhem von Leeb et al* (the *High Command* case), which was tried by an American Military Tribunal established pursuant to Control Council Law No 10, 14 officers who

751 Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ 163 (20 July).
752 Article 10 of the UN Charter.
753 Article 14 of the UN Charter.
754 Article 12 of the UN Charter.
755 Cryer et al (n231) 270.
756 Ibid at 271; Mauro Politi and Giuseppe Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate, Aldershot 2004) 168.
757 ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) UN Doc A/51/10.

held high-level positions in the German military were charged, among others, with crimes against peace (count one).[758] The tribunal evaluated whether these individuals operated at a high enough 'policy level' to incur criminal responsibility. The tribunal noted that the national policy was made by individuals and that those who made a criminal national policy incurred criminal responsibility in contrast to those who operated below the policy level in carrying out the criminal policies.[759] The tribunal also held that top policy-makers are not the only individuals who can be held responsible for aggression but rather that the line had to be drawn between senior officials and common soldiers.[760] Ultimately, all of the accused were acquitted, as they were deemed not to have operated at a sufficiently high policy level.[761]

It is important to note that the policy level threshold is not limited to individuals within the government or military, as individuals outside this field can operate at a sufficiently high policy level to be held responsible for the crime of aggression.[762] For instance, in the *United States of America v Carl Krauch et al* (the *IG Farben* case), industrialists were charged with crimes against peace. In this case, 24 high-level industrialists who were high-level officials of *IG Farben* were charged with participating in planning, preparing, initiating and waging wars of aggression and invasions of other countries.[763] The tribunal considered whether the accused operated at a high enough policy level to be held criminally responsible for aggression. The tribunal noted that the case involved men of industry who were not policy makers but nonetheless supported their government during the rearmament and the aggressive war.[764] The accused were not high-level government or military officials and participated as followers rather than leaders.[765] The tribunal acquitted the accused of the crime of aggression on the basis that none of the accused operated at a high enough policy level, as the accused merely followed their leaders and aided in the war effort; they did not actually plan or lead the nation into an aggressive war.[766]

Conduct: act of aggression

The underlying collective act for the crime of aggression is that a State has committed an act against another State.[767] Consequently, non-State entities, such as terrorist organisations, revolutionary groups or individual mercenaries not sponsored by the State, could not be held accountable for the crime of aggression.[768] Under customary international law, only aggressive war leads to individual criminal responsibility and threats of aggression are insufficient to hold a person liable for aggression.[769]

758 Historical Review of Developments Relating to Aggression, Prepatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, April 18–19, 2002, UN Doc No PCNICC/2002/WGCA/L1 (24 Jan 2002) para (149).
759 Ibid para (158).
760 Ibid para (159).
761 Ibid para (165).
762 Cryer et al (n4) 272.
763 Historical Review of Developments Relating to Aggression, Prepatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, April 18–19, 2002, UN Doc No PCNICC/2002/WGCA/L1 (24 Jan 2002) para (128).
764 Ibid para (135).
765 Ibid para (137).
766 Ibid para (138).
767 Cryer et al (n4) 272.
768 Mathias Schuster, 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword' (2003) 14 Crim LF 23.
769 Cryer et al (n4) 273.

Further, a connection must exist between the actions of the individual leader charged with aggression and the State's act of aggression.[770] At the Nuremberg Tribunal, the prosecution was able to establish this nexus by proving that the accused was involved in the planning, preparation, initiation or waging of a war of aggression, since Article 6(a) of the Nuremberg Charter provides that individual criminal responsibility for the crime of aggression results from the 'planning, preparation, initiation or waging of a war of aggression. . . or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'.[771]

MENTAL ELEMENTS

It is virtually uncontested that the *mens rea* requirement for the crime of aggression is criminal intent.[772] An individual satisfies the *mens rea* requirement for the crime of aggression if they are aware of the collective intent to initiate and wage a war of aggression and continue to participate in this action.[773] For instance, in the *Roechling* case, the General Tribunal of the Military Government of the French Zone of Occupation in Germany found the defendant not guilty of preparing for aggressive war because there was insufficient evidence to prove that he possessed 'the necessary intent of furthering an invasion or an aggressive war'.[774]

Current developments in the crime of aggression

As mentioned above, the Contracting States to the ICC Statute were unable to agree upon a definition of aggression at the Rome Conference and deferred defining aggression until the future. As a result, even though the crime of aggression is listed as a core crime in the ICC Statute, the provision is inoperative until States agree upon a definition of aggression and the conditions under which the ICC will exercise its jurisdiction over the crime. Although development on the issue of aggression has been slow over the years, the Special Working Group on the Crime of Aggression has recently made progress, as it has concluded its work and produced draft amendments to the ICC Statute on the crime of aggression, holding its seventh and final session in New York from 9–13 February 2009.[775]

The Special Working Group's draft proposals include a suggested definition for the crime of aggression, which borrows heavily from the definition of aggression found in General Assembly resolution 3314(XXIX), and a suggested outline of the ICC's jurisdiction over the crime. However, the draft proposals must be presented to member States at a Review Conference for the ICC Statute, set to be held in 2010 in Kampala, Uganda, before the Statute could be amended. The Special Working Group's draft definition of aggression is as follows:[776]

770 Ibid at 274.
771 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, (8 Aug 1945) 82 UNTS 279 (Annex).
772 Schuster (n768) 24.
773 Cryer et al (n4) 274.
774 Historical Review of Developments Relating to Aggression, Prepatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, April 18–19, 2002, UN Doc No PCNICC/2002/WGCA/L1 (24 Jan 2002) para (264).
775 Assembly of States Parties, Report of the Special Working Group on the Crime of Aggression, UN Doc ICC-ASP/7/SWGCA/2 (20 Feb 2009) para (46).
776 Ibid Annex 1, Appendix, para (2).

Article 8bis

Crime of Aggression

1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State againt the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

   (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

   (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

   (c) The blockade of the ports or coasts of a State by the armed forces of another State;

   (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

   (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

   (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

   (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

However, the draft definition does not include acts of terrorism, performed by non-State actors, as an act of aggression.

Further, the Special Working Group has also addressed the issue of who may be a perpetrator of the crime of aggression, explaining that a perpetrator is a person who is in a position effectively to exercise control over the political or military action of a State.[777]

Although progress on the draft definition of aggression has been made at the Special Working Group's final session, it must be highlighted that State parties still have not come to a consensus with respect to what role the UN Security Council plays in determining acts of aggression. The lack of progress on this front is due in part to the insistence of the five permanent members of the UN Security Council that the Security Council has the exclusive right of determining acts of aggression. The objective of the next informal inter-sessional meeting on the Crime of Aggression is to resolve this issue and determine the UN Security Council's role.

Torture

Introduction

Torture is beyond any doubt a crime prohibited by international law. After examining the relevant treaty and customary international law in 1998, the ICTY pronounced that:

> the existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.[778]

The prohibition on torture under international law is absolute. The right not to be tortured is a right which allows of no derogation.[779] The prohibition of torture is *jus cogens* and States incur international responsibility if their officials commit torture.[780] The prohibition applies also in times of emergences or war without any exceptions or justifications.[781]

Torture

- Absolute prohibition of torture
- Prohibition of torture constitutes *jus cogens*
- Prohibition of torture applies in times of peace and during armed conflict

777 Ibid Annex 1, Appendix, para (4).
778 *Prosecutor v Furundžija* (n453) para (146).
779 UNCHR 'General Comment 24'(4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para (10).
780 *Prosecutor v Furundžija* (n453) para (153).
781 Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (10 Dec 1984) 1465 UNTS 85.

Under international humanitarian law, torture is prohibited by the 1949 Geneva Conventions and the two 1977 Additional Protocols.[782] Torture can constitute a crime against humanity under Article 7(1)(f) of the ICC Statute, Article 5(f) of the ICTY Statute and Article 3(f) of the ICTR Statute. Torture is also a war crime under Article 8(2)(a)(ii) of the ICC's Statute, Article 2(b) of the ICTY Statute and Article 4(a) of the ICTR Statute.

In time of war or internal armed conflict, military personnel can be found liable for committing the war crime of torture, if they torture a member of the enemy military or civilians. Private individuals not acting in an official capacity can also be found liable if they torture a member of the enemy military or protected persons who are the same nationality as the enemy or are under the control of the enemy. To qualify as a war crime, the torture must be linked to an armed conflict.[783]

Torture committed in time of internal or international armed conflict or in time of peace may amount to a crime against humanity, if it is part of a widespread or systematic practice or attack on a population, which is a requirement for all crimes against humanity. The torturer must also know that his acts formed part of the widespread or systematic attack. Non-military and non-State officials may also be held liable for this crime.[784]

In addition to these legal regimes, international criminal law also prohibits torture as a 'discrete crime'. Torture therefore exists as a crime per se in addition to as a crime against humanity and as a war crime.[785] Torture as a discrete crime is punishable no matter when or where it is committed, with liability attributable to the individual who commits the crime. The prohibition on torture being a part of customary international law, all States have jurisdiction to prosecute those who engage in torture. The necessary element of torture as a discrete crime is that it must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[786]

Three categories of torture as an international crime

- Torture as a war crime
- Torture as a crime against humanity
- Torture as a 'discrete crime'

782 Of the four 1949 Geneva Conventions, see, eg, Articles 3, 12 and 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 35; Articles 3, 12 and 51 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 Aug 1949) 75 UNTS 81; Articles 3, 17, 87 and 130 of the Geneva Convention relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; Articles 27, 32 and 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287; Article 75 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I) (8 June 1977) 1125 UNTS 3; and Article 4 of the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609.

783 See Cassese (n232) 149.

784 Ibid at 149–150.

785 Ibid at 149.

786 Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.

International human rights law also recognises the right to be free from torture.[787] This right is non-derogable.[788] The definition of torture under international human rights law does not require the involvement of a public official or State agent, nor does it require an armed conflict or widespread or systematic attack.[789] Thus, in many ways it is a wider definition then under any other legal regime. However, a human rights violation does not constitute an international crime per se. Rather, it is a violation of the relevant treaty obligation by the State involved.

There are many treaties, both international and regional, that ban the use of torture,[790] although few provide any definition for torture. As noted, many human rights treaties prohibit the use of torture, as human rights violations. Other instruments of international humanitarian law and international criminal law encapsulate torture as a war crime or a crime against humanity. These documents are informative for ascertaining the nature of the customary norm. However, the most thorough codification of the definition of torture can be found in Article 1(1) of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter UNCAT).[791]

International humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition.[792] In the absence of an express definition of torture under international humanitarian law, the ICTY turned to human rights law, namely the definition of torture provided in Article 1 of the UNCAT.[793] The ICTY has concluded that the UNCAT definition 'reflects a consensus which the Trial Chamber considers to be representative of customary international law'.[794] As held by the Trial Chamber in *Furundžija*

> [t]he broad convergence of the. . . international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.[795]

The Trial Chamber, however, pointed out that while the definition in Article 1 of the UNCAT applies to any instance of torture, whether in time of peace or armed conflict, it is appropriate 'to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts'.[796] In *Kunarac et al*, the Trial Chamber identified the following three elements that remain contentious: (a) the list of purposes for which torture is inflicted; (b) the connection with an armed conflict; (c) and the requirement that the act be inflicted by, or at the instigation or with the consent or acquiescence of, a public official.[797]

787 See, eg, Article 5 of the Universal Declaration of Human Rights, GA Res 217A (III), at 71, UN Doc A/810 (10 Dec 1948); Article 7 of the International Covenant on Civil and Political Rights, (16 Dec 1966) 999 UNTS 171; Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, (4 Nov 1950) 213 UNTS 222, 312 ETS 5; Article 5 of the American Convention on Human Rights (22 Nov 1969) OAS Treaty Series No 36; 1144 UNTS 123, 9 ILM 99 (1969); Article 5 of the African Charter on Human and Peoples' Rights (26 June 1981) OAU Doc CAB/LEG/67/3 Rev 5, 1520 UNTS 217, 21 ILM 58 (1982).

788 UNCHR 'General Comment 24' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para (10).

789 *HLR v France* (App no 24573/94) ECHR 1997-III 745.

790 See, eg, Article 5 of the Universal Declaration of Human Rights, GA Res 217A (III), at 71, UN Doc A/810 (10 Dec 1948); Article 7 of the International Covenant on Civil and Political Rights (16 Dec 1966) 999 UNTS 171; Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 Nov 1950) 213 UNTS 222, 312 ETS 5; Article 5 of the American Convention on Human Rights (22 Nov 1969) OAS Treaty Series No 36; 1144 UNTS 123, 9 ILM 99 (1969); Article 5 of the African Charter on Human and Peoples' Rights (26 June 1981) OAU Doc CAB/LEG/67/3 Rev 5, 1520 UNTS 217, 21 ILM 58 (1982).

791 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.

792 *Prosecutor v Furundžija* (n453) para (159).

793 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.

794 *Prosecutor v Furundžija* (n453) paras (160)–(161); *Prosecutor v Delalić et al* (n443) para (459). See also *Prosecutor v Kunarac et al* (n419) paras (468), (472).

795 *Prosecutor v Furundžija* (n453) para (161).

796 Ibid para (162); *Prosecutor v Furundžija* (ICTY) Case No IT-95-17/1-A, Appeal Judgment (21 July 2000) para (111). See also *Prosecutor v Kunarac et al* (n419) para (468).

797 *Prosecutor v Kunarac et al* (n419) para (484).

Beginning with the UNCAT definition, this section will outline the elements contained in the customary international law definition of torture as a discrete crime, before briefly highlighting the differences in the definition of torture under other international and regional international law regimes.

1984 United Nations Convention against Torture (UNCAT)

The UNCAT is the mostly widely ratified international treaty that defines torture. It reflects the 1975 General Assembly Declaration on Torture, which was adopted by general consensus, with some minor modifications.[798] The main elements of torture it contains have been held by the ICTY as being generally accepted by the world community, forming part of customary international law.[799] Article 1(1) of the UNCAT provides that:

> *Article 1(1) of the UNCAT*
>
> For the purpose of this Convention, 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 or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition of torture can be divided into its physical (*actus reus*) and mental (*mens rea*) elements. Both must be satisfied for an act to rise to the level of torture.

PHYSICAL ELEMENTS (ACTUS REUS)

The physical elements of the crime of torture in the UNCAT require:[800]

- an act;
- by which severe pain or suffering, whether physical or mental, is inflicted upon a person;
- such pain or suffering must be inflicted at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity; and
- such pain or suffering does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

798 Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 3452 (XXX), UN Doc A/10034 (9 Dec 1975).

799 *Prosecutor v Delalić et al* (n443) paras (455)–(474); *Prosecutor v Kunarac et al* (n419) paras (483)–(497).

800 See also *Prosecutor v Furundžija* (n796) para (111), which provides for the elements of torture in a situation of armed conflict. It spells out the same elements as the definition provided under UNCAT, except that it requires that the act or omission amounting to torture must be linked to an armed conflict.

Where all four of these elements are satisfied, the physical elements of the crime of torture will be satisfied.

An act

During the negotiation of the UNCAT there was some debate about the extent that acts of omission can satisfy the requirement that an 'act' must cause the severe pain or suffering under the UNCAT. Given the purpose and objective of the UNCAT, of prohibiting conduct that causes severe pain and suffering for a prohibited purpose, it is generally agreed that omissions can give rise to conviction for torture. Additionally, State practice, in the implementation of the UNCAT into domestic legislation, indicates a propensity for omissions to be included in the scope of 'act' under the UNCAT, although this is not universally the case.[801]

The question of whether omissions are included in the definition of torture as a discrete crime has yet to be decided by an international tribunal or court, although in relation to torture as a crime under international humanitarian law, the ICTY has found that not only acts but also omissions, which give rise to severe pain or suffering, whether physical or mental, can qualify as torture, providing a strong indication that both acts and acts of omissions can constitute torture when considered as a discrete crime.[802]

Severe pain or suffering

To constitute torture, the act must inflict severe pain or suffering, either physical or mental, upon the victim. Thus, torture can constitute both physical attacks on the body, such as beatings, electric shocks or deprivation of food, or purely psychological suffering such as forcing someone to watch an execution or threats of harm.[803] The severe nature of the pain or suffering is central to the act amounting to torture and not being classified as cruel, inhuman or degrading treatment – a lesser contravention of international criminal law. It is the most distinctive feature of the crime of torture.[804]

Clearly torture stands at the extreme end of the spectrum of pain-inducing acts. A hierarchy of ill treatment was elucidated in a 1969 European Commission on Human Rights case, the *Greek* Case.[805] In that case, the Commission found that torture was an aggravated form of inhuman treatment, which itself is based in degrading treatment. This hierarchy has been supported in later ECtHR cases and finds support in Article 16 of the UNCAT. Article 16 of the UNCAT requires State parties to prevent 'cruel, inhuman or degrading treatment or punishment which do not amount to torture', clearly indicating a hierarchy of ill treatment under international law.

Evaluating whether the pain or suffering amounts to 'severe pain or suffering' is a delicate task that is usually left to the discretion of the judge. There is no single test that clearly sets out how to undertake this analysis; however it is clear that while the severity of harm is determined via an objective test, the mental or physical suffering requires a subjective assessment of factors such as age, health and sex.[806] That is, regard must be had of the actual effect that the act has on the victim and so lists of prohibited conduct would be unhelpful and cannot be definitive.

801 See the reports of the States Parties to the UNCAT, available at <www2.ohchr.org/english/bodies/cat/> accessed 30 November 2009.
802 *Prosecutor v Furundžija* (n453) para (162); *Prosecutor v Furundžija* (n796) para (111).
803 *Denmark, Norway, Sweden & the Netherlands v Greece (The Greek Case)* (1969) Ybk Eur Conv on HR 1 (EComHR).
804 *Ireland v United Kingdom* (App no 5310/71) [1978] ECHR Series A no 25.
805 *Denmark, Norway, Sweden & the Netherlands v Greece (The Greek Case)* (n803).
806 *Ireland v United Kingdom* (n804); *Prosecutor v Kvočka et al* (n513), para (143).

To determine the severity of harm, the court may look to evidence of sexual violence, prolonged denial of sleep, food hygiene or medical assistance and threats of torture, rape or the killing of relatives and mutilation of body parts.[807] Importantly, these must be considered in relation to the nature of the victim being tortured. Acts that may not rise to the level of torture when committed against an adult male, may be severe pain or suffering if committed against a child.

While it would not be possible to outline exactly what would and would not satisfy the severe pain or suffering requirement, one can gain some indication of judicial trends from the case law. For example, the ECtHR held in 1978 that wall standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink amounted to inhuman and degrading treatment and not torture.[808] However, it is doubtful whether the same assessment would be made today.[809]

The ICTY has held that sexual violence necessarily gives rise to severe pain or suffering, both physical and mental, and that the suffering resulting from rape is at the requisite level of severity to amount to torture.[810] Solitary confinement may also be regarded as torture, though it must be shown to 'have caused the victim severe pain or suffering'[811] and thus is not particularly informative as to the standard to be applied by judges. Whether these examples would apply in a future case will depend on the nature of the treatment and, importantly too, the nature of the victim.

Public official requirement

The 'public official' requirement of the UNCAT definition narrows the ambit of the discrete crime of torture, excluding torture conducted by non-State actors such as guerrillas, paramilitaries, terrorists and common criminals, if it occurs without the acquiescence or consent of the State. This is because torture as a discrete crime is punishable under international law even when it is a single occurrence, apart from war or conflict; and to separate the international crime of torture from the domestic crime of torture – for example, by sadists.

The requirement for a torture to be instigated with the consent or acquiescence of a public official is what separates the discrete crime of torture from torture when committed as a war crime, a crime against humanity or as a human rights violation. It requires that the torture not be an isolated individual performing the torture without the knowledge or consent of the State. Rather for the act to amount to an international crime a public or State organ must be involved instigating the torture, sanctioning the torture or allowing it to continue unimpeded.

807 *Prosecutor v Kvočka et al* (n513) para (144).
808 *Ireland v United Kingdom* (n804) (disposition).
809 See *Selmouni v France* (App no 25803/94) ECHR 1999-V.
810 *Prosecutor v Delalić et al* (n443) para (489).
811 *Prosecutor v Krnojelac* (n434) para (183).

However, under the ECHR and the ICCPR, there is no requirement for the involvement of State organs or agents.[812] The ECtHR held in *HLM v France* that

> [o]wing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.[813]

While it may be tempting to use this definition from international human rights law for international criminal law, this would be in direct contradiction to the language of the UNCAT.[814]

Additionally, the public official requirement is also what separates the discrete crime of torture under customary international law from torture as a crime under international humanitarian law. The 1949 Geneva Conventions contain no requirement that the torture be committed by a State official; neither does the ICC Statute or the ICTY Statute.[815] This difference was also confirmed by the ICTY Appeals Chamber in the *Kunarac et al*, namely 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'.[816]

Accordingly, as held by the Trial Chamber in *Kunarac et al*, in the field of international humanitarian law, the physical elements of the offence of torture, under customary international law, can be described as 'the infliction, by an act or omission, of severe pain or suffering, whether physical or mental'.[817]

Arising from, inherent in or incidental to lawful sanctions

The UNCAT contains an exception for pain or suffering 'arising from, inherent in or incidental to lawful sanctions'. This confers a wide exemption for many acts that could constitute torture and had the potential to undermine the treaty itself. There is currently little guidance as to the limits this exception places on acts of torture, as no government has had lawfully sanctioned techniques challenged as torture. It is worth noting that the ambiguities inherent in this exception were debated when the UNCAT was adopted and its implementation in national legislation varies widely. Additionally, it is important to keep in mind the objects and purposes of the UNCAT and the general principles of treaty interpretation which require a good faith interpretation of this exception, such that it does not undermine the operation of the treaty entirely.[818]

812 See, eg, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 Nov 1950) 213 UNTS 222, 312 ETS 5; Article 7 of the International Covenant on Civil and Political Rights (16 Dec 1966) 999 UNTS 171; United Nations Human Rights Committee, General Comment No 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7) (30 May 1982) para (2), available at <www2.ohchr.org/english/bodies/hrc/comments.htm> accessed 25 October 2009.

813 *HLR v France* (n789).

814 Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.

815 Articles 3 and 5 of the ICTY Statute; Article 7(2)(e) of the ICC Statute.

816 *Prosecutor v Kunarac et al* (n307) para (148); see also paras (145)–(147).

817 *Prosecutor v Kunarac et al* (n419) para (497).

818 Article 31 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

MENTAL ELEMENTS (MENS REA)

The mental elements of the crime of torture in the UNCAT are:

- the pain or suffering must be intentionally inflicted;
- for such purposes as obtaining information or a confession, punishment for acts committed or suspected, intimidation or coercion, or for any reason based on discrimination. This applies both to the direct torture victim and to third parties.

Both of these elements must be satisfied for the mental elements of torture to be satisfied.

The ICTY has recognised both elements as constituting the mental elements of torture under international humanitarian law, namely that '[t]he act or omission must be intentional' and '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'.[819]

Intentionally inflicted

The requirement of 'intentionality' arises from the text of Article 1(1) of the UNCAT. It means that criminal intent is always required for torture as an international crime,[820] and as such, other forms of *mens rea* such as recklessness or culpable negligence will not suffice.[821]

In international human rights law, the ECHR has substantially eased the burden on the victim to prove 'intentionally', by requiring the accused government to provide an explanation for harm incurred while in custody. In the case of *Selmouni v France*[822] the ECHR held that physical evidence of harm while in State custody was enough to raise a presumption of intent.

Thus, torture requires the perpetrator intentionally to carry out an act designed to cause severe pain or suffering to the victim, or to carry out an act that could reasonably have been foreseen to cause such pain or suffering. However, it most likely will exclude pain or suffering caused accidentally or from merely negligent conduct. The jurisprudence suggests that the intention can be relatively easily inferred by the conduct and evidence of harm.

For a specific purpose

Torture must also be inflicted for a specific purpose. The pain and suffering caused must be a means to and end, as a way for the torturer to obtain a prohibited goal. The listed purposes in the UNCAT are not exhaustive, though any other purpose must be of a similar nature to those listed.

The specific purpose requirement limits the application of the crime of torture such that torture for purely sadistic reasons or to humiliate the victim are unlikely to satisfy the definition under customary international law. This is to further delineate between the international crime of torture and the 'ordinary' or purely domestic crime, which should be prosecuted in the national jurisdiction.

819 *Prosecutor v Kunarac et al* (n419) para (497). See also *Prosecutor v Akayesu* (n346) para (594).
820 *Raquel Marti de Mejia v Peru*, Case 10.970 Inter-American Court of Human Rights Report No 5/96, OEA/Ser.L/V/II.91 doc. 7, 157, para (185) (1996).
821 See also *Prosecutor v Furundžija* (n453) para (162); *Prosecutor v Kunarac et al* (n419) para (497).
822 *Selmouni v France* (n809).

The punishable purposes that are listed in Article 1 of the UNCAT are:

- to obtain information or a confession;
- to punish or intimidate a person;
- to coerce the victim or a third person to do or omit to do something; or
- to discriminate, on any ground, against the victim or a third person.

It should be noted that this list is not exhaustive, as indicated by the words 'for such purposes as' which precede the list above. Thus, courts are able to expand upon this list for purposes such as those listed.

The ICTY Trial Chamber in *Furundžija* extended the relevant purposes to the intentional 'humiliation' of the victim, on the basis of the general spirit of international humanitarian law to protect human dignity and on the grounds that the concept of humiliation was close to the notion of 'intimidation' contained in the UNCAT.[823] However, the proposition that 'humiliation' could come under torture was rejected by the ICTY Trial Chamber in *Krnojelac* as not yet having reached 'customary status'.[824] Arguably, intentional humiliation is more properly characterised as the offences of 'outrages upon personal dignity' and/or 'inhuman and degrading treatment' rather than torture.

It should also be noted that under the ICC Statute, no specific purpose is required for torture to amount to a crime against humanity.

DEFENCES

As torture is never permissible or justifiable under any circumstances, no circumstances can be used to justify its use.[825] Thus, torture has no defences available to those who commit it apart from demonstrating that the elements have not been satisfied.

JURISDICTIONAL ISSUES

Under the UNCAT, State parties are required, under Article 4, to legislate to make torture a criminal offence.[826] They are also required to either prosecute alleged torturers or to extradite them to a State that has the proper jurisdiction for the purpose of prosecution.[827] Under customary international law, States are required to prohibit acts of torture and prevent individuals from being placed in a position where they are likely to be tortured.[828] States are also required to ensure individuals in their territory are able to complain to 'competent authorities' about torture allegations.[829]

The UN Committee Against Torture was also created in 1988 to monitor the implementation and adherence by States parties to UNCAT. The Committee meets twice per year and reviews State practice based on reports submitted by State parties. It then gives recommendations to States as to their compliance with their obligations under UNCAT. Additionally, if a State party has declared

823 *Prosecutor v Furundžija* (n453) para (162).
824 *Prosecutor v Krnojelac* (n434) para (186). See also *Prosecutor v Kunarac et al* (n419) para (485).
825 Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.
826 Ibid Article 4.
827 Ibid Article 7.
828 *Prosecutor v Furundžija* (n453) para (156).
829 Article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 Dec 1984) 1465 UNTS 85.

the Committee competent to receive communications from individuals, the Committee may receive complaints from individuals provided that the author reveals their identity, the Committee has considered that the communication does not abuse the right to submit communications, the communication is compatible with the provisions of the UNCAT, the matter has not been considered by international investigation or settlement body, and the individual complainant has exhausted all domestic remedies.[830]

Torture per se, that is as a discrete crime, distinct from torture as a crime against humanity or as a war crime, does not fall within the jurisdiction of any of the international courts and tribunals, no doubt due to the fact that those tribunals' focus is primarily on crimes committed in armed conflict or of a widespread or systematic nature.

States themselves have also been reluctant to prosecute torturers committing offences outside of their territory as a discrete international crime, despite their ability to do so under international law, although obviously many have enacted torture provisions within their criminal legislation to protect their own residents. The exception to this is the jurisprudence surrounding human rights instruments that deal with torture as a human rights violation by the State. The difference between State and individual responsibility under international law must be remembered in this regard.

Other relevant instruments

Some other international instruments relevant to torture include:

- The 1949 Geneva Conventions and the two Additional Protocols of 1977:[831] these prohibit the use of torture during armed conflict. As noted above, these international humanitarian law instruments have no requirement of involvement by a public official.
- The 1975 General Assembly Declaration on Torture:[832] this was adopted by consensus and contains a very similar definition of torture to the one contained in the UNCAT.
- The 1985 Inter-American Torture Convention:[833] this contains a broader definition of torture than the UNCAT; it does not require a 'severe' threshold for the pain or suffering inflicted. No physical pain or mental anguish is required if the torturer's purpose is to 'obliterate the personality of the victim or to diminish his physical or mental capacities'.[834] Additionally, the list of purposes provided in the definition of torture includes 'any other purposes', leaving the list of applicable purposes much wider than under the UNCAT.

830 Ibid Article 21.

831 Of the four 1949 Geneva Conventions, see, eg, Articles 3, 12 and 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 Aug 1949) 75 UNTS 35; Articles 3, 12 and 51 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (12 Aug 1949) 75 UNTS 81; Articles 3, 17, 87 and 130 of the Geneva Convention relative to the Treatment of Prisoners of War (12 Aug 1949) 75 UNTS 135; Articles 27, 32 and 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 Aug 1949) 75 UNTS 287; Article 75 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I) (8 June 1977) 1125 UNTS 3; and Article 4 of the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609.

832 Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 3452 (XXX), UN Doc A/10034 (9 Dec 1975).

833 Inter-American Convention to Prevent and Punish Torture (9 Dec 1985) OAS Treaty Series No 67.

834 Ibid Article 2.

- The ECHR:[835] Article 3 of this instrument has been found not to require the involvement of State organs or agents to satisfy the definition of torture.[836]
- The ICCPR:[837] the UN Human Rights Committee has found that Article 7 of the ICCPR does not require the involvement of State organs of agents to satisfy the definition of torture.[838]

Conclusion

Apart from amounting to a human rights violation under various human rights treaties, torture can be conceptualised as three distinct violations of international criminal law. First, torture can be a crime against humanity when it is committed as part of widespread or large-scale criminal conduct, in peace time or in war. Second, torture can be a war crime when committed in connection with an armed conflict. Third, torture can be a discrete crime for which an individual can attract liability at any time and in any country under customary international law.

As a discrete crime, torture applies to a narrow category of actions that satisfy the physical and mental elements outlined above. Though the requirements may appear quite difficult to satisfy they are in place due to the far-reaching application that the discrete crime of torture has as a customary norm of international law and to differentiate it from torture when committed in the two other categories of international violations or indeed as a domestic crime.

Torture in the context of domestic prosecutions on the basis of universal jurisdiction is discussed in Chapter 5.

Terrorism as an international crime

Introduction

International terrorism has thus far proved particularly difficult to regulate due to the lack of a commonly accepted legal definition of the phenomenon.[839] The international community has been struggling for decades to reach a consensus on whether a crime of terrorism exists under international law and, if so, what elements would constitute the crime.[840] The main contentious question is whether 'freedom fighters' engaged in national liberation movements could be classified as terrorists.[841] As a consequence, no legally binding instrument laying down a comprehensive definition has yet been concluded.

Arguably, a consensus on a generally acceptable definition could be agreed upon. Some scholars even argue that a widespread consensus on a generally acceptable definition has evolved in the international community which constitutes a customary rule on the physical

835 Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (4 Nov 1950) 213 UNTS 222, 312 ETS 5.
836 *HLR v France* (n789) para (40).
837 International Covenant on Civil and Political Rights (16 Dec 1966) 999 UNTS 171.
838 UNCHR 'General Comment 20' in 'Replaces Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7) (10 March 1992) para (2) available at <www2.ohchr.org/english/bodies/hrc/comments.htm> accessed 30 November 2009.
839 See M Cherif Bassiouni, 'Legal Control of International Terrorism: a Policy-Oriented Assessment' (2002) 43 Harv Intl LJ 83–104; Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 J Intl Crim Just 933–958; Hans-Peter Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' (2002) 84 Intl Rev Red Cross 547–570; Gilbert Guillame, 'Terrorism and International Law' (2004) 53 ICLQ 537–548; Marco Sassòli, 'Terrorism and War' (2006) 4 J Intl Crim Just 959–981; Jean-Marc Sorel, 'Some Questions about the Definition of Terrorism and the Fight against its Financing' (2003) 14 Eur J Intl L 365–378.
840 Guido Acquaviva, 'Terrorism', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 533, 533.
841 See further Cassese (n232) 162–163 n1.

and mental elements of the crime of international terrorism in time of peace.[842] However, disagreement remains as to the existence and extent of an exception to such definition, namely whether to exempt from the definition acts that, although falling within the definition of terrorism, are legitimised in law by their being performed by 'freedom fighters' engaged in liberation wars.[843]

International legal instruments on terrorism

INTERNATIONAL TERRORISM CONVENTIONS

Disagreements over the constitutive elements of terrorism have limited its international regulation to 16 universal instruments against international terrorism comprising 13 thematic conventions and three amendments.[844] These instruments have been elaborated within the framework of the UN system relating to specific terrorist activities. Thus, they criminalise specific acts as terrorist offences, rather than attempting to criminalise terrorism in its entirety. They oblige State parties to incorporate the regime into their domestic laws by criminalising the specific offences and providing penalties.[845] States are further required to either extradite the offender or to consider the case for prosecution (*aut dedere aut judicare*) and to provide each other with mutual legal assistance in extradition and criminal proceedings.[846]

The jurisdiction of the State parties to these international terrorism conventions differs according to each individual convention. Most of these conventions base jurisdiction on the territory upon which the offence was committed, or on the nationality of the offender.[847] Others allow for jurisdiction to be established according to the nationality of the victim.[848] For example, the 1997 Convention for the Suppression of Terrorist Bombings obliges State parties to exercise jurisdiction over an offence when it is committed on its territory, on its ships or aircraft, or by its nationals.[849] A State party, however, is also permitted to exercise jurisdiction over an offence when it is committed against a national or against a State or government facility of that State abroad, by a stateless persons who resides in the

842 Ibid at 163.

843 Ibid.

844 The 13 conventions are: Convention on Offences and Certain Other Acts Committed on Board Aircraft (14 Sept 1963) 704 UNTS 219; Convention for the Suppression of Unlawful Seizure of Aircraft (16 Dec 1970) 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23 Sept 1971) 974 UNTS 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (14 Dec 1973) 1035 UNTS 167; International Convention against the Taking of Hostages (17 Dec 1979) 1316 UNTS 205; Convention on the Physical Protection of Nuclear Material (3 March 1980) 1456 UNTS 101; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (10 March 1988) 1678 UNTS 221; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (3 Oct 1988) 1678 UNTS 304; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (24 Feb 1988) 27 ILM 627; Convention on the Marking of Plastic Explosives for the Purpose of Detection (1 March 1991) 30 ILM 721; International Convention for the Suppression of Terrorist Bombings, GA Res 52/164, UN Doc A/RES/52/164 (15 Dec 1997); International Convention for the Suppression of the Financing of Terrorism, GA Res 54/109, UN Doc A/RES/54/109 (9 Dec 1999); International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res 59/290, UN Doc A/RES/59/290 (13 April 2005). The three amendments adopted in 2005 are: Amendments to the Convention on the Physical Protection of Nuclear Material; Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (14 Oct 2005); and Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

845 For example, Article 4 of the International Convention for the Suppression of Terrorist Bombings, requiring State Parties to 'establish as criminal offences under its domestic law the offences set forth in Article 2 of this Convention' and to 'establish those offences punishable by appropriate penalties which take into account the grave nature of those offences'. GA Res 52/164, UN Doc A/RES/52/164 (15 Dec 1997).

846 For example, the *aut dedere aut judicare* principle is embodied in Article 8 of the International Convention for the Suppression of Terrorist Bombings, GA Res 52/164, UN Doc A/RES/52/164 (15 Dec 1997).

847 See, eg, Article 3(1) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (14 Dec 1973) 1035 UNTS 167; Article 6 of the International Convention for the Suppression of Terrorist Bombings, GA Res 52/164, UN Doc A/RES/52/164 (15 Dec 1997).

848 Ibid.

849 Article 6(1) of the International Convention for the Suppression of Terrorist Bombings, GA Res 52/164, UN Doc A/RES/52/164 (15 Dec 1997).

territory of that State, or if the offence is committed in order to coerce the State to do or to abstain from doing any act.[850]

Regulation of international terrorism by these international terrorism conventions extends only to offences defined by these conventions, such as hostage-taking, financing terrorism, bombings, aeroplane hijacking, other offences against air travel and the like. Regulation is further limited to acts of international terrorism; acts of terrorism not of an *international* character, ie acts committed within a single State where the offender is a national of that State, the victims are nationals of that State, and the offender is found in the territory of that State, are not considered acts of international terrorism for the purposes of these conventions.[851]

UN SECURITY COUNCIL RESOLUTIONS

The UN Security Council has been dealing with terrorism issues since the early 1990s. In response to specific acts of terrorism, the Security Council determined that suppression of international terrorism was essential for the maintenance of international peace and security. The Security Council imposed sanctions against Libya and Sudan for not complying with its request for the surrender to justice of persons accused of specific terrorist acts. Libya was requested to surrender two individuals (allegedly State agents) who were accused of being responsible for the explosion of Pan American Flight 103 over the Scottish town of Lockerbie in 1988 (see further the Lockerbie Trial in Chapter 2).[852] Sudan was requested to surrender three persons accused of attempting to assassinate the President of Egypt in 1995 in Addis Ababa in Ethiopia.[853]

Similarly, in the wake of the terrorist bomb explosions outside the United States Embassies in Kenya and Tanzania in 1998, the Security Council adopted resolution 1267 (1999) in which it imposed sanctions under Chapter VII against the Taliban for their failure to comply with its request to stop providing sanctuary and training for international terrorists and their organisations, and that all Afghan fractions cooperate with efforts to bring indicted terrorists to justice.[854] The sanctions included the freezing of funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban. The Security Council also requested the Taliban to turn over Osama bin Laden to the authorities in a country where he had been indicted. For the purpose of overseeing the implementation of the sanctions the Security Council established a Committee consisting of all the members of the Security Council.[855]

The sanctions regime has been modified and strengthened by subsequent resolutions so that the sanctions measures now apply to designated individuals, groups, undertakings, and entities associated with Al-Qaeda, Osama bin Laden, and/or the Taliban.[856] States are required to implement three sanctions measures, namely; (a) to freeze the funds and other financial assets or economic resources of these individuals,

850 Ibid Article 6(2).

851 See, eg, Article 13 of the International Convention against the Taking of Hostages (17 Dec 1979) 1316 UNTS 205; Article 3 of the International Convention for the Suppression of Terrorist Bombings, GA Res 52/164, UN Doc A/RES/52/164 (15 Dec 1997); Article 3 of the International Convention for the Suppression of the Financing of Terrorism, GA Res 54/109, UN Doc A/RES/54/109 (9 Dec 1999); Article 3 of the International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res 59/290, UN Doc A/RES/59/290 (13 April 2005); Article 3 of the Convention for the Suppression of Unlawful Seizure of Aircraft (16 Dec 1970) 860 UNTS 105.

852 SC Res 731, UN Doc S/RES/731 (21 Jan 1992); SC Res 748, UN Doc S/RES/748 (31 March 1992).

853 SC Res 1044, UN Doc S/RES/1044 (31 Jan 1996); SC Res 1054, UN Doc S/RES/1054 (26 April 1996).

854 See SC Res 1214, UN Doc S/RES/1214 (8 Dec 1998).

855 SC Res 1267, UN Doc S/RES/1267 (15 Oct 1999).

856 SC Res 1333, UN S/RES/1333 (19 Dec 2000); SC Res 1390, UN Doc S/RES/1390 (16 Jan 2002); SC Res 1455, UN Doc S/RES/1455 (17 Jan 2003); SC Res 1526, UN Doc S/RES/1526 (30 Jan 2004); SC Res 1617, UN Doc S/RES/1617 (29 July 2005); SC Res 1735, UN Doc S/RES/1735 (22 Dec 2006); SC Res 1822, UN Doc S/RES/1822 (30 June 2008).

groups, undertakings and entities; (b) to prevent the entry into or transit through their territories of these individuals; and (c) to prevent the direct or indirect supply, sale, or transfer to designated individuals, groups, undertakings or entities of arms and related material of all types including weapons and ammunition, military vehicles, etc.[857] The Sanctions Committee, also known as 'the Al-Qaeda and Taliban Sanctions Committee' maintains a regularly updated list of designated individuals, groups, undertakings and entities (the Consolidated List) that serves as the foundation for enforcing the sanctions.[858]

In the latest resolution adopted within the Al-Qaeda and Taliban sanctions regime, UN Security Council resolution 1822 (2008), the Security Council reaffirmed that

> [T]errorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and *reiterating* its unequivocal condemnation of Al-Qaeda, Osama bin Laden, the Taliban, and other individuals, groups, undertakings, and entities associated with them, for ongoing and multiple criminal terrorist acts aimed at causing the death of innocent civilians and other victims, destruction of property and greatly undermining stability, . . .[859]

Following the September 11 terrorist attacks against the United States, the UN Security Council adopted a resolution 1373 (2001) under Chapter VII of the UN Charter which obliges States to take a number of measures to prevent terrorist activities and to criminalise various forms of terrorist actions.[860] In particular, States are required to criminalise the financing of terrorism, freeze any funds related to persons involved in acts of terrorism, deny all forms of financial support for terrorist groups, suppress the provision of safe havens, sustenance or support for terrorists, criminalise active and passive assistance for terrorism in domestic law and bring violators to justice. In addition, States are obliged to take measures that assist and promote cooperation among countries including adherence to international counter terrorism instruments.

The 1373 (2001) resolution establishes a Counter Terrorism Committee composed of all UN Security Council members to supervise its implementation. States are required to report regularly to the Committee on the measures they have taken to implement the resolution. By determining that *any* act of international terrorism constitutes a threat to international peace and security, the Security Council adopted a general definition of threat to peace and security which is no longer necessarily linked to any specific situation. It should be pointed out that the obligations imposed by the Security Council in resolution 1373 (2001) are not sanctions but measures that resemble 'model legislation'.[861]

857 See SC Res 1822, UN Doc S/RES/1822 (30 June 2008) para (1).

858 See further the Guidelines of the Committee for the Conduct of its Work (9 December 2008), available at <www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf> accessed 20 November 2009.

859 SC Res 1822, UN Doc S/RES/1822 (30 June 2008).

860 SC Res 1373, UN Doc S/RES/1373 (28 Sept 2001).

861 It has been argued that by adopting resolution 1373 (2001) the Security Council acted as a 'global legislator'. Some of the obligations imposed by the Security Council in resolution 1373 (2001) resemble obligations which are regulated by the 1999 International Conventions for the Suppression of the Financing of Terrorism. The measures provided in the resolution are not linked to any specific situation of a threat to peace and security – instead, the threat to the peace and security caused by international terrorism is defined in general terms. The obligations imposed by the Security Council upon States are abstract, general, and unlimited in time. For these reasons they arguably fulfil the characteristics of 'legislative' norms. Similar 'model legislation' was imposed by Security Council resolution 1540 (2004), adopted under Chapter VII, which obliges States to refrain from supporting by any means non-State actors, including terrorists, from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems. States are required to adopt and enforce appropriate effective laws which prohibit any non-State actor from manufacturing, acquiring, possessing, developing, transporting, transferring or using nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, and to take and enforce measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery. Unlike the Counter Terrorism Committee, the 1540 Committee, which supervises the implementation of the 1540 resolution, was established for a period of two years. SC Res 1540, UN S/RES/1540 (28 April 2004). Its mandate was subsequently extended for a further two years (SC Res 1673, UN S/RES/1673 (27 April 2006)) and thereafter for a period of three years until 2011 (SC Res 1810, UN S/RES/1810 (25 April 2008)).

In a further resolution 1566 (2004) the Security Council reaffirmed that terrorism in all its forms and manifestations constituted one of the most serious threats to peace and security.[862] Acting under Chapter VII the Security Council called upon States to take action against individuals, groups and entities engaged in terrorist activities other than those that are already subject to the Al-Qaeda and Taliban sanctions regime under Security Council resolution 1267 (1999). Resolution 1566 (2004) established a Working Group made up of all Security Council members to recommend practical measures against such individuals and groups, including more effective procedures considered to be appropriate for bringing them to justice through prosecution or extradition, freezing their assets, etc. The operative part of resolution 1566 (2004) adopted under Chapter VII refers to certain acts that are never justifiable:

> Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.[863]

Although it would be far-fetched to state that resolution 1566 (2004) provides for a binding definition of international terrorism, the above definition offers guidance on determining which acts are considered terrorist acts. In resolution 1566 (2004), the Security Council obliged States to prevent such acts and, if not prevented, to ensure such acts are punished by penalties consistent with their grave nature.[864]

EFFORTS TO DRAW UP A COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM

In 1937, the general Convention for the Prevention and Punishment of Terrorism was drawn up within the League of Nations, but it failed to secure sufficient ratification to enter into force. The convention defined acts of terrorism as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public' and listed acts to be criminalised by States parties, including those causing death, serious injury or loss of liberty to Heads of State and public officials, damage to public property of another State, and risk to the lives of members of the public.[865]

As mentioned above, various thematic conventions have been adopted since then, each of them prohibiting specific terrorist acts. The 1999 International Convention for the Supression of the Financing of Terrorism added to some specifically enumerated acts '[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act'.[866]

862 SC Res 1566, UN Doc S/RES/1566 (8 Oct 2004).
863 Ibid para (3).
864 Ibid.
865 League of Nations Doc C546(1).M.383(1).1937.V; See also Ben Saul, 'The Legal Response of the League of Nations to Terrorism' (2006) 4 J Int'l Crim Just 78.
866 Article 2(b) of the International Convention for the Suppression of the Financing of Terrorism, GA Res 54/109, UN Doc A/RES/54/109 (9 Dec 1999).

The efforts to eliminate international terrorism have also produced results on the regional (and subregional) level by adoption of numerous regional conventions on international terrorism.[867] These regional conventions take a markedly different approach to regulating terrorism than that of the international terrorism conventions. Rather than criminalising specific acts, the regional conventions are more general in their approach and the majority of them regulate terrorism through a comprehensive definition.[868] One such example of a comprehensive legal definition of terrorism is as follows:

> 'Terrorism' means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorising people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.[869]

Despite the success at the regional level of developing a comprehensive legal definition of terrorism, the international community has yet to do so. The General Assembly has adopted by consensus a Declaration on Measures to Eliminate International Terrorism, which calls upon States, inter alia, to refrain from supporting terrorist activities, to take effective measures to eliminate international terrorism and to enhance cooperation in this area. The declaration states that

> [c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[870]

UN Member States are currently negotiating a draft comprehensive convention on international terrorism. The General Assembly has entrusted its Ad Hoc Committee with the task of elaborating the draft comprehensive convention on international terrorism, including the consideration of the question of convening a high-level conference under the auspices of the UN.[871] This convention would complement the existing framework of international anti-terrorism instruments and would build on key guiding principles already present in recent anti-terrorist conventions:

- the importance of criminalisation of terrorist offences, making them punishable by law and calling for prosecution and extradition of the perpetrators;
- the need to eliminate legislation which establishes exceptions to such criminalisation on political, philosophical, ideological, racial, ethnic, religious or similar grounds;
- a strong call for member States to prevent terrorist acts; and

867 The list of regional conventions on international terrorism are available at <www.unodc.org/tldb/en/regional_instruments.html> accessed 20 November 2009.

868 The following regional conventions contain comprehensive definitions of terrorism: the 1998 Arab Convention on the Suppression of Terrorism (League of Arab States); Convention of the Organization of the Islamic Conference on Combating International Terrorism (1 July 1999); OAU Convention on the Prevention and Combating of Terrorism (Organisation of African Union) (14 July 1999); Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism (4 June 1999).

869 Article 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1 July 1999).

870 GA Res 49/60, UN Doc A/RES/49/60 (17 Feb 1995); GA Res 51/210, UN Doc A/RES/51/210 (16 Jan 1997).

871 See GA Res 63/129, UN Doc A/RES/63/129 (11 Dec 2008).

- emphasis on the need for member States to cooperate, exchange information and provide each other with the greatest measures of assistance in connection with the prevention, investigation and prosecution of terrorist acts.[872]

THE ICC STATUTE

Due to the lack of an internationally acceptable definition of terrorism, the international community was unable to include terrorism within the jurisdiction of the ICC.[873] Other factors which precluded ICC jurisdiction over the discrete crime of terrorism were concerns that some acts of terrorism would be insufficiently serious to warrant prosecution by the ICC, and the fear that the inclusion of terrorism in the Statute would politicise the Court.[874]

However, Resolution E passed during the Rome Conference in 1998 recognised that 'terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community'.[875] The resolution also expresses a regret that no generally acceptable definition of the crime of terrorism could have been agreed upon for inclusion within the jurisdiction of the ICC. The resolution therefore recommended that a Review Conference, which will be convened in 2010 in Kampala, Uganda, pursuant to Article 123 of the ICC Statute, consider the crime of terrorism with a view to arriving at an acceptable definition and its inclusion in the list of crimes within the jurisdiction of the ICC Statute.[876]

Although the crime of terrorism, due to the lack of definition, has not been included in the list of crimes within the ICC Statute, this does not mean that ICC jurisdiction is completely precluded in all instances. Acts of international terrorism can also amount to either war crimes, or crimes against humanity, over which the ICC could exercise jurisdiction.

Elements of terrorism as an international crime

With one possible exception, no international court or tribunal has jurisdiction over the crime of terrorism as such, ie as a 'discrete crime'. The exception is the STL, whose jurisdiction covers acts of terrorism. In defining terrorism, however, the judges of the STL must apply the provisions of the Lebanese Criminal Code.[877] The international terrorism conventions rely on States to domestically enforce their provisions, and in general most prosecutions for international crimes have been pursued at the domestic level.

An example of a domestic trial which involved international terrorism was the Lockerbie trial. Two Libyan nationals were accused of responsibility for the bomb explosion of Pan Am Flight 103 in 1988 over Lockerbie in Scotland. The trial was domestic but it was organised on the international level. The accused were tried before a Scottish court applying Scottish law at a neutral venue, namely Camp Zeist in the Netherlands. The accused, however, were not charged with committing an act of terrorism but were tried for murder (*see* further Chapter 2).

872 See <www.un.org/terrorism/instruments.shtml> accessed 15 November 2009.
873 Antonio Cassese, 'Terrorism as an International Crime', in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart, Oxford 2004) 218.
874 Christian Much, 'International Criminal Court (ICC) and Terrorism as an International Crime' (2006) 14 J Intl L & Practice 121.
875 Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) UN Doc A/CONF.183/10, Res E.
876 Ibid.
877 Article 2 of the Statute of the Special Tribunal for Lebanon (hereinafter STL Statute).

Nevertheless, a terrorist act may be an international crime if it falls within one of the established categories of crimes against humanity or war crimes. It has been argued, however, that the above mentioned international and regional instruments on terrorism, together with the national laws and jurisprudence, are indicative of the formation of a consensus on a definition of terrorism a crime per se, also referred to as terrorism as a 'discrete crime'.[878]

TERRORISM AS A DISCRETE INTERNATIONAL CRIME

The elements of the generally accepted definition of terrorism as a 'discrete crime' may be described as follows:[879]

Elements of terrorism (in time of peace)

- terrorism consists of acts normally criminalised under any national penal system, or assistance in the commission of such acts whenever they are performed in time of peace;
- those acts must be intended to provoke a state of terror in the population or to coerce a State or an international organisation to take some sort of action;
- those acts must be politically or ideologically motivated (ie not based on the pursuit of private interests).

On the basis of the above definition the following physical and mental elements can be identified.

Physical elements (*Actus reus*)

The terrorist act consists of conduct that is an offence in itself, which means that it is already criminalised under any national criminal law. Examples of underlying offences include: murder, mass killing, serious bodily harm, kidnapping, bombing, hijacking, causing serious damage to property including public transport or the environment, etc.[880] In some circumstances the conduct may be lawful as such, for example, financing of an organisation. Such conduct becomes criminal if the conduct has the requisite connection with terrorism, for example, if the financed organisation is terrorist in nature.[881] Additionally, the conduct must be transnational in nature; if it is limited to the territory of one State with no foreign elements, it would exclusively fall under the domestic jurisdiction of that State.[882]

878 The expression terrorism as a 'discrete crime' has been used by Antonio Cassese: Cassese (n232) 164–165.
879 Cassese (n232) 165.
880 Ibid 166; Cryer et al (n4) 239.
881 Cassese (n232) 166.
882 Ibid.

Mental elements (*Mens rea*)

Terrorism, like genocide and persecution as a crime against humanity, falls into the category of crimes of specific intent. Therefore, two mental elements are required for terrorism:

- mental element (*mens rea*) of the underlying offence (for example, intent to kill or cause serious bodily harm);
- specific intent (*dolus specialis*).

With regard to the specific intent of terrorism, a number of international instruments, regional conventions and national laws specify an intent or purpose for which the criminal acts are committed: to spread terror among the population or to intimidate the population; to persuade or compel a government or an international organisation to act or abstain from doing any act; to destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation; to create general insurrection in a State; etc.[883] In sum, the specific intent can be described as 'compelling a public or prominent private authority to take, or refrain from taking, an action'.[884]

TERRORISM AS A WAR CRIME

Acts of terrorism may amount to war crimes if committed in times of international or non-international armed conflict. In other words, in order for acts of terrorism to constitute war crimes, they must take place within the context of either an international or internal armed conflict. International humanitarian law does not provide a definition of terrorism, but prohibits most acts committed in armed conflict that would commonly be considered 'terrorist' if they were committed in peacetime. International humanitarian law, however, specifically mentions and in fact prohibits 'measures of terrorism' or 'acts of terrorism'.

The requirement to distinguish between civilians and combatants, and the prohibition of attacks on civilians or indiscriminate attacks, lies at the heart of international humanitarian law. In addition, international humanitarian law provides for an express prohibition of all acts aimed at spreading terror among the civilian population. Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Conventions both provide that '[t]he civilian population as such, as well as individual civilians, shall not be made the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.[885]

Furthermore, Article 33(1) of the Fourth Geneva Convention provides that '[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited'. Article 4(2)(d) of the Additional Protocol II prohibits 'acts of terrorism' against persons not or no longer taking part in hostilities. The main aim is to emphasise that neither individuals, nor the civilian population, may be subject to collective punishments, which, among other things, obviously induce a state of terror.

883 See, eg, the UN Security Council resolution 1566 (2004), SC Res 1566, UN Doc S/RES/1566 (8 Oct 2004); Article 2(b) of the International Convention for the Suppression of the Financing of Terrorism, GA Res 54/109, UN Doc A/RES/54/109 (9 Dec 1999); Article 1(2) of the Convention of the Organization of the Islamic Conference on Combating International Terrorism (1 July 1999); Council of EU Framework Decision on Combating Terrorism, OJ 2002 No L 164/3; Article 1(3) of the OAU Convention on the Preventing and Combating of Terrorism of 1999 (14 July 1999); Article 83.01(1) (B) of the Canadian Criminal Code.

884 This definition of specific intent has been formulated by Antonio Cassese: Cassese (n232) 168.

885 See also <www.icrc.org> accessed 20 November 2009.

International humanitarian law also proscribes the following acts, which could be considered terrorist attacks:[886]

- attacks on civilians and civilian objects (Articles 51(2) and 52 of Additional Protocol I; and Article 13 of Additional Protocol II);
- indiscriminate attacks (Article 51(4) of Additional Protocol I);
- attacks on places of worship (Article 53 of Additional Protocol I; and Article 16 of Additional Protocol II);
- attacks on works and installations containing dangerous forces (Article 56 of Additional Protocol I; and Article 15 of Additional Protocol II);
- the taking of hostages (Article 75 of Additional Protocol I; Article 3 common to the four Geneva Conventions; and Article 4(2b) of Additional Protocol II);
- murder of persons not or no longer taking part in hostilities (Article 75 of Additional Protocol I; Article 3 common to the four Geneva Conventions; and Article 4(2a) of Additional Protocol II).

The ICTY, ICTR and SCSL have jurisdiction over terrorism as a war crime. Article 4(d) of the ICTR Statute and Article 3(d) of the SCSL Statute grant the ICTR and SCSL, respectively, jurisdiction to prosecute persons who committed or ordered the commission of serious violations of Article 3 common to the Geneva Conventions for the Protection of War Victims of 1949 and of Additional Protocol II of 1977. These violations include 'acts of terrorism' and 'threats to commit acts of terrorism'. Terrorism as a war crime falls within the scope of Article 3 of the ICTY Statute, which provides jurisdiction over violations of the laws or customs of war.

The most important case of an international prosecution for acts of terrorism is the *Galić* case at the ICTY. This case is the first instance of an international tribunal pronouncing on the crime of 'terror against the civilian population' as a war crime, in particular, as a violation of the laws or customs of war under Article 3 of the ICTY Statute.

Prosecutor v Stanislav Galić [887]

ICTY, Case No IT-98-29

During 1992 and 1995, Stanislav Galić was a commander of the Sarajevo Romanija Corps ('SRK') of the Bosnian Serb Army, based around Sarajevo in Bosnia and Herzegovina. In November 1992, he was promoted to Major General. For all military persons present in Sarajevo, Galić was the *de jure* commander of the SRK, his superiors being the Chief of Staff of the Army of the Serbian Republic ('VRS'), Ratko Mladić, and the supreme commander of the VRS, Radovan Karadžić.[888]

886 Ibid.
887 *Prosecutor v Galić* (n508); *Prosecutor v Galić* (ICTY) Case No IT-98-29-A, Appeal Judgment (30 November 2006).
888 *Prosecutor v Galić* (ICTY) Case No IT-98-29-A, Appeal Judgment (30 November 2006) para (2).

Galić was charged in 1999 with conducting:[889]

- a campaign of shelling and sniping against civilian areas of Sarajevo between 10 September 1992 and 10 August 1994, thereby inflicting terror upon its civilian population (Count 1);
- a protracted campaign of sniper attacks upon the civilian population of Sarajevo, killing and wounding a large number of persons of all ages and both sexes (Counts 2 to 4);
- a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo, resulting in thousands of civilians being killed or injuried (Counts 5 to 7).

On 5 December 2003, the Trial Chamber, by a majority, found Galić guilty of:[890]

- acts of violance, the primary purpose of which was to spread terror among the civilian population, a violation of the laws or customs of war (war crimes), as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949 (Count 1);
- murder as a crime against humanity through sniping (Count 2);
- inhumane acts other than murder as crimes against humanity through sniping (Count 3);
- murder as a crime against humanity through shelling (Count 5);
- and inhumane acts other than murder as crimes against humanity through shelling (Count 6).

As a consequence of the finding of guilt entered on Count 1, the Trial Chamber dismissed Counts 4 and 7 (attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949 as violations of the laws and customs of war) as impermissibly cumulative (see below 'Multiplicity of offences').[891]

Galić was sentenced to a single sentence of 20 years' imprisonment. Judge Nieto-Navia appended a dissenting opinion, in which he disagreed with numerous factual findings and disagreed with the majority's finding that the ICTY had jurisdiction over the crime of terror.[892]

Both the Prosecution and Galić appealed the trial judgment. Galić filed multiple grounds against the judgment, while the Prosecution only appealed the sentence. In its judgment of 30 November 2006, the Appeals Chamber dismissed Galić's appeal and allowed, by majority,[893] the Prosecution appeal and increased Galić's sentence to life imprisonment.[894]

889 Ibid para (3).
890 *Prosecutor v Galić* (n508) para (769).
891 Ibid.
892 Ibid Separate and Partially Dissenting Opinion of Judge Nieto-Navia.
893 Judge Pocar, partially dissenting, and Judge Meron, dissenting; *Prosecutor v Galić* (n888), Partially Dissenting Opinion of Judge Pocar, 186–188, and Separate and Partially Dissenting Opinion of Judge Meron, 203–210.
894 *Prosecutor v Galić* (n888) 185 (disposition).

As indicated in the summary above, Galić was indicted under Count 1 for violations of the laws or customs or war, specifically for 'unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949', punishable under Article 3 of the ICTY Statute.[895] The paragraphs introducing Count 1 allege that Galić, as commander of the SRK, 'conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population, thereby inflicting terror and mental suffering upon its civilian population'.[896]

The Appeals Chamber in *Galić* first delineated the crime of terror as a violation of the laws or customs or war under Article 3 of the ICTY Statute. The Appeals Chamber held that the crime charged under Count 1 of the indictment pursuant to Article 3 of the ICTY Statute and on the basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II is 'the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population. It encompasses the intent to spread terror when committed by combatants in a period of armed conflict'.[897]

The Appeals Chamber then determined that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties.[898] As regards the question of criminalisation of the prohibition, the Appeals Chamber found, by a majority, that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, from at least the period relevant to the indictment.[899]

The Appeals Chamber further defined the physical (*actus reus*) and mental (*mens rea*) elements of the crime in question. The Appeals Chamber described the physical elements as follows:

> [T]he crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population can comprise attacks or threats of attacks against the civilian population. The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof. The nature of the acts or threats of violence directed against the civilian population can vary; the primary concern. . . is that those acts or threats of violence be committed with the specific intent to spread terror among the civilian population. Further, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is not a case in which an explosive device was planted outside of an ongoing military attack but rather a case of 'extensive trauma and psychological damage' being caused by 'attacks [which] were designed to keep the inhabitants in a constant state of terror'. Such extensive trauma and psychological damage form part of the acts or threats of violence.

The Appeals Chamber held that 'actual terrorisation of the civilian population is not an element of the crime'.[900] In *Dragomir Milošević*, the Appeals Chamber further clarified that causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and this is not an element of the offence per se. What is required, however, in order for the offence to fall under the jurisdiction of the ICTY, is that the victims suffered grave consequences

895 *Prosecutor v Galić* (n508) para (64).
896 Ibid para (65).
897 *Prosecutor v Galić* (n888) para (69) (footnote omitted).
898 Ibid paras (86)–(90).
899 Ibid paras (86), (91)–(98). Judge Schomburg dissenting, see Separate and Partially Dissenting Opinion of Judge Schomburg, 213–219.
900 Ibid paras (103)–(104).

resulting from the acts or threats of violence, such grave consequences including, but not being limited to, death or serious injury to body or health.[901]

The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population comprise the *specific intent* to spread terror among the civilian population.[902] Simple *dolus eventualis* or recklessness must therefore be ruled out.[903] While spreading terror must be the primary purpose of the acts or threats of violence, it need not be the only one.[904] Such intent may be inferred from the circumstances of the acts or threats, that is from their 'nature, manner, timing, and duration'.[905] However, this is not an exhaustive list of mandatory considerations but an indication of some factors that may be taken into account according to the circumstances of the case.[906]

The SCSL adopted the *Galić* Appeals Chamber reasoning and the definition of terrorism in armed conflict in the 'CDF case' involving two leaders of the Sierra Leonean Civil Defence Forces ('CDF').[907] The two accused, Moinina Fofana and Allieu Kondewa, were charged, among others, with acts of terrorism and collective punishment as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, prohibited under Article 3 of the SCSL Statute. The Trial Chamber, however, acquitted the two accused of this crime because it was not proved beyond a reasonable doubt that either possessed the requisite *mens rea* to establish criminal responsibility.[908]

The SCSL also pronounced upon acts of terrorism as a war crime in the 'RUF case' involving three former leaders of the Revolutionary United Front ('RUF'), Hassan Sesay, Morris Kallon, and Augustine Gbao, who were indicted for 18 counts of crimes against humanity, war crimes and other serious violations of international humanitarian law.[909] The SCSL Trial Chamber followed the reasoning of the Appeals Chamber in the 'CDF case', and on the basis of Article 3 of the SCSL Statute convicted the three accused of acts of terrorism in violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[910]

The SCSL Appeals Chamber further established that acts of terrorism may consist of threats of violence 'independent of whether such acts or threats of violence satisfy the elements of any other criminal offence'.[911] However, not every act or threat of violence will be sufficient. The crime of acts of terrorism may be proved by any act or threat of violence 'capable of spreading extreme fear amongst civilian populations'.[912] For example, acts of burning are acts or threats that are potentially capable of spreading terror, even though they do not satisfy the elements of pillage. Whether any given act or threat of violence is capable of spreading terror is to be judged on a case-by-case basis within the particular context involved.[913]

901 *Prosecutor v Dragomir Milošević* (ICTY) Case No IT-98-29/1-A, Appeal Judgment (12 November 2009) para (33). Dragomir Milošević was the general in command of the Sarajevo-Romanija Corps of the army of Republika Srpska and took over the position of Stanislav Galić. Like Galić, Dragomir Milošević was indicted by the ICTY for conducting a campaign of sniping and shelling attacks on the city of Sarajevo with the primary aim of spreading terror among the civilian population in the period from August 1994 to November 1995.
902 *Prosecutor v Galić* (n888) para (104).
903 *Prosecutor v Galić* (n508) para (136).
904 *Prosecutor v Galić* (n888) para (104); *Prosecutor v Dragomir Milošević* (n901) para (37).
905 *Prosecutor v Galić* (n888) para (104).
906 *Prosecutor v Dragomir Milošević* (n901) para (37).
907 *Prosecutor v Fofana & Kondewa* (SCSL) Case No SCSL-03-14-A, Appeal Judgment (28 May 2008) para (350).
908 *Prosecutor v Fofana & Kondewa* (SCSL) Case No SCSL-03-14-T, Trial Judgment (2 August 2007) paras (731), (743), (779)–(789), (879); confirmed on appeal, Case No SCSL-03-14-A, Appeal Judgment (28 May 2008) para (379).
909 *Prosecutor v Sesay, Kallon & Gbao* (SCSL) Case No SCSL-04-15-A, Appeal Judgment (26 October 2009) para (14).
910 *Prosecutor v Sesay, Kallon & Gbao* (SCSL) Case No SCSL-04-15-PT, Corrected Amended Consolidated Indictment (2 August 2006) para (44).
911 *Prosecutor v Fofana & Kondewa* (SCSL) Case No SCSL-03-14-A, Appeal Judgment (28 May 2008) paras (352), (359).
912 Ibid para (359).
913 Ibid para (352).

TERRORISM AS A CRIME AGAINST HUMANITY

Terrorist acts are not included as crimes against humanity in the Statutes of the ad hoc international tribunals or the ICC. However, acts of terrorism may amount to crimes against humanity (for example, murder or torture as a crime against humanity) if they meet the requirements for this category of crimes. In particular, the terrorist acts must constitute part of a widespread or systematic attack directed against any civilian population. In addition, the perpetrators of such an act must have knowledge that their acts are part of a widespread or systematic attack (see above the section on Crimes against Humanity).[914]

In the *Galić* case at the ICTY, the accused was charged with and convicted of crimes against humanity of murder and inhumane acts on the basis of the same facts as the war crime of terror.[915]

Conclusion

The body of international criminal law related to international terrorism is still emerging and consolidating. Although there is currently no comprehensive legal definition of terrorism, acts of terrorism can qualify as international crimes giving rise to individual criminal responsibility if they meet the criteria of war crimes or crimes against humanity. So far no international court or tribunal has jurisdiction over terrorism as a 'discrete crime'. Nevertheless, this category of terrorism seems to be evolving and it may be included in the jurisdiction of the ICC in the future.

Three categories of terrorism as an international crime

- Terrorism as a war crime;
- Terrorism as a crime against humanity;
- Terrorism as a 'discrete crime'.

Multiplicity of offences

It is often the case that a perpetrator's conduct meets the definitions of several crimes. Depending on the elements and circumstances of the crimes, for example, killings may be simultaneously prosecuted as genocide, crimes against humanity and war crimes. The question is whether cumulative charging for the same offences is permissible, and if so, under what conditions and with what legal consequences.

ICTY and ICTR jurisprudence establishes generally that cumulative charging for several crimes on the basis of the same conduct is permissible. Cumulative charging is allowed because 'prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven'.[916] On the basis of the same reasoning, the Appeals Chamber has affirmed the general admissibility of alternative charging.[917]

914 Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, Article 7 of the ICC Statute.
915 *See Prosecutor v Galić* (n508) paras (595)–(602).
916 *Prosecutor v Delalić et al* (ICTY) Case No IT-96-21-A, Appeal Judgment (20 February 2001) para (400).
917 *Prosecutor v Naletilić & Martinović* (ICTY) Case No IT-98-34-A, Appeal Judgment (3 May 2006) paras (102) et seq.

As regards the practice of multiple convictions, the ICTY Appeals Chamber held in *Čelebići* that an accused may be convicted of more than one crime for the same conduct unless one of the crimes is *lex specialis*.[918] This means that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from anther if it requires proof of a fact not required by the other.[919] Where this test is not met, only the conviction under the more specific provision will be entered, because it entails the commission of the less specific one.[920]

The ICTR applied the same test in *Musema* where the Appeals Chamber held that in relation to genocide and extermination as a crime against humanity, cumulative convictions were permissible. Particularly, genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which is not required by extermination, while extermination as a crime against humanity requires proof that the crime was committed as part of widespread and systematic attack against a civilian population, which is not required in the case of genocide.[921]

When the accused is found guilty of several crimes on the basis of the same conduct, the sentence imposed should reflect the 'totality of the criminal conduct and overall culpability of the offender'.[922]

The ICC Statute contains no specific provision on the issue of multiplicity of offences although it envisages the possibility of a person being found guilty of more than one crime. In particular, Article 78(3) of the ICC Statute provides that 'when a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment'.[923]

Concluding remarks

There is a broad consensus in the international community as to the crimes which are of the greatest international concern, and those crimes are designated 'core crimes': aggression, genocide, crimes against humanity and war crimes. Besides the 'core crimes', there are other international crimes such as torture and terrorism.

As is apparent from the foregoing discussion in this Chapter, there is a huge array of problems associated with the definitions and elements of international crimes. With the creation of the ICTY and ICTR, there has been an explosion of case-law on this subject, which has helped to provide definitions of various crimes, and this process has been consolidated by the drafting of the ICC Statute. The crimes will continue to be defined and refined by both the ICC and the existing international tribunals, as well as by domestic courts, in line with evolving standards of humane conduct and in the spirit of the progressive development of international law.

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918 Gerhard Werle, 'General Principles of International Criminal Law', in in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009).

919 *Prosecutor v Delalić et al* (ICTY) (n916) paras (412); *Prosecutor v Akayesu* (n346) para (468).

920 *Prosecutor v Delalić et al* (n916) para (413).

921 *Prosecutor v Musema* (n371) paras (363), (366)–(367). See further examples in Gabrielle McIntyre, 'Cumulative Convictions', in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009).

922 *Prosecutor v Delalić et al* (n916) para (430).

923 Article 78(3) of the ICC Statute.

Exercises and case studies

War crimes

- What is the relationship between international humanitarian law and international criminal law?
- What are the sources of international humanitarian law?
- How is international armed conflict to be proved?
- Does international humanitarian law offer protection only during armed conflicts?
- Does any internal disturbance qualify as an internal conflict? How do you define an international conflict for the purpose of international humanitarian law?
- Apart from grave breaches of the 1949 Geneva Convention do any other violations of international humanitarian law amount to war crimes under the ICC Statute?
- What is the threshold for a breach of international humanitarian law to qualify as a war crime falling within the ICC jurisdiction?
- What elements have to be proved for a conviction for a war crime?
- What are the elements which are common to all war crimes?
- Can a civilian be found responsible for a war crime?
- Which groups are protected under international humanitarian law?
- Can you name five underlying offences that may amount to war crimes?

Crimes against humanity

- What is the distinction between a war crime and a crime against humanity?
- Does an offence need to be linked to an armed conflict in order to amount to a crime against humanity?
- Who is targeted by the crimes against humanity? Can an offence against a military personnel amount to crimes against humanity and if yes, under what conditions?
- What elements have to be proved for a conviction for a crime against humanity?
- Does an underlying offence need to be committed on discriminatory grounds to qualify as a crime against humanity?
- Can you name five underlying offences which may amount to crimes against humanity?

Genocide

- What kind of intent must be proved in order for a person to be convicted of genocide?
- Which groups are protected by the Genocide Convention? Can any other group enjoy the same protection as the one provided by the Genocide Convention?
- What are the conditions for the victim to be considered a member of the protected group? How do we prove that a group constitutes, for example, an ethnic group which differs from the ethnicity of the perpetrators?
- Does every perpetrator have to have a specific intent to destroy or is it sufficient, either for all, or at least for non-leaders, that they have knowledge of a collective plan and foresee that their conduct will further it?
- What is a distinction between special intent and normal intent?
- Is motive relevant?
- Does the plan to destroy a group have to be proven for the conviction of genocide?
- What is the 'whole' or 'part' of a group?
- What is the meaning of 'destroy' for the purpose of special intent?
- What sort of proof will suffice to prove specific intent to destroy a group in whole or in part, with respect to a high level perpetrator such as a senior military or political leader?
- How can a scale of destruction be proved effectively?
- Does the commander have to have specific intent in order to be convicted for genocide for the acts amounting to genocide committed by his subordinates?
- Can any kind of participation constitute genocide? Which specific (underlying) acts can result in genocide and what are their elements?

Aggression

- Has the crime of aggression ever been prosecuted before any international courts and tribunals?
- In which instrument was the war prohibited for the first time?
- Is the use of force under Article 2(4) of the UN Charter absolutely prohibited?
- Does the ICC's jurisdiction extend over the crime of aggression?
- Do you think that the UN Security Council's determination of the existence of an act of aggression should be a precondition for triggering the prosecution for the crime of aggression?

Torture

- Is torture an international crime?
- Can torture be justifiable by any circumstances, such as prevention of terrorist acts or other horrific crimes?
- What are the physical and mental elements of torture under the UNCAT?

Terrorism

- Is terrorism an international crime?
- Is there a generally accepted definition of terrorism?
- What is the contentious issue which remains to be discussed in the context of terrorism?
- How would you define the physical and mental elements of terrorism?

Case study

Please, refer to the factual allegations regarding the conflict between Astania and Bestania provided under Chapter 1 and answer the questions below.

Questions

- On the basis of the facts you should ascertain if there are sufficient grounds for bringing charges for international crimes against the actors involved in the conflict. Please consider the appropriate charges with respect to the offences committed during the conflict, such as war crimes, crimes against humanity, genocide. If there is more than one option, please indicate the possible alternatives.
- You are working as a Legal Officer for the Prosecution and you are asked by the Chief Prosecutor to provide legal advice on the following questions:
- What needs to be proved for each of the charges suggested in the answer to the previous question?
- What evidence is there that is relevant to those charges and currently supports those charges?
- What further evidence should the Prosecutor seek to find that is relevant to those charges, for both the Prosecution and Defence?

