Elements of War Crimes
under the Rome Statute of the International Criminal Court

Sources and Commentary

KNUT DÖRMANN

with contributions by
Louise Doswald-Beck
and Robert Kolb

ICRC

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The Elements of Crimes are intended to assist the International Criminal Court (ICC) in the interpretation and application of the articles of the ICC Statute defining the crimes under its jurisdiction. These will not only be of crucial importance for the future work of the ICC in interpreting the crimes provisions, but also for national courts, which have the primary responsibility in the prosecution of international crimes under the Rome Statute. This commentary provides a critical insight into the *travaux préparatoires* of the Preparatory Commission leading to the adoption of the elements of war crimes. It contains an analysis of existing case law related to each war crime in the Statute. The aim is to provide States, judges, prosecutors and international and national lawyers with the necessary background information to implement international humanitarian law in future cases dealing with war crimes under the ICC Statute. The book is a unique, indispensable tool for anyone working in international criminal law.

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Foreword by Dr Jakob Kellenberger

President of the International Committee of the Red Cross

Under the regime of the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, States undertook to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and Additional Protocols as defined in these instruments of international humanitarian law. More specifically, they incurred the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, hand such persons over for trial to another High Contracting Party. In addition, States agreed to take measures necessary for the suppression of all acts contrary to the provisions of the Conventions and Protocols other than grave breaches.

The decision to lay down specific rules on the penal repression of serious violations of international humanitarian law was founded on the conviction that a law which is not backed up by sanctions quickly loses its credibility. Those who drafted the Geneva Conventions and Additional Protocols felt that penal repression could best be ensured on the national level, leaving the primary responsibility of defining and setting up an appropriate system to national authorities. Nevertheless, ever since the founding of the United Nations, and especially in view of the trials that took place after the Second World War, there has been an ongoing debate on the need to create a permanent international criminal court competent to try international crimes, including serious violations of international humanitarian law. Despite early enthusiasm, attempts to achieve this aim slowed down considerably and were even suspended, notably owing to the difficult political situation during the Cold War. After the Cold War came to an end, discussions on the issue gained new momentum.

The tragic events that took place in the former Yugoslavia and Rwanda, involving extremely serious violations of international humanitarian law,

prompted new efforts to complete the work begun half a century before. After intensive discussions lasting several years, the goal was reached with the adoption of the Rome Statute on 17 July 1998. The Diplomatic Conference that drafted the Rome Statute had the difficult task of accommodating the views of about 160 different countries and creating a court that would be credible in the eyes of the world. A considerable number of thorny and extremely sensitive issues had to be resolved. This could be achieved only through an historic compromise which could not satisfy the wishes of all concerned but had to be generally acceptable. With a vote of 120 States in favour, 21 abstentions and only 7 votes against, the international community came out strongly in support of an international criminal court. This determination was confirmed by the fact that in the period during which it was open for signature 139 States signed the Statute. The process of ratification started quickly, and it is hoped that in the near future a number of ratifications well above 60 – the required number for entry into force – will make the Court truly universal. It is also encouraging that many States have proceeded so quickly in preparing national implementation legislation that takes into account the sometimes broader obligations stemming from the Geneva Conventions and Additional Protocols.

Throughout the negotiating process, the International Committee of the Red Cross (ICRC) supported and firmly defended the idea of an effective and independent permanent international criminal court. On the basis of its expertise in the field of international humanitarian law, it focused primarily on the negotiations relating to war crimes. It participated in the process, alongside governments, United Nations agencies and non-governmental organisations, in various ways, in particular through active involvement in the negotiations and the production of background materials. It felt that such a court could considerably improve the implementation of international humanitarian law, which, in addition to bringing aid and protection to victims of armed conflict, is one of the ICRC's primary objectives.

The trust placed in, and the credibility of, the future International Criminal Court will depend largely on the way it exercises its jurisdiction. The quality of its judgments will certainly come under close scrutiny by the international community, and it is therefore essential that the law is properly applied.

Bearing this in mind, the Rome Diplomatic Conference decided that elements of crimes should be drafted in order to provide the judges with an additional instrument which might help them with their interpretation of the definitions of crimes contained in the Statute.

The ICRC remained actively involved in the negotiations that took place after the Rome Diplomatic Conference, producing further working documents to contribute to the successful outcome of debates in the Preparatory Commission mandated to prepare the drafts on elements of crimes. In accordance with its role as guardian of international humanitarian law, the ICRC focused on war crimes. Its main contribution was an extensive study on the elements of war crimes, based in particular on existing case law from international and national courts.

After the successful completion of the diplomatic negotiations within the Preparatory Commission – the draft on elements of crimes was adopted by consensus – and in view of the very positive response to its study, the ICRC decided, by means of this commentary, to make available to the public at large the material collected and a description of the substantive discussions of the Preparatory Commission. We feel that this commentary may be especially useful for judges, prosecutors and defence lawyers in their important task of applying humanitarian law in criminal proceedings, not only on the international but also on the national level. Given that the Rome Statute is based on the principle of complementarity – the International Criminal Court will exercise its jurisdiction only when a State is unwilling or unable genuinely to carry out the investigation or prosecution – the main responsibility for the prosecution of international crimes will remain with national jurisdictions.