Chapter 4 – Individual Criminal Responsibility

Learning objectives

To familiarise participants with the general principles of legality and *non bis in idem* that govern individual criminal responsibility.

To provide a basic understanding of the different modes of liability by which individuals and members of a group can be prosecuted for international crimes.

To set out the elements of each mode of liability which the prosecution need to establish in order to prove individual criminal responsibility for such crimes.

To provide an overview of grounds for contesting or mitigating criminal responsibility.

Questions

Have you, in the exercise of your professional activities as judges, prosecutors or lawyers, ever been involved in determining the modes of liability which should be applied to proceedings alleging the commission of international crimes?

What modes of liability were applied and how were these modes chosen?

Did you encounter any problems regarding the application of these modes of liability to the individuals alleged to have committed the crimes, ie gaps or imprecision in their application?

What was the outcome of the case?

Introduction

Although not without their controversies, the substantive offences of international criminal law are now reasonably well-settled – and have a long historical pedigree. The same may not be said of the doctrines of individual responsibility, which have received extensive consideration only in the last 15 years. As they are largely the product of judicial law-making, rather than express State consent, they continue to comprise an area of law susceptible to legal challenge. This Chapter introduces the key doctrines used by the leading international jurisdictions to analyse the attribution of responsibility for international crimes, and situates them in the context of core fair trial guarantees.

General principles of criminal law

The law surrounding individual responsibility is part of a larger body of law known as the 'general principles' of criminal law. It may be argued that these general principles represent the heart of international criminal law, and represent its chief guarantees of efficiency and fairness.[924]

Due to the very nature of international law, neither the content nor the precise origin of the majority of international law norms is entirely clear: much is open to interpretation and argument. As the

924 See *Prosecutor v Tadić* (ICTY), Case No IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct 1995) para (45).

substantive crimes considered by international criminal jurisdictions are frequently the products of international law, they may also be open to similar criticisms.

Among their other functions, the general principles of criminal law are the measure which lawyers use to test a substantive norm's application in a particular case. Two key principles – the principle of legality and the *non bis in idem* principle – are essential in this regard. They receive more detailed consideration below.

It should also be noted that general principles of criminal law inform much of the procedural law applied by international jurisdictions. For practical purposes, it is essential to refer to the Rules of Procedure and Evidence in force at a particular tribunal. Viewing them in comparison, however, certain general themes tend to emerge. These themes, which reflect general principles of criminal law, offer a possible glimpse of a future, general law of international criminal procedure.

The principle of legality

The principle of legality is a fundamental concept which prescribes criteria for the legitimate application of the criminal law. Frequently described by reference to the latin maxim *nullum crimen, nulla poena sine lege* ('no crime, no penalty without law'), the heart of the principle lies in the idea that a person may only be held criminally liable and punished if, at the time when he performed a certain act, the act was regarded as criminal offence by the relevant legal order.[925] The principle has represented a key force in litigation since the very beginning of international criminal law, and has been expressly identified and applied as a controlling consideration in the use of doctrines providing for different forms of individual criminal responsibility.[926]

All of the significant international instruments protecting general civil and political rights include a provision giving effect to the principle of legality:

Article 7(2) of the African Charter on Human and Peoples' Rights:

> No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.[927]

Article 9 of the American Convention on Human Rights (hereinafter ACHR) freedom from *ex post facto* laws:

> No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence, the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom. [928]

925 Antonio Cassese, 'Nullum Crimen Sine Lege' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 438.

926 *Prosecutor v Bagilishema* (ICTR) Case No ICTR-95-1A-A, Appeal Judgment (3 July 2002) para (34); *Prosecutor v Milutinović et al* (ICTY) Case No IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003) para (21); *Prosecutor v Fofana & Kondewa* (SCSL) Case No SCSL-04-14-T, Trial Judgment (2 August 2007) para (202).

927 African Charter on Human and Peoples' Rights (26 June 1981) OAU Doc CAB/LEG/67/3 Rev 5, 1520 UNTS 217, 21 ILM 58 (1982).

928 American Convention on Human Rights (22 Nov 1969) OAS Treaty Series No 36; 1144 UNTS 123, 9 ILM 99 (1969).

Article 7(1) of the ECHR – no punishment without law:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. . .[929]

Article 15(1) of the ICCPR:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby. . .[930]

Civil law jurisdictions, which frequently adopt an especially rigorous approach in this context, often construe the principle of legality as imposing four strict requirements: *lex praevia*, *lex certa*, *lex stricta*, *lex scripta* (the law must have preceded the offence, the law must be certain, the law must be interpreted strictly, the law must have existed in written form).[931] In common law jurisdictions, where judge-made law prevails or is at least firmly embedded in the legal system, there is a tendency to adopt a qualified approach to these principles.[932] However, the civil law and common law traditions converge on the essential point: 'the underlying principle is that no [person] shall be held criminally responsible for conduct which [they] could not reasonably understand to be proscribed'.[933]

The ECtHR, which is informed both by civil and common law notions, has construed the principle in the following fashion:

> [A]rticle 7 para 1. . . of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make [them] liable.[934]

Within the principle of legality, we can discern the following core guarantees:

- the *nullum crimen* principle;
- the *nulla poena* principle;
- the principle of non-retroactivity;
- the principle of specificity;
- the ban on analogy; and
- the *favor rei* principle.

929 Convention for the Protection of Human Rights and Fundamental Freedoms (4 Nov 1950) 213 UNTS 222, 312 ETS 5.
930 International Covenant on Civil and Political Rights (16 Dec 1966) 999 UNTS 171.
931 Kai Ambos, 'Remarks on the General Part of International Criminal Law' (2006) 4 J Int'l Crim Just 660, 669–671.
932 Antonio Cassese, 'Nullum Crimen Sine Lege' (n925) 438, 438.
933 *United States v Harriss* (1954) 347 US 612, 617.
934 *Kokkinakis v Greece* (App no 14307/88) (1994) 17 EHRR 397, (2003) 260-A ECHR Series A, para (52).

The principles of non-retroactivity, specificity, the ban on analogy, and interpretation in favour of the accused are often considered as deriving from, or sub-categories of, the principle *nullum crimen, nulla poena sine lege* which is in turn used as an umbrella term.[935] The role of each guarantee in the jurisprudence of the various international criminal tribunals is set out below.

It is important, however, to sound a note of caution. In practical terms, neither the guarantees identified by the ECtHR nor the four guarantees more familiar to civil law should be applied mechanistically. The ad hoc international tribunals, and the other international and hybrid criminal courts and tribunals subsequently established, are likely to continue to interpret the various contours of the principle of legality *purposively*. The core objective of the principle is the provision of 'fair warning': ensuring that an individual may reasonably foresee the legal consequences of their actions and thereby providing a fundamental protection against arbitrary prosecution and imprisonment.[936] Thus, the fact that a legal provision may *appear* to have infringed the letter of one of these guarantees (it did not previously exist in a written form, for example, or the manner of its application in a particular set of factual circumstances was not clearly predictable) may not be regarded as significant by a tribunal if it is nonetheless satisfied that the core objective (giving fair warning) has been met.

The ICC, unlike the other tribunals, sets out the principle of legality in its Statute:

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 characterisation 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.

935 See, eg, Cassese (n925) 438, 439.

936 Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, Antwerp 2002) 176, 611, 616.

Article 24

Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Despite their appearance, these provisions do not necessarily lead to the conclusion that the ICC's approach to legality will in fact be stricter than that applied by other international tribunals.[937] It should be noted that key phrases are drafted only to cover the definitions of substantive offences, rather than forms of responsibility. For example, Article 22(1) provides that criminal responsibility is predicated upon the fact that the accused's conduct already constituted a crime within the ICC's jurisdiction at the relevant time – it does not, however, expressly state that the manner of the accused's participation in that conduct (in effect, their form of responsibility) must also have been expressly proscribed by the ICC's law at the relevant time. Similarly, Article 22(2) only requires strict construction of 'the definition of a crime', which presumably refers only to the elements of the substantive offence(s). Some early decisions of the ICC appear to reflect this narrow interpretation of Article 22's scope.[938] Moreover, despite the attempt at 'comprehensiveness' in the ICC Statute, it also seems unlikely that the judges of the ICC will disavow an 'interpretive' and 'elaborative' voice for themselves.[939] As such, the breadth of any practical gap between the approach to legality adopted by the judges of the ICC and the ad hoc tribunals remains to be seen.

NULLUM CRIMEN SINE LEGE

The basic proposition of the principle of legality is that individuals may only be held criminally responsible according to law. One key question, therefore, is the status of any norm which is advanced in a particular case: does it conform to one of the accepted sources of public international law? If there is any doubt as to this point, it is important to press the issue in the course of litigation – but, in practical terms, there will rarely be a realistic prospect of success in such an argument for any of the modes of liability described in this Chapter. As we will see with Joint Criminal Enterprise (JCE) liability, repeated challenges along these lines have yielded little fruit. The greater specificity of the ICC Statute also serves to limit the utility of this basic argument for many of the cases which will be heard there.

937 Ibid 395.

938 In the *Lubanga* case, the Pre-Trial Chamber held that '[h]aving regard to the principle of legality, the terms enlisting, conscripting and using children under the age of fifteen years to participate actively in hostilities are defined with sufficient particularity in articles 8(2)(b)(xxvi) and 8(2)(e)(vii), 22 to 24 and 77 of the ICC Statute and the Elements of Crimes, which entered into force on 1 July 2002, as entailing criminal responsibility and punishable as criminal offences'. *Prosecutor v Thomas Lubanga Dyilo*, ICC, ICC-01/04-01/06, Decision on the Confirmation of Charges (29 January 2007) para (302), see also paras (294), (297) and (301).

939 Jared Wessel, 'Judicial policy-making at the International Criminal Court: an institutional guide to analyzing international adjudication' (2005) 44 Colum J Transnat'l L 377, 450–451.

NULLA POENA SINE LEGE

Strictly, the *nulla poena sine lege* principle requires only that punishment is carried out in accordance with the law. In practical terms, however, it may also be understood to include a requirement that the accused is not penalised to an extent greater than that compatible with the law at the time they committed the crime for which they have been convicted, as well perhaps as the *lex mitior* principle entitling the accused to benefit from the retroactive application of a more lenient penal law.[940] The guarantee is of considerable significance to the complex law of sentencing, but of little relevance to the attribution of criminal responsibility.

THE PRINCIPLE OF NON-RETROACTIVITY

The principle of non-retroactivity requires that the relevant law must have existed *before* the time at which the proscribed act was undertaken. Arguably, it has caused more difficulty in the context of national prosecutions of international crimes than international prosecutions. In a number of countries, legislation providing for the criminal liability of individuals for unlawful acts committed during the Second World War was only introduced much later, rendering the legislation retroactive, at least from a narrow, municipal law perspective. This argument was effectively answered by asserting that the crimes were already unlawful under international law at the relevant time, and that the Statutes merely served an instrumental purpose in establishing jurisdiction over such matters. The theory underlying this approach, which emphasises the ability of the accused to appreciate that the law regulates a particular type of conduct, rather than the technical means by which the law may operate, may also be seen as a significant influence on international jurisprudence.

Given that almost all of the litigation at the ad hoc tribunals on the retroactivity point has been based on discussion of customary law, the precise date at which it may be said to have crystallised is almost impossible to pin down precisely. Although the judges are ever mindful of the *in dubio pro reo* principle (ie, that doubt should be resolved in favour of the accused), the amorphous nature of international law in this respect often tends to make the work of defence counsel difficult. That said, the non-retroactivity principle may be used effectively in conjunction with the prohibition of analogy. As one ICTY Trial Chamber underlined, under no circumstances would 'the court create new criminal offences after the act charged against an accused either by giving a definition to a crime crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal'.[941]

THE PRINCIPLE OF SPECIFICITY

One of the core ideas embodied within the principle of legality is the general notion that the law must be 'certain'.[942] Yet, as any lawyer knows, absolute certainty as to the application of the law is often a remote aspiration:

940 *Prosecutor v Deronjić*, (ICTY) IT-02-61-A, Sentencing Appeal Judgment (20 July 2005) paras (93)–(99); *Prosecutor v Dragan Nikolić*, (ICTY) IT-94-2-A, Judgment on Sentencing Appeal (4 February 2005) paras (77)–(86).

941 *Prosecutor v Vasiljević* (ICTY) Case No IT-98-32-T, Trial Judgment (29 November 2002) para (196).

942 Mohamed Shahabuddeen, 'Does the principle of legality stand in the way of progressive development of the law?' (2004) 2 J Int'l Crim Just 1007, 1008.

> Absolute precision in the law exists rarely, if at all. The question is whether [there is] an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterised as having a discretionary element, because the standard can never specify all the instances in which it applies.[943]

The ECtHR has come to a similar conclusion. It has recognised that, in light of '[t]he need to avoid excessive rigidity and to keep pace with changing circumstances. . . many laws are inevitably couched in terms which, to a greater or lesser extent, are vague'.[944] As such, the degree of specificity required depends 'to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed'.[945] A law must be formulated with sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[946]

In this context, it becomes clear that in discussing whether a particular legal norm should be invalidated due to its lack of precision, the key question is not 'is it entirely specific about its extent and application?' but rather 'is it specific *enough* for the particular purposes in which it is sought to be applied?'

For the purposes of international criminal law, a norm must possess 'sufficient clarity' such that its 'general nature, its criminal character and its approximate gravity'[947] were foreseeable to the accused. The clear goal is to ensure that the accused received fair warning as to the illegality of their conduct. However, as it is also recognised that this principle does not mandate the illegitimacy of unwritten forms of law, the notion of what constitutes fair warning must be assessed within the limits of 'the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law'.[948] Accordingly, as noted above, there is a strong suggestion that the accused need only be placed on notice in a general sense that their conduct is likely to incur criminal responsibility. In this context, the horrific nature of the crimes involved has frequently led chambers to rely on 'moral warning' rather than technical legal warning.[949] Somewhat surprisingly, this approach is more or less consistent with the stance adopted by bodies such as the ECtHR.[950]

THE PROHIBITION OF ANALOGY

Closely related to the principle of specificity is the prohibition of analogy, which requires the definition of a crime to be narrowly construed and not extended through means of unwarranted interpretation. This does not mean, however, that criminal offences must be exhaustively and statically defined *ab initio*. The ECtHR has reasoned that:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention states, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition.

943 *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927.
944 *Cantoni v France* (App no 17862/91) (1996) ECHR 1996-V 15 November 1996, para (31).
945 *Groppera Radio AG and Others v Switzerland* (App no 10890/84) (1990) 173 ECHR Series A, para (68).
946 *Tolstoy Miloslavsky v the United Kingdom* (App no 18139/91) (1995) 316-B ECHR Series A, para (37).
947 *Prosecutor v Vasiljević* (n941) para (201).
948 Ibid para (193). See also *Prosecutor v Milutinović et al* (n926) paras (39), (41); *Prosecutor v Delalić et al* (ICTY) Case No IT-96-21-T, Trial Judgment (16 November 1998) paras (403), (405).
949 *Prosecutor v Milutinović et al* (n926) para (42); *Prosecutor v Furundžija* (ICTY) Case No IT-95-17/1-T, Trial Judgment (10 December 1998) para (184).
950 *SW v the United Kingdom* (App no 20166/92) (1995) 335-B ECHR Series A, para (44).

> 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.[951]

The ad hoc tribunals have adopted this reasoning, holding that the principle of legality does not preclude the evolution of the elements of a crime through a process of interpretation and clarification.[952] Thus, the prohibition of analogy is less a black-and-white issue than the term may first suggest, and more a question of reasonableness. Accordingly, the approach of the judges of the ad hoc tribunals has been to examine whether particular circumstances fall reasonably within the scope of the law, rather than searching for specific precedents which illustrate that a particular act has been established to be criminal.[953]

For all these reasons, when considering jurisprudence on the principle of legality in international criminal law, it appears to be the 'very essence'[954] of the relevant norm that governs questions of legitimacy. Providing that the accused had notice of that essence – which may appear very often to be satisfied by the fundamental nature of the moral outrages committed – the principle of legality is often considered to be met.

THE FAVOR REI PRINCIPLE

The principle *favor rei* or 'interpretation in favor of the accused' is closely interwined with the ban on analogy. It requires, in case of conflicting interpretations of a rule, a construction that favors the accused.[955] It is embodied in Article 22(2) of the ICC Statute providing that '[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.' This principle has been upheld by the ad hoc tribunals: the ICTR Trial Chamber, for example, confirmed the principle in *Akayesu* with regard to the interpretation of the word 'killing' in the Genocide Conventions and the ICTR Statute;[956] and the ICTY Trial Chamber reaffirmed the principle in *Krstić* with regard to the definition of 'extermination'.[957]

This principle is also applied in the assessment of evidence: a standard known as *in dubio pro reo* (in case of doubt, one should hold for the accused).[958]

951 Ibid para (36).

952 *Prosecutor v Aleksovski* (ICTY) Case No IT-95-14/1-A, Appeal Judgment (24 March 2000) para (127).

953 *Prosecutor v Stakić* (ICTY) Case No IT-97-24-A, Appeal Judgment (22 March 2006) *per* Judge Shahabuddeen, paras (35)–(36), (39); *Prosecutor v Karemera et al* (ICTR) Case No ICTR-98-44-AR72.5, Decision on Jurisdictional Appeals – Joint Criminal Enterprise (12 April 2006) para (15); *Prosecutor v Karemera et al* (ICTR) Case No ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise (11 May 2004) paras (15), (37), (43)–(44); *Prosecutor v Hadžihasanović & Kubura* (ICTY) Case No IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (16 July 2003) para (12).

954 Mohamed Shahabuddeen, 'Does the principle of legality stand in the way of progressive development of the law?' (n942) (1007), (1017).

955 Cassese (n925) 438, 440.

956 *Prosecutor v Akayesu* (ICTR) Case No ICTR-96-4-T, Trial Judgment (2 September 1998) paras (500)–(501). The Trial Chamber held in para (501) that '[g]iven the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which "*meurtre*" (killing) is homicide committed with the intent to cause death'.

957 The Trial Chamber noted that the ICC definition of extermination (which provides that it would be sufficient that the criminal acts are 'calculated to bring about the destruction of *part* of the population') was adopted after the time the offences in *Krstić* case were committed. The Trial Chamber held that '[i]n accordance with the principle that where there is a plausible difference of interpretation or application, the position which most favours the accused should be adopted, the Chamber determines that, for the purpose of this case, the definition should be read as meaning the destruction of a numerically significant part of the population concerned'. *Prosecutor v Krstić* (ICTY) Case No IT-98-33-T. Trial Judgment (2 August 2001) para (502).

958 Cassese (n925) 438, 440. See, eg, *Prosecutor v Stakić* (ICTY) Case No IT-97-24-T, Trial Judgment (31 July 2003) para (416).

The non bis in idem *principle (double jeopardy)*

The *non bis in idem* principle (also known as the rule against double jeopardy or the *autrefois acquit/ autrefois convict* principle) is another cardinal protection under international law. Like the principle of legality, it is both an international human right and an essential procedural guarantee of fairness in criminal law. As with the principle of legality, it also varies considerably in the manner of its application in domestic legal systems.

The *non bis in idem* principle states that no one shall be tried or punished more than once for the same crime. There are a number of reasons for this principle. The first is that of fairness to defendants. This is achieved by the knowledge that once a judgment is passed it will be final. There will be no further threat or anxiety of a renewed prosecution.[959] The finality of judgments also ensures 'stability in international legal relations by preventing the interminable pursuit of international criminals between jurisdictions'.[960] An additional reason is the interest of thorough investigations and preparations of cases by the prosecutorial authorities.[961] Unless the finality of a judgment is certain, prosecutorial authorities may become careless in their work, as they know that they will have a second or third chance to do a better job.

The principle of double jeopardy is enshrined in the major human rights treaties, for example in Article 14(7) of the ICCPR, Article 4 of Protocol 7 to the ECHR and Article 8(4) of the ACHR.

Article 14(7) of the ICCPR

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 4 of Protocol 7 to the ECHR

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

959 Gerard Conway, '*Ne Bis in Idem* in International Law' (2003) 3 Int'l Crim L Rev 217, 223.
960 Ibid.
961 Cryer et al (n4) 67.

The *non bis in idem* principle is particularly important in the international context. While it constitutes a valuable protection against arbitrary and malicious prosecution in domestic law (which is generally a 'vertical' legal order), its significance may be even greater in 'horizontal' systems – such as the international legal order – where various bodies may be able to exercise jurisdiction in a particular case but are not necessarily bound to defer to one another's findings. Matters potentially become yet further complicated by the 'primacy' of certain jurisdictions (such as the ICTY and ICTR) over all others, which creates a vertical relationship between the international tribunals and other jurisdictions.

The effect of a prior international prosecution on a subsequent national prosecution is sometimes referred to as 'downward' *non bis in idem*. The reverse, the effect of a prior national prosecution on a subsequent international prosecution, may then be referred to as 'upward' *non bis in idem*. Both 'upward' and 'downward' *non bis in idem* may impose constraints on subsequent prosecutions.

The particular form of *non bis in idem* that applies varies according to the international jurisdiction concerned. It is therefore important to refer to the relevant Statute in each particular case to determine the contours of the *non bis in idem* principle. The ICTY, ICTR and SCSL have substantially similar provisions.[962] They require that:

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 characterised as an ordinary crime; or
   (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3 In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall 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.

Article 5 of the STL Statute defines *non bis in idem* in almost identical terms.

These provisions, therefore, deal with *non bis in idem* as a general rule and an exception. The general rule is embodied in the prohibition on national courts from trying a person in respect of acts for which he or she has already been tried before the tribunals. The exception consists in the provision whereby a person who has been tried by national courts may be subsequently tried before the tribunals for the same acts under certain specific circumstances:

962 Article 10 of the ICTY Statute; Article 9 of the ICTR Statute; Article 9 of the SCSL Statute. *Cf Prosecutor v Tadić* (ICTY) Case No IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-bis-in-idem* (14 November 1995) paras (19)–(20).

- when, in the first set of proceedings, the act for which the accused was tried was characterised as an ordinary crime;
- the proceedings were not impartial or independent;
- the proceedings were designed to shield the accused from international criminal responsibility;
- the case was not diligently prosecuted.

The decisions of national courts are only 'final' for the purposes of the tribunals if they have not only prosecuted the relevant conduct, but done so for an 'international' crime. A common example given of the limited nature of 'upward' *non bis in idem* is a situation in which an accused was tried in a national court for the 'ordinary' crime of murder for a killing that could be charged as an 'international' crime of genocide, a crime against humanity or a war crime. Pursuant to the Statutes of the ICTY, ICTR and SCSL, the accused could be retried for the same conduct in the international tribunal for the international crime. The 'upward' *non bis in idem* is, thus, limited to a prior national prosecution specifically for genocide, crimes against humanity, or war crimes. If the accused was prosecuted in a national court only for an 'ordinary' crime, he or she could face a second prosecution for the same underlying conduct in the international tribunal. In contrast, under the Statutes of these courts, a prosecution in a national court for murder subsequent to a prosecution in the international tribunal for genocide, a crime against humanity or a war crime and based on the same conduct would be barred. The 'downward' *non bis in idem* is, thus, broader in its scope, prohibiting national prosecutions for any crime based on the same act(s) as were prosecuted in the international tribunal.

With regard to the 'downward' *non bis in idem*, Rule 13 of the ICTY and ICTR Rules of Procedure and Evidence provides that when the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall issue a reasoned order requesting the court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the UN Security Council.

The regime under the ICC Statute is rather different. Article 20 provides that:[963]

Article 20 of the ICC Statute

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 [genocide, crimes against humanity, war crimes, and potentially aggression] for which that person has already been convicted or acquitted by the Court.

963 Article 20 of the ICC Statute.

> 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 [genocide, crimes against humanity, and war crimes] 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 recognised 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.

Although we do not yet have interpretations of these provisions by the ICC, it is most likely that, in contrast to the ad hoc tribunals, the 'downward' *non bis in idem* effect is narrower than the 'upward' *non bis in idem* effect under the ICC Statute. A prosecution in the ICC is only 'final' for the purpose of *non bis in idem* for a 'crime' covered by Article 5 (currently genocide, crimes against humanity or war crimes). Arguably, this means that a subsequent prosecution in a national court for an 'ordinary' crime, such a murder, is *not* barred even if the ICC has already prosecuted the accused on the basis of the same underlying conduct.[964]

However, in only permitting itself to re-try cases where the relevant 'conduct' was not prosecuted in a fair or proper manner (whatever the type of charge), it seems likely that a prosecution in the ICC would be barred if there had previously been a national prosecution for even an 'ordinary' crime if that prosecution was based on the same underlying conduct unless the national prosecution was a sham trial or conducted improperly. A common example of a likely sham trial is a national prosecution for only assault when the crime could be charged as genocide. In this instance, it is likely that the ICC would consider itself entitled to try the accused.[965]

It can be concluded, therefore, that the ICC Statute does not permit the Court to re-try certain conduct with a selection of offences which it regards as more 'appropriate' to the nature of the crime.[966] As such, the ICC is required to afford national proceedings a greater degree of deference. This is entirely consistent with the ICC's general commitment to 'complementarity' of jurisdiction rather than 'primacy'.

In case of a retrial, the Statutes of the ICTY, ICTR and SCSL provide that the tribunal 'shall 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'.[967] The ICC Statute, however, has not adopted the principle of mandatory deduction of sentence, but instead it provides in Article 78(2) that when determining the sentence, the Court *may* deduct any time otherwise spent in detention in connection with conduct underlying the crime.

964 Christine Van den Wyngaert and Tom Ongena, '*Ne bis in idem* Principle, Including the Issue of Amnesty' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds) I *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 705, 723.

965 Ibid 725–726.

966 There may be a caveat, however, where the offence prosecuted is so inappropriate to the gravity of the original conduct that the 'sham trial' provisions are engaged. Ibid 726.

967 Article 10(3) of the ICTY Statute; Article 9(3) of the ICTR Statute; Article 9(3) of the SCSL Statute.

Forms of individual criminal responsibility

Introduction

The various forms of responsibility recognised by the leading international jurisdictions are set out below. As in national jurisdictions, international criminal law does not merely hold responsible the person who 'pulls the trigger' (or directly 'perpetrates' the crime); it is also possible to impose liability upon individuals who "use" or cause others to commit the crimes, who commit crimes as part of a group, or who deliberately help others to do so. Indeed, given that international criminal law is frequently concerned with the most serious crimes, and those that occur on an enormous scale, these 'other' forms of responsibility may in fact be the most significant. A senior politician, for example, will rarely physically commit crimes, but may be responsible for thousands of others so doing – clearly they should not escape liability merely because they did not 'get their hands dirty'.

A general degree of familiarity with all the forms of responsibility applicable in the relevant jurisdiction is crucial for all lawyers working in this area. It has been general practice at the ad hoc tribunals for the Prosecution to plead a wide range of modes of liability in the indictment. Thus far, prosecutions at the ICC have been more narrowly focused, but this may be more a result of circumstance than a deliberate policy decision.

The forms of liability which exist at the ad hoc tribunals are similar but not identical to those set out in the ICC Statute. It would, however, be a mistake to think that the ICC represents an entirely new legal paradigm: although ideas from the ad hoc tribunals cannot be applied mechanically to the ICC, they may still influence the way in which the ICC Statute is interpreted.

The distinct sources of law should also be noted. The ICC Statute, as an international treaty, is an authoritative source of law with respect to conduct committed after it has come into force. In large part it attempts to codify all relevant matters, substantive and procedural, and binds only those States which have expressed their consent through ratification. The status of the ad hoc tribunals, however, is very different. The method by which they were created varies,[968] but they were all established after the conduct which they sought to try had taken place (albeit that the ICTY's temporal jurisdiction is open-ended so that it also encompasses crimes, such as the genocide in Srebrenica in 1995 or events in Kosovo in 1999, which occurred after its establishment). As such, the position could not be taken that their Statutes created the law which they were to apply: this would clearly infringe the principle of legality. Instead, therefore, the ad hoc tribunals apply customary international law which existed at the time that the relevant conduct took place. Reference in the ad hoc tribunals' Statutes to substantive crimes or forms of liability only establishes the tribunals' jurisdiction over the conduct falling within these legal concepts: it does not purport to provide new definitions of crimes.

As the UN Secretary-General observed in his report on the ICTY Statute:[969]

> It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

968 For example, the ICTY and ICTR Statutes were created by binding resolutions of the UN Security Council, whereas the SCSL Statute was established by international agreement between the UN Secretary-General and the Government of Sierra Leone.

969 Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 (3 May 1993) para (29).

The UN Secretary-General further held that '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'.[970]

Forms of responsibility prosecuted at the international courts and tribunals

The various forms (also referred to as 'heads' or 'modes') of responsibility (or 'liability') recognised in the Statute of the ICTY are provided in Articles 7(1) and 7(3):

Article 7(1) and 7(3) of the ICTY Statute

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.

   . . .

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.

Article 4(3) of the ICTY Statute provides for punishable forms of participation in genocide:

Article 4(3) of the ICTY Statute

Genocide

The following acts shall be prohibited:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

970 Ibid para (34).

It should be clarified that except for complicity in genocide, which is a *mode of liability*, the other punishable forms of participation in genocide set out in Article 4(3) of the ICTY Statute direct and public incitement, conspiracy and attempt are themselves crimes. They are so-called *inchoate* or *incomplete* crimes which are punishable even if no act of genocide has resulted therefrom (*see* the definitions below).[971] The reason for including Article 4(3) in the ICTY Statute has been explained as follows:[972]

> [b]y incorporating Article 4(3) in the Statute, the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law. The consequence of this approach, however, is that certain heads of individual criminal responsibility in Article 4(3) overlap with those in Article 7(1).

The Appeals Chamber in *Krstić* rejected the argument that Article 4(3) was *lex specialis* in relation to Article 7(1). Instead, the Appeals Chamber held that the modes of liability provided under Article 7(1) should be read into Article 4(3) of the ICTY Statute.[973]

The ICTR Statute contains identical provisions in Articles 2(3), 6(1) and 6(3), as does the SCSL in Articles 6(1) and 6(3) (save for those relating to genocide, over which it does not have jurisdiction). Individual criminal responsibility for crimes under the law of Sierra Leone prosecuted at the SCSL is determined in accordance with domestic law.[974]

In comparison to the ad hoc tribunals, the ICC Statute specifies the various forms of individual criminal responsibility with greater detail:

Article 25 of the ICC Statute

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;

971 William A Schabas, *Genocide in International Law, The Crime of Crimes* 307 (2nd ed CUP, Cambridge 2009) 307; *Prosecutor v Nahimana et al* (ICTR) Case No ICTR-99-52-A, Appeal Judgment (28 November 2007) para (678).

972 *Prosecutor v Krstić* (n957) para (640) (footnote omitted); *Prosecutor v Krstić* (ICTY) Case No IT-98-33-A, Appeal Judgment (19 April 2004) paras (138)–(139); *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-T, Trial Judgment (1 September 2004) para (726).

973 *Prosecutor v Krstić* (n972) paras (138)–(139).

974 Article 6(5) of the SCSL Statute.

(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 crimes 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 the 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 28 of the ICC Statute

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, 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.

Modes of liability v inchoate crimes

In considering the forms of individual responsibility under international criminal law, it is essential to appreciate the distinction between modes of liability and inchoate crimes.

A *mode of liability* is a legal doctrine by which the intentional or knowing conduct of an accused renders them criminally liable for a broader unlawful act committed by other parties.

The development of the mode of liability concept stemmed from a concern to ensure the just attribution of criminal responsibility 'up' the chain of causation, beyond the 'trigger-man'. Conviction by a mode of liability permits the accused to be convicted and sentenced for the same crime as the direct physical perpetrator. Assessment of the proper sentence should then take all the individual's circumstances into account, including their role within any collective entity.[975]

For example, a person may be convicted of murder by aiding and abetting if they knowingly provide the murderer with a firearm. Although they did not carry out the killing themselves, they are nonetheless considered to have some responsibility for the underlying offence.

An *inchoate crime* penalises the commission of certain acts capable of constituting a step in the commission of another crime.[976] An inchoate crime does not require that the substantive offence be committed. The inchoate offences are attempts, incitements and conspiracy.

As inchoate crimes do not require the substantive crime to be committed, they are a much simpler legal concept. For this reason, they are well-suited to regulatory purposes but, in practical terms,

975 Robert D Sloane, 'The expressive capacity of international punishment: the limits of the national law analogy and the potential of international criminal law' (2007) 43 Stanford J Int'l L 39, 89.

976 *Prosecutor v Nahimana et al* (ICTR) Case No ICTR-99-52-A, Appeal Judgment (28 November 2007) para (720). See also B A Gardner (ed) *Black's Law Dictionary* (9th ed West Group, St Paul, Minnesota 2000), 1186, which defines 'inchoate offense' as '[a] step towards the commission of another crime, the step in itself being serious enough to merit punishment'.

may tend to divorce the liability of the accused from the reality of the consequences of their acts. As such, they may be less suitable for serious crimes. Inchoate offences are rarely used in international criminal law, with the exception of conspiracy to commit genocide and direct and public incitement to commit genocide, widely prosecuted at the ICTR.

A classic example of an inchoate crime is conspiracy. This makes it an offence for two or more people to agree on a course of conduct which will necessarily result in the commission of a criminal offence with the intent that the targeted offence occurs (eg conspiracy to commit genocide). It is not necessary for the agreed crime actually to be carried out, and, unless the agreed crime is carried out, the defendants should only be charged with the conspiracy and not with the substantive offence. If, however, the agreed crime is committed, the accused may be convicted of both the completed crime and the inchoate crime of conspiracy to commit the targeted offence.[977]

MODES OF LIABILITY

In a landmark early decision, the ICTY Appeals Chamber held that 'nobody may be held criminally responsible for acts or transactions in which [they] have not personally engaged or in some other way participated'.[978] More recently, it has emphasised that 'not every type of conduct would amount to a significant enough contribution to the crime [to establish] criminal liability'.[979] These two statements reflect the *principle of personal culpability*, which requires the demonstration of a meaningful link between the personal conduct of the accused and the criminal offence with which they are charged. Modes of liability demonstrate that link, and are legitimate insofar as they meaningfully reflect an individual's culpability.

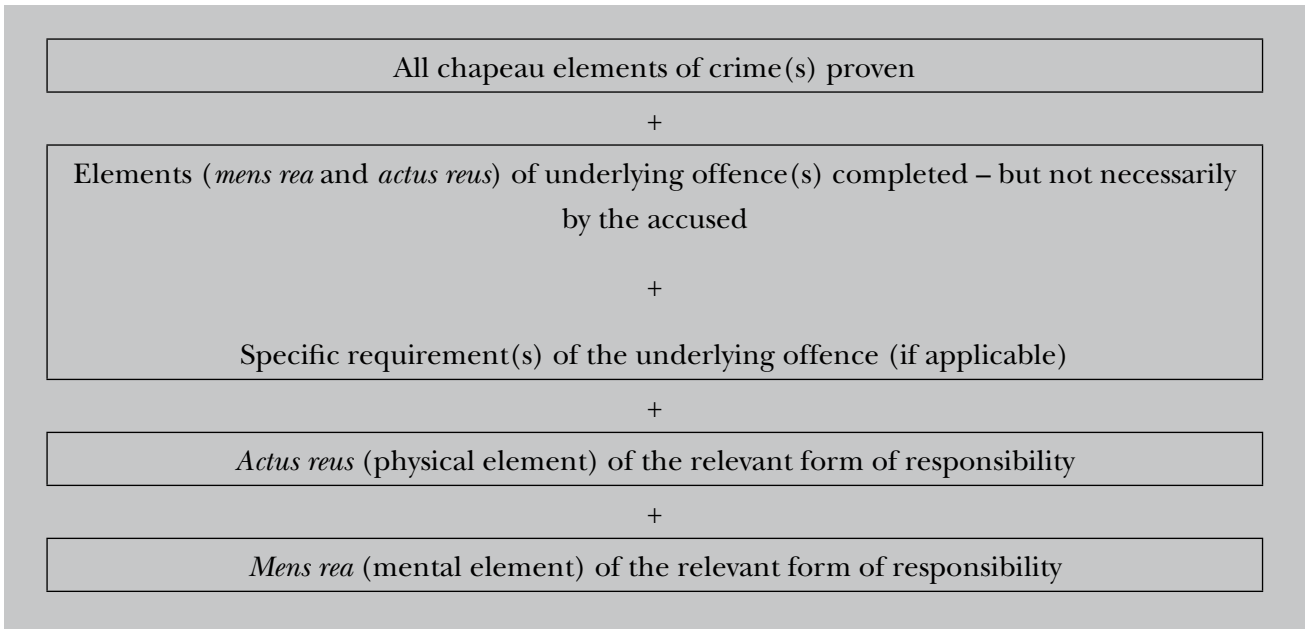
Various forms of liability have different physical and mental elements. The large-scale nature of international crimes means that the attribution of individual responsibility frequently requires proof not only of the accused's conduct, but also that of other people. Accordingly, in order to secure a conviction, the Prosecution must invariably prove the following key elements.[980] They are set out in the following diagram:

977 It should be noted, however, that the ICTR Trial Chambers have differed as to whether a conviction may be entered for conspiracy to commit genocide and perpetration of the crime as such. In *Musema*, the Trial Chamber held that cumulative convictions cannot be sustained (*Prosecutor v Musema* (ICTR) Case No ICTR-96-13-T, Trial Judgment (27 January 2000) paras (196)–(198)). In other cases before the ICTR, eg, in *Niyitegeka* and *Nahimana et al*, the accused were found guilty for both offences, genocide and conspiracy to commit genocide. *Prosecutor v Niyitegeka* (ICTR) Case No ICTR-96-14-T, Trial Judgment (16 May 2003) paras (429), (480), (483), (502); *Prosecutor v Nahimana et al* (ICTR) Case No ICTR-99-52-T, Trial Judgment (3 December 2003) paras (1043)–(1055). The Appeals Chamber has not yet resolved the controversy. See *Prosecutor v Nahimana et al* (ICTR) Case No ICTR-99-52-A, Appeal Judgment (28 November 2007) para (1023).

978 *Prosecutor v Tadić* (ICTY) Case No IT-94-1-A, Appeal Judgment (15 July 1999) para (186).

979 *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-A, Appeal Judgment (3 April 2007) para (427).

980 See further *Prosecutor v Milutinović et al* (ICTY) Case No IT-05-87-T, Trial Judgment (26 February 2009) paras (65)–(67).

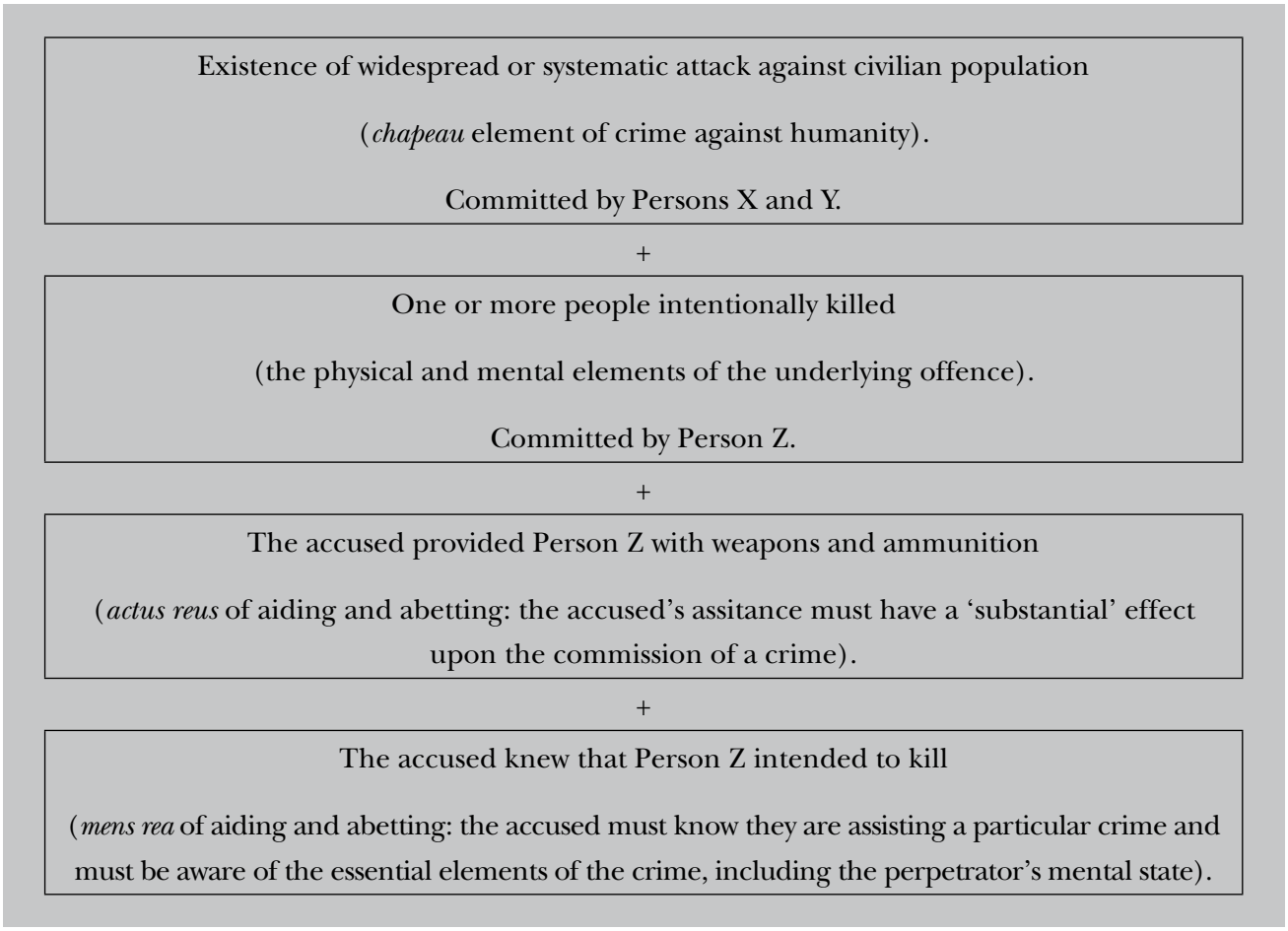


As discussed in Chapter 3, the underlying offence can be compared to a crime under domestic criminal law, such as murder. Each underlying offence contains its own *mens rea* and *actus reus*; however, some of them require specific requirements, such as a discriminatory intent. The *chapeau* elements or so-called general requirements of the crime, such as a widespread or systematic attack against civilian population, are specific to each particular crime, such as a crime against humanity. In other words, these general elements qualify an underlying offence, such as murder, as an international crime, such as murder as a crime against humanity. Additionally, the accused can be responsible for a crime on the basis of one of the forms of responsibility, each of which has both *mens rea* and *actus reus* elements.[981]

As the above diagram indicates, the first two elements may often have nothing to do with the accused; they provide the necessary context for the accused's criminal conduct but are not sufficient to make him or her culpable. This situation occurs when the accused is not the physical perpetrator of a crime. For example, the perpetrator may be a commander of a unit which is part of the army forces of a particular State. If members of the commander's unit torture and rape civilians during a widespread and systematic attack carried out by the army forces against a civilian population of a certain region within the State, then it is only the last two elements, the *actus reus* and *mens rea* of a particular form of responsibility which will determine whether the accused incurs responsibility for the crimes committed. Each form of responsibility establishes specific tests for these two elements. Therefore, whenever we refer to *actus reus* or *mens rea* in this Chapter (unless clearly stated otherwise), we refer to the elements which define the form of responsibility.

It may be helpful to relate these elements to another practical example. For a person to be convicted of aiding and abetting murder as a crime against humanity, the following elements would need to be proved:

981 See further *Prosecutor v Milutinović* et al (n980) paras (65)–(67).



The precise manner in which the Prosecution must prove the *actus reus* and *mens rea* elements varies according to the particular form of responsibility. However it is always necessary to prove both *actus reus* and *mens rea*, and any attempt to dilute these requirements will be of questionable legitimacy.

With regard to *actus reus*, the acts of the accused must, except in the case of superior responsibility,[982] contribute to, or have an effect on, the commission of the crime. Hence, this participation must have 'a direct and substantial effect on the commission of the illegal act'.[983]

With regard to *mens rea*, except in the case of superior responsibility, the accused must at least know (or be aware of the substantial likelihood) that their acts will render assisance to the criminal consequence. This requirement was originally expressed to the minimal extent that:

> The corresponding. . . *mens rea* is indicated by the requirement that the act of participation be performed with knowledge that it will assist. . . in the commission of the criminal act. Thus, there must be 'awareness of the act of participation coupled with a conscious decision to participate'. . .[984]

982 The exception is superior responsibility, which does not – at least in the law of the ad hoc tribunals – contain any requirement for causation; instead, arguably, the superior's failure to act appropriately amounts to an 'adoption' of the criminal consequence which is sufficient to satisfy the culpability principle. It is perhaps not coincidental, however, that the ICC has introduced an express requirement for causation in its provision on superior responsibility. See below.

983 *Prosecutor v Delalić et al* (n948) para (326) (footnote omitted). See also *Prosecutor v Aleksovski* (ICTY) Case No IT-95-14/1-T, Trial Judgment (25 June 1999) para (61); *Prosecutor v Tadić* (ICTY) Case No IT-94-1-T, Trial Judgment (7 May 1997) paras (674), (688); *Prosecutor v Akayesu* (n956) paras (477)–(479).

984 *Prosecutor v Delalić et al* (n948) para (326) (footnote omitted).

It is arguable that the minimum *mens rea* state is better expressed by reference to the civil law standard known as *dolus eventualis* which is used to describe 'a lesser form of intent, ie, a degree of fault bordering on negligence'.[985] It may be further explained in the following general terms:[986]

> *[D]olus eventualis* is present when a person, who is going to do something that will cause an event, is fully aware of the possible outome as a side-effect to such behaviour, but nevertheless decides to continue with the conduct, recognizing and approving the result as a possible cost of attaining the aimed goal. Approval of an evil result, though not directly pursued by the actor ('side effect'), is the subjective attitude that underpins the criminal conviction.

For example, the ICTY Appeal Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to 'ordering' under Article 7(1) of the Statute. Accordingly, a person who orders an act or omission has the requisite *mens rea* under Article 7(1) of the Statute pursuant to ordering if that person orders an act or ommission with 'awareness of substantial likelihood that a crime will be committed'. The Appeals Chamber further explained that ordering with such awareness has to be regarded as 'accepting that crime'.[987]

In practical terms, the ICC also introduces a common minimum standard for the mental element of criminal responsibility. Technically, it is a default standard, and therefore it can be over-ridden by express provisions to the contrary. These exceptions are, however, rare. The provision – Article 30 of the ICC Statute – states as follows:

> 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.[988]

The precise meaning of 'intent and knowledge' remains ambiguous: authoritative commentators disagree as to whether these terms include or exclude a *dolus eventualis* standard.[989] Although certain recent decisions have been careful to avoid the issue,[990] an ICC Pre-Trial Chamber found no difficulty in reading the concept of *dolus eventualis* into Article 30 of the ICC Statute.[991]

A final comment should be made on the question of specific intent. In principle, any mode of liability may apply to any crime and any underlying offence,[992] and the requirements of a particular mode do not formally alter or replace the elements of the underlying offence.[993] However, there is a degree of tension between these two concepts. Crimes of specific intent, like genocide, require that the perpetrator not only act intentionally but that they desire a particular result. The question has therefore been asked as to how individuals can be properly convicted for such crimes through modes of liability which require a *mens rea* standard less than direct intent. This has already been discussed

985 Alberto di Martino, 'Dolus Eventualis' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 302.
986 Ibid.
987 *Prosecutor v Kordić & Čerkez* (ICTY) Case No IT-95-14/2-A, Appeal Judgment (17 December 2004) paras (29)–(32); *Prosecutor v Blaškić* (ICTY) Case No IT-95-14-A, Appeal Judgment (29 July 2004) para (42).
988 Article 30 of the ICC Statute.
989 Cryer et al (n4) 320; Gerhard Werle and Florian Jessberger, '"Unless otherwise provided": Article 30 of the ICC Statute and the mental elements of crimes under international criminal law' (2005) 3 J Int'l Crim Just 35, 42, 53; Albin Eser, 'Individual criminal responsibility' in *Antonio Cassese et al* I *The Rome Statute of the International Criminal Court: A Commentary* (n964) 881; Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, Cambridge/The Hague 2003) 51–52.
990 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (ICC) Case No ICC-01/04-01/07, Decision on the Confirmation of Charges (30 September 2008) para (531).
991 *Prosecutor v Thomas Lubanga Dyilo* (ICC) Case No ICC-01/04-01/06, Decision on the Confirmation of Charges (29 January 2007) paras (351)–(355).
992 *Prosecutor v Kajelijeli* (ICTR) Case No ICTR-98-44A-T, Trial Judgment (1 December 2003) para (756).
993 *Prosecutor v Stakić* (n958) para (437), (442).

in Chapter 3, in the context of responsibility for genocide, and is briefly considered in the context of other forms of responsibility below.

INCHOATE CRIMES

For the reasons expressed above, inchoate crimes should be seen as the exception, rather than the rule, in attributing responsibility in international criminal law. That said, a limited number of inchoate offences are well established in international criminal law, and so they are briefly described here. They include:

- attempt to commit a crime proscribed by international law (ICC only, except for attempt to commit genocide which is an offence under the ICTY and ICTR Statutes);
- direct and public incitement to commit genocide; and
- conspiracy to commit genocide.

The relevant provisions on genocide in the Statutes of the ad hoc tribunals refer to criminal liability for attempt, incitement, conspiracy and complicity but (unhelpfully) do not make clear whether these should be regarded as modes of liability or inchoate offences.[994] The tribunals' jurisprudence has also been confused on this point. The best view is that direct and public incitement to commit genocide[995] and conspiracy to commit genocide[996] are *inchoate offences*; and that complicity in genocide is a *mode of liability*.[997]

The ad hoc tribunals have been entirely silent on the question of attempt, and prosecutions along those lines have not been pursued. It is difficult to predict how the provision on attempt to commit genocide might be construed.

Confusingly, the ICC Statute refers to direct and public incitement to commit genocide[998] and attempt to commit genocide in a provision[999] which is otherwise concerned solely with modes of liability. Nonetheless, these (as yet untested) offences should probably also be considered as inchoate crimes.[1000] The ICC Statute makes no reference at all to the notion of conspiracy to commit genocide, but the Prosecution might attempt to introduce such an offence by means of Article 21 of the Statute.[1001] It is arguable that such an offence exists in customary international law.[1002]

The elements of these inchoate offences can be summarised as follows.

994 See generally, Article 4 of the ICTY Statute; Article 2 of the ICTR Statute.
995 *Prosecutor v Nahimana et al* (n977) para (678)–(679).
996 *Prosecutor v Kajelijeli* (n992) para (788); *Prosecutor v Musema* (ICTR) Case No ICTR-96-13-T, Trial Judgment (27 January 2000) paras (184)–(198).
997 *Prosecutor v Blagojević & Jokić* (ICTY) Case No IT-02-60-T, Trial Judgment (17 January 2005) paras (776)–(782).
998 Article 25(3)(e) of the ICC Statute.
999 Article 25(3)(f) of the ICC Statute: A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the ICC if that person '[a]ttempts 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… if that person completely and voluntarily gave up the criminal purpose'.
1000 See, eg, Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, Cambridge/The Hague 2005) 166, 168.
1001 See *Prosecutor v Al-Bashir* (ICC) Case No ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) para (44).
1002 Harmen van der Wilt, 'Joint criminal enterprise: possibilities and limitations' (2007) 5 J Int'l Crim Just 91, 95; Antonio Cassese, 'Genocide' in *Cassese et al* (n964) 335, 347; *Prosecutor v Seromba* (ICTR) Case No ICTR-2001-66-A, Appeal Judgment (12 March 2008) para (218), OUP, Oxford.

Attempt

The offence of attempt, as a matter of international criminal law, has only codified in Article 25(3)(f) of the ICC Statute. The Statutes of the ICTY and ICTR make no reference to attempts, apart from specifically penalising 'attempt to commit genocide'.[1003] Article 25(3)(f) of the ICC Statute provides for the criminal liability, in respect of a crime within the jurisdiction of the ICC, of a person who:

> 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 prevent 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.

Attempt (as prosecuted at the ICC) requires a person to take 'a substantial step' that 'commences' a crime under the Statute. The step must be more than merely 'preparatory' to the commission of the offence, but the crime need not actually occur. The person must have acted deliberately, with the intention that a particular crime take place. It is a defence if the attempt is completely and voluntarily abandoned.[1004]

Direct and public incitement to commit genocide

Direct and public incitement to commit genocide consists of directly and publicly provoking a person to commit genocide. The crime may be commited through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[1005] Express words need not be used providing it is proven that the speech constituted a direct and public incitement in the particular context. The speaker must have possessed the special intent for genocide and intended to incite it.[1006]

Direct and public incitement has to be distinguished from instigation, which is a mode of responsibility. An accused will incur criminal responsibility for instigation if the instigation is in fact substantially contributed to the commission of a crime, whereas direct and public incitement to commit genocide is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide. The latter is therefore punishable even if no act of genocide has resulted therefrom.[1007]

1003 Article 4(3) of the ICTY Statute and the corresponding Article 2(3) of the ICTR Statute.
1004 See further Albin Eser, 'Individual Criminal Responsibility' (n989) 767, 809–818.
1005 *Prosecutor v Akayesu* (n956) para (559).
1006 Ibid para (560).
1007 *Prosecutor v Karemera et al* (ICTR) Case No ICTR-98-44-AR73(C), Decision on Motions for Reconsideration, Appeals Chamber (1 December 2006) para (678).

There is also a difference between hate speech in general and direct and public incitement to commit genocide. The latter assumes that the speech is a direct appeal to commit genocide and it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceeded or accompanied by hate speech, but only direct and public incitement to commit genocide is punishable under the ICTY and ICTR Statutes.[1008]

Conspiracy to commit genocide

Conspiracy to commit genocide requires proof that two or more people agreed to commit the crime of genocide.[1009] It need not be shown that the crime was actually committed. The conspirators must have possessed the special intent for genocide.

Finally, it is also worth noting (despite some suggestions to the contrary[1010]) that responsibility by means of 'joint criminal enterprise',[1011] or 'planning' or 'ordering',[1012] is not imposed on the basis of an inchoate offence theory. With respect to each of these modes of liability, it is indisputable that an accused may not be convicted unless the criminal act which he planned is in fact carried out, and the accused contributed to it along the lines expressed above.

The Media Case[1013]

Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze

ICTR, Case No ICTR-99-52-A

'The Media Trial' at the International Criminal Tribunal for Rwanda considered the role played by the media during Rwanda's genocide in 1994 and whether any individual could be held criminally responsible for the content of radio broadcasts and/or paper journalism.

The three defendants, Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, were tried jointly. Both Nahimana and Barayagwiza were members of the steering committee of 'RTLM SA', the founding company of the radio station Radio Television Libre des Mille Collines ('RTLM') in Rwanda. Ngeze was the owner, founder and editor-in-chief of the newspaper *Kangura*.

1008 Ibid para (692).

1009 *Prosecutor v Ntagerura et al* (ICTR) Case No ICTR-99-46-A, Appeal Judgment (7 July 2006) para (92).

1010 See Gerhard Werle, *Principles of International Criminal Law* (n1000) 316. With respect to ordering, see Von Falkenhorst, British Military Court (Brunswick) (2 August 1946) (1949) 11 Law Reports of Trials of War Criminals 18, 24.

1011 'Joint criminal enterprise' is not analogous to the general inchoate offence of 'conspiracy' (whose existence in international law remains contested): *Prosecutor v Milutinović et al* (n926) per Judge Hunt, para (23); George Fletcher, 'The Hamdan case and conspiracy as a war crime' (2006) 4 J Int'l Crim Just 442, 445–446; Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP, Oxford 253, 291) 2005; George Fletcher, *Rethinking Criminal Law* (OUP, Oxford 2000) 647.

1012 *Prosecutor v Nahimana et al* (n977) para (479); *Prosecutor v Kordić & Čerkez* (n987) paras (26), (28); Prosecutor v Haradinaj et al (ICTY) Case No IT-04-84-T, Trial Judgment (3 April 2008) para (141); *Prosecutor v Brđanin* (n972) para (267).

1013 Summary prepared by Joanna Evans on the basis of Gillian Higgins and Joanna Evans, 'Nahimana and Others (Media case)' in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 833–836.

All three accused were charged with individual criminal responsibility under Article 6(1) of the ICTR Statute on counts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and crimes against humanity (persecution, extermination). Barayagwiza and Ngeze were additionally charged with superior responsibility under Article 6(3) of the ICTR Statute in respect of all counts save for conspiracy to commit genocide. Nahimana was charged with superior responsibility only in respect of the charges of direct and public incitement to commit genocide and the crime against humanity of persecution. Ngeze was additionally charged with murder as a crime against humanity.

This summary focuses upon the charges of direct and public incitement to commit genocide and conspiracy to commit genocide.

Direct and public incitement to commit genocide

The Trial Chamber found all three accused guilty of direct and public incitement to commit genocide. It considered that the crime of incitement is an inchoate offence which continues in time until the completion of the acts contemplated and as such the Chamber in coming to its decision was able to consider acts prior to the temporal jurisdiction of the ICTR. The Appeals Chamber however, held that this approach was incorrect and that the offence of direct and public incitement is completed as soon as the words in question are uttered, broadcast or published.

The Appeals Chamber further held that RTLM programmes broadcast post 6 April 1994 and certain *Kangura* articles published in 1994 amounted to direct and public incitement to commit genocide. The Appeals Chamber also found that Nahimana was a superior of the RTLM staff who had the material ability to prevent or punish the broadcast of criminal utterances by staff even after 6 April 1994. It was further held that he knew or had reason to know that his subordinates were about to broadcast or had already broadcast utterances inciting the killing of Tutsi and that he had not taken reasonable and necessary steps to prevent or punish this incitement by RTLM staff in 1994 to kill the Tutsi. The conviction against Nahimana for direct and public incitement to commit genocide pursuant to Article 6(3) was therefore upheld. However, that of Barayagwiza was overturned on the basis that he only exercised effective control over the journalists and employees of RTLM prior to 6 April 1994 at a time when the Appeals Chamber held that the relevant broadcasts did not amount to direct and public incitement to genocide. Consequently, Barayagwiza's conviction under Article 6(3) of the Statute was overturned.

The Appeals Chamber upheld Ngeze's conviction for direct and public incitement to commit genocide on the basis that he wrote two or three of the articles published in 1994.

Conspiracy to commit genocide

The Trial Chamber convicted all three defendants of conspiracy to commit genocide under Article 6(1). It reasoned that conspiracy can consist of individuals acting in an institutional capacity as well as or even independently of their personal links to each other. It further held that the three accused had consciously interacted with each other, using the institutions they controlled to promote their joint agenda of targeting the Tutsi population for destruction. Furthermore, in view of the inchoate nature of the offence, the Trial Chamber considered that acts of conspiracy prior to 1994 that resulted in the commission of genocide in 1994 fell within the temporal jurisdiction of the Tribunal. The Appeals Chamber however considered that the inference that the appellants conspired with each other in order to commit genocide or that the coordinated action of the relevant institutions amounted to a criminal conspiracy was not the only reasonable inference which could be drawn from the evidence presented. Accordingly, the convictions of the Trial Chamber for conspiracy to commit genocide were reversed.

Nahimana was sentenced to 30 years' imprisonment, Barayagwiza was sentenced to 32 years' imprisonment, and Ngeze was sentenced to 35 years' imprisonment.

Direct and individual perpetration

The ICTY and ICTR consider a person to have 'committed' an offence 'when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law'.[1014] Terms such as 'commission' and 'perpetration' are interchangeable. The 'physical' nature of the accused's act is also not an absolute requirement: the reference is a term of art to connote 'direct' and 'personal' (ie individual) involvement.[1015] In this context, it is possible for an individual to perpetrate a crime under international law by omission, provided that the accused was under a positive legal duty to act at the relevant time.[1016] It has not been clearly settled what types of duties may permit conviction, and whether they must emanate from any particular body of law. As a hypothetical example, the international humanitarian law obligation to protect prisoners of war might permit the prosecution of a guard for murder by omission where he or she failed to prevent a crowd of civilians from killing the prisoner of war.[1017]

1014 *Prosecutor v Kunarac et al* (ICTY) Case No IT-96-23-T/IT-96-23/1-T, Trial Judgment (22 February 2001) para (390) (footnote omitted). See also *Prosecutor v Kayishema & Ruzindana* (ICTR) Case No ICTR-95-1-A, Appeal Judgment (1 June 2001) para (187); *Prosecutor v Tadić* (n978) para (572).

1015 *Prosecutor v Gacumbitsi* (ICTR) Case No ICTR-2001-64-A, Appeal Judgment (7 July 2006) para (60); *Prosecutor v Limaj et al* (ICTY) Case No IT-03-66-T, Trial Judgment (30 November 2005) para (509).

1016 *Prosecutor v Brđanin* (n979) para (274); *Prosecutor v Galić* (ICTY) Case No IT-98-29-A, Appeal Judgment (30 November 2006) para (175); *Prosecutor v Ntagerura et al* (n1009) para (334).

1017 See, eg, *Prosecutor v Mrkšić et al* (ICTY) Case No IT-95-13/1-A, Appeal Judgment (5 May 2009) paras (73)–(74).

In general, the Prosecution must establish the following elements beyond reasonable doubt:

- the deliberate conduct of the accused formed an 'integral'[1018] part of the *actus reus* of the offence charged;
- the accused 'intended' the offence, or acted while reconciled to the knowledge of the substantial likelihood that their actions would result in that offence coming to pass;[1019] and
- the accused possessed any specific intent required.

The SCSL has expressly declared that it follows the law of the ICTY/ICTR in this context.[1020] The position at the ICC is also likely to be broadly similar, although the precise scope of the applicable mental standard obviously depends on the interpretation given to Article 30 of the ICC Statute (*see* above). It should be noted that the ICC Statute makes no reference to the possibility of omissions forming the basis for criminal conduct. The ICC Chambers may well follow the approach of the ICTY/ICTR in this regard, importing relevant customary international law through Article 21 to fill this *lacuna*.[1021]

Perpetration through a group

The international and hybrid criminal courts and tribunals have endorsed different technical definitions of those modes of liability which encompass the perpetration of an offence through group activity. The complexity which results from this variety is unfortunate. The same core concept (individual responsibility for crimes completed by the concerted action of more than one person) is chiefly reflected by the following modes of liability:

- Joint Criminal Enterprise (JCE);
- Co-perpetration (also known as 'joint perpetration');
- Indirect perpetration (also known as 'perpetration by means');
- Indirect co-perpetration.

The equal criminal responsibility of all members of the group is a fundamental principle of this general category of liability,[1022] although sentencing may (and should) be individualised to take account of personal circumstances.

1018 In the context of genocide, 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crimes. For example, the ICTR Appeals Chamber found that Gacumbitsi who was physically present at the scene to supervise and direct the Nyarubuye Parish massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed, was 'committing' genocide and not simply 'ordering', 'planning' or 'instigating' genocide. It confirmed the Trial Chamber's finding that Gacumbitsi's action of personally directing the Tutsi and Hutu refugees to separate was as much an integral part of the genocide as were the killings which it enabled. *Prosecutor v Gacumbitsi* (n1015) paras (60)–(61); *Prosecutor v Seromba* (n1002) para (161).

1019 *Prosecutor v Limaj et al* (n1015) para (509).

1020 *Prosecutor v Fofana & Kondewa* (n926) para (205); *Prosecutor v Brima et al* (SCSL) Case No SCSL-04-16-T, Trial Judgment (20 June 2007) paras (762)–(763).

1021 See *Prosecutor v Al-Bashir* (n1001) para (44).

1022 *Prosecutor v Vasiljević* (ICTY) Case No IT-98-32-A, Appeal Judgment (25 February 2004) para (111); *Prosecutor v Blagojević & Jokić* (n997) para (702); *Prosecutor v Stakić* (n958) para (435).

JOINT CRIMINAL ENTERPRISE (JCE)

The most common mode of liability for perpetration through a group is 'Joint Criminal Enterprise' (JCE) liability.[1023] First expressly defined as a doctrine of international law in a landmark decision of the ICTY,[1024] JCE has been extraordinarily controversial. The basic legitimacy of its application has been subject to major challenges at the ICTY alone on four separate occasions.[1025] Nonetheless, over the same period, a number of other tribunals have adopted the doctrine,[1026] and more are giving it active consideration.[1027]

The controversy of the JCE doctrine has two main explanations. First, the concept was not expressly included in the ICTY Statute, and the term was derived by means of judicial interpretation of the word 'committing' in Article 7(1) of the ICTY Statute.[1028] This has led to concern both about the tribunal's power to 'expand' its jurisdiction, and the relative culpability of those convicted under the doctrine. Second, simply as a more complicated mode of liability than others, the basis and extent of the doctrine in customary international law has been open to challenge. In principle, many of these issues have been settled in the ICTY's jurisprudence for some time. In practice, given the complexity of JCE (and the broad range of conduct upon which liability for JCE may be based), the doctrine will continue to undergo further development and remain controversial.

JCE liability holds an accused responsible as a perpetrator for the totality of conduct which may be attributed to a group operating with a common criminal plan, design or purpose which they share. The accused need not personally carry out all or any elements of the crime(s) or underlying offence(s). Although the accused's contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.

JCE is commonly described in three categories, characterised by different approaches to *mens rea*. These are:

- 'Basic' JCE (JCE I), according to which, all members, acting pursuant to a common purpose, possess the same intent to commit a crime or underlying offence, and the crime or underlying offence is committed by one or more or them, or by others acting on their behest.[1029]
- 'Systemic' JCE (JCE II), which is characterised by the existence of an organised criminal system, as in the case of detention camps in which the prisoners are mistreated pursuant to a common purpose.[1030]

1023 Variously, it has also been described as liability for 'a common criminal plan, a common criminal purpose, a common design or purpose, a common criminal design, a common purpose, a common design. . . a common concerted design. . . a criminal enterprise, a common enterprise, and a joint criminal enterprise'. It may also be loosely described as acting 'in concert'. All of these terms refer to JCE liability. *Prosecutor v Brđanin & Talić* (ICTY) Case No IT-99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (26 June 2001) para (24); *Prosecutor v Vasiljević* (n941) para (63).

1024 *Prosecutor v Tadić* (n978) para (190 *et seq*).

1025 *Prosecutor v Krajišnik* (ICTY) Case No IT-00-39-A, Appeal Judgment (17 March 2009); *Prosecutor v Brđanin* (n979); *Prosecutor v Milutinović et al* (n926); *Prosecutor v Tadić* (n978).

1026 *Prosecutor v Ntakirutimana & Ntakirutimana* (ICTR) Case No ICTR-96-10-A/ICTR-96-17-A, Appeal Judgment (13 December 2004) para (468); *Prosecutor v Fofana & Kondewa* (n926) para (208); *Prosecutor v Perreira*, Special Panel for Serious Crimes (East Timor) 34/3003, Trial Judgment (27 April 2005) 19–20; *Prosecutor v de Deus*, Special Panel for Serious Crimes (East Timor) 2a/2004, Trial Judgment (12 April 2005) 13.

1027 See, eg, ECCC, Office of the Co-Investigating Judges, Doc No D.97, Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise (16 September 2008).

1028 *Prosecutor v Tadić* (n978) para (226).

1029 *Prosecutor v Tadić* (n978) paras (196), (220); *Prosecutor v Brđanin* (n979) para (365); *Prosecutor v Milutinović et al* (n980) para (96).

1030 *Prosecutor v Tadić* (n978) paras (202)–(203), (220); *Prosecutor v Krnojelac* (ICTY) Case No IT-97-25-A, Appeal Judgment (17 September 2003) para (89); *Prosecutor v Milutinović et al* (n980) para (96).

- 'Extended' JCE (JCE III) covers crimes that fall outside the common plan, but which are nevertheless a natural and foreseeable consequence of the effecting of that common purpose. For example, a group-shared intention to forcibly remove members of one ethnicity from their town, village or region with the consequence that, in the course of doing so, one or more of the victims is shot and killed.[1031]

Each category is considered further below.

Like all modes of liability, all categories of JCE are applicable to all crimes and underlying offences, including crimes or underlying offences requiring specific intent, such as persecution as a crime against humanity.[1032]

Physical elements

All forms of JCE share the same physical elements, first laid out by the ICTY Appeals Chamber in *Tadić*. The meaning of each of these points has been elaborated in the case-law, as discussed below.

Physical elements

(a) plurality of persons;

(b) existence of a common criminal plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;

(c) participation of the accused in the common criminal plan, design or purpose involving the perpetration of one of the crimes provided for in the Statute.

Plurality of persons

The basic meaning of 'plurality' entails that a JCE may arise whenever more than one person is engaged in a criminal endeavour. It is not necessary to identify specifically all members by name, providing the identity of the plurality itself is established.[1033] The individuals who personally carry out criminal acts (physical perpetrators) do not necessarily have to be members of the JCE sharing the common criminal purpose but, if not, it must be shown that (a) the crime or underlying offence can be imputed to one member of the joint criminal enterprise (not necessarily the accused), and (b) that this member when using a principal perpetrator acted in accordance with the common plan.[1034] The plurality need not be organised in a military, political, administrative, or any other formal structure.[1035]

1031 *Prosecutor v Tadić* (n978) para (204); *Prosecutor v Kvočka et al* (ICTY) Case No IT-98-30/1-A, Appeal Judgment (28 February 2005) para (83).
1032 *Prosecutor v Kvočka et al* (n1031) para (240); *Prosecutor v Krnojelac* (n1030) para (111).
1033 *Prosecutor v Krajišnik* (n1025) para (156); *Prosecutor v Krnojelac* (n1030) para (116).
1034 *Prosecutor v Brđanin* (n979) paras (413), (418), (430).
1035 *Prosecutor v Tadić* (n978) para (227)(i).

Common plan, design or purpose

The common plan, design or purpose is loosely defined as 'an understanding or arrangement amounting to an agreement'[1036] to commit one or more particular crimes and/or underlying offences, yet it essentially amounts to an *objective* concept. There is no need for any sort of express agreement,[1037] or for the parties concerned to recognise subjectively that there is a common plan as such.[1038] The common purpose need not be previously arranged or formulated; it may materialise extemporaneously.[1039] There is no requirement of an additional understanding or agreement to commit a particular crime between the accused and the principal perpetrator of a crime.[1040] With regard to JCE II, the system of ill-treatment is itself the common plan, design or purpose.[1041]

In practice, the common plan is generally established by judicial inference.[1042] This must, of course, be accomplished to the criminal standard:[1043] ie, proven beyond reasonable doubt. One useful indicator of a common plan, design or purpose may be the co-ordinated action of the parties concerned.[1044] The court should not rely, however, on isolated examples of apparently facilitative conduct.[1045] The common purpose requirement requires proof that 'the criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise'.[1046]

This approach is best illustrated by an example.

Within the context of a wider attack on the civilian population of the country, three people (Mayor, Police Chief and Bus Company Boss) agree to remove all red-headed people from their town. They leave no direct evidence of this agreement. However, over the following week, all redheads in the town are arrested by local police officers. In choosing whom to arrest, the police officers are seen to be consulting lists marked 'Redheads'. All the arrested people are taken to the town square, where every single bus in the town is waiting. The redheads are deported to a neighbouring country.
An international criminal tribunal later convicts Mayor, Police Chief and Bus Company Boss of deportation as a crime against humanity, through a JCE theory. The tribunal inferred the existence of the common plan from the facts that a) the police officers had been ordered to detain redheads; b) the Mayor's office had provided them with a list of targets; c) the Bus Company had halted all normal services in order to transport the redheads away. The tribunal acquitted a fourth person, who had drawn up a list of redheads for census purposes, because it did not consider their commitment to the common plan to be proven beyond reasonable doubt, even though they had indirectly provided the basis for the victims to be identified.

1036 *Prosecutor v Simić et al* (ICTY) Case No IT-95-9-T, Trial Judgment (17 October 2003) para (158); *Prosecutor v Stakić* (n958) para (435).
1037 *Prosecutor v Brđanin* (n979) paras (417)–(419); *Prosecutor v Mrkšić et al* (ICTY) Case No IT-95-13/1-T, Trial Judgment (27 September 2007) para (545).
1038 *Prosecutor v Vasiljević* (n1022) para (109).
1039 *Prosecutor v Brđanin* (n979) para (418); to *Prosecutor v Tadić* (n978) para (227)(ii); *Prosecutor v Vasiljević* (n1022) para (100).
1040 *Prosecutor v Brđanin* (n979) para (418).
1041 *Prosecutor v Kvočka et al* (ICTY) Case No IT-98-30/1-T, Trial Judgement (2 November 2001) para (320); ICTY IT-98-30/1-A, Appeal Judgment (28 February 2005) para (183).
1042 *Prosecutor v Tadić* (n978) para (227)(ii).
1043 *Prosecutor v Furundžija* (ICTY) Case No IT-95-17/1-A, Appeal Judgment (21 July 2000) para (120).
1044 *Prosecutor v Haradinaj et al* (n1012) para (139); *Prosecutor v Krajišnik* (ICTY) Case No IT-00-39-T, Trial Judgment (27 September 2006) para (884); *Prosecutor v Brđanin* (n972) para (351).
1045 *Prosecutor v Brđanin* (n972) para (352).
1046 *Prosecutor v Stakić* (n953) para (69); *Prosecutor v Brđanin* (n979) para (430).