The ICRC is pleased to have been part of the concerted effort made by the international community to draft the Rome Statute and to prepare, in the context of the Preparatory Commission, the instruments annexed to the Statute, in particular the document on elements of crimes. It remains committed to contributing through its various activities, the publication of this commentary being one among many others, to work for the faithful and effective implementation of international humanitarian law in the interests of victims of armed conflict.

Foreword by Philippe Kirsch, QC

Canadian Ambassador to the Kingdom of Sweden; Chairman of the Preparatory Commission for the International Criminal Court; former Chairman of the Committee of the Whole, United Nations Diplomatic Conference on the Establishment of an International Criminal Court

On June 30, 2000, the Preparatory Commission for the International Criminal Court (ICC) adopted by consensus the draft Elements of Crimes, elaborating upon the definitions of genocide, crimes against humanity and war crimes contained in the ICC Statute. The Elements document, to be adopted by the ICC Assembly of States Parties, was the culmination of a remarkable codification process by the international community. The negotiations involved experts from a variety of diverse fields, including military lawyers, human rights lawyers and criminal lawyers, working together to reconcile their conflicting perspectives, priorities and backgrounds, to create a single statement on these serious international crimes.

The development of the Elements of Crimes has proven to be a very useful exercise. Because of the general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law, states relied heavily on accepted historical precedents in crafting the definitions in Articles 6 to 8 of the ICC Statute. This approach ensured the widespread acceptability of the definitions, but resulted in an assortment of provisions drawn from different sources and different eras. As a result, terminology was frequently inconsistent and often outdated. The Elements of Crimes negotiations provided the opportunity to unify these provisions in a single coherent structure, reflecting consistent and modern terminology. It was also an opportunity to resolve difficult problems and ambiguities surrounding the interplay of general legal principles, such as the *mens rea* requirement for particular provisions. By providing additional clarity, the Elements have helped garner greater acceptance for international criminal law and the ICC.

The ICRC was at the heart of the negotiations on the war crimes provisions, given its respected role as a guardian of international humanitarian law. The extensive ICRC study on the relevant jurisprudence, which forms

the basis for this text, was an early and indispensable contribution. Since it was generally agreed that the Elements must be consistent with existing law and existing precedents, the ICRC study quickly became a basic reference point for all subsequent discussions.

The ICRC not only contributed the jurisprudential study, but carried on to play a pivotal role in the Elements negotiations. Knut Dörmann and other ICRC delegates were leading participants in the protracted negotiations on how best to reconcile the demands of military necessity, the strictures of criminal law, and the humanitarian aims of these laws, and to integrate them into a coherent approach. The imprimatur of the ICRC can be seen throughout the Elements of Crimes.

The present study will therefore be of great interest to the judges of the ICC, first, because it was a major influence on the Elements negotiations, second, because it collects and analyses the relevant case law, and third, because it provides valuable insights into the considerations and debates that shaped the Elements. This study should also prove extremely useful to other judges and lawyers engaging in national or international war crimes prosecutions. Although the Elements document is not legally binding, it is worth recalling that each of the provisions of the Elements of Crimes was subjected to extensive review and debate by diverse experts and officials, taking into account various concerns and aspirations, and the outcome reflects the balance achieved on these difficult issues by the international community as a whole. It is true that the document contains various compromises that will be considered by some as too narrow and others as too broad, but it is precisely *because* it is a compromise document, indeed a consensus document, that it is so valuable: it is a unified statement by the international community on these legal issues. Moreover, cross-fertilization and convergence between the ICC, the ad hoc Tribunals and national courts is inherently desirable. If international criminal law is to continue to gain in credibility and effectiveness, it must be *one* law, a coherent corpus of law.

This thorough and balanced study will make a very important contribution to the process of building this edifice of law. By illuminating both the jurisprudence and the practical underpinnings of war crimes law, it will serve as an invaluable reference for anyone involved in the enforcement and vindication of international humanitarian law.

Table of cases by alphabetical order

For full citation see Table of cases by jurisdiction

Table of cases by jurisdiction

Arranged in alphabetical order of Tribunal (except for the Leipzig Trials which immediately precede War Crimes Trials and National Courts which come at the end).

Apart from IACiHR and ECiHR cases almost all the decisions referred to in the text have been reported in full or digest form in the *Annual Digest and Reports of Public International Cases* (AD) (now referred to as *International Law Reports*), vols. 1–16, or in the International Law Reports (ILR). ILR references are included as appropriate in this Table.

European Commission of Human Rights

1967

X v. *Austria*, 7 February 1967, Application No. 2370/64 (COM) (22 Collection of Decisions of the European Commission of Human Rights) 425

1970

The Greek case, 15 March 1970 ((1972) 12 Yearbook of the Convention on Human Rights) 51, 53, 60, 61, 67, 320, 321

1973

East African Asians v. *UK*, Commission's report of 14 December 1973, Application Nos. 4403/70 ff. (3 EHRR 1973) 322

X v. *FRG*, Decision of 11 July 1973, No. 6038/73 ((1973) 44 Collection of Decisions of the European Commission of Human Rights) 68

1975

X v. *Austria*, Decision of 29 May 1975 on the admissibility of the application, E 6185/73 (COM), Application No. 6185/73 (2 Decisions and Reports) 419

1977

Dieter Haase v. *Federal Republic of Germany*, Commission's Report of 12 July 1977, Application No. 7412/76 (11 Decisions and Reports) 425

1978

G. Ensslin, A. Baader and J. Raspe v. *Federal Republic of Germany*, Decision of 8 July 1978 on the admissibility of the applications, Applications Nos. 7572/76, 7586/76 and 7587/76 (14 Decisions and Reports) 68

European Commission of Human Rights and Committee of Ministers

European Court of Human Rights

Inter-American Commission on Human Rights

Inter-American Court of Human Rights

International Court of Justice

International Criminal Tribunal for the former Yugoslavia

International Criminal Tribunal for Rwanda

Mixed Arbitral Tribunals

United Nations Human Rights Committee

Leipzig Trials

War Crimes Trials after the Second World War

1945

1946

National courts

Table of treaties and other international instruments

1949

1950

1954

1972

1975

1976

1977

1999

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AD	Annual Digest and Reports of Public International Law Cases
AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–7)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECiHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EOC	Elements of Crimes
FRG	Federal Republic of Germany
GA	General Assembly
GAOR	General Assembly Official Records
GC	Refers to all four Geneva Conventions
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949

GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
Hague Regulations/ HR	Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (IV) respecting the Laws and Customs of War on Land
IACiHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAYHR	Inter-American Yearbook on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILM	International Legal Materials
ILR	International Law Reports
LOAC	Law of Armed Conflicts
LRTWC	Law Reports of Trials of War Criminals
NATO	North Atlantic Treaty Organisation
OAS	Organization of American States
OR	Official Records
POW	prisoner(s) of war
PrepCom	Preparatory Commission for the International Criminal Court
SC	United Nations Security Council
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UN Doc.	United Nations Document
UNGA	United Nations General Assembly
UNGA Res.	United Nations General Assembly Resolution
UNHRC	United Nations Human Rights Committee
UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
US	United States of America
USSR	Union of Soviet Socialist Republics

1. Introduction

General background

> The establishment of the [International Criminal] Court has at last provided international humanitarian law with an instrument that will remedy the shortcomings of the current system of repression, which is inadequate and all too often ignored. Indeed, the obligation to prosecute war criminals already exists, but frequently remains a dead letter. It is therefore to be hoped that this new institution, which is intended to be complementary to national criminal jurisdictions, will encourage States to adopt the legislation necessary to implement international humanitarian law and to bring violators before their own courts.
>
> (Statement by the International Committee of the Red Cross (ICRC), United Nations General Assembly, 53rd session, Sixth Committee, item 153 of the agenda, New York, 22 October 1998)

On 17 July 1998 the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) adopted the Rome Statute of the International Criminal Court. The UN General Assembly had first recognised the need for such a court in 1948, in view of the Nuremberg and Tokyo trials that followed the Second World War. Its creation had been under discussion at the UN ever since. The Statute's adoption in 1998 may therefore be seen as the fruit of some fifty years of effort.

As pointed out by the ICRC in the same statement quoted above, '[b]y adopting this treaty the great majority of States clearly demonstrated their resolve to put an end to the impunity enjoyed by the perpetrators of the most heinous crimes, and hence to deter the commission of further violations'.

The Statute entered into force on 1 July 2002. The ICC will have jurisdiction over the crime of genocide, crimes against humanity, war crimes and

the crime of aggression[1] (Art. 5 of the ICC Statute). It will be complementary to national criminal jurisdictions. Under international law, States have the right and the obligation to prosecute those responsible for war crimes, for crimes against humanity and for genocide. This remains. The Geneva Conventions and their Additional Protocol I specifically lay down an obligation to repress grave breaches of international humanitarian law, which are considered war crimes. For other breaches of the Conventions and of Protocol I, the States Parties must take the measures needed to suppress them. Despite these rules, however, the need remains for an international criminal court since many States have proved unwilling to fulfil their duty to exercise their jurisdiction. Though the States continue to have the primary role to play in prosecuting war criminals, the ICC is being set up precisely to step in for national courts when these are unwilling or genuinely unable to do so. It is then that the ICC will be able to exercise its jurisdiction.

The ICRC was active throughout the process of negotiating the Rome Statute. In particular, it prepared a proposed list of war crimes together with a commentary and submitted a paper on 'State consent regime vs. universal jurisdiction'. It also took an active part in all the preparatory work for the Rome Conference and in the Conference itself.

Background to this commentary

In Arts. 6, 7 and 8, the Rome Statute sets out a list of crimes over which the Court will have jurisdiction: genocide crimes against humanity and war crimes. In order to provide greater certainty and clarity concerning the content of each crime, some States felt that specific texts on Elements of Crimes (EOC) should be drafted.

Eventually Art. 9 was added. It states that the 'Elements of Crimes shall assist the Court in the interpretation and application of Arts. 6, 7, and 8. They shall be adopted by . . . the members of the Assembly of States Parties.' As a general rule, Art. 21 states that 'the Court shall apply . . . the Elements of Crimes'. On the basis of these rules, the EOC will guide the future judges and will therefore be of crucial importance for the work of the ICC in the interpretation of the provisions on crimes. In Rome, it was agreed that a text on the elements of genocide, crimes against humanity and war crimes was to be prepared by a preparatory commission.