Participation of the accused in the JCE

For JCE liability to arise, the accused must have participated in at least one aspect of the common plan, design or purpose involved in the commission of a crime or underlying offence provided for in the Statute.[1047] The importance of the participatory element in JCE should not be underestimated: without proof that the accused took some part in the criminal plan, JCE would come close to liability for the inchoate offence of conspiracy.[1048] Not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question.[1049] Although the contribution need not be necessary or substantial,[1050] it should at least be a significant contribution to the crimes for which the accused is to be found responsible.[1051] It must also be established that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place.[1052] It need not be shown that the accused committed a specific crime or underlying offence themselves;[1053] however, the accused must have participated in furthering the common purpose of the core of the JCE.[1054] This does not limit the fashion in which the accused may contribute, which ranges from physical participation in any element of the crime to the rendering of assistance and encouragement to the infliction of particular conditions of life on the target population.[1055]

MENTAL ELEMENTS (MENS REA)

JCE I

The mental element for the first category of JCE, often referred to as 'basic JCE' or 'JCE I', requires that the accused voluntarily participated in at least one aspect of the common purpose and that the accused shared with the other JCE members the intent to commit the crime or underlying offence envisaged in the common plan.[1056] The Prosecution, however, does not need to prove, as an element of the first category of JCE, that every single person alleged to have been a member of the JCE shared the intent to commit the crime or underlying offence that is the object of the JCE.[1057]

Where the criminal object consists of a crime requiring specific intent, the Prosecution must prove not only that the accused shared with others the general intent to commit the underlying offence, for example the intent to kill for 'murder' as an underlying offence of persecution as a crime against humanity or 'killing members of the group' as an underlying offence of genocide, but also that he shared with other JCE members the specific intent required of the crime or underlying offence.[1058] Accordingly, where the common plan involves genocide, the accused must also possess the specific intent to destroy (in whole or in part) the group as such. Where the common plan involves murder as an underlying offence of persecution, the Prosecution must also prove that the accused shared with others the intent to discriminate against a protected group.[1059]

1047 *Prosecutor v Vasiljević* (n1022) paras (100, 119); *Prosecutor v Milutinović et al* (n980) para (103).
1048 *Prosecutor v Milutinović et al* (n926) para (26).
1049 *Prosecutor v Brđanin* (n979) para (427).
1050 *Prosecutor v Kvočka et al* (n1031) para (97)–(98).
1051 *Prosecutor v Brđanin* (n979) para (430); *Prosecutor v Krajišnik* (n1025) para (215).
1052 *Prosecutor v Brđanin* (n979) para (430).
1053 *Prosecutor v Tadić* (n978) para (227)(ii).
1054 *Prosecutor v Brđanin* (n979) para (427).
1055 *Prosecutor v Vasiljević* (n1022) para (100); *Prosecutor v Krnojelac* (n1030) para (81); *Prosecutor v Ntakirutimana and Ntakirutimana* (n1026) para (466).
1056 *Prosecutor v Brđanin* (n979) paras (365), (429); *Prosecutor v Stakić* (n953) para (65); *Prosecutor v Kvočka et al* (n1031) para (82); *Prosecutor v Ntakirutimana and Ntakirutimana* (n1026) paras (463), (467); *Prosecutor v Tadić* (n978) para (196).
1057 *Prosecutor v Milutinović et al* (n980) para (108).
1058 *Prosecutor v Kvočka et al* (n1031) paras (110), (240); *Prosecutor v Krnojelac* (n1030) para (111); *Prosecutor v Milutinović et al* (n980) para (109).
1059 *Prosecutor v Kvočka et al* (n1031) para (110).

JCE II

The second form of JCE ('systemic JCE', 'concentration camp JCE', or 'JCE II') is in many ways closely related to JCE I. It imposes the same requirement for intent, but provides a unique way of proving it in the special circumstances of a detention facility or other 'organised system set in place to achieve a common criminal purpose'.[1060] It requires proof of personal knowledge of the criminal purpose of the system as well as the intent to further the system.[1061]

Prosecutor v Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić & Dragoljub Prcać ('Omarska, Keraterm & Trnopolje Camps')

Case No IT-98-30/1

The case concerns the events that took place within three camps established at the Omarska and Trnopolje villages and at the Keraterm factory, in the municipality of Prijedor, in north-western Bosnia and Herzegovina. These camps were established shortly after the Serb forces took control over the town of Prijedor on 30 April 1992. The overriding purpose of the camps was to hold individuals who were suspected of sympathising with the opposition to takeover. The Trial Chamber found that the Omarska camp functioned as a joint criminal enterprise: atrocities committed therein consisted of a broad mixture of serious crimes committed intentionally in order to persecute and subjugate non-Serbs detained in the camp.[1062]

Miroslav Kvočka was a professional police officer attached to the Omarska police station department at the time that the Omarska camp was established. The Trial Chamber found that he participated in the operation of the camp as the functional equivalent of the deputy commander of the guard service and that he had some degree of authority over the guards. He was found to be a co-perpetrator of the joint criminal enterprise of the Omarska camp because of his authority and influence which he exerted over the guard service and the limited attempts he made to prevent crimes and to alleviate the suffering of the detainees, as well as the significant role he played in keeping the camp functioning despite his knowledge that it was a criminal endeavour.[1063]

Milojica Kos, a waiter by profession, was mobilised to serve as a reserve officer. The Trial Chamber found that he was a guard shift leader of the Omarska camp from the end of May to the beginning of August in 1992. The Trial Chamber found that because he made a substantial contribution to the maintenance and functioning of the camp, he knowingly and intentionally contributed to the furtherance of the joint criminal enterprise at the Omarska camp.[1064]

1060 *Prosecutor v Stakić* (n953) para (65); *Prosecutor v Kvočka et al* (n1031) para (182); *Prosecutor v Ntakirutimana and Ntakirutimana* (n1026) para (464).
1061 *Prosecutor v Brđanin* (n979) para (365); *Prosecutor v Stakić* (n953) para (65); *Prosecutor v Kvočka et al* (n1031) paras (82), (198), (237); *Prosecutor v Ntakirutimana and Ntakirutimana* (n1026) para (234).
1062 *Prosecutor v Kvočka et al* (n1031) para (2), referring to the Trial Judgement (2 November 2001), paras (2), (15)–(21), (319)–(320).
1063 Ibid para (3), referring to the Trial Judgment (2 November 2001) paras (332), (372), (414).
1064 Ibid para (4), referring to the Trial Judgment (2 November 2001) paras (485), (475)–(476), (499)–(500).

Dragoljub Prcać was a retired policeman and a crime technician who was mobilised to serve in the Omarska police station on 29 April 1992. The Trial Chamber found that he was an administrative aide to the commander of the Omarska camp for over three weeks and that, as such, he was able to move unhindered through the camp. As a result of his position, he was found to have some influence over the guards. However, he remained impassive when crimes were committed in his presence and that, although not responsible for the behaviour of the guards or interrogators, he was still responsible for managing the movement of detainees within the camp. According to the Trial Chamber, his participation in the camp, with full knowledge of what went on, was significant and his acts and omissions substantially contributed to assisting and facilitating the joint criminal enterprise of the camp.[1065]

Mlađo Radić was a professional policeman attached to the Omarska police station. The Trial Chamber found that from the end of May until the end of August 1992 he was a guard shift leader in the Omarska camp and, as such, he was found to have been in a position of substantial authority over guards on his shift. He used his power selectively to prevent the crimes, and ignored the vast majority of crimes committed on his shift. The Trial Chamber noted that the guards on his shift were particularly brutal and that Radić personally committed sexual violence against female detainees. The Trial Chamber found that Radić played a substantial role in the functioning of the Omarska camp and that he was a co-perpetrator to the joint criminal enterprise.[1066]

Zoran Žigić was a civilian taxi-driver who was mobilised to serve as a reserve police officer. He worked for a short period of time in the Keraterm camp and delivered supplies, and he was also allowed to enter the Omarska and Trnopolje camps. With regard to the Omarska camp, the Trial Chamber found that Žigić regularly entered the camp specifically to abuse detainees. His significant participation in the crimes at the Omarska camp, coupled with his awareness of their persecutory nature and the eagerness and aggressiveness with which he participated therein, led the Trial Chamber to conclude that he was a co-perpetrator of the joint criminal enterprise of Omarska camp. The Trial Chamber found that he committed persecutions, torture and murder at the Keraterm camp and that these crimes were part of a widespread or systematic attack against non-Serbs there, constituting crimes against humanity. He also entered Trnopolje camp and abused detainees.[1067]

At issue in this case was the second form of joint criminal enterprise, the 'systemic' form, characterised by the existence of an organised criminal system, in particular in the case of concentration or detention camps. This form of joint criminal enterprise requires personal knowledge of the organised system and intent to further the common criminal purpose of that system. The Trial Chamber did not find that the accused were involved in the conception of the camps ot in the decision to open them. However, the Trial Chamber found that they were perfectly aware of the system of persecution set in place in the camps and that they participated in it and were fully aware of what they were doing.

1065 Ibid para (5), referring to the Trial Judgment (2 November 2001) paras (425), (459), (460)–(463), (468)–(469).
1066 Ibid para (6), referring to the Trial Judgment (2 November 2001) paras (512), (517), (526), (575).
1067 Ibid para (7), referring to the Trial Judgment (2 November 2001) paras (4), (610), (614), (672), (676), (682), (684), (688).

Kvočka, Kos, Prcać, and Radić were found individually responsible under Article 7(1) and guilty as co-perpetrators of persecutions under Article 5 of the ICTY Statute as well as murder and torture under Article 3 of the ICTY Statute. The Trial Chamber found that they did not incur superior responsibility for failing to prevent or punish the crimes committed by their subordinates, pursuant to Article 7(3) of the ICTY Statute. Kvočka was sentenced to seven years' imprisonment, Kos to six years' imprisonment, Prcać to five years's imprisonment, and Radić to twenty years' imprisonment.[1068] The remaining charges against the accused were dismissed.

Žigić was found guilty pursuant to Article 7(1) of persecution for crimes committed in the Omarska camp generally, and in particular aginst specified individuals, as well as of crimes committed by him in the Keraterim camp against specified individuals. He was found guilty of murder with respect to crimes committed in the Omarska camp generally and against a specified individual. With regard to the Keraterm camp, he was found guilty of murder with respect to specified individuals. He was found guilty for torture with respect to crimes committed in the Omarska camp generally and against specified individuals, and with respect to crimes committed in the Keraterm camp against specified individuals. He was found guilty of cruel treatment with respect to crimes committed against a specified individual in the Omarska camp and a specified individual in the Trnopolje camp. Trial Chamber sentenced him to 25 years' imprisonment.[1069]

The Appeals Chamber, while recognising that a person need not have any official function in the camp or belong to the camp personnel to be held responsible as a participant in the joint criminal enterprise, it held that a significant contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine. The incidents, in which Žigić participated, despite their quality of being grave crimes, formed only mosaic stones in the general picture of violence and oppression. On the basis of the evidence, the Appeals Chamber concluded that the evidence did not support the Trial Chamber's finding that he participated in the joint criminal enterprise and consequently quashed his conviction for the crimes committed in this camp 'in general'.[1070]

The Appeals Chamber affirmed the sentences of all of the accused.[1071]

1068 Ibid paras (3)–(6).
1069 Ibid paras (8)–(9).
1070 Ibid paras (598)–(599).
1071 Ibid (243)–(244).

JCE III

The third form of JCE (known as 'extended JCE' or 'JCE III') first requires proof that the accused was member of a JCE I or JCE II. Accordingly, it must be proven that the accused intended to participate in the JCE and that the accused intended to further its criminal objectives.[1072] The accused may be liable for crimes or underlying offences committed by other participants in the JCE even though those crimes were outside the common purpose of the JCE if it is proved that these further crimes were 'reasonably foreseeable' to the accused[1073] and that the accused willingly took that risk, even without directly intending the further crimes himself.[1074]

The Appeals Chamber also used other terms to describe this requirement such as that the accused must be aware that the crime was 'a natural and foreseeable consequence' of that common purpose,[1075] or that a crime 'was a probable consequence of the joint criminal enterprise'[1076], or that a crime was merely a possible consequence, rather than substantially likely to occur.[1077] Although the jurisprudence on the point is somewhat unclear, 'risk' should be interpreted to mean 'a state of mind in which a person, although he did not intend to bring about a certain result, was aware that actions of the group were most likely to lead to that result' (*dolus eventualis*).[1078]

Similarly, an individual may be convicted of a crime of specific intent through JCE III, such as genocide or persecution as a crime against humanity, even where their specific intent has not been proved.[1079] In *Brđanin*,[1080] the Appeals Chamber held that JCE III is no different from other forms of criminal liability which do not require proof of full intent to commit a crime before liability can attach, such as aiding and abetting and command responsibility.[1081] The Appeals Chamber provided the following example: [1082]

1072 Ibid para (83); *Prosecutor v Tadić* (n978) para (220).

1073 *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-A, Decision on Interlocutory Appeal (19 March 2004) para (5); *Prosecutor v Milutinović et al* (n111) para (96).

1074 *Prosecutor v Brđanin* (n979) para (365); *Prosecutor v Stakić* (n953) para (65); *Prosecutor v Kvočka et al* (n1031) paras (83), (86); *Prosecutor v Ntakirutimana and Ntakirutimana* (n1026) paras (465), (467); *Prosecutor v Milutinović et al* (n980) para (111).

1075 *Prosecutor v Tadić* (n978) para (204).

1076 *Prosecutor v Milutinović et al* (n980) para (111).

1077 *Prosecutor v Blaškić* (n987) para (33); *Prosecutor v Milutinović et al* (n980) para (111).

1078 *Prosecutor v Tadić* (n978) para (220). See also *Prosecutor v Krstić* (n972) para (234); *Prosecutor v Stakić* (n958) para (436).

1079 *Prosecutor v Milutinović et al* (n980) para (110); *Prosecutor v Brđanin* (n1073) paras (5)–(9).

1080 In *Brđanin*, the Trial Chamber dismissed a count of the indictment on the ground that the specific intent required for a conviction of genocide was incompatible with the lower *mens rea* standards of a third category joint criminal enterprise. According to the Trial Chamber, the *mens rea* required to prove responsibility under a third category of joint criminal enterprise fell short of the threshold that must be satisfied for a conviction of genocide under Article 4(3)(a) of the Tribunal's Statute. *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98*bis* (28 November 2003) paras (55)–(57). The Appeals Chamber held that the Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental element requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused' and therefore reversed the Trial Chamber's decision to acquit the accused of that charge. *Prosecutor v Brđanin* (n1073) para (10). See also *Prosecutor v Slobodan Milošević*, Case No IT-02-54-T, Decision on Motion for Judgement of Aquittal, Trial Chamber (16 June 2004) para (291).

1081 *Prosecutor v Brđanin* (n1073) para (7). See also *Prosecutor v Krnojelac* (n1030) para (52).

1082 *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-A, Appeals Chamber Decision on Interlocutory Appeal (19 March 2004) para (6).

> an accused who enters into a joint criminal enterprise to commit the crime of forcible transfer shares the intent of the direct perpetrators to commit that crime. However, if the Prosecution can establish that the direct perpetrator in fact committed a different crime, and that the accused was aware that the different crime was a natural and foreseeable consequence of the agreement to forcibly transfer, then the accused can be convicted of that different offence. Where that different crime is the crime of genocide, the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) would be committed and that it would be committed with genocidal intent.

Accordingly, JCE III applies to genocide if it was reasonably foreseeable from the JCE's objective that an act specified in Article 4 of the ICTY Statute or Article 2 of the ICTR Statute would be committed with genocidal intent and that the defendant was aware of this possibility when he or she participated in the JCE[1083] (*see* Chapter 3). The same applies to other crimes of specific intent, such as persecution as a crime against humanity.

Summary of the elements

The elements of the three forms of JCE liability at the ad hoc tribunals can be summarised in the following way.

JCE I requires proof beyond a reasonable doubt that the accused:

- shared a common plan, design or purpose with one or more others, which amounts to or involves the commission of a crime and underlying offence;
- made a significant contribution to the accomplishment of the criminal conduct envisaged in the shared plan, design or purpose;
- voluntarily participated in at least one aspect of the common plan, design or purpose;
- intended the crime and underlying offences to be carried out; and
- possessed any specific intent necessary.

JCE II also requires proof beyond a reasonable doubt that the accused:

- made a significant contribution to an organised system intended to achieve a criminal purpose (such as a 'concentration camp');
- knew of the system's criminal purpose;
- intended to further that purpose; and
- possessed any specific intent necessary.

1083 Ibid.

JCE III requires proof beyond a reasonable doubt that the accused:

- was a member of JCE I or II and intended to participate in the JCE and to further its criminal objectives;
- was aware of the risk that further crimes might be perpetrated (and, in the case of a crime of specific intent, that the crime would be committed with specific intent); and
- willingly took that risk.

Joint criminal enterprise and the ICC Statute

It is not entirely certain whether JCE liability will remain in common use in international law beyond the life of the present ad hoc tribunals. As set out below, early decisions of the ICC have given precedence to a different technical basis of liability for crimes perpetrated through a group.[1084] This should not be taken to mean, however, that the ICC lacks jurisdiction to prosecute crimes by means of a JCE theory. Article 25(3)(d) of the ICC Statute permits the imposition of liability on anyone 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:
>
> (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 crimes within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime;

This provision has not yet received judicial consideration but it is plainly modelled on JCE (although it is not the same). Like JCE before the ad hoc tribunals, the ICC model has three physical elements: a plurality of persons, a common purpose that involves the commission of a crime within the jurisdiction of the ICC, and the accused's contribution to the commission of such a crime.[1085] However, a number of aspects require further clarification, most notably the participation standard (which refers only to contribution in 'any' other way) and the extent to which the statutory mental elements might be compatible with JCE III. In this context, reference to the jurisprudence of the ad hoc tribunals by the ICC might be desirable in some respects but is not certain. The inclusion of the term 'contributes to the commission' may suggest that prosecutions under this head at the ICC will be considered less serious than those under other co-perpetration doctrines.[1086]

1084 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (483); *Prosecutor v Thomas Lubanga Dyilo* (n991) para (337).
1085 See also Gideon Boas et al, *International Criminal Law Practitioner Library: Forms of Responsibility in International Criminal Law* (CUP, Cambridge 2007) (126)–(128)
1086 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (483).

CO-PERPETRATION DOCTRINES

The provision of the ICC Statute which deals with other forms of co-perpetration is, on its face, much less complicated than the law on JCE detailed above. It simply states in Article 25(3)(a):

> 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;

In addition to direct and individual perpetration, this text expressly discloses two modes of liability loosely known as 'co-perpetration' ('jointly with another') and 'perpetration by means' or 'indirect perpetration' ('through another person').[1087] These modes of liability were explored in the ICTY's *Stakić* decision by the Trial Chamber.[1088] The Appeals Chamber in *Stakić*, however, held that the mode of liability which the Trial Chamber in that case termed 'co-perpetratorship' was new to the jurisprudence of this Tribunal and it 'does not have support in customary international law'.[1089]

'Indirect perpetration' requires the use by the accused of an agent to carry out the crime. In the domestic law origins of this doctrine, the agent was typically required to be 'innocent' (for example, due to their status as a minor, or a subject of duress, etc). However, this does not necessarily have to be the case: the ICC Statute recognises liability for the acts even of non-innocent agents (liability for the 'perpetrator behind the perpetrator') where the accused wields such power as to be able to guarantee compliance with their will, whatever the agent's own will may be. This may often be accomplished by means of control over an organisation, such as a military service or police force.[1090]

The theory underlying liability for 'co-perpetration' is distinct from JCE. As held by the ICTY Trial Chamber in *Stakić*:[1091]

> For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts.

Whereas JCE liability is characterised by the shared intent of those involved, the co-perpetration doctrine emphasises 'joint control' over the crime.[1092] As such, the *actus reus* lies at the heart of this form of responsibility.

1087 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (488); *Prosecutor v Thomas Lubanga Dyilo* (n991) para (332).

1088 *Prosecutor v Stakić* (n958) paras (438)–(442). See also *Prosecutor v Simić et al* (ICTY) Case No IT-95-9-A, Appeal Judgment (28 November 2006) *per* Judge Schomburg, paras (12)–(14); *Prosecutor v Gacumbitsi* (n1015) *per* Judge Schomburg, paras (16)–(22).

1089 *Prosecutor v Stakić* (n953) para (58)–(62). See also *Prosecutor v Simić et al* (ICTY) Case No IT-95-9-A, Appeal Judgment (28 November 2006) *per* Judge Shahabuddeen, para (32); *Prosecutor v Gacumbitsi* (n1015), *per* Judge Shahabuddeen, paras (47)–(48); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n990) para (508).

1090 In general, see *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (n990) paras (495)–(510). For the specific requirements of such an organisation, see paras (512)–(514), (516)–(518).

1091 *Prosecutor v Stakić* (n958) para (440).

1092 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (521).

The ICC Pre-Trial Chamber defined 'co-perpetration' in the following terms:[1093]

> Co-perpetration is based on joint control over the crime. It involves the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of commiting that crime. The fulfillment of the essential task(s) can be carried out by the co-perpetrators physically or they may be executed through another person.

The test for 'co-perpetration', might, therefore, be expressed as follows (based on the rulings of the ICC Pre-Trial Chambers):

Physical elements:

- The existence of an agreement or common plan between two or more persons, express or implied, which include the commission of a crime;[1094]
- The coordinated essential contribution by each co-perpetrator resulting in the realisation of the physical elements of the crime;[1095]

Mental elements:

- The accused must fulfil the subjective elements of the crime for which he is charged, including any requisite *dolus specialis* or ulterior intent for the type of crime involved;[1096]
- The accused must be mutually aware that implementing their common plan will result in the realisation of the physical elements of the crime;[1097]
- The accused must undertake such activities with the specific intent to bring about the physical elements of the crime, or must be aware that the realisation of the physical elements will be a consequence of their acts in the ordinary course of events;[1098]
- In the case of a co-perpetration of a crime through another person an additional mental element requires that the accused were aware of the factual circumstances enabling them to exercise control over the crime through another person.[1099]

Depending upon the construction of Article 30 of the ICC Statute, it is possible that co-perpetration, like JCE III, may have an extended form in which offences reasonably foreseeable from the common plan and which in fact come to pass may also fall within the scope of liability (*dolus eventualis*).[1100] This question has not yet received judicial consideration.[1101]

1093 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (521); *Prosecutor v Thomas Lubanga Dyilo* (n991) para (342); *Prosecutor v Stakić* (n958) para (440).
1094 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (522)–(523); *Prosecutor v Thomas Lubanga Dyilo* (n991) paras (343)–(345).
1095 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (524)–(526); *Prosecutor v Thomas Lubanga Dyilo* (n991) paras (346)–(348).
1096 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (527); *Prosecutor v Thomas Lubanga Dyilo* (n991) para (349).
1097 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (533); *Prosecutor v Thomas Lubanga Dyilo* (n991) para (361). See also *Prosecutor v Stakić* (n958) para (496).
1098 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (533); *Prosecutor v Thomas Lubanga Dyilo* (n991) para (361).
1099 The person must be aware of the character of their organisations, their authority within the organisation, and the factual circumstances enabling near-automatic compliance with their orders. *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) paras (534), (538); *Prosecutor v Thomas Lubanga Dyilo* (n991) para (366).
1100 Kai Hamdorf, 'The concept of a joint criminal enterprise and domestic modes of liability for parties to a crime: a comparison of German and English law' (2007) 5 J Int'l Crim Just 208, 216.
1101 *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* (n990) para (531).

'Co-perpetration' and 'perpetration by means' can also be combined in a further mode of liability known as 'indirect co-perpetration', which is characterised by the accused's use of agents to carry out the crucial task assigned to them in the common criminal plan.[1102] Like simple co-perpetration, it is essential that the accused exercised 'joint control' over the criminal conduct, and thus that their contribution was a *sine qua non* for its success.

Ordering, instigating, soliciting, inducing and planning

The ad hoc tribunals and ICC provide for the liability of those who 'order', 'instigate', 'plan' (except for the ICC Statute), 'solicit', or 'induce' the criminal conduct of a third party.

Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute provide:

> A person who planned, instigated, ordered. . . 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.

Article 25(3)(b) of the ICC Statute similarly states that:

> 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. . .
>
> (b) Orders, solicits or induces the commission of a crime which in fact occurs or is attempted;

Although a variety of terms are used to reflect the forms of liability under this head, they share common physical and mental elements.[1103] In all cases,[1104] the accused exerts their influence to cause the perpetrator's decision to commit a crime to become more likely. While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor 'substantially contributing' to the conduct of another person committing the crime.[1105]

1102 See, eg, ibid para (575).
1103 Gideon Boas et al, *Forms of responsibility in international criminal law* (CUP, Cambridge 2007) 344.
1104 Various commentators have indicated the similarity between these forms of liability: Eser (n989) 767, 795; Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (n989) 77.
1105 *Prosecutor v Kordić & Čerkez* (n987) para (27); *Prosecutor v Orić* (ICTY) Case No IT-03-68-T, Trial Judgment (30 June 2006) para (274). See also Andrew Simester and Robert Sullivan, *Criminal Law: Theory and Doctrine* (2nd ed Hart, Oxford 2003) 202–203.

In *Orić*, the ICTY Trial Chamber distinguished liability under this head from that of aiding and abetting:

> [A]s long as the principal perpetrator is not finally determined to commit the crime, any acts of demanding, convincing, encouraging or morally assuring him to commit the crime may constitute instigation, and even qualify as ordering if [an appropriate] relationship exists. As soon as the principal perpetrator is already prepared to commit the crime, but may still need or appreciate some moral support to pursue it or some assistance in performing the crime, any contributions making the planning, preparation or execution of the crime possible or at least easier may constitute aiding and abetting.[1106]

Forms of liability under this head also share the same mental element, although the precise test differs to some extent between the ad hoc tribunals and the ICC. The Prosecution must prove that the accused intended the crime to be committed as a result of their plan, order, or instigation, **or** were aware of the 'substantial likelihood' that the crime would be committed in the execution of their plan, order, or instigation (ie accepted the crime or underlying offence).[1107] At the ICC, the practical test for the mental element awaits judicial interpretation of Article 30, but it is clear that the same approach should apply for liability for ordering, soliciting or inducing.[1108]

The elements of each form of liability under this head can be summarised as follows:

PLANNING

Liability for planning at the ad hoc tribunals requires proof beyond a reasonable doubt that the accused:

- deliberately designed (alone or with others) the criminal conduct (act or omission) to be carried out by a third party, and that a criminal offence was carried out, wholly or in part, in the framework of that plan;[1109]
- made a substantial contribution to the criminal conduct by by their planning;
- intended the crime or underlying offence to be committed in the execution of that plan *or* was aware of the 'substantial likelihood' that the crime or underlying offence would be commited in the execution of that plan (ie accepted the commission of the crime or underlying offence).[1110]

It should also be noted that planning is *not* listed as a distinct category of liability at the ICC. Depending on the circumstances, the act of planning could be prosecuted under a variety of modes of liability.

1106 *Prosecutor v Orić* (n1105) para (281) (footnote omitted).
1107 *Prosecutor v Kordić & Čerkez* (n987) paras (29)–(32); *Prosecutor v Blaškić* (n987) paras (41)–(42).
1108 Eser (n989) 767, 797–798.
1109 *Prosecutor v Kordić & Čerkez* (n987) para (26); *Prosecutor v Galić* (ICTY) Case No IT-98-29-T, Trial Judgment (5 December 2003) para (168); *Prosecutor v Akayesu* (n956) para (480). See also *Prosecutor v Brđanin* (n972) paras (268), (357)–(358).
1110 *Prosecutor v Kordić & Čerkez* (n987) para (31).

INSTIGATING

Liability for instigating at the ad hoc tribunals requires proof beyond a reasonable doubt that the accused:

- prompted (through an act or an omission) another person to commit a criminal offence,[1111] and that offence was in fact carried out as a result of such prompting;
- made a substantial contribution to the conduct of another person commiting the crime or underlying offence;
- intended the crime or underlying offence to be committed as a result of such prompting *or* was aware of the 'substantial likelihood' that the crime or underlying offence would be committed in the execution of that instigation (ie accepted the commission of the crime or underlying offence).[1112]

ORDERING

Liability for ordering at the ad hoc tribunals requires proof beyond a reasonable doubt that the accused:

- possessed a position of authority, which may be informal and/or temporary in nature, that would compel another to commit a crime or underlying offence in following the accused's order;[1113]
- deliberately used their position of authority to instruct/order another person to commit a criminal offence, and that offence was in fact carried out;[1114]
- made a substantial contribution to the commission of a crime or underlying offence by their ordering/issuance of the order; and
- intended the crime or underlying offence to be committed in the execution of that order *or* was aware of the 'substantial likelihood' that the crime or underlying offence would be commited in the execution of that order (ie accepted the commission of the crime or underlying offence).[1115]

Aiding, abetting or otherwise assisting

Under this head, the ICTY Statute provides for the liability of those persons who 'otherwise aided and abetted in the planning, perpetration or execution of a crime'.[1116] The consistent jurisprudence of the ad hoc tribunals has demonstrated that *actus reus* for aiding and abetting consists of practical assistance, encouragement or moral support to the perpetration of a certain specific crime or underlying offence, for example, murder, extermination, rape, torture, wanton destruction of civilian

1111 Ibid para (27).
1112 Ibid para (32).
1113 *Prosecutor v Semanza* (ICTR) Case No ICTR-97-20-A, Appeal Judgment (20 March 2005) paras (361), (363); *Prosecutor v Kordić & Čerkez* (n987) para (28). Despite the similarity of concepts, it should be noted that the hierarchical relationship required for 'ordering' liability is not the same as the superior-subordinate relationship required for superior responsibility, and does not require proof of effective control: *Prosecutor v Seromba* (n1002) para (202); *Prosecutor v Kamuhanda* (ICTR) Case No ICTR-99-54A-A, Appeal Judgment (19 September 2005) para (75); *Prosecutor v Gacumbitsi* (ICTR) Case No ICTR-2001-64-T, Trial Judgment (17 June 2004) para (282).
1114 The Appeals Chamber in *Galić* clarified that ordering requires a positive act; it cannot be commited by omission. However, the mode of liability of ordering can be proven, like any other mode of liability, by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused. *Prosecutor v Galić* (n1109) paras (176)–(177).
1115 *Prosecutor v Blaškić* (n987) para (42).
1116 Article 7 of the ICTY Statute.

property, etc.[1117] In other words, this mode of liability extends to 'all acts of assistance that lend encouragement or support to the perpetration of an offence'.[1118]

Article 23(3)(c) of the ICC Statute provides for liability for 'aiding' and 'abetting' to which is added the catch-all phrase 'or otherwise assists':

> For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or attempted commission, including providing the means for its commission.

PHYSICAL ELEMENTS (ACTUS REUS)

The physical element for aiding and abetting, before both the ad hoc tribunals and the ICC, is extremely broad: virtually any type of conduct can meet the standard, provided that it is 'specifically directed' to the relevant crime or underlying offence (such that the assistance provided is not merely coincidental).[1119] The accused does not have to manifest 'independent initiative, power or discretion'.[1120] Under the law of the ad hoc tribunals, the Prosecution must show that the act of assistance had a 'substantial effect' upon the commission of a crime or underlying offence.[1121] No such requirement is presently clear in the law of the ICC.

The Prosecution, however, need not prove that the crime or underlying offence would not have been perpetrated *but for* the accused's contribution.[1122] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[1123] The accused cannot be held responsible for aiding and abetting if a crime or underlying offence is never actually carried out with his assistance, encouragement or moral support.[1124] As a general rule, the perpetrators of the crime or underlying offence need not know of the accused's assistance in the commission of the crime.[1125]

No evidence of a plan or agreement between the aider and abettor and the physical perpetrator or intermediary perpetrator is required.[1126] However, where the accused is alleged to have rendered knowing assistance *after* the completion of the core crime, the jurisprudence of the ad hoc tribunals only permits the accused to be convicted where a prior agreement between the accused and the perpetrators is proven, such that the latter were genuinely assisted in their conduct.[1127]

1117 *Prosecutor v Blaškić* (n987) para (45); *Prosecutor v Vasiljević* (n1022) para (102)(i). *Prosecutor v Blagojević & Jokić* (ICTY) Case No IT-02-60-A, Appeal Judgment (9 May 2007) para (127); *Prosecutor v Simić et al* (ICTY) Case No IT-95-9-A, Appeal Judgment (28 November 2006) para (85).
1118 *Prosecutor v Delalić et al* (n948) para (327).
1119 *Prosecutor v Blagojević & Jokić* (n1117) para (189); *Prosecutor v Vasiljević* (n1022) para (102)(i); *Prosecutor v Aleksovski* (n952) para (163)(ii); *Prosecutor v Fofana & Kondewa* (n926) para (209).
1120 *Prosecutor v Blagojević & Jokić* (n1117) para (195).
1121 *Prosecutor v Blaškić* (n987) paras (45)–(46); *Prosecutor v Vasiljević* (n1022) para (2102)(i); *Prosecutor v Blagojević & Jokić* (n1117) para (127); *Prosecutor v Brđanin* (n979) para (277).
1122 *Prosecutor v Blaškić* (n987) para (48); *Prosecutor v Mrkšić et al* (n1017) para (81).
1123 *Prosecutor v Blaškić* (n987) para (48); *Prosecutor v Mrkšić et al* (n1017) para (81).
1124 *Prosecutor v Aleksovski* (n952) para (165).
1125 *Prosecutor v Brđanin* (n979) para (349); *Prosecutor v Tadić* (n978) para (229)(ii); *Prosecutor v Simić et al* (n1036) para (161).
1126 *Prosecutor v Brđanin* (n979) para (263); *Prosecutor v Tadić* (n978) para (229)(ii).
1127 *Prosecutor v Haradinaj et al* (n1012) para (145); *Prosecutor v Blagojević & Jokić* (n997) para (731).

The ICTY and ICTR Appeals Chamber confirmed that the *actus reus* of aiding and abetting may be perpetrated through an omission.[1128] The basic elements of the mode of liability of aiding and abetting by omission are the same as for aiding and abetting by a positive act.[1129] The responsibility for aiding and abetting by 'omission' may arise where the accused was under 'a legal duty to act'.[1130] 'The *actus reus* for aiding and abetting by omission will thus be fulfilled when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realisation of that crime.'[1131] The Prosecution must prove that the accused 'had the ability to act but failed to do so'.[1132]

MENTAL ELEMENTS (MENS REA)

Before the ad hoc tribunals, it is well established that the aider and abettor must 'know' that his acts would assist in the commission of a crime or underlying offence,[1133] and must be aware of the 'essential elements' of the crime or underlying offence ultimately committed, including any specific intent of the physical perpetrator.[1134] The accused need not know the particular identities of the perpetrators,[1135] nor share the perpetrators' own intent to commit the crime or underlying offence.[1136]

For example, in relation to the crime of persecution, an offence with a specific intent, the aider and abettor 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. The aider and abettor need not share the intent of the physical perpetrator to commit the crime or underlying offence, 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.[1137] Similarily, with regard to genocide, the accused may be convicted for aiding and abetting genocide if he is aware of the principal perpetrator's specific intent but he does not himself need to share that intent[1138] (see Chapter 3).

The question may be posed whether the accused must foresee the specific crime which is ultimately committed. The ICTY Appeals Chamber has held that '[w]hile it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter'.[1139]

The *mens rea* standard for aiding and abetting under the law of the ICC appears slightly stricter than that of the ad hoc tribunals, requiring that the accused is proved to have acted 'with the purpose' of facilitating the commission of the crime.

1128 *Prosecutor v Mrkšić et al* (n1017) para (134); *Prosecutor v Orić* (ICTY) Case No IT-03-68-A, Appeal Judgment (3 July 2008) para (43); *Prosecutor v Ntagerura et al* (n1009) paras (334), (370); *Prosecutor v Nahimana et al* (n977) para (482); *Prosecutor v Blaškić* (n987) para (47).
1129 *Prosecutor v Mrkšić et al* (n1017) paras (81), (49), (146); *Prosecutor v Orić* (n1128) para (43).
1130 The Appeals Chamber in *Orić* recalled that 'omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act'. *Prosecutor v Orić* (n1128) para (43).
1131 *Prosecutor v Mrkšić et al* (n1017) para (49); *Prosecutor v Orić* (n1128) para (43); *Prosecutor v Nahimana et al* (n977) para (482).
1132 *Prosecutor v Mrkšić et al* (n1017) para (82).
1133 *Prosecutor v Blaškić* (n987) para (49); *Prosecutor v Blagojević & Jokić* (n1117) paras (127), (219)–(221); *Prosecutor v Brđanin* (n979) para (484).
1134 *Prosecutor v Orić* (n1128) para (43); *Prosecutor v Seromba* (n1002) paras (56), (65); *Prosecutor v Blagojević & Jokić* (n1117) para (127).
1135 *Prosecutor v Brđanin* (n979) para (355).
1136 *Prosecutor v Simić et al* (n1117) para (86); *Prosecutor v Blagojević & Jokić* (n1117) para (221).
1137 *Prosecutor v Simić et al* (n1117) para (86); *Prosecutor v Krnojelac* (n1030) para (52).
1138 *Prosecutor v Krstić* (n972) para (140); *Prosecutor v Blagojević & Jokić* (n1117) paras (120)–(123).
1139 *Prosecutor v Mrkšić et al* (n1017) para (159); *Prosecutor v Blagojević & Jokić* (n1117) para (222); *Prosecutor v Simić et al* (n1117) para (86); *Prosecutor v Blaškić* (n987) para (50). See also *Prosecutor v Brima et al* (SCSL) Case No SCSL-2004-16-A, Appeal Judgment (22 February 2008) para (243).

Complicity in genocide

Complicity is a form of responsibility which is provided in the ICTY and ICTR Statutes only in respect of genocide.[1140]

According to the jurisprudence of ad hoc tribunals, complicity in genocide includes 'aiding and abetting' genocide.[1141] It therefore shares the same elements as aiding and abetting generally. Aiding and abetting genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide by the principal perpetrator.[1142] As discussed above, the aider or abettor must have knowledge of the *mens reas* of the perpetrator, but he need not have the specific intent to commit genocide.[1143]

However, the ICTY Appeals Chamber in *Krstić* held that complicity 'may encompass conduct broader than that of aiding and abetting'.[1144] In such as case the Prosecution would need to prove that the accomplice had the 'specific intent' to destroy a protected group in whole or in part.[1145] In *Ntakirutimana*, the ICTR Appeals Chamber endorsed the view taken in *Krstić* and held as follows:[1146]

> the Krstić Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent.

The answer to the question of why the *mens rea* requirement should be different from one form of complicity and not another remains unresolved in the jurisprudence of the ad hoc tribunals.[1147]

Superior or command responsibility

Superior responsibility is a distinct mode of liability in international criminal law in that it takes a very different approach to the nature of the requisite link between the conduct of the accused and that of the direct perpetrator(s) of the criminal offence(s). Together with liability for perpetration through a group or JCE, it is one of the most technically complicated modes of liability, and continues to prompt a considerable amount of litigation. Of all the modes of liability, it also seems most likely to provoke early controversy at the ICC.

Obviously, a superior may be held responsible (like anyone else) for participation in an act which violates international law. As such, their personal contribution to a crime or underlying offence may engage their responsibility under the ordinary principles of liability introduced above. However, it has also been established that certain eligible superiors may be held responsible for offences committed by their subordinates, *even though the superior made no personal contribution to the criminal activity at all*. This special form of liability is justified as a device to acknowledge and enforce the particular responsibilities assumed by an individual trusted to command the actions of others. It is in this latter

1140 Article 4(3)(e) of the ICTY Statute; Article 2(3)(e) of the ICTR Statute.
1141 *Prosecutor v Krstić* (n972) para (139); *Prosecutor v Brđanin* (n972) para (729); *Prosecutor v Semanza* (n1113) para (395).
1142 *Prosecutor v Brđanin* (n972) para (729); *Prosecutor v Semanza* (n1113) para (395).
1143 *Prosecutor v Brđanin* (n972) para (730); *Prosecutor v Semanza* (n1113) para (395).
1144 *Prosecutor v Krstić* (n972) para (139); *Prosecutor v Krnojelac* (n1030) para (70); *Prosecutor v Semanza* (n1113) para (394); *Prosecutor v Brđanin* (n972) para (394).
1145 *Prosecutor v Krstić* (n972) para (142).
1146 *Prosecutor v Ntakirutimana and Ntakirutimana* (n1026) para (500). See also *Prosecutor v Krajišnik* (n1044) para (8).
1147 See William A Schabas, *Genocide in International Law: The Crimes of Crimes* (n971) 353.

sense that the terms 'superior responsibility' or 'command responsibility' have acquired independent legal meaning. The term 'superior responsibility' is to be preferred, as it emphasises that liability under this head is no longer confined to members of the military.

By comparison with other modes of liability, superior responsibility has a relatively long history, intimately associated with armed conflict. Echoes of the modern doctrine can be identified in the wake of First World War,[1148] Second World War[1149] and the US–Vietnam war.[1150] In its implications for the role of military commanders, the first Additional Protocol to the Geneva Conventions of 1977 contains closely related ideas. The basic concept is a simple one, and can be summarised as follows:

> Superior responsibility reflects an individual's liability for their failure to prevent or punish the criminal conduct of their subordinates.

It must be stressed that superior responsibility is not a form of vicarious liability (which imposes liability on the accused due to a breach of duty committed entirely by another person). Although the charge against the superior is determined by the conduct of their subordinates, their liability is predicated on their own culpable failure. This still leads to the somewhat odd position, however, that the exact same breach of duty by the superior could equally result in responsibility for a 'mere' property offence as for genocide – the 'crime of crimes'.

Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute provide that:

> The fact that any of the acts referred to in articles 2 to 5 [articles 2 to 4 at the ICTR] 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.

The SCSL and ECCC have substantially similar provisions.[1151] Article 29 of the Law on Establishment of the ECCC explicitly adds the condition that 'the superior had effective command and control or authority and control over the subordinate'.

Three elements must be satisfied for command/superior responsibility:

- There must be a 'superior-subordinate' relationship between the accused and the person who committed the crime;

1148 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report presented to the Preliminary Peace Conference' (1920) 14 Am J Int'l L 95, 121.

1149 See, eg, Trial of General Tanaka Hisakasu and Five Others (1948) 6 Law Reports of Trials of War Criminals 66, 78–79; Trial of Franz Holstein and Twenty-Five Others (1949) 8 Law Reports of Trials of War Criminals 22, 26, 32; Trial of Lieutenant-General Baba Masao (1949) 11 Law Reports of Trials of War Criminals 56, 58–60; Trial of Takashi Sakai (1949) 3 Law Reports of Trials of War Criminals, 1–2; Trial of SS Brigadeführer Kurt Meyer (1948) 4 Law Reports of Trials of War Criminals 97, 99, 107–109.

1150 *US v Medina* (1971), unreported, cited in Leslie Green, Fifteenth Waldemar A Solf Lecture in International Law – 'Superior orders and command responsibility' (2003) 175 Military L Rev 309, 356–357.

1151 See Article 6(3) of the SCSL Statute and Article 29 of the Law on Establishment of the ECCC.

- The accused knew or had reason to know that his subordinate was committing or was about to or had committed a crime (mental element);
- The accused failed to take the necessary and reasonable measures to prevent the subordinate from commiting the crime and/or to punish the subordinate for the crime (physical element).

Providing these elements are met, it is not, in fact, necessary that subordinates 'commit' criminal acts in their entirety: a superior may be liable for the participation of a subordinate in criminal activity through any of the modes of liability described in this Chapter.[1152] A superior's criminal liability for crimes or underlying offences committed by subordinates also includes their commission by omission.[1153]

SUPERIOR-SUBORDINATE RELATIONSHIP

The Prosecution must prove that the accused was the superior party in a superior-subordinate relationship with the perpetrators of the criminal offence(s).[1154]

Neither the formal nature of the relationship between the parties,[1155] nor their subjective opinions of it, is strictly relevant to the court's assessment of this limb of the test. Instead, an objective test is applied: whether the superior actually manifested 'effective control'[1156] over the subordinate on the facts of the particular case.[1157] *De jure* authority may establish a strong basis for judicial inference of effective control, but it is not conclusive.[1158] Formal titles or chains of command may be relevant, but the Tribunals look to what *is*, not what ought to be.[1159]

A superior is considered to have effective control if they have the material ability to prevent or punish the commission of offences by subordinates.[1160] In practical terms, the superior should generally be able at least to induce compliance with their instructions, often through threat of enforcement powers (formal or informal)[1161] rather than the exercise of mere 'influence'.[1162]

The potential existence of superior-subordinate relationships is not confined solely to the context of military or paramilitary organisations.[1163] In principle, any civilian may be in a position to exercise the powers (and bear the responsibility) of a superior, although the means and methods by which they work may differ from conventional military principles. In practical terms, proving the status of a civilian superior can be challenging for the Prosecution. Nonetheless, providing all three requisite elements are fulfilled, there is no bar to a civilian's liability under this head.[1164]

1152 *Prosecutor v Blagojević & Jokić* (n1117) paras (280)–(282); *Prosecutor v Orić* (n1128) para (47).
1153 *Prosecutor v Orić* (n1128) paras (21), (43).
1154 *Prosecutor v Halilović* (ICTY) Case No IT-01-48-A, Appeal Judgment (16 October 2007) para (59); *Prosecutor v Kordić & Čerkez* (n987) para (827).
1155 *Prosecutor v Halilović* (n1154) paras (59), (210); *Prosecutor v Bagilishema* (n926) paras (50), (61).
1156 *Prosecutor v Brima et al* (n1139) para (257); *Prosecutor v Halilović* (n1154) para (59); *Prosecutor v Bagilishema* (n926) paras (50), (60), (61).
1157 *Prosecutor v Hadžihasanović & Kubura* (ICTY) Case No IT-01-47-T, Trial Judgment (15 March 2006) para (84).
1158 *Prosecutor v Hadžihasanović & Kubura* (ICTY) Case No IT-01-47-A, Appeal Judgment (22 April 2008) para (21); *Prosecutor v Kvočka et al* (n1031) paras (144), (382).
1159 See *Prosecutor v Orić* (n1128) paras (91)–(92).
1160 *Prosecutor v Brima et al* (n1139) paras (257), (289); *Prosecutor v Halilović* (n1154) paras (59), (175).
1161 *Prosecutor v Blaškić* (n987) para (69); *Prosecutor v Hadžihasanović & Kubura* (n1157) paras (86)–(88).
1162 *Prosecutor v Brima et al* (n1139) para (289); *Prosecutor v Delalić et al* (ICTY) Case No IT-96-21-A, Appeal Judgment (20 February 2001) paras (257)–(266), (300).
1163 *Prosecutor v Brima et al* (n1139) para (257); *Prosecutor v Bagilishema* (n926) para (51); *Prosecutor v Aleksovski* (n952) para (76).
1164 *Prosecutor v Bagilishema* (n926) paras (50), (55); *Prosecutor v Orić* (n1105) para (320); *Prosecutor v Brđanin* (n972) paras (281)–(283).

MENTAL ELEMENT: KNEW OR HAD REASON TO KNOW

Two alternative *mens rea* states are sufficient to found liability:

- actual knowledge; or
- constructive knowledge ('reason to know').[1165]

Superiors may be liable for the acts of their subordinates where they have actual knowledge of the fact of past or imminent crimes, or where they possess information which would place a reasonable person in their role on notice of the need to investigate further. The Prosecution must prove one of these states beyond reasonable doubt: superior responsibility is not strict liability,[1166] and the superior's knowledge may not be presumed simply by virtue of their command position.[1167]

Inherent in the notion that the accused must have knowledge or reasons to know of the commision of the crime for which they are charged is a requirement that they know or have reasons to know that all the elements of that crime have been, are being, or are about to be fulfilled by their subordinates. Consequently, in respect of crimes of specific intent, such as persecution, the accused must have knowledge or reasons to know that the relevant subordinates possessed discriminatory intent.[1168] Similarly, a superior may be held responsible for genocide if he: (a) knew or had reasons to know that his subordinates were about to commit or had committed genocide; and (b) that the subordinates possessed the requisite specific intent[1169] (*see* Chapter 3).

It is particularly important to put the Prosecution to strict proof on the basis for which they consider the accused to have constructive knowledge. Judicial findings in this regard require a 'finely balanced assessment'[1170] of the facts of the particular case.[1171] It has been established that it is sufficient that the superior was in *possession* of information which would alert them to the fact of past or imminent crimes, or to put them on notice. The Prosecution does not need to prove that the accused was actually acquainted with the contents of the information: it suffices that such information was '*available*' to him.[1172] Superior responsibility does not, however, amount to criminal responsibility for mere negligence, which is an objective standard of what the person *should have known.*[1173]

Various references have been made to the effect that the superior responsibility doctrine does not permit the accused to be 'wilfully blind' to the crimes committed or threatened by subordinates, and this may have contributed to the early confusion as to the extent of the superior's duty to become informed. In fact, the prohibition on wilful blindness should be entirely compatible with the ordinary reading of the 'know or have reason to know' standard. For the blindness to be truly *wilful*, the accused must already possess sufficient knowledge to trigger the constructive knowledge approach.

1165 *Prosecutor v Halilović* (n1154) para (59); *Prosecutor v Orić* (n1128) para (18).
1166 *Prosecutor v Delalić et al* (n1162) para (239).
1167 *Prosecutor v Mrkšić et al* (n1037) para (563); *Prosecutor v Orić* (n1105) para (319); *Prosecutor v Hadžihasanović & Kubura* (n1157) para (94).
1168 *Prosecutor v Krnojelac* (n1030) paras (155), (187); *Prosecutor v Milutinović et al* (n980) para (119).
1169 *Prosecutor v Brđanin* (n972) para (721); *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-A, Decision on Interlocutory Appeal (19 March 2004) para (7).
1170 *Prosecutor v Strugar* (ICTY) Case No IT-01-42-T, Trial Judgment (31 January 2005) para (417).
1171 *Prosecutor v Krnojelac* (n1030) para (156); *Prosecutor v Delalić et al* (n1162) para (239).
1172 *Prosecutor v Delalić et al* (n1162) paras (238)–(239); *Prosecutor v Mrkšić et al* (n1037) para (564); *Prosecutor v Orić* (n1105) para (322).
1173 *Prosecutor v Blaškić* (n987) para (63); *Prosecutor v Bagilishema* (n926) para (35).

The Prosecution must prove that the information in the superior's possession at least demonstrated a present and real risk that crimes had been, or were about to be, committed by subordinates.[1174] The information need not be conclusive,[1175] but must give notice of the particular offence with which the accused is charged. Thus, where a superior is charged with torture, 'it is not enough that an accused has sufficient information about beatings. . . he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the [prohibited] purposes'.[1176] In other words, '[a]lthough the information may be general in nature, it must be sufficiently specific to demand further clarification'.[1177] In some circumstances, knowledge of the prior commission of crimes by identified subordinates *may* be sufficient notice of future crimes[1178] – but, in any event, triggers the superior's duty to take steps to punish the crimes committed, which also serves a preventative function.

PHYSICAL ELEMENT: FAILURE TO PREVENT OR PUNISH

In the context of the other two limbs of the test, the Prosecution must prove that the superior failed to take the necessary[1179] and reasonable measures to prevent the offence(s) charged, or to punish the perpetrators.[1180] Although these obligations are legally distinct,[1181] they are usually characterised in similar terms. Unlike the other modes of liability discussed above, there is no requirement that the superior's actions be causally related to the occurrence of the criminal consequence.[1182]

'Necessary' measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and 'reasonable' measures are those reasonably falling within the material powers of the superior.[1183] In general, determination of what constitutes 'necessary and reasonable' measures is not a question of substantive law but of evidence.[1184] It is settled law, however, that superiors may not 'pick and choose' which obligation to discharge: it will plainly never be reasonable for a superior to choose not to prevent the commission of a crime but to punish it thereafter.[1185] The extent to which the superior's response is 'reasonable' is dictated in part by the time at which they gain the requisite knowledge, the methods and means available to them, and the ill that the measure is intended to remedy.[1186]

1174 *Prosecutor v Brđanin* (n972) para (278). See also *Prosecutor v Delalić et al* (n1162) para (238); *Prosecutor v Halilović* (n1154) paras (65), (68).
1175 *Prosecutor v Mrkšić et al* (n1037) para (564); *Prosecutor v Hadžihasanović & Kubura* (n1157) para (97).
1176 *Prosecutor v Krnojelac* (n1030) paras (155), (166), (171).
1177 *Prosecutor v Orić* (n1105) para (322) (footnotes omitted).
1178 *Prosecutor v Hadžihasanović & Kubura* (n1158) paras (30)–(31).
1179 The bulk of judicial discussion explores the meaning of 'reasonable' measures in a particular situation. Measures are 'necessary' if they are 'appropriate for the superior to discharge his [or her] obligation, evincing a genuine effort'. *Prosecutor v Milutinović et al* (n980) para (122)
1180 *Prosecutor v Halilović* (n1154) para (59).
1181 *Prosecutor v Blaškić* (n987) para (83); *Prosecutor v Mrkšić et al* (n1037) para (566).
1182 *Prosecutor v Hadžihasanović & Kubura* (n1158) para (38), (40); *Prosecutor v Kordić & Čerkez* (n987) para (832).
1183 *Prosecutor v Orić* (n1128) para (177).
1184 *Prosecutor v Orić* (n1128) para (177); *Prosecutor v Hadžihasanović & Kubura* (n1158) paras (33), (151); *Prosecutor v Halilović* (n1154) paras (63)–(64); *Prosecutor v Blaškić* (n987) para (72).
1185 *Prosecutor v Mrkšić et al* (n1037) para (566); *Prosecutor v Orić* (n1105) para (326); *Prosecutor v Hadžihasanović & Kubura* (n1157) para (126).
1186 *Prosecutor v Orić* (n1105) para (329); *Prosecutor v Hadžihasanović & Kubura* (n1157) para (155).

Argument over the reasonable (or otherwise) nature of measures adopted by the accused is generally focused on practicality. The superior is not required to perform the impossible[1187] but should use 'every means' practicable[1188] – and not merely those within their *de jure* powers.[1189] Once a superior knows or has reason to know a crime has been committed, it will almost always be reasonable for them to initiate an investigation insofar as they are able, and/or to submit a report to the competent authorities to take direct remedial action.[1190] Where a superior fails to do so, adverse inferences may be drawn. Reliance on 'non-assertive orders' (ie, acts undertaken by the superior with no intention of enforcing them, insofar as they are able) is not a valid defence.

Prosecutor v Naser Orić[1191]

ICTY, Case No IT-03-68

Naser Orić (born on 3 March 1967) was the wartime commander of Srebrenica, a town in eastern Bosnia, when it was under siege by Serb forces in 1992–1993. He was charged with two sets of offences:[1192]

- crimes against property (plunder and wanton destruction of property) allegedly committed during attacks on Serb villages around Srebrenica in 1992–1993; and
- crimes against Serb detainees (murder of four individuals and cruel treatment of five individuals) committed in two detention centres in Srebrenica between September 1992 and March 1993.

The offences allegedly occurred during the period that Srebrenica was under constant attack by Serb forces following their 'ethnic cleansing' campaign in eastern Bosnia in April–June 1992.

Orić was allegedly the commander of the Srebrenica Municipal Territorial Defence Staff during the relevant period, and in that capacity was indicted on the basis of command responsibility for the offences charged in the indictment. In respect of the crimes against property alleged in the indictment, he was also indicted on the basis of having allegedly aided and abetted and/or incited the alleged crimes.[1193]

The trial commenced on 6 October 2004. At the close of the prosecution case, the Trial Chamber, in its ruling under Rule 98 bis, acquitted Orić of all of the charges of plunder on the basis that the attacks carried out on Serb villages were conducted in order to obtain food, medicine and other essentials for survival, and therefore the acts were excused on the grounds of necessity.[1194]

1187 *Prosecutor v Orić* (n1105) para (329); *Prosecutor v Hadžihasanović & Kubura* (n1157) para (122).
1188 *Prosecutor v Blaškić* (n987) para (72), (417); *Prosecutor v Mrkšić et al* (n1037) para (568).
1189 *Prosecutor v Mrkšić et al* (n1017) para (94); *Prosecutor v Mrkšić et al* (n1037) para (565); *Prosecutor v Orić* (n1172) paras (329), (331); *Prosecutor v Hadžihasanović & Kubura* (n1157) paras (122), (170); *Prosecutor v Limaj et al* (n1015) para (526).
1190 *Prosecutor v Halilović* (n1154) para (182); *Prosecutor v Mrkšić et al* (n1037) para (568); *Prosecutor v Orić* (n1172) para (336); *Prosecutor v Limaj et al* (n1015) para (529).
1191 *Prosecutor v Orić* (ICTY) Case No IT-03-68-T, Trial Judgment (30 June 2006), Case No IT-03-68-A, Appeal Judgment (3 July 2008).
1192 *Prosecutor v Orić* (n1105) paras (1)–(10).
1193 *Prosecutor v Orić* (ICTY) Case No IT-03-68-PT, Third Amended Indictment (30 June 2005).
1194 *Prosecutor v Orić* (ICTY) Case No IT-03-68-T, Trial Chamber's Oral Decision Rendered Pursuant to Rule 98*bis* (8 June 2005).

At the close of the trial, in its Judgment of 30 June 2006, the Trial Chamber acquitted Orić of all of the remaining charges of crimes against property, namely wanton destruction, on the basis that Orić did not possess effective control over the groups of fighters around Srebrenica, which operated largely independent of any superior authority. It also appeared that much of the destruction of Serb homes and property was carried out by thousands of desperate civilians over whom Orić had no effective control. The Trial Chamber, however, convicted Orić as a superior of having failed to prevent the deaths and ill-treatment of the detained Serbs, on the basis that Orić, from November 1992 onwards, had effective control over the military police which, in turn, the Chamber found ran the detention facilities and was therefore responsible for the Serb detainees.[1195]

Recognising substantial mitigation, however, the Trial Chamber sentenced Orić to two years' imprisonment – the lowest sentence to date by an international criminal tribunal. In sentencing Orić, the Trial Chamber referred to Orić's 'very limited responsibility' and 'uniquely limited criminal responsibility'. The circumstances prevailing in Srebrenica and those particular to Orić were considered 'pivotal' for establishing the sentence of two years. The Chamber ordered that Orić be immediately released since he had already been in confinement in excess of three years at the time the judgment was rendered.[1196]

The judgment is of interest as it was held for the first time in a trial judgment of the Tribunal that the direct perpetrators of a crime for which the superior is charged with responsibility under Article 7(3) need not necessarily be subordinates of that superior. Thus the Chamber found Orić responsible for the acts of mainly unknown 'opportunistic visitors' who intruded into the detention facilities to mistreat the Serb detainees. In this context, the Chamber also held that not only acts, but also culpable omissions by subordinates fall within the purview of the underlying crime.

The trial judgment is also of interest with respect to the Chamber's application of the 'reason to know' standard for command responsibility. The Chamber could find no direct evidence that Orić obtained information about the condition of the detained Serbs for whose murder and cruel treatment he was found responsible, but attributed responsibility to Orić on the basis of imputed knowledge in that he was aware of the risk that there would be mistreatment of detainees.

On appeal, in its judgment dated 3 July 2008, the Appeals Chamber acquitted Orić of all the charges, reversing the Trial Chamber's convictions. The Appeals Chamber found that the Trial Chamber had erred in finding that Orić knew or had reason to know that his subordinates were about to commit or had committed the crimes in the detention centres. First, the Trial Chamber had only identified one culpable subordinate from the Military Police, Atif Krdžić, yet it was unclear on what basis the Trial Chamber had found that Krdžić was himself criminally responsible. Yet such finding would have been required to determine Orić's guilt. Second, the Trial Chamber had failed to make a finding on whether Orić knew or had reason to know that Krdžić was about to or had engaged in criminal activity. This too constituted an error of law.[1197]

The Appeals Chamber thus allowed the defence appeal and reversed Orić's convictions.

1195 *Prosecutor v Orić* (n1105).
1196 Ibid at (240)–(254).
1197 *Prosecutor v Orić* (n1128).

SUPERIOR RESPONSIBILITY AT THE ICC

The relevant provision in the ICC Statute (which is more or less followed in the STL Statute) is much more detailed than that applied by other tribunals. It introduces a new, two-part model of superior responsibility which varies in its definition according to the nature of the authority exercised by the accused. Article 28 of the ICC Statute reads:

Article 28 of the ICC Statute

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 his 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 and repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

From this provision, it is clear that the law of superior responsibility before the ICC differs from that applicable before the ad hoc tribunals and their followers in three key respects:

- the distinction between military and non-military superiors;
- the mental element; and
- causation.

Each will be dealt with in turn. With regard to the other aspects of the doctrine (such as the meaning of effective control, actual knowledge and the nature of 'necessary and reasonable measures'), there is no reason why the ICC should depart substantively from the principles set out above.[1198]

To the extent that the introduction of different provisions for military and non-military superiors is largely a cosmetic change, it is a helpful one. Article 28(b)(ii) highlights the particular need for care in assessing the actual powers of civilian superiors that is already reflected in the case law of the ad hoc tribunals.[1199] As discussed below, the distinction between the two categories has been used to introduce a lower standard for the *mens rea* of military superiors, which may or may not be desirable. The effect, however, is that a new line of litigation will undoubtedly flourish with regard to the distinction between 'non-military superiors' (who benefit from a higher *mens rea* standard under Article 28(b)) and persons who are not members of the military but are 'effectively acting as. . . military commander[s]' (who are subject to the lower *mens rea* standard under Article 28(a)). It is hard to predict how this will unfold. The Court may well be concerned to prevent armed groups with less rigorous disciplinary standards than traditional militaries from benefiting by asserting their 'non-military' status in a criminal trial – but, if the test for those effectively acting as military commanders is set relatively low, it must be asked whether prosecutions will proceed under Article 28(b) with any frequency at all.

The Prosecution must prove that non-military superiors 'knew, or consciously disregarded information which clearly indicated' that subordinates were or would be involved in relevant criminal activity. This is substantially the same as the 'knew or had reason to know' test in general application before the ad hoc tribunals. However, with respect to military superiors, it is sufficient for the Prosecution to prove only that they 'knew or, owing to the circumstances at the time, should have known' of subordinates' criminal activities. The use of the wording 'should have known' re-opens the door to a lower mental standard, placing the military superior under some kind of positive duty to remain informed (in other words, to be a 'good' commander), an approach rejected by the ICTY. There remains good cause for doubt as to the desirability of such an objective approach. Even for members of the military, the circumstances of armed struggle mean that there is always a risk that criminal acts will occur,[1200] and superiors cannot be reasonably expected both to execute their operational responsibilities while also 'going in search' of evidence of subordinates' crimes. They must, of course, react properly – but Article 28 may permit the imposition of criminal liability for a failure to be sufficiently *proactive*. Alternatively, it may be open to the ICC to stress the effect of the modifying clause 'owing to the circumstances at the time'. This approach would return the standard more or less to constructive knowledge, emphasising what the circumstances meant the accused 'must have' subjectively known.[1201]

1198 Van Sliedregt (n989) 143.
1199 *Prosecutor v Bagilishema* (n926) para (52); *Prosecutor v Kordić & Čerkez* (n987) para (840); *Prosecutor v Akayesu* (n956) para (491).
1200 Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (n1011) 305–306
1201 See Greg Vetter, 'Command responsibility of non-military superiors in the International Criminal Court' (ICC) (2000) 25 Yale J Int'l L 89, 122; Ilias Bantekas, 'The contemporary law of superior responsibility' (1999) 93 Am J Int'l L 573, 589.

The formal recognition of a causation requirement for superior responsibility is perhaps the most radical innovation in Article 28. In the case of both military and non-military superiors, responsibility will only lie where crimes are committed 'as a result of his or her failure to exercise control properly'. This provision was obviously intended to address the challenge posed by superior responsibility to the culpability principle – but comes at the cost of introducing (potentially significant) new theoretical ambiguities. At the most basic level, how (in the absence of a prior agreement) can a superior's failure to *punish* a crime after it has taken place represent a meaningful link in the chain of causation leading to it?

The best interpretation is probably that the causal requirement represents an additional (ie fourth) contextual element in the (formerly) three-pronged test for superior responsibility discussed above.[1202] The test before the ICC may thus look something like this:

- The accused was a superior in a 'superior-subordinate' relationship;
- The accused failed to exercise control properly over their subordinates;
- The accused knew or had reason to know that one or more subordinates had committed, or were about to commit, crimes under international law (mental element);
- The accused failed to take reasonable measures to prevent their subordinates' anticipated crimes or to punish the perpetrators (physical element).

The *actus reus* remains unchanged, but is now predicated on proof of a general failure by the superior to control their subordinates. In other words, it introduces a threshold requirement that the superior was not a 'good' superior: in the military context, for example, this might manifest itself in a failure to provide effective training and education for subordinates or to maintain unit discipline and obedience to command. The ad hoc tribunals have recognised similar 'general' failures of this nature as a potentially relevant circumstance in assessing on the facts whether a superior took reasonable 'specific' measures to prevent subordinates' anticipated crimes.[1203] The ICC judges will have to elucidate how the equivalent *indicia* of properly exercised control by non-military superiors may be recognised. In practical terms, where the Prosecution cannot make out a general failure to exercise control, this head of liability will now presumably fail. In 'failure to prevent' cases, the additional hurdle will be easy to overcome (indeed, it may be more or less subsumed in the proof of the *actus reus*). In 'failure to punish' cases, however, it may be marginally more difficult to obtain a conviction than it has been before the ad hoc tribunals.

The resolution of concurrent responsibilities

Given the tendency of the Prosecution, noted above, to allege multiple forms of responsibility in indictments, the ad hoc tribunals have had to develop rules to resolve situations where the facts seem to uphold liability for the same conduct under a number of heads. Although these rules have been articulated primarily (but not exclusively) at the ICTY, it is to be assumed that they are equally binding on both the ICTY and ICTR.

1202 See generally Otto Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?' (2002) 15 Leiden J Int'l L 179, 192, 197–205.

1203 *Prosecutor v Mrkšić et al* (n1037) para (567); *Prosecutor v Orić* (n1105) para (144); *Prosecutor v Hadžihasanović & Kubura* (n1157) para (144); *Prosecutor v Halilović* (n1154) paras (87)–(88).

- Where the Prosecution establishes the elements of the accused's responsibility both for 'committing' (alone or through a JCE) and any other head of responsibility under Article 7(1) of the ICTY Statute, the Chamber may only convict the accused on *one* theory and must choose the most appropriate to the facts presented. If the Chamber opts to convict the accused for 'committing' the offence, any other proven heads of liability from within the same subsection may be taken into account in sentencing as aggravating circumstances.[1204]

- Where the Prosecution establishes the elements of the accused's responsibility both under Article 7(1) and Article 7(3) of the ICTY Statute, the Chamber should enter a conviction on the basis of the mode of liability proven under Article 7(1) only, and take the Article 7(3) responsibility into account in sentencing.[1205]

- Where the Prosecution only establishes the concurrent responsibilities under Article 7(1) and Article 7(3) by means of a 'liability by omission' theory, however, it has been recently suggested that a conviction should be entered under Article 7(3) instead.[1206] This approach is yet to receive consideration on appeal.

The ICC has not yet developed similar rules and, insofar as charges in its present cases specify only limited forms of responsibility, it may not be likely to do so in the future. In the event that it did find itself in a similar position as the ad hoc tribunals in this regard, it is anticipated that it would reason similarly.

Grounds for contesting criminal responsibility

Introduction

This section considers the three principal grounds for contesting criminal responsibility: defences, challenges to jurisdiction and challenges to proof.

A defence is an answer to a criminal charge which, if proved, would entitle the defendant either to an acquittal or mitigation of punishment. Generally speaking, defences concede that the acts constituting the crime alleged *have been committed* but, in order to exclude the defendant from criminal liability, offer either:

- a *justification*: a denial that the act was wrongful, transforming what would otherwise be an unlawful action into a rightful one (eg self-defence); or

- an *excuse*: a denial of responsibility of the defendant for the wrongful act (eg mental incapacity).

The conceptual distinction between justification and excuse is of little practical significance: both are equally valid forms of defence.[1207]

1204 *Prosecutor v Milutinović et al* (n980) para (77); *Prosecutor v Brđanin* (n972) para (268); *Prosecutor v Stakić* (n958) para (443).
1205 *Prosecutor v Kajelijeli* (ICTR), Case No ICTR-98-44A-A, Appeal Judgment (23 May 2005) para 81; *Prosecutor v Blaškić* (n987) para (91)–(92).
1206 *Prosecutor v Milutinović et al* (n980) para (79).
1207 Antonio Cassese, 'Justifications and Excuses in International Criminal Law' in *Cassese et al* (n964) 951, 951–953.

In addition to raising a defence, the other two principal ways to contest a prosecution are to *challenge the court's jurisdiction* in some manner and/or to *challenge the Prosecution's proof* of the elements of the crime as specified in the indictment. It should be noted that the challenge to the proof of the elements is often described as a 'defence', but it is more accurately considered an absence of proof. In this section, the term, 'defence' will be used to refer to a justification or excuse as described above and a 'challenge to proof' will refer to the negation of an element of the crime.

In addition, it is in some circumstances possible to rely on Prosecution violations of procedural law to contest a trial, but these will rarely constitute an 'absolute' defence.

The three principal grounds for contesting criminal responsibility can be summarised as follows:

- ***Challenges to jurisdiction***: an attack on the court's right to try the accused for particular conduct;
- ***Challenges to proof***: an attack on the Prosecution's case, normally by raising a reasonable doubt and/or proposing an alternative theory of events;
- ***Defences***: an answer to the Prosecution's case, admitting the crime but offering a justification or excuse to avoid liability.

Challenges to jurisdiction

There are numerous ways in which the jurisdiction of an international tribunal can be challenged. This form of challenge is not strictly a defence because it does not consider the question of responsibility at all: instead, it is merely a plea that a particular tribunal is not competent to hear a particular case.[1208] A successful challenge to a tribunal's jurisdiction would not normally amount to an acquittal for the purposes of the *non bis in idem* principle.

Common examples include:

- challenge to the tribunal's exercise of jurisdiction over a particular event;
- challenge to the tribunal's exercise of jurisdiction over a particular offence;
- challenge to the tribunal's exercise of jurisdiction over a particular person.

Challenges to jurisdiction over an *event* are often based on the limitations in the constituent instrument of a particular tribunal. These may be limitations concerning geography, time or some other matter. As discussed in Chapter 2, the ICTY may only exercise jurisdiction over serious violations of international humanitarian law committed 'in the territory of the former Yugoslavia since 1991';[1209] the ECCC may only exercise jurisdiction over offences committed in the period 17 April 1975 to 6 January 1979;[1210] and the ICC may only exercise jurisdiction over crimes committed after its Statute has entered into force for the relevant State and in accordance with its provisions on complementarity;[1211] and so on.

1208 Cryer et al (n4) 291–292.
1209 Article 1 of the ICTY Statute.
1210 Articles 1–8 of the Law on the Establishment of the ECCC.
1211 Articles 11–14 of the ICC Statute.

A challenge to jurisdiction over a particular *offence* is usually based on the argument that it is not within the particular court or tribunal's jurisdiction, eg, the Statute of the SCSL does not provide for jurisdiction over genocide, or that the alleged offence is not really law at all – in other words, it infringes the *principle of legality*. We have already discussed this concept in this Chapter.

The third form of challenge argues that a particular tribunal may not exercise jurisdiction over a particular *person*. This is often argued on the basis that the accused falls into a protected category, by virtue of their occupation or status. Two of these arguments, immunity and minority, will be discussed below. In addition, a brief consideration will be given to amnesties.

IMMUNITY

Introduction

Due to the sovereign equality of States under international law, State representatives have traditionally been granted immunity from foreign jurisdiction.[1212] Immunity, if available, prohibits all kinds of measures, including extradition and surrender, and not only the actual trial.[1213] Immunity falls broadly into two categories:

- *functional immunity* (immunity *ratione materiae* or 'subject matter' immunity) which protects the carrying out of 'official business' for the State; and
- *personal immunity* (immunity *ratione personae* or 'procedural' immunities), which protects the person of certain individuals essential to the State's administration (such as the Head of State and Foreign Minister).

The rationale behind the grant of immunity is that State officials need to be free from possible prosecution and thereby interference from other States so as to effectively carry out their official functions and represent their States in international relations. It should be pointed out that immunity operates as a procedural bar to the foreign jurisdiction to entertain a case and the appropriate authorities of the official's State of nationality may waive it. This is because immunity is *a right of the State* rather than a right of the individual.

In this Chapter the immunities of individuals in the context of criminal prosecution for international crimes is discussed with a focus on international courts and tribunals. Questions concerning immunities in the context of domestic prosecution for international crimes will receive further consideration in Chapter 5. However, the general definitions of each category of immunities will be discussed in this Chapter.

Functional immunity

Functional immunity is immunity from prosecution that attaches only to the official acts of State officials and is determined by the nature of the acts in question rather than by the position of the person performing them. Consequently, once the official's term in office has ended, subject matter immunity continues to apply to all acts that were carried out as part of his or her official functions.

1212 See generally Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 Am J Int'l L 407.
1213 Steffen Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute' (2001) 12 Crim LF 429, 430.

Functional immunity protects individuals only insofar as their actions are genuinely 'official', and thus does not protect them from prosecution for 'private' criminal offences.

Functional immunities

- the subject entitled to immunities is a State official;
- it extends to act performed in the exercise of a State official's functions;
- it does not extend to a State official's private acts;
- it does not end when the State official relinquishes his or her official position.

Since the Second World Wars, a customary international rule has evolved rendering subject matter immunity inapplicable to international crimes, namely genocide, crimes against humanity, war crimes and, more recently, torture.[1214] Article 7 of the Nuremberg Charter (the Tokyo Charter includes a parallel provision[1215]) provides that:[1216]

Article 7 of the Nuremberg Charter

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

Given that the Nuremberg and Tokyo tribunals tried and convicted the major Nazi and Japanese leaders, it is clear that this rule was consistently observed.

Similar provisions have been incorporated into most of the international instruments dealing with the prosecution and punishment of the most serious international crimes, for example, the 1945 Control Council Law No 10,[1217] Article IV of the 1948 Genocide Convention,[1218] Principle III of the Nuremberg Principles of 1950,[1219] and Article III of the 1973 Apartheid Convention.[1220] More recently, the Statutes of ad hoc tribunals, the SCSL and the ICC all include a provision precluding the invocation of functional immunity as defence:

1214 Micaela Frulli, 'Immunities of Persons from Jurisdiction' in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 368, 368.
1215 Article 6 of the Charter of the International Military Tribunal for the Far East (19 January 1946) TIAS No 1589.
1216 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 August 1945) 82 UNTS 280 (Annex).
1217 Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Allied Control Council for Germany (1946) No 3 *Official Gazette* 50 (20 December 1945).
1218 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 227.
1219 *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal*, GA Res 95(I) (11 December 1950) UN Doc A/1316 ; (1950) 44 Am J Int'l L 126.
1220 International Convention on the Supression and Punishment of the Crime of Apartheid (30 November 1973) 1015 UNTS 243.