[1] The Court may exercise jurisdiction over the crime of aggression only once a provision is adopted in accordance with Articles 121 and 123 of the Statute defining the crime and setting out the conditions under which the Court must exercise jurisdiction with respect to this crime.

That commission (PrepCom), which was mandated by the UN General Assembly, started its activity in February 1999 and, after five sessions, finalised its work on the Elements of Crimes on 30 June 2000. Its text, which was adopted by consensus, will be submitted to the future Assembly of States Parties for adoption. The ICRC was active throughout the negotiating process. In particular, in order to assist the PrepCom, the ICRC prepared a study of existing case law and international humanitarian and human rights law instruments relevant to drafting the elements of war crimes. Since the ICRC's core mandate is limited to developing and spreading knowledge and promoting the implementation of international humanitarian law, the study was confined to an analysis of elements of war crimes. In preparing the study, the ICRC played its internationally recognised role as guardian of international humanitarian law.[2] The aim of the study, which was submitted in seven parts, was to provide the government delegations taking part in the PrepCom with the necessary legal background and to prepare a means of accurately interpreting war crimes as defined in the Rome Statute. The study was a crucial working tool throughout the negotiations. It was repeatedly cited as the reference text that should guide the discussion. The study was officially submitted to the PrepCom at the request of seven States (Belgium, Costa Rica, Finland, Hungary, Republic of Korea, South Africa and Switzerland).[3]

Working method

The study submitted to the PrepCom was based on an exhaustive analysis of international and national war crimes trials. It reviewed existing case law from the Leipzig trials, from post-Second World War trials, including the Nuremberg and Tokyo trials,[4] as well as national case law and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. National case law on war

[2] The formal basis for the ICRC's role in implementing and developing international humanitarian law is to be found in the Statutes of the International Red Cross and Red Crescent Movement. The Movement is comprised of the ICRC, National Red Cross and Red Crescent Societies and their International Federation. It works closely with all States Party to the Geneva Conventions of 1949. By means of the Movement's Statutes, the International Conference of the Red Cross and Red Crescent has assigned the ICRC the task of working 'for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and [preparing] any development thereof' (Art. 5(g) of the Statutes of the International Red Cross and Red Crescent Movement).

[3] PCNICC/1999/WGEC/INF.1 of 19 February 1999, PCNICC/1999/WGEC/INF.2 of 14 July 1999, PCNICC/1999/WGEC/INF.2/Add.1 of 30 July 1999, PCNICC/1999/WGEC/INF.2/Add.2 of 4 August 1999 and PCNICC/1999/WGEC/INF.2/Add.3 of 24 November 1999.

[4] Much of this material is available in digest form in the *Annual Digest and Reports of Public International Law Cases* (now volumes 1–16 of the *International Law Reports*).

crimes was studied when it was available in English, French or German. Decisions from international and regional human rights bodies were also analysed to facilitate interpretation of particular offences closely linked to human rights concepts (for example, torture and inhuman or cruel treatment). This approach has also been chosen by the two ad hoc Tribunals in their judgments (for example, in the *Delalic* and *Furundzija* cases).

Those aspects of this case law that were relevant in interpreting war crimes as listed in the Rome Statute were included in the study.[5] The quotations were taken from the original sources. Relevant provisions from treaties of international humanitarian law were also included. This last point was particularly important for crimes such as 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'. The Geneva Conventions contain specific provisions in various chapters that define the conditions under which property might be lawfully appropriated or destroyed. In order to ensure correct interpretation of the law, it was therefore necessary to indicate these provisions. Where little or no case law was available, reference was also made to commentaries on the relevant instruments, in particular the commentaries published by the ICRC on the Geneva Conventions and their Additional Protocols, military manuals and – to a very minor extent – legal writings.

The study submitted to the PrepCom indicated the results that emerged from the analysis of the sources mentioned above. These results were used by Costa Rica, Hungary and Switzerland to present their own text proposals for EOC during the PrepCom negotiations. The ICRC's work was greatly appreciated by an overwhelming number of delegations and considerably influenced the outcome of the negotiations. Several delegations indicated in particular that the sources quoted in the study would be of enormous assistance to future judges, not only those of the ICC but, more importantly, national judges who will have to apply international humanitarian law under their national legislation. The ICRC was repeatedly encouraged to publish the study.

Against this background, we began preparing the present commentary, which – with regard to the sources quoted – is essentially an update of the study submitted to the PrepCom.[6] The commentary also includes some new sections: the outcome of the PrepCom (the elements of war crimes as

[5] The various sources were selected in an objective manner based on their relevance to a particular crime. They were not intended as a reflection of any particular view or position.

[6] Since completion of the initial study for the PrepCom, substantial jurisprudence has emerged from the ad hoc Tribunals for the former Yugoslavia and Rwanda.

they were adopted) and a summary of the PrepCom's *travaux préparatoires*, including an explanation of certain understandings apparent within the Commission on its way to adopting the final text.[7] On this basis, the commentary follows the same structure for each war crime under the Rome Statute:

1. text adopted (this section replaced the original section entitled 'Results from the sources');
2. *travaux préparatoires*/understandings of the PrepCom (new section); and
3. legal sources relating to particular war crimes under the heading 'Legal basis of the war crime' (updated section including the review of existing case law and relevant instruments of international humanitarian law).

The section on the *travaux préparatoires* explains in detail the decisions taken by the PrepCom. For persons not involved in diplomatic negotiations but who have to work with the legal texts that emerge from such negotiations, it is often not apparent why certain words have been chosen and for what purpose. This section also endeavours to present the relevant context of the negotiations to those who will have to use the texts in the future. Since the ICRC representatives were invited to participate as experts in almost all formal and informal negotiation sessions on war crimes, we are in a position to give a full account of the *travaux préparatoires*.

Given that the Elements of Crimes cannot provide all the detail needed to interpret the law on war crimes as defined in the Rome Statute, the judges, prosecutors and lawyers will have to consult additional sources. These sources are presented in the third section of the commentary on each war crime, which is an update of the ICRC's original study. They include, in particular, the case law of the ad hoc Tribunals for the former Yugoslavia and Rwanda subsequent to the PrepCom negotiations up to 31 August 2001.

It is important to note that the present commentary does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) or questions concerning crimes committed by attempt, incitement, conspiracy or other forms of assistance (Art. 25 ICC Statute).

[7] The term 'understanding' in this context should not be confused with the technical term in Art. 31 of the Vienna Convention on the Law of Treaties. For the purposes of the present commentary, it describes the understandings of the negotiating delegations as we perceived them during the deliberations.

This commentary's purpose

The purpose of this commentary is to provide judges, prosecutors and lawyers with the background information needed to implement international humanitarian law properly in the future prosecution of war crimes under the Rome Statute. In order to serve the interests of justice, it is important that the legal basis of the crimes is well known and implemented. Lack of knowledge of the issues in international humanitarian law, so often a feature of national trials, demonstrates the need for something of this kind. Since the ICC is only complementary to national jurisdictions, reference texts like the present commentary will be an important tool for lawyers at the national level. It is interesting to note that the International Criminal Tribunal for the former Yugoslavia referred to the initial ICRC study in one of its judgments (*Aleksovski*).

Neither the definition of the crimes in the Rome Statute nor the document on EOC as adopted by the PrepCom provides a complete picture, which is necessary for an accurate and faithful interpretation of the crimes. For example, both the Statute and the EOC use certain legal terms (such as 'attack', 'military objective' or 'civilian population') without further defining them. However, the treaties of international humanitarian law, from which the crimes involving these terms are derived, do contain specific definitions. Judges, prosecutors and defence lawyers will therefore have to look to these treaties of international humanitarian law to identify the relevant provisions. The present commentary indicates these provisions. In addition, there are cases in which the treaties do not provide specific definitions, but in which clarification has been provided by existing case law. This case law is quoted in the commentary. Finally, certain controversial issues remained unresolved by the PrepCom for a number of reasons and the EOC therefore amount to more or less a reproduction of the Statute's wording, making it necessary to consult other sources. The second ('*Travaux préparatoires*/understandings of the PrepCom') and third ('Legal basis of the war crime') sections of the commentary on each crime should provide judges, prosecutors and defence lawyers at both international and national levels with a tool to apply international humanitarian law correctly.

Acknowledgements

Both the present commentary and the study submitted to the PrepCom were written by Mr Knut Dörmann, Legal Advisor at the ICRC's Legal Division. Ms Louise Doswald-Beck, former head of the organisation's Legal

Division, supervised the project and contributed to the text with her advice. Both represented the ICRC at the diplomatic negotiations that led to the adoption of the EOC document by the PrepCom. Much of the research into the sources – in particular the Leipzig trials, the post-Second World War trials and decisions and reports from human rights bodies – was undertaken by Mr Robert Kolb who worked at that time as a researcher for the ICRC.

Several other persons working for the ICRC – Fabrizio Carboni, Isabelle Daoust, Thomas Graditzki, Michelle Mack, Jean Perrenoud and Baptiste Rolle – contributed with their research and Sarah Avrillaud, Edith Bérard, Martha Grenzeback and Rod Miller helped with administration, language and proof-reading. We would like to express our sincere gratitude for their work.

Finally, special thanks are due to the Cambridge University Press Staff, and in particular to Ms Finola O'Sullivan, Ms Jennie Rubio and Ms Diane Ilott, who were extremely helpful in preparing this book.

2. Legal value of the elements of crimes

During the diplomatic conference in Rome, some States argued that a document on elements of crimes was needed to provide greater certainty and clarity regarding the content of each crime. One delegation suggested making the elements binding on the judges of the ICC. However, the majority of States were concerned at the prospect of unduly restricting judicial discretion and felt that it would be unacceptable to make the elements binding. In particular it was pointed out that all the war crimes in the Statute are derived from existing instruments of international humanitarian law, which provide the necessary framework for interpretation of the law on the crimes and secure the principle of legality.

Nevertheless, the idea of a document outlining the elements of crimes was not completely rejected in Rome, and Art. 9 of the Statute reflects the compromise that was reached. It stipulates that the Elements of Crimes 'shall assist the Court in the interpretation and application of articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes)' and thus clearly indicates that the elements themselves are to be used as an interpretative aid and are not binding upon the judges. The elements must 'be consistent with this Statute' and it should be emphasised that consistency with the Statute must be determined by the Court. Article 9 appears to be the *lex specialis* with regard to Art. 21(1) which states that '[t]he Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence . . .'