Article 7(2)/6(2) of the ICTY/ICTR Statute, Article 6(2) of the SCSL Statute

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.

Article 27(1) of the ICC Statute

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.

This provision refers to subject matter immunities regardless of whether they are provided for in international or national law. It therefore excludes the availability of the international law doctrine of functional immunity and of national legislation sheltering State officials with immunity for official acts in the case of crimes within the ICC jurisdiction.[1221]

Furthermore, national and international case law have confirmed the customary nature of the rule waiving functional immunities with regard to international crimes. For example, in the extradition proceedings in the United Kingdom in the *Pinochet* case the court denied immunity for acts of torture to Pinochet who was a former Head of State (*see* further Chapter 5). The ICTY Trial Chamber in the *Furundžija* case, for example, held:

> The treaty and customary rules referred to above impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts. As the International Military Tribunal at Nuremberg put it in general terms: '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'. Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda. . . are indisputably declaratory of customary international law.[1222]

1221 Paola Gaeta, 'Official Capacity and Immunities' in *Cassese et al* (n964) 975, 978.
1222 *Prosecutor v Furundžija* (n949) para (140) (footnotes omitted).

It can therefore be concluded that with regard to functional immuntities, a customary rule has evolved to the effect that States officials, including those at the highest level, are not entitled to functional immunities if charged with international crimes, such as war crimes or crimes against humanity. This rule applies not only in international criminal proceedings but also domestic ones (*see* Chapter 5).[1223]

Personal immunity

Personal immunity is full immunity from all prosecution regardless of whether an act was carried out as part of the official functions or in a personal capacity attaching directly to the person by virtue of his or her position and lasting for the duration of his or her term in office. Thus, personal immunity is absolute – but only lasts for the length of the person's time in office.

Personal immunities are granted to specific classes of individuals while they carry out important representative functions. They pertain to the particular status of the holder, for example, Heads of State, Heads of Government, and Foreign Ministers, and to diplomats and other officials on special mission in foreign State in order to enable them to carry out their official duties within the territory of a foreign State.[1224] Arguably, other senior members of the government, for example, defence ministers or ministers of the interior, may also enjoy personal immunities because they perform comparable functions in representing their States in international relations. However, insufficient State practice and jurisprudence has emerged with regard to other categories of State officials to warrant their enumeration.[1225]

Personal immunities

- absolute immunities;
- protects the highest State officials, such as Heads of State;
- cover all acts performed by State officials;
- it ends when a State official leaves office.

Personal immunity for incumbent State officials has been affirmed in numerous cases brought before national courts, even with regard to international crimes. The consistent practice shows that the rules on personal immunities cannot be derogated from at the national level (*see* further Chapter 5).[1226] On the other hand, international courts and tribunals may indict and charge high State officials, such as Heads of State, suspected of crimes under their jurisdiction even if they are still serving in office.[1227]

1223 Paola Gaeta, 'Official Capacity and Immunities' in *Cassese et al* (n964) 975, 982.
1224 Ibid at 976.
1225 See also Micaela Frulli, 'Immunities of Persons from Jurisdiction' (n1214) 368, 369.
1226 Ibid.
1227 Ibid.

The ICJ in the *Arrest Warrant* case concluded that it was unable to identify an exception under customary international law to the rule that State officials enjoy immunity from prosecution before *domestic courts* for international crimes, such as war crimes or crimes against humanity.[1228] However, the ICJ emphasised that this did not imply that State officials enjoyed *impunity* in respect of any crimes they might have committed. The ICJ then clarified that State officials may be tried by international criminal tribunals where available:

> the immunities enjoyed under international law. . . do not represent a bar to criminal prosecution in certain circumstances. . . [A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities 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'.[1229]

One explanation for this view is that States consent to waive immunity before international courts and tribunals. The States may give their consent directly through the ratification of a treaty, for example, the ICC Statute. It should be pointed out, however, that since only parties to a treaty are bound by its provisions, a treaty establishing an international tribunal cannot remove immunities with regard to officials of States non-parties to the treaty.[1230]

As regards the ad hoc tribunals, their Statutes provide for derogation from the rule of customary international law granting personal immunities. This derogation, however, is not provided explicitly in the Statutes; it is implied in the obligation of all UN Member States to cooperate with the tribunals. This is because the ICTY and ICTR Statutes were adopted in a form of a Security Council resolution binding upon all UN Member States. By virtue of Article 103 of the UN Charter, the obligation to cooperate with the tribunals prevails over customary and treaty obligations concerning personal immunities. The States are therefore obliged to comply with requests for the surrender of persons, even if the request conflicts with a duty to respect immunities. The States consent to the decision of the Security Council to remove immunity indirectly, through ratification of the UN Charter, thereby accepting their obligations by their membership of the organisation.[1231] As a consequence, although, for example, the States involved in the conflict in the former Yugoslavia did not agree to the removal of immunities with regard to their officials, they were obliged to comply with the UN Security Council resolutions.[1232]

In practice, serving Heads of State have been indicted before the ad hoc tribunals as well as the mixed tribunals. The ICTY indicted two sitting Heads of State, Slobodan Milošević (President of the Federal Republic of Yugoslavia) and Milan Milutinović (President of Serbia). Both defendants had left office by the time the ICTY was able to exercise its jurisdiction effectively, namely by the time the defendants entered custody. Given that the ICTY and ICTR were created by binding resolutions of the UN Security Council (acting under Chapter VII of the UN Charter), all UN members are obliged to comply with their requests. As such, there was no question that claims of immunity would be ineffective

1228 Arrest Warrant of 11 April 2000 (*Dem Rep Congo v Belg*), Judgment, ICJ Reports 2002, para 58 (14 February 2002).
1229 Arrest Warrant of 11 April 2000 (*Dem Rep Congo v Belg*) Judgment, ICJ Reports 2002, para 61 (14 February 2002), 41 Int'l Legal Materials 536.
1230 Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 Am J Int'l L 407, 417.
1231 Ibid.
1232 The Federal Republic of Yugoslavia was not recognised as a member of the UN. However, it was party to the Dayton Accords, which imposed an obligation to cooperate with the ICTY. See Article IX of the Dayton Peace Accords (21 November 1995).

in challenging the tribunals' jurisdiction. In 1998, the ICTR convicted former Prime Minister Jean Kambanda and sentenced him to life imprisonment for genocide and crimes against humanity.[1233]

The SCSL indicted Charles Taylor while he was sitting President of Liberia; he was former President when he was surrendered to the SCSL. Unlike the ICTY and ICTR, the SCSL was created by means of an agreement between the Government of Sierra Leone and the Secretary-General of the UN. Charles Taylor challenged the exercise of jurisdiction over him by the SCSL. Mr. Taylor submitted that, because he was the President of Liberia when he was indicted by the Court, he enjoyed personal immunity from the Court's jurisdiction. He argued that the lack of a supporting Chapter VII resolution by the UN Security Council meant that the SCSL was effectively a national court and thus other members of the international community were not bound to cooperate with it nor to waive immunity. The SCSL Appeals Chamber dismissed the motion and held that (a) the Court is an international criminal tribunal;[1234] and (b) Head of State immunity does not apply in respect of crimes adjudicated by international tribunals.[1235] With regard to the first finding, the Appeals Chamber held that '[t]he Agreement between the UN and Sierra Leone is thus an agreement between *all* members of the UN and Sierra Leone. This fact makes the Agreement an expression of the will of the international community'.[1236] Although the Chamber's finding may be considered something of a stretch on the facts, the decision is consistent with the general principle that waiver of immunities flows from State consent, express or implied.

In theory, matters should be more straightforward before the ICC, where the ratification of the ICC Statute represents a State's express consent to the waiver of immunity. Article 27(2) of the ICC Statute clearly removes personal immunities when international crimes are at stake and therefore provides for an important derogation from customary international law on personal immunities:[1237]

Article 27(2) of the ICC Statute

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.

The scope of Article 27(2), however, can only be determined by considering Article 98 of the ICC Statute which also addresses personal immunities. Article 98 of the ICC Statute is part of the set of rules governing the question of cooperation with the ICC and it provides as follows:

1233 *Prosecutor v Kambanda* (ICTR) Case No ICTR-97-23-T, Trial Judgment (4 September 1998) Case No ICTR-97-23-A, Appeal Judgment (19 October 2000).
1234 *Prosecutor v Charles Ghankay Taylor* (SCSL) Case No SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004) paras (40)–(42).
1235 Ibid paras (50)–(51).
1236 Ibid para (38) (footnote omitted).
1237 Paola Gaeta, 'Official Capacity and Immunities' in *Cassese et al* (n964) 975, 1000.

Article 98 of the ICC Statute

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 98(1) of the ICC Statute seemingly narrows down the scope of Article 27(2). Article 98(1) makes clear that the ICC cannot compel a State party to surrender an official of a State not party to the Statute in violation of its obligations under international law with regard to immunities *vis-à-vis* the State not party concerned. The Court may proceed with a request for surrender of such official only after obtaining a waiver of immunities from the State not party concerned. If this is the case, the requested State is legally bound to comply with the Court's request. By contrast, the waiver of immunity is not necessary if the requested State is bound, as far as immunities are concerned, towards the State party to the Statute.[1238]

Article 27 of the ICC Statute has an important impact on national legislations concerning immunities of States parties. Read in conjunction with Article 88 of the ICC Statute, which requires States to ensure there are procedures available under their national law for all of the forms of cooperation specified in the Statute (including requests for transfer of persons accused before the ICC), Article 27 obliges States to change their national legislation with a view to removing immunities with regard to the perpetration of the international crimes falling within the ICC's jurisdiction.[1239]

The ICC has been first faced with the question of immunity with respect to a State (Sudan) which is *not* a party to the ICC Statute but was instead referred by the UN Security Council for investigation. In granting the application for an indictment of President Al Bashir of Sudan, a Pre-Trial Chamber of the ICC dealt with the issue of immunity. It first clarified that, insofar as the Darfur situation has been referred to the Court by the Security Council, the case falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal liability of a national of a State that is not party to the Statute, for crimes which have been allegedly committed in the territory of a State not party to the Statute.[1240] Without prejudice to a substantive challenge to its jurisdiction at President Al Bashir's motion, the Pre-Trial Chamber dismissed the issue of immunity in a single sentence: 'the current

1238 Ibid at (992)–(994).
1239 Ibid at (996)–(1001).
1240 *Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC) Case No ICC-02/05-01/09-1, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Public Redacted Version (4 March 2009) para (40).

position of Omar Al Bashir as Head of a State which is not party to the Statute, has no effect on the Court's jurisdiction over the present case'.[1241] The Pre-Trial Chamber reached this conclusion by considering one of the core goals of the Statute, namely to put an end to impunity, and Article 27 of the ICC Statute, which provides for the unavailability of personal and functional immunities, and the fact that by referring the Darfur situation to the Court, the UN Security Council 'has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole'.[1242]

MINORITY

The extent to which legal minors may face charges under general international criminal law is not entirely clear. The ICC adopts a 'bright line' approach, declaring absolutely in Article 26 of the ICC Statute that:

> *Article 26 of the ICC Statute*
>
> The Court shall have no jurisdiction over any person who under the age of 18 at the time of the alleged commission of a crime.

The only other tribunal which makes express reference to a minimum age for the exercise of jurisdiction is the SCSL, which provides at Article 7(1) of its Statute that:

> *Article 7(1) of the SCSL Statute*
>
> The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

With regard to the other international tribunals, it must be assumed that they would also apply a minimum age for the exercise of jurisdiction if it became relevant. However, there is little basis to estimate the age at which they would think it appropriate to introduce the threshold. Arguments could be made by analogy with the SCSL or ICC, or by reference to the general approach adopted by international humanitarian law to juveniles in combat.

1241 Ibid para (41).
1242 Ibid paras (42)–(45).

AMNESTY

An amnesty can be defined as a sovereign act of forgiveness for past offences.[1243] In other words, amnesty is immunity in law from criminal (or civil) legal consequences for wrongs committed in the past in a political context.[1244] Amnesties should be distinguished from pardons which are acts of forgiveness for specific offenders who have already been convicted. Amnesties are most commonly granted through national law or a governmental decree (*see* further Chapter 5), but they may also be included in a peace agreement between States or among internal factions at the end of a civil war.[1245]

The rationale behind the enactment of amnesty laws is premised on the ideas of transition, peace, reconciliation, forgiveness and truth.[1246] It is argued that following periods of turbulence, such as armed conflict, civil strife or revolution, sometimes the quickest and best way in which to restore a lasting peace is not to punish the perpetrators for the crimes they have committed. Instead of punishment, restoration of peace or a move towards democracy or towards a human rights based society may seem more desirable. Thus, in order for this stability or new society to be achieved amnesties may be granted as part of the negotiation process between the opposing forces.

With regard to humanitarian law, explicit reference to amnesties can be found in Article 6(5) of the Additional Protocol II which provides as follows:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

However, domestic amnesties do not bar prosecution before international criminal courts and tribunals. This issue is of particular importance with regard to internationalised or mixed tribunals. The concern not to allow amnesty for serious international crimes was evident during the negotiations between the UN and Sierra Leone for the establishement of the SCSL. As a result, the Statute of the SCSL includes a special provision dealing with amnesties:

> *Article 10 of the SCSL*
>
> An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in article 2 to 4 of the present Statute shall not be a bar to prosecution.

Similarily, the Agreement between the UN and Cambodia on the establishment of the ECCC provides in Article 11(1) as follows:

1243 Micaela Frulli, 'Amnesty' in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 243, 243.
1244 Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, The Hague 2002) 1.
1245 Micaela Frulli, 'Amnesty' (n1243) 243, 243.
1246 Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (n1244) 23.

Article 11(1) of the ECCC Agreement

The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.

The SCSL has pronounced upon the prohibition of amnesties for international crimes in two cases, namely *Kallon* and *Kondewa*. In both cases the SCSL was concerned with whether the amnesties that had been granted to persons belonging to the warring fractions in the civil law by the Lomé Peace Agreement of 1999 as part of the peace settlement in Sierra Leone precluded the prosecutions of the alleged perpetrators before the Court. In the *Kallon* case the Appeals Chamber held:

> The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.[1247]

The Appeals Chamber of the SCSL went on to clarify:

> The submission by the Prosecution that there is a 'crystallizing international norm that a government cannot grant amnesty for serious violations of crimes under international law' is amply supported by materials placed before this Court. . . It is accepted that such a norm is developing under international law.[1248]

Similarly, Judge Robertson in his Separate Opinion in the *Kondewa* case held:

> It may therefore be said that state practice is changing to conform with the consistent view that blanket amnesties are, at least 'in general', impermissible in international law for international crimes.[1249]

If a general rule that prohibits specific international crimes attains the status of a peremptory norm of international law (*jus cogens*), such a rule can be considered as imposing, among other things, the obligation not to grant an amnesty in respect of the crimes it proscribes. An ICTY Trial Chamber in *Furundžija* has spelt out this view with regard to torture as a war crime:

> The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded

1247 *Prosecutor v Kallon* (SCSL) Case No SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004) para (67) (footnote omitted).
1248 Ibid para (82).
1249 *Prosecutor v Kondewa* (SCSL) Case No SCSL-2004-14-AR72(E), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (25 May 2004) para (48).

> international legal recognition. . . What is even more important is that perpetrators of torture acting upon or benefiting from these national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime.[1250]

From the foregoing it can be concluded that a State cannot adopt a national act granting amnesties to perpetrators of torture. If such an amnesty were granted, other States would be obliged not to recognise such an act.

As regards the ICC, the preamble affirms 'that the most serious crimes of concern to the international community as a whole must not go unpunished'. Furthermore, the State parties are 'determined to put an end to impunity for the perpetrators of these crimes'. The State parties also recall 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[1251] Although the preamble does not create legal obligations, the ICC Statute suggests that domestic amnesties do not bind the ICC and its Prosecutor. In accordance with the complementarity principle, a failure to prosecute crimes committed by nationals of, or on the territory of, State parties to the ICC Statute as a result of an amnesty might lead to the ICC exercising its powers to prosecute the perpetrators itself.[1252]

Challenges to proof

The Prosecution must, of course, be required to prove every element of their case 'beyond a reasonable doubt'. This standard, although derived from the common law, is very similar to that applied in civil law jurisdictions, which is sometimes expressed as the need to satisfy the 'judge's innermost conviction' (or *l'intime conviction du juge*).[1253] As such, the principal role of the Defence often lies in highlighting the existence of the 'holes' in the Prosecution case, and the doubts that must therefore ensue.

The Defence may also raise specific issues which do not form part of the Prosecution case but which create doubt as to the 'true' course of events. These issues may be directed to 'attack' one or more elements of the Prosecution case. Three examples are set out below: alibi, consent and mistake of fact or law.

ALIBI

An alibi is an assertion by an accused that he was not in a position to commit a crime for which he is charged because he was in another place when the alleged crime was committed. Although termed a 'defence', an alibi merely requires the accused to introduce evidence that they were in a different geographical location at the time material to the Prosecution case. As the ICTY Appeals Chamber recalled:

> It is a common misuse of the word to describe an alibi as a 'defence'. If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.[1254]

1250 *Prosecutor v Furundžija* (n949) para (155).
1251 Preambule of the ICC Statute, paras (4)–(6).
1252 Cryer et al (n4) 131–132.
1253 Ibid at para (356).
1254 *Prosecutor v Delalić et al* (n1162) para (581); *Prosecutor v Kunarac et al* (n1014) para (463).

Once an alibi has been introduced, the Defence is under no obligation to prove its truth.[1255] Rather, the Prosecution is obliged 'to eliminate any reasonable possibility that the evidence of alibi is true'.[1256] Thus, once an alibi is notified, the Prosecution must rebut the alibi and establish the guilt of the accused beyond reasonable doubt, and the burden does not shift to the accused to prove the alibi.[1257] Both the ad hoc tribunals and the ICC require counsel to notify the Prosecution in a timely manner of the intention to raise an alibi, according to the particular tribunal's Rules of Procedure and Evidence.

Since international crimes occur over a long period of time, the 'defence' of alibi is not frequently invoked for those crimes. For obvious reasons, alibi 'defences' are not strictly relevant to modes of liability which do not require the presence of the accused at the scene of the crime, such as JCE or command responsibility.

CONSENT

Rape and other sexual offences are defined by the victim's lack of consent.[1258] As such, raising the issue of consent is merely a challenge to the proof of the Prosecution's case. The *Kunarac* Trial Chamber held that:

> The reference in [Rule 96] to consent as a 'defence' is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood. . . to be *absence of consent* which is an *element* of the crime. The use of the word 'defence', which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not understand the reference to consent as a 'defence' in Rule 96 to have been used in this technical way. The reference in Rule 67(A)(ii)(a) to the 'defence of alibi' is another example of the use of the word 'defence' in a non-technical sense.[1259]

Rule 96 of the ICTY's Rules of Procedure and Evidence states that:

Rule 96

Evidence in cases of sexual assault

In cases of sexual assault:

(i) no corroboration of the victim's testimony shall be required;

(ii) consent shall not be allowed as a defence if the victim

(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

1255 See, eg, *Prosecutor v Kvočka et al* (n1041) para (638).
1256 *Prosecutor v Vasiljević* (n941) para (15) (footnote omitted).
1257 See further *Prosecutor v Kajelijeli* (n1205) para (234); *Prosecutor v Niyitegeka* (ICTR) Case No ICTR-96-14-A, Appeal Judgment (9 July 2004) para (60); *Prosecutor v Kayishema & Ruzindana* (n1014) para (107)
1258 *Prosecutor v Furundžija* (n949) paras (180), (185)–(186).
1259 *Prosecutor v Kunarac et al* (n1014) para (463).

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;

(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 96 of the ICTR's Rules of Procedure and Evidence is substantially similar. Rule 96 of the SCSL's Rules of Procedure and Evidence introduces a new formulation:

Rule 96: Rules of evidence in cases of sexual assault

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

(i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;

(ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

(iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of [the] sexual nature of the prior or subsequent conduct of a victim or witness.

This approach is reproduced in Rule 70 of the ICC's Rules of Procedure and Evidence.

Accordingly, we can see that all of the tribunals adopt a narrow reading of the idea of consent as a defence to sexual crimes, and the Prosecution need only discharge its burden of proof within that context. The regime applicable at the SCSL and ICC is marginally preferable as it confines itself to the rules by which the possibility of consent may be legitimately raised.

The Trial Chamber in *Kunarac* held that:

> [I]t is evident. . . that the terms coercion, force, or threat of force [are] not to be interpreted narrowly and that coercion in particular would encompass *most* conduct which negates consent. . .[1260]

1260 *Prosecutor v Kunarac et al* (n1014) para (459).

There is some suggestion that the situation of armed conflict is an inherently coercive context,[1261] although it cannot be entirely correct to say that any form of sexual activity in a war zone constitutes a sexual offence.[1262] Instead, the Trial Chamber should examine the significance of all the circumstances. Certainly, it has been established that 'any form of captivity vitiates consent'.[1263]

Consent is also a 'defence' to certain other crimes, notably deportation/forcible transfer, enslavement and the unlawful labour of Prisoners of War. As with sexual offences, the Prosecution must prove the absence of consent beyond reasonable doubt. The absence of special rules of evidence relating to these crimes has led the Chambers to consider the meaning of consent more fully than it has done in the context of sexual offences. It is submitted that these same considerations usefully apply to all coercion-based crimes.

The ICTY has consistently indicated that it will examine the issue of voluntariness on an *objective* basis, looking 'beyond formalities to all the circumstances surrounding the person's displacement, to ascertain that person's genuine intention'.[1264] In *Krnojelac*, the Trial Chamber described the test as whether the displaced person had a *real* choice,[1265] an approach which has been widely adopted.[1266] Certainly, subjective expressions of consent are not entirely determinative, even when apparently heartfelt, as the Appeals Chamber has noted:

> [T]estimony shows that the prisoners were happy about the exchanges, which gave them hope and made them keenly wish to be liberated, and that some of the detainees even went so far as to ask to be exchanged. . . [I]t is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value.[1267]

The Appeals Chamber has endorsed a similar approach to certain apparent expressions of consent by the victims of sexual offences.[1268] This does not amount to denying the requisite *mens rea* of rape (that the accused knew the victim did not consent), but rather illustrates how the tribunals analyse the extent to which the accused could genuinely have believed in consent. In circumstances where this analysis becomes strained, the accused may also be able to rely on the 'mistake of fact' principle (*see* below).

The idea of 'coercion' has been interpreted broadly to include, somewhat vaguely, the perpetrator(s) 'taking advantage of coercive circumstances'.[1269] Not only does coercion include physical force, but also 'the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power'.[1270] A Trial Chamber similarly discerned a 'general prohibition of physical and moral coercion covering pressure that is direct or indirect, obvious or hidden'.[1271] The perception that an individual was vulnerable may trigger a Trial Chamber's particular care in examining the import of the surrounding circumstances.[1272]

1261 *Prosecutor v Kvočka et al* (n1041) para (178); *Prosecutor v Akayesu* (n956) para (688).
1262 In an earlier version, this was clearly the effect of Rule 96. The Rule was quickly amended.
1263 *Prosecutor v Kvočka et al* (n1041) para (178); *Prosecutor v Furundžija* (n949) para (271). See also *Prosecutor v Krnojelac* (n1030) para (233).
1264 *Prosecutor v Simić et al* (n1036) para (126).
1265 *Prosecutor v Krnojelac* (n1030) para (475) (emphasis added).
1266 *Prosecutor v Blagojević & Jokić* (n1117) para (109); *Prosecutor v Simić et al* (n1117) para (184); *Prosecutor v Stakić* (n953) para (279); *Prosecutor v Krnojelac* (n1030) para (229).
1267 *Prosecutor v Krnojelac* (n1030) para (228) (footnote omitted).
1268 *Prosecutor v Kunarac et al* (ICTY) Case No IT-96-23-A/IT-96-23/1-A, Appeal Judgment (12 June 2002) paras (133), (218); *Prosecutor v Kunarac et al* (n1014) paras (644)–(647).
1269 *Prosecutor v Stakić* (n953) para (279) (footnote omitted).
1270 Ibid para (281).
1271 *Prosecutor v Naletilić & Martinović* (ICTY) Case No IT-98-34-T, Trial Judgment (31 March 2003) para (519) (footnote omitted).
1272 *Prosecutor v Blagojević & Jokić* (n997) para (596).

The question of voluntariness is also a highly personal one, to be established for each victim. '[W]hat matters is the *personal* consent or wish of an individual,' reasoned the *Simić* Trial Chamber, 'as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person; or a group of persons'.[1273] The Appeals Chamber and Trial Chambers have agreed that neither '[m]ilitary commanders or political leaders [can] consent on behalf of the individual'.[1274]

MISTAKE OF FACT OR LAW

The ICC Statute has a distinct provision concerning mistake of fact or law. Although generally considered as a 'defence', the wording of the ICC provision makes clear that it goes in fact to the question of the Prosecution's ability to prove its case beyond a reasonable doubt, particularly the mental element.[1275] As such, it is better considered as a form of challenge to proof.

Modern consideration of this doctrine seems to be confined to the ICC. Although there is no reason in law why such an approach cannot be raised before the ad hoc tribunals, this has not in fact been expressly done in any case. Undoubtedly, the tribunals have touched upon related matters, but they have not done so with sufficient clarity to enable general inferences to be drawn.[1276] One possible exception relates to the *Brima et al* case before the SCSL where one of the accused, Santigie Borbor Kanu, argued that he had mistakenly believed it was legitimate to recruit child soldiers at the material time and that he therefore lacked the requisite criminal intent required for the crime of 'conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities'.[1277] In the alternative, Kanu argued that conscripting children under the age of 15 was not a war crime at the time alleged in the indictment. The SCSL's Appeals Chamber dismissed his claims observing that recriting child soldiers was a crime entailing criminal responsibility at the material time and that:

> Kanu's submission that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment is without merit. Furthermore it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers.[1278]

1273 *Prosecutor v Simić et al* (n1036) para (128).
1274 Ibid para (127) (footnote omitted). See also *Prosecutor v Naletilić & Martinović* (ICTY) IT-98-34-A, Appeal Judgment (3 May 2006) para (350); *Prosecutor v Krajišnik* (n1044) para (724).
1275 Bantekas and Nash (n4) 141.
1276 William A Schabas, *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone* (CUP, Cambridge 2006) 337.
1277 This crime is punishable under Article 4.c of the SCSL Statute.
1278 *Prosecutor v Brima et al* (n1139) paras (296), (293)–(295).

Article 32 of the ICC Statute provides that:

> *Article 32*
>
> *Mistake of fact or mistake of law*
>
> 1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
> 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the court 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 article 33.

Article 32(1) provides that a *mistake of fact* is only relevant to liability if it is raised to show that the defendant did not have the requisite mental element (*mens rea*). An example would be a soldier who believes that he is killing a group of enemy soldiers, but in fact he is killing innocent civilians. This mistake might negate the mental element required for a charge of wilful killing of protected persons, which is a war crime. If the targets had been military, the conduct would have been lawful. Similarily, there may not be liability if a person bombed a civilian target, for example a school, believing that it was an enemy military command centre. However, the mistake must not result from negligence or recklessness.[1279]

Like mistake of fact, mistake of law must negate *mens rea*. However, the extent to which *mistake of law* can negate the accused's mental element is closely confined. It is reasonably clear that Article 32(2) 'does not include mistakes about whether conduct is criminalized by the ICC Statute or whether a defence exists in law. Nor does it deal with errors about the ambit of defences'.[1280] It will be noted that Article 32(2) of the ICC Statute refers only to the fact that criminal responsibility 'may' be excluded by a mistake of law which negates *mens rea*. This peculiarity of the text should not be given great weight, however: as mistake of law represents a challenge to proof, the Trial Chamber enjoys no discretion to ignore the reasonable possibility of its existence as it indicates that the Prosecution has not made out its case to the criminal standard.[1281]

At the confirmation of charges hearing, Thomas Lubanga claimed that he was unaware of the existence of the crime of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. Thus, he could not foresee that the conduct in question was criminal in nature and could therefore entail his criminal responsibility under the ICC Statute. The Pre-Trial Chamber rejected his plea, finding that there was nothing in the evidence admitted for the purpose of the confirmation hearing to show that Lubanga might have made any such mistake in the context in which the crimes were committed.[1282]

1279 Cassese (n232) 290. Cryer et al (n4) 342.
1280 Cryer et al (n4) 342 (footnote omitted).
1281 Ibid.
1282 *Prosecutor v Thomas Lubanga Dyilo* (n991) paras (294)–(316).

Defences

The ICC Statute is the first treaty or similar instrument which attempts systematically to address the subject of defences in international criminal law. Previously, substantive defences have been developed primarily through the case law of the various courts and tribunals. In general, it is accepted that defences 'form part of the general principles of criminal law which the [ad hoc tribunals] must take into account in deciding the cases before [them]'.[1283]

Article 31(1) of the ICC Statute expressly provides for the 'exclusion' of criminal responsibility on the basis of:

- mental incapacity;
- intoxication;
- defence of the self, another, or certain property; and
- duress.

The ICC Statute makes residual provision for the incorporation of other defences from international law in accordance with the mechanism in Article 21 of the ICC Statute.[1284] Rule 80 of the ICC's Rules of Procedure and Evidence require the Defence to give notice if it wishes to rely on such a defence and submit to a hearing to determine the admissibility of the proposed doctrine.

In addition, Article 33 of the ICC Statute provides for a (limited) defence of 'superior orders', a doctrine which straddles the line between an excuse and a challenge to proof based upon mistake of law.

Each of these defences is considered in turn below, namely: (a) mental incapacity; (b) intoxication; (c) defence of the self, another or certain property; (d) duress (necessity); and (e) superior orders. In addition, consideration will be given to two notable defences which may exist in customary law but do not receive express consideration in the ICC Statute: (f) military necessity; and (g) *tu quoque* and reprisals.

MENTAL DISEASE OR DEFECT

Mental disease or defect, together with intoxication (*see* below) exclude criminal responsibility of the individual if he or she is not able to control or assess his or her conduct.[1285] With regard to mental disease or defect, Article 31(1)(a) of the ICC Statute states that individual responsibility is precluded when:

> The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or illegal nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

1283 *Prosecutor v Kordić & Čerkez* (n987) para (449).
1284 Article 31(3) of the ICC Statute. See *Prosecutor v Al-Bashir* (n1001) para (44).
1285 Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in *Cassese et al* (n964) 1003, 1029.

This provision is more or less straightforward. It provides for a range of circumstances when the mental capacity of the accused is, by virtue of a disease or defect (ie, by natural means), 'destroyed'. This is a high standard. It is not clear whether a previous neurological injury of sufficient gravity might be considered to fall within this provision by analogy.

There are cogent reasons to consider mental incapacity a challenge to proof, rather than a proper defence. However, although some mental diseases or defects may render the accused so delusional that they cannot appreciate the substance of their acts at all (and thus can form no intent), other pathologies may do otherwise, and may exert an influence more akin to intoxication (on which *see* below). In this latter context, it may not be correct to say that the accused formed no intent; rather, it is the case that the criminal nature of their conduct is nevertheless excused by virtue of their illness.

The scope of the defence of mental incapacity has not received extensive consideration before the ad hoc tribunals. The ICTY Appeals Chamber in *Delalić et al* has established that it is a 'complete defence' (which may lead to acquittal) if the accused successfully proves that:

> at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong. [1286]

To the extent that any lesser disease or defect is shown, the accused remains entirely responsible for their conduct, although may benefit from a mitigation of sentence.[1287] The test for this form of 'diminished' responsibility is 'an impairment to [the accused's] capacity to appreciate the unlawfulness of or the nature of his conduct or to control his conduct so as to conform to the requirements of the law'.[1288] Mere emotional disorders may not even count towards mitigation of sentence.[1289] Similar provision is made at the ICC, by Rule 145(2)(a)(i) of the ICC's Rules of Procedure and Evidence.

In advancing either a complete or partial defence of mental incapacity before the ICTY, the accused must prove their lack of capacity on a balance of probabilities.[1290] The position may be different at the ICC, however, where Article 67(1)(i) of the ICC Statute protects the accused from 'any reversal of the burden of proof or any onus of rebuttal'. As such, the ICC may construe the Prosecution's obligation under Article 66 of the ICC Statute as including a requirement to'disprove' any possible defences beyond a reasonable doubt. Accordingly, counsel may only need to place the defence of mental incapacity 'in issue'.[1291]

1286 *Prosecutor v Delalić et al* (n1162) para (582) (footnote omitted); *Prosecutor v Delalić et al* (n948) para (1156).
1287 *Prosecutor v Delalić et al* (n1162) paras (589)–(590); *Prosecutor v Sikirica et al* (ICTY) Case No IT-95-8-S, Sentencing Judgment (13 November 2001) para (197).
1288 *Prosecutor v Vasiljević* (n941) para (283) (footnote omitted).
1289 *Prosecutor v Sikirica et al* (n1287) paras (198)–(199).
1290 *Prosecutor v Delalić et al* (ICTY) Case No IT-96-21-T, Order on Esad Landžo's Submission regarding Diminished or Lack of Mental Capacity (18 June 1998) at (2). See also *Prosecutor v Delalić et al* (n1162) para (582); *Prosecutor v Sikirica et al* (n1287) para (197); *Prosecutor v Delalić et al* (n948) paras (1160), (1172).
1291 William A Schabas, *An Introduction to the International Criminal Court* (3rd ed CUP, Cambridge 2007) 111.

INTOXICATION

Like the defence of mental incapacity, intoxication may be considered to exclude the responsibility of the accused in the sense of excuse. While mental disease or defect is universally recognised as an affirmative defence, intoxication is recognised only in a limited way.[1292]

Article 31(1)(b) of the ICC Statute states that individual responsibility is precluded when:

> 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. . .

The defence of intoxication seeks to excuse the accused from responsibility on the basis of the exceptional circumstances that formed the context of their intent to commit a crime, robbing them of the exercise of rationality in controlling their instincts or resisting the influence of others. The (temporary) destruction of the accused's rational self, defined as the 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' – in other words, moral reasoning or self-control, must be complete; mere diminution is insufficient to invoke this defence.[1293]

The application of the defence of intoxication in Article 31(1)(b) is limited by the adoption of the following principle:

> 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 Court.

Thus this deals with a situation in which the accused consciously decided to surrender his rationality, and either directly intended to commit one or more crimes, or was reckless as to the consequences for themselves and those around them.[1294] The ICC Statute appears to reach the reckless, or possibly even negligent, accused who should have known that his own intoxication would result in criminal behaviour.[1295] Accordingly, mere proof of intoxication cannot be said to negate the mental element (such as to make it a challenge to proof rather than a defence), as this would require voluntary intoxication to be an equal bar to liability.[1296]

1292 Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in *Cassese et al* (n964) 1003, 1029.
1293 Cryer et al (n4) 336.
1294 See generally, Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in *Cassese et al* (n964) 1003, 1030–1031.
1295 Jens Ohlin, 'Intoxication' in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 385, 385.
1296 Cryer et al (n4) 336

The intoxication defence at the ICC has some curious aspects, not least the fact that it will presumably only apply to a very limited class of people. Given that the ICC is likely to exercise jurisdiction over senior individuals who bear responsibility for widespread criminality, it is unlikely that their conduct will occur in a sustained inebriated state.[1297] As a rule, intoxication is a defence more usually appropriate to the lower ranks, where substance abuse may frequently be a widespread issue. Secondly, in the event that a relevant case does appear before the ICC, it is likely that the precise terms of the qualification will require some judicial elucidation.

Nonetheless, by introducing even a qualified complete defence of intoxication, the ICC goes further than the ad hoc tribunals. The ICTY has only accepted that involuntary intoxication can be adduced in mitigation of sentence:

> [W]hen mental capacity is diminished due to use of alcohol or drugs, account must be taken of whether the person subjected himself voluntarily or consciously to such a diminished mental state. While a state of intoxication could constitute a mitigating circumstance if it is forced or coerced, the Trial Chamber cannot accept Žigić's contention that an intentionally procured diminished mental state could result in a mitigated sentence. Indeed, the Trial Chamber considers that, particularly in contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than mitigating factor.[1298]

Voluntary intoxication is not relevant, even to mitigation.[1299]

It has been argued that the approach adopted by the ICTY is not ideal.[1300] There is no clear reason why a state of involuntary intoxication, if it mitigates the offence, may not also excuse the offence entirely in appropriate circumstances. When alleging involuntary intoxication at the ICTY, the accused must 'prove, on the balance of probabilities, that the consumption of alcohol was indeed involuntary'.[1301]

DEFENCE OF SELF, OF OTHERS, AND OF CERTAIN PROPERTY

Self-defence is a fundamental concept in most domestic legal systems and probably constitutes a general principle of international law. In its essence, it is the simplest form of justification: despite the fact that the elements of the crime were undoubtedly committed, the conduct of the accused was not wrongful because their motive (preservation of their own person) was lawful, and the crime committed was, arguably, 'the lesser of two evils'.[1302] Nonetheless, the application of the doctrine in the context of genocide, armed conflict or a widespread or systematic attack against a civilian population is plainly problematic.

1297 Ibid at (335).
1298 *Prosecutor v Kvočka et al* (n1041) para (706) (footnote omitted).
1299 *Prosecutor v Milan Simić* (ICTY) Case No IT-95-9/2-S, Sentencing Judgment (17 October 2002) para (74).
1300 See, eg, William A Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda, and Sierra Leone* (CUP, Cambridge 2006) 335.
1301 *Prosecutor v Kvočka et al* (n1031) para (708).
1302 See, eg, *Prosecutor v Blaškić* (n987) para (694). It has been argued that under the ICC regime, 'if objectively the accused did not act in self-defence but subjectively believed him- or herself to be doing so, the rules on mistake of fact or law (Article 32) apply'. Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in *Cassese et al* (n964) 1003, 1032.

Article 31(1)(c) of the ICC Statute states that individual responsibility is precluded when:

> 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 force shall not in itself constitute a ground for excluding criminal responsibility unider this subparagraph.

The self-defence doctrine is known to the ad hoc tribunals, but has never been successfully pleaded. The leading case in point is in fact heavily influenced by the provision in the ICC Statute.[1303] It interprets Article 31(1)(c) of the ICC Statute to impose a two-part test:

> (a) the act must be in response to an 'imminent and unlawful use of force' against an attack on a 'protected' person or property; (b) the act of defence must be 'proportionate to the degree of danger'.[1304]

It goes on to stress the fact that the wider context and strategic objective of any military operation is irrelevant:

> the involvement of a person in a 'defensive operation' does not 'in itself' constitute a ground for excluding criminal responsibility. It is therefore clear that any argument raising self defence must be assessed on its own facts and in the specific circumstances relating to each charge.[1305]

In this context, it is important not to confuse a defence under Article 31(3)(c) of the ICC Statute with the principle in general international law of self-defence pursuant to Article 51 of the UN Charter.[1306] These provisions deal separately with individual and State actions respectively.

In the absence of any ICC case-law yet on the point, it is difficult to predict how the ICC will interpret the requirements of the test for self defence. Until such time as a decision is rendered to the contrary, it is appropriate to adopt a cautious approach along the following lines:

> 'force' must be understood broadly, encompassing physical coercion and psychological threats; it must be 'imminent', ie immediately antecedent, presently exercised or still enduring, which means that a pre-emptive strike against a feared attack is excluded as is retaliation for a successful attack. The use of force is 'unlawful' if not legally justified. Given this broad definition, only the 'danger' implied by the use of force can restrict the scope of application of self-defence. Certainly, danger must imply a serious risk for the life or physical integrity of a person. . .[1307]

The extension of self defence to include the protection of certain property is novel, and has proved somewhat controversial. Quite apart from property essential for the survival of the person, the scope

1303 *Prosecutor v Kordić & Čerkez* (n987) para (449).
1304 Ibid para (451).
1305 Ibid para (452).
1306 Cryer et al (n4) 333, 337.
1307 Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in *Cassese et al* (n964) 1003, 1032–1033.

for self-defence in the interest of protecting property 'essential for accomplishing a military mission' seems very wide.[1308] However, the fact that a State is acting in self-defence is not enough in itself to invoke this provision.[1309]

With regard to the second limb of the test, Professor Ambos has stated:

> As to the *second* requirement – the 'reasonable' and 'proportionate' reaction to avert the danger – these are concepts very well known in national criminal law but impossible to define conclusively in an abstract way. Generally, 'reasonable' means that the defence must be necessary and adequate to prevent or avert the danger. Thus, a reasonable reaction must only create the harm to the aggressor necessary to repel the danger and the means applied must not be inept or inefficient. Even if the defence is 'reasonable', it must still be 'proportionate', ie it may not cause disproportionately greater harm than the one sought to be avoided.[1310]

Most importantly, it must be noted that Professor Ambos also suggests there is a *third* limb of the test 'not contained in subparagraph (c) but derived from general principles of law according to Article 31(3) in connection with Article 21(1)(c)' of the ICC Statute. This third element is '*subjective element* of self defence' and it requires that:

> the defender must at least know about the attack; it is controversial whether he or she must also be motivated by this knowledge. . . [T]he subjective element is an *additional* requirement, which lends stronger legitimacy to the defender's claim that his or her conduct was justified and lawful. If this knowledge does not exist, the defence act is only half-lawful. . . In sum, the use of force cannot be justified by a mere objective standard; it also requires that the defender acted in good faith, believing that he or she was entitled to use self defence.[1311]

Clearly, significant aspects of the manner in which self-defence will be applied before the ICC – and, given the approach adopted in *Kordić*, possibly also before the ad hoc tribunals – remain ambiguous.

DURESS (AND NECESSITY)

Article 31(1)(d) of the ICC Statute states that individual responsibility is precluded when:

> The conduct which is alleged to constitute a crime within the jurisdiction of the Court 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.

1308 For further consideration of this element see Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in *Cassese et al* (n964) 1003, 1033 (footnote omitted).
1309 Cryer et al (n4) 338.
1310 Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in *Cassese et al* (n964) 1003, 1034 (footnotes omitted).
1311 Ibid at 1035 (footnotes omitted).

Despite the fact that the express wording of this provision refers only to 'duress', it is reasonably well established that the related defence of necessity is also included.[1312] *Duress* refers to a situation deliberately caused by other people; *necessity* refers to a requirement for action in response to circumstances which may or may not be attributable to the intentional conduct of others. Both concepts unite in the idea that the volition of the accused is overwhelmed by an external force, mandating a particular course of conduct.

Duress and necessity may be considered to be particularly important issues in the context of international criminal law, where crimes frequently occur within the framework of a web of personal relationships. At the same time, the very relevance of the concepts is a source of tension. On the one hand, there is an interest in confining the doctrines within narrow limits, so there is little possibility of crimes committed by 'group-think' (ie a body of people acting in a coordinated fashion but with each feeling themselves under pressure or 'duress' from every other member). On the other hand, the chaos of an armed conflict or a widespread or systematic attack against a civilian population makes it especially likely that some 'innocent' people will become caught up in events, and may become involved in horrifying events for genuine fear of their lives. It may be inappropriate to brand such people as war criminals.

The codification of duress and necessity in the ICC Statute may be a welcome development. In one of their earliest decisions, in the *Erdemović* case, the judges of the ICTY Appeals Chamber gave long and careful consideration to the defence of duress.

Prosecutor v Dražen Erdemović, Case No IT-96-22

According to the indictment, in July 1995, bus loads of Bosnian Muslim civilian men from Srebrenica, between ages of 17 to 60 years, were transferred to, among other places, a collective farm near Pilica in the Zvornik Municipality. On the arrival at the farm, the Bosnian Muslims were removed from each bus in groups of about ten and escorted by members of the 10th Sabotage Detachment of of the Bosnian Serb Army to a field adjacent to the farm buildings, where they were summarily executed. Dražen Erdemović, born 25 November 1971, was a soldier in the 10th Sabotage Detachment of the Bosnian Serb Army and as a member of the firing squad of that unit he participated in these executions. He was charged with murder as a crime against humanity, or alternatively, murder as a violation of the laws or customs of war.

On 31 May 1996, Erdemović pleaded guilty to the charge of murder as a crime against humanity by participating in the execution of unarmed civilian Muslim men in Srebrenica in July 1995. He admitted personally killing approximately 70 civilians in response to being expressly threatened that, if he disobeyed the order to kill, he would be executed himself. The Trial Chamber accepted Erdemović's guilty plea and dismissed the alternative charge of murder as violation of the laws or customs of war. On 29 November 1996, the Trial Chamber sentenced Erdemović to ten years' imprisonment. The Trial Chamber did not accept the plea of extreme necessity put forward by the accused because the Defence produced no corroborate evidence.[1313]

1312 While necessity and duress are recognised in comparative criminal law as two separate defences, the ICC sets a single standard for them. See further ibid at 1035–1036.

1313 *Prosecutor v Erdemović* (ICTY) IT-96-22-T, Sentencing Judgment (29 November 1996).

Erdemović appealed against this sentence on 14 April 1997, alleging that the Trial Chamber committed mistakes of fact and erred in law by not accepting duress as defence. The Appeals Chamber rejected the appeal, stating that duress can be a mitigating factor in sentencing, but it does not afford a complete defence to a soldier charged with a crime against humanity or a war crime involving the killing of innocent human beings. However, because the accused was unaware that duress was not a defence under international law, a majority of the judges reversed the Trial Chamber's ruling by holding that Erdemović's guily plea was not informed. The Appeals Chamber directed that Erdemović's case be remitted to a new Trial Chamber to allow him to re-plead.[1314]

On 14 January 1998, Erdemović changed his plea to one of guilty of murder as a violation of the laws or customs of war. The Posecutor withdrew the charge of murder as a crime against humanity. On 5 March 1998, the Trial Chamber rendered its judgment and sentenced Erdemović to five years' imprisonment. The Trial Chamber accepted that Erdemović committed the offences under threat of death. There was a real risk that he would have been killed had he disobeyed the order: he had to kill or be killed. In determining the sentence, the Trial Chamber considered, inter alia, the magnitude of the crime and the scale of the accused's role in it (aggravating circumstances) and also the accused's admission of guilt, his remorse and his cooperation with the Prosecutor (mitigating circumstances).[1315] Neither party lodged an appeal against the second sentencing judgment.

On 26 August 1998, Erdemović was transferred to Norway to serve his sentence. He was granted early release on 13 August 1999.

As indicated in the above summary of the case, the ICTY Appeals Chamber concluded, (by a margin of 3 to 2) that, although the defence exists in international law, it may not be relied upon as a defence to crimes which involve the taking of human life.[1316] For at least two of the majority, this conclusion seem to be reached, at least in part, on policy grounds.[1317] Judge Cassese and Judge Stephen separately dissented, arguing that admitting duress as a defence in cases of murder could not be categorically ruled out under existing international law.[1318] Four judges concluded that no specific customary international law rule exists on duress as a defence to killing.[1319]

The law on duress at the ICTY has essentially remained in this state ever since, permitting only that duress may be pleaded in mitigation of sentence where the offence involves intentional killing.[1320] The extent to which a complete defence of duress may be available for offences at the ad hoc tribunals not resulting in loss of life has remained uncertain.[1321] Similarly, the existence and nature of

1314 *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-A, Appeal Judgment (7 October 1997).
1315 *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-T*bis*, Sentencing Judgment (5 March 1998).
1316 *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-A, Appeal Judgment (7 October 1997) para (17), Part 4, para (4). See further *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (7 October 1997) para (88).
1317 See, eg, *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (7 October 1997) paras (75), (78).
1318 See *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-A, Separate and Dissenting opinion of Judge Stephen, para (49), and Separate and Dissenting Opinion of Judge Cassese (7 October 1997) paras (66)–(68).
1319 Claus Kreß, 'Erdemović' in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 660, 660.
1320 See, eg, *Prosecutor v Vasiljević* (ICTY) Case No IT-98-32-A, Appeal Judgment (25 February 2004) *per* Judge Shahabuddeen, para (41); *Prosecutor v Mrđa* (ICTY) Case No IT-02-59-S, Sentencing Judgment (31 March 2004) para (66).
1321 *Prosecutor v Banović* (ICTY) Case No IT-02-65/1-S, Sentencing Judgment (28 October 2003) paras (17), (63).

any defence of necessity has remained unresolved: on the only occasion when the matter presented itself, the ICTY Appeals Chamber considered it 'unnecessary to dwell on whether necessity constitutes a defence under international law [or] whether it is the same as the defence of duress'.[1322]

The dissenting opinions in *Erdemović* have proved more obviously influential than the opinions of the majority. Judge Cassese considered that

> (1) under international law duress may be generally urged as a defence, provided certain strict requirements are met; when it cannot be admitted as a defence, duress may nevertheless be acted upon as a mitigating circumstance; (2) with regard to war crimes or crimes against humanity whose underlying offence is murder or more generally the taking of human lives, no special rule of customary international law has evolved on the matter; consequently, even with respect to these offences the general rule on duress applies; it follows that duress may amount to a defence provided that its stringent requirements are met.[1323]

Judge Cassese considered that the relevant case law sets down the following test for any defence of duress:[1324]

(i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;

(ii) there was no adequate means of averting such evil;

(iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;

(iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.

There are clear links between this test and Article 31(1)(d) of the ICC Statute, which also breaks down into a four-part test requiring:

- the existence of an imminent threat (death or serious harm to a person) beyond the control of the accused;
- the threat caused the accused to adopt a particular course of conduct;
- in that course of conduct, the accused acted necessarily and reasonably to avert the threat; and
- the accused intended no greater harm than that which they sought to avoid.

In many respects, it may be helpful to read the two together.

1322 *Prosecutor v Aleksovski* (n952) para (55).
1323 *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, (7 October 1997) para (12) (footnote omitted).
1324 Ibid para (16); see also *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-T, Sentencing Judgment (29 November 1996) para (17).

On the first point, since 'threat of imminent death or of continuing or imminent serious bodily harm' must exist, any lesser threats render the defence inapplicable. Furthermore there is some suggestion that the threat must be objectively real, and not merely the unfounded subjective fear of the accused. The threat must emanate from an external source, beyond the control of the accused. In cases where the defendant 'courted' the threat (eg by virtue of membership of a notoriously criminal group), this criterion may be difficult to satisfy, and would in any event be specifically barred by the fourth limb of the test identified by Judge Cassese.[1325]

The second point, relating to causation, was not directly considered by Judge Cassese. However, by his requirement that there could be no other means of averting the threat, he arrives at a similar conclusion: the threat must lead inexorably to the criminal conduct of the accused. There can be no realistic alternative path of 'escape'.[1326] If the accused would have acted as they did anyway, then they would not be able to invoke this defence. There is presently no clear basis for suggesting what form of causal link is required between the threat and the criminal conduct, whether it must be the proximate cause or need only be contributory.[1327]

On the third point, the accused must have acted reasonably to diffuse the threat.[1328] Coercive factors do not excuse all reactions. They only provide a limited defence, extending to that which is necessary to avoid the threat and nothing more. A similar test to that of proportionality for self-defence can be applied here.[1329] If the accused chose to protect his or her own life over that of the victim, then the proportionality test may not be satisfied.[1330] However if it is unlikely the victim's life would have been preserved anyway, then the test may be satisfied.[1331]

Finally, the intent requirement upon the accused (to cause no greater harm than that threatened) also touches upon the proportionality point. The statutory reference to 'harm' in this context awaits authoritative interpretation: it is unclear whether it requires the accused to intend a course of *conduct* that is no more grave than the threat, or whether the accused must also take into account the possible consequences of his or her actions. Obviously, the latter approach would significantly 'raise' the standard of the test.[1332]

SUPERIOR ORDERS

The defence of superior orders borrows in many respects from other doctrines, including duress and mistake of fact. The tensions in the development of the doctrine have resulted from its twin roots in international law and military principles. The unique, high-risk environment of military activity entails the fact that disobedience to orders can have severe consequences. As such, traditional thought emphasised the importance of adhering to orders to the letter – and imputed liability instead to whomever made an illegal order. As such, 'superior orders' could serve as a complete defence.[1333]

1325 Cryer et al (n4) 340.
1326 William A Schabas, *An Introduction to the International Criminal Court* (n1291) 229.
1327 Cryer et al (n4) 340.
1328 Bantekas and Nash (n4) 137.
1329 Cryer et al (n4) 340.
1330 Geert-Jan Alexander Knoops, *Defences in Contemporary International Criminal Law* (2nd edn Transnational Publishers, New York 2008) 208
1331 *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-A, Appeal Judgment, Separate and Dissenting Opinion of Judge Stephen (7 October 1997).
1332 Cryer et al (n4) 341.
1333 Bantekas and Nash (n4) 131.

The 20th century saw a rapid evolution of thought in this regard: around the time of the First World War, superior orders only served as a defence if they were not 'manifestly unlawful';[1334] and by the aftermath of Second World War, the Nuremberg Tribunal held that superior orders could not in fact exclude responsibility but rather could be considered as a mitigating factor for sentencing purposes.[1335]

It was in this context (albeit half a century later) that the ad hoc tribunals were established. Article 7(4) of the ICTY Statute (replicated in relevant part by Articles 6(4) of the ICTR and SCSL Statutes) declares that:

Article 7(4)/6(4) of the ICTY/ICTR Statute

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.

This approach has been upheld by the ad hoc tribunals' jurisprudence.[1336] It is interesting to note that, in some decisions, the Trial Chamber has been influenced in reaching its decision on mitigation (or, rather, the lack thereof) by the fact 'the orders were so manifestly unlawful that [the accused] must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity'.[1337]

In creating even a qualified defence of superior orders, Article 33 of the ICC Statute thus represents something of an innovation. It provides that:

Article 33 of the ICC Statute

1. The fact that a crime within the jurisdiction of the Court has been committed pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
   (b) The person did not know that the order was unlawful; and
   (c) The order was not manifestly unlawful.
2. For the purpose of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

1334 Cryer et al (n4) 343.
1335 Article 8 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 August 1945) 82 UNTS 280 (Annex); Article 6 of the Charter of the International Military Tribunal for the Far East (19 January 1946) TIAS No 1589.
1336 See, eg, *Prosecutor v Delalić* (n948) para (1281); *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-T, Sentencing Judgment (29 November 1996) paras (48)–(54).
1337 *Prosecutor v Mrđa* (n1320) para (67).

Consistent with the ad hoc tribunals and their forebears, the provision establishes the general principle that superior orders do not represent a defence, except insofar as the test is met. In directing that orders to commit genocide or crimes against humanity are to be considered, as a matter of law, as manifestly unlawful (and so failing the test), the provision also confines the application of the defence to war crimes.

To satisfy the first component of the superior orders defence, there must exist a legal obligation on the part of the defendant to obey orders.[1338] Clearly, where this obligation is imposed in the context of a legislative enactment, or an order passed through the chain of command of a statutory body, this requirement is clearly met. However, it has also been suggested that 'quasi-legal' obligations might also suffice, imposed by bodies or individuals which exercise a degree of control and influence which is analogous to that of a government or superior. Superiors can be civilian as well as military, provided that they exercise a similar degree of control. The order relied upon must not be permissive, but must specify a particular action or course of conduct.[1339]

Second, the subordinate must not know that the order is unlawful.[1340] Essentially, this is a subjective requirement, and thus relatively favourable to the defence. As an example, Karl Neuman was acquitted in the *Dover Castle* case[1341] because he did not know that the ship that his superior ordered him to torpedo was a hospital ship, and he therefore did not know the act would be criminal.[1342]

In addition to the subjective test of the accused's knowledge is an *objective* test: was the order 'manifestly unlawful', such that a reasonable person would have realised its illegality?[1343] For example, in the *Llandovery Castle* case,[1344] superior orders to murder torpedo survivors were clearly illegal and so the defence was not permitted.[1345] The Trial Chamber's determination of what counts as manifestly unlawful should take into account the rank, general experience, training, education, culture, and so forth of the accused, or at least of the class of people into which the accused falls. As we have already noted, genocide and crimes against humanity are deemed always to be manifestly unlawful.

MILITARY NECESSITY

Despite the similarity in terminology, military necessity is a distinct doctrine from the concept of 'necessity' which may form part of the defence of duress.[1346] Military necessity may be a defence to certain specified crimes relating to the conduct of hostilities. It is not a general defence.[1347] It originated in the balance between military and humanitarian interests which is enshrined at the heart of international humanitarian law, which must combine pragmatism with principle in order to be relied upon by States at all.

1338 Schabas (n1291) 230–231.
1339 Andreas Zimmermann, 'Superior Orders' in *Cassese et al* (n964) 957, 966–969.
1340 Schabas (n1291) 231.
1341 '*Dover Castle* case', 16 Am J Int'l L 704 (1922).
1342 Bantekas and Nash (n4) 132.
1343 Andreas Zimmermann, 'Superior Orders' in *Cassese et al* (n964) 957, 970.
1344 '*Llandovery Castle* case' (1922) 16 Am J Int'l L 708.
1345 Bantekas and Nash (n4) 132.
1346 Van Sliedregt (n989) 295.
1347 Cryer et al (n4) 348; Werle (n1000) 164.

Practice has varied as to which crimes are amenable to the military necessity defence, and the ad hoc tribunals have not attempted a general consideration of the doctrine. The particular nature of the incidents which prompted the tribunals' creation has meant that the doctrine has really only been of relevance (albeit tangentially) to cases heard by the ICTY.

Two key early authorities on the nature of 'imperative military reasons' (a concept either the same as or analogous to military necessity) are *List et al* (*Hostages* case) and *von Lewinski* (called *von Manstein*).[1348]

In the *Hostages* case, General Lothar Rendulic was charged with violations of the 1907 Hague Regulations, Article 23(g), prohibiting the destruction or seizure of enemy property unless 'imperatively demanded by the necessities of war'.[1349] Forces under his command used scorched earth tactics, as well as twice ordering the evacuation of local civilian communities. In his defence he pleaded military necessity, citing pursuit by overwhelming Soviet forces. The United States Military Tribunal at Nuremberg agreed, noting that although it may have reached a different conclusion as to the true necessity of the evacuation, 'conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act'.[1350]

In *von Manstein*, a British Military Court convicted the accused of charges related to devastation and 'the mass deportation and evacuation of civilian inhabitants' of the Ukraine. The defendant had pleaded that his acts were militarily necessary for the purpose of military security and to deprive the enemy of manpower. In his summing-up, the Judge-Advocate observed as follows:

> [T]he requirement is 'necessity' and not 'advantage'. The. . . necessity must be an imperative one. . . [I]t is essential that [the Court] should view the situation through the eyes of the accused and look at it at the time when the events were actually occurring. It would not be just or proper to test the matter in the light of subsequent events, or to substitute an atmosphere of calm deliberation for one of urgency and anxiety. . . [T]he Prosecution suggest. . . that so far from this destruction being the result of imperative necessities of the moment, it was really the carrying out of a policy planned a considerable time before, a policy which the accused had in fact been prepared to carry out on two previous occasions and now was carrying out in its entirety and carrying out irrespective of any question of military necessity.[1351]

The ICTY has not given specific consideration to a particular test for military necessity, although the Trial Chamber in *Blagojević* implied that the military justification should be of 'imperative' or 'overriding' importance.[1352] It is not clear whether modern courts would favour an objective or subjective test, as favoured by *List et al* and *von Manstein*.

In discussing the unlawful targeting of civilians and civilian objects, the ICTY Trial Chamber in *Kordić* recalled that 'prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and. . . not justified by military necessity'.[1353] The Trial Chambers in

1348 In fact, *von Manstein* expressly excludes military necessity as a formal defence, yet links the existence of any defence to the extent to which other acts, including the devastation of an area, was militarily necessary: von Lewinski (called von Manstein), British Military Court (Hamburg), 19 December 1949, 16 *Annual Digest & Rep of Public Int'l L Cases* 509, 523 (1949).

1349 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) 36 Stat 2277, 1 Bevans 631.

1350 Trial of Wilhem List and Others, 8 Law Reports of Trials of War Criminals 34, 69 (1949).

1351 Von Lewinski (called von Manstein), British Military Court (Hamburg), 19 December 1949, 16 *Annual Digest & Rep of Public Int'l L Cases* 509, 522–523 (1949).

1352 *Prosecutor v Blagojević & Jokić* (n997) para (598).

1353 *Prosecutor v Kordić & Čerkez* (n987) para (328).

Rajić[1354] and *Blaškić*[1355] reasoned similarly. However, this approach was questioned in *Galić*, where it was noted that

> the prohibited conduct set out in the first part of Article 51(2) of Additional Protocol I is [not] adequately described as 'targeting civilians when not justified by military necessity'. This provision states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity.[1356]

Similarly, on appeal, it was held:

> The Appeals Chamber has previously emphasized that 'there is an absolute prohibition on the targeting of civilians in customary international law' and that 'the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity'. The Trial Chamber was therefore correct. . .[1357]

The same principle is considered to be expressed (although not clearly) in the Appeals Chamber's earlier judgment in *Kordić*.[1358] As a result, it is likely that military necessity is *not* a defence to the targeting of civilians and civilian objects, at least before the ad hoc tribunals.

The ICC Statute continues to offer a potential loophole (although more on the lines of a challenge to proof), in defining civilian objects by the fact that they are 'not military objectives'.[1359] Presumably, certain aspects of military necessity may come into play in establishing whether an object was a military objective, which the Prosecution must disprove beyond a reasonable doubt. A similar consideration may also apply to war crimes such as attack upon undefended settlements, and attack upon cultural, historical, spiritual or other protected objects.[1360]

It remains arguable, however, that military necessity remains a good defence to war crimes such as the wanton destruction or devastation of property[1361] and the unlawful transfer of civilians.[1362] The inclusion of express qualifications for 'military necessity'[1363] in these crimes specified in the ICC Statute illustrates that the ICC may also be amenable to such an approach.

To the extent that crimes against humanity are also committed in the context of an armed conflict, the military necessity defence may also apply to persecutions (where destruction of property,[1364] deportation or forcible transfer[1365] are alleged as underlying acts), deportation, or other inhumane acts (where forcible transfer is alleged as an underlying act).[1366]

1354 *Prosecutor v Rajić* (ICTY) Case No IT-95-12-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (13 September 1996) paras (54)–(57).
1355 *Prosecutor v Blaškić* (ICTY) Case No IT-95-14-T, Trial Judgment (3 March 2000) paras (12), (180), (651).
1356 *Prosecutor v Galić* (n1109) para (44) (footnotes omitted).
1357 *Prosecutor v Galić* (n1016) para (130) (footnotes omitted).
1358 *Prosecutor v Kordić & Čerkez* (n987) para (54). For interpretations, see, eg, *Prosecutor v Blaškić* (n987) para (109); *Prosecutor v Strugar* (n1170) para (280).
1359 Article 8(2)(b)(ii) of the ICC Statute.
1360 Articles 8(2)(b)(v), (ix); 8(2)(e)(iv) of the ICC Statute.
1361 *Prosecutor v Blaškić* (n1355) paras (148), (157), (183), (510), (544), (550), (559).
1362 *Prosecutor v Naletilić & Martinović* (ICTY) Case No IT-98-34-T, Trial Judgment (31 March 2003) para (521).
1363 Articles 8(2)(a)(iv), 8(2)(e)(viii) of the ICC Statute.
1364 *Prosecutor v Blagojević & Jokić* (n997) paras (593), (615); *Prosecutor v Blaškić* (n1355) para (234)
1365 *Prosecutor v Blagojević & Jokić* (n997) para (598).
1366 *Prosecutor v Krajišnik* (n1044) para (725).

TU QUOQUE AND REPRISALS

The *tu quoque* principle (literally, 'you also', meaning: 'I can retaliate with your own means of attack') is one of the most elementary defences. It seeks to justify conduct on the basis that an adversary was behaving in a similar fashion, sometimes with the strong implication that the adversary 'started it'. The *tu quoque* defence, however, is no longer accepted in modern international humanitarian law as a defence. This has been confirmed in the jurisprudence of the ad hoc tribunals.

As early as 1999, the Trial Chamber in *Kupreškić* recalled that:

> [T]he Chamber reiterates. . . that the *tu quoque* principle does not apply to international humanitarian law. This body of law does not lay down synallagmatic obligations, ie obligations based on reciprocity, but obligations *erga omnes* (or, in the case of treaty obligations, obligations *erga omnes contractantes*) which are designed to safeguard fundamental human values and therefore must be complied with regardless of the conduct of the other party or parties.[1367]

In its later judgment, the Trial Chamber expanded upon this theme. It pointed out that *tu quoque* had been rejected as a general defence in post-World War Two trials, and that the concept is 'flawed in principle': obligations under international humanitarian law are owed to the whole community, not just the adverse party, and therefore the rejection of those obligations by one party does not release the other.[1368] In a key passage, it concluded:

> [I]t [has become] clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals qua human beings. Unlike other international norms. . . compliance with international humanitarian norms could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. . .[1369]

> As a consequence of their absolute character, these norms of international humanitarian law. . . lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations.[1370]

Applying these principles more recently, the ICTR Trial Chamber in *Gacumbitsi* described the *tu quoque* defence as 'inadmissible'.[1371]

The Appeals Chambers of the ad hoc tribunals have not had opportunity to engage with this issue directly. However, relevant statements have occasionally been made in passing. Upholding the approach of the Trial Chamber,[1372] the Appeals Chamber observed:

1367 *Prosecutor v Kupreškić et al* (ICTY) Case No IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque* (17 February 1999) 3.
1368 *Prosecutor v Kupreškić et al* (ICTY) Case No IT-95-16-T, Trial Judgment (14 January 2000) paras (516)–(520).
1369 *Prosecutor v Kupreškić et al* (n1368) para (518) (footnote omitted).
1370 Ibid para (519) (footnote omitted).
1371 *Prosecutor v Gacumbitsi* (n1113) para (165).
1372 *Prosecutor v Kunarac et al* (n1014) para (580).

> [W]hen establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population. The existence of an attack from one side against the other side's civilian population would neither justify the attack by that side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.[1373]

In certain circumstances, it should be recalled that evidence of criminal activity by the 'other side' may remain relevant in raising reasonable doubt in aspects of the Prosecution's case (a 'challenge to proof' approach, as considered above). However, this should not be confused with a 'true' *tu quoque* defence, which looks unlikely to be resurrected as a broad principle, either by the ad hoc tribunals or the ICC.

Nonetheless, it is not entirely true to say that the conduct of the adverse party in an armed conflict can never justify otherwise criminal actions. Although the *tu quoque* principle is generally incompatible with modern international humanitarian law, a narrow exception continues to exist in the form of the defence of 'reprisals'. Although reprisals also entail the adoption of *prima facie* unlawful methods as a result of the unlawful acts of the adverse party, they are distinguished by the fact that they aspire only to compel the adverse party to act in accordance with international law.[1374] *Tu quoque* can be considered to represent a unilateral abandonment of the civilising constraints of humanitarian law; reprisals work towards the resumption and reinforcement of those constraints, albeit by unfortunate means.

Lawful reprisals are tightly circumscribed. In its judgment, the *Kupreškić* Trial Chamber suggested that reprisals against civilians are in all circumstances unlawful under customary international law,[1375] and thus not a valid defence. This assertion arguably goes too far, and has been subjected to criticism both from academic commentators and a number of States.[1376] The *Kupreškić* Trial Chamber was correct, however, in setting out the basic framework of the defence:

> It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by: (a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued) and; (d) 'elementary considerations of humanity'. . .[1377]

States, such as the United Kingdom, which continue to maintain treaty reservations permitting them the right of reprisal in certain circumstances impose similar obligations upon their personnel.[1378] The requirement of respect for elementary considerations of humanity has been interpreted to mean that reprisals may never be directed against the wounded, sick and shipwrecked, medical personnel and

1373 *Prosecutor v Kunarac et al* (n1268) para (87) (footnote omitted).
1374 Van Sliedregt (n989) 294.
1375 *Prosecutor v Kupreškić et al* (n1368) paras (527)–(534).
1376 See, eg, William A Schabas, *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda, and Sierra Leone* (n1300) 345, n278; *The Manual of the Law of Armed Conflict* (The UK Ministry of Defence) (OUP, Oxford 2004) para (16.19.2), n62.
1377 *Prosecutor v Kupreškić et al* (n1368) para (535).
1378 Additional Protocol I to the Geneva Conventions of 12 August 1949, United Kingdom, Reservation/Declaration text (2 July 2002), para (m) Re: Article 51–55, available at <www.icrc.org> accessed 30 November 2009.

chaplains, medical units, establishments and transports, prisoners of war and 'protected persons' and their property within the meaning of Article 4 of the Fourth Geneva Convention.[1379]

In summary, a qualified defence of reprisal may exist before the ad hoc tribunals and the ICC (imported through Articles 31(3) and 21(1) of the ICC Statute[1380]) in the following circumstances:

- the existence of an armed conflict (there has to be an adversary; as such, the reprisals defence might not lie against charges of genocide or crimes against humanity);
- the reprisal was demonstrably a last resort;
- the reprisal was authorised at the highest levels (it must not be the unilateral act of a commander 'on the ground');
- appropriate precautions were taken;
- the reprisal was proportionate, and strictly limited to the objective of compelling the adverse party's compliance with the law; and
- the reprisal was not directed against a protected person or object.

Concluding remarks

When arguing the law in an international criminal trial, the themes introduced in this Chapter represent some of the most potentially fruitful avenues for a lawyer to explore. The evolutionary nature of international law means that judges should always be sensitive to arguments concerning the principle of legality – even if in practice they often shy away from an excessively 'legalistic' approach to their resolution. Moreover, the subtlety and variety of the human relationships which frequently underpin responsibility for the most serious crimes under international law are very hard to reduce to straightforward propositions of law. The academic Andrew Clapham has observed that a secondary definition for the term 'complicity' is 'state of being complex'.[1381] The definition could not be more appropriate to the law of individual responsibility. In general, even in Bench trials, simplicity plays to the Prosecution's strengths; complexity plays to those of the Defence.

Individual responsibility may prove to be one of the key areas in which the law of the ad hoc tribunals and the ICC diverges. As such, it is likely to offer fresh opportunity to revisit many important issues, to the advantage both of the law itself and, potentially, the achievement of a fair result in particular trials. Familiarity with the doctrines outlined in this Chapter may thus pay dividends.

1379 Article 46 of the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Article 47 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Article 13 of the Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135; Article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287. See also *The Manual of the Law of Armed Conflict* (n1376) paras (9.17), (16.18). Reprisals are also prohibited (although perhaps to a limited extent) against works containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations or against military objectives there or in their vicinity. *The Manual of the Law of Armed Conflict* (n1376) paras (5.30.8)

1380 Contrast Van Sliedregt (n989) 292–293.

1381 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford 2006) 563.

Exercises and case studies

Case study

The conflict between Astania and Bestania soon spilled over into Cestania which is located south of Astania and Bestania and borders both countries to the north. Many people of Bestanian origin and some of Astanian origin live in northern Cestania. Crimes of international concern are widely reported to have occurred on the territory of all three States. Suspicion, fear, and old prejudices have led parties within all three States to make an attempt at 'ethnic cleansing'.

The international community has responded with alarm. As we have already noted, Astania is a party to the ICC. Bestania and Cestania are not. For internal political reasons, the UN Security Council decided against referring the situation in Bestania and Cestania to the ICC. Instead, determining that the conflict between Bestania and Cestania poses a threat to international peace and security, the Security Council created, under Chapter VII of the UN Charter, the International Criminal Tribunal for Bestania and Cestania (hereinafter ICTBC). The Statute of the ICTBC is a precise duplicate of the Statute of the ICTY.

The attack by Astanian army forces ('Operation Salvage') on the Bestanian rebels in East Astania was commanded by General Bader. Forces under his command included the 2nd Astanian Rifles, the 17th Light Infantry (the Fightin' Badgers), and elements of the 7th Brigade of Engineers. A group known as the Kleptopian Citizens' Militia had followed behind the first wave of General Bader's forces entering the East Astania theatre of operations.

Situation A

Before launching Operation Salvage, General Bader issued an order to his officers and men, exhorting them to engage the enemy forces aggressively. Instructing the men of the 17th Light Infantry to push right through to the Bestanian border, he told them that they could afford to give 'no quarter' to the enemy forces that they encountered (ie, they could not accept their surrender), and that they would not be able to deal with prisoners. He ordered the men of the 2nd and 7th, who would follow the 17th's advance and secure the area to 'make sure we don't have a problem with the media'.

In the course of the 17th's advance, a number of Bestanian rebels surrendered near Nohm-Orr. The rebels were disarmed and summarily executed.

In the wake of the 2nd and 7th's occupation of the towns swept by the 17th, a number of ethnic Bestanian civilians organised impromptu protests. In the town of Upsala, a number of demonstrators were heard to mention 'atrocities' caused by Astanian forces. In the small hours of the following morning, a company of the 2nd detained all the people who had demonstrated in Upsala, and removed them to a secret detention centre.

Situation B

Superintendent Loaff, the commander of the East Astanian Police, had consulted with General Bader throughout Operation Salvage. The two men met daily in the 'Emergency Executive Committee' (EEC), discussing the progress of the campaign in East Astania and the maintenance of law and order in the newly reoccupied areas. They should have been joined by the Governor of East Astania, but she always found a reason not to attend.

Situation C

The Kleptopian Citizens' Militia moved into the village of Dombed (in East Astania), in force, and proceeded to loot and burn all the houses. The Bestanian residents of Dombed were forced to flee further to the east. No members of the Kleptopian Citizens' Militia were seen in the company of members of the Astanian armed forces.

Situation D

In Cestania, the municipal council of the town of Dunfor (in North Cestania), is composed exclusively of ethnic Cestanians. They have decreed that all ethnic Bestanians must be interned, and have commandeered three local secondary schools for the purpose. Once interned, Bestanians in all three camps are subjected to beatings, other physical assaults and jeers by their guards.

Caius worked as a clerk for the municipal council of the town Dunfor. He was ordered to set up an administrative office for internee affairs. He was highly efficient, and quickly set to work. Guard rosters, requisitions for spare police uniforms and equipment, rosters of internee details, and the like flew from his desk. He never visited any of the camps, and was sensitive about discussing what occurred there.

Situation E

Norris is a baker in Dunfor (in North Cestania). He volunteers to provide bread for the guards at the three internment camps, free of charge, and makes two deliveries to each camp per day. In return, the guards permit Norris 'all areas' access to the camps. On one occasion, he is seen to visit a camp while not making a delivery. He sees a man who used to be the other baker in the town, Kato. He jeers at Kato's condition, and spits at him.

Situation F

A leading North Cestanian politician, Mr Patko, agrees with fellow politicians that the members of the Astanian minority living in a nationalistic town in North Cestania should be evacuated for the inhabitants' own safety during the course of the war. The plan is that they be removed into Astania, but that they be allowed to return to their homes at the end of the war. For these purposes, a well-disciplined brigade (the 1st brigade) is chosen to conduct the evacuation operation. This brigade has an excellent reputation for compliance with IHL.

Shortly before the operation is due to begin, however, a surprise attack on the other front is made and the 1st brigade is deployed to deal with it. The local commander instead deploys a Military Police Unit – 'the Black Cats' – well-known for their violent behaviour, to conduct the evacuation. The Black Cats carry out the evacuation with a great deal of brutality, and murders and mistreatment of civilians occur as a result.

Situation G

Ernest was one of the soldiers under command of Colonel Butel. (As described in Chapter 1, Butel was a commander of a unit whose task was to capture the rebels in the largest town in the east part of Astania, called Sidea.) Ernest, whose parents were of Bestanian origin, refused to participate in the massacre of the members of the Bestanian minority in Sidea. However, Colonel Butel told Ernest that if he failed to comply with Butel's orders, his wife and two children would be executed. Therefore, frightened for the life of his wife and children, Ernest decided to follow the orders and he eventually executed 15 members of the Bestanian minority.

Situation H

Subordinates of the Astanian military commander Nasor guard a prison cell where Bestanian prisoners of war are kept. One evening, when only one guard is on duty, Astanian civilians – angered at an atrocity committed against them by the Bestanian enemy that day – break into the prison, overpower the guard and beat several prisoners of war to death. The commander Nasor does not learn of the deaths until many months later, when the prison has been disbanded.

Questions

Situation A

You work for the ICC Prosecutor and have been asked to assist in the preparation of the indictment for General Bader's participation in war crimes and crimes against humanity. You are asked to advise on relevant offences and modes of liability relating to the incidents in Nomsk and Upsala. You are asked to comment on whether General Bader can rely on military necessity in any respect.

Situation B

Superintendent Loaff's role in the events which transpired in East Astania has always been difficult to determine. However, a friendly intelligence service has provided the ICC Prosecutor with the minutes of several EEC meetings. These detail numerous occasions on which he exhorted General Bader to 'do a thorough job', to 'settle this matter once and for all', and even to 'kill those Bestanian beggars'. You are asked to advise on whether an indictment should be prepared for Superintendent Loaff, and on what basis.

Situation C

You work for the ICC Pre-Trial Chamber, and have been asked to write a preliminary opinion on the merits of the written application for an indictment of General Bader for review by the judges. You note that the application indictment makes especially vague reference to his responsibility for crimes committed in the village of Dombed (in East Astania). What form of responsibility might the ICC Prosecutor have in mind, and on what sorts of issues might the pre-trial judges require additional submissions from the Prosecutor?

Situation D

You work for the newly-appointed ICTBC Prosecutor. Rather to the surprise of all concerned, five Cestanians have been detained while holidaying on a Mediterranean island. They were identified by a number of ethnic Bestanians who had received asylum there, and their presence reported to the police. The island authorities then commenced a prosecution under national law. However, the name of one of the men, Mr Caius, also features in 16 sacks' worth of documents, which were rescued from incineration and passed to the ICTBC by an enterprising TV news crew. You are asked to advise on whether an indictment should be prepared for Mr Caius, on what basis, and whether there will be any impediment to his trial before the ICTBC.

Situation E

You have been instructed as counsel for Mr Norris in *Prosecutor v Caius, Norris and Thompson* (Mr Thompson is a guard at one of the Dunfor camps). They have all been charged with responsibility for the range of inhuman and degrading treatment which was perpetrated at the Dunfor internment camps. The indictment against them alleges that:

> Lars CAIUS, Quigley NORRIS, and Walter THOMPSON are individually responsible for the crimes charged against them in this indictment, pursuant to Article 7(1) of the Statute of this Tribunal. As defined by Article 7(1), individual criminal responsibility includes planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below. The term 'participation', as used in the Counts hereunder is intended to incorporate any and all forms of individual criminal responsibility as set forth in Article 7(1).

On the basis of a preliminary assessment of the evidence which of the modes of liability alleged might be of most relevance to Mr Norris?

Later on, in the course of a conference with your client, Mr Norris also informs you that he was drunk on most occasions he visited the camps. On three separate occasions he drove his van into the side of the guard hut at the gate, while making deliveries. He asks whether this might help his case?

Situation F

Would Mr Patko be liable for the crimes of the Black Cats on the basis of joint criminal enterprise?

Situation G

The ICC Prosecutor indicted Ernest for his participation in genocide. Can Ernest invoke any of the available defences provided in the ICC Statute?

Situation H

The ICC Prosecutor indicted the commander for failing to prevent or punish the murders of the prisoners of war on the basis of command responsibility for the acts of his subordinate who omitted to protect the prisoners of war from mistreatment by the civilians. Should he be convicted? What are the arguments for and against?

Chapter 5 – Prosecution Before National Courts

Learning objectives

To provide participants with an understanding of how national prosecutions of international criminal law can be undertaken.

To alert participants to the fundamental value of national prosecutions of international criminal law.

To familiarise participants with the various difficulties that arise in national prosecutions of international criminal law and the possible ways in which such difficulties can be overcome.

Questions

How does international criminal law become a part of the domestic law in your country?

Has your country implemented in its domestic law its international treaty obligations to criminalise certain conduct and provide jurisdiction over such crimes to its national courts?

Has your country undergone a regime change and if so due to what circumstances?

Have you been involved in a national prosecution of international criminal law? If so did this involve any cooperation with other countries?

Introduction

In the 1990s international criminal justice once again came to the forefront of international attention. The crimes committed in the former Yugoslavia and Rwanda not only led to the establishment of international criminal tribunals but also gave rise to numerous domestic prosecutions of international crimes in States all over the world. Furthermore, the establishment of the ICC sparked national debates on the prosecution of international crimes, both at the international and national level. States began to pass national legislation implementing the ICC Statute and affording jurisdiction to their national courts over international crimes.

Often national prosecutions of international crimes are regarded as preferable to international prosecution, for political, sociological and practical reasons.[1382] National prosecutions are also sometimes regarded as having greater legitimacy, as being more directly grounded in the popular will and more directly subject to democratic accountability. Indeed national prosecutions are generally deemed to be the primary vehicle for enforcement of international criminal law. International courts and tribunals cannot begin to try all persons suspected of having perpetrated international crimes. Thus, for international criminal justice truly to be achieved, national courts must be in a position to prosecute the great majority of offenders.

This Chapter will inform the reader about the different bases of jurisdiction on which national courts can prosecute international crimes. It will also discuss the impact that international law has had on both national legislation and national prosecutions of international criminal law. Further,

1382 Cryer et al (n4) 54.

the Chapter will alert the reader to the various legal rules that impede national prosecutions of international crimes. Finally, this Chapter will consider the necessary State cooperation mechanisms with respect to national proceedings involving the enforcement of international criminal law.

Jurisdiction

The term 'jurisdiction', for present purposes, refers to the ability of a State to make, apply and enforce rules of conduct upon persons, both natural and legal, pursuant to its domestic laws.[1383] By exercising jurisdiction, States assert a form of sovereignty. In international relations, rules governing jurisdiction regulate the ability of each State to determine its own distinct societal and public order, 'defin[ing] the limits of the State's coercive powers',[1384] to the extent that such rules dictate that one State does not have the right to regulate the conduct of non-nationals in another State.

Consequently, in cases where States assert extraterritorial jurisdiction, sovereignties will overlap. Within general international law there are currently no principles establishing a hierarchy of lawful jurisdictional claims. Nevertheless, the extent to which international law permits States to exercise jurisdiction over international crimes is sometimes broader than the jurisdiction it permits to be exercised over other crimes. The following discussion relates only to jurisdiction over the conduct of persons in relation to international crimes.

Forms of jurisdiction

There are three forms of jurisdiction: legislative, adjudicative and enforcement. The extraterritorial assertion of legislative jurisdiction is the least controversial of these three forms, while extraterritorial assertion of enforcement jurisdiction will almost certainly impinge upon the territorial sovereignty of the State.

Legislative/prescriptive jurisdiction

This is the right of a State to enact legislation that influences the conduct of natural and legal persons.

Adjudicative jurisdiction

This is the competence of domestic courts to receive, try and decide cases brought before them.

1383 In common parlance the term 'jurisdiction' also describes the capacity of courts and tribunals to adjudicate upon cases brought before them. However, in the criminal context, this assertion of jurisdiction is simply the exercise of legislative jurisdiction, since both assertions amount to the law in question being applicable to the conduct in question.

1384 Vaughan Lowe, 'Jurisdiction', *in* Malcolm Evans (ed), *International Law* (OUP, Oxford 2006) 335,336.

Enforcement jurisdiction

This is the right to carry out coercive legal processes, such as arrests, searches and seizures. Enforcement jurisdiction is mainly executed by domestic law enforcement agencies such as the police. It is limited to a State's own territory, unless prior consent is obtained or where a special rule of general international law permits.[1385] For this reason extradition is sought of persons who have committed a crime within the legislative jurisdiction of a State where these persons are outside the territory of that State. States have chosen to utilise their right to pass jurisdiction to one another by including 'extradite or prosecute' provisions[1386] in numerous treaties criminalising conduct such as hostage taking or drugs trafficking.

The 'traditional' heads of legislative jurisdiction

There are four 'traditional' bases or 'heads' of legislative jurisdiction:

- territoriality;
- active nationality;
- passive nationality;
- the 'protective' principle.

TERRITORIALITY

This is the least contested basis of legislative jurisdiction. Territoriality gives States the right to assert jurisdiction over all events that occur on their territory, including on ships and aeroplanes registered in that State. Even if a crime originates abroad ('objective territoriality') or is completed abroad ('subjective territoriality'), so long as at least one of the elements of the offence occurs on its territory the State can assert territorial jurisdiction. For example, if a rocket is launched from one State at a civilian object in another – the State in which the rocket was launched would have subjective territorial jurisdiction over the offence, while the State in which the rocket landed would have objective territorial jurisdiction over it.

The main advantages of the territoriality principle are:

- The collection of sufficient evidence for a criminal prosecution is usually most easily accomplished in the place where the crime was committed;
- The territorial State is usually where the rights of the defendant are best protected, since it is expected that he/she will know the criminal law in force and his/her rights at trial;

1385 However, if a suspect is obtained illegally, this does not necessarily mean that criminal proceedings cannot continue. Legislative jurisdiction and enforcement jurisdiction are independent of each other. Thus, 'the lawfulness of a State's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, and vice versa', Roger O'Keefe, 'Universal Jurisdiction – Clarifying The Basic Concept (2004)' 2 J Int'l Crim Justice 735, 741.

1386 This is known as the *aut dedere, aut judicare* provision and stipulates that in cases where the alleged perpetrator is found on its territory the State must either extradite him/her to face proceedings in another State seeking to do so, or otherwise, the State must submit the case to its own competent authorities. See section 'International Treaty Law Obligations or the "*Aut Dedere Aut Judicare*" Obligation' below.

- The participants in the legal proceedings will know the culture and language of the territorial State;
- Particularly with regard to international crimes, it is likely that the objectives of international criminal law, such as deterrence, rehabilitation of victims and reconstruction of society, will best be fulfilled by a prosecution conducted in the territorial State.[1387]

On the other hand, the main problems of the territoriality principle are that the territorial State may be reluctant to prosecute individuals who have committed international crimes and there may be difficulties ensuring fair trial procedures. The problem of reluctance is especially acute in international criminal law because international crimes are often committed by State officials or with their complicity or acquiescence. Consequently, State judicial authorities do not always have the will to initiate proceedings against agents of the State or private individuals who might reveal the involvement of State organs.

National trials in Rwanda of those accused of genocide, both regular courts and 'gacaca' courts (*see* Chapter 1),[1388] and the trials in the Bosnian War Crimes Chamber (*see* Chapter 2) are but two recent examples of prosecutions for international crimes based on territoriality.

NATIONALITY: ACTIVE AND PASSIVE

Active nationality

This head of jurisdiction is based on the undeniable right of States under international law to apply their domestic laws to the conduct of their nationals even when they are abroad. This principle is particularly important in international criminal law because within the legislative framework of most States, the armed forces that are stationed abroad carry the flag of the State with them. However the principle may also apply to civilians.

In some States active nationality is an important head of jurisdiction because the extradition of their nationals to the territorial State is expressly forbidden. Consequently, the only way for such persons to be brought to justice is under the provision of active nationality.

Passive nationality

This refers to the assertion of jurisdiction by a State over crimes committed abroad against its nationals. In other words, 'passive nationality' refers to the nationality *of the victims*, whereas 'active nationality' refers to the nationality *of the perpetrator*. It is a rather controversial head of jurisdiction. It is most frequently asserted by the US in relation to terrorist offences. Within international criminal law, however, passive personality jurisdiction has indisputably been accepted with regard to war crimes. Thereby States can prosecute war criminals who have committed offences against their nationals.

1387 For a detailed discussion of the main objectives of international criminal law see W Michael Reisman, 'Institutions and Practices for Restoring and Maintaining Public Order' (1995) 6 Duke J Comp & Int'l L 175.

1388 See section 'Especially Established National Courts' below.

Determining nationality

The nationality of a person is usually obvious and the criteria for determining nationality are typically found in domestic legislation. In the *Nottebohm* case[1389] it was held by the ICJ that in order to determine whether a person asserting nationality was in fact a national of that State, a 'genuine connection' between that person and State had to exist.[1390]

Most often in cases where nationality jurisdiction is applied, the person over whom jurisdiction is being asserted must be a national at the time that the offence was committed. However, there are a number of States that provide for jurisdiction even when suspects become nationals after they have committed the offence. For example Swedish law takes this approach.

> *Chapter 2, Section 2 of the Swedish Penal Code*
>
> Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:
>
> 1 by a Swedish citizen or an alien domiciled in Sweden,
>
> 2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm. . .

Increasingly States are also extending extraterritorial nationality jurisdiction over mere permanent residents when they are abroad. One reason given for this is to increase the effectiveness of the repression of serious crimes.[1391] This extension is also justified on the grounds that persons who choose to become permanent residents of a State surely intend to be linked to that State and to be subject to its laws.

THE PROTECTIVE PRINCIPLE

It is fully accepted that each State has the right to assert protective jurisdiction over extraterritorial activities that threaten the State's essential interests. Classic examples of such activities are the selling of a State's secrets, spying or the counterfeiting of its currency or official seal. Within international criminal law, protective jurisdiction is, however, fairly redundant as practically every permutation of it overlaps with territorial, active nationality or passive nationality jurisdiction.

1389 *Nottebohm Case (second phase), Judgment of April 6 1955*, (1955) ICJ Rep 4. p 4 (6 April 1955). In this case Liechtenstein brought a claim before the ICJ for restitution and compensation against the Republic of Guatemala, alleging a violation of international law. The claim was based on protection of a national, Mr Nottebohm, by Liechtenstein. However, the Republic of Guatemala submitted that the claim was inadmissible since Mr Nottebohm was not in fact a national of Liechtenstein. The ICJ agreed with the Republic of Guatemala and held the claim of Liechtenstein to be inadmissible.

1390 However, Professor Lowe disputes that this is what the ICJ actually decided; see Vaughan Lowe, 'Jurisdiction', in Malcolm Evans (ed), *International Law* (n1384) 335, 346.

1391 Lowe (n1384) 335, 347.

Universal jurisdiction

In international criminal law, universal jurisdiction is the most controversial head of jurisdiction. Like the other heads of jurisdiction discussed above, universal jurisdiction is also a form of legislative jurisdiction. However, unlike the other heads of jurisdiction, there is no generally accepted definition of universal jurisdiction. Universal jurisdiction is usually defined negatively.[1392] Thus, universal jurisdiction may be defined as jurisdiction that requires no reference to the place of perpetration, the nationality of the perpetrator, the nationality of the victim, nor any other recognised link between the crime and the forum State.

> ***'Universal jurisdiction*** is [. . .] based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State excercising such jurisdiction.'[1393]

Some commentators assert that universal jurisdiction simply does not exist.[1394] Nevertheless, the prevalent view, which is consistent with current State practice, is that States have the right to assert universal jurisdiction over genocide, war crimes, crimes against humanity and torture.[1395] Piracy, by its very nature, requires the assertion of universal jurisdiction, since by definition it occurs on the high seas, ie outside any territorial jurisdiction. Under some treaty arrangements, States are in fact obliged to assert universal jurisdiction over certain crimes.[1396]

For example, each of the 1949 Geneva Conventions provides that States parties must seek out and either prosecute or extradite persons suspected of having committed 'grave breaches' of those Conventions, no matter if those suspects have any connection to that State party. The 1984 Convention against Torture similarly obliges States parties to prosecute or extradite suspected torturers regardless of whether there is any connection between that person and the State party.[1397]

In academic literature, universal jurisdiction is often split into two subcategories: 'absolute', 'pure' or 'true' universal jurisdiction (the broad notion of universality) and 'conditional' universal jurisdiction (the narrow notion of universality).

1392 See further Roger O'Keefe, 'Universal Jurisdiction – Clarifying The Basic Concept' (2004) 2 J Int'l Crim Justice 735, 745.

1393 'Principle 1 – Fundamentals of Universal Jurisdiction' in *The Princeton Principles on Universal Jurisdiction* (Princeton Project on Universal Jurisdiction, 2001) (Routledge, Oxford 2001) 28.

1394 See, eg, Alfred Rubin, 'Actio Popularis, Jus Cogens and Offences Erga Omnes' (2001) 35 New Eng L Rev 265.

1395 See, eg, *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (2002) ICJ Rep 3; Israeli Supreme Court *Adolf Eichmann v Attorney-General of the Government of Israel* (Case No 336/61) (29 May 1962) (1968) 36 ILR 227, para (196); *Prosecutor v Furundžija* (Trial Judgment) ICTY-95-17/1-T (10 December 1998); *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147; and *US v Yunis* 30 ILM 403 (1991). See also Amnesty International's global study of domestic laws, *Universal Jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002–018/2001, (31 August 2001), available at <www.amnesty.org>.

1396 However, it has been argued that these treaties do not provide for universal jurisdiction proper, since only States Parties have the right to assert extraterritorial jurisdiction, though this argument seems to be proffered by the minority. See Roger O'Keefe, 'Universal Jurisdiction – Clarifying The Basic Concept' (2004) 2 J Int'l Crim Justice 735, 746.

1397 For a more in-depth discussion of this obligation see section 'International Treaty Law Obligations or the "*Aut Dedere Aut Judicare*" Obligation' below.

Universal jurisdiction

Absolute universal jurisdiction arises when a State seeks to assert jurisdiction over an international crime (usually by investigating it and/or requesting extradition of the suspect) regardless of whether the alleged perpetrator has been apprehended or is even present in its territory ('universal jurisdiction *in absentia*').

Conditional universal jurisdiction is universal jurisdiction requiring the presence of the alleged perpetrator on the territory of the apprehending State.

Outside of the academic literature, the distinction between the narrow and broad notions of universal jurisdiction is 'non-existent at a conceptual level'.[1398] States that have adopted the use of the more limited conditional universal jurisdiction have done so not so much as a matter of law but rather out of political pressure and international courtesy.[1399] In other words, States have generally not recognised absolute universal jurisdiction as a distinct category of jurisdiction since, as a matter of international law, if the prescription of universal jurisdiction is permissible so is its exercise *in absentia.*

Nonetheless, it has generally been accepted that the use of absolute universal jurisdiction is less desirable than that of conditional universal jurisdiction. Indeed, the use of the narrower notion of universal jurisdiction has been advanced by a number of judges and writers as a more sensible, realistic and politically convenient approach to take. It is further argued that universal jurisdiction should only be used as a 'default jurisdiction'.[1400] This means that unless the territorial State or State of nationality is unable or unwilling to carry out proceedings, much in line with the principle of complementarity that limits the operation of the ICC, other States should not assert jurisdiction based on universality.

EXAMPLES OF UNIVERSAL JURISDICTION

Eichmann case

The most notorious case of a prosecution based on the principle of universal jurisdiction is probably that of Adolf Eichmann, who was tried by the District Court in Jerusalem in 1961 for crimes committed during the Second World War.

1398 Cryer et al (n4) 45.

1399 For example, in 2003 Belgium amended its universal jurisdiction laws, significantly narrowing their application, as a result of direct pressure from other governments including the US, which threatened to have the NATO Headquarters moved from Brussels; see Universal Jurisdiction in Europe, The State of the Art, Human Rights Watch Report Vol 18, No 5(D) (June 2006), 2, available at <www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe> accessed 30 November 2009. For a more detailed discussion of the Belgian amendments to its universal jurisdiction laws see section 'The Decline of Universal Jurisdiction?' below.

1400 Antonio Cassese, 'Is the Bell Tolling For Universality? A Plea For A Sensible Notion of Universal Jurisdiction (2003)' 1 J Int'l Crim Justice 589, 595.

Attorney-General v Eichmann[1401]

District Court of Jerusalem, Israel (1961)

Adolf Eichmann, a high ranking officer in the Nazi regime, was born in Germany in 1906. In 1932 he joined the National Socialist Party and was soon assigned to the specialist Jewish section. In 1939 Eichmann became head of Department IV D4 in the Gestapom which dealt with Jewish affairs and evacuation and was responsible for the mass deportation of Jews to concentration camps. After the war, Eichmann was captured by the US Army, but he managed to escape unrecognised. He fled to Argentina where he lived with his family for ten years until Israeli Mossad agents abducted him in 1960 and brought him to Israel to stand trial. The trial took place in Jerusalem and lasted from 2 April to 14 August 1961. Eichmann was sentenced to death and executed by hanging on 31 May 1962.

Eichmann was indicted on 15 counts under the 1950 Nazi and Nazi Collaborators (Punishment) Law ('NNCL'), including crimes against the Jewish people, crimes aginst humanity and membership in a criminal enemy organisation. The definiton of crimes against the Jewish people follows – with some exceptions – the definition of Article II of the Genocide Convention.[1402] The definitions of crimes against humanity and war crimes follow the definitions in the IMT Charter and Control Council Law No 10. However, the definition of crimes against humanity provides that such crimes are not linked to the war or to the commision of other crimes and their application extends to the entire period of the Nazi regime.

Eichmann pleaded 'not guilty' on all counts contending, inter alia, that he was only a transportation specialist who was following superior orders. The District Court found that Eichmann was aware of the plan to exterminate the Jews and acted to implement it. On 15 December 1961, the Jerusalem District Court found Eichmann guilty on all counts and sentenced him to death. Supreme Court rejected his appeal on 29 May 1962. In his defence, Eichmann raised a number of arguments which were considered by both judicial instances:[1403]

1. Eichmann alleged that the District Court of Jerusalem lacked jurisdiction to try him. This argument is further analysed below.

2. Eichmann argued that the NNCL constituted *ex post facto* penal legislation in violation of international legal principles. This argument was rejected mainly on the grounds that the arguments included that the crimes in the NNCL constituted crimes under international law recognised by all civilised nations including Germany since immemorial and that the prohibition on retroactive legislation and punishment has not yet become a rule of customary international law.[1404]

1401 *Attorney-General of the Government of Israel v Adolf Eichmann* (Case No 40/61) Dist Ct Jer (15 January 1961) 36 ILR 5 (1968); *Adolf Eichmann v Attorney-General of the Government of Israel* (n1395).

1402 The exceptions are as follows: (a) specific designation of the mental requirement to the destruction of the Jewish people exclusively; (b) the inclusion of what could be termed as 'cultural' genocide and 'incitement to hatred'; (c) retroactive application, which extends to the entire period of the Nazi regime. Orna Ben-Naftali, 'Eichmann' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009).

1403 Ibid (654–656).

1404 Ibid (654).

3. Eichmann argued that his acts were 'Acts of State' and therefore he was not responsible for them and that he was only obeying superior orders. Both arguments were rejected mainly on the grounds that international instruments, in particular the IMF Charter and judgments, abrogated the 'Acts of State' defence for certain crimes, while the NCCK abrogated the defence of 'superior orders', limiting it to mitigating circumstances relative to the punishment.

3. Eichmann argued that he was brought to Israel following an abduction against the will of his country of residence (Argentina) which is illegal and jurisdiction should not be grounded in an illegality. This argument was rejected mainly on the grounds that under customary international law, abduction provides no reason for denying a court the competence to try an abducted person once he is within the area of its jurisdcition.

4. The courts also rejected Eichmann's argument that the Israeli judges should be disqualified as their affinity with the victims rendered them psychologically incapable of trying the case objectively by emphasising their duty to subdue their emotions as they sit in judgment and their determination to abide by this duty.

Eichmann argued that Israel, a State with no connection to the victims, had excercised inadmissible extraterritorial authority in violation of the principle of territoriality. The crimes were committed by a foreign national outside Israel at the time when the State of Israel did not even exist. Jurisdiction, however, is vested in any of the States where Eichmann had allegedly committed the crime.[1405] The court rejected Eichmann's allegations and determed that it had jurisdiction to try him. The court based its argument on the universal character of the crimes Eichmann had been accused of:

> The abhorrent crimes defined under this Law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an international court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.[1406]

Basing itself upon the jurisprudence of both common law and civil law States, the District Court further held that even though Eichmann had been brought to Israel illegally, this did not vitiate the court's jurisdiction. The decision of the District Court was upheld by the Supreme Court of Israel which similarly ruled that:

> Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.[1407]

1405 Ibid.
1406 *Adolf Eichmann v Attorney-General of the Government of Israel* (n1395) para (12).
1407 *Adolf Eichmann v Attorney-General of the Government of Israel* (n1395) para (304).

Pinochet case

It took more than 30 years, however, for universal jurisdiction to gain momentum, initiated in large part by the *Pinochet* case.[1408]

R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (Amnesty International and Others Intervening)

House of Lords, United Kingdom (1999)

On 11 September 1973, the left-wing regime of President Allende was ousted by a right-wing, military coup d'état led by Augusto Pinochet. Shortly thereafter, Pinochet installed himself as the Chilean Head of State. There followed a brutal repression of real or imagined opponenets of the regime, a great many of whom were tortured, murdered or 'disappeared'. In 1990, after democratic elections in Chile, Pinochet resigned as a Chilean Head of State and was created a Senator for life, amnesty being the *quid pro quo* for his relinquishment of power.[1409]

In 1998, Senator Augusto Pinochet travelled to the United Kingdom for medical treatment. Spanish authorities issued an arrest warrant on the basis of the charges for crimes, including torture, committed during the time of the military dictatorship in Chile between 1973 and 1990. After being arrested by the British authorities, he applied to have the arrest warrant quashed, including on the grounds that as a former Head of State he was entitled to immunity. The Divisional Court, which heard the application at first instance, decided that Pinochet, as a former Head of State, was immune from criminal proceedings.[1410] The Spanish Government and the Commissioner of the Metropolitan Police appealed this decision to the House of Lords.

The first appeal to the House of Lords, a panel of Five Law Lords, by a split decision 3-2, overturned the Divisional Court and allowed the arrest warrant to stand (Pinochet No 1).[1411] Another panel of the House of Lords, however, set aside this judgment following the request by Pinochet lawyers arguing that one of the judges, Lord Hoffmann, failed to reveal his links to Amnesty International, which was intervening in the proceedings (Pinochet No 2).[1412] At its second sitting, the House of Lords decided that the goals Amnesty promoted were such that Lord Hoffmann was automatically disqualified from sitting.[1413] Consequently, the case reopened before a new House of Lords panel comprising seven judges.[1414]

1408 For more detailed discussions of the *Pinochet* cases see case comments by Maria del Carmen Marquez Carrasco, Joaquin Alcaide Fernandez, Brigitte Stern, Luc Reydams and Christine Chinkin, 'International Decisions' (1999) 93 Am J Int'l L 690, 690–711.

1409 John R W D Jones, 'Immunity and "Double criminality": General Augusto Pinochet before the House of Lords' in Sienho Yee and Wang Tieya (eds) *International Law in the Post-Cold War World* (Routledge, London 2001) 254, 256–257.

1410 *Re Pinochet Ugarte* [1998] All ER (D) 629 (Q B Div'l Ct 1998).

1411 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (Amnesty International and Others Intervening)* (No 1) [1998] 4 All ER 897.

1412 Lady Hoffmann was an employee of Amnesty International whilst Lord Hoffmann was a director of Amnesty International Charitable Trust.

1413 *R v Bow Street Metropolitan Stipendiary Magistrate (Bartle) ex parte Pinochet Ugarte (Amnesty International and Others Intervening)* (No 2) [1999] 1 All ER 577.

1414 See further Robert Cryer, 'Pinochet' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009).

On 24 March 1999, the second House of Lords Decision was rendered (*Pinochet No 3*). Six out of seven judges allowed the appeal against the Divisional Court's decision and confirmed that Pinochet did not have immunity from extradition.[1415] After the decision, the Home Secretary gave his consent for the extradition to continue, but then determined that due to Pinochet's health he was not to be extradited to Spain. Instead, Pinochet returned to Chile, where he faced various allegations of financial offences, torture and disappearances. Pinochet died in 2006 before the end of the proceedings in Chile and abroad (eg France).

The Spanish judge who requested Pinochet's extradition justified the jurisdiction of the Spanish courts by virtue of both the 'passive personality' principle because the victims of certain of the crimes were Spanish nationals and the 'universality' principle because the crimes were of universal jurisdiction, meaning that any State could prosecute them.[1416] In the *Pinochet No 3* decision by the House of Lords, Lord Browne-Wilkinson reaffirmed the principle of universal jurisdiction set out in the Torture Convention:[1417]

> The jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences jus cogens may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution'. . . The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal – the torturer – could find no safe haven.

General Pinochet was the first former Head of State to be arrested by another country in respect of international crimes.

THE DECLINE OF UNIVERSAL JURISDICTION?

In academic literature there is much talk of the decline of universal jurisdiction since the *Arrest Warrant* case before the ICJ[1418] and the subsequent alteration of the Belgian legislation.[1419]

In the *Arrest Warrant* case, brought by the Democratic Republic of Congo (hereinafter DRC) against Belgium, the DRC alleged that Belgium did not have jurisdiction to issue an international arrest warrant for the arrest of the incumbent DRC Foreign Minister, Abdulaye Yerodia Ndombasi, since he enjoyed immunity. Belgium had issued the warrant *in absentia* for Mr Yerodia charging him with war crimes amounting to grave breaches of the 1949 Geneva Conventions and their 1977 Additional Protocols, as well as crimes against humanity, committed in the DRC.

1415 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147, [1999] 2 All ER 97.
1416 John R W D Jones, 'Immunity and "Double criminality": General Augusto Pinochet before the House of Lords' (n1409) 254, 257.
1417 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147, 198–199 (footnote omitted).
1418 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (2002) ICJ Rep 3.
1419 Belgian law provided for a 'quasi-absolute' universal jurisdiction until its amendment in 2003; for a detailed discussion of the Belgian universal jurisdiction legislation and practices see Damien Vandermeersch, 'Prosecuting International Crimes in Belgium' (2005) 3 J Int'l Crim Justice 400; and Steven R Ratner, 'Belgium's War Crimes Statute: A Postmortem', 97 Am J Int'l L 888.

In its decision, the majority of the ICJ found that Mr Yerodia was clearly immune from prosecution in Belgium and that there was no need to consider whether Belgium was entitled to exercise jurisdiction over the offences. However, three judges, although agreeing that Mr Yerodia had immunity, dissented from the majority on the jurisdictional question. In their opinion, this question logically preceded the question of immunity. Therefore, in their Separate Opinion the three judges considered the question of jurisdiction. Discussing international treaties that criminalise certain conduct, the judges opined that:

> The parties to these treaties agreed both to grounds of jurisdiction and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. … These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as 'universal jurisdiction', though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.[1420]

They further found that rather than describing a duty to establish universal jurisdiction, the obligation to extradite or prosecute more accurately describes the duty to establish 'territorial jurisdiction over persons for extraterritorial events'.[1421] Additionally, the three judges concluded:

> That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.[1422]

A number of features of the Belgian Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977 – the Belgian Universal Jurisdiction law (hereinafter Belgian UJ law) – made it the most comprehensive universal jurisdiction law in the world. Indeed, the Belgian UJ law, enacted on 16 June 1993 and amended in 1999, provided Belgian courts with the power to exercise universal jurisdiction over genocide, war crimes and crimes against humanity. Furthermore, there was no requirement of the presence of the suspect on Belgian territory for the initiation of an investigation and immunity for State officials was expressly excluded. Moreover, victims were granted the right to file a complaint directly before the investigating judge.

The first blow to the Belgian UJ law was the ICJ's ruling in the *Arrest Warrant* case in 2002 that under customary international law incumbent Foreign Ministers, as well as Prime Ministers and Heads of State, had immunity from arrest by foreign jurisdictions. Consequently, Belgium could not issue an arrest warrant for Mr Yerodia. A Belgian court struck the second blow in June and July 2002 citing a provision of the Criminal Procedure Code to declare complaints under the UJ law against suspects *in absentia* inadmissible. However, a higher court reversed these decisions. Nevertheless, in April 2003, the Belgian Parliament decided to restrict the scope of the Belgian UJ law. On 12 July 2003, it struck the final blow by announcing that the UJ law would be repealed altogether. This decision was undertaken in light of continuing criticism of the law by foreign governments.

1420 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*), Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal (2002) ICJ Rep 63.
1421 Ibid para (42).
1422 Ibid para (45).

As a result the Belgian Criminal Code was amended in August 2003, providing Belgian courts with jurisdiction over international crimes if a number of criteria are met:

- The accused must be a Belgian national or must have his/her primary residence in Belgium;
- The victim must be a Belgian national or must have lived in Belgium for a minimum of three years at the time that the crimes were committed; or
- Belgium must be under a treaty obligation to exercise jurisdiction over the case.

The victims' ability to obtain direct access to the courts is also greatly reduced in the new law – unless the accused is a Belgian national or has his or her primary residence in Belgium, the State Prosecutor has the sole right to decide whether or not to proceed with any complaint. The consequence of these amendments is that the reach of universal jurisdiction in Belgian courts is now similar to or, in some cases, more restrictive than most European countries.

Despite these developments, practice suggests that the view that universal jurisdiction is in a state of decline is greatly exaggerated. There are many examples of the assertion of universal jurisdiction with regard to offences committed in the former Yugoslavia and Rwanda, and many NGOs have widely reported on the increase in universal jurisdiction cases in Europe since 2001.[1423] Additionally, since becoming parties to the ICC Statute, many States have enacted legislation providing for universal jurisdiction over the crimes within the jurisdiction of the ICC.[1424] Furthermore, not only was the discussion of universal jurisdiction in the *Arrest Warrant* case *obiter dictum*, this *dictum* has been heavily criticised for its failure to distinguish between legislative jurisdiction and enforcement jurisdiction and consequently for 'muddying the waters' with regard to universal jurisdiction.[1425]

PRACTICAL PROBLEMS OF PROSECUTIONS BASED ON UNIVERSAL JURISDICTION

The problems facing successful prosecutions where the basis of jurisdiction is universal may be enumerated as follows:

- There is no obligation of the territorial or nationality State to assist or cooperate with the prosecution per se. Therefore, a case based on universal jurisdiction may fail to achieve the requisite criminal law standard of proof, unless the territorial or nationality State is willing to provide assistance;
- Even where witnesses can be found, 'problems of inter-cultural understanding'[1426] and difficulties arising from translation can occur;
- In cases of absolute universal jurisdiction, the situation may arise that judges will end up investigating numerous complaints that they can do nothing about because the alleged perpetrator never enters the forum State and is never extradited to it;
- Investigations and prosecutions based on universal jurisdiction are time- and resource-intensive;

1423 See, eg, REDRESS's publication of 'UJ Update' in April 2003 (1st ed) and December 2003 (2nd ed), which details developments in relation to implementation of universal jurisdiction legislation and prosecutions, available at <www.redress.org/reports.html> accessed 30 November 2009.
1424 For a discussion of the implementing legislation see section 'Impact of International Law on National Legislation and Prosecution' below.
1425 Roger O'Keefe, 'Universal Jurisdiction – Clarifying The Basic Concept' (2004) 2 J Int'l Crim Justice 735, 760.
1426 Cryer et al (n4) 51.

- Universal jurisdiction cases are usually more complex than ordinary criminal cases and they often raise unique legal questions for domestic courts.

A number of solutions present themselves:

- Diaspora living in the forum State can be used to help in creating leads on the location of suspects and as witnesses in trials against them.
- Specialised departments within immigration authorities can be created in order to track the presence of suspects, by way of reviewing visa and asylum applications. The immigration authorities will then be able to alert the police of the presence of the suspect in the State. In Denmark an initiative was undertaken by the immigration authorities that distributed pamphlets among asylum seekers explaining where and with whom they could file a complaint if they were the victim of an international crime or had knowledge of a perpetrator physically present in Denmark.
- Units within police and prosecutorial authorities specialising in investigation and prosecution of international crimes, including universal jurisdiction cases, can also be created.

Concluding observations

The use of universal jurisdiction is justified by the argument that without it, an impunity gap would exist. International courts and tribunals generally tend to prosecute only those most responsible because these courts only have finite resources. Consequently, in order to enable true justice to be served, national prosecutions based on universal jurisdiction must be an option. Furthermore, in the preamble of the ICC Statute it is recalled that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Article 1 of the ICC Statute also provides that the exercise of jurisdiction by the ICC will be 'complementary' to national criminal jurisdiction. Even more pertinently, the ICC's temporal jurisdiction is only over crimes committed on or after 1 July 2002 – thus an impunity gap may arise for international crimes committed before that date. All of these considerations lead to the simple conclusion that universal jurisdiction for international crimes must be a viable and realistic option.

Impact of international law on national legislation and prosecution

Impact of international law on national legislation

In order for national prosecutions of international crimes to occur, as was discussed in the first section of this Chapter, jurisdiction over those crimes must be established. However, this presupposes that there is applicable criminal law on the national level enabling the prosecution to go ahead. Consequently, the impact of international law on national legislation concerning international crimes is discussed below.

INTERNATIONAL TREATY OBLIGATIONS TO CRIMINALISE CERTAIN CONDUCT

A number of international treaties require States parties to enact domestic laws that enable national prosecutions of the crimes contained in those treaties. For example, this obligation is set out in

the 1948 Genocide Convention, each of the four 1949 Geneva Conventions, the 1984 Torture Convention, as well as various other international treaties.[1427]

Article V of the Genocide Convention[1428]

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III and Article 146 of Geneva Convention IV[1429]

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

An example of domestic trial for genocide is the case of *Special Prosecutor v Col Mengistu Hailamariam et al* brought before the Ethiopian Federal High Court.[1430] The purpose of the case was to try President Mengistu and others for crimes committed in Ethiopia between 1977 and the late 1980s.[1431] Article 281 of the Ethiopian penal code incorporates many aspects of the Convention definition of genocide, but also conflates crimes against humanity with genocide[1432] – two crimes that are clearly distinguished from each other in the Statutes of the ad hoc tribunals and the ICC.

Ethiopia Penal Code 1957

Art 281. Genocide; Crimes against Humanity

Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:

(a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or

1427 For a detailed overview of these provisions see Amnesty International, The International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*) (3 February 2009), IOR 40/001/2009, available at <www.amnesty.org> accessed 30 November 2009.

1428 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.

1429 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287.

1430 Tiba Firew Kebede, 'The Mengistu, Genocide Trial in Ethiopia' (2007), 5 J Int'l Crim Justice 513, 514.

1431 Ibid (513).

1432 Penal Code of the Empire of Ethiopia of 1957, Proclamation No 158 of 1957, *Negarit Gazeta*, Extraordinary Issue No 1 of 1957, 23 July 1957 (entered into force on 5 May 1958).

(b) measures to prevent the propagation or continued survival of its members or their progeny; or

(c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance,

is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

Article 281 also includes 'political groups' as a victim group and adds 'compulsory movement or dispersion' as a possible act of genocide. At the beginning of the trials held in Ethiopia, many defendants took issue with the discrepancies between the definitions of genocide in Article 281 and in the Genocide Convention, however the Ethiopian courts held that it was within their national jurisdiction to expand upon the internationally established definition of genocide.[1433] Many of those convicted for genocide and crimes against humanity were tried *in absentia*, including Mengistu, because they were in exile in countries that refused to surrender them pursuant to Ethiopia's extradition requests.[1434]

Article 4 of the Torture Convention[1435]

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

As a result, the majority of States parties to those international treaties have criminalised the relevant international crimes in their national legislation, thereby complying with their international obligations. This is one manner in which international law has had an impact on national legislation.

Furthermore, the obligation in international treaties to criminalise certain conduct in national legislation is usually accompanied with the *aut dedere aut judicare* obligation (the 'extradite or prosecute' obligation). More will be said about this below. At this stage it is necessary to mention that the 'extradite or prosecute' obligation has been adopted by many States parties in their national legislation covering a wide range of international crimes. One example is Article 137(2) of the 2006 Criminal Code of Montenegro.[1436]

1433 Tiba Firew Kebede, 'The Mengistu, Genocide Trial in Ethiopia' (n1430).
1434 Ibid.
1435 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
1436 Article 137 (Applicability of criminal legislation of Montenegro to a foreigner who commits a criminal offence abroad) of the Criminal Code (Official Gazette of the Republic of Montenegro, No 70/2003, and Correction, No 13/2004) available at <www.legislationline.org/legislation.php?tid=1&lid=6221> accessed 30 November 2009.

Article 137(2) of the Montenegrin Criminal Code

Criminal legislation of Montenegro shall also be applicable to a foreigner who commits abroad, against a foreign country or a foreigner, a criminal offence for which under the law of the country it was committed in, a prison penalty may be pronounced in duration of five years or more, should s/he be caught in the territory of Montenegro but not extradited to a foreign country. . .

Other States have chosen to adopt legislation which not only provides for the 'extradite or prosecute' alternative, but also adds an additional alternative of surrender of the suspected criminal to the ICC. For example this was the approach taken by Argentina.

Art 4 of the 2007 Argentine Law 26.200 Implementing the Rome Statute

'[w]hen a person suspected of having committed a crime defined in this law is found in the territory of the Republic or in any place under its jurisdiction and it does not extradite or surrender him or her to the International Criminal Court, the Argentine Republic shall take all measures as may be necessary to exercise its jurisdiction with regard to such an offense'.[1437]

THE INFLUENCE OF THE ICC STATUTE

A further example of the impact of international law on national legislation is that of the influence of the ICC Statute. The principle underlying the ICC Statute is that of complementarity. Primacy over prosecutions of the crimes within the jurisdiction of the Court, namely genocide, crimes against humanity, war crimes and the crime of aggression,[1438] is given to national courts. Only if it is determined that national courts are 'unable' or 'unwilling' to undertake *bona fide* prosecutions of ICC crimes will the jurisdiction of the ICC be triggered.

As stated above, the complementarity principle is not only evoked in the preamble of the ICC Statute but also in Article 1 of the Statute. Furthermore, Article 17 of the ICC Statute provides the test for determining whether States are unable or unwilling and consequently whether a case is admissible before the ICC or not. In this way the ICC 'exercises supervisory functions over the adequacy of national criminal jurisdictions, determining the outer boundaries for States to implement and enforce international criminal law and how much discretion is available to them in that respect'.[1439]

By way of incentive for States to meet this complementarity test, thereby preventing a determination of inability of the national legal system to prosecute perpetrators of ICC crimes, States have

1437 Amnesty International, The International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*) (3 February 2009), IOR 40/001/2009, 17, available at <www.amnesty.org> accessed 30 November 2009.
1438 Article 5 of the ICC Statute.
1439 Jann K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 J Int'l Crim Justice 86, 87.

criminalised such crimes in their domestic legislation.[1440] This step has not only been undertaken by States parties to the ICC Statute, but also by non-party States. Article 12 of the ICC Statute provides that even non-party States' nationals can be subject to the jurisdiction of the ICC in certain circumstances.[1441] As a result, in order for the non-party States' nationals to be saved from prosecution before the ICC and thus for State sovereignty to be left intact, these States have also criminalised the ICC crimes in their national legislation. In other words, non-party States have also enacted national legislation that allows them to meet the complementarity test.

It must be mentioned that the impact of the ICC Statute on national legislation is particularly important with regard to crimes against humanity. This is because the very first comprehensive codification of such crimes was the ICC Statute and since most States do not allow for prosecution of international crimes based solely on customary international law,[1442] this development must be seen as an impressive step forward. Therefore, the impact of the ICC Statute on national implementation of international criminal law has even been described as 'revolutionary'.[1443]

The question then arises as to whether implementation of ICC crimes in national legislation is an obligation under the ICC Statute. A textual interpretation of the Statute clearly negates this proposition. However, a purposive evaluation of the ICC Statute leads to the conclusion that unless States do implement the substantive law of the ICC Statute in their national legislation, the ICC will be unable to perform its complementary function effectively. The ICC will become a court of first (and only) instance for the prosecution of international crimes instead of the subsidiary court it is envisaged to be. Put succinctly, 'to interpret the provisions on complementarity so as to give them the fullest weight and effect consistent with the ICC's functions therefore involves an obligation on States parties to establish their jurisdiction over the ICC crimes to the extent required for the purpose of national prosecution'.[1444]

There are a number of ways in which States have chosen to meet the complementarity test:

- Some States have enacted specific national legislation, defining the ICC crimes with reference to customary international law and conventional international law. For example, this dynamic approach has been taken by Canada.

Section 4.(3) of the Canadian 2000 Crimes Against Humanity and War Crimes Act

'"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.'[1445]

1440 A database of the ICC implementing legislation is available at: <www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php> accessed 30 November 2009.
1441 See Article 12 of the ICC Statute on preconditions to the exercise of its jurisdiction.
1442 See further Cassese (n2)303.
1443 Gabriele Olivi, 'The Role of National Courts in Prosecuting International Crimes: New Perspectives' (2006) 18 Sri Lanka J Int'l L 83, 84.
1444 Jann K Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 J Int'l Crim Justice 86, 94.
1445 Available at <http://laws.justice.gc.ca/en/showtdm/cs/C-45.9> accessed 30 November 2009.

- Some States have enacted specific national legislation, defining the ICC crimes in exact terms as the ICC Statute. For example, this has been the case in Australia, New Zealand, South Africa and the UK.

Section 50(1) of the UK 2001 International Criminal Court Act

'"genocide" means an act of genocide as defined in article 6 [of the ICC Statute]…'[1446]

- Other States have enacted specific national legislation but have defined the ICC crimes by adopting definitions used in international instruments. This means that the definition of genocide is taken from the Genocide Convention and the definition of crimes against humanity is taken from the ICC Statute. For example, the Netherlands has taken this approach.

Section 3(1) of the Netherlands 2003 International Crimes Act

Anyone who, with intent to wholly or partly destroy, any national, ethnic or religious group or a group belonging to a particular race, as such:

(a) kills members of the group;

(b) causes serious bodily or mental harm to members of the group;

(c) deliberately inflicts upon the group conditions of life calculated to bring about the physical destruction of the group, in whole or in part;

(d) imposes measures intended to prevent births within the group; or

(e) forcibly transfers children of the group to another group,

shall be guilty of genocide and liable to life imprisonment or a term of imprisonment not exceeding thirty years or a sixth category fine.[1447]

- Other States, such as Germany, have transformed the ICC crimes into the regular legal terminology of the national system.

1446 Available at <www.opsi.gov.uk/acts/acts2001/ukpga_20010017_en_1> accessed 30 November 2009.
1447 Available at <www.nottingham.ac.uk/shared/shared_hrlcicju/Netherlands/International_Crimes_Act__English_.doc> accessed 30 November 2009.

Section 6(1) of the 2002 German Act to Introduce the Code of Crimes against International Law

(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial or ethnic group

1. kills a member of the group;
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code;
3 inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part;
4. imposes measures intended to prevent births within the group;
5. forcibly transfers a child of the group to another group,

shall be punished with imprisonment for life.[1448]

A LIMITED IMPACT?

Of course, not all States comply with their international treaty obligations. As a result, even where States have become parties to international treaties requiring them to criminalise certain conduct in their national legislation, not all of them have done so. For example, China and Greece have not implemented their obligations under the Genocide Convention. This means that genocide can only be prosecuted as 'ordinary crimes' such as murder. Furthermore, even where an attempt to criminalise international crimes domestically has been made, this has not always been satisfactory. There are three main reasons for this. First, the international crimes have been defined in such a way as to exclude all or some of the conduct criminalised in international treaties. Secondly, the domestic legislation does not always include the modes of liability as set forth in the international treaties. Finally, the national laws do not always make provision for the inclusion of crimes under customary international law.

Another way in which some States have fallen short of their obligations under international treaties is by providing a more restricted jurisdiction over international crimes than was envisaged in the treaty itself. By way of example, the jurisdiction that is afforded to the courts in the US over grave breaches of the Geneva Conventions can be cited. Although the US has implemented the 1949 Geneva Conventions in its national legislation, it has only allowed jurisdiction based on active or passive nationality to be exercised over grave breaches. However, the Geneva Conventions prescribe universal jurisdiction.

1448 Available at <www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.htm> accessed November 2009.

US Code, Title 18, Chapter 118, § 2441. War crimes

(a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).[1449]

Despite the foregoing, it is fair to say that the impact of international law on national legislation has been extensive. The majority of States do comply with their international obligations and have made adequate provision for the prosecution of international crimes in their national legislation.

IMPACT OF INTERNATIONAL JURISPRUDENCE ON NATIONAL LAW

As an offshoot from international law, the jurisprudence of international courts and tribunals has also had an impact on national legislation. In some domestic systems, courts have been interpreting national legislation in accordance with the jurisprudence of international courts and tribunals. In other domestic systems, legislation has been enacted specifically requiring the domestic courts to take into account decisions and judgments of the ICC and other international courts and tribunals. For example, the UK Section 66(4) of the 2001 International Criminal Court Act ('2001 ICC Act') explicitly provides this.

Section 66(4) of the 2001 ICC Act

In interpreting and applying the provisions of this section (which corresponds to article 30) the court shall take into account any relevant judgment or decision of the ICC. Account may also be taken of any other relevant international jurisprudence.

Impact of international law on national prosecution

The impact of international law on national prosecutions of international crimes can be seen in a number of ways. One of the biggest impacts results from the obligation arising out of the *aut dedere aut judicare* or 'extradite or prosecute' provisions included in international treaties. A further, yet indirect, impact has been the setting up of national courts in order to prosecute international crimes arising out of conflict situations or massive human rights violations, such as the gacaca courts (traditional local courts) in Rwanda. A third, yet also indirect, impact of international law on national prosecutions has arisen out of the complementarity principle in the ICC Statute.

1449 Available at <www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002441—000-.html> accessed November 2009.

INTERNATIONAL TREATY LAW OBLIGATIONS OR THE 'AUT DEDERE AUT JUDICARE' OBLIGATION

In many international treaties criminalising certain conduct, States parties have chosen to include the 'extradite or prosecute' obligation. This rule sets out that once States parties have criminalised the specified conduct in their national legislation, they are obliged either to extradite or to bring before their national courts those suspected of having committed such an offence. Unlike universal jurisdiction provisions that enable States parties to establish jurisdiction over certain crimes, 'extradite or prosecute' provisions are usually phrased in mandatory terms.

For example, the 1949 Geneva Conventions and the 1984 Torture Convention both include this obligation.[1450]

Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III and Article 146 of Geneva Convention IV[1451]

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Article 7(1) of the Torture Convention[1452]

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

As a result of such provisions a great number of national prosecutions of the crimes committed during the Second World War, during the military dictatorships in Latin America, during the armed conflict in the former Yugoslavia and during the Rwandan genocide, among others, have taken place all over the world. Furthermore, numerous prosecutions of torture have also been undertaken at the domestic level. One such example is the *Novislav Djajić* case in Germany.

In the *Djajić* case the defendant, a former Yugoslav national, was brought before the Bavarian Supreme Court in Munich on charges of war crimes against civilians committed in Bosnia in 1992 during the armed conflict. In order to establish jurisdiction over the crimes alleged, the Bavarian

1450 For a comprehensive overview of the *aut dedere aut judicare* obligation in various international treaties see Amnesty International, The International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*) (3 February 2009) IOR 40/001/2009, available at <www.amnesty.org> accessed 30 November 2009.

1451 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287.

1452 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

Court specifically relied on the duty of States parties to the Geneva Conventions to prosecute grave breaches as set out in Articles 146 and 147 of the fourth Geneva Convention. In the Court's view, the 'extradite or prosecute' obligation was a measure introduced by the international community to combat impunity and to deter the commission of crimes against civilians during armed conflict. Therefore, on 23 May 1997 the Bavarian Supreme Court found Djajić guilty of 14 counts of abetting murder and one count of attempted murder, under Sections 211 and 27 of the German Criminal Code. He was sentenced to five years' imprisonment.

SPECIALLY ESTABLISHED NATIONAL COURTS

In some States international law has had an indirect impact on national prosecutions of international crimes in the form of the establishment of courts and tribunals or specialised chambers. This impact is described as indirect because the creation of these national courts is the consequence of the 'extradite or prosecute' obligation in international law or the complementarity principle of the ICC. One example is the gacaca court system set up in Rwanda to prosecute the perpetrators of the 1994 genocide.

In 1996 a new law on genocide was enacted in Rwanda. This new legislation coupled with the determination to hold everyone suspected of having taken part in the genocide accountable, stemmed from the international law obligation to extradite or prosecute. The outcome was that large numbers of accused were being detained throughout Rwanda and a backlog of cases was developing. Therefore, as a way of reducing this backlog, 750 gacaca courts based on indigenous models of local justice were set up and became operational in 2005[1453] (*see* Chapter 1).

THE ICC COMPLEMENTARITY PRINCIPLE

As discussed above, the complementarity principle has had an impact on national legislation in a number of ways. It is also expected to have an impact on the national prosecution of international crimes. As a consequence of States having adopted national legislation criminalising ICC crimes, if in the future any of those crimes are committed within their territories, those States will necessarily be able to undertake prosecutions. Other States also will be able to prosecute if they have provisions allowing for jurisdiction based on nationality or universal jurisdiction. It will only be the case that national prosecutions will not take place if the ICC decides that the forum State is unable or unwilling to undertake *bona fide* prosecutions. Furthermore, since the complementarity principle necessarily accords national courts primacy over prosecutions of ICC crimes, it is expected that such prosecutions will take place more regularly at the national level. Therefore, the ICC complementarity principle should impact not only on the quality, but also on the number of national prosecutions of ICC crimes.

The complementarity principle is further discussed in Chapter 6.

1453 For a detailed discussion about the gacaca courts in Rwanda see William A Schabas, 'Genocide Trials and Gacaca Courts' (2005) 3 J Int'l Crim Justice 879.

DOES A CUSTOMARY INTERNATIONAL LAW OBLIGATION TO PROSECUTE EXIST?

Some States advocate that for all core international crimes there exists a customary international law duty to prosecute those accused of such crimes. This proposition is voiced by a minority and is inconsistent with State practice. Furthermore, as is appositely pointed out 'an argument of mandatory "universal jurisdiction" (due to the *ius cogens* status of the crimes or otherwise) would in fact result in most States being in constant breach of the obligation'.[1454]

Nevertheless, it would seem that a customary international law duty to prosecute grave breaches of the 1949 Geneva Conventions has indeed crystallised. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ held that the fundamental principles enshrined in the Geneva Conventions had become customary international law.[1455] Although the Court did not expressly state that the 'extradite or prosecute' obligation was such a fundamental principle, there is no doubt that the Court had this in mind. Consequently, it cannot be denied that there does now exist a customary international law obligation to prosecute grave breaches.[1456]

Legal impediments to the exercise of national jurisdiction

There are many impediments to the exercise of national jurisdiction over international crimes. In this section the six main impediments are discussed. They are: the enactment of amnesty laws covering a wide range of international crimes; the granting of pardons; the right of certain categories of persons to be immune from prosecution; the prescription of statutes of limitations in national legislation and the principle of *non bis in idem* (double jeopardy). Most of the impediments are analysed in Chapter 4 in the context of the prosecution of international crimes before international court and tribunals. However, this Chapter will address some of the issues in the national context.

Amnesty

The issue of amnesties has already been discussed in Chapter 4 in the context of the prosecution of international crimes before the international courts and tribunals. Here we will therefore deal with questions relating to amnesties which are of particular relevance for the domestic prosecution of international crimes. As already explained in Chapter 4, amnesties block criminal (or civil) legal action against people in the State in which they are passed. They are most commonly granted through national legislation in order to promote reconciliation between previously antagonistic parties and to allow people to move on from the past.[1457]

The South African amnesty law enacted to cancel the crimes committed during the apartheid regime is one example in which national reconciliation was achieved. Nevertheless, in the *Azanian People's Organization* case,[1458] the constitutionality of the amnesty law was questioned. The decision of the South African Constitutional Court to uphold the law can be justified on a number of grounds. First, the Court itself recognised that the amnesty law solution is only suitable for nations that are freeing themselves of terror regimes and that are undergoing a transition to democracy. Secondly, it would

1454 Cryer (n1382) 61.
1455 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para (79).
1456 See Cassese (n2) 302.
1457 Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, The Hague 2002) 23–33.
1458 *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa* (1996) 4 SA 562 (CC).

be extremely difficult to carry out prosecutions of the apartheid crimes in South Africa, given the secrecy and efficiency of the offences. Thirdly, in conjunction with the amnesty law a Truth and Reconciliation Commission was set up to establish a comprehensive account of the offences that had been committed during the apartheid regime. Indeed, the Court itself recognised the importance of this. It held:

> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order.[1459]

Finally, the amnesty granted was not a blanket amnesty and strict criteria had to be met before its grant, including the full disclosure of all the relevant facts relating to acts associated with a political objective.

However, there is much doubt that amnesty produces a lasting and meaningful peace. Instead it is argued that where members of ethnic, religious or political groups have been involved in the commission of very serious crimes, 'moral and psychological wounds may fester if attempts are made to sweep past horrors under the carpet. Resentment and hate are temporarily suppressed; sooner or later, however, they resurface and spawn even greater violence and crimes'.[1460]

On the basis of a number of decisions by international criminal tribunals, human rights bodies, and domestic courts, it is possible to identify a trend towards considering amnesties incompatible with international crimes.[1461] As the relevant decisions by international criminal courts and tribunals are already considered in Chapter 4, we will address here only a few important decisions by human rights bodies which considered amnesty laws to be incompatible with human rights treaty provisions. This is particularly so in relation to provisions concerning the right to judicial remedies for breaches of human rights.

For example, the UN Human Rights Committee took this view in its General Comment No 20:[1462]

Human Rights Committee, General Comment 20 (para 15)

The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

1459 Ibid para (17).
1460 Cassese (n2) 313.
1461 Micaela Frulli, 'Amnesty' *in* Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 243, 244.
1462 United Nations Human Rights Committee, General Comment No 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7) (10 March 1992), available at <www2.ohchr.org/english/bodies/hrc/comments.htm> accessed 25 October 2009.

Both the Inter-American Commission and the Inter-American Court of Human Rights have expressed the same opinion as the UN Human Rights Committee. For example, in the seminal *Barrios Altos* case, the Inter-American Court of Human Rights found that since amnesties were incompatible with the obligation of States to prosecute gross human rights violations, the two amnesty laws that had been enacted in Peru were 'devoid of legal effects'. These amnesties granted immunity to all State agents who had been responsible for gross human rights violations during the armed conflict in Peru between 1980 and 2000. The Court held:

> This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[1463]

This ruling was followed by a number of domestic courts, affirming, therefore, that amnesties are no bar to the prosecution of gross human rights violations. For example, the decision of the Supreme Court of Chile in *Sandoval* held that an amnesty cannot prevent the prosecution of enforced disappearances.[1464] The Supreme Court in Argentina, in *Simón, Julio Héctor y otros*,[1465] declared two amnesties laws adopted in the 1980s to protect the authors of serious crimes such as enforced disappearances as unconstitutional and void.

An obligation to prosecute international crimes is also contained in a number of international treaties such as the 1948 Genocide Convention,[1466] the four 1949 Geneva Conventions and the 1984 Torture Convention.[1467] An amnesty law that prevents the prosecution of the crimes subject to such a treaty obligation would obviously be incompatible with that obligation. Furthermore, because international crimes are seen as attacks on universal values, the ability of individual States to enact laws eradicating such crimes or removing their legal consequences would be paradoxical.

Despite the frequently proclaimed view that amnesties for international crimes are always unlawful, it seems that a customary international law obligation for States to refrain from enacting amnesty laws on international crimes has not yet fully developed.[1468] Nonetheless, it is contradictory to say that where the prohibition of a crime is considered to be a peremptory norm, an amnesty law can apply in respect to it (*see* also Chapter 4). In addition, it is generally acknowledged that amnesties for international crimes are only legitimate if they are qualified rather than blanket amnesties.[1469]

Pardon

In many States there exist legislative provisions, either in their constitutions or criminal codes that allow convicted individuals to be pardoned by the serving Head of State. Pardon is a discretionary mechanism granted on the basis of individualised considerations[1470] providing for the sidestepping of

1463 *Barrios Altos v Peru* (14 March 2001) Inter-Am Ct Hum Rts (Ser C) No 75, para (41), available at <www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf> accessed 25 October 2009.
1464 S Ct, causa 517/2004, Résolucion n 22267 (17 November 2004) available (in Spanish) at <http://derechos.org/nizkor/chile/doc/krassnoff.html> accessed 25 October 2009.
1465 S Ct, *Simón, Julio Héctor y otros s/privación ilegítima de la libertad*, causa No 17.768 (14 June 2005) available (in Spanish) at <www.derechos.org/nizkor/arg/doc/nulidad.html> accessed 25 October 2009.
1466 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 227.
1467 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
1468 Cryer (n1382) 33.
1469 Lisa J Laplante, 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 Virginia J Int'l L 915.
1470 Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (OUP, Oxford 1995) 22.

court proceedings.[1471] In relation to perpetrators of gross human rights violations the granting of pardon is arguably less objectionable than the granting of amnesties. This argument can be justified by the reasoning that even though pardon spares the offender from serving his or her sentence or from serving it in full, the judgment of guilt is left intact. On the other hand, since amnesties are granted before prosecution is carried out, no determination of guilt by a court is made. Furthermore, pardon can be justified in situations of miscarriage of justice, in other words, when the offender is legally or morally innocent, or when an overly severe sentence has been issued.[1472] In terms of the legal obligations of States not to grant pardons and amnesties for perpetrators of international crimes, there is little distinction between the two.

Generally when treaties proscribe the obligation to prosecute international crimes[1473] there is no accompanying provision detailing what, if any, penalties should be imposed. All the same, it would seem contrary to the object and purpose of such provisions if no sentence were ever served by the perpetrator of these crimes requiring prosecution. For example, the 1948 Genocide Convention and the 1984 Torture Convention both voice that the perpetrators of genocide and torture respectively should have imposed upon them appropriate penalties, yet neither treaty provides what those penalties should be.[1474] Considering the gravity of the offences within these conventions, it is only logical that any penalty should be reflective of this.[1475] By implication pardon would be incompatible with the obligation to prosecute such international crimes. The same argument extends to grave breaches of the 1949 Geneva Conventions.

Immunities

The immunities of individuals in the context of criminal prosecution for international crimes with a focus on international courts and tribunals are discussed in Chapter 4. The discussion provided in Chapter 4 also covers the definitions of the two categories of immunities: functional and personal immunities. The remaining question that needs further consideration is whether immunities can constitute a bar to the domestic prosecution for international crimes.

As regards functional immunities, it has been established in Chapter 4 that since the Second World War a customary rule has evolved to the effect that States officials are not entitled to functional immunities if charged with international crimes, either in international or domestic criminal proceedings. Both national and international case law are consistent on the application of this rule. As regards the national case law, in *Eichmann* the Israeli Supreme Court held:

> There is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of 'crimes against humanity' (in the wide sense). Such acts. . . are completely outside the 'sovereign' jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission. . .[1476]

1471 Andreas O'Shea, Amnesty for Crime in International Law and Practice (n1457) 2.
1472 Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (n1470) 22.
1473 See section 'International Treaty Law Obligations or the "*Aut Dedere Aut Judicare*" Obligation' above.
1474 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85; Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.
1475 See further Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale L J 2537, 2605.
1476 *Adolf Eichmann v Attorney-General of the Government of Israel* (n1395), paras (308)–(310).

The *Pinochet* case in the UK House of Lords, which arose in the context of extradition proceedings in the UK, is considered to be the leading authority on the question of functional immunity for international crimes. The summary of the case is provided above in the discussion of universal jurisdiction. As mentioned, the Divisional Court quashed Pinochet's arrest warrant, alleging torture, on the grounds of immunity since the acts described therein related to Pinochet's activities as a Head of State. The Court rejected the Prosecution's contention that certain crimes, in particular torture, could not be considered under international law as constituting official acts and therefore would not be covered by State immunity.[1477]

On appeal, the House of Lords was requested to provide 'the proper interpretation and scope of immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State'.[1478] The Law Lords agreed that a serving Head of State enjoyed absolute personal immunity. However, the answer to the question whether a former Head of State continued to enjoy immunity depended on the enquiry whether the acts of torture alleged against Pinochet would constitute 'official acts performed by a Head of State' under international law. The minority of the judges agreed with Divisional Court that acts committed under colour of State authority – even if they constituted international crimes – were 'official' and therefore covered by State immunity.[1479] The majority considered that such illegality removed the acts from the 'official' sphere.[1480] A former Head of State would therefore enjoy no immunity with respect to those 'unofficial' acts.[1481]

The House of Lords judgment was subsequently annulled and the case reopened before a new House of Lords panel (*see* the summary above). The majority in *Pinochet No 3* rejected Pinochet's claim of immunity but for somewhat different reasons from those relied on by the majorty in *Pinochet No 1*. They accepted, apparently as a result of a concession by the Prosecution, that the crimes charged against Pinochet would have been carried out under colour of the State authority and were therefore acts performed in the exercise of the functions of the Head of State and, *prima facie*, protected by immunity. Their enquiry then focused on whether there was an exception to this immunity in the case of 'acts the prohibition of which has acquired the status under international law of *jus cogens*'.[1482] They concluded that there was and that torture by virtue of the Torture Convention of 1984, constituted such an exception.[1483]

The Torture Convention of 1984 contains no provision expressly stating that it abrogates Head of State immunity. The majority of the House of Lords in *Pinochet No 3* felt that it was nonetheless necessary to imply such a waiver of immunity into the Torture Conventions. Otherwise, since the Convention's definition of torture includes the requirement that it be committed 'by or with the acquiescence of a public official or other person acting in an official capacity' (Article 1), it would have created a defence which was co-extensive with the definition of the crime. If torture's official and State-sponsored character were at the same time a defence, then the Convention would appear to be self-defeating.

1477 *Re Pinochet Ugarte* [1998] All ER (D) 629 (Q B Div'l Ct 1998).
1478 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (Amnesty International and Others Intervening)* (No 1) [1998] 4 All ER 897.
1479 The minority constituted Lord Slynn of Hadley and Lord Lloyd of Berwick.
1480 The majority constituted Lord Nicholls of Birkenhead, Lord Steyn, and Lord Hoffmann.
1481 Jones (n1409) 254, 259–260.
1482 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97, see the opinion of Lord Hope of Craighead, 147.
1483 Jones (n1409) 254, 260–261.

Lord Goff, dissenting, relied upon the absence of an express provision in the Torture Convention waiving State immunity. He concluded that a charge of torture per se does not abrogate a claim of State immunity.[1484]

Lord Hope of Craighead held that there was no Head of State immunity for crimes of *jus cogens*. Torture was contrary to *jus cogens* when it was committed as part of a widespread and systematic attack on a civilian population (ie torture as a crime against humanity), but not when it concerned an isolated act. Lord Hope held that while the Torture Convention did not expressly waive Head of State immunity, therefore, the waiver had to arise by necessary implication when it concerned torture as an international crime.[1485]

While Lord Hope recognised the importance of *jus cogens*, he nonetheless relied on the Torture Convention of 1984 for the waiver of immunity rather than customary international law. The latter approach appears to be taken by Lord Millet who held that universal jurisdiction over a crime exists when two criteria are satisfied: (1) the crime is one of *jus cogens*; and (2) the crime is so serious and on such a scale that it can justly be regarded as an attack on the international legal order. Lord Millet applied the second criterion in such a way as to suggest that the crime was an attack on the international legal order when it was a crime against humanity.[1486]

The upshot of the *Pinochet* decision is that former State officials, including former Heads of State, cannot be exempt from prosecution for torture, and arguably other international crimes, performed while they were in office even if as part of their official functions.

As regards personal immunities, numerous cases brought before national courts show that the rules on personal immunities cannot be derogated from at the national level, even with regard to international crimes. For example, in the *Pinochet* case, the House of Lords agreed that personal immunity of Heads of State should be upheld. In the words of Lord Millet: 'The nature of the charge is irrelevant; his immunity is personal and absolute'.[1487] Other examples of national jurisprudence that have affirmed the personal immunity of State officials are the *Qadaffi* case in France, the *Gillion* case in Denmark, and the *Mofaz* and *Mugabe* cases in the UK.

The *Qadaffi* case related to the possible prosecution of a serving Head of State for serious acts of terrorism. The French Court of Cassation held:

> at this stage of development of international customary law, the crime charged, no matter how serious, does not fall within the exceptions to the principle of immunity from jurisdiction of foreign Heads of State in office.[1488]

In the *Gillion* case the Danish Government was confronted with the question of whether Mr Carmi Gillion, the Israeli Ambassador to Denmark, should be accorded diplomatic immunity and thereby avoid arrest and prosecution for alleged torture committed in Israel. In an official note to the press, the Minister of Justice stated:

1484 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97, see the opinion of Lord Goff, 127.
1485 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97, see the opinion of Lord Hope of Craighead, 153.
1486 Jones (n1409) 264.
1487 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147, 277.
1488 Translation taken from Salvatore Zappala, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Gaddafi Case before the French Cour de Cassation' (2001) 12 Eur J Int'l L 595, 600.

> It is the assessment of the Ministry of Foreign Affairs, that the special provisions of the Vienna Convention on Diplomatic Relations as special rules for diplomatic representatives will supersede the general rules contained in the UN Torture Convention. The Vienna Convention will, in other words, impede the arrest and criminal prosecution of a diplomatic representative in this country.[1489]

A senior district judge sitting at Bow Street Magistrates Court, in the United Kingdom, similarly held that Mr Mugabe, President of Zimbabwe, was immune from criminal proceedings in relation to alleged acts of torture:[1490]

> Mr Tatchell has argued persuasively that the doctrine of State immunity is not one which sits comfortably with the State's obligation under international law to prosecute grave crimes of universal jurisdiction. Mr Tatchell has sought to persuade me that the principle of universal jurisdiction should be extended to override the immunity afforded to a Head of State.
>
> Whilst international law evolves over a period of time international customary law which is embodied in our Common Law currently provides absolute immunity to any Head of State.
>
> In addition to the Common Law our State Immunity Act of 1978 which extends the Diplomatic Privileges Act of 1964 provides for immunity from the criminal jurisdiction for any Head of State.
>
> I am satisfied that Robert Mugabe is President and Head of State of Zimbabwe and is entitled whilst he is Head of State to that immunity. He is not liable to any form of arrest or detention. . .

Again in the *Mofaz* case a district judge sitting at Bow Street Magistrates Court upheld the personal immunity of State officials, this time a Defence Minister, in relation to criminal proceedings for grave braches of the Geneva Conventions.[1491]

The decision of the ICJ in the *Arrest Warrant* case also affirmed that incumbent State officials, including Ministers for Foreign Affairs, enjoyed personal immunity regardless of the nature of the crimes that they are alleged to have committed.[1492] Upon examination of State practice and national legislation, as well as the few judgments of national higher courts that pronounced on the matter, such as the UK House of Lords and the French Court of Cassation, the ICJ concluded that it was unable to identify under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability of incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[1493] The ICJ also examined the legal instruments creating international criminal tribunals and found that they did not suggest any exception in customary international law in regard to national courts.[1494]

Still, in concluding that Mr Yerodia, the Minister of Foreign Affairs of DRC, enjoyed personal immunity, the ICJ emphasised that the temporary status of personal immunities did not imply that State officials enjoyed *impunity* for serious crimes. Apart from the possibility of being subject to criminal proceedings before certain international criminal courts, where they have jurisdiction (*see* Chapter 4), the ICJ outlined the following scenarios:

1489 Translation taken from Jacques Hartmann, 'The Gillion Affair' (2005) 54 Int'l & Comp LQ 745, 747.
1490 Judgment reproduced in Colin Warbrick, 'Immunity and International Crimes in English Law' (2004) 53 Int'l & Comp LQ 769, 770.
1491 Idem at (771)–(773).
1492 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (Judgment) [2002] ICJ Rep 3 paras (54)–(55).
1493 Ibid para (58).
1494 Ibid.

> First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[1495]

The ICJ's decision seems to be in line with the national decisions and State practice upholding absolute personal immunity.[1496]

Statutes of limitation

Many States provide in their domestic legislation that after the lapse of a certain period of time prosecutions for particular crimes may no longer be initiated. Additionally, some States provide that if a final sentence pronounced for a crime has not been served after a certain period that sentence will no longer be applicable.

Statutes of limitation seek to prevent unjust delays between the commission of a crime and the prosecution thereof. There are a number of arguments supporting the prescription of statutes of limitation:

- If a long period of time lapses between the commission of a crime and its prosecution there will be greater difficulty in collecting necessary and sufficiently reliable evidence, because witnesses will no longer be available, material evidence may no longer exist or may have disappeared, etc. This is known as the 'staleness of evidence' doctrine.[1497]
- Victims or their relatives may have come to terms with the crimes committed so long ago, thus it may be better for society to forget such crimes.
- Since the prosecution was not carried out in a timely manner, the deterrent effect associated with such prosecution may have become null and void.