3. General Introduction adopted by the PrepCom

During the negotiations it became apparent that there are certain issues that arise in all crimes and are worth clarifying. But these do not necessarily qualify as elements. Therefore the PrepCom decided that a general introduction applicable to all crimes[1] should precede the section on the elements of particular crimes.

The relationship between the crimes and general principles of criminal law presented the Working Group on Elements of Crimes with a particularly difficult drafting problem. Long discussions on this issue were held during an intersessional meeting convened for this purpose by the government of Italy and the International Institute of Higher Studies in Criminal Sciences, in Siracusa, Italy. The results of the Siracusa meeting provided a useful basis for the discussions at the March 2000 session of the PrepCom,[2] which tentatively agreed on the General Introduction. This text was confirmed with slight modifications during the final session of the PrepCom in June 2000. It reads as follows:[3]

> 1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21, and the general principles set out in Part 3 are applicable to the Elements of Crimes.
>
> 2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements

[1] Henceforth 'General Introduction'.
[2] See report reproduced in PCNICC/2000/WGEC/INF.1* of 10 March 2000.
[3] The finalised draft text is reproduced in PCNICC/2000/1/Add.2 of 2 November 2000.

of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

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

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

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

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

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

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

8. As used in the Elements of Crimes, the term 'perpetrator' is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply *mutatis mutandis* to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.

9. A particular conduct may constitute one or more crimes.

10. The use of short titles for the crimes has no legal effect.

The following remarks may be made regarding the content of this General Introduction.

The first paragraph stresses the non-binding character of the EOC derived from Art. 9(3) of the Rome Statute and clarifies the relationship between the EOC and the Statute's provisions, i.e. the general provisions of the Statute remain applicable even without explicit reference to the elements of a particular crime. Article 21 and Part 3 on general principles of criminal law are mentioned because they are the most relevant rules in this context.

Paragraph 2 of the Introduction details the manner in which Art. 30 of the Rome Statute,[4] which defines the mental element in general terms, is to be applied in the EOC. In particular, this paragraph explains the reason why little mention of the accompanying mental element is made in the elements of the various crimes. During the negotiations at the PrepCom the difficulty of adequately reflecting the relationship between Art. 30 and the definition of the crimes in the EOC document became obvious. Delegations worked hard to find a coherent approach. Three questions – whether the mental element should be defined for every crime, whether Art. 30 alone is sufficient, and whether the judges should make their own determination – were hotly debated, particularly as considerable differences in national legal systems made it almost impossible to address the mental element of war crimes in a consistent manner.

Probably the most problematic question as to the interpretation of Art. 30 relates to what is meant by 'unless otherwise provided', i.e. what other legal sources are of relevance in this context. For example, does this formulation mean that Art. 30 defines the mental element for every crime exclusively unless the Statute itself otherwise provides, even if it is more restrictive than customary international law? Or does it mean that the mental element might also be specifically defined in the EOC? It appears that, in addition to the different standards explicitly set out in the Statute, the general view was that a departure from the rule in Art. 30 may be required by other sources of international law as defined in Art. 21 of the Statute, in particular by applicable treaties and established principles of international humanitarian law. In this regard, the jurisprudence – in particular the case law of the ad hoc Tribunals for the former Yugoslavia and Rwanda – may provide valuable interpretative insights. For example, in relation to the mental element applicable to grave breaches of the Geneva Conventions, discussed in more detail below, the Trial Chamber

[4] Art. 30 reads as follows:

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.

of the International Criminal Tribunal for the former Yugoslavia held that

> the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[5]

It will be up to the future judges of the ICC to determine how to bring this jurisprudence into line with the rule set out in Art. 30. The judges may face a similar problem with the term 'wilful', which is used in the definition of some of the crimes listed in Art. 8 and which has not been repeated in the EOC. The court will have to decide whether, in fact, the standard set in Art. 30 and the definition of 'wilfulness' in the jurisprudence of the ad hoc Tribunals correspond.

The second interpretative problem relates to the concept of 'material element'. Article 30 states that *material* elements must be committed with intent and knowledge, without clearly defining what is meant by 'material'. The provision itself does give indications in so far as it mentions, in paragraphs 2 and 3, three types of non-mental elements (conduct, consequence and circumstance) that might therefore be considered as material elements under the Statute. However, Art. 30 itself does not answer the question as to whether there exist other elements, for example ones related to the jurisdiction of the Court, which would require no accompanying mental element at all. This explains why there was considerable debate over the nature of some non-mental elements, in particular in relation to the specific element in the war-crimes section which describes the context in which a crime must be committed in order to be considered a war crime.[6]

For many delegations, the third paragraph of the General Introduction was of particular importance. They feared that some of the mental elements introduced in the EOC created an excessive burden for the prosecutor. It was therefore considered necessary to emphasise that the actual knowledge or intent of the accused can generally be inferred from the circumstances and that the prosecutor will not be required specifically to prove these elements in every case.

Paragraph 4 gives some guidance for the judges on how to handle 'value judgements'. The Siracusa Report emphasised that '[t]he issue was whether a statement was required in the Elements of Crimes clarifying that the

[5] ICTY, Judgment,*The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.
[6] See below in more detail.