However, where statutes of limitation are applicable, impunity for international crimes may arise. For example, in the *Barbie* case the defendant escaped prosecution for war crimes because they were not included as a separate class of crimes to which statutes of limitation did not apply under French law. Klaus Barbie was prosecuted for the numerous crimes against humanity that he had committed while head of the Gestapo in Lyon between 1942 and 1944, during the German occupation of France. This was possible because the French Law of 26 December 1964 introducing the category of crimes against humanity in the French Penal Code by reference to Article 6 of the Nurember Charter removed any statutory limitations for crimes against humanity.[1498]

1495 Ibid para (61).
1496 Cryer (n1382) (436)–(437).
1497 Ruth Kok, *Statutory Limitations in International Criminal Law* (TMC Asser Press, Cambridge/The Hague 2007) 28.
1498 See Leila Sadat Wexler, 'Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again' (1994–1995) 32 Colum J Transnat'l L 289, 337–344.

The French Court of Cassation (*Cour de Cassation*) found that by the reason of the nature of those crimes, the provisions of the French Law of 26 December 1964 were in accordance with the general principles of law recognised by the community of nations, referred to in Article 15(2) of the ICCPR and Article 7(2) of the ECHR:

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The Court of Cassation held that these provisions, laid down in international treaties, had been properly integrated into the French legal order and had an authority superior to that of statutes by virtue of Article 55 of the French Constitution of 4 October 1958.[1499] Barbie was found guilty on all 340 counts of the 17 crimes against humanity with which he was charged and sentenced to life imprisonment. He died in prison on 25 September 1991. Among his most notorious crimes which included the torture and murder of thousands of Jews and resistants during the Second World War, was the capture on 6 April 1944 of 44 Jewish children and their seven educators sheltered in Izieu, a village near Lyon, all of whom were taken to Auschwitz.

In order to prevent possible impunity for international crimes resulting from statutes of limitation, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[1500] and the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes were adopted.[1501] However, neither treaty has received wide support. Nonetheless, a large number of States have enacted domestic legislation barring statutes of limitation for certain international crimes. For example, Article 19 of the 2003 Bosnian Criminal Code provides that no statutory limitations will apply with respect to genocide, crimes against humanity, war crimes and other crimes that under international law are not subject to statutes of limitation, such as torture and aggression.

Article 19 (Criminal Offences not subject to the Statute of Limitations) of the Bosnian Criminal Code

Criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations.

The Bosnian provision thus covers all of the core international crimes. Still, a study of most legal systems in the world illustrates that domestic provisions on the non-applicability of statutory limitations for international crimes are 'quite divergent'.[1502]

1499 Antoine Reinhard, 'Barbie' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 598, 599.
1500 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, GA Res 2391 (XXIII) Annex, UN Doc A/7218 (26 November 1968); 754 UNTS 73; 8 ILM 68.
1501 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (25 January 1974) ETS No 82, 2245 UNTS 309.
1502 Ruth Kok, *Statutory Limitations in International Criminal Law* (n1497) 9.

There are a number of cases both at the national and international level determining the non-applicability of statutes of limitation to international crimes. For example, in the *Hass and Priebke* case in Italy it was held that the non-applicability of statutory limitations to war crimes derived from a general principle of international law having the status of *jus cogens*.[1503] In a further example, the Inter-American Court of Human Rights held that statutory limitations for gross human rights violations were prohibited because they violated non-derogable rights found in international human rights law.[1504] Another example is the decision of the ICTY in the *Furundžija* case in which the Trial Chamber held *obiter* that a consequence of the peremptory nature of the prohibition of torture was the non-applicability of statutory limitations to prosecutions for that crime.[1505]

Additionally, the Committee against Torture has stated unambiguously that statutes of limitation do not apply to torture:

> The Committee is of the view that acts of torture cannot be subject to any statute of limitations (arts 1, 4, 12 and 16). . . crimes such as torture. . . are crimes to which the statute of limitations does not apply. . . Taking into account the grave nature of acts of torture, the Committee is of the view that acts of torture cannot be subject to any statute of limitations (arts 1, 4 and 12).[1506]

The abhorrent nature of international crimes implies that the application of statutory limitations would necessarily be incompatible. Perpetrators of these crimes must be punished, regardless of the amount of time that has lapsed since the commission of the crime. Additionally, since such crimes have a universal dimension in that they affect the whole international community, it would be unacceptable to consider the statutes of limitation of one particular State.[1507] Nonetheless, no customary rule prohibiting the application of statutes of limitation in national courts to all international crimes has yet crystallised.

Still, it is safe to say that specific customary rules have developed with regard to genocide, crimes against humanity and torture. Furthermore, there is a strong argument in support of the proposition that the application of statutory limitations to war crimes is now also prohibited by a customary rule. The ICC Statute provides in Article 29 that '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'. Since the Statute has been ratified by a large number of States it may be taken that a customary international rule as to the prohibition of statutory limitations to war crimes has also crystallised.

The non bis in idem *principle (double jeopardy)*

The *non bis in idem* or double jeopardy principle is discussed in Chapter 4. In the context of national prosecution of international crimes, it should be noted that although this principle is almost universally included in national criminal laws, it is not recognised as a customary norm or general principle of law in its extraterritorial application.[1508] Foreign States may be lawfully permitted, within their domestic legal order, to prosecute a person for a crime of which he or she has already been convicted and punished for elsewhere. The rationale behind this is that the sovereign equality of States prevents one State's courts from binding another's.

1503 *Hass and Priebke*, Judgment of the Military Tribunal in Rome, Italy (22 July 1997) para (49).
1504 *Barrios Altos* (2001) Inter-Am Ct Hum Rts (Ser C) No 75, para (41); see 'Treaty Law Prohibition of Amnesties' above.
1505 *Prosecutor v Furundžija* (ICTY) Case No IT-95-17/1-T, Trial Judgment (10 December 1998) para (157).
1506 Report of the Committee against Torture, 39th Sess (5–23 Nov 2007); 40th Sess (28 April–16 May 2008) UN Doc A/63/44 (2008).
1507 Cassese (n2) 318.
1508 Dionysios Spinellis, 'Global Report The *Ne Bis in Idem* Principle in "Global" Instruments' (2002) 73 Revue Internationale De Droit Pénal 1149, 1150.

Nonetheless, it may be argued that, in relation to international crimes, the consequence of allowing universal jurisdiction is that those crimes should only be prosecuted in one State, provided that the guarantees of a fair trial, independence, impartiality and due diligence were met in the original trial. Relevant provisions of the Statutes of the international courts and tribunals establishing that double jeopardy shall be reciprocal between the international courts and the national courts, especially the wide acceptance of the ICC Statute, support the argument that an international customary norm is evolving in this regard (*see* further Chapter 4).[1509]

State cooperation with respect to national proceedings

The principle of State sovereignty plays a major role in criminal law and proceedings, thereby affecting State cooperation. Since all States are considered equal, each must give its consent for cooperation to materialise. However, due to the increase in cross-border activities including the perpetration of crimes, there is also a growing need for State cooperation. One form of such cooperation, extradition, is the other side of the *aut dedere aut judicare* coin. We have seen so far that the 'extradite or prosecute' obligation has had a major impact on national criminal justice systems. Its influence on matters of State cooperation is no less significant. Thus it is vital that special regimes governing State cooperation exist. However, as of yet no such special regime has evolved within international law. Nonetheless, in this section the developments with regard to the traditional forms of State cooperation in criminal matters are discussed. These traditional forms are: extradition, mutual legal assistance and enforcement of foreign penalties.

Extradition

Provisions enabling the extradition of suspected perpetrators of international crimes are essential in matters of State cooperation. This results partly from their inclusion as an alternative to prosecution in the *aut dedere aut judicare* provisions that are often found in international treaties criminalising certain conduct. Older international treaties containing the 'extradite or prosecute' alternative tend to address the question of extradition only in general terms. Three examples are the 1948 Genocide Convention, the four 1949 Geneva Conventions and the 1977 Additional Protocol I thereto.

Article VII of the Genocide Convention[1510]

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

1509 Kai Ambos, 'The International Criminal Court and the Traditional Principles of International Cooperation in Criminal Matters' (1998) 9 Finn YB Int'l L 413, 420.

1510 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.

Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III and Article 146 of Geneva Convention IV[1511]

Each High Contracting Party. . . may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Article 88 of Additional Protocol I[1512]

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

However, more recent international treaties have started to include much more elaborate cooperation provisions, including complete regimes for extradition. Examples include the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[1513] and the Convention against Transnational Organised Crimes.[1514]

Extradition is the name given to the process whereby one State surrenders to another State a person accused of a (extraditable) crime or who is unlawfully at large after conviction.

Since extradition is considerably intrusive on the liberty of the person in question many States require the regulation of extradition in international agreements. The common interests of the international community in combating crimes and overcoming impunity justify extradition. However,

1511 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287

1512 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I) (8 June 1977) 1125 UNTS 3.

1513 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) 28 ILM 493 (1989).

1514 Convention against Transnational Organised Crimes (15 November 2000) 40 ILM 335 (2001).

the actual surrender of an individual is determined in accordance with national law taking into account international extradition treaties.[1515] It is for this reason that extradition is not only subject to strict requirements such as double criminality and the prohibition of double jeopardy, but it also faces a number of factors that may bar a successful grant. These bars include the question of extraditable offences, the non-extradition of nationals and considerations of human rights standards.

Extradition tends to follow a standard procedure. The law and practice of the requested States, as well as any applicable extradition agreements, apply. The first step is a request for the arrest and extradition of the person in question by the requesting State. This is followed by proceedings in the requested State, usually consisting of a judicial decision on whether the formal requirements for extradition have been met and an executive decision on the actual surrender. In most States it is presumed that extradition is requested in good faith. However, courts will usually take into account challenges made by the person in question regarding potential human rights violations upon return to the requesting State.

DOUBLE CRIMINALITY AND DOUBLE JEOPARDY

The double criminality requirement is the requirement that the act or omission in question be criminal in both the requesting and the requested State. It has a long history of application and is based in the principle of legality since its aim is to ensure that the individual is conferred a measure of certainty *vis-à-vis* his or her legal rights and obligations. Double criminality is also linked to notions of State sovereignty to the extent that it is the prerogative of States to criminalise the conduct they wish to and to endow such conduct with the degree of severity according to ethical considerations of their society at a given time.[1516] Therefore, States are permitted to refuse extradition where the act in question is not criminal, or does not carry the same approximate severity of punishment, in the requesting State.

The application of the double criminality principle requires different considerations in different States. Some States call for the crime to be identical. Other States need only the conduct to constitute crimes in both legal systems. In a number of States, apart from the conduct constituting a crime, there must also be a corresponding jurisdiction upon which the crime can be tried in the requesting and requested State. A final aspect of the double criminality principle is that the crime must have been so in both States at the time that the conduct occurred.[1517]

Although the double criminality rule presents a difficulty to the successful grant of extradition requests, it should be noted that the ICC complementarity principle should reduce the possibility of extradition refusals. As was discussed above, the complementarity principle has had a great impact with regard to the adoption of implementation legislation criminalising ICC crimes. Hence, as far as extradition requests for international crimes are concerned, in future the double criminality principle should not present a major obstacle.

1515 John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 Am J Int'l L 187, 188.
1516 Susie Alegre and Marisa Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant' (2004) 10 Eur LJ 200, 208.
1517 The UK House of Lords dealt with this question in *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.

As set out above, the double jeopardy rule applies in most national criminal law systems and is particularly relevant to international crimes since such crimes are usually subject to extraterritorial jurisdiction. International extradition agreements have traditionally acknowledged the principle by prohibiting extradition if the requested State has already passed a final judgment against the person in question. The majority of States takes this approach.

BARS TO EXTRADITION

There are three main factors that may constitute bars to successful extradition requests. First, the offence allegedly committed by the person in question must meet a certain threshold seriousness in order for the person to be extraditable. Secondly, the question of non-extradition of nationals may arise. Finally, human rights considerations such as the abolition of the death penalty and the question of life imprisonment may block proceedings.

Traditionally, the most serious offences are usually considered to constitute extraditable offences or 'extradition offences'. The meaning of 'serious offence' is regularly ascertained by reference to the level of punishment accorded to the conduct in question. Obviously where conduct is subject to an *aut dedere aut judicare* provision it meets the severity threshold. However, most States regard that international crimes can be the subject of extradition requests regardless of such provisions, since such crimes necessarily meet the gravity prerequisite.

Two classes of crimes are typically excluded from extradition. These are political offences and military offences. The latter are offences under military rather than criminal law and accordingly should not prevent extradition for war crimes. Conversely, there is no generally accepted definition of the former. For that reason, considerable latitude is given to individual States to refuse extradition based on the political element of the conduct in question. For example, when making a decision as to whether a political element exists, States will take into account:

- the motive behind the offence;
- the effect of the offence;
- the purpose of the offence;
- the identity of the victim;
- democracy;
- human rights; and
- recent political conflicts.

To overcome this hurdle, some international instruments explicitly set out that the crimes with which they are concerned are not to be viewed as political offences for the purpose of extradition. One such example is the 1948 Genocide Convention.

Article VII of the Genocide Convention[1518]

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The majority of civil law States exclude the possibility of the extradition of their own nationals to other States for the purpose of prosecution. This prohibition derives from misgivings about foreign criminal justice systems and the safeguarding of a State's own nationals, and is commonly enshrined in the State's Constitution. Indeed, many countries have maintained the practice of refusing to surrender one's nationals for centuries.[1519] Consequently, such States tend to have provisions granting extensive criminal jurisdiction over conduct performed abroad by their own nationals.

Nonetheless, this is not always the case and even where it is, a number of limitations have been identified.[1520] First, the scope of application of jurisdiction is typically limited by conditions and requirements such as double criminality, a catalogue of specific offences and special characteristics of the offender. Secondly, the jurisdiction only affords the possibility of prosecution and materialisation of this possibility is determined by the exercise of discretionary powers by the public prosecutor. Finally, insurmountable difficulties in conducting the prosecution may arise due to inability to obtain necessary evidence. Therefore, international crimes may go unpunished.

A third possible bar to successful extradition requests is the consideration of human rights standards. In the *Soering* case the ECtHR stressed the importance of balancing criminal justice and the respect for human rights. The Court held:

> inherent in the whole of the [ECHR] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.[1521]

Where the death penalty has been abolished domestically this will usually prevent the extradition to a State in which no such abolition has taken place. Similarly, where life imprisonment is prohibited at the national level, extradition of persons to States where they may face a life sentence will usually not occur. Furthermore, under the 1984 Torture Convention States parties are obliged not to extradite persons to States in which they face being tortured.

1518 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.
1519 Michael Plachta, '(Non-)Extradition of Nationals: A Neverending Story?' (1999) 13 Emory Int'l L Rev 77.
1520 Ibid at (122)–(123).
1521 *Soering v United Kingdom* (1989) 161 Eur Ct HR (ser A), para (89). In this case, a West German national had murdered his girlfriend's parents in Virginia. Subsequently he fled to the UK, from which the US sought his extradition. The UK's grant of extradition was held by the European Court to violate the prohibition of inhuman and degrading treatment in Article 3 of the ECHR. The violation arose since there was a real risk that Soering would be subjected to such treatment by being kept on death row for a prolonged period in Virginia.

Article 3(1) of the Torture Convention[1522]

No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

In these cases it is possible that the requesting State can provide an assurance so as to enable extradition. Such assurances will be to the effect that either the death penalty or life imprisonment will not be applied in the case in question, or that the person in question will not be tortured. The requested State is not obliged to accept such assurances. Nevertheless, it may choose to do so if they appear to be reliable.

A recent decision by the UK High Court has confirmed that extradition will not be granted in cases where there is a serious risk that the suspects would not receive a fair trial in the requesting State.[1523] The High Court confirmed that fair trial issues are judged on whether the suspects would 'suffer a real risk of a flagrant denial of justice if they were extradited for trial' in the requesting State.[1524] In this case, the Government of Rwanda requested the extradition of four men accused of having taken part in the genocide there. However, after having evaluated the state of the criminal justice system in Rwanda, the UK High Court refused extradition on the ground that if the men were returned to stand trial in Rwanda there would be a real risk that they would not receive a fair trial as provided in Article 6 of the ECHR,[1525] in particular due to problems with defence witnesses testifying.

OTHER CONSIDERATIONS RELATING TO EXTRADITION

Two further considerations that relate to extradition must be taken into account. The first is the re-extradition of the person in question. The second concerns the illegality of means by which a person is brought before national courts.

The conditions that must be satisfied in order for extradition to be granted, namely the existence of an extraditable offence, the guarantee of human rights standards, double criminality and double jeopardy, all serve to protect the person in question from abuses and arbitrary prosecutions. For this reason it is generally prohibited for States to re-extradite a person to a third State. This is only permissible where the consent of the requested State is obtained. Furthermore, the third State will need to meet the requirements both in the original requested and requesting States for re-extradition to be lawful.[1526]

Extradition arrangements do not exist between certain States. In those circumstances and even in circumstances where extradition arrangements do exist some States, in particular the United States, have resorted to extra judicial measures to secure the presence of the person in question for the purpose of prosecution. These measures include abduction, rendition and deportation. Generally

1522 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
1523 *Brown and others v Government of Rwanda and another* [2009] EWCH 770 (Admin).
1524 Ibid para (33).
1525 Ibid para (121).
1526 Cryer (n4) 85.

speaking, these practices breach international law, although in certain situations they may not. It depends on whether the territorial sovereignty of the other State has been violated and whether the human rights of the person in question have been disrespected.

According to the principle, *male captus, bene detentus* ('wrongly captured [but] rightly detained') national courts will continue proceedings in relation to persons irrespective of how they came within their jurisdiction. The trial of Eichmann in Israel is but one example. In that case the Israeli District Court held:

> It is an established rule of law that a person standing trial for an offence against the laws of a state may not oppose his being tried by reason of the illegality of his arrest, or of the means whereby he was brought to the area of jurisdiction of the state. . .[1527]

The District Court went on to say:

> An analysis of these judgments [the *Ker-Frisbie* line of cases exemplifying the *male captus* rule] reveals that the doctrine is not confined to the infringement of municipal laws, as distinct from international law, but the principle is general and comprehensive. . .[1528]

This has come to be known as the 'Eichmann exception' and is usually argued with regard to 'universally condemned offences'.[1529] Although the principle was greatly criticised after the *Alvarez-Machain* case in the US,[1530] its 'revivification' came in the jurisprudence of the ICTY and ICTR.[1531] As the ICTY Appeals Chamber in the *Nikolić* case held:

> the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organisation involved.[1532]

Nonetheless, the Appeals Chamber did hold:

> Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of these abuses. Apart from such exceptional cases, however, the remedy of setting aside jurisdiction will, in the Appeal Chamber's view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.[1533]

1527 *Attorney-General of the Government of Israel v Adolf Eichmann* (n1401) para (41).
1528 Ibid para (47).
1529 Cryer et al (n4) 85.
1530 *United States v Alvarez-Machain* (1992) 112 S Ct 2188. In that case agents from the US Drug Enforcement Agency abducted the Mexican accused from his office in Mexico and took him to Texas where they arrested him. The Supreme Court held that the extra-territorial abduction of the accused did not prohibit his trial in the US.
1531 Robert J Currie, 'Abducted Fugitives Before the International Criminal Court: Problems and Prospects' (2007) 18 Crim LF 349, 360.
1532 *Prosecutor v Dragan Nikolić* (ICTY) Case No IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest (5 June 2003) para (26). The case concerned the illegal abduction of Nikolić by an unknown person from Serbia. Nikolić was put into the boot of a car and smuggled into Bosnia, where he was later arrested by SFOR. The ICTY Appeals Chamber found that Nikolić had not suffered such egregious violations of human rights to dismiss his case before the Tribunal.
1533 Ibid para (30).

The Appeals Chamber agreed with the Trial Chamber's finding that:

> in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused.[1534]

There is national case-law, however, resulting from this stance, notably the decision of the UK House of Lords in *Bennett v Horseferry Road Magistrates* [1993] 3 All ER 138. In that case, Bennett had been kidnapped from South Africa and brought into the UK. The House of Lords held that the Court had the power to enquire into the circumstances by which a person has been brought within the jurisdiction and, if satisfied that it was in disregard of extradition procedures, it may stay the prosecution and order the release of the accused. Thus a Court may dismiss a case not because the accused was not guilty or because he could not receive a fair trial or to discipline the police but to protect the integrity of the criminal justice system.[1535]

Mutual legal assistance

Mutual legal assistance derives from a comity-based system of requests, but is now predominantly based in treaty law. In these treaties a broad variety of measures intended to aid investigation, prosecution and suppression of conduct are included. Although these measures differ within different treaty regimes, the following list embraces the main examples. Mutual legal assistance measures include:

- the taking of testimony;
- the provision of documents, records and articles of evidence;
- the serving of documents;
- the locating of persons;
- the transfer of persons in custody for searches and seizures;
- the freezing of unlawfully obtained assets.

Examples of mutual legal assistance treaties are the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and its two Additional Protocols of 1978 and 2001,[1536] as well as the 2000 UN Convention against Transnational Organized Crime (Palmero Convention)[1537] and the 2003 UN Convention against Corruption.[1538] With regard to international crimes covered in this Chapter, namely genocide, crimes against humanity, war crimes and torture, Article 9 of the 1984 Torture Convention, for example, includes a general obligation of cooperation.[1539]

1534 Ibid para (28).
1535 For a more detailed discussion of the applicability of the *male captus, bene detentus* principle see Robert J Currie, 'Abducted Fugitives Before the International Criminal Court: Problems and Prospects' (2007) 18 Crim LF 349, 349.
1536 European Convention on Mutual Assistance in Criminal Matter (20 April 1959) 72 UNTS 185; Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (13 March 1978) 1496 UNTS 350; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (8 November 2001) CETS No 182.
1537 Convention against Transnational Organized Crime (15 November 2000) GA Res 55/25, UN Doc A/55/383.
1538 United Nations Convention against Corruption (31 October 2003) GA Res 58/4, UN Doc A/58/422.
1539 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

Article 9 of the Torture Convention

1. States parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

The different treaty regimes also contain different grounds on which requests for assistance can be refused. Generally, though, the main justifications for refusal are:

- the crime in question is a political offence;
- the crime in question is a military law offence;
- carrying out the request would be contrary to the public interests of the requested State;
- the principle of double jeopardy would be breached;
- the belief that if the request were granted, the person would be prosecuted or punished on discriminatory grounds;
- the execution of the request would entail the requested State to act in a way that would be illegal in the requesting State.

These grounds carry significant similarities to the grounds upon which extradition may be refused, as discussed above. However, unlike extradition refusal grounds, mutual legal assistance refusal grounds tend to adopt a discretionary formula, allowing refusal on optional grounds.[1540]

Enforcement of penalties

Traditionally, opposition to the enforcement of foreign criminal law was absolute. It applied

> not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.[1541]

However, in recent years with the growing increase in international cooperation a number of exceptions have developed. First, an obligation has been included in a number of international treaties requiring States to recognise foreign criminal judgments. Secondly, a number of international treaties have made provision for the transfer of prisoners to serve their sentences in the administering rather than the sentencing State. Finally, a limited exception has developed in cases of the transfer of criminal proceedings from one State to another.

1540 Robert J Currie, 'Human Rights and International Mutual Legal Assistance: Resolving the Tension' (2000) 11 Crim LF 143, 159.
1541 *Wisconsin v Pelican Insurance Co* (1888) 127 US 265.

RECOGNITION OF FOREIGN CRIMINAL JUDGMENTS

One example of an international treaty on the subject of recognition of foreign criminal judgments is the 1970 European Convention on the International Validity of Criminal Judgments.[1542] This Convention concerns the validity of the final decision of Contracting States' criminal courts in other Contracting States.[1543] It further concerns the validity of sanctions imposed by one Contracting State in other Contracting States. The Convention requires that any punishment imposed in one Contracting State is enforceable in all other Contracting States if (i) the double criminality rule is met, and (ii) if the sanctioned individual would be liable in the other Contracting State since, for example, no rules on immunity would be applicable. The Convention further sets out conditions that must be met in order for a request for enforcement in another Contracting State to be granted. These conditions include better prospects of rehabilitation of the sentenced individual in the other State and that the sentenced person is normally resident in the administering State.

Under the Convention, the domestic laws of the administering State govern enforcement. Nonetheless, either State may exercise the right of amnesty or pardon. The Convention also includes 13 grounds upon which the request of enforcement in another State may be refused. These grounds include:

- The fundamental principles of the domestic criminal law of the requested State would be violated if the request were granted.
- The requested State considers that the crime in question is a political or military one.
- Enforcement would be contrary to the international obligations of the requested State.

Furthermore, the Convention provides that a request must be refused where the double jeopardy rule would be breached.

TRANSFER OF PRISONERS

One example of an international treaty concerning the transfer of prisoners is the 1983 Council of Europe Convention on the Transfer of Sentenced Persons.[1544] Under the Convention, transfer of the individual is possible upon request of either the sentencing or administering State.[1545] In addition, although the individual cannot make a request as such, he or she 'may express his [or her] interest to the sentencing State or to the administering State in being transferred'.[1546]

A number of conditions must be satisfied in order for a request to be granted. These include consideration of the finality of the judgment, the requirement that the individual be a national of the administering State, also that the double criminality rule be met and, finally, that a minimum of six months of the sentence remain. Further, the granting of the request is completely discretionary and there are no provisions on grounds for refusal. Finally, either State party can grant pardon, amnesty or commutation of the sentence in accordance with its domestic laws.

1542 European Convention on the International Validity of Criminal Judgments (28 May 1970) CETS No 70, 973 UNTS 57.
1543 See David McClean, *International Co-operation In Civil and Criminal Matters* (OUP, Oxford 2002) 367–373.
1544 Convention on the Transfer of Sentenced Persons (21 March 1983) CETS No 112.
1545 See McClean (n1543) 378–381.
1546 Article 2(2) of the Convention on the Transfer of Sentenced Persons (21 March 1983) CETS No 112.

TRANSFER OF PROCEEDINGS

One example of an international treaty concerning the transfer of proceedings between States parties that both have jurisdiction over the offence in question is the 1972 European Convention on the Transfer of Proceedings in Criminal Matters.[1547] The Convention makes provision for the transfer of proceedings where the requested State would be in a better position to bring the proceedings to a successful conclusion.[1548] Both the double criminality and double jeopardy rules apply. Furthermore, there are numerous grounds upon which the transfer of proceedings can be denied and in practical terms transfer is difficult since for example evidence collected in the requested State may be inadmissible in the requesting State.

CONCLUDING OBSERVATIONS

Even though a number of exceptions have developed to the existing traditional view that judgments and sentences of foreign criminal courts cannot be recognised in other States, the reality is that these exceptions are applied only very rarely.[1549] In addition, very few States have ratified the international instruments that govern the validity of foreign judgments and sanctions, the transfer of prisoners and the transfer of proceedings.

Concluding remarks

National prosecutions of international crimes can be undertaken where provision has been made in domestic legislation whereby courts can exercise jurisdiction based on territoriality, active nationality, passive nationality or universality. Different advantages and disadvantages pertain to each of these bases of jurisdiction, but in the interests of attaining international criminal justice, States are encouraged to make provision for all four, and many do.

National prosecutions of international crimes can only take place when international crimes are criminalised in domestic legislation. Some international treaties, such as the 1948 Genocide Convention,[1550] require States to criminalise certain conduct and States parties to these treaties have tended to comply with their international obligations. The complementarity principle underlying the ICC has also invigorated the adoption of national legislation concerning international crimes.

Nonetheless, national prosecutions of international crimes face many legal impediments such as amnesties, pardons, immunities, statutes of limitations, double jeopardy and non-retroactivity. In addition, they face the added difficulties associated with extradition, mutual legal assistance and enforcement of penalties. Yet in spite of such setbacks, national prosecutions of international crimes are on the increase and are considered fundamental to the realisation of international criminal justice.

1547 European Convention on the Transfer of Proceedings in Criminal Matters (15 May 1972) CETS No 73.
1548 See McClean (n1543) (193)–(196).
1549 Cryer et al (n4) 88.
1550 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277.

Exercises and case studies

What forms of jurisdiction exist and what are traditional heads of jurisdiction?

Does universal jurisdiction require any link between the crime and the forum State?

Are you in favour of universal jurisdiction? What are the pros and cons of universal jurisdiction?

Once a State ratifies an international treaty dealing with international criminal matters, does it have to modify its domestic laws in order to implement the treaty?

Does the ICC Statute require of States parties that they harmonise their domestic criminal laws with the ICC Statute?

Does the jurisprudence of the international courts and tribunals influence the prosecution of international crimes in your country?

Are States allowed to enact amnesties for genocide, crimes against humanity and war crimes? What about pardons?

Can an acting Head of State be arrested on the basis of an arrest warrant for his or her alleged involvement in the commission of international crimes (genocide, crimes against humanity, war crimes) when travelling abroad? What about a Minister for Interior Affairs who is attending a diplomatic conference abroad or a former Head of State while spending a holiday abroad?

Can a national court try a person who has already been tried by the international court or tribunal?

Case study

After a period of time peace was restored in the region and a Peace Agreement was signed by the Astanian and Bestanian authorities. President Veva of Astania enacted an amnesty law granting amnesty to all Astanians, including the militia forces, who had participated in the war. The amnesty law included President Veva himself. Shortly after, President Veva decided to go into retirement, and having learnt of an international arrest warrant issued against him, fled to a secret island in his private jet.

The arrest warrant had been issued by prosecutors in Dastania, after a group of Bestanians initiated proceedings against former Astanian President Veva in the Dastanian courts. The group of Bestanians consisted of a number of civilians who had managed to escape to Dastania after the 100 day siege of the capital city. They had all been victims of the chemical weapon attacks on the city and had suffered serious burns as a result. In addition, the group consisted of a number of Bestanian soldiers who had been captured and subsequently mistreated in the prison camps in Astania. Therefore, the arrest warrant was for charges of war crimes, crimes against humanity and torture. Since becoming a State party to the ICC Statute, Dastania has criminalised in its domestic law all of the conduct in the ICC Statute in exact terms. Dastania has also made provision for the possible prosecution of crimes under customary international law. Furthermore, Dastania has been a State party to the Torture Convention since 1 January 1990, and has carried out all of its obligations under the Convention.

After a few years, former President Veva fell ill and travelled to Estania for medical treatment. While there, and although using a false identity, he was arrested under the authority of the international arrest warrant. Dastania immediately sought his extradition for the purposes of prosecution. However, Estania was at first reluctant to surrender former Astanian President Veva because Dastania still had the death penalty. Nonetheless, Estania surrendered former President Veva to Dastania since the Dastanian authorities had made assurances that the death penalty would not be imposed.

Questions

What is the basis of jurisdiction for the prosecution of former Astanian President Veva in Dastania?

Can Dastania assert jurisdiction over all of the crimes alleged?

What is the impact of the amnesty granted by former President Veva?

Does it matter that former President Veva was a serving Head of State at the time of commission of the alleged crimes?

What factors did Estania have to take into account before granting the extradition request of former President Veva to Dastania?

Chapter 6 – Prosecution Before the International Courts and Tribunals

Learning objectives

To provide participants with an understanding of how international prosecutions of international criminal law can be undertaken.

To alert participants to the fundamental value of international prosecutions of international criminal law.

To familiarise participants with the organisation and functioning of various international courts and tribunals, namely the structure of their organs, various stages of their procedures and the nature of cooperation between the courts and tribunals and States.

To familiarise participants with the various difficulties that arise in international prosecutions of international criminal law and the possible ways in which such difficulties can be overcome.

Questions

Has your country been involved in cooperation with the international courts and tribunals? Do you know of any particular example of such cooperation?

Have any of the international courts or tribunals had jurisdiction over the international crimes committed in your country or by the nationals of your country?

Have you been involved in an international prosecution of international crimes? If so, in what capacity?

Are you familiar with the procedures before the international courts and tribunals? Are they similar or do they differ from the procedures before the domestic courts of your country?

Introduction

This Chapter deals with prosecution before international courts and tribunals. It will first discuss the relationship between international and national jurisdictions, in particular the principles of primacy and complementarity. It will then outline the organisation and structure of the most important international courts and tribunals. Although proceedings before international courts and tribunals differ from those brought in domestic legal systems, the former are much influenced by the latter, in particular by the common law (adversarial) and civil law (inquisitorial) traditions. In this context, the features of adversarial and inquisitorial systems which have been adopted by the international courts and tribunals will be discussed. The Chapter will then present the general principles that govern international criminal trials before turning to an analysis of each particular stage of the proceedings. Special focus will be placed on the proceedings that have developed for the ad hoc tribunals and the ICC.

Relationship between international and national jurisdictions

International criminal courts and tribunals are not intended to replace national courts in prosecuting crime. Where national courts are willing and able to try individuals for crimes falling within the jurisdiction of the ICTY and ICTR, it is not only permissible but also desirable for them to do so in preference to the tribunals, which do not have the resources to deal with every alleged perpetrator and crime which might fall within their jurisdiction. However, the trials in the national courts must be fair and impartial, and not designed to shield the accused from criminal justice.[1551] The relationship between the international courts and tribunals, and domestic courts, is generally defined in the Statutes of the former. For example, under their Statutes, the ICTY and the ICTR have primacy over national courts whereas the ICC is based on the principle of complementarity with national courts.

Primacy and complementarity

PRIMACY

The ad hoc international tribunals do not have exclusive jurisdiction over crimes that fall within their Statute. Rather, they operate in a concurrent regime with national courts. The tribunals, however, have primacy over national courts.

Article 9 of the ICTY Statute

Concurrent jurisdiction

1. The International Tribunal and national courts shall ***have concurrent jurisdiction*** to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have ***primacy over national courts***. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 8 of the ICTR Statute

Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have ***concurrent jurisdiction*** to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.

1551 John R W D Jones and Steven Powles, *International Criminal Practice* (3rd ed OUP, Oxford 2003) 362.

2. The International Tribunal for Rwanda shall have ***primacy over the national courts*** of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

The rationale behind the primacy of the ad hoc tribunals is two-fold. First, since they were created by the UN Security Council in response to threats to international peace and security, the establishment of the tribunals constitutes an enforcement measure under Chapter VII of the UN Charter. Consequently, all States are obliged to cooperate with the tribunals, and therefore the tribunals are in a position to command that national courts defer jurisdiction to them. Second, there was a perception at the time of the tribunals' creation that national courts would be unwilling and/or unable to prosecute the perpetrators of crimes and to conduct fair trials. At the time of the establishment of the ICTY, the conflict among some of the successors of the former Yugoslavia was still ongoing. It was not expected that the authorities would bring to justice their own people, and it was feared that any proceedings brought against adversaries would be biased. In Rwanda, on the other hand, the national judicial system had collapsed, rendering national prosecutions unlikely, if not impossible, at the time of the ICTR's establishment. Of course, the national judicial systems have since evolved in both the States of the former Yugoslavia and Rwanda, with a domino effect in terms of deferrals and referrals (discussed below).

The Statutes of the tribunals do not define the conditions and manner by which primacy is to be exercised. The rules on primacy are provided for in the Rules of Procedure and Evidence of the ICTY and ICTR. Rule 9 of the Rules of Procedure and Evidence of both the ICTY and ICTR provides that, at the request of the Prosecutor, the tribunal may assert primacy in the following cases:[1552]

ICTY

Rule 9: Prosecutor's request for deferral

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterised as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

1552 The ICTY has held several deferral procedures including Tadić, Bosnian Serb leadership (Karadžić, Mladić and Stanišić), Lašva River Valley, Erdemović, Vukovar and the Macedonian deferrals. ICTR deferral procedures include Ndayambaje, Kanyabashi, Higaniro, Musema, Bagosora and Nahimana, Barayagwiza and Ngeze.

(iii) what is at issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal, the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

ICTR

Rule 9: Prosecutor's application for deferral

Where it appears to the Prosecutor that crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State:

(i) are the subject of an investigation by the Prosecutor;

(ii) should be the subject of an investigation by the Prosecutor considering, inter alia:

  (a) the seriousness of the offences;

  (b) the status of the accused at the time of the alleged offences;

  (c) the general importance of the legal questions involved in the case;

(iii) are the subject of an indictment in the Tribunal,

the Prosecutor may apply to the Trial Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal.

According to Rule 11bis to the Rules of Procedure and Evidence of the ICTY, a case may be referred back to the national courts if the tribunal considers it appropriate. The same Rule is included in the Rules of Procedure and Evidence of the ICTR.

Rule 11bis of the ICTY/ICTR Statute

Referral of the indictment to another court

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the 'Referral Bench'), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

  (i) in whose territory the crime was committed; or

  (ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004)1, consider the gravity of the crimes charged and the level of responsibility of the accused.

To date, eight cases involving 13 persons indicted by the ICTY have been referred to courts of the former Yugoslavia, mainly to Bosnia and Herzegovina and Croatia.[1553] These cases have been tried in accordance with the national laws on the basis of the ICTY indictments and the supporting evidence provided by the ICTY Prosecutor. The increasing use of 11bis Rule was triggered by the 'completion strategy' adopted in 2003 by the UN Security Council for the two ad hoc tribunals with the aim of completing the work of the tribunals within a few years' time. The UN Security Council directed the tribunals to transfer lower level accused to national jurisdictions. Due to its increased workload, the ICTY's resources were to be used to try senior leaders suspected of bearing the greatest responsibility for the crimes committed in the former Yugoslavia. It is therefore appropriate that the national courts of the States involved should take over the trials of the lower-ranking accused. This is now possible because the national courts are better organised, structured and arguably less biased than they were when the ICTY was established.[1554] The ICTR has so far referred two cases to national courts, in both cases to France.[1555]

The SCSL and the STL have also been granted primacy over national courts, however, this primacy is limited to the national courts of Sierra Leone and Lebanon, respectively. Article 8 of the SCSL Statute provides as follows:

Article 8 of the SCSL

Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

1553 The names of the accused and details of the cases are available at <www.icty.org> accessed 30 November 2009.
1554 Cassese (n2) 341.
1555 *Prosecutor v Bucyibaruta* (ICTR) Case No ICTR-05-85 and *Prosecutor v Munyeshyaka* (ICTR) Case No ICTR-05-87.

Article 4 of the STL Statute, attached to UN Security Council resolution 1757 (30 May 2007) defines primacy in the following terms:

Article 4 of the STL

Concurrent jurisdiction

1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.

2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

3. (a) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor;

   (b) At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal;

   (c) The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

COMPLEMENTARITY

The ICC, by contrast with the ad hoc and hybrid tribunals, is based on the principle of 'complementarity', which means that the ICC does not have primacy over national courts but that the exercise of its jurisdiction is subsidiary or complementary to that of national courts. The national courts therefore enjoy priority in the exercise of jurisdiction except under special circumstances, when the ICC is entitled to take over and assert its jurisdiction.[1556] The principle of complementarity is designed to ensure the sovereignty of States remains respected. It also allows the national courts which are generally better equipped to prosecute and try suspects, particularly where the crimes were committed on its territory, to assume jurisdiction on the basis of territoriality, nationality or even universality. The complementarity principle, therefore, should also prevent the ICC from becoming overloaded with cases from all over the world.

1556 Cassese (n2) 342–343.

Preamble of the ICC Statute (para 10)

Emphasising that the International Criminal Court established under this Statute shall be ***complementary*** to national criminal jurisdictions…

Immediately after the Preamble, Article 1 of the ICC Statute reaffirms the complementarity of the ICC in respect of national criminal jurisdictions as regards the 'the most serious crimes of international concern'.

Article 1 of the ICC Statute

The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be ***complementary to national criminal jurisdictions***. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

The relationship of complementarity between national and international jurisdiction is not symmetrical. In ordinary circumstances, national criminal tribunals preserve their jurisdiction with the ICC exercising its role only in those cases in which the domestic criminal system is experiencing some political or practical difficulties in working efficiently, or, in other words, if the State is unwilling or unable genuinely to carry out investigations or prosecutions.[1557]

Pursuant to Article 17 of the ICC Statute, which determines issues of admissibility, the ICC is barred from exercising its jurisdiction over a crime which falls within any of the following categories:[1558]

- The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.
- The case is not of sufficient gravity to justify further action by the Court.

1557 Jones and Powles (n1551) 390.
1558 Article 17(1) of the ICC Statute.

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following criteria exist:[1559]

- The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
- There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

In order to determine inability to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out effective criminal proceedings.[1560] This includes cases where the national court is unable to try a person on account of legislative impediments such as an amnesty law or a statute of limitations.[1561]

The principle of complementarity applies not only with regard to the States parties to the ICC Statute but also with regard to States which are not parties. For example, a national of a non-State party, State A, has committed an international crime on the territory of a State B, party to the ICC Statute. He then escapes to a third State, C, which is also not party to the ICC Statute. State C may assert its jurisdiction, for example, on the basis of universality. The ICC may not exercise jurisdiction if that State is willing and able to conduct a proper and fair trial.[1562]

Furthermore, the complementarity principle applies with regard to all trigger mechanisms of the ICC's proceedings provided in the ICC Statute (Article 13):

- when the case has been brought to the court by a State party (Article 14);
- when the case has been initiated by the Prosecutor *proprio motu* (Article 15);
- when the UN Security Council, acting under Chapter VII of the UN Charter, has referred to the Court a situation in which one or more crimes appear to have been committed (Article 13(b)).

Cooperation under the ICTY, ICTR and ICC

International criminal courts and tribunals need to cooperate with States for their successful operation and the effectiveness of the international judicial process. International criminal courts and tribunals do not have their own enforcement mechanisms or police authorities which would execute their decisions, such as arrest warrants, on the territory of a State. They are therefore dependant on cooperation with States and must turn to State authorities and request them to take action to assist their officers and investigators. In this context, the ICTY Appeals Chamber in Blaškić

1559 Article 17(2) of the ICC Statute.
1560 Article 17(3) of the ICC Statute.
1561 Cassese (n2) 344.
1562 Ibid.

held that enforcement powers must be expressly provided for and cannot be regarded as inherent in an international tribunal.[1563]

The duty of every State to cooperate with the ICTY and ICTR derives from the UN Charter which provides that the decisions of the UN Security Council adopted under Chapter VII for the maintenance of international peace and security are binding upon all member States. The UN Security Council resolutions establishing the ICTY and ICTR lay down the obligation to cooperate with the tribunals. Accordingly, this obligation is binding on all UN member States.[1564] The ICTY extended this duty to self-proclaimed entit(ies) which are de facto exercising governmental functions, whether recognised as States or not, in particular the Bosnian Serb administration in Pale. Under the 1995 Dayton Peace Agreement, this entity became the entity called 'Republika Srpska' within Bosnia and Herzegovina.[1565]

The cooperation between the State and the ICTY was analysed by the Appeals Chamber in Blaškić as follows:[1566]

> In 1993 the Security Council for the first time established an international criminal court endowed with jurisdiction over individuals living within sovereign States, be they States of the former Yugoslavia or third States, and, in addition, conferred on the International Tribunal primacy over national courts. By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a 'vertical' relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned (whereas in the area of enforcement the International Tribunal is still dependent upon States and the Security Council).

The strongly mandatory nature of the obligation to cooperate with the two ad hoc international tribunals, and to comply with their orders, contrasts with the weaker, request-based, cooperative system of the ICC. The difference is due to the fact that the tribunals were established by the UN Security Council acting under Chapter VII of the UN Charter, while the ICC was established by treaty, and the fact that the former enjoy primacy over national courts while the latter is based on complementarity with national courts.[1567] The obligation of the States and entities of the former Yugoslavia to cooperate with the ICTY and to comply with its orders was reaffirmed in the Dayton Peace Agreement, signed on 14 December 1995.

The relation between national courts of different States is 'horizontal' in nature. In contrast, the model used by the tribunals has been referred to as a 'vertical' system which is based on a hierarchical superiority of the tribunals over States. The model used by the ICC has been referred to as a mixture of the 'vertical' and the 'horizontal' systems. The ICC model contains a duty of States to cooperate with the ICC (ie a 'vertical' relationship), but in other respects the model appears closer to a model of inter-State cooperation (ie a 'horizontal' relationship). In particular, the ICC model is based on requests instead of orders, certain grounds allowing States to postpone or refuse cooperation exist, and scope for on-site investigations and compelling individuals to give evidence is limited.[1568]

1563 *Prosecutor v Blaškić* (ICTY) Case No IT-95-14, Appeal Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997) para (25).
1564 Switzerland was, at the time of the establishment of the ICTY, not a member of the UN, but it declared that it would cooperate voluntarily.
1565 Jones and Powles (n1551) 848.
1566 *Prosecutor v Blaškić* (n1563) para (47).
1567 Jones and Powles (n1551) 836–837.
1568 Cryer et al (n4) 406; Jones and Powles (n1551) 837: Antonio Cassese, *International Criminal Law* (2nd ed OUP, Oxford 2008) 349.

Article 29 of the ICTY Statute and the corresponding Article 28 of the ICTR Statute determine in a general way the obligation of States to cooperate with the tribunals and to comply with any request for assistance or order. As regards the ICTY, other details regarding cooperation between the tribunals and the States have been elaborated by the judges in the Rules of Procedure and Evidence, particularly Rules 54 to 61, and the jurisprudence of the tribunal, particularly in the Blaškić Subpoena Appeals Judgment.[1569]

Article 29 of the ICTY Statute/Article 28 of the ICTR Statute

Cooperation and judicial assistance

1. States shall cooperate with the [ICTY/ICTR] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
   (a) the identification and location of persons;
   (b) the taking of testimony and the production of evidence;
   (c) the service of documents;
   (d) the arrest or detention of persons;
   (e) the surrender or the transfer of the accused to the [ICTY/ICTR].

In particular, in their relationship with the ICTY and ICTR, States are not allowed to rely upon traditional clauses for refusing cooperation or extradition, such as 'double criminality', the political offence exception and the constitutional ban on extraditing their own nationals. The ICTY can issue binding orders to States for the handing over of evidence, the arresting of suspects, etc. It can also issue subpoenas to individuals acting in a private capacity. While States are permitted to raise national security concerns as a ground for refusing the transmission of documents or evidence, this right is subject to strict limitations. The ICTY Prosecutor may undertake investigations and gather evidence directly on the territory of the former Yugoslavia, as well as on the territory of those States which have passed implementing legislation authorizing this activity by the ICTY.[1570]

1569 *Prosecutor v Blaškić* (n1563).
1570 Cassese (n2) 344; Jones and Powles (n1551) 840–842; *Prosecutor v Blaškić* (n1563) paras (53)–(54), (61)–(69).

The question arises as to sanctions when States fail to comply with the tribunals' requests or orders. In the case of non-compliance by a State with the obligation to cooperate, the tribunals may make a judicial finding of failure to cooperate, which the ICTY President is then authorised to forward to the UN Security Council. The UN Security Council is then bound by the finding and may not contest it. However, the Security Council retains the discretion of imposing, or not imposing, sanctions. If it is an individual who fails to cooperate, the tribunals may initiate contempt proceedings, even *in absentia*, which may carry with it penal or financial sanctions.[1571]

Orders directed to States for the production of documents are now regulated in Rule 54bis of the ICTY Rules of Procedure and Evidence.

Rule 7bis of the ICTY/ICTR Rules of Procedure and Evidence

Non-compliance with obligations

(A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council.

(B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof.

The ICC cooperation regime, by contrast, is, as set out above, based on the principle of complementarity which favours domestic investigation and prosecutions. The ICC Statute allows States to challenge the ICC's jurisdiction in a given case, which may in turn weaken State cooperation with the ICC. The general obligation to cooperate is defined in Article 86 of the ICC Statute. In addition, the ICC Statute provides a number of specific provisions which determine the content and the scope of States parties' obligations. Article 88 of the ICC Statutes requires States to ensure there are procedures available under their national law for all of the forms of cooperation.

Article 86 of the ICC Statute

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

1571 *Prosecutor v Blaškić* (n1563) paras (36)–(37), (57)–(60); Cassese (n1554) 348.

The duty to 'cooperate fully' is confined to cooperation in accordance with the provisions of the Statute. This means that the ICC cannot request cooperation beyond what the Statute requires. The States, however, may provide additional cooperation voluntarily. In addition to arrest and surrender,[1572] the Statute provides in Article 93 a list of 'other forms of cooperation', such as identifying persons and their whereabouts, the location of items, the taking of evidence, and the production of evidence and the examination of places or sites, including the exhumation and examination of grave sites. Article 93 concludes with a catch-all provision demanding '[a]ny other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court'.

In case of a competing request for surrender or extradition, where the ICC requests the arrest or surrender of a person at the same time as a State which is not party to the ICC Statute, the request from the ICC does not automatically prevail. Article 90(6) of the ICC Statute provides that if the requested State is under an existing international obligation to extradite the person to the requesting non-State party to the Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making the decision, the requested State shall consider all the relevant factors.[1573]

The ICC Statute allows a national security exception to a request for assistance. Article 93(4) provides that '[i]n accordance with article 72, a State party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security'. The procedure envisaged in Article 72 of the ICC Statute aims at persuading a State that wishes to withhold information on national security grounds to disclose as much information as possible.

Article 87(7) of the ICC Statute determines what may happen in the case of a refusal by a State party to cooperate with the ICC. In particular, if the State party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under the Statute, the Court may make a finding to that effect and refer the matter (i) to the Assembly of State parties or, (ii) where the Security Council referred the matter to the Court, to the Security Council. However, the ICC Statute does not spell out the potential consequences of a Court's finding of non-cooperation by a State.[1574]

As regards cooperation between the ICC and States non-parties to the ICC Statute, Article 87(5) provides that the Court may invite any State not party to the Statute to provide assistance on the basis of an ad hoc arrangement, agreement or any other appropriate basis. States non-parties which accept the jurisdiction of the ICC in individual cases are obliged to cooperate with the Court in accordance with the provision of Part 9 of the ICC Statute. Furthermore, the UN Security Council may, when referring a situation to the ICC, require that UN member States cooperate with the Court, regardless of whether those States are parties to the ICC Statute or not.[1575]

1572 See Articles 89, 91, and 92 of the ICC Statute.

1573 Factors that should be taken in consideration include (a) the respective dates of the request; (b) the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and (c) the possibility of subsequent surrender between the Court and the requesting State.

1574 Cassese argues that '[t]he Statute could have specified that the Assembly of States Parties might agree upon countermeasures, or authorize contracting states to adopt such countermeasures, or, in the event of disagreement, that each contracting state might take such countermeasures. In addition, it would have been appropriate to provide for the possibility of the SC's stepping in and adopting sanctions even in cases where the matter had not been previously referred by this body to the Court. . .' Cassese (n1554) 351.

1575 See, eg, Security Council resolution 1593 (2005) on Darfur, SC Res 1593, UN Doc S/RES/1593 (31 March 2005).

States often need to modify their constitutions or to enact new legislation enabling them to cooperate with the ad hoc tribunals and the ICC, as these are new institutions; for example, there may not be any provision under the State's existing extradition arrangements for the transfer of the accused to the tribunals. In fact, the constitutions or laws of many civil law countries lay down the principle that nationals may not be extradited for prosecution abroad. However, States may not invoke their national legislation, including their constitutions, to evade an international obligation but must ensure their national law allows them to comply with their international obligations. Some States, instead of amending their constitutions, have interpreted the international instruments and the constitution as compatible with each other.[1576] The tribunals and the ICC, in order to resolve the problem regarding the constitutional prohibition of extradition, differentiate between 'surrender', meaning transfer of a person by a State to the Court, and 'extradition', meaning the delivering up of a person by one State to another.[1577]

Organisation of the international tribunals

Under the Nuremberg Charter, the IMT comprised four judges (also referred to as 'members') and their alternates, one each appointed by each of the Signatories (the United Kingdom, the United States, France, and the USSR).[1578] Neither a Registry nor a Secretariat was mentioned in the Nuremberg Charter, although the IMT had the support of auxiliary staff. The prosecuting authority consisted of a body which was, in a sense, independent of the IMT, namely the Committee for the Investigation and Prosecution of Major War Criminals,[1579] comprised of four Chief Prosecutors, again one appointed by each Signatory.[1580]

The Tokyo Tribunal differed from the Nuremberg Tribunal in its composition. It consisted of its members numbering between six and 11,[1581] a President, and a Secretariat headed by a General-Secretary to 'organise and direct the work of the Secretariat'.[1582]

The ICTY and ICTR both comprise three organs: the Chambers (ie the judges), the Prosecutor, and a Registry.[1583] At the ICTY and ICTR, the Chambers consist of three Trial Chambers and a common Appeals Chamber. The Defence is not an organ of the tribunals and is thus 'outside' the tribunal's structure.

The ICC has a similar organisation to that of the ICTY and ICTR, with the Presidency as an additional organ which nonetheless corresponds to the Bureaux (see below) introduced by Rule 23 of the ICTY and ICTR Rules of Procedure and Evidence.

1576 Cryer et al (n4) 54.
1577 See Article 29 of the ICTY Statute; Rule 58 of the ICTY Rules of Procedure and Evidence; Article 102 of the ICC Statute.
1578 Article 2 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 August 1945) 82 UNTS 280 (Annex).
1579 Articles 14 and 15 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 August 1945) 82 UNTS 280 (Annex).
1580 John RWD Jones, 'Composition of the Court' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) I *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 235, 237.
1581 Article 2 of the Charter of the International Military Tribunal for the Far East (19 January 1946) TIAS No 1589.
1582 Article 3 of the Charter of the International Military Tribunal for the Far East (19 January 1946) TIAS No 1589. John RWD Jones, 'Composition of the Court' (n1580) 238.
1583 Article 11 of the ICTY Statute; Article 10 of the ICTR Statute.

Article 34 of the ICC Statute

Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Although the ICTY and ICTR Statutes do not refer to a Pre-Trial Division, the ICTY instituted a Pre-Trial Judge by amendment of its Rules of Procedure and Evidence, providing a precedent for the ICC Pre-Trial Division.[1584] The function of the Pre-Trial Judge is to provide judicial control and review over the early stages of an investigation.[1585]

In general, the SCSL follows the organisation of other courts and tribunals by comprising the Chambers, the Prosecution and the Registry as the main organs of the Court. However, unlike the ICTY, ICTR and ICC, the Registrar of the Special Court established a Defence Office which was envisaged as being akin to a public defenders office. Defence Counsel are still assigned at the ICTY to represent individual suspects but the Defence Office provides legal and logistical support.[1586]

The ECCC, which is modelled much more on the inquisitorial system, comprises Chambers, Co-Investigating Judges, Co-Prosecutors and Office of Administration.[1587]

Judges (chambers)

The judges are the centrepiece of any court of law. At all international courts and tribunals, the judges are 'both judge and jury', that is to say both triers of law (judges) and triers of facts (jurors). Thus, the fused trier of fact and trier of law has become the model for the administration of international criminal justice. It is therefore of the utmost importance to ensure the judges possess the necessary impartiality, independence, discretion and good judgment.[1588]

The ICTY and ICTR 'Chambers' is the collective term for the judges, organised into three Trial Chambers and one Appeals Chamber. The Appeals Chamber is common to the ICTY and ICTR. The ICTY Chambers consist of 16 permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of 12 *ad litem* judges.[1589] The ICTR Chambers also consists of 16 permanent judges, although the number of *ad litem* judges is limited to a maximum of

1584 See ICTY Rules 65ter ('Pre-Trial Judge') and 73bis ('Pre-Trial Conference'), both added to the ICTY Rules of Procedure and Evidence at its eighteen plenary session on 9–10 July 1998.
1585 Jones (n1580) 239.
1586 John RWD Jones et al, 'The Special Court for Sierra Leone: A Defence Perspective' (2004) 2 J Int'l Crim Justice 211, 211–230.
1587 See the Law on the Establishment of the ECCC.
1588 Jones (n1580) 241.
1589 Article 12(1) of the ICTY Statute.

nine.[1590] The Presidents of the ICTY and ICTR are elected by the permanent judges of each tribunal from among their number.[1591]

Permanent judges of the ICTY and ICTR are elected by the UN General Assembly, from a list submitted by the UN Security Council, for a term of four years with the possibility of re-election.[1592] They are initially selected from a list of nominees submitted by member States of the UN. As regards the ICTY *ad litem* judges, the General Assembly first elects a pool of 27 *ad litem* judges for a term of four years, with the possibility of re-election. In the case of ICTR, the pool of *ad litem* judges consists of 18 judges. During any term, *ad litem* judges are appointed by the UN Secretary-General, upon request of the President of the ICTY or President of the ICTR, respectively, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years.[1593]

Each ICTY Trial Chamber consists of three permanent judges and, at any one time, a maximum of nine *ad litem* judges.[1594] ICTR Trial Chambers are composed of three permanent judges and a maximum at any one time of six *ad litem* judges.[1595] Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber has the same powers and responsibilities as a Trial Chamber under the Statute.[1596]

Seven of the permanent judges are members of the Appeals Chamber. For each appeal, the Appeals Chamber is composed of five of its members.[1597] The President of the ICTY is a member of the Appeals Chamber and presides over its proceedings. The ICTY President assigns four of the permanent judges to the Appeals Chamber and nine to the Trial Chambers.[1598] Two of the permanent judges of the ICTR are assigned by the President of the ICTR, in consultation with the President of the ICTY, to be members of the Appeals Chamber. The President of the ICTR, who is a member of one of the Trial Chambers, appoints eight other permanent judges to the Trial Chambers of the ICTR.[1599]

All judges, permanent and *ad litem*, should be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In this respect due account is to be taken of the experience of the judges in criminal law, international law, including international humanitarian law, and human rights law.[1600] Additionally, in the process of nomination of the candidates, due account is to be taken of the need for adequate legal representation of the principal legal systems of the world, bearing in mind the importance of equitable geographic distribution.[1601]

1590 Article 11(1) of the ICTR Statute.
1591 Article 14(1) of the ICTY Statute, Article 13(1) of the ICTR Statute.
1592 Article 13bis of the ICTY Statute; Article 12bis of the ICTR Statute.
1593 Article 13ter of the ICTY Statute; Article 12ter of the ICTR Statute.
1594 Article 12(2) of the ICTY Statute.
1595 Article 11(2) of the ICTR Statute.
1596 Article 12(2) of the ICTY Statute; Article 11(2) of the ICTR Statute.
1597 Article 12(3) of the ICTY Statute; Article 11(3) of the ICTR Statute.
1598 Article 14(3) of the ICTY Statute.
1599 Article 14(4) of the ICTY Statute; Articles 13(2) and 13(3) of the ICTR Statute.
1600 Article 13 of the ICTY Statute; Article 12 of the ICTR Statute.
1601 Article 13bis(c) of the ICTY Statute; Article 12bis(c) of the ICTR Statute; Article 13ter(c) of the ICTY Statute; Article 12ter(c) of the ICTR Statute.

As regards the ICC, there are 18 judges of the Court who are elected as full-time members of the Court. The number of the judges may be increased under certain circumstances. The judges are chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. They should have established competence either in criminal law and procedure, including criminal trial experience, or in international law. Judges hold office for a term of nine years, but are not eligible for re-election (subject to some limited exceptions).[1602]

Nominations of candidates for election to the Court may be made by any State party to the ICC Statute. Judges are selected by secret ballot at a meeting of the Assembly of States parties convened for that purpose. The persons elected are the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States parties present and voting. However, no two judges may be nationals of the same State. In the selection of the judges the States parties should also take into account the representation of the principal legal systems of the world, equitable geographic representation and a fair representation of female and male judges.[1603]

The ICC is more hierarchical in its separation of the trial and appellate levels than the ICTY and ICTR, and imposes different requirements for the qualifications and expertise for trial and appellate judges. The Appeals Division is composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The Trial and Pre-Trial Divisions are to be composed predominantly of judges with criminal trial experience.[1604]

The Appeals Chamber is composed of all the judges of the Appeals Division. The functions of the Trial Chamber are carried out by three judges of the Trial Division. The functions of the Pre-Trial Chamber are carried out either by three judges of the Pre-Trial Division or by a single judge of that division. Judges assigned to the Appeals Division serve only in that division. Conversely, the judges from the Trial Division may be temporarily attached to the Pre-Trial Division or vice-versa.[1605]

The ICC Statute treats independence and impartiality separately: Article 40 deals with judicial independence while Article 41(2) deals with judicial impartiality. Article 40 of the ICC Statute specifically requires that the judges be independent in the performance of their functions and must 'not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence'. Judges required to serve on a full-time basis at the seat of the ICC must not engage in any other occupation of a professional nature. Disputes about the independence of judges are to be decided by an absolute majority of the judges, without the participation of the judge in question.[1606]

Under Article 41(1) of the ICC Statute, a judge may, at his own request, be excused by the Presidency from the exercise of a function under the Statute. Article 41(2) of the ICC Statute provides the following grounds for the disqualification of a judge for lack of impartiality or for the appearance of partiality:

1602 Article 36 of the ICC Statute.
1603 See Article 36 of the ICC Statute.
1604 Article 39(1) of the ICC Statute.
1605 See Article 39(2) and (4) of the ICC Statute.
1606 Article 40 of the ICC Statute.

- his or her impartiality might be doubted on any ground in that case;
- the judge has previously been involved in some capacity in the case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted; or
- other grounds as provided in the Rules of Procedure and Evidence.[1607]

Disqualification may be requested by the Prosecutor or the suspect/accused.[1608] The question of disqualification is decided by an absolute majority of the judges. The challenged judge may present his or her observations, but must refrain from voting.[1609]

A comparable provision to Article 41(1) of the ICC Statute is Rule 15(A) of the ICTY's Rules of Procedure and Evidence which provides that '[a] Judge may not sit on a trial or appeal in any case in which he has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality'. Although this provision was designed to allow withdrawal on the grounds of impugned impartiality, it has been applied to allow a judge to withdraw from a case 'without cause', ie without any suggestion of personal interest or bias.[1610] When a party raises an objection against a judge upon the above grounds and applies for his or her disqualification and withdrawal, the matter is determined – if the judge in question does not voluntarily withdraw – by the Bureau.[1611] The ICTR contains a similar provision in Rule 15 of its Rules of Procedure and Evidence.[1612]

The SCSL has two Trial Chambers and one Appeals Chamber. The appointment of the judges reflects the Special Court's hybrid nature. Each Trial Chamber consists of three judges, one appointed by the Government of Sierra Leone and two by the UN Secretary-General. In addition, one alternate judge was appointed by the UN Secretary-General to Trial Chamber II in the case of Charles Taylor. The Appeals Chamber consists of five judges, two appointed by the Government of Sierra Leone and three appointed by the UN Secretary-General. The Presiding Judge of the Appeals Chamber is the President of the Court. The President is elected by a majority of the votes of the judges appointed to the Appeals Chamber for a renewable term of one year. The judges are appointed for a renewable term of three years.[1613]

The ECCC Chambers comprise a Trial Chamber, a Supreme Court Chamber, and a Pre-Trial Chamber (which will be convened only if necessary). A Trial Chamber is composed of three Cambodian judges with one as president, and two foreign judges. The Supreme Court Chamber, which serves as both appellate chamber and final instance, is composed of four Cambodian judges with one as president, and three foreign judges.[1614] A Pre-Trial Chamber may in certain circumstances be specially convened by the Direction of the Office of Administration. If convened, it will comprise three Cambodian judges and two international judges.[1615] Thus in all compositions, Cambodian judges predominate and they may, therefore, always outvote the foreign judges.

1607 See Rule 34 of the Rules of Procedure and Evidence of the ICC.
1608 Article 41(2)(b) of the ICC Statute.
1609 Article 41(2)(c) of the ICC Statute.
1610 *Prosecutor v Milan Kovačević* (ICTY) Case No IT-97-24-T, Order of the President for the Assignment of a Judge to a Trial Chamber (9 April 1998).
1611 Rule 15(B) of the Rules of Procedure and Evidence of the ICTY.
1612 See Rule 15(A) and (B) of the Rules of Procedure and Evidence of the ICTR.
1613 Article 12 and Article 13 of the SCSL Statute.
1614 Article 9 of the Law on the Establishment of the ECCC.
1615 Article 20 and Article 23 of the Law on the Establishment of the ECCC.

The judges of the ECCC, both Cambodian and foreign, are appointed by the Supreme Council of the Magistracy. The foreign judges are appointed from the list of at least seven nominees submitted by the UN Secretary-General.[1616] The judges should be persons of high moral character, impartiality and integrity. They should be independent and must not accept or seek any instructions from any government or any other source.[1617] All these judges are appointed for the duration of the proceedings.[1618] From among the Cambodian judges appointed to serve on the three chambers, the Supreme Council of the Magistracy appoints a president for each chamber.[1619]

The Presidency

The Presidency appears as an organ of an international court for the first time in the Statute of the ICC. While both the Nuremberg and Tokyo Tribunals had Chairmen presiding over the proceedings, there was no organ similar to the ICC Presidency. As stated above, the institution of the Presidency was presaged by the ICTY and ICTR bureaux.[1620] The institution of the Bureau, though not mentioned in the ICTY or ICTR Statutes, was introduced in their respective Rules of Procedure and Evidence. The Bureau is composed of the President, a Vice-President and Presiding Judge of each Trial Chamber. [1621] The Bureau is consulted by the President on 'all major questions relating to the functioning of the Tribunal'.[1622]

The ICC's Presidency consists of the President and the First and Second Vice-Presidents. They are elected by an absolute majority of the judges and are eligible for re-election once. Each of them serves for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. The Presidency is primarily responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor, and for other functions conferred upon it in accordance with the Statute.[1623] These 'other functions' include deciding when judges shall discharge their duties on a full-time basis, proposing increases and reductions in the number of judges, and excusing a judge from a function.

As mentioned, while the Presidency has no responsibility for the administration of the Office of the Prosecutor, as they are separate organs. However, the Presidency does have a duty to 'coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern'.[1624] As regards the division of labour between the Presidency and the Registry, Article 43(1) of the Statute provides that the Registry shall be responsible for 'the non-judicial aspects of the administration and servicing of the Court'.

The Prosecution

Article 14 of the Nuremberg Charter provided that each signatory to the London Agreement on War Criminals 1945 (France, United Kingdom, United States and USSR) should appoint a Chief

1616 Article 11 of the Law on the Establishment of the ECCC.
1617 Article 10 of the Law on the Establishment of the ECCC.
1618 Article 12 of the Law on the Establishment of the ECCC
1619 Article 11 of the Law on the Establishment of the ECCC.
1620 Jones (n1580) 235, 259.
1621 See Article 14(1) and (7) of the ICTY Statute, 13(1) and (7) of the ICTR Statute, Rules 20 and 23 of the Rules of Procedure and Evidence of the ICTY and the ICTR.
1622 Rule 23(B) of the Rule of Procedure and Evidence of the ICTY and ICTR.
1623 Article 38 of the ICC Statute.
1624 Article 38(4) of the ICC Statute.

Prosecutor for the investigation of the charges against and the prosecution of major war criminals. The four Chief Prosecutors[1625] acted as a committee to agree on a work plan and on the defendants to be tried, and to draw up and file the indictments, as well as to suggest draft rules of procedure to be used by the Nuremberg Tribunal.[1626]

Article 8 of the Tokyo Charter provided that the task of investigating and prosecuting should be entrusted to the Chief of Counsel designated by the Supreme Commander for the Allied Powers.[1627] The Chief of Counsel, Joseph B Keenan, from the United States, was also mandated to render such legal assistance to the Supreme Commander as appropriate. He was assisted by Associated Counsel from each of the 11 signatory nations.[1628]

The ICC Office of the Prosecutor (hereinafter OTP) is a separate organ of the Court which acts independently. It is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the OTP is prohibited from seeking or acting on instructions from any external source.[1629]

The ICC OTP is headed by the Prosecutor with full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor is assisted by one or more Deputy Prosecutors, who are authorised to perform any of the Prosecutor's functions. The Prosecutor and Deputy Prosecutor are to be of different nationalities and to serve on a full-time basis.[1630] The Prosecutor and Deputy Prosecutor must:[1631]

- be of high moral character;
- be highly competent in, and with practical experience of, prosecuting criminal cases; and
- have excellent knowledge of, and be fluent in, one of the working languages of the Court.

The ICC Prosecutor is elected by secret ballot by absolute majority of the members of the Assembly of States parties, and Deputy Prosecutors are elected in the same way from a list provided by the Prosecutor. The Prosecutor and Deputy Prosecutors are appointed for a term of nine years unless a shorter term is decided upon at the time of their election. Like the judges, they are not eligible for re-election, with the exception of those initially appointed for a term of three years or less.[1632]

The ICC Prosecutor and the Deputy Prosecutors must not engage in any activities likely to interfere with their prosecutorial functions or independence or in any other occupation of a professional nature.[1633] The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.[1634] They must not participate in any matter in which their impartiality might reasonably be doubted on any ground. They are disqualified if they have previously been

1625 Justice Robert H Jackson from the USA, Sir Hartley Shawcross from the UK, François de Menthon from France, and General R A Rudenko from the USSR.
1626 John R W D Jones, 'The Office of the Prosecutor' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds) I *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 229, 272.
1627 Charter of the International Military Tribunal for the Far East (19 January 1946). TIAS No 1589.
1628 John R W D Jones, 'The Office of the Prosecutor' (n1626) 272.
1629 Article 42(1) of the ICC Statute.
1630 Article 42(2) of the ICC Statute.
1631 Article 42(3) of the ICC Statute.
1632 Article 42(4) of the ICC Statute.
1633 Article 42(5) of the ICC Statute.
1634 Article 42(6) of the ICC Statute.

involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.[1635]

Article 42(9) requires the ICC Prosecutor to appoint advisers with legal expertise on specific issues, including, but not limited to sexual and gender violence and violence against children.[1636]

The ICTY and ICTR OTP is composed of a Prosecutor, a Deputy Prosecutor and such other qualified staff as may be required.[1637] The Deputy Prosecutors and the staff of the OTP are appointed by the UN Secretary-General on recommendation of the Prosecutor.[1638]

The ICTY Prosecutor and the ICTR Prosecutor are responsible for the investigations and prosecution of persons responsible for serous violations of international humanitarian law in the former Yugoslavia and Rwanda, respectively.[1639] Like the ICC Prosecutor, they must act independently as a separate organ of the tribunals and must not seek or receive instructions from any Government or from any other source.[1640] The ICTY and ICTR Prosecutors are appointed by the UN Security Council on nomination by the UN Secretary-General. They serve for a four year term and are eligible for reappointment.[1641]

While the ICC Prosecutor may be assisted by one or more Deputy Prosecutors, the ICTY and ICTR Prosecutors have only one Deputy Prosecutor each who exercises the functions of the Prosecutor in the event of the latter's absence from duty or inability to act or upon the Prosecutor's express instructions.[1642]

The ICTY's OTP consists of an investigations section, comprising investigators who collect evidence, identify and question witnesses and conduct on-site investigations, and a prosecutions section, comprising lawyers who are generally responsible for the conduct of the case before the court. The OTP is assisted by the Military Analyst Team and the Leadership Research Team, whose staff analyse documentary, intercept and open source materials. There is also a Trial Support Unit which assists the trial teams and investigators.

The Prosecutor of the SCSL has the same responsibilities as the ICTY and ICTR Prosecutors, namely investigation and prosecution. The Prosecutor is appointed by the UN Secretary-General; however, his term is limited to three years with the possibility of re-appointment. The Prosecutor is assisted by a Sierra Leonean Deputy Prosecutor.[1643]

At the ECCC, all investigations are the joint responsibility of two investigating judges, one Cambodian and one foreign, referred to as Co-Investigating Judges. They are appointed by the Supreme Council Magistracy – the foreign one upon nomination by the UN Secretary-General – for the period of the investigation. They have the power to question suspects and victims, to hear witnesses, and to collect evidence. They conduct the investigations on the basis of information obtained from any institution, including the Cambodian Government, UN organs and non-governmental organisations. If the

1635 Article 42(7) of the ICC Statute.
1636 Article 42(9) of the ICC Statute.
1637 Article 16(3) of the ICTY Statute; Article 15(3) of the ICTR Statute.
1638 Article 16(5) of the ICTY Statute; Article 15(5) of the ICTR Statute; Rule 38(1) of the Rules of Procedure and Evidence of the ICTY and ICTR.
1639 Article 16(1) of the ICTY Statute; Article 15(1) of the ICTR Statute.
1640 Article 16(2) of the ICTY Statute; Article 15(2) of the ICTR Statute.
1641 Article 16(4) of the ICTY Statute; Article 15(4) of the ICTR Statute.
1642 Rule 38(B) of the Rules of Procedure and Evidence of the ICTY and ICTR.
1643 Article 15 of the SCSL Statute.

Co-Investigating Judges consider it necessary, they may issue orders and requests that the Co-Prosecutors interrogate witnesses. In carrying out their investigations, they may seek the assistance of the Cambodian Government.[1644]

The indictments in the ECCC are the responsibility of two prosecutors, one Cambodian and one foreign, referred to as Co-Prosecutors, who work together to prepare indictments against suspects in the Extraordinary Chambers. The Co-Prosecutor may seek the assistance of the Cambodian Government in carrying out the prosecutions. They are appointed by the Supreme Council Magistracy, the foreign one upon the UN Secretary-General's nomination. Each Co-Prosecutor is appointed for the period of these proceedings.[1645] Any differences between the Co-Investigating Judges or Co-Prosecutors are settled by the Pre-Trial Chamber.[1646]

The Registry

As with domestic courts, international courts and tribunals need a registry or secretariat to service the judges and to manage the court proceedings. However, the role of the Registry in the international courts and tribunals is more complex and diverse, as will be shown below.

The Charter for the Nuremberg Tribunal made no reference to a Registry. The Tokyo Tribunal's Charter, on the other hand, did refer to a Secretariat.[1647]

The ICTY Registry is responsible for the administration and servicing of the tribunals.[1648] In addition, the Registry administers a legal aid system of assigning defence counsel to indigent accused, manages a unit for the protection of victims and witnesses, superintends the UN Detention Unit and maintains diplomatic contact with States and Embassies. It thus combines the diverse roles played in a national system by court registry, legal aid board, social workers, prison service and diplomatic corps.[1649] The same holds true for the ICTR Registry whose organisation and mandate corresponds in every respect to that of the ICTY.[1650]

The Court Management and Support Section of the ICTY Registry supports the work of the Chambers, the Prosecution and the Defence for the purpose of conducting trials. The Registry's task is to make sure that the proceedings before the court run smoothly. In court, the Registry is represented by a court usher and courtroom officers, who keep an official record of events in all hearings and administer exhibits and all filings submitted by the parties to the case. The Registry also has an extensive interpretation and translation section. This is essential, since all court proceedings are interpreted and all documents used by the parties are translated into or from English, French, Bosnian/Croatia/Serbian and/or Albanian and Macedonian.

The Registry is also responsible for bringing witnesses to testify in court, protecting them when necessary and providing them with expert support. In accordance with Rule 34 of the Rules of Procedure and Evidence, the Victims and Witnesses Section, consisting of qualified staff, was set up to recommend protective measures for victims and witnesses and to provide counselling and support for

1644 Article 23, Article 25, Article 26 and Article 27 of the Law on the Establishment of the ECCC.
1645 Article 16, Article 18, Article 19 and Article 21 of the Law on the Establishment of the ECCC.
1646 Article 21 and Article 23 of the Law on the Establishment of the ECCC.
1647 Article 3 of the Charter of the International Military Tribunal for the Far East, (19 January 1946), TIAS No 1589.
1648 Rule 33(A) of the ICTY Rules of Procedure and Evidence.
1649 Jones and Powles (n1551) 83.
1650 See Article 16 of the ICTR Statute and Rules 30, 31 and 33 of the Rules of Procedure and Evidence of the ICTR.

them, in particular in cases of rape and sexual assault.[1651] The Victims and Witnesses Section must be impartial between the Prosecutor and the Defence.

The Office of Legal Aid and Detention Matters ensures all accused are duly represented. Its task includes assigning defence counsel to represent indigent defendants – defendants who cannot afford to pay their own counsel. The Registry also supervises the UN Detention Unit. All accused persons and persons awaiting appeal are detained at the UN Detention Unit during trial and most of them also spend the pre-trial period in detention. Because all accused persons are presumed innocent until proven guilty, the regime in the UNDU is different from that of a prison which is reserved for convicted persons.

The Registry is also a channel for diplomatic contacts between the Tribunal and the international community, addressing a host of issues including cooperation of member States, enforcement of sentences and the relationship with the authorities of the Netherlands, the host country of the tribunal and the UN Detention Unit. The Registry also acts as the administrative organ of a UN body covering a wide range of services, such as public information, security, travel, human resources, finance, archiving and official visits to the Tribunal.

The Registry consists of a Registrar and such other staff as may be required. The Registrar is appointed by the UN Secretary-General after consultation with the President of the ICTY. The Registrar serves for a four-year term and is eligible for reappointment. The Staff of the Registrar is appointed by the UN Secretary-General on the recommendation of the Registrar.[1652] The President must seek the opinion of the judges on the candidates for the post of Registrar before consulting with the UN Secretary-General.[1653] The Registrar, after consultation with the Bureau, makes recommendations to the UN Secretary-General for the appointment of the Deputy Registrar and other Registry staff.[1654]

The ICC Statute provides that the Registry is responsible only for the 'non-judicial' aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor.[1655] This may seem to be a departure from the ICTY and ICTR Statutes, which contain no such limitation, however, the phrase is only intended to ensure the Registry should not interfere with judicial prerogatives. The ICTY and ICTR Registries include judicial departments staffed by lawyers.[1656] The functions of these units are all judicial, or at least legal, in the sense that they involve the interpretation and application of the tribunals' Statute, Rules of Procedure and Evidence and other regulations.[1657] The phrase, 'non-judicial aspects' in the ICC Statute does not exclude the judicial or legal tasks described above and is not intended to affect the Registry's duties to provide for the management of the Court's judicial activities, including scheduling and support services.[1658]

1651 Rule 34 of the Rules of Procedure and Evidence of the ICTY; Article 22 of the Statute of the ICTY.
1652 Article 17 of the ICTY Statute.
1653 Rule 30 of the Rules of Procedure and Evidence of the ICTY.
1654 Rule 31 of the Rules of Procedure and Evidence of the ICTY.
1655 Article 43 of the ICC Statute.
1656 For example, the Court Management and Support Section, the Office of Legal Aid and Detention Matters, UN Detention Unit and Victims and Witnesses Section.
1657 John R W D Jones, 'The Registry and Staff' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds) I *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 275, 276.
1658 David Tolbert, Article 43, in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (Nomos, Baden-Baden 1999) 637, 640.

The ICC Registry is headed by the Registrar, who is the principal administrative officer of the Court. The Registrar exercises his or her functions under the authority of the President of the Court.[1659] The Registrar and Deputy Registrar must both be persons of high moral character, highly competent, and with an excellent knowledge of and fluency in at least one of the working languages of the Court.[1660] The Registrar is elected, by secret ballot, by an absolute majority of the judges, not by the Assembly of States parties, although the judges must take into account any recommendation made by the Assembly.[1661]

A Deputy Registrar is elected only if the need arises, and upon the recommendation of the Registrar. Rule 12(4) of the Rules of Procedure and Evidence provides that the Registrar shall recommend that a Deputy Registrar be elected, and if the Court, by an absolute majority, decides that a Deputy Registrar shall be elected, then the Registrar shall submit a list of candidates to the Court, from which the Deputy Registrar shall be elected. The Deputy Registrar is elected by the same procedure as that for the Registrar. As a corollary to the judges' election of the Registrar and Deputy Registrar, the judges may also remove them, pursuant to Article 46(3).

A Deputy Registrar has, in fact, been appointed for the ICC.

The Registrar serves full time, for a five-year term, and is eligible once for re-election. The Deputy Registrar's term is five years or shorter, as decided upon by a majority of the judges.[1662]

A Victims and Witnesses Unit has been set up within the Registry. This Unit will provide, in consultation with the Office of the Prosecutor, protective measures and security managements, counselling and other appropriate assistance for witnesses and victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The ICC Statute further provides that the Victims and Witnesses Unit is to include staff with expertise in trauma, including trauma-related crimes of sexual violence.[1663]

It should be noted that the ICTY and ICTR Victims and Witnesses Units are not required to consult with the OTP under the ICTY and ICTR Statutes nor in their Rules of Procedure and Evidence. The requirement that the ICC Victims and Witnesses Unit consult with the OTP, but not with the Defence, seems to offend against the principle of equality of arms.[1664]

As regards the Staff of the ICC, the Prosecutor and Registrar separately appoint their staff, which in the case of the Prosecutor includes the appointment of investigators.[1665] At the ICTY and ICTR, the staff of the Registry and the Prosecution are appointed by the UN Secretary-General on the recommendation of the Registrar and the Prosecutor, respectively.[1666]

The Registry of the SCSL has the same tasks as the Registries of other international courts and tribunals, namely the administration and servicing of the SCSL. The Registrar is appointed by the UN Secretary-General for a renewable three-year mandate.[1667]

At the ECCC, the Office of Administration, staffed by Cambodian and international members,

1659 Article 43(2) of the ICC Statute.
1660 Article 43(3) of the ICC Statute.
1661 Article 43(4) of the ICC Statute.
1662 Article 43(5) of the ICC Statute.
1663 Article 43(6) of the ICC Statute.
1664 Jones (n1580) 280.
1665 Article 44(1) of the ICC Statute.
1666 Article 17(4) and 16(5) of the ICTY Statute; Article 16(4) and 15(5) of the ICTR Statute.
1667 Article 16 of the SCSL Statute.

is tasked to service the Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office. The Office is headed by the Director, a Cambodian appointed by the Cambodian Government. The Director is responsible for the overall management of the office, except in the matters that are subject to UN rules and procedures. The Deputy-Director, an international (ie non-Cambodian) appointed by the UN Secretary-General and assigned by the Cambodian Government, is responsible for the recruitment and administration of all international staff.[1668]

The Defence

As in any other court of law, the Defence plays a crucial role at the international courts and tribunals.

> 'A competent defence upholds equality of arms between the Prosecution and the Defence, thereby ensuring the fairness of the proceedings. Furthermore, a competent and vigorous defence contributes to the [. . .] credibility and legitimacy [of the international courts and tribunals] in the eyes of the international community. The confidence the public has in the court depends on the fairness of its trials.'[1669]

All persons indicted by and appearing before the international courts and tribunals have the right to be represented by defence counsel. This right is enshrined in, and elaborated upon, in the Statutes and Rules of Procedure and Evidence of the international courts and tribunals. A suspect who is being questioned by the Prosecutor has the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it.[1670] The accused has the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing. If the accused does not have legal assistance, he should be informed of this right. The accused should have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.[1671] Except where the accused is self-representing, Defence counsel are responsible for conducting the defence throughout all stages of the case.

In accordance with Rule 44 of the Rules of Procedure and Evidence, to become defence counsel before the ICTY or ICTR, a lawyer must fulfil the following qualification requirements:

- He or she must be admitted to practice law in a State or be a university law professor;
- He or she must have written and oral proficiency in one of the two working languages of the Tribunal – English or French. In certain circumstances, counsel privately retained by an accused may obtain a waiver of this requirement from the Registrar, In addition, the Registrar may exceptionally waive this requirement for an assigned co-counsel who does not speak either working language but speaks the language of the accused;

1668 Article 31 of the Law on the Establishment of the ECCC.
1669 Text taken from the ICTY official website <www.icty.org/sections/AbouttheICTY/Defence> accessed 7 May 2009.
1670 Article 18(3) of the ICTY Statute; Article 17(3) of the ICTR Statute; Article 42 of the Rules of Procedure and Evidence of the ICTY and ICTR; Article 55(2) of the ICC Statute.
1671 Article 21(4)(d) of the ICTY Statute; Article 20(4)(d) of the ICTR Statute; Article 67(1)(d) of the ICC Statute.

- He or she must be a member of an association of counsel practising at the Tribunal recognised by the Registrar;
- He or she must not have been found guilty or otherwise disciplined in relevant disciplinary proceedings against him or her in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;
- He or she must not have been found guilty in relevant criminal proceedings;
- He or she must not have engaged in conduct which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the Tribunal or the administration of justice, or otherwise bring the Tribunal into disrepute;
- He or she must not have provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.

In accordance with Rule 45 of the ICTY and ICTR Rules of Procedure and Evidence, suspect or accused persons who cannot afford to pay for counsel are entitled to the assignment of counsel, paid for by the tribunals. If the suspect or the accused has means to remunerate counsel partially, the tribunals will only cover that portion of the costs of the defence which the suspect or the accused cannot bear. The Office for Legal Aid and Detention Matters within the Registry deals with all matters related to the issues of defence and detention at the Tribunal.

For this purpose, the Registrars of the ICTY and ICTR establish and maintain a list of counsel who fulfil all the requirements for qualifications of Counsel. In addition, Counsel must possess established competence in criminal law and/or international humanitarian law/international human rights law and possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings and must have indicated their availability and willingness to be assigned by the tribunals.[1672]

Since 2002, ICTY Defence counsel have been represented through the Association of Defence Counsel practising before the ICTY (ADC-ICTY). The ADC-ICTY is not an organ of the ICTY, but it is an independent professional organisation. The purpose of the association is to support the functioning, efficiency and independence of Defence counsel, to promote and ensure the proficiency and competence of Defence counsel, to make collective representations to the organs of the ICTY on behalf of all defence counsel involved in ICTY cases and to oversee the performance and professional conduct of Defence counsel.[1673] In the ICTR context, the Association des avocats de la defence auprès du tribunal international pour Rwanda was established.[1674]

The ICC defines the criteria and procedures for assignment of legal assistance in the Court's Regulations, which mainly correspond to that of the ICTY and ICTR.[1675] As at the tribunals, the Registrar of the ICC creates a list of counsel meeting the criteria set forth in Rule 22 of the Rules of Procedure and Evidence and the Court's Regulations, from which the counsel are chosen. However,

1672 Rule 45(B) of the Rules of Procedure and Evidence of the ICTY and ICTR.
1673 The ADC-ICTY's official website is available at <www.adcicty.org/> accessed 7 May 2009.
1674 See the Statute of the ADCD available at <http://adadictr.org/adad_statuts.pdf> accessed 17 October 2009.
1675 Rule 21(1) of the ICC Rules of Procedure and Evidence; Regulations 69–72 of the Regulations of the ICC.

Rule 21(2) of the ICC Rules of Procedure and Evidence provides that an accused person or suspect is free not only to choose his or her counsel from this list but may choose other counsel provided that this counsel meets the required criteria and is willing to be included in the list.

To qualify for admission on the list of ICC counsel, a candidate must have established competence in international or criminal law and procedure, as well as the necessary relevant experience in criminal proceedings, whether as a judge, prosecutor, advocate or in another similar capacity. This must amount to at least ten years' experience. In addition, counsel must have excellent knowledge of and be fluent in at least one of the working languages of the Court (English or French) and must not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.[1676]

In contrast to the ICTY and ICTR, the ICC took a step further and created the Office of Public Counsel for the Defence (hereinafter OPCD) pursuant to Regulation 77 of the ICC's Regulations.[1677] The OPCD's main task is to represent and protect the rights of the Defence in the initial stages of the investigation in order to reinforce the equality of arms and to ensure a fair trial.[1678] The OPCD falls within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office.[1679] The OPCD is not considered as a public defenders' office, since suspects or accused persons are guaranteed free choice of Counsel under the ICC Statute. Moreover, any attempt to have a public defenders' office in an international tribunal would almost certainly founder due to the problems which would arise from the same office representing different accused persons with conflicting interests.

The tasks of the OPCD include:[1680]

- Representing and protecting the rights of the Defence during the initial stages of an investigation;
- Providing support and assistance to Defence Counsel and to persons entitled to legal assistance, either by providing legal advice, or by appearing before a Chamber in respect of specific issues;
- Acting as ad hoc Counsel if appointed by a Chamber, or as duty Counsel if selected by a suspect who has not yet secured permanent legal representation;
- In the event of a dispute between the person entitled to legal assistance and his or her Counsel, the Registrar may offer mediation and the OPCD may be requested to act as a mediator.

The SCSL has a similar innovation to the OPCD, namely the Defence Office, headed by the Principal Defender. The main task of the SCSL Defence Office is to ensure the rights of suspects and accused persons, thereby acting as a counterbalance to the Prosecution. While the ICTY and ICTR have administrative bodies to deal with the Defence, neither has a permanent institution within the Court such as the Defence Office of the SCSL. The Defence Office is not itself an independent organ of the SCSL, but it is within the Registry, which is an organ of the court, and within that structure enjoys a high degree of autonomy. The Defence Office provides advice, assistance and representation to suspects and accused persons before the Special Court.[1681]

1676 Rule 22 of the ICC Rules of Procedure and Evidence; Regulations 67 and 69 of the ICC Regulations.
1677 The OPCD was established on paper on 26 May 2004 when the judges adopted the Regulations of the Court and became fully operational following the appointment of its Principal Counsel on 15 January 2007, although it had been operating since April 2006 under an Associate Counsel.
1678 Regulation 77(4) of the ICC Regulations.
1679 Regulation 77(2) of the ICC Regulations.
1680 Regulation 77(4) and (5) of the ICC Regulations.
1681 See Rule 45 of the Rules of Procedure and Evidence of the SCSL.

In addition to administrative functions associated with the assignment of Defence counsel, the SCSL Defence Office monitors trials, and, where requested, particularly at the initial stage, provides advice and substantive assistance to Defence teams in the preparation of their cases, ranging from research on legal issues as needed, to working jointly on arguments on matters of common interest to the accused persons, the provision of expert witnesses, consultants and investigators, both national and international, and liaising with various governments and other entities on matters of judicial cooperation.[1682]

At the ECCC, a Defence Support Section was created to ensure fair trials through effective representation of the accused. The Defence Support Section is an organ of the ECCC. It is responsible for providing indigent accused with a list of lawyers who can defend them, and for providing legal and administrative support to lawyers assigned to work on cases, including the payment of fees. The Defence Support Section also acts as a voice for the defence at outreach events and in the media, liaises with other tribunals and NGOs, runs training courses and organises an internship programme for young lawyers. In order to be assigned as a defence lawyer, it is necessary to be admitted to the Bar of the Kingdom of Cambodia; foreign lawyers may be admitted upon payment of a fee and meeting the relevant requirements.

The international courts and tribunals generally allow accused to represent themselves in person. Indeed this is a human right enshrined in their Statutes, for example, Article 21(4)(d) of the ICTY Statute.[1683] However, this right is not absolute. It may be limited when self-representation substantially and persistently obstructs the proper and expeditious conduct of the trial. The right to self-representation before the international criminal courts and tribunals is further discussed below under 'general principles governing international proceedings'.

The role of amicus curiae *before international tribunals*

Amicus curiae which means 'a friend of the court' has been used in proceedings before international criminal courts and tribunals providing them with arguments, information and expertise, usually in the form of written brief or submission, from non-parties. No general right exists for *amicus curiae* submissions before international criminal courts and tribunals. However, the Rules of Procedure and Evidence of the ICTY, ICTR, SCSL and ICC all include the provision that allows submission of *amicus curiae* briefs. Rule 103(1) of the ICC Statute, which mirrors the provision in Rule 74 of the Rules of Procedure and Evidence of the ICTY, ICTR, and SCSL, provides:

> At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

1682 See also <www.sc-sl.org/ABOUT/CourtOrganization/Defence/tabid/91/Default.aspx> accessed 7 May 2009.

1683 See also Rule 21(4) of the ICC Rules of Procedure and Evidence; Article 20(4)(d) of the ICTR Statute; Article 17(4)(d) of the SCSL Statute; Article 35(d) of the Law on the Establishment of the ECCC.

The status of *amicus curiae* may be acquired either by invitation or by spontaneous application of an individual, State or organisation; however, an *amicus curiae* is not considered a party to the proceedings.[1684] The Chamber has discretion both with regard to conferring the status of *amicus curiae* and as to determining the issues or scope of subject matter addressed by *amicus curiae*. Generally, the Chambers have relied upon *amicus curiae* in two situations: (1) when confronted with complicated legal issues of significance in order to develop legal argument; or (2) when an accused has sought self-representation, in order to argue in favour of the interests of the accused.[1685] In the latter case the *amicus curiae* acts more like an 'uninstructed de facto defence counsel'.[1686]

At the ICTY, for example, in the *Blaškić* case, following the invitation by the Trial Chamber and subsequently the Appeals Chamber, when the matter came under appeal/review, several persons, States and organisations submitted *amicus curiae* briefs on the issue whether *subpoena duces tecum* (see Rule 54 of the ICTY Rules of Procedure and Evidence) could be issued to a sovereign State.[1687] At the ICTR, for example, in *Nahimana et al* case, the Open Society Justice Initiative was granted leave to file *amicus curiae* brief on whether and what kinds of public speech may constitute incitement or instigation to commit genocide or persecution.[1688]

The most significant development in the use of *amicus curiae* came in the *Milošević* case at the ICTY where the accused refused to engage a lawyer to represent him, but expressed his wish to represent himself. In order to assure a fair trial, the Trial Chamber ordered the appointment of three *amicus curiae* to appear at trial. The Trial Chamber stressed that they were not representing the accused, but were appearing in order to assist in proper determination of the case. They were allowed, in particular, to file preliminary or other pre-trial motions, to make any submissions or objections to evidence during the trial proceedings and cross-examining the witnesses as appropriate, and to draw to the Trial Chamber's attention any exculpatory or mitigating evidence.[1689]

In the *Krajišnik* case, the accused requested to represent himself on the appeal. Appeals Chamber appointed his previously assigned counsel as *amicus curiae* to assist the Appeals Chamber by arguing in favour of Mr Krajišnik's interest.[1690] The Appeals Chamber deemed it prudent to appoint *amicus curiae* to keep an eye on Mr Krajišnik's interests since he was the first defendant seeking to self-represent on appeal. Appeals Chamber requested *amicus curiae* to work independently from Mr Krajišnik and, in light of the evidence at issue in the trial record, to submit grounds of appeal seeking reversal of conviction or reduction in sentence and to argue against grounds of appeal advanced by the Prosecution.[1691]

1684 *Prosecutor v Slobodan Milošević* (ICTY) Case No IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case (20 January 2004) para (4); *Prosecutor v Momčilo Krajišnik* (ICTY) Case No IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-represent, on Counsel's Motion in relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007 Appeals Chamber (11 May 2007) para (20).

1685 Daryl Mundis, 'Amicus Curiae' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009); Sarah Williams & Hannah Woolaver, 'The Role of the Amicus Curiae before International Criminal Tribunals' (2006) 6 Int'l Crim L Rev 151, 155.

1686 Gideon Boas, *The Milošević Trial, Lessons for the Conduct of Complex International Criminal Proceedings* (CUP, Cambridge 2007) 254.

1687 *Prosecutor v Blaškić* (n1563), Appeals Chamber, paras (10), (17).

1688 The 'Open Society Justice Initiative' filed a brief on (1) the distinction between hate speech, direct and public incitement to commit genocide and genocide; and (2) the issue whether hate speech could amount to persecution as a crime against humanity. *Prosecutor v Nahimana et al* (ICTR) Case No ICTR-99-52-A, Decision on the Admissibility of the Amicus Curiae Brief Filed by the 'Open Society Justice Initiative' and on its Request to be Heard at the Appeals Hearing, Appeals Chamber (12 January 2007).

1689 *Prosecutor v Slobodan Milošević* (ICTY) Case No IT-99-37-PT, Orders Inviting Designation of Amicus Curiae, Trial Chamber (30 August 2001, 30 October 2001, 23 November 2001). See further Gideon Boas: *The Milošević Trial, Lessons for the Conduct of Complex International Criminal Proceedings* (n1686) 251–257.

1690 *Prosecutor v Krajišnik* (ICTY) Case No IT-00-39-A, Decision [by the Deputy Registrar to Assign Mr Nicholls as Amicus Curiae] (8 June 2007).

1691 *Prosecutor v Krajišnik* (ICTY) Case No IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self-represent, on Counsel's Motion in relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, Appeals Chamber (11 May 2007) paras (18)–(19).

PROCEDURE – INTERNATIONAL CRIMINAL TRIALS

International proceedings before the international courts and tribunals differ substantially from any given domestic legal system. In theory, international criminal proceedings should be inspired by all the principal legal systems of the world. However, in practice, the international courts and tribunals tend to emphasise the common law and civil law traditions, to the exclusion of other world legal systems such as Sharia, Hindu law or African customary law. From the jurisprudence of the international courts and tribunals, in particular that of the ICTY and ICTR, has emerged a unique international criminal procedure which, while not purely adversarial, is predominantly inspired by the common law, adversarial tradition, in which the procedure is 'advocate-led', rather than the inquisitorial tradition in which the procedure is 'judge-led'.[1692]

There are no single set of rules applicable to all international criminal proceedings. Each international court or tribunal has its own rules of procedure and evidence. Usually, the most important general principles governing international criminal trials are provided in the relevant court's Statute, whereas detailed rules on procedure are set out in its rules of procedure and evidence. However, in practice, a number of rules shared by the ad hoc tribunals have been accepted by the States parties to the ICC, which may indicate the beginning of the process of development of general international rules.[1693]

Rules of Procedure and Evidence

In general, the Statutes of the international courts and tribunals do not set out to include all the rules on procedure and evidence. While the ICTY and ICTR Statutes limit themselves to the inclusion of only the most rudimentary provisions, the creators of the ICC Statute departed from this practice of the ad hoc tribunals and included a significantly more elaborated procedural scheme. All three Statutes are complemented by their respective Rules of Procedure and Evidence which regulate the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other matters.

The Rules of Procedure and Evidence of the ICTY and the ICTR are adopted by the judges.[1694] At the outset, the Rules of the ICTY and ICTR were closely modelled on a common law, adversarial system. The main reason for this was the fact that the first proposal for the Rules was by the United States, whose proposal was based on the US Federal Rules of Evidence. The tribunals have since amended the Rules in a number of ways to move away from the adversarial paradigm towards a more inquisitorial approach, thereby combining the elements of both systems.[1695]

By contrast, at the ICC, the judges are not responsible for drafting and adopting the Rules of Procedure and Evidence. This task is entrusted to the Assembly of States parties established by the ICC Statute. The ICC Rules are adopted and amended by the Assembly of States parties voting with a two-thirds majority. Article 51(2)(b) of the ICC Statute does, however, endow the judges with the limited power of acting by an absolute majority to propose amendments to the Rules of Procedure and Evidence. Amendments may also be proposed by any State Party or the Prosecutor. In urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a

1692 Jones and Powles (n1551) 465.
1693 See Cassese (n2) 378.
1694 Article 15 of the ICTY Statute; Article 14 of the ICTR Statute.
1695 Jones and Powles (n1551) 465–466.

two-thirds majority, draw up provisional Rules.[1696]

Although the rigorous method chosen by the ICC for adopting and amending the Rules of Procedure and Evidence may be more cumbersome than the equivalent process at the ad hoc tribunals, it undoubtedly enhances the legitimacy, stability and transparency of the Rules. The ICTY and the ICTR approach, on the other hand, introduces greater flexibility and therefore, arguably, more efficient proceedings,[1697] but at the expense of being open to the charge that the judges are inappropriately acting as 'legislators'.

Features of adversarial and inquisitorial systems

The main differences between the adversarial (common law, Anglo-American) and inquisitorial (civil law, continental European) legal traditions 'concern the degree of the parties' control over the proceedings, the nature and method of fact-finding, and the nature and method of decision-making'.[1698] The ICTY and the ICTR adopted the key common law concepts of 'party autonomy, fact-finding conducted by the parties, and a relatively inactive judiciary';[1699] however, the tribunals also integrated some important features of the inquisitorial system. The ICC remains 'common-law orientated, but at all thresholds a civil-law corrective instrument is implanted'.[1700]

In the adversarial procedure, the parties dominate the proceedings with their respective attempts to persuade the trier of fact (usually a jury) of their case. The parties have the exclusive task of gathering evidence and presenting their case at trial. The judge acts at trial like an umpire/adjudicator listening to the arguments and evidence of the parties and taking decisions of a mainly procedural character. The judge is relatively passive and does not make his or her own enquiries as to the facts, or adopt conclusions of fact not proposed by either party. During the pre-trial investigation the judge is not involved in investigation. The judge may only order coercive measures and decide at the end of the investigation if the evidence is sufficient to commit the accused for trial.[1701]

By contrast, where the procedure is inquisitorial, the judge is actively seeking the truth in cooperation with the parties. The judge controls the trial and may order evidence to be produced in court. The judge may interrogate the accused and witnesses. The parties may adduce additional evidence and suggest supplementary investigations. The judge also plays an important role in gathering the evidence during the pre-trial investigation and decides at the end of the investigations whether the evidence justifies a committal for trial. These pre-trial judges usually do not sit at the trial. The dossier containing the results of the investigation is available not only to the parties but also to the trial bench.[1702]

1696 Article 51 of the ICC Statute.
1697 Fabricio Guariglai, 'The Rules of Procedure and Evidence for the International Criminal Court', in Antonio Cassese, Paola Gaeta and John R W D Jones (eds) II *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 1115.
1698 Alexander Zahar and Göran Sluiter, *International Criminal Law* (OUP, Oxford 2008) 43, citing Mirjan Damaška, *Faces of Justice and State Authority—A Comparative Approach to the Legal Process* (Yale University Press, New Haven 1991).
1699 Ibid.
1700 Alphons Orie, 'Accusatorial v Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds) II *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 1439, 1442–1456.
1701 Ibid at 1442–1443.
1702 Ibid at 1444–1452.

At the ICTY and the ICTR, the Pre-Trial Judge is not involved in collecting the evidence. This task falls on the Prosecutor who submits the indictment to a judge for confirmation and who argues the case before the Court. Once the indictment is confirmed, the Defence is entitled to have disclosure of all relevant evidence (witness statements and exhibits) on which the Prosecution will rely on trial. Disclosure obligations are not the same as between the Prosecution and the Defence reflecting the fact that it is the Prosecution that brings the case and has to prove the accused's guilt beyond a reasonable doubt. The Prosecution must also disclose exculpatory evidence to the Defence. The Defence has to notify the names of its witnesses, and it may have to provide a summary of the witness's testimony in advance of their giving evidence. The Defence is not, however, obliged to serve its witness statements on the Prosecution.

At the trial, the parties present their respective cases as they would in adversarial proceedings: evidence for the prosecution, evidence for the defence, prosecution evidence in rebuttal, and then defence evidence in rejoinder. Each party is entitled to cross-examine the witnesses presented by the other party.[1703] Each party has a right to re-examine its own witnesses.

However, there are some important differences between the ICTY/ICTR procedure and that of common-law systems. For example, there are no technical rules for the admissibility of evidence at the ad hoc tribunals. In the absence of a jury, the judges are solely responsible for weighing the probative value of the evidence before them. While in adversarial systems, the court must be content with the evidence produced by the parties, the tribunal may order the production of additional or new evidence *proprio motu* to ensure it is fully satisfied with the evidence on which its decisions are based. The granting of immunity and the practice of plea-bargaining find no place in the rules. It remains entirely a matter for the Prosecutor to determine against whom to proceed.[1704]

The departure from the pure common law system at the ICTY and ICTR was necessary because the practice has shown that administration of justice according to the adversarial model tends to run into difficulties, and potential paralysis, in complex cases. Accordingly, the ICTY/ICTR judges responded to this problem by introducing a number of new rules in order to improve the efficiency of the procedure. An example is the introduction of a pre-trial judge at the ICTY who coordinates communications between the parties during the pre-trial phase and takes measures necessary to prepare the case for a fair and expeditious trial. He orders the parties to file briefs containing the factual and legal issues they want to raise, the list of witnesses they wish to call and a summary of the facts on which each witness will testify.[1705]

Compared to the ICTY and the ICTR, the ICC treats the common law and civil law systems on a more equal footing. The judge at the ICC is more active in the proceedings than his or her ICTY/ICTR counterpart. The role of the Pre-Trial Chamber is not restricted to facilitating the parties in their efforts, but may proceed on its own initiative in order to preserve evidence that would be essential for the defence at trial which risks becoming unavailable. Although the position of the parties at trial remains generally common-law orientated, many civil law features are still to be found. The most

1703 Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc A/49/342-S/1994/1007 (29 August 1991), para 71. See Rules 39–43, 47, 84, 85, 66–67 of the Rules of Procedure and Evidence of the ICTY.

1704 Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN Doc A/49/342-S/1994/1007 (29 August 1991), paras (72)–(74).

1705 See Rule 65ter of the ICTY Rules of Procedure and Evidence.

notable development is in respect of the enlarged role of the victims at the ICC.[1706]

The procedure of the SCSL replicates the ICTY and the ICTR procedure and is therefore more common law orientated. Article 14 of the SCSL Statute provides that the ICTR Rules shall be applicable *mutatis mutandis* to the conduct of legal proceedings before the Special Court. However, judges of the Special Court are entitled to amend the Rules of Procedure and Evidence or adopt additional rules if necessary. In so doing, they may be guided by the Criminal Procedure Act of 1965 of Sierra Leone. It should be pointed out that, as a former British colony, Sierra Leone's legal system is based on the common law.[1707]

At the STL, on the other hand, 'in the conduct of the trial process, more elements of civil law are evident than of common law'.[1708] The Tribunal's Rules of Procedure and Evidence 'take into account the unique features of the crimes of terrorism falling under its jurisdiction, they are based on the highest fair trial standards and the Lebanese Code of Criminal Procedure. The Rules also draw upon the practice and procedure of other international criminal courts and tribunals'.[1709]

The ECCC are part of the Cambodian legal order and apply Cambodian procedural law, based on the civil law tradition. However, when Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may be sought in procedural rules established at the international level.[1710] Similarly, the procedural law of the East Timor Special Panels consists of the laws applied in East Timor prior to 25 October 1999.[1711]

General principles governing international proceedings

General principles governing international proceedings are drawn from the Statutes and Rules of Procedure and Evidence as well as relevant case law of the international courts and tribunals. These general principles include universal international human rights standards designed to protect defendants in criminal proceedings, such as Article 14 of the ICCPR and Article 6 of the ECHR.

The main general principles governing international proceedings are:

- the requirement that the accused be tried by an independent and impartial court or tribunal;
- the presumption of innocence;
- the requirement that the trial be fair and expeditious;
- the right of the accused to be present during the trial.

Within the requirement that the trial be fair and expeditious the following principles or rights will be discussed:

1706 See Alphons Orie, 'Accusatorial v Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC' (n1700) 1475–1495.
1707 See Article 14 of the SCSL Statute.
1708 Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc S/2006/893 (15 November 2006) para (8).
1709 Statement by the STL President Judge Antonio Cassese on the Adoption of the legal instruments governing the organisation and the functioning of the Special Tribunal for Lebanon, available at <www.stl-tsl.org/sid/59> accessed 6 October 2009.
1710 Article 12(1) of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (6 June 2003) 2329 UNTS 117 (Annex).
1711 Section 3.1 of the UNTAET Regulation 1999/1, UNTAET/REG/1999/1 (27 November 1999).

- rights enshrined in the principle of equality of arms;
- right to a public hearing;
- expeditiousness of the proceedings;
- right to self-representation.

IMPARTIALITY AND INDEPENDENCE OF THE JUDGES

The right of the accused to be tried by an independent and impartial court or tribunal is 'an integral part of the accused's right to a fair trial and a general principle of law recognised by all legal systems of the world'.[1712] This right is based on Article 14(1) of the ICCPR and Article 6(1) of the ECHR.

Article 14(1) of the ICCPR

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing ***by a competent, independent and impartial tribunal*** established by law.

Article 6(1) of the ECHR

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by ***an independent and impartial tribunal*** established by law.

The requirement that judges be impartial and independent is set out in various places in the ICTY, ICTR and ICC Statutes. The most important provisions of the Statutes expressly require that judges be independent, impartial, competent and of high moral character, impartiality and integrity.[1713] The ICC Statute further elaborates that the independence of judges requires that they not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In addition, the ICC Statute expressly prohibits full-time judges from engaging in any other occupation of a professional nature.[1714]

There are a number of mechanisms designed to ensure judges' impartiality and independence: the selection of the judges is bestowed upon a representative body, such as the UN General Assembly, which selects the ICTY and ICTR judges, and the Assembly of the States parties to the ICC Statute, which selects the ICC judges; the mandate of the judges is limited, although the ICTY and ICTR judges are eligible for re-election; judges enjoy privileges and immunities, including from States'

1712 Cryer et al (n4) 354–355.
1713 Articles 12 and 13 of the ICTY Statute; Articles 11 and 12 of the ICTR Statute; Articles 40 and 41 of the ICC Statute.
1714 Article 40 of the ICC Statute and Rule 34 of the ICC Rules of Procedure and Evidence; See also Rule 15 of the ICTY and ICTR Rules of Procedure and Evidence.

jurisdiction, in order to prevent undue interference by States. Finally, the rules of the courts provide for mechanisms for disqualification of a judge and may allow a judge to be excused from the exercise of a function on his or her own initiative.[1715]

PRESUMPTION OF INNOCENCE

The presumption of innocence is practically a universal feature of criminal law, although the precise meaning and implications of the phrase may vary from system to system. The presumption of innocence is enshrined in Article 14(2) of the ICCPR and Article 6(2) which both require that every person charged with a criminal offence has a right to be presumed innocent until proved guilty according to law. The presumption of innocence is provided in ICTY Article 21(3) and ICTR Article 20(3) as one of the fundamental rights of the accused.

Article 21(3) of the ICTY Statute/Article 20(3) of the ICTR Statute

The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

In general, the presumption of innocence means that the person charged with a crime must be treated as being innocent until proved guilty. The ICTY and ICTR Statutes, as well as the human rights instruments, namely ICCPR and ECHR, seemingly limit this right to the 'accused'. However, it has been widely argued that the presumption should also extend to the investigative stage.[1716] The ICC Statute filled this gap by affording this right to 'everyone' which suggests general application. Article 66 of the ICC Statute reads as follows:

Article 66 of the ICC Statute

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

1715 See, eg, Article 41 of the ICC Statute. On the criteria for the disqualification of judges on the grounds of bias see *Prosecutor v Brđanin & Talić* (ICTY) Case No IT-99-36, Trial Chamber's Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge (18 May 2000) para (19); *Prosecutor v Furundžija* (ICTY), Case No IT-95-17/1-A, Appeal Judgment (21 July 2000) paras (189)–(190); *Prosecutor v Sesay, Kallon and Gbao* (SCSL) Case No SCSL-2004-15-AR15, Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (13 March 2004) para (15); *Prosecutor v Sesay, Kallon and Gbao* (SCSL), Case No SCSL-2004-15-T-956, Decision on Sesay, Kallon and Gbao Appeal Against Sesay and Gbado Motion for Voluntary Withdrawal or Disqualification of Hon Justice Bankole Thompson from the RUF Case (24 January 2008) paras (8)–(16).

1716 See Cassese (n2) 381.

The presumption of innocence means, among other things, that the burden of proof is on the prosecution. The prosecution brings the case and the onus is, therefore, on the prosecution to prove that the accused is guilty and not on the accused to prove that he is innocent. In case of doubt the accused must be found not guilty (*in dubio pro reo*). The presumption of innocence relates not only to the burden of proof but also to the standard of proof, thereby requiring that the prosecution must prove the accused's guilt according to a certain standard. Pursuant to the common law approach, which is adopted by the ad hoc tribunals and the ICC, the Prosecutor is required to prove guilt 'beyond reasonable doubt'.[1717] Furthermore, Article 67(1)(i) of the ICC Statute provides that no reversal of the burden of proof is allowed nor any onus of rebuttal.

The presumption of innocence is also reflected in the right not to testify against oneself or to confess guilt (ie privilege against self-incrimination).[1718] Thus, the accused has the right to remain silent, without his silence being a consideration in the determination of guilt or innocence, and the right not to be compelled to incriminate himself or to confess guilt.[1719] Furthermore, if the accused refuses to enter a plea of guilty or not guilty, he must be considered as not having admitted any guilt. At the ICTY and ICTR, where there is a system with formal pleadings, the judge or the Trial Chamber must therefore enter a plea of not guilty on the accused's behalf where his plea is equivocal.[1720] The presumption of innocence principle may also carry with it certain ancillary rules and presumptions, eg, a presumptive right to provisional release.[1721]

FAIR, PUBLIC AND EXPEDITIOUS TRIAL

The principle of fair trial is a fundamental principle for any international criminal procedure. It has attained universal status through the adoption of international and regional human rights instruments, such as Article 14 of the ICCPR, Article 6 of the ECHR and Article 8 of the ACHR. The fair trial guarantees in Article 14 of the ICCPR have been adopted almost verbatim in Article 21 of the ICTY Statute, Article 20 of the ICTR Statute and Article 67 of the ICC Statute.

Article 67 of the ICC Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

   (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

1717 Rule 87(A) of the ICTY and ICTR Rules of Procedure and Evidence.
1718 See Article 21(4)(g) of the ICTY Statute; Article 20(4)(g) of the ICTR Statute; Article 67(1)(g) of the ICC Statute.
1719 See Article 42(A)(iii) of the ICTY and ICTR Rules of Procedure and Evidence; Article 55(1)(a) and 55(2)(b) of the ICC Statute.
1720 Rule 62(A)(iv) of the ICTY and ICTR Rules of Procedure and Evidence.
1721 Jones and Powles (n1551) 580.

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Equality of arms

The principle of the equality of arms is a fundamental element of a fair trial. The basic notion is that each party to the proceedings should be on an even footing. It requires that each party have the opportunity to prepare and present its case, both on the facts and law, and to respond to the opponent's case. The equality of arms means that each party must have a reasonable opportunity to defend its case under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent. Therefore, a judicial body must ensure neither party is put at a disadvantage when presenting its case.[1722] However, equality of arms does not mean equality of means and resources. Thus, the accused's right to have adequate time and facilities to prepare does not imply ensuring parity of resources between the parties, such as the material equality of financial or personal

1722 *Prosecutor v Tadić* (ICTY) Case No IT-94-1-A, Appeal Judgment (15 July 1999) para (48).

resources.[1723] Thus the fact that the Prosecution has a larger budget to prosecute with than the Defence has to defend with does not, in itself, breach the equality of arms principle.

The equality of arms is also reflected in the accused's right to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel; to defence counsel; to examine witnesses against him or her, and to call witnesses under equal conditions. The right to equality of arms also includes the right of the accused to disclosure of and access to the Prosecution's evidence. The accused also has the right to the free assistance of an interpreter if he cannot understand or speak the language used in the court or tribunal.[1724]

Right to a public hearing

The accused has the right to a public hearing which allows public scrutiny of the judicial proceedings in order to ensure the trial is fair and that the rights of the accused are fully respected. However, there are some exceptions to the publicity of the trials which are in line with the ICCPR and ECHR. At the ICTY and ICTR closed sessions or so-called *in camera* proceedings are allowed at the request of one of the parties or *proprio motu* for the following reasons:[1725]

- public order or morality;
- safety, security or non-disclosure of identity of a protected victim or witness;
- protection of confidential or sensitive evidence.

Similarly, the ICC Statute provides that the Trial Chamber may determine that special circumstances require that certain proceedings be in closed session for the purpose of: [1726]

- protection of the accused, victims and witnesses;
- protection of confidential or sensitive evidence.

Expeditiousness of the proceedings

In accordance with the human rights instrument, the Statutes of the ICTY, ICTR and ICC provide the right of the accused to be tried without undue delay. Notwithstanding this explicit requirement, the proceedings before the ad hoc tribunals have often turned out to be unduly protracted. Many accused spent years in detention before their trial finally began. For example, Bagosara spent six years in detention before his trial started at the ICTR. In order to comply with the requirement of trial without undue delay, the ICTY and ICTR have amended their rules and practice to achieve more expeditious proceedings. For example, Rule 73bis of the ICTY Rules of Procedure and Evidence provides as follows:

1723 *Prosecutor v Kayishema & Ruzindana* (ICTR) Case No ICTR-95-1-A, Appeal Judgment (1 June 2001) paras (67)–(69); *Prosecutor v Kordić & Čerkez* (ICTY) Case No IT-95-14/2-A, Appeal Judgment (17 December 2004) para (176).
1724 See Article 21(4) of the ICTY Statute; Article 20(4) of the ICTR Statute; Article 67(1) of the ICC Statute.
1725 Rule 79 of the ICTY and ICTR Rules of Procedure and Evidence.
1726 Article 64(7) and Article 68 of the ICC Statute.

(D) After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged. (Amended 17 July 2003, amended 30 May 2006)

(E) Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 ter, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed. Any decision taken under this paragraph may be appealed as of right by a party. (Amended 30 May 2006)

The problem of delay is a real one but as the international tribunals have matured, they have become more sensitive to the issue and have taken measures to expedite trial proceedings. For instance, while it was once the practice of prosecutors to include all crimes committed by a suspect in an indictment rather than focusing on the most important charges, the latter approach is now preferred.

However, one should bear in mind that investigations and prosecutions of international crimes are factually and legally very complex and time consuming. Usually there is a substantial amount of documentary evidence and a large number of witnesses which results in long trials. Further, the tribunals and the courts are located far from the actual crime scenes and witnesses. For all these reasons it is reasonable to expect that the international proceedings will take much longer than domestic trials.

Right to self-representation

The Statutes of the international court and tribunals generally recognise the right of the accused to defend themselves in person or through legal assistance of the accused's choosing.[1727] This right derives from various international human rights instruments namely Article 14(3) of the ICCPR, Article 6(3)(c) of the ECHR and Article 8(2)(d) of the ACHR. Article 21(4)(d) of the ICTY Statute, Article 20(4)(d) of the ICTR Statute and Article 17(4)(d) of the SCSL Statute define the accused's right to self representation as follows:

1727 Article 21(4)(d) of the ICTY Statute; Article 20(4)(d) of the ICTR Statute; Article 67(1)(d) of the ICC Statute; Article 17(4)(d) of the SCSL Statute.

> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> …
>
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> …

At the ICTY, the right to self-representation of the accused has been recognised in a number of cases, such as Slobodan Milošević, Vojislav Šešelj, Radovan Karadžić and Zdravko Tolimir, all of whom were allowed to conduct their own self-defence during the trial. In the *Krajišnik* case, the accused was allowed to represent himself on his appeal.[1728] At the SCSL, Chief Samuel Hinga Norman opted for self-representation. The right to self-representation is qualified since the accused is required to apply for it and it may be overridden (see below). The application, which can be made before the trial, during the trial or at the appellate stage, must be unequivocal.[1729]

Although the right of self-representation is considered a fundamental right of an accused, it is not absolute and it may be subject to some limitations.[1730] Rule 45 ter of the ICTY Rules of Procedure and Evidence permits a Trial Chamber to instruct the Registrar to assign a counsel to represent the interests of an accused, if it determines that to do so would be in the interest of justice.[1731] The ICTY Appeals Chamber held that the right to self-representation may be curtailed when its exercise by the accused is 'substantially and persistently obstructing the proper and expeditious conduct of his trial'.[1732] The existence of circumstances justifying curtailing the right to self-representation is for the Trial Chamber to determine on a case-by-case basis, in light of all the facts.[1733]

In the *Milošević* case, for example, the Appeals Chamber upheld the Trial Chamber's determination that Milošević's self-representation could be curtailed on account of his poor health on the basis that his health condition had severely disrupted the hearing schedule over the course of at least two and a half years and was likely to continue to undermine the expeditious conduct of the trial, causing it to last an unreasonably long time or even failing to conclude.[1734]

The Appeals Chamber, however, held that any restrictions on the accused's right to represent himself must

1728 *Prosecutor v Krajišnik* (n1691) para (13).
1729 *Prosecutor v Krajišnik* (ICTY) Case No IT-00-39-T, Reasons for Oral Decision Denying Mr. Krajišnik's Request to Proceed Unrepresented by Counsel (18 August 2005) paras (5)–(6), (31).
1730 *Prosecutor v Slobodan Milošević* (ICTY) Case No IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (1 November 2004) paras (11), (13).
1731 The ICTR Rules of Procedure and Evidence provide the same provision in Rule 45 quater.
1732 *Prosecutor v Slobodan Milošević* (ICTY) Case No IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel (1 November 2004) para (13); *Prosecutor v Karadžić* (ICTY) Case No IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings (5 November 2009) para (15).
1733 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel (20 October 2006) para (20).
1734 *Prosecutor v Slobodan Milošević* (n1732) paras (4)–(7), (19).

be guided by a principle of proportionality and thus 'limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial'.[1735] The ICTY Appeals Chamber in *Šešelj* (see the analysis of Šešelj's right to self-representation below) also found that 'an accused should be duly warned' before a Trial Chamber restricts his right to self-representation so that the accused is 'fully and fairly informed and is afforded the opportunity to change the disruptive circumstances, whether resulting from deliberate misconduct or unintentional factors, so as to avoid surrendering those rights'.[1736]

In the *Milošević* case, while the Appeals Chamber affirmed the Trial Chamber's imposition of defence counsel, it reversed the Trial Chamber's working arrangement between Milošević and assigned counsel, which, in the Appeals Chamber's view, sharply restricted the accused's ability to participate in the conduct of his case.[1737] According to the Trial Chamber's arrangement, the accused was allowed, with the leave of the Trial Chamber, to continue to participate actively in the conduct of his case, including, where appropriate, examining witnesses, following examination by court assigned counsel.[1738] Instead, the Appeals Chamber determined that when he was physically capable of doing so, Milošević would take the lead in presenting his case: choosing which witnesses to present, questioning those witnesses before the assigned counsel had an opportunity to do so, arguing any proper motions he desired to present to the court, giving a closing statement when the defence rests, and making the basic strategic decisions about the presentation of his defence.[1739]

In the *Karadžić* case, the Trial Chamber decided to appoint a counsel to represent the interests of Radovan Karadžić at trial because he has 'substantially and persistently obstructed the proper and expeditious conduct of his trial by refusing to attend the proceedings until such time as he considers himself to be ready, despite this [Trial] Chamber's decision, upheld by the Appeals Chamber, that he has had sufficient time to prepare, and the warnings that were given to him by the Chamber'.[1740] The Trial Chamber repeatedly warned the accused that the specific consequences of persisting with his obstructive conduct could be the assignment of counsel to him and the continuation of the proceedings without him therefore giving him ample opportunity to alter his behaviour.[1741] Considering the fundamental nature of the right to self-representation and in accordance with the principle of proportionality, the Trial Chamber allowed Karadžić to continue to represent himself, including dealing with the day-to-day matters that arose, such as the filing of motions and responses to motions filed by the Prosecution, and further preparing himself for the trial.[1742] The appointed counsel will attend the proceedings and remian available to step in at any time the Chamber determines it to be necessary. However, the Trial Chamber held that should Karadžić continue to absent himself from the resumed trial proceedings, or should he engage in any other conduct that obstructs the proper and expeditious conduct of trial, he will forfeit his right to self-representaton, no longer be entitled to assistance from his assigned defence team, and the appointed counsel will take over as an assigned counsel to represent him.[1743]

In *Krajišnik*, the Trial Chamber held that a self-representation would be granted if it was 'unequivoval,

1735 *Prosecutor v Slobodan Milošević* (n1732) para (17).
1736 *Prosecutor v Šešelj* (n1733) para (23) (footnote omitted).
1737 *Prosecutor v Slobodan Milošević* (n1732) para (16).
1738 *Prosecutor v Slobodan Milošević* (ICTY) Case No IT-02-54-T, Order on the Modalities to be Followed by Court Assigned Counsel (3 September 2004) paras (2)–(3).
1739 *Prosecutor v Slobodan Milošević* (n1732) para (19).
1740 *Prosecutor v Karadžić* (n1732) para (21); Status Conference, T. 456 (8 September 2009); IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial (13 October 2009) para (27).
1741 *Prosecutor v Karadžić* (n1732) para (22).
1742 *Prosecutor v.Karadžić* (n1732) para (25).
1743 Ibid para (27).

informed and intelligent' and subsequently denided Krajišnik's application to represent himself because the accused, in the Trial Chamber's view, did not express himself clearly on his application and thus his request failed the equivocation test.[1744] Krajišnik was later allowed by the Appeals Chamber to represent himself on his appeal. However, the Appeals Chamber decided to appoint *amicus curiae* in order to ensure the appeal was a fair one (see above 'The role of *amicus curiae* before the international tribunals').[1745]

The SCSL while recognising that the accused Chief Hinga Norman had a right to self-representation, held that such a right, being qualified and not absolute, could, in the light of certain circumstances, be derogated should the interests of justice so dictate. The Trial Chamber held that Norman's right to self-representation could only be exercised with the assistance of Counsel to be assigned to the trial.[1746] When Norman deliberately refused to appear before the Trial Chamber, the Chamber determined that his right to self-representation should be revoked and the trial would be continued in his absence. The Court transformed Norman's standby counsel into Court appointed counsel to represent Norman in his trial proceedings.[1747]

Where an accused chose to self-represent, he would not necessarily receive all the benefits held by an accused who opts for counsel. The ICTY Appeals Chamber in *Krajišnik* held as follows:

> where an accused elects to self-represent, he is asserting his ability to conduct his case without legal assistance and thus Tribunal funding and legal aid for him can be presumed to be unnecessary to the conduct of a fair trial. To the extent that the accused lacks the ability to conduct his own case and his self-representation is thus 'substantially and persistently obstructing the proper and expeditious conduct of his trial', then the remedy is restriction of his right to self-representation. To allow an accused to self-represent and yet also to receive full legal aid funding from the Tribunal would, as the saying goes, let him have his cake and eat it too.[1748]

The Appeals Chamber, however, considered it appropriate to provide some funding for legal associates designed to assist indigent self-represented accused. Such funding, however, is not to be comparable to that paid to counsel for represented accused particularly since work such as the drafting of written filings should be considered the responsibility of the self-represented accused. The Appeals Chamber held that nonetheless the legal associates should be adequately reimbursed for their coordinating work and for related legal consultation. Consequently, the Registry may impose additional criteria on designated legal associates who seek funding from the Tribunal.[1749]

PRESENCE OF THE ACCUSED AT THE TRIAL

The Statutes of the ad hoc tribunals and the ICC require that the accused be present at trial. Therefore, there are no trials *in absentia* before the ICTY, ICTR and ICC. This requirement originates from the adversarial proceedings where the nature of the proceedings necessitates the attendance of

1744 *Prosecutor v Krajišnik* (n1729) paras (5), (20).
1745 *Prosecutor v Krajišnik* (n1691) paras (11), (13), (18).
1746 *Prosecutor v Norman, Fofana & Kondewa* (SCSL) Case No SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self-representation under Article 17(4)(d) of the Statute of the Special Court (8 June 2004) paras (31)–(32).
1747 *Prosecutor v Norman, Fofana & Kondewa* (SCSL) Case No SCSL-04-14-PT, Ruling on the Issue of Non-Appearance of the First Accused Samuel Hinga Norman, the Second Accused Moinina Fofana, and the Third Accused, Allieu Kondewa at the Trial Proceedings (1 October 2004) para (23).
1748 *Prosecutor v Krajišnik* (ICTY) Case No IT-00-39-A, Decision on Krajišnik Request and on Prosecution Motion (11 September 2007) para (41) (footnote omitted).
1749 Ibid para (42). See also *Prosecutor v Karadžić* (ICTY) Case No IT-95-5/18-PT, Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates (28 January 2009).

the parties. Each party presents its own evidence and the opposite party is allowed to cross-examine the witnesses called to testify. However, this right is not absolute and may be restricted if the accused deliberately disrupts the trial.[1750] For this purpose Article 63(2) of the ICC Statute provides as follows:

> If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

The Appeals Chamber in *Milošević* adopted the same conclusion with regard to the right of an accused to be physically present during his trial as with regard to the right of an accused to respresent himself. Namely, the right of an accused to be physically present during his trial is fundamental but it is not absolute and may thus be limited under certain circumstances.[1751] Rule 80(B) of the ICTY Rules of Procedure and Evidence empowers a Trial Chamber to order the removal of an accused from the courtroom and continue the proceedings in his absence, if the accused has 'persisted in disruptive conduct' following a warning.

Vojislav Šešelj is an example of an accused who has persistently disrupted his trial. When Šešelj decided to represent himself, the Trial Chamber had first assigned a standby counsel to assist him upon considering that he was 'increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance'.[1752] As a result of Šešelj's obstructionist and disruptive behaviour, including intimidation of witnesses, deliberate disrespect for the rules and inappropriate and insulting language, the Trial Chamber concluded that his self-representation 'may substantially and persistently obstruct the proper and expeditious conduct of a fair trial'. Consequently, the Trial Chamber decided that he could not longer represent himself and that his participation in the proceedings would be through assigned counsel.[1753]

The Appeals Chamber overturned the Trial Chamber's decision by which it assigned counsel to represent Šešelj, finding the Trial Chamber failed to formally warn the accused that his self-representation could be revoked if his misconduct continued.[1754] Subsequently, the Trial Chamber restored the standby status of imposed counsel.[1755] Šešelj protested against this decision, repeatedly disrupted the proceedings and refused to remain in court in the presence of standby counsel. Eventually, the Trial Chamber ordered the removal of Šešelj from the courtroom and instructed standby counsel to temporarily take over the conduct of the Defence.[1756]

1750 The behaviour in court of certain high-profile accused has caused many difficulties for the international tribunals; see, eg, Goran Sluiter, 'Compromising the Authority of International Criminal Justice: How Vojislav Šešelj Runs His Trial' (2007) 5 J Int'l Crim Just 529.

1751 *Prosecutor v Slobodan Milošević* (n1732) paras (11), (13). *Prosecutor v Karadžić* (n1732) para (14).

1752 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence (9 May 2003) paras (23), (30).

1753 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-PT, Decision on Assignment of Counsel (21 August 2006) paras (30), (79), (81).

1754 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel (20 October 2006) para (52).

1755 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-PT, Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial (25 October 2006).

1756 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-PT, Status Conference (1 November 2006) paras (627)–(628), (633)–(635), (636).

Notwithstanding the repeated warnings, Šešelj continued to obstruct the proceedings, he refused to attend the hearings, and he even started a hunger strike. As a result the Trial Chamber assigned counsel to take over the proceedings.[1757] The Appeals Chamber, however, once again overruled the decision and the trial resumed with Šešelj representing himself. The Appeals Chamber held the Trial Chamber should not have immediately imposed standby counsel before determining that Šešelj was continuing to behave in an obstructionist manner. The Appeals Chamber ruled that he should be given another opportunity to represent himself without the assistance of counsel.[1758] It will come as little surprise that the lack of control evidenced in the Šešelj proceedings has been heavily criticised.[1759]

At the ICTR, Jean-Bosco Barayagwiza chose not to attend his trial because he did not have confidence that he would be afforded a just and fair trial. In his statement, he challenged the ability of the ICTR to render an independent and impartial justice due to the fact that it was so dependent on the 'dictatorial anti-Hutu regime in Kigali'.[1760] He was represented in his absence by counsel assigned by the ICTR. Barayagwiza refused to provide instructions to assigned counsel. However, he did attend and participate in his appeal through a new legal team.[1761]

Stages of the proceedings

INVESTIGATION AND RIGHTS OF SUSPECTS

At the ICTY and ICTR, the Prosecutor initiates investigations *ex officio* or on the basis of information obtained from any source, particularly from governments, UN organs and intergovernmental and non-governmental organisations. After assessing the information received or obtained, the Prosecutor decides whether there is 'sufficient basis to proceed'.[1762] The Prosecutor enjoys broad discretion to decide whether to start a particular investigation and is therefore not obliged to investigate all crimes fulfilling jurisdictional criteria.[1763] Unlike at the ICC, there is no requirement that the investigation be authorised by a judge.

1757 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-PT, Reasons for Decision (No 2) on Assignment of Counsel (27 November 2006).
1758 *Prosecutor v Šešelj* (ICTY) Case No IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber's Decision (No 2) on Assignment of Counsel (8 December 2006), paras (26)–(30).
1759 See, eg, Goran Sluiter, 'Karadžić on Trial: Two Procedural Problems' (2008) 6 J Int'l Crim Just 617, 620.
1760 See *Prosecutor v Barayagwiza* (ICTR) Case No ICTR-97-19-AR72, Decision (Request for Withdrawal of Defence Counsel) (31 January 2000); ICTR-97-19-T Decision on Defence Counsel Motion to Withdraw (2 November 2000) para (1).
1761 See *Prosecutor v Nahimana et al* (ICTR) Case No ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or A Stay of Proceedings (22 October 2004).
1762 Article 18(1) of the ICTY Statute; Article 17(1) of the ICTR Statute.
1763 Cryer et al (n4) 365.

At the outset, the ICTY Prosecutor first indicted a large number of lower-level perpetrators according to a declared strategy of working up from those cases towards the leadership figures. Soon it was realised, however, that time and resources did not favour this approach, nor was it necessary from an investigative or legal standpoint. Thus, by the time of the second Prosecutor, Louise Arbour, the ICTY Prosecutor began to concentrate on those most responsible for the most serious violations of international humanitarian law.

The ICTR also applied a strategy of going after leadership figures; however, it adopted this strategy from the start, possibly being in a better position to do so than the ICTY. Since the Rwandan conflict ended in a military victory by the Rwandan Patriotic Front (RPF), the Rwandan leadership figures who planned and waged the genocide were all in custody or on the run from the outset; unlike in the former Yugoslavia where the war ended in a stalemate, with leadership figures like Milošević still in power.

In 2004, the UN Security Council adopted resolution 1534 calling upon the ICTY and ICTR 'in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal'. On this basis, the ICTY judges adopted Rule 28(A) of the Rules of Procedure and Evidence according to which the Registrar consults with the President on receipt of an indictment for review from the Prosecutor. The President refers the matter to the Bureau whose task is to establish whether or not indictments issued by the Prosecutor concentrate on the most senior leaders suspected of crimes.[1764]

- At the ICC, investigations may be initiated:
- at the request of a State Party to the Statute;
- by the Prosecutor acting *proprio motu*;
- at the request of the UN Security Council acting under Chapter VII of the UN Charter.[1765]

The alleged victims of crimes or non-governmental organisations acting on their behalf have no right to refer a case to the ICC. However, the Prosecutor may use the information and allegations they might submit.[1766]

In accordance with Rule 53(1) of the ICC Rules of Procedure and Evidence, in deciding whether to initiate an investigation, the Prosecutor must consider whether the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; whether the case is admissible in accordance with the provisions regulating issues of admissibility (Article 17 of the ICC Statute) and whether, taking into account the gravity of the crimes and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

When the Prosecutor decides to initiate an investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the Court, the Prosecutor must analyse the seriousness of the information received.[1767] For this purpose he may seek additional information from States, organs of

1764 Rule 28(A) of the ICTY Rules of Procedure and Evidence. Cassese (n2) 398.
1765 Article 13(b) of the ICC Statute.
1766 Cassese (n2) 396.
1767 Article 15(2) of the ICC Statute.

the UN, intergovernmental organisations or other reliable sources that he deems appropriate. The Prosecutor may receive written and oral testimonies at the seat of the Court. [1768] If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he must submit to the Pre-Trial Chamber a request for authorisation of an investigation.[1769]

Without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case, the Pre-Trial Chamber may authorise the commencement of the investigation, if, upon examination of the request and the supporting material, it considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the ICC's jurisdiction.[1770] By contrast, if a situation is referred by a State party or the UN Security Council, the Prosecutor does not require the authorisation of the Pre-Trial Chamber to initiate an investigation. There is an assumption that the referring State's authorities and Security Council have already screened allegations of crimes or information relating to the possible perpetration of crimes.[1771]

If after a preliminary examination, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he shall inform those who provided the information. However, this should not preclude the Prosecutor from considering further information submitted to him regarding the same situation in the light of new facts or evidence.[1772] Further, the refusal of the Pre-Trial Chamber to authorise an investigation does not preclude the presentation of a subsequent request by the Prosecutor based on new evidence regarding the same situation.[1773]

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of the crimes.[1774] In its referral, the State must, as far as possible, specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.[1775] The ICC Statute does not require that the requesting State be the national State of the victim or the alleged perpetrator, or the State on whose territory the crime has been allegedly committed. Consequently, any State possessing the relevant information may bring it to the attention of the Prosecutor.[1776]

The Prosecutor may also initiate an investigation at the request of the UN Security Council. A decision by the UN Security Council to refer a situation in which one or more crimes under the jurisdiction of the ICC appear to have been committed must be adopted under Chapter VII of the UN Charter as a measure to maintain or restore international peace and security.[1777] The UN Security Council, acting under Charter VII of the UN Charter, is also authorised to defer the investigation or prosecution for a period of 12 months. Article 16 of the ICC Statute reads as follows:

1768 Article 15(2) of the ICC Statute.
1769 Article 15(3) of the ICC Statute.
1770 Article 15(4) of the ICC Statute.
1771 In case of Darfur, for example, the UN Security Council's referred the situation to the ICC by its resolution 1593(2005), based on the report of the International Commission of Inquiry on Darfur contained in UN Doc S/2005/60.
1772 Article 15(6) of the ICC Statute.
1773 Article 15(5) of the ICC Statute.
1774 Article 14(1) of the ICC Statute.
1775 Article 14(2) of the ICC Statute.
1776 Cassese (n1554) 397.
1777 Article 13(b) of the ICC Statute.

Article 16 of the ICC Statute

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

At the ad hoc tribunals and the ICC, the Prosecutor is in charge of the criminal investigation. In the course of investigations, the Prosecutor has the power to question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations. The Prosecutor may undertake such other measures as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants. The Prosecutor may seek the cooperation or assistance of any State or international organisation (eg INTERPOL).[1778]

A special feature of the ICC proceedings is the role of the Pre-Trial Chamber during the investigation. The ICC Statute provides a possibility for a so-called 'unique investigative opportunity' whereby the Pre-Trial Chamber may take measures necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.[1779] In addition, the Pre-Trial Chamber has certain general functions and powers during the investigation, such as issuing orders and warrants, providing for the protection and privacy of victims and the preservation of evidence.[1780] Similarly, at the ICTY and ICTR, a Judge or a Trial Chamber may issue orders, summonses, subpoenas, warrants and transfer orders which are necessary for the purpose of an investigation (or for the preparation or conduct of the trial).[1781]

Another important difference between the ad hoc tribunals and the ICC is the scope of the Prosecutor's investigation, At the ICTY and ICTR, the Prosecutor is not required to investigate exonerating circumstances and collect exculpatory evidence; however, if such evidence is obtained during the investigation, it must be disclosed to the Defence. At the ICC, the Prosecutor must – in order to establish the truth – extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility. In doing so, the Prosecutor must investigate incriminating and exonerating circumstances equally.[1782] This is an example of a feature of the inquisitorial tradition adopted at the ICC.

The Defence should, of course, search for and collect evidence that would refute the charges. At the ICTY and ICTR, the Defence may, just like the Prosecutor, request a judge or a Trial Chamber to issue orders, summonses, subpoenas, warrants and transfer orders which are necessary for the purpose of an investigation or for the preparation or conduct of the trial.[1783] By this means the Defence may secure the

1778 Article 18(2) of the ICTY Statute; Article 17(2) of the ICTR Statute; Rule 39 of the ICTY and the ICTR Rules of Procedure and Evidence; Article 54 of the ICC Statute.
1779 Article 56 of the ICC Statute.
1780 Article 57(3) of the ICC Statute.
1781 Rule 54 of the ICTY and ICTR Rules of Procedure and Evidence. See also Rule 39(iv) of the ICTY and ICTR Rules of Procedure and Evidence.
1782 Article 54(1)(a) of the ICC Statute.
1783 Rule 54 of the ICTY and ICTR Rules of Procedure and Evidence.

necessary cooperation by a State. Similarly, the ICC Statute authorises the Defence to request the Pre-Trial Chamber to issue orders, including the measures necessary to ensure the efficiency and integrity of the proceedings ('unique investigative opportunity'). In addition, the Defence may seek cooperation by a State party as may be necessary to assist in the preparation of the defence.[1784]

During an investigation, a suspect enjoys certain rights of which the suspect needs to be informed prior to being questioned. A suspect who is questioned has the right to remain silent and to be cautioned that any statement he makes shall be recorded and may be used in evidence: he is also entitled to legal assistance and interpretation.[1785] The ICC Statute requires that these rights must be respected not only by the ICC Prosecutor, but also by national authorities when they conduct the questioning on behalf of the ICC.[1786] In addition, Article 55(1) of the ICC Statute lists certain fundamental rights of any person:

> 1. In respect of an investigation under this Statute, a person:
>
> (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
>
> (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
>
> (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
>
> (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

At the ICTY and ICTR, the Prosecutor is entitled to transmit to the Registrar, for an order by a judge, a request for the transfer of a suspect and for his or her provisional detention in the premises of the detention unit of the Tribunal.[1787] In urgent cases, the Prosecutor may request any State to arrest a suspect or an accused provisionally, to seize physical evidence, and to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.[1788] At the ICC, only the Pre-Trial Chamber issues warrants of arrest and other orders requested by the Prosecutor.[1789] As mentioned, the ICC Pre-Trial Chamber may take measures to collect and preserve evidence which may subsequently become unavailable for the purpose of a trial.[1790]

1784 Article 57(3) of the ICC Statute.
1785 Article 18(3) of the ICTY Statute; Article 17(3) of the ICTR Statute; Rule 42 of the ICTY and ICTR Rules of Procedure and Evidence; Article 55(2) of the ICC Statute.
1786 Article 55(2) of the ICC Statute.
1787 Rule 40bis(A) of the ICTY and ICTR Rules of Procedure and Evidence.
1788 Rule 40 of the ICTY and ICTR Rules of Procedure and Evidence.
1789 Article 58 of the ICC Statute.
1790 Article 56 of the ICC Statute.

PRE-TRIAL PROCEEDINGS

Indictment

At the ICTY, ICTR and SCSL, the Prosecutor has the task of drawing up indictments based on investigations conducted by the investigators in the Office of the Prosecutor. The Prosecutor may prepare an indictment in the course of an investigation upon determining that a *prima facie* case exists. In particular, the Prosecutor must be satisfied that there is 'sufficient evidence to provide reasonable grounds for believing' that a suspect has committed a crime within the jurisdiction of the Tribunal.[1791] The indictment, together with the supporting material which provides the evidence in support of the charges, is then transmitted to a judge of the Trial Chamber for confirmation. The indictment must contain the name and particulars of the suspect, and a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.[1792]

At the ICTY and ICTR, the judge of the Trial Chamber to whom the indictment has been transmitted reviews the indictment. After examining each of the counts in the indictment and any supporting material provided by the Prosecutor the judge may:[1793]

- confirm the indictment if he or she is satisfied that a *prima facie* case has been established by the Prosecutor;
- dismiss the indictment if he or she is not satisfied that a *prima facie* case has been established;
- request the Prosecutor to present additional material in support of any or all counts; or
- adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

The reviewing judge takes the decision regarding the confirmation of the indictment in a hearing that is *ex parte* (without the presence of the suspect or his counsel) and held *in camera*. Upon the confirmation of the indictment, the suspect acquires the status of an 'accused'. In addition, once the indictment is confirmed, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.[1794] It should be noted that the dismissal of a count in an indictment does not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.[1795]

Under the ICTY and ICTR Rules of Procedure and Evidence, the indictment may be amended or withdrawn at any time before its confirmation, without leave. Between its confirmation and the assignment of the case to a Trial Chamber, the indictment may be amended or withdrawn only with the leave of the judge who confirmed the indictment, or a judge assigned by the President. After the assignment of the case to a Trial Chamber, the indictment may be amended only with leave of that Trial Chamber or a judge of that Chamber, after having heard the parties. The indictment may be

1791 Rule 47(B) of the ICTY and ICTR Rules of Procedure and Evidence.
1792 Article 18(4) of the ICTY Statute; Article 17(4) of the ICTR Statute; Rule 47(c) of the ICTY, ICTR and SCSL Rules of Procedure and Evidence.
1793 Article 19(1) of the ICTY Statute; Article 18(1) of the ICTR Statute; Rule 47(E) and (F) of the ICTY and ICTR Rules of Procedure and Evidence.
1794 Article 19(2) of the ICTY Statute; Article 18(2) of the ICTR Statute; Rule 47(H) of the ICTY and ICTR Rules of Procedure and Evidence.
1795 Rule 47(I) of the ICTY and ICTR Rules of Procedure and Evidence.

withdrawn at this stage by motion before the Trial Chamber.[1796]

At the ICTY and ICTR, the indictment is generally made public upon its confirmation.[1797] However, the indictment may be kept under seal until it is served on the accused in order, for example, to facilitate the arrest of the accused or protect confidential information.[1798] This issue does not arise at the ICC, since the confirmation of an indictment is not a prerequisite for the issuance of an arrest warrant. Additionally, the arrest warrant itself does not have to be made public.[1799]

At the ICC, at the end of the investigation the Prosecutor may decide that there is a reasonable basis for a prosecution. The Prosecutor then requests the Pre-Trial Chamber to issue either a warrant of arrest or summons to appear by filing an application pursuant to the provisions of Article 58(2) and (7) of the ICC Statute. This application is broadly equivalent to the indictment prepared by the Prosecutor of the ICTY and ICTR.[1800] In particular, it must contain the name of the persons, a specific reference to the alleged crime committed, a concise statement of the facts and a summary of the evidence.[1801] The application serves as a 'provisional indictment' and the issuance of the warrant or summons by the Chamber constitutes a 'provisional confirmation of an indictment'.[1802] The Pre-Trial Chamber must grant the Prosecutor's application if it comes to the conclusion that there are reasonable grounds to believe that the suspect has committed a crime within the jurisdiction of the Court and that the suspect's arrest is necessary to ensure his presence at the trial, to ensure he does not obstruct the investigation or to prevent the continued criminal conduct.[1803]

After the person's surrender or voluntary appearance before the ICC, the Pre-Trial Chamber holds a hearing for the confirmation of the charges on which the Prosecutor intends to seek trial.[1804] The hearing is held in the presence of the Prosecutor and the person charged, as well as his or her counsel. The Pre-Trial Chamber may hold a confirmation hearing in the absence of the person charged when the person has waived his or her right to be present or fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held. In that case, the person is represented by counsel when the Pre-Trial Chamber determines that it is in the interests of justice.[1805]

In light of the confirmation hearing by the Pre-Trial Chamber, the 'provisional indictment' contained in the application under Article 58(2) is subsequently modified, completed, and made 'formal' by the Prosecutor.[1806] The Prosecutor must, no later than 30 days before the confirmation hearing, provide to the Chamber and to the defendant a document regarded as the 'formal indictment', containing a detailed description of the charges together with a list of the evidence on which the Prosecutor intends to rely at the hearing for the purposes of confirmation.[1807] Before the confirmation hearing, the Prosecutor may amend or withdraw any charges, provided that the amended indictment is

1796 Rules 50(A) and 51(A) of the ICTY and ICTR Rules of Procedure and Evidence; Rule 73 of the ICTY and ICTR Rules of Procedure and Evidence.
1797 Rule 52 of the ICTY and ICTR Rules of Procedure and Evidence.
1798 Rule 53 of the ICTY and ICTR Rules of Procedure and Evidence.
1799 Cryer (n1382) 380.
1800 Giulano Turone, 'Powers and Duties of the Prosecutor' in Antonio Cassese, Paola Gaeta and John R WD Jones (eds) II *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002) 1137, 1177–1178.
1801 Article 58(2) and (7) of the ICC Statute.
1802 Turone (n1800) 1178.
1803 *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) paras (15), (28)–(34).
1804 Article 61(1) of the ICC Statute.
1805 Article 61(2) of the ICC Statute.
1806 Turone (n1800) 1178.
1807 Article 61(3) of the ICC Statute; Rule 121(3) of the ICC Rules of Procedure and Evidence.

notified no later than 15 days before the hearing.[1808]

The purpose of the confirmation hearing is to enable the Pre-Trial Chamber to determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. The Pre-Trial Chamber may:[1809]

- confirm the charges or some of them, and commit the accused to a Trial Chamber for trial on charges as confirmed;
- decline to confirm the charges in relation to which it has been determined that there is insufficient evidence; or
- adjourn the hearing to enable the Prosecutor to submit further evidence or amend the charges.