Prosecutor is not obliged to prove that the accused personally completed the correct normative evaluation, i.e. that the accused considered his acts "inhumane" or "severe". There was a general view that this proposition was sufficiently evident and that further elaboration in the Elements of Crimes was not required.'[7] It was, nevertheless, decided by the PrepCom that clarification was needed to ensure that the standard of knowledge required by Art. 30 did not apply to such elements. Therefore, on the basis of the clarification provided in the General Introduction, it is the judges who must determine whether particular conduct can be held to have been 'inhumane' or 'severe'. The prosecutor will therefore be required only to demonstrate that the accused knew that harm would occur in the ordinary course of events as the result of his conduct. It would thus not be a valid defence for the accused to say 'I knew that I was going to cause harm, but I did not feel it would be severe.'

Paragraph 5 makes clear that grounds for excluding criminal responsibility are dealt with in the EOC only in exceptional cases.

Paragraph 6 is one of the most crucial in the Introduction. The content is not easy to understand without referring to the negotiation history of the EOC. The term 'unlawful' does not refer to grounds for excluding criminal responsibility under the Statute. It was instead intended as a reference to relevant provisions of international humanitarian law defining the unlawfulness of particular conduct. For example, deportation (Art. 8(2)(a)(vii)) can be a war crime only if it is undertaken in ways or in situations contrary to Art. 49(2) and (3) of the Fourth Geneva Convention, which describe lawful evacuations. The war crime of 'destruction and appropriation' as set out in Art. 8(2)(a)(iv) must be read in conjunction with the provisions on what is allowed or prohibited in relation to property under the Geneva Conventions and other instruments of international humanitarian law. The term 'unlawful' serves more or less the same purpose as the terms 'in violation of the relevant provisions of this Protocol' and 'in violation of the Conventions or the Protocol' in Art. 85(3) and (4) of Additional Protocol I. In the context of war crimes under the Statute, therefore, 'unlawful' means 'in violation of international humanitarian law'.

Paragraph 7 of the General Introduction describes the structure of the EOC document. It has no additional substantive meaning.

Intensive discussions took place on several occasions as to whether the term 'accused' should be used. Until the last session of the PrepCom, all rolling texts contained this term despite repeated criticism by a

[7] See report reproduced in: PCNICC/2000/WGEC/INF.1* of 10 March 2000.

number of delegations. Basically, they argued that it has specific procedural connotations in the context of the Rules of Procedure and Evidence, and that it should therefore be avoided. Eventually the term was replaced by 'perpetrator'. One delegation stated that this choice would conflict with the presumption of innocence. But paragraph 8 specifies therefore that 'the term "perpetrator" is neutral as to guilt or innocence'. The change made during the final reading has no substantive impact.

During the intersessional meeting in Siracusa there was also a debate over whether it was necessary to elaborate on other forms of criminal responsibility such as those which are defined in Art. 25 (dealing with, for example, different forms of participation in the commission of a crime, attempted crime, etc.) and Art. 28 (dealing with command and superior responsibility). Despite the fact that at the first session of the PrepCom a delegation submitted a proposal on this issue,[8] the general view was that the provisions in the Statute are sufficient and no additional elements addressing those forms of criminal responsibility are needed. The text of the EOC therefore addresses only the direct perpetrator and not other forms of individual criminal responsibility. Paragraph 8 points out in this regard that '[t]he elements, including the appropriate mental elements, apply *mutatis mutandis* to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute'.

Paragraph 9 of the General Introduction deals in very general terms with the overlap of crimes. It emphasises that particular conduct may constitute several crimes. This statement was considered very important, especially as regards sexual crimes which are not only crimes under Art. 7(1)(g), Art. 8(2)(b)(xxii) and Art. 8(2)(e)(vi), but may also fulfil the conditions for torture, inhuman treatment or other more general crimes. Given that this principle is not confined to sexual crimes, the PrepCom decided to include the general statement quoted above.

The final paragraph deals with the choice of titles in the EOC document. Many delegations felt that it would be more convenient and 'user-friendly' to have short titles. Those delegations who preferred the full titles as contained in the Statute agreed to this approach on the understanding, which was shared by everyone, that '[t]he use of short titles for the crimes has no legal effect'.

[8] PCNICC/1999/DP.4/Add.3 of 4 February 1999.

4. Introduction to elements of war crimes listed in Article 8 of the Rome Statute

In addition to the issues dealt with in the General Introduction, it was realised that certain points were particularly relevant to all crimes under Art. 8 ICC Statute. The PrepCom decided therefore to include in the EOC document an introduction which is specifically applicable to all these crimes. The substance must be read in conjunction with the elements defined for each crime. The introduction reads as follows:

> The elements for war crimes under article 8, paragraph 2(c) and (e), are subject to the limitations addressed in article 8, paragraph 2(d) and (f), which are not elements of crimes.
>
> The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.
>
> With respect to the last two elements listed for each crime:
>
> - There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
> - In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
> - There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'.

At this point it is worthwhile to discuss in some detail the second paragraph of the introduction. The other paragraphs will be dealt with in the context of those elements where they become relevant, i.e. the first

paragraph in sections 7.1. and 8.1. and the third paragraph in sections 5.1., 6.1., 7.2. and 8.2.