Accordingly, the Prosecutor has the opportunity to carry out supplementary investigations after the issuance of the 'provisional indictment' under Article 58(2). Thus, the Prosecutor may:[1810]

- continue the investigation in order to complete, amend, and finalise the charges in light of the confirmation hearing;[1811]
- conduct further investigations with regard to a particular charge upon the request of the Chamber following an adjournment of the confirmation hearing;[1812]
- continue the investigation in order to seek additional evidence when the Chamber declines to confirm a charge and in anticipation of a subsequent request of confirmation of that charge.[1813]

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks additional charges or to substitute more serious charges, a confirmation hearing to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw charges.[1814] If the Pre-Trial Chamber declines to confirm the charges, the Prosecutor is not precluded from subsequently requesting their confirmation if the request is supported by additional evidence.[1815]

If upon investigation, the ICC Prosecutor concludes that there is not a sufficient basis for a prosecution because there is an insufficient legal or factual basis to seek a warrant or summons (Article 58 of the ICC Statute); the case is inadmissible (Article 17 of the ICC Statute); or a prosecution is not in the interests of justice, taking into account all the circumstances (including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime), the Prosecutor informs the Pre-Trial Chamber and the State making a referral or the UN Security Council in the case of a Security Council referral, of his conclusion and the reasons for the conclusion.[1816]

At the request of the referring State or the UN Security Council, the Pre-Trial Chamber may review

1808 Article 61(4) of the ICC Statute; Rule 121(4) of the ICC Rules of Procedure and Evidence.
1809 Article 61(7)(a) of the ICC Statute; Rule 129 of the ICC Rules of Procedure and Evidence.
1810 Turone (n1800) 1178.
1811 Article 61(4) of the ICC Statute.
1812 Article 61(7) of the ICC Statute.
1813 Article 61(8) of the ICC Statute
1814 Article 61(9) of the ICC Statute.
1815 Article 61(8) of the ICC Statute.
1816 Article 53(2) of the ICC Statute.

the decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision.[1817] In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on the grounds that the prosecution is not in the interests of justice (Article 53(1)(c) and 2(c)). In such a case, the decision of the Prosecutor is effective only if confirmed by the Pre-Trial Chamber.[1818] However, the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.[1819]

As described above, at the ICTY and ICTR, the arrest warrant may be, and usually is, issued by the judge following the confirmation of the indictment in whole or in part.[1820] It must be signed by a permanent judge and it must include an order for the prompt transfer of the accused to the relevant tribunal upon his or her arrest. The warrant is accompanied by the indictment and a statement of the accused's rights.[1821] As indicated in the section dealing with investigations, in urgent cases, the Prosecutor may request any State to arrest the suspect provisionally without an arrest warrant.[1822] However, the subsequent transfer and provisional detention of a suspect in the premises of the detention unit require an order issued by a judge.[1823]

Upon being transferred to the seat of the ICTY or ICTR, the accused is detained in facilities normally provided by the host country.[1824] The Trial Chamber may order provisional release if it is satisfied that the accused will appear for trial and, if released will not pose a danger to any victims, witnesses or other persons.[1825] The Trial Chamber may impose such conditions upon the release of the accused as it determines appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.[1826] Provisional release, or bail, has in fact been ordered in respect of several ICTY accused persons.

At the ICC, the arrest warrant is always issued by the Pre-Trial Chamber on the application of the Prosecutor (considered as the 'provisional indictment' given its content). Article 58 of the ICC Statute provides for a separate procedure for issuing a warrant of arrest. The arrest warrant normally precedes the confirmation of the charges. Two main requirements need to be satisfied for a warrant to be issued, namely that there are reasonable grounds to believe that the person has committed a crime and that the arrest of the person appears necessary for the following reasons:[1827]

- to ensure that person's appearance at trial;
- to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
- to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

Persons detained pursuant to a warrant of arrest issued by the ICC may apply for interim release

1817 Article 53(3)(a) of the ICC Statute.
1818 Article 53(3(b) of the ICC Statute.
1819 Article 53(4) of the ICC Statute.
1820 Rule 47(H)(i) of the ICTY and ICTR Rules of Procedure and Evidence.
1821 Rule 55 of the ICTY and ICTR Rules of Procedure and Evidence.
1822 Rule 40 of the ICTY and ICTR Rules of Procedure and Evidence.
1823 Rule 40bis of the ICTY and ICTR Rules of Procedure and Evidence.
1824 Rule 64 of the ICTY and ICTR Rules of Procedure and Evidence.
1825 Rule 65(A) and (B) of the ICTY and ICTR Rules of Procedure and Evidence.
1826 Rule 65(C) of the ICTY and ICTR Rules of Procedure and Evidence.
1827 Article 58(1) of the ICC Statute.

pending trial. The same conditions need to be assessed by the Pre-Trial Chamber when it decides upon such request. If the Pre-Trial Chamber is satisfied that the conditions set forth in Article 58(1) of the ICC Statute are met, the person shall not be released.[1828] As at the ICTY and ICTR, the ICC arrest warrant must contain the name of the persons and any other relevant information, a specific reference to the crimes for which the person's arrest is sought, and a concise statement of the facts which are alleged to constitute those crimes.[1829]

The ICC Statute introduces an innovative procedure whereby a summons to appear may be issued which serves as an alternative to issuing an arrest warrant. The Pre-Trial Chamber can issue the summons to appear on the application by the Prosecution if it is satisfied that there are reasonable grounds to believe that the person committed the crimes alleged and that a summons is sufficient to ensure the person's appearance. A summons may be issued with or without conditions restricting liberty (other than detention) if provided for by national law. The summons contains the same information that the arrest warrant with the addition of the specified date on which the person is to appear. The summons must be served on the person.[1830] Notably, this procedure has already been used, with respect to Bahr Idriss Abu Garda, suspected of crimes in Darfur, Sudan, who was summoned to appear and duly appeared at the ICC on 18 May 2009.[1831]

Unlike at the ICTY and ICTR, the ICC Statute provides for compensation to anyone who has been the victim of unlawful arrest or detention. Compensation may also be awarded to convicted persons if the Court finds conclusively that there has been a miscarriage of justice.[1832]

Preparation for the trial

At the ICTY and ICTR, the pre-trial proceedings begin with the initial appearance of the accused. Upon the accused's transfer to the seat of the tribunal, he is brought before the Trial Chamber or a judge without delay. In this initial hearing, the judge or the Trial Chamber reads the indictment to the accused (unless the accused waives the right to have the entire indictment read). The Chamber must also satisfy itself that the accused understands the nature of the charges and that the right of the accused to counsel is respected. The accused is then asked whether he pleads guilty or not guilty.[1833]

If the accused pleads guilty, the Trial Chamber enters a finding of guilty provided that the requisite conditions set out in Rule 62bis are met, namely the guilty plea must have been made voluntarily, must be informed, must be unequivocal, and there must be a sufficient factual basis for the crime and for the accused's participation in it. The Trial Chamber then instructs the Registrar to set a date for the sentencing hearing.[1834] The Prosecutor and the Defence may agree on the basis upon which the accused will plead guilty, for example, on the basis that the Prosecutor will amend the indictment or support a particular sentence. However, the Trial Chamber is not bound by any such agreement.[1835]

If the accused pleads not guilty, the Presiding Judge of the Trial Chamber, no later than seven days

1828 Article 60(2) of the ICC Statute.
1829 Article 58(3) of the ICC Statute.
1830 Article 58(7) of the ICC Statute; Rule 119 of the ICC Rules of Procedure and Evidence.
1831 *Prosecutor v Bahr Idriss Abu Garda* (ICC) Case No ICC-02/05-02/09-1, Decision on the Prosecutor's Application under Article 58 (7 May 2009).
1832 Article 85 of the ICC Statute; Rules 173–175 of the ICC Rules of Procedure and Evidence.
1833 Article 20(2) and (3) of the ICTY Statute; Article 19(2) and (3) of the ICTR Statute; Rule 62 of the ICTY and ICTR Rules of Procedure and Evidence.
1834 Rule 62(A)(vi) of the ICTY Rules of Procedure and Evidence and Rule 62(A)(v) of the ICTR Rules of Procedure and Evidence; 62bis of the ICTY Rules of Procedure and Evidence; 62(B) of the ICTY Rules of Procedure and Evidence.
1835 Rule 62ter of the ICTY Rules of Procedure and Evidence; Rule 62bis of the ICTR Rules of Procedure and Evidence.

after the initial appearance of the accused, designates from among its members a Pre-Trial Judge responsible for the Pre-Trial proceedings. The Pre-Trial Judge coordinates communication between the parties during the Pre-Trial phase and ensures the proceedings are not unduly delayed. The Pre-Trial Judge may take any measures necessary to prepare the case for a fair and expeditious trial. The Pre-Trial Judge is entrusted with all the Pre-Trial functions, such as ordering disclosure and holding the Pre-Trial and Pre-Defence conferences.[1836]

The most important part of the Pre-Trial proceedings is disclosure by the Prosecution. Disclosure refers to the service of documents or information by the Prosecution on Defence and vice-versa. Disclosure is governed by Rules 66 to 68 of the ICTY's Rules of Procedure and Evidence, and in the corresponding provisions of the ICTR's and the SCSL's Rules of Procedure and Evidence. Substantively the disclosure provisions of the ICTY, ICTR and SCSL are almost identical. The main categories of disclosure at the ICTY, ICTR and SCSL are as follows:

- First, the Prosecution is obliged to disclose to the Defence the material which was before the judge who confirmed the indictment, as well as all prior statements obtained by the Prosecutor from the accused. This must be done within 30 days of the initial appearance of the accused.[1837]
- Second, the Prosecution must disclose to the Defence within a set time-frame copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements, with copies of the statements of additional prosecution witnesses being made available to the Defence when a decision is made to call those witnesses.[1838]
- Third, on a continuous basis, the Prosecution must disclose to the Defence any exculpatory material, ie, any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.[1839]
- Finally, the Defence is entitled, on request, to inspect books, documents, photographs and tangible objects in the possession of the Prosecutor which are material to the preparation of the Defence.[1840]

At the ICC, the disclosure regime is clearly inspired by the same principles which govern disclosure before the ICTY, ICTR and SCSL. The Prosecution has to disclose the names of witnesses whom it intends to call to testify and their statements,[1841] as well as any exculpatory evidence to the Defence.[1842] The Prosecution must also permit the Defence to inspect any relevant material in the possession of the Prosecutor.[1843] Unlike the ICTY, the ICC rules also provide for a right of the Prosecution to request the inspection of the relevant material in the possession of the Defence.[1844]

At the ICTY, the Defence also has disclosure obligations. The Defence must, within a set time-frame determined by the Pre-Trial Judge, notify the Prosecutor of its intent to offer the Defence of alibi or any special defence, including that of diminished or lack of mental responsibility and must also notify particulars of the alibi or special defence and the evidence which will be offered for it.[1845] At the ICC,

1836 Rules 65ter, 66, 67, 73, 73bis, and 73ter of the ICTY Rules of Procedure and Evidence.
1837 Rule 66(A)(i) of the ICTY and ICTR Rules of Procedure and Evidence.
1838 Rule 66(A)(ii) of the ICTY and ICTR Rules of Procedure and Evidence.
1839 Rule 68(A) of the ICTY and ICTR Rules of Procedure and Evidence.
1840 Rule 66(B) of the ICTY and ICTR Rules of Procedure and Evidence.
1841 Rule 76 of the ICC Rules of Procedure and Evidence.
1842 Article 67(2) of the ICC Statute.
1843 Rule 77 of the ICC Rules of Procedure and Evidence.
1844 Rule 78 of the ICC Rules of Procedure and Evidence.
1845 Rule 67(B) of the ICTY Rules of Procedure and Evidence.

the disclosure obligations on the Defence are slightly broader. Rule 79 requires the Defence to notify the Prosecution of its intent to raise alibi or 'any ground for excluding criminal responsibility'. At the ICC, such notification must be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. At the ICTR, the notification must be given as early as reasonably practical and in any event before the commencement of the trial.[1846] Failure of the Defence to provide such notice within the prescribed time does not limit the right of the accused to testify or present evidence on the above defences.[1847]

The international tribunals all have restrictions on disclosure; in particular, reports, memoranda or other internal documents prepared by the party in connection with the investigation or preparation of the case, ie 'work product', and confidential information are not disclosable.[1848]

At the ICTY, during the Pre-Trial phase of the proceedings, the Pre-Trial Judge may convene one or more Status Conferences designed to organise exchanges between the parties so as to ensure expeditious preparation for trial and to review the status of his or her case and to allow the accused the opportunity to raise any relevant issues, including the mental and physical condition of the accused. The first status conference must be held within 120 days of the initial appearance of the accused and thereafter within 120 days following the previous Status Conference.[1849]

The Pre-Trial Judge establishes a work plan indicating the obligations that the parties are required to meet and the dates by which these obligations must be fulfilled. A Pre-Trial Judge is usually assisted by one of the Senior Legal Officers assigned to the Chambers who, acting under the supervision of the Pre-Trial Judge, oversees the implementation of the work plan and keeps the Pre-Trial Judge informed of the progress of the discussions between and with the parties. The Senior Legal Officer presents the Pre-Trial Judge with reports as appropriate and communicates to the parties any observations and decisions made by the Pre-Trial Judge.[1850]

The Pre-Trial Judges may also order the parties to meet to discuss issues related to the preparation of the case in order to ensure the trial date is effective. These meetings, called Rule 65ter conferences, are held *inter partes* or with the Senior Legal Officer or one or more parties. The Senior Legal Officer must make sure that the parties satisfy their obligations in accordance with the work plan. The presence of the accused is not necessary for meetings convened by the Senior Legal Officer,[1851] and indeed it would be extremely rare for the accused to attend.

Once the Prosecutor discloses to the Defence all supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, the parties may, within 30 days of the disclosure, file preliminary motions, namely motions which:[1852]

1846 Rule 67(A) of the ICTR Rules of Procedure and Evidence.
1847 Rule 67 of the ICTY and ICTR Rules of Procedure and Evidence; Rule 79(3) of the ICC Rules of Procedure and Evidence.
1848 Rule 70 of the ICTY, ICTR and SCSL Rules of Procedure and Evidence; Rules 81 to 82 of the ICC Rules of Procedure and Evidence.
1849 Rule 65bis of the ICTY and ICTR Rules of Procedure and Evidence.
1850 Rule 65ter(D)(i)(ii) and (iii) of the ICTY Rules of Procedure and Evidence.
1851 Rule 65ter(D)(iv)(v)(vi) of the ICTY Rule of Procedure and Evidence.
1852 Rule 72(A) of the ICTY and ICTR Rules of Procedure and Evidence.

- challenge the court's jurisdiction;
- allege defects in the form of the indictment;
- seek the severance of counts joined in one indictment or separate trial, or instead, seek joinder of trials;
- raise objections concerning the assignment of counsel.

The parties may also file other motions that are not of a preliminary nature, such as a motion for the accused's provisional release, motions for protective measures in respect of witnesses, motions for disclosure, motions for judicial notice, motions for the exclusion of evidence and motions for the disqualification or recusal of a judge.

Trial Chambers' decisions on preliminary motions and other motions are not appealable as of right, except in the case of the motions challenging jurisdiction, where appeal lies as of right. However, the Trial Chamber may grant certification for an interlocutory appeal if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.[1853]

Once preliminary motions are disposed of, the Pre-Trial Judge orders the Prosecutor to file within a certain time limit:

- the final version of the Prosecutor's Pre-Trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused;
- admissions by the parties and a statement of matters which are not in dispute;
- a statement of contested matters of fact and law;
- a list of witnesses the Prosecutor intends to call, including a summary of the facts on which each witness will testify;
- the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity.

After the Prosecutor has completed all his filings, the Pre-Trial Judge orders the Defence to file a Pre-Trial brief addressing the factual and legal issues, and including a written statement setting out the nature of the accused's defence, the matters with which the accused takes issue in the Prosecutor's Pre-Trial brief, and the reasons why the accused takes issue with it. After the close of the Prosecutor's case and before the commencement of the Defence case, the Pre-Trial Judge orders the Defence to file a list of witnesses the Defence intends to call and a list of exhibits.[1854]

After the filings by the Prosecutor of the Pre-Trial brief and other materials, the Pre-Trial Judge submits to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions

1853 Rule 72(B) and 73(B) of the ICTY and ICTR Rules of Procedure and Evidence.
1854 Rule 65ter(F) and (G) of the ICTY Rules of Procedure and Evidence.

pursuant to Rule 65ter. Once the Defence completes its filings, the Pre-Trial Judge submits to the Trial Chamber a second file.[1855] This material assists the Trial Chamber in preparing for the Pre-Trial Conference which is held prior to the commencement of the trial.[1856]

At the Pre-Trial Conference, in light of the file submitted to it by the Pre-Trial Judge, the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses or reduce the number of witnesses he or she intends to call. In addition, in the interest of a fair and expeditious trial, the Trial Chamber may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents in respect of which evidence may be presented. The Trial Chamber may also direct the Prosecutor to select the counts in the indictment on which to proceed.[1857] The Chamber's power to make these directions was a late innovation at the ICTY and one which may be regarded both as an attempt to render the proceedings more inquisitorial, with the judges having greater control over the proceedings, and at the same time a device to enable the tribunal to comply with the 'completion strategy' by ensuring trials are concluded more expeditiously than they had been hitherto.

The Trial Chamber may hold a Pre-Defence Conference prior to the commencement by the Defence of its case. In light of the complete file submitted by the Pre-Trial Judge, the Trial Chamber sets the number of witnesses the Defence may call and determines the time available to the Defence for presenting evidence.[1858]

At the ICC, a person subject to a warrant of arrest or summons to appear must appear before the Pre-Trial Chamber, in the presence of the Prosecutor, promptly upon arriving at the Court. At this first appearance, the Pre-Trial Chamber sets the date on which it intends to hold a hearing to confirm the charges.[1859] Before the confirmation hearing the person must be provided with a copy of the document containing the charges and be informed of the evidence on which the Prosecutor intends to rely. For this purpose, the Pre-Trial Chamber may take necessary decisions regarding disclosure between the Prosecutor and the suspect.[1860]

During proceedings relating to disclosure, suspects may be assisted or represented by counsel. The Pre-Trial Chamber, as at the ICTY and ICTR, holds status conferences to ensure disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber is appointed to organise such status conferences, on his or her own motion, or at the request of the Prosecutor or the suspect. All evidence disclosed between the Prosecutor and the suspect for the purpose of the confirmation hearing must be communicated to the Pre-Trial Chamber.[1861] The Prosecutor must disclose to the Pre-Trial Chamber and the suspect a detailed description of the charges with a list of evidence no later than 30 days before the confirmation hearing.[1862]

The Registry creates and maintains a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber for the purpose of the confirmation hearing. The Prosecutor, the suspect, the victims and their respective legal representatives

1855 Rule 65ter(L) of the ICTY Rules of Procedure and Evidence.
1856 Rule 73bis of the ICTY and ICTR Rules of Procedure and Evidence.
1857 Rule 73bis(A) of the ICTY and ICTR Rules of Procedure and Evidence.
1858 Rule 73ter of the ICTY and ICTR Rules of Procedure and Evidence.
1859 Rule 121(1) of the ICC Rules of Procedure and Evidence.
1860 Article 61(3) of the ICC Statute.
1861 Rule 121(2) of the ICC Rules of Procedure and Evidence.
1862 Rule 121(3) of the ICC Rules of Procedure and Evidence.

participating in the proceeding are entitled to consult this record.[1863] Upon confirmation of the charges and closure of the Pre-Trial phase of the proceedings, this record is transmitted to the Trial Chamber before the opening of the trial proceedings.[1864]

At the confirmation hearing, the charges as presented by the Prosecutor are read out. The Prosecutor must support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The suspect may object to the charges, challenge the evidence presented by the Prosecutor and present evidence. The Pre-Trial Chamber then considers the charges and pronounces upon them. Once the Pre-Trial Chamber confirms the charges, the Presidency constitutes a Trial Chamber which is responsible for the conduct of subsequent proceedings.[1865]

TRIAL AND JUDGEMENT

After the closure of the Pre-Trial proceedings, when the case is ready for trial, the Trial Chamber organises trial hearings for the presentation of evidence by the parties. With some exceptions, the trial proceedings before the ICTY and ICTR follow the adversarial model. The ICC, however, provides more room for the introduction of inquisitorial elements from the civil law tradition. It should be pointed out that none of the international courts or tribunals have a jury to decide questions of fact. The judges pronounce upon the guilt of the accused and impose appropriate sentence. Throughout the trial, the Trial Chamber must ensure the trial is fair and expeditious with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[1866]

At the ICTY and ICTR, the trial begins with an opening statement by the Prosecutor setting out the main elements of charges and the outline of the case. The Defence may also make an opening statement. Usually, however, the Defence elects to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the Defence.[1867] After the opening statement(s), the accused has the right to make a statement under control of the Trial Chamber. The accused's statement is not given under oath, and is therefore not regarded as testimony or evidence as such, although the Trial Chamber may decide to give it probative value.[1868]

The Prosecutor then presents his case by calling witnesses and producing exhibits. At the close of the Prosecution case, the Defence may make a submission of no case to answer, which if successful, means that the accused is acquitted at that stage. Indeed, the Chamber is required, even without such a motion, to acquit the accused on any count if there is no evidence capable of supporting a conviction (Rule 98 bis). If there is a case to answer, then the Defence proceeds (usually after a pause in the proceedings to allow the Defence to prepare further) to present its case. The Defence calls its witnesses and presents its exhibits. After the closure of the Defence case, the Prosecution is allowed to present evidence in rebuttal followed by the Defence evidence in rejoinder.[1869] For every witness, examination-in-chief, cross-examination and subsequently re-examination is allowed. The party calling a witness conducts the examination-in-chief of witness; however, judges are permitted at any stage to put questions to the witnesses.[1870]

1863 Rule 121(10) of the ICC Rules of Procedure and Evidence.
1864 Rules 130 and 131 of the ICC Rules of Procedure and Evidence.
1865 Article 61 of the ICC Statute; Rule 122 of the ICC Rules of Procedure and Evidence.
1866 Article 20(1) of the ICTY Statute; Article 19(1) of the ICTR Statute; Article 64(2) of the ICC Statute.
1867 Rule 84 of the ICTY and ICTR Rules of Procedure and Evidence.
1868 Rule 84bis of the ICTY Rules of Procedure and Evidence.
1869 Rule 85(A) of the ICTY and ICTR Rules of Procedure and Evidence.
1870 Rule 85(B) of the ICTY and ICTR Rules of Procedure and Evidence.

After the Defence's submission of evidence in rejoinder, the Trial Chamber may order either party to produce additional evidence. The Trial Chamber is also empowered to summon witnesses and order their attendance.[1871] Normally, witnesses called by the Trial Chamber are questioned first by the judges, and then cross-examined by the Prosecutor and subsequently by Defence counsel. The Trial Chamber may then re-examine the witnesses. If questioning by the judges raises matters not previously considered in examination or cross-examination, the Prosecutor and the Defence have the right to cross-examine on such matters.[1872]

Trial proceedings before the ICC are much less regulated than those before the ad hoc tribunals. The rules regarding the organisation of the trial at the ICC are very flexible. The ICC Statute provides only some minimal rules on examination which are relatively similar to the ICTY and ICTR Rules. Thus, the ICC Statute leaves much room to the Trial Chamber to decide on the process of the presentation of the case. At the commencement of the trial at the ICC, the Trial Chamber reads to the accused the charges previously confirmed by the Pre-Trial Chamber. It must therefore satisfy itself that the accused understands the nature of the charges and afford the accused the opportunity to make an admission of guilt or to plead not guilty.[1873]

At the trial, the presiding judge may give directions for the conduct of the proceedings in order to ensure they are conducted in a fair and impartial manner.[1874] If the Presiding Judge does not give directions, the Prosecutor and the Defence agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge must issue directions.[1875] Each party is entitled to examine a witness it has called and to cross-examine a witness called by the opposite party. The Trial Chamber has the right to question a witness before or after the witness is questioned by the party in examination or cross-examination. However, the Defence has the right to be the last to examine a witness.[1876]

The accused must be present during the trial.[1877] Trials are public, but the Trial Chamber may order closed sessions for reasons of public order and morality, safety and security of victims or witnesses, protection of confidential or sensitive information, or the protection of the interests of justice.[1878] The Trial Chamber may exclude disruptive persons from the proceedings, and may also even order the removal of the accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed. In such cases, the Trial Chamber may allow the accused to observe the trial and instruct counsel from outside the courtroom, using communication technology, if required.[1879]

At the ICTY and ICTR, after the presentation of all the evidence, the Prosecutor may present a closing argument which is followed by the Defence closing argument. The Prosecutor may present a rebuttal argument to which the Defence may present a rejoinder. In their closing arguments, the parties must address the matter of sentencing. Parties must file their final trial briefs not later than

1871 Rule 85(A)(v) of the ICTY and ICTR Rules of Procedure and Evidence; Rule 98 of the ICTY Rules of Procedure and Evidence.
1872 Cassese (n2) 412.
1873 Article 64(8)(a) of the ICC Statute.
1874 Article 64(8)(b) of the ICC Statute.
1875 Rule 140(1) of the ICC Rules of Procedure and Evidence.
1876 Rule 140(2) of the ICC Rules of Procedure and Evidence.
1877 Article 21(4)(d) of the ICTY Statute; Article 20(4)(d) of the ICTR Statute; Article 63(1) of the ICC Statute.
1878 Article 20(4) of the ICTY Statute; Article 19(4) of the ICTR Statute; Rule 78 and 79 of the ICTY and ICTR Rules of Procedure and Evidence; Article 64(7) of the ICC Statute.
1879 Rule 80 of the ICTY and ICTR Rules of Procedure and Evidence; Article 63(2) and 71 of the ICC Statute.

five days prior to presenting their closing arguments.[1880] At the ICC, the Presiding Judge declares when the submission of evidence is closed and invites the Prosecutor and Defence to make their closing statements. The ICC Rules explicitly provide that the Defence should always have the opportunity to speak last.[1881]

After the parties complete their presentation of the case and once the hearings are closed, the Trial Chamber retires to deliberate in private (*in camera*). An accused may be found guilty only if a majority of the Trial Chamber is satisfied that his guilt has been proved beyond reasonable doubt. The Trial Chamber decides separately on each charge contained in the indictment. If two or more accused are tried together, separate findings are made as to each accused.[1882] The judgment must be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended. The judgment is pronounced in public. All the parties are entitled to be present, including, at the ICC, the victims or the legal representatives of the victims and the representatives of the State which have participated in the proceedings.[1883]

At the ICC, if the accused pleads guilty, the Trial Chamber determines whether the admission of guilt is supported by the facts of the case contained in the charges, any materials presented by the Prosecutor which supplement the charges and which the accused accepts and any other evidence, such as testimony of witnesses, presented by the Prosecutor or the accused. In addition, the Trial Chamber must be satisfied that the admission of guilt is voluntary and that the accused understands the nature and consequences of pleading guilty. If all these requirements are met, the Trial Chamber may convict the accused of that crime. If not, the admission of guilt is considered as not having been made, in which case the Trial Chamber orders that the trial be continued under the ordinary trial procedure provided in the Statute.[1884]

At the SCSL the trial proceedings are modelled according to the ICTY/ICTR proceedings.

RULES OF EVIDENCE

Unlike national jurisdictions, particularly those of the common law tradition, which often have complex rules of evidence, the international criminal tribunals, and the ICC, have relatively rudimentary rules of evidence. The rationale which is often cited for this is that the international criminal tribunals sit without a jury, and that many of the rules of evidence in common law jurisdictions grew up in order to protect the integrity of the truth-finding process from the inherent prejudices of a jury. In the international criminal tribunals, on the other hand, decisions on guilt or innocence are determined by professional judges; accordingly, it is considered that they are much less in need of being constrained by formal rules of evidence.

The ICTY, ICTR, SCSL and ICC have practically identical rules of evidence and accordingly they will here be considered together.

1880 Rule 86 of the ICTY and ICTR Rules of Procedure and Evidence.
1881 Rule 141 of the ICC Rules of Procedure and Evidence.
1882 Rule 87 of the ICTY and ICTR Rules of Procedure and Evidence; Articles 66 and 74 of the ICC Statute; Rule 142 of the ICC Rules of Procedure and Evidence.
1883 Article 23 of the ICTY Statute; Article 22 of the ICTR Statute; Rule 98ter of the ICTY Rules of Procedure and Evidence and Rule 88 of the ICTR Rules of Procedure and Evidence; Article 74 of the ICC Statute; Rule 144 of the ICC Rules of Procedure and Evidence.
1884 Article 65 of the ICC Statute.

Accordingly, first and foremost, it should be borne in mind that the international criminal tribunals and the ICC are not bound by national rules of evidence, such as the hearsay rule and its exceptions, or requirements for corroboration in certain types of case.[1885] Written evidence is permitted in lieu of oral evidence in certain circumstances.[1886] Trial Chambers are given a broad discretion to assess the evidence before them and to decide upon its admissibility,[1887] and must do so by applying rules of evidence which best favour a fair determination of the matter before them.[1888]

The two guideline principles for the tribunals and ICC are an inclusionary rule and an exclusionary rule. The inclusionary rule is that the Chambers may admit any evidence which they deem to have probative value.[1889] The exclusionary rule is the rule that the Chambers have the power to exclude evidence if its probative value is outweighed by the need to ensure a fair trial[1890] or if its admission would be antithetical to and would seriously damage the integrity of the proceedings.[1891]

Based on the practice at the ICTY, it is relatively rare for the Trial Chambers to exclude evidence altogether; generally speaking, the approach is to declare all evidence admissible and then to consider submissions as to the reliability, authenticity and integrity of evidence at the end of the trial, as going to the weight of the evidence, rather than its admissibility per se.

The tribunals and ICC also share provisions on judicial notice, ie that facts of common knowledge do not require proof,[1892] and provisions explicitly stating that there is no corroboration requirement.[1893] International tribunals provide special rules on evidence relating to cases of sexual assaults which are designed to protect the particularly vulnerable victims of those types of crime.[1894]

The Statutes and Rules of both the international criminal tribunals and the ICC also regulate the manner in which witnesses give evidence, ie under oath[1895] and with penalties for giving false testimony.[1896] Within these broad parameters, it is left very much to the Chambers to conduct the proceedings in such a way as to make the examination of witnesses and presentation of evidence effective for ascertaining the truth and to avoid needless consumption of time.[1897]

Consequently, the nature of the proceedings before any given Trial Chamber will depend a lot on the backgrounds of the judges, and may, for example, take on a more inquisitorial aspect where the Presiding Judge is from a civil law jurisdiction than in one in which he is from a common law jurisdiction.

VICTIMS AND WITNESSES

The issue of victims and witnesses in international criminal proceedings arises in three main contexts. First, victims and witnesses testify in the proceedings and in so doing they may need protective measures (eg voice distortion, use of a pseudonym, testifying in closed session, etc). Second, victims

1885 Rule 89(A) of the ICTY Rules of Procedure and Evidence; Rule 63(5) of the ICC Rules of Procedure and Evidence.
1886 See, eg, Rule 92bis of the ICTY Rules of Procedure and Evidence; Rule 94bis of the ICTY Rules of Procedure and Evidence.
1887 Article 64(9) of the ICC Statute and Rule 63(2) of the ICC Rules of Procedure and Evidence
1888 Rule 89(B) of the ICTY and ICTR Rules of Procedure and Evidence.
1889 Rule 89(C) of the ICTY and ICTR Rules of Procedure and Evidence; Article 69(4) of the ICC Statute.
1890 Rule 89(D) of the ICTY Rules of Procedure and Evidence; Article 69(4) of the ICC Statute.
1891 Article 69(7)(b) of the ICC Statute; Rule 95 of the ICTY Rules of Procedure and Evidence.
1892 Rule 94 of the ICTY and ICTR Rules of Procedure and Evidence; Article 69(6) of the ICC Statute.
1893 Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence; Rule 63(4) of the ICC Rules of Procedure and Evidence.
1894 Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence; Rule 70 of the ICC Rules of Procedure and Evidence.
1895 Rule 90(A) of the ICTY Rules of Procedure and Evidence; Rule 66 of the ICC Rules of Procedure and Evidence.
1896 Rule 91 of the ICTY Rules of Procedure and Evidence; Article 70 of the ICC Statute.
1897 See, eg, Rule 90(F) of the ICTY Rules of Procedure and Evidence.

may have a role as participants in the proceedings. Third, victims may be awarded compensation or reparation for the crimes that they have suffered.

Each of these issues is discussed separately below.

Protection of victims and witnesses

From the inception of the ICTY, great emphasis has been placed on the need to provide adequate measures for the protection of victims and witnesses in international criminal proceedings. The reasons for this are, perhaps, obvious: the international criminal tribunals were set up, inter alia, to bring justice for victims of war crimes and crimes against humanity, and it follows that their interests should be properly taken into account at all stages of the proceedings.

Second, due to the very nature of the conflicts and the grave crimes with which the international tribunals deal, it is more likely than in national jurisdictions that testifying may place their lives or safety in danger and/or that the victims are will be suffering from serious trauma, requiring appropriate treatment and care by trained professionals. Third, the issue of witness protection gains additional sensitivity from the fact that the international criminal tribunals do not have their own police forces to protect witnesses, or to relocate them, and accordingly must depend on national police forces and witness relocation programmes to assist.

Accordingly, the ICTY's Statute enshrined the importance of measures to protect victims and witnesses. Article 22 ('Protection of victims and witnesses') of the ICTY Statute stipulates that the tribunal's rules of procedure and evidence will provide for the protection of victims and witnesses, including by conducting *in camera* proceedings and the protection of the victim's identity.

In accordance with Article 22 of the ICTY Statute, the ICTY judges adopted two sets of provisions dealing with victims and witnesses in the Rules of Procedure and Evidence:

- First, Rule 34 establishes a Victims and Witnesses Section (hereinafter VWS) within the Registry, which has a special mandate to recommend protective measures for victims and witnesses and to provide counselling and support for victims, in particular in cases of rape and sexual assault.
- Second, Rules 69 and 75 provide for the adoption of protective measures for victims and witnesses.

Rule 69 is intended to cover the Pre-Trial stage of the proceedings. The rule allows, in exceptional circumstances, for the identity of a prosecution victim or witness not to be disclosed to the Defence until they are brought under the protection of the Tribunal. The rule envisages, however, that the victim's or witness's identity will nonetheless be disclosed to the Defence in time to allow the Defence properly to prepare for trial.

Rule 75 governs the protection of victims and witnesses during the trial stage. Principally, it envisages various protective measures which may be adopted for a victim or witness. The measure or range of measures adopted will depend on the particular needs and fears of a given witness. For a victim, say, of a sexual attack who does not wish her community to know of the attack, it may be appropriate to order a host of protective measures, eg, use of a pseudonym, facial and voice distortion and expunging from the public record of any details of the victim's identity. For other witnesses, less far-reaching or no protective measures may need to be ordered.

It should be borne in mind that a fundamental principle of criminal trials is open justice, enabling the public to follow the proceedings. Protective measures should, therefore, never be ordered where they are unnecessary, or where less restrictive measures would achieve the same purpose. Moreover, such measures may only be adopted to the extent that they are consistent with the rights of the accused.

Rule 75(B) enumerates some of the protective measures commonly ordered:

> (B) A Chamber may hold an *in camera* proceeding to determine whether to order:
>
> (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:
>
> (a) expunging names and identifying information from the tribunal's public records;
>
> (b) non-disclosure to the public of any records identifying the victim or witness;
>
> (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
>
> (d) assignment of a pseudonym;
>
> (ii) closed sessions, in accordance with Rule 79;
>
> (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

As the above provisions demonstrate, a range of protective measures may be ordered for Prosecution and Defence witnesses, subject to the overriding requirement that the measures are consistent with the rights of the accused. It is now generally accepted at the international criminal tribunals that witness anonymity – where neither the accused nor his counsel know the identity of the witness throughout the trial – is not acceptable, as it too greatly jeopardises the accused's right to a fair trial.

The ICTR and SCSL have adopted substantially identical provisions on the protection of victims and witnesses, including in each case the institution of a VWS (at the SCSL it is called Victims and Witnesses Unit), and a consistent body of case law has emerged on witness protection issues. The VWS of each of the ICTY, ICTR and SCSL have proved themselves to be extremely useful and efficient, units, carrying responsibility for a variety of weighty functions, from ensuring witnesses attend court when needed to facilitating counselling and relocation of vulnerable witnesses.

The ICC has built on this foundation and has the same basic institutional and procedural provisions. Institutionally, the ICC's rules also provide for a Victims and Witnesses Unit, to be established within the Registry.[1898] Procedurally, the ICC is also mandated to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses, paying particular regard to victims of sexual or gender violence or crimes against children.[1899]

1898 Article 43(6) of the ICC Statute.
1899 Article 68 of the ICC Statute and Rule 86 of the ICC Rules of Procedure and Evidence.

Victims' participation in the proceedings

While the importance of victims and witnesses is expressly recognised in the Statutes and Rules of Procedure and Evidence of the ICTY, ICTR and SCSL, victims do not participate in the proceedings as a party. The only parties to the proceedings at those tribunals are the Prosecutor and the Defence.

The position is different at the ICC. The ICC deliberately took a bolder step than its predecessors when it came to the issue of victims and witnesses by providing for their participation in the proceedings. Adopting a procedure analogous, but not identical, to that of *partie civile* in civil law, inquisitorial legal systems, Article 68 of the ICC Statute enables victims and witnesses to make their views and concerns known to the ICC at all stages of the proceedings where their personal interests are affected.

Article 68(3) of the ICC Statute provides as follows:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

The victims' views and concerns may be presented by the legal representatives of the victims.[1900] The ICC has established an Office of Public Counsel for victims for this purpose.[1901]

Reparation or compensation to victims

While the Rules of Procedure and Evidence of the ICTY, ICTR and SCSL provide for compensation and restitution to victims, in practice these provisions have remained dead letters.

Rule 105 of both the ICTY and the ICTR Rules of Procedure and Evidence provides for restitution of property or proceeds following a judgment of conviction. The SCSL has a corresponding provision in Rule 104 ('Forfeiture of property'). Under these provisions, the Trial Chamber has the power to order restitution of property or its proceeds to the rightful owner. The reason why this provision has been little applied is due to the difficulties of locating specific, tangible property which has fallen into the hands of an accused as a result of his criminal activity, and of identifying the lawful owner.

The ICTY, ICTR and SCSL also have provisions regarding the award of compensation to victims.[1902] These rules stipulate that the Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim. Pursuant to the relevant national legislation, a victim or persons claiming through the victim may then bring an action in a national court or other competent body to obtain compensation. These

1900 Article 68(3) of the ICC Statute; Rules 89–93 of the ICC Rules of Procedure and Evidence.
1901 Regulation 81 of the ICC Regulations.
1902 Rule 106 of the ICTY and ICTR Rules of Procedure and Evidence and Rule 105 of the SCSL Rules of Procedure and Evidence.

rules further stipulate that for the purposes of making a claim for compensation in a national court, the judgment of the ICTY, ICTR or SCSL, as the case may be, shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Again, however, these provisions have had little practical significance, largely because the matter of awarding compensation is left to national courts, whose mechanisms and means for offering compensation to victims of crimes are often limited or ineffectual.

The ICC has, again, innovated in this area. Article 75 of the ICC Statute envisages various forms of reparation to victims, including but not limited to restitution, compensation and rehabilitation. Unlike the ICTY, ICTR and SCSL, however, the ICC specifically envisages the establishment of a 'Trust Fund' by the Assembly of States Parties, from which the victims of crimes or their families would be paid compensation. Article 79, which provides for this fund, also establishes that fines or forfeiture levied by the Court may be paid into the Trust Fund. Rules 94 to 99 further regulate the making of reparations to victims by the ICC.

SENTENCING

It should be pointed out at the outset that, with the exception of the Nuremberg and Tokyo tribunals,[1903] there is no death penalty before the international court and tribunals. The penalties imposed by the ICTY, ICTR and SCSL are limited to imprisonment (and fines for contempt). The Trial Chamber, however, may also order the return of any property and proceeds acquired by the criminal conduct, including by means of duress, to the rightful owner.[1904]

At the ICTY and ICTR a convicted person may be sentenced to a fixed term of imprisonment or to imprisonment for remainder of his or her life.[1905] Article 19(1) of the SCSL Statute, on the other hand, provides that the Trial Chamber may impose upon a convicted person, other than a juvenile offender, 'imprisonment for a specified number of years', which suggests that the SCSL cannot impose life imprisonment.[1906] In several cases, the SCSL imposed very high sentences which would have the same effect as a sentence of life imprisonment. For example, Tamba Brima, a leading member of the Armed Forces Revolutionary Council (AFRC), and Issa Hassan Sesay, a senior officer and commander in the Revolutionary United Front (RUF), were both convicted for war crimes and crimes against humanity and sentenced to 50 (upheld on appeal) and 52 years of imprisonment, respectively.[1907]

1903 Article 27 of the IMT Charter and Article 16 IMTFE Charter.
1904 Article 24 of the ICTY Statute; Article 23 of the ICTR Statute; Article 19 of the SCSL Statute.
1905 Rule 101(A) of the ICTY and ICTR Rules of Procedure and Evidence.
1906 William A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP, Cambridge 2006) 549.
1907 *Prosecutor v Brima, Kamara & Kanu* (SCSL) Case No SCSL-2004-16-A, Appeal Judgment (22 February 2008) *Prosecutor v Sesay, Kallon & Gbao* (SCSL) Case No SCSL-04-15-T, Trial Judgment (25 February 2009) Sentencing Judgment (8 April 2009). The sentence was confirmed on appeal, Case No SCSL-04-15-A, Appeal Judgment (26 October 2009).

The ICC Statute provides as follows:[1908]

Article 77

Applicable penalties

1. [T]he court may impose one of the following penalties on a person convicted of a crime [within the Court's jurisdiction]:

   (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

   (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

   (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

   (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

The ICC may order money and other property collected through the fines or forfeiture to be transferred, by the order of the Court, to the Trust Fund.[1909]

Sentencing is a 'discretionary process'.[1910] In imposing the sentences, various factors are taken into account, in particular the gravity of the offences and the individual circumstances of the convicted person.[1911]

According to Rule 101 of the ICTY and ICTR Rules of Procedure and Evidence, the Trial Chamber may take into consideration in determining the sentence any aggravating and mitigating circumstances. However, no definitions of these factors have been provided in the Rules except for one mitigating circumstance: substantial cooperation with the Prosecutor by the convicted person before or after conviction.[1912] The ICTY and ICTR Trial Chambers are therefore left with broad discretion in considering the factors and the weight to be given to each factor.

The ICC Rules of Procedure and Evidence, inspired by the jurisprudence of the ICTY and ICTR, developed more detailed rules with regard to factors that may be taken into account in determining the appropriate sentence to impose. According to ICC Rule 145(1)(c), the Chamber must give consideration, *inter alia*, to the following factors:

- extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime;

1908 See also Rule 146 and 147 of the ICC Rules of Procedure and Evidence.
1909 Article 79(2) of the ICC Statute.
1910 *Prosecutor v Kvočka et al* (ICTY) Case No IT-98-30/1-A, Appeal Judgment (28 February 2005) para (669).
1911 Article 24(2) of the ICTY Statute; Article 23(2) of the ICTR Statute; Article 78(1) of the ICC Statute.
1912 Rule 101(B)(ii) of the ICTY and ICTR Rules of Procedure and Evidence.

- the degree of participation of the convicted person;
- the degree of intent;
- the circumstances of manner, time and location;
- the age, education, social and economic condition of the convicted person.

In addition, pursuant to Rule 145(2) of the ICC Rules of Procedure and Evidence, the Chamber may take into account any mitigating and aggravating circumstances:

Mitigating circumstances

- the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
- the convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.

Aggravating circumstances

- any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;
- abuse of power or official capacity;
- commission of the crime where the victim is particularly defenceless;
- commission of the crime with particular cruelty or where there were multiple victims;
- commission of the crime for any motive involving discrimination on any of the grounds referred to in Article 21(3) of the ICC Statute;
- other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

ICC Rule 145(3) provides that life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

At the ICTY and ICTR, in determining the terms of imprisonment, the Trial Chamber should have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia or Rwanda.[1913] The purpose of this provision is to respect the principle, *nulla poena sine lege*. The Statute of the SCSL requires that the Trial Chamber shall, in determining the terms of imprisonment, have

1913 Article 24(1) of the ICTY Statute; Article 23(1) of the ICTR Statute.

recourse to the practice regarding prison sentences in the ICTR and the national courts of Sierra Leone.[1914]

The main purposes of sentencing for international crimes are deterrence and retiribution, though rehabilitation may also be a relevant factor.[1915] Sentencing judgments also refer to broader goals of international criminal law such as restoring international peace and security, ending impunity and promoting ethnic and national reconciliation.[1916]

In imposing a sentence of imprisonment, the time, if any, previously spent by the accused in detention, should be deducted.[1917] If the accused has been found guilty of one or more crimes in the indictment, the Chamber pronounces a sentence for each crime and a joint sentence specifying the total period of imprisonment.[1918] At the ICC, this period must be no less than the highest individual sentence pronounced and shall not exceed 30 years of imprisonment or a sentence of life imprisonment.[1919]

Normally, the Trial Chamber considers guilt and sentencing in a unified process. The disadvantage of this procedure is that it is difficult, if not impossible, for the defence to argue for mitigation of guilt, eg because of remorse, at the same time as maintaining innocence. At the ICC, therefore, the Trial Chamber holds a further hearing at the request of the Prosecutor or the accused in order to hear any additional evidence or submissions relevant to the sentence.[1920]

In practice, the ICTY and the ICTR have imposed various sentences from few years of imprisonment to the life imprisonment.

The ICTY Appeals Chamber imposed the highest sentence, life imprisonment, only on Stanislav Galić (see also Chapter 3), who was a commander of the Sarajevo Romanija Corps of the Bosnian Serb Army, based around Sarajevo, during the 1992–1995 war in Bosnia and Herzegovina. He was found guilty of various crimes committed in connection with a campaign of sniping and shelling attacks on the city of Sarajevo with the primary aim to spread terror among the city's civilian population. The attacks took place on an almost daily basis, over many months, and they resulted in the killing of hundreds of men and women of all ages, including children, and the wounding of thousands. The Trial Chamber's sentence of 20 years' imprisonment was increased by the Appeals Chamber to life imprisonment.[1921]

In the *Stakić* case, the Appeals Chamber revised the sentence from life to 40 years' imprisonment. Milomir Stakić was convicted of various crimes, such as extermination, deportation, other inhumane acts, persecution and murder, while he held several positions as a leading figure of the Prijedor municipal authorities. He played an important role in campaign aimed at ethnically cleansing Prijedor municipality by deporting and persecuting Bosnian Muslim and Bosnian Croats. He also actively participated in the establishment of camps of Omarska, Keraterm and Trnopolje where the detaines were subjected to serious mistreatement and abuse. He was responsible for more than 1,500 killings in the Prijedor municipality.[1922]

1914 Article 19(1) of the SCSL Statute.
1915 *Prosecutor v Delalić et al* (ICTY) Case No IT-96-21-A, Appeal Judgment (20 February 2001) para (806).
1916 Robert Sloane, 'Sentencing' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 509.
1917 Rule 78(2) of the ICC Statute; Rule 101(C) of the ICTY and ICTR Rules of Procedure and Evidence.
1918 Rule 87(C) of the ICTY and ICTR Rules of Procedure and Evidence.
1919 Article 78(3) of the ICC Statute. See also Rule 87(C) of the ICTY and ICTR Rules of Procedure and Evidence.
1920 Article 76(2) of the ICC Statute; Rule 143 of the ICC Rules of Procedure and Evidence.
1921 *Prosecutor v Galić* (ICTY) Case No IT-98-29-T, Trial Judgment (5 December 2003) Case No IT-98-29-A, Appeal Judgment (30 November 2006).
1922 *Prosecutor v Stakić* (ICTY) Case No IT-97-24-T, Trial Judgment (31 July 2003) Case No IT-97-24-A, Appeal Judgment (22 March 2006).

Examples of low sentences imposed by the ICTY are three-and-a-half years of imprisonment in the case of Enver Hadžihasanović and two years of imprisonment received by Amir Kubura. Hadžihasanović and Kubura were both senior officers of the Army of Bosnia and Herzegovina which was engaged in an armed conflict with Croatian Defence Council (army of the BiH Croats). Both of them were found guilty on the basis of their superior criminal responsibility of failing to take necessary and reasonable measures to prevent and punish certain crimes committed by their subordinates: Hadžihasanović was found guilty of failing to prevent or punish cruel treatment at the Zenica Music School; Kubura was found guilty of failing to punish plundering in a number of villages.[1923]

As regards the sentences of political leaders, the ICTY has, for example, given 20 years of imprisonment to Momčilo Krajišnik who was the President of the Bosnian Serb Assembly during the conflict in Bosnia and Herzegovina and a prominent member of the Serbian Democratic Party. He was convicted for deportations and forcible transfer of several thousands of Muslim and Croatian civilians through his participation in a joint criminal enterprise which existed throughout the territories of the Bosnian-Serb Republic. The common objective of common criminal enterprise was to ethnically recompose the territories targeted by the Bosnian-Serb leadership by drastically reducing the proportion of Bosnian Muslims and Bosnian Croats through expulsion.[1924]

An example of a medium-range sentence is a sentence given to Georges Ruggiu, a Belgian citizen who was employed as a journalist and broadcaster for Radio Télévision Libre des Mille Collines (RTML), a radio station that played a significant role in promoting the Rwandan genocide. The indictement accused Ruggiu of direct and public incitement to commit genocide against the Tutsis and of persecution of Tutsis, certain Hutus and Belgians. At his initial appearance, Ruggiu pleaded not guilty, but he later changed his plea to guilty. The Trial Chamber found that Ruggiu played a crucial role in the incitement of ethnic hatred and violence and that his radio programmes incited massacres of the Tutsi population and hatred against Tutsis, Hutu political opponents and Belgians. Ruggiu was sentenced to two concurrent terms of imprisonment of 12 years.[1925]

APPEAL

The Statutes of the international courts and tribunals allow appeal against a decision of conviction or acquittal.[1926] In the case of the former, the appeal may be brought against conviction or sentence or both.

On appeal, the Appeals Chamber may affirm, reverse or revise the appealed decision. Alternatively, it may set aside the judgment and order a new trial before a different Trial Chamber.[1927] For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or it may itself call evidence to determine the issue.[1928]

1923 *Prosecutor v Hadžihasanović & Kubura* (ICTY) Case No IT-01-47-T, Trial Judgment (15 March 2006) Case No IT-01-47-A, Appeal Judgment (22 April 2008).
1924 *Prosecutor v Krajišnik* (ICTY) Case No IT-00-39-T, Trial Judgment (27 September 2006) Case No IT-00-39-A, Appeal Judgment (17 March 2009).
1925 *Prosecutor v Ruggiu* (ICTR) Case No ICTR-97-32, Trial Judgment (1 June 2000).
1926 Article 25 of the ICTY Statute; Article 24 of the ICTR Statute; Article 81 of the ICC Statute.
1927 Article 83(2) of the ICC Statute; Article 25(2) of the ICTY Statute; Article 24(2) of the ICTR Statute; Rule 117(C) of the ICTY Rules of Procedure and Evidence; Rule 118 (C) of the ICTR Rules of Procedure and Evidence.
1928 Article 83(2) of the ICC Statute.

Unlike at the ICTR and ICTR, the ICC Statute provides that when the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.[1929]

At the ICTY and ICTR the Appeals Chamber hears appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

Grounds of appeal at the ICTY and ICTR

- an error on a question of law invalidating the decisions; or
- an error of fact which has occasioned a miscarriage of justice.

The ICC Statute provides that appeal may be brought by the Prosecutor or the convicted person or the Prosecutor on that person's behalf on the following grounds:[1930]

Grounds of appeal at the ICC

- procedural error;
- error of fact;
- error of law;
- any other ground that affects the fairness or reliability of the proceedings or decisions.

The last ground may be invoked only by the convicted person, or the Prosecutor on that person's behalf. A sentence may also be appealed by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence.[1931]

It should be noted that an accused has a right to self-representation on the appeal. In *Krajišnik*, the Appeals Chamber held that '[a]s at trial, however, this right is not unqualified. Should [the accused's] self-representation substantially and persistently obstruct the proper and expeditious conduct of his appeal, then counsel may be imposed upon him'.[1932]

If the accused is acquitted by the Trial Chamber he must be released immediately. However, under certain circumstances, the Trial Chamber may, at the request of the Prosecutor, maintain the detention of the person pending appeal.[1933]

As explained in the section dealing with the preparation for the trial, decisions rendered during the proceedings may generally not be the subject of interlocutory appeal as of right. However, the

1929 Ibid.
1930 Article 81(1) of the ICC Statute.
1931 Article 81(2) of the ICC Statute.
1932 *Prosecutor v Krajišnik* (n1691) para (13).
1933 Article 81(3)(c) of the ICC Statute; Rule 99(A) of the ICTY and ICTR Rules of Procedure and Evidence.

tribunals provide interlocutory appeal as of right against some of the most important decisions, such as decisions on jurisdictions, decisions on provisional release, and decisions concerning the admissibility of the case (at the ICC). Other decisions require leave of appeal or certification from the Trial Chamber that issued it.[1934]

The requirements regarding the delivery of the Appeals Chamber judgments are the same as the Trial Chamber judgments. It has to be taken by a majority of the judges and be delivered in open court. It must state reasons on which it is based to which separate or dissenting opinions may be appended.[1935]

REVIEW PROCEEDINGS

The ICTY, ICTR and ICC Statutes all make provision for review proceedings. At the ICTY and ICTR, both parties may seek revision which allows the Prosecutor to apply in relation to acquittal. The ICC, conversely, allows the revision only in regard to the conviction or sentence.[1936] At the ICTY and ICTR an application for review of the judgment may be filed if the following requirements are met:[1937]

- a new fact has been discovered;
- the new fact was not known to the applicant at the time of the proceedings before the Trial Chambers or the Appeals Chamber;
- the fact could not have been discovered through the exercise of due diligence;
- the new fact could have been a decisive factor in reaching the original decision.

Similarly, the ICC Statute provides for revision if new evidence has been discovered that[1938]

- was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
- is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict.

In addition, the ICC Statute allows revision if:[1939]

1934 Rules 72(B), 73(B), 65(D) of the ICTY and ICTR Statute; Article 82 of the ICC Statute.
1935 Rule 117 of the ICTY Rules of Procedure and Evidence; Rule 118 of the ICTR Rules of Procedure and Evidence; Article 83(4) of the ICC Statute.
1936 Article 84(1) of the ICC Statute.
1937 Article 26 of the ICTY Statute; Article 25 of the ICTR Statute; Rule 119 of the ICTY Rules of Procedure and Evidence; Rule 120 of the ICTR Rules of Procedure and Evidence.
1938 Article 84(1)(a) of the ICC Statute.
1939 Article 84(1)(b) and (c) of the ICC Statute.

- it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; or
- one of more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from the office.

At the ICTY and ICTR, the original Chamber usually pronounces upon the admissibility of the application for revision and reviews its earlier decision. At the ICC, the review procedure involves two stages. First, the Appeals Chamber considers the admissibility of the application for revision. Second, if the Appeals Chamber determines that the application is meritorious, it may:[1940]

- reconvene the original Trial Chamber;
- constitute a new Trial Chamber; or
- retain jurisdiction over the matter.

The ICTY and ICTR Rules also provide that if the judgment to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposal of the motion.[1941] The judgment of a Trial Chamber on review may be appealed.[1942]

ENFORCEMENT OF SENTENCES

International courts and tribunals do not have their own prisons in which to detain convicted persons. The international tribunals must therefore turn to the States which are willing to enforce the sentences. At the ICTY and ICTR, imprisonment is served in a State designated by the tribunals from a list of States which have indicated to the Security Council their willingness to accept convicted persons.[1943] Similarly, at the ICC, imprisonment is served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.[1944]

While the ICTR Statute allows that imprisonment to be served in Rwanda,[1945] persons convicted at the ICTY may not serve their sentence in prisons in the former Yugoslavia the reason given being 'the nature of the crimes in question and the international character of the tribunal'.[1946] In Erdemović, an ICTY Trial Chamber confirmed that sentences should be served outside the former Yugoslavia given that 'because of the situation prevailing in that region, it would not be possible to ensure the security of the convicted person'.[1947]

1940 Article 84(2) of the ICC Statute; Rules 159 to 161 of the ICC Rules of Procedure and Evidence.
1941 Rule 122 of the ICTY Rules of Procedure and Evidence; Article 123 of the ICTR Rules of Procedure and Evidence.
1942 Rule 121 of the ICTY Rules of Procedure and Evidence; Article 122 of the ICTR Rules of Procedure and Evidence.
1943 Article 27 of the ICTY Statute; Article 26 of the ICTR Statute; Rule 103 of the ICTY and ICTR Rules of Procedure and Evidence.
1944 Article 103(1)(a) of the ICC Statute.
1945 Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc S/1995/134 (13 February 1995) para (19); Article 26 of the ICTR Statute.
1946 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) UN Doc S/25704 (3 May 1993) para (121) Article 27 of the ICTY Statute.
1947 *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-T, Sentencing Judgment (29 November 1996) para (70).

Under the SCSL Statute, imprisonment shall be served in Sierra Leone; however, if circumstances so require, imprisonment may also be served in any of the States which have concluded with the ICTY and ICTR an agreement for the enforcement of sentences, and which have indicated to the Registrar of the SCSL their willingness to accept persons convicted by the SCSL. The SCSL may conclude similar agreements for the enforcement of sentences with other States.[1948]

The ICTY and ICTR have adopted similar Practice Directions on the procedure to be followed by each tribunal in determining the State in which the convicted person is to serve his/her sentence of imprisonment.[1949] These provide that once the final judgment is issued, the Registrar is to approach those States that have indicated their willingness to receive convicted persons, taking into account the domestic law of those States in relation to commutation of sentences, pardons and the maximum enforceable sentence; the need for an equitable allocation of prisoners among States; and anything else that may be relevant.[1950]

Upon confirmation that a State approached by the Registrar is prepared to accept the convicted individual, the President of the tribunal makes a final determination as to whether or not that convicted person will serve his/her sentence in the State in question. In so doing, the Registrar must take into account a variety of relevant factors, for example, whether the convicted person is expected to serve as a witness in further proceedings, linguistic skills, the general conditions of imprisonment in that State, the convicted person's relations, medical or psychological reports, etc.[1951]

The first country to accept an ICTY prisoner was Norway which took Dražen Erdemović. Other countries include Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Spain, Sweden and the United Kingdom.[1952] As for the ICTR, there are agreements with several States, most of them in Europe. However, the Registrar has held that for socio-cultural reasons, the enforcement of sentences should take place in an environment which is comparable to that in which the convicted person formerly lived, in this case Africa. All persons convicted by the ICTR have been imprisoned in Mali except for one Italian national who was repatriated.[1953]

The conditions of imprisonment will be in accordance with the domestic law of the State of enforcement, but subject to the supervision of the respective court or tribunal.[1954] In addition, the ICC Statute provides that the enforcement of a sentence of imprisonment must be consistent with widely accepted international treaty standards governing treatment of prisoners. In no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.[1955] As discussed below, the State of detention may not modify the sentence or release the offender on parole without the authorisation of the relevant tribunal or the court.[1956]

1948 Article 22(1) of the SCSL Statute.
1949 ICTY Practice Direction on the Procedure for the International Tribunal's designation of the State in which a convicted person is to serve his/her sentence of imprisonment, IT/137/ Rev.1 (1 September 2009) (hereinafter ICTY Practice Direction); ICTR Practice Direction on the Procedure for the designation of the State in which a convicted person is to serve his/her sentence of imprisonment (23 September 2008), available at <www.ictr.org> (hereinafter ICTR Practice Direction).
1950 ICTY Practice Direction, para (2); ICTR Practice Direction, para (2).
1951 ICTY Practice Direction, paras (4)–(5); ICTR Practice Direction, paras (3)–(4).
1952 See Key Figures of ICTY cases, available at <www.icty.org/sections/TheCases/KeyFigures> accessed 17 October 2009.
1953 William A Schabas, 'Enforcement of Sentences' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 310, 311.
1954 Article 27 of the ICTY Statute; Article 26 of the ICTR Statute; Article 106 of the ICC Statute; Article 22(2) of the SCSL Statute.
1955 Article 106(2) of the ICC Statute.
1956 See *Prosecutor v Erdemović* (ICTY) Case No IT-96-22-T, Sentencing Judgment (29 November 1996) para (73).

The ICC Statute also provides for the enforcement of fines, forfeiture orders and reparation orders by the national authorities at the request of the Court.[1957] At the ICTY and ICTR, the enforcement by national authorities is also envisaged with regard to the restitution of property or the proceeds thereof, as ordered by the Trial Chamber.[1958]

EARLY RELEASE, PARDON OR COMMUTATION OF SENTENCES AND REVIEW OF SENTENCE

The convicted person may be eligible for pardon or commutation of the sentence or early release in the State where it is served in accordance with the applicable law of that State. Pardon is '[t]he act or instance of officially nullifying punishment or other legal consequences of a crime', whereas commutation of sentences means 'the executive's substitution in a particular case of a less severe punishment for a more servere one that has already been judicially imposed on the defendant'.[1959] However, any such act must be authorised by the relevant court or tribunal.

At the ICTY, ICTR and the SCSL, the State where the convicted person served his or her sentence must notify the President of the relevant tribunal of such eligibility. Upon such notice, the President, in consultation with the judges, determines whether pardon or commutation is appropriate taking into account, *inter alia*:[1960]

- the gravity of the crime or crimes for which the prisoner was convicted;
- the treatment of similarly-situated prisoners;
- the prisoner's demonstration of rehabilitation;
- any substantial cooperation of the prisoner with the Prosecutor.

The decision by the President is final and therefore not subject to appeal. If the President decides that early release is inappropriate, the President shall specify the date on which the convicted person will next become eligible for consideration for early release, unless the domestic law in the enforcement State already provides a date.[1961]

The ICC, on the other hand, provides for an automatic review of sentences which serves a similar purpose as pardon, commutation or early release. The review by the Court must take place when two-thirds of the sentence has been served, or 25 years in the case of life imprisonment. If the Court determines in its initial review that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at regular intervals. The grounds for reduction of sentence include:[1962]

- post-conviction cooperation with the Court in its investigations and prosecutions;
- voluntary assistance of the prisoner in enabling the enforcement of the judgments and orders of the Court in other cases;

1957 Articles 75 and 109 of the ICC Statute; Rules 212, 217 to 222 of the ICC Rules of Procedure and Evidence.
1958 Rule 105 of the ICTY Rules of Procedure and Evidence.
1959 B A Gardner (ed) *Black's Law Dictionary* (9th ed West Group, St Paul, Minnesota 2000) 318, 1221.
1960 Article 28 of the ICTY Statute; Article 27 of the ICTR Statute; Article 23 of the SCSL Statute; Rules 123, 124 and 125 of the ICTY Rules of Procedure and Evidence and Rules 124, 125 and 126 of the ICTR Rules of Procedure and Evidence; Rule 123 of the SCSL Rules of Procedure and Evidence.
1961 See Practice Direction on the Procedure for the Determination of Application for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, IT/146/Rev.2 (1 September 2009) paras (19)–(20).
1962 Article 110 of the ICC Statute; Rules 223 to 224 of the ICC Rules of Procedure and Evidence.

- other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in Rule 223 of the ICC Rules of Procedure and Evidence (for example, conduct of the sentenced person while in detention, prospect of resocialisation and successful resettlement of the sentenced person, the sentenced person's individual circumstances, etc.).

Practice indicates that the minimum enforcement term to be observed is two-thirds of sentence and 25 years in the case of life imprisonment.[1963] For instance, Erdemović was granted early release under Norwegian law, after serving two-thirds of his five-year sentence.

Concluding remarks

International criminal proceedings have substantially evolved since the days of the Nuremberg and Tokyo Tribunals. The rules of procedure and evidence of the modern international criminal tribunals are not only a lot more detailed than the rudimentary provisions of the post-World War Two International Military Tribunals, they also embody the fundamental rights of a fair trial as they have emerged in the human rights era of the past 50 years. Accordingly, accused persons benefit from a much greater degree of procedural due process safeguards than their counterparts in the Nuremberg and Tokyo trials.

The elaboration of the ICTY's and ICTR's Rules of Procedure and Evidence are not, however, a result of the adoption and frequent amendment of those rules; a whole corpus of international criminal procedural law has developed as judge-made law, with the ICTY, ICTR and SCSL judges crafting solutions to the problems of international war crimes trials as they emerge, which solutions have then subsequently been adopted by other trial chambers and become consolidated in the tribunals' case-law (which is then often subsequently adopted in an amendment to the rules).

The ICC has been the direct beneficiary of this flurry of jurisprudential and procedural activity of the past 15 years or so. The ICC's Statute and Rules are directly modelled on many of the provisions from the ICTY and ICTR's Statutes and Rules of Procedure and Evidence. The ICC is thus greatly indebted to the pioneering case-law developed by the tribunals' judges. To coin a phrase, if the ICC sees further than the ICTY and ICTR, it is only because it stands on their shoulders.

Exercises and case studies

Situation A

Can the ICC exercise its jurisdiction in the following cases? Assume that all States involved are parties to the ICC.

- A State has been investigating crimes against humanity allegedly committed by its own nationals during an armed conflict which ended ten years ago. The investigation officially began three years ago, however, nobody has yet been indicted for the crimes in question.

1963 Salvatore Zappalà, 'Pardon and Commutation of Sentences' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 450, 450. See Article 110 of the ICC Statute.

- Three men were tried together before a domestic court for crimes against humanity, war crimes and genocide. After a three-month trial they were acquitted of genocide but found guilty of war crimes and crimes against humanity. They were given an aggregate sentence of two years for these two offences.
- A State has investigated a crime against humanity allegedly committed by its own national. After two years of investigations, the Prosecutor decides not to prosecute the person concerned due to insufficient evidence. The victims, who have since moved to a neighbouring country, object to the Prosecutor's decision and claim that they have been repeatedly urging the Prosecutor to consider their evidence against the perpetrator.
- In a trial before the ICTY, an accused was found guilty of war crimes and sentenced to two years of imprisonment. On appeal, the Appeals Chamber reversed the conviction and found him not guilty of the charges. Two years after the accused returned to his home country, the domestic authorities, unconvinced by the decision of the ICTY, decided to prosecute him for war crimes. Are they entitled to do so? What about if they found new evidence?

- If the accused refuses to enter a plea, does it mean that he is admitting his crime? What must the court do?
- What are the most fundamental rights of the accused during the criminal proceedings?
- In light of the principle of equality of arms, is the accused entitled to the same level of funding and the same number of lawyers as the Prosecution?
- Can the ad hoc tribunals and the ICC always appoint a defence counsel to the accused despite the fact that the accused insists on defending himself?
- What are the main differences between the Pre-Trial proceedings before the ICTY/ICTR and the ICC?
- Can a person who is formally a suspect of war crimes be arrested before his indictment or before the charges are confirmed during the Pre-Trial phase at the ICTY/ICTR or ICC?
- What obligations do the parties have in the proceedings before the ICTY/ICTR or ICC as regards disclosure?
- What are most common protective measures available to victims and witnesses?
- Can the victims participate in the proceedings before the international courts and tribunals?
- What is the standard of proof for convicting a person at the international courts and tribunals?
- Can an appeal be brought against a decision on acquittal? Can the appeal be brought against the sentence only?
- Can a person request the revision of a conviction five years after the delivery of the judgment if he discovers new evidence which, if it had been proved at trial, might have resulted in a different verdict? What are the conditions for a revision?

Case study

Horace Rumpole, a criminal barrister from London, decides that he wants to defend a case at the ICC in The Hague as a change from his normal practice. He applies to be put on the list of persons willing to be assigned as counsel maintained by the Registry pursuant to Rule 21 of the ICC Rules of Procedure and Evidence, completes the requirements and then sits back and waits for a case to come along. After a year or so, he gets a call from the Registry. They want to know if he would be interested in defending an Astanian mercenary who fought in East Astania, Osman Flashman, who has so far been defending himself and whose trial is due to start in eight weeks.

Flashman has, however, been so unruly and so abusive during the Pre-Trial proceedings – shouting abuse at the judges, calling the prosecuting attorneys 'smurfs', etc – that the judges have decided that he may no longer defend himself and so they wish to appoint Rumpole as Flashman's Defence Counsel for the trial. Rumpole is interested at the prospect of getting involved in an ICC trial, but he has reservations about defending someone who wants to defend himself. So he agrees and flies out to The Hague to see what the situation is.

Rumpole arrives at the ICC, obtains a copy of the Statute and the Rules of Procedure and Evidence, discusses with the Registry about how he will be paid his fees and travel expenses, etc. He discovers that he is entitled to a Co-Counsel, an investigator and a legal assistant. He chooses (a) Joseph Petrocelli from the Nevada Bar to be his Co-Counsel, as Petrocelli's mother is from Astania and speaks the language. He also chooses an investigator and a legal assistant.

Rumpole receives from the Prosecution:

- Disclosure of the names and statements of Prosecution witnesses who will be called to testify at trial (Rule 76(1));
- Disclosure of exculpatory material (Article 67(2)), which tends to suggests that Flashman might have a cast-iron alibi.

Rumpole also receives a Prosecution Motion for Protective Measures, lodged under Rule 87, requesting that the Prosecution be permitted to disclose the name and statement of a key Prosecution witness, Mr X, only 30 days before he testifies. Rumpole is not very happy with the Prosecution Motion – how can he prepare the case if he does not know the name of a key Prosecution witness until potentially well into the trial?

Rumpole tries to schedule a meeting with his client in the prison. Rumpole is dismayed to discover that Flashman refuses absolutely to see him, as he considers that his right to defend himself is being infringed. Flashman threatens to kill any lawyer who defends him against his will. Perplexed by these developments, Rumpole decides to resign from the case. Rumpole files a motion before the Trial Chamber stating that his client does not wish to have his services and requesting to be allowed to withdraw from the case.

To Rumpole's astonishment, the Trial Chamber refuses his application and orders him to continue in the case as Flashman's court-appointed defence lawyer. Rumpole then files a motion before the Trial Chamber, arguing with reference to copious case-law that imposing Defence Counsel on an accused violates his fundamental human right to defend himself.

The Trial Chamber refuses the Motion, arguing that the right to defend oneself is not absolute and may have to give way to other considerations, such as the right to a speedy trial. Rumpole is unconvinced by this reasoning, so he applies to the Trial Chamber, pursuant to Rule 155, to be given leave to appeal its decision before the Appeals Chamber. The Trial Chamber refuses to do so. Furious, Rumpole applies directly to the Appeals Chamber, hoping that the Appeals Chamber will see sense.

In the meantime, Flashman, who has been following all of this, is impressed by Rumpole's vigorous campaigning for his rights and decides that, after all, he will be happy to have Rumpole defending him. Flashman and Rumpole are reconciled and they begin to prepare for trial.

Rumpole's investigator has found a number of good defence witnesses, and so Rumpole is confident of an acquittal. The defence increasingly looks like one of alibi. Although Rule 79(1)(a) requires the Defence to provide notification of the defence of alibi, Rumpole notes that no specific time-limit has been set for disclosure of the defence of alibi; he decides to keep quiet about it for the moment and see how the Prosecution case develops.

The Trial Chamber grants the Prosecution Motion to protect the identity of Mr X. Flashman tells Rumpole not to worry; he knows very well that Mr X is, in fact, Dirk Darkovic, and he knows what his evidence will be. Rumpole speaks to Defence witnesses about Mr X and his likely evidence. One witness speaks to the press and blurts out that Mr Darkovic will be a witness for the Prosecution in the case against Flashman. The Prosecution initiates proceedings against Rumpole for an offence against the administration of justice (Article 70) for revealing the name of a protected witness, thereby interfering with his attendance. Fortunately, Rumpole is acquitted on the grounds of lack of *mens rea*.

The case goes to trial. When the defence case starts and alibi witnesses come forward, Rumpole is asked by the Chamber why he did not give proper notice of the alibi defence. His answer is not found convincing. The Chamber convicts Flashman, stating that it has given little weight to the alibi evidence since proper notice was not given. Flashman appeals, still instructing Rumpole to defend him, his confidence in Rumpole's talents undiminished, notwithstanding Rumpole's failure to save him from conviction.

Situation B

A number of refugees of Astanian ethnicity who were expelled by Bestanian armed forces from East Astania during the conflict between Astania and Bestania moved to the United Kingdom where they were given political asylum. The victims have heard that Astania is a party to the ICC and that the crimes committed in East Astania may be prosecuted before the ICC. One of the victims has heard from her daughter who has been studying international law at the Columbia University School of Law in New York that the ICC allows the victims to be involved in its proceedings.

Situation C

Buda, a 22-year-old police officer, was nominated as Police Chief of a small police station in one of the villages in the East Astania during the conflict between Astania and Bestania. Buda's parents died in a car accident about 19 years ago. Since his parent's death, Buda was in foster care until he joined the Bestanian police academy at the age of 15. During the armed conflict, Buda and his officers were ordered to participate in 'Operation Freedom' carried out jointly by the army and police forces. 'Operation Freedom' was aimed at cleansing East Astania of everyone who was not of Bestanian ethnicity.

Although Buda did not feel comfortable with the new assignment, he knew he had to obey the orders of superiors, otherwise he would lose his job. In order to get enough courage to carry out the assignment, Buda drank five glasses of whiskey. Buda and his officers then went to the assigned village where they gathered all the inhabitants who were not of Bestanian origin and ordered them to walk, at gunpoint, to the border with Astania. Buda and his police officers deported about 100 people of Astanian origin out of which one-third were children.

Questions

Situation A

- Can Rumpole oppose the Prosecution Motion for protective measures? If so, how would he do so procedurally? On what grounds could he oppose the Motion? If the Chamber does not wish to grant or refuse the Prosecution Motion outright, what might be a compromise solution?
- Should Rumpole be allowed to withdraw from the case if he considers that his professional duty requires him to do so?
- Is the right to defend oneself absolute? If not, under what circumstances may the right be infringed?
- Was the Trial Chamber right to acquit Rumpole of an offence against the administration of justice?
- Did Rumpole approach the question of alibi correctly? Did the Trial Chamber?

Situation B

In order to get further information, the victims contacted you and asked you to provide legal advice on the following questions:

- Can the victims participate in the proceedings? If so, at what stages?
- Can the victims participate in the proceedings personally or do they need to have a legal representative?
- Can the victims give evidence before the ICC?
- Can the victims request protective measures to prevent disclosure of their identities if they testify before the ICC?

- Can the victims request any reparation(s) from the persons convicted before the ICC who were responsible for the injuries, losses or harm they suffered?

Situation C

The ICC Trial Chamber convicted Buda for deportations as a crime against humanity. However, there have been some disagreements between the judges of the Trial Chamber in their consideration of the appropriate sentence for Buda's criminal conduct. You are working as a Legal Officer in the Trial Chamber which has been dealing with Buda's case. In order to resolve the disagreements, the presiding judge of the Trial Chamber asks you to prepare a proposal for the appropriate sentence by analysing all the factors that should be taken into account pursuant to the ICC Statute and the Rules of Procedure and Evidence. Buda has no prior convictions.