The second paragraph of the introduction takes into account that the rules of international humanitarian law applicable in warfare on land and those applicable in warfare at sea are not always identical. The EOC document reflects primarily the law applicable to land warfare. In the context of particular war crimes (e.g. Art. 8(2)(b)(vii) and (xiii)[1]) delegations pointed out that different rules apply to sea warfare. They considered that an explicit statement to that effect was needed in the elements of these crimes. The PrepCom, however, recognised that this issue was of a more general nature. The problem was resolved by a specific reference to the law of armed conflict at sea in the second paragraph of the introduction. This paragraph is meant to be a reminder to the judges that the elements cannot be applied schematically to conduct in naval warfare operations in all circumstances, although it is clear that the Statute applies to war crimes committed during naval warfare. The States felt, however, that it would not be advisable to indicate for every crime specific rules of naval warfare that would differ from those reflected in the elements. The paragraph serves *grosso modo* the same purpose as the sixth paragraph of the General Introduction applicable to all crimes listed in Arts. 6, 7 and 8 of the ICC Statute (see above, section 3., page 13). It is a *renvoi* to other applicable norms.

[1] See PCNICC/1999/L.5/Rev.1/Add.2 of 22 December 1999, n. 53.

5. Article 8(2)(a) ICC Statute – Grave breaches of the 1949 Geneva Conventions

5.1. Elements common to all crimes under Article 8(2)(a) ICC Statute

Four elements describing the subject-matter jurisdiction for war crimes under Art. 8(2)(a) ICC Statute are drafted in the same way for all crimes under this section and will therefore be discussed separately from the specific elements of each particular crime. Two of the four deal with the persons/property affected and the other two with the context in which the war crime took place.

Text adopted by the PrepCom

- Such person or persons/property[1] were/was protected under one or more of the Geneva Conventions of 1949.
- The perpetrator was aware of the factual circumstances that established that protected status.[*][**]
- 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.

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

[1] The protection of property is only relevant in the context of Art. 8(2)(a)(iv) of the ICC Statute. All the other crimes are crimes committed against protected persons.

[**] With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8(2)(a).

[***] The term 'international armed conflict' includes military occupation. This footnote also applies to the corresponding element in each crime under article 8(2)(a).

Commentary

War crimes as listed in Art. 8(2)(a) of the ICC Statute cover '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'. In accordance with the jurisprudence of the ICTY, grave breaches of the Geneva Conventions concern acts committed in the context of an international armed conflict against persons or property protected under the relevant provisions of the four 1949 Geneva Conventions.[2] Two common elements can be derived from this statement: first, the context in which the crimes must be committed; and second, against whom or what the crimes must be committed.

In the following analysis the two elements relating to the context, i.e. the third and fourth elements quoted above, shall be treated first and the elements relating to the persons/property affected, i.e. the first and second elements quoted above, will be dealt with afterwards.

(1) CONTEXTUAL ELEMENTS

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom followed the approach taken in the *Tadic* case, where it was held that the concept of grave breaches applies only to international armed conflicts.[3] It decided not to define the notion of an international armed

[2] See ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 201.

[3] ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-A, para. 80; 105 ILR 453 at 497; ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 84 (for the reasons see paras. 79 ff.); 105 ILR 453 at 499; see also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 74; 122 ILR 1 at 43:

> Within the terms of the *Tadic* Appeal Decision and *Tadic* Appeal Judgment, Article 2 applies only when the conflict is international. Moreover, the grave breaches must be perpetrated against persons or property covered by the 'protection' of any of the Geneva Conventions of 1949.

The ICTY seemed, however, to take a more progressive approach in the *Delalic* case:

> While Trial Chamber II in the *Tadic* case did not initially consider the nature of the armed conflict to be a relevant consideration in applying Article 2 of the Statute, the majority of the Appeals Chamber in the *Tadic* Jurisdiction Decision did find that grave breaches

conflict. However, it emphasised in a footnote that the term 'international armed conflict' includes military occupations. Considerable emphasis has been placed on the description of the nexus that must exist between the conduct of the perpetrator and the international armed conflict, as well as on the question of a possible mental element which would be linked to the element describing the context.

The words 'in the context of and was associated with' are meant to draw the distinction between war crimes and ordinary criminal behaviour. The PrepCom clearly derived this formulation from the jurisprudence of the ad hoc Tribunals. The words 'in the context of' were meant to indicate the concept, developed by the ICTY, that:

> international humanitarian law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached[4]

and

> that at least some of the provisions of the [Geneva] Conventions apply to the entire territory of the Parties to the conflict, not just the vicinity of actual hostilities . . . [P]articularly those relating to the protection of prisoners of war and civilians are not so limited.[5]

The words 'in association with' were meant to reflect the jurisprudence of the ad hoc Tribunals, which states that a sufficient nexus must be

> of the Geneva Conventions could only be committed in international armed conflicts and this requirement was thus an integral part of Article 2 of the Statute. In his Separate Opinion, however, Judge Abi-Saab opined that 'a strong case can be made for the application of Article 2, even when the incriminated act takes place in an internal conflict'. The majority of the Appeals Chamber did indeed recognise that a change in the customary law scope of the 'grave breaches regime' in this direction may be occurring. This Trial Chamber is also of the view that the possibility that customary law has developed the provisions of the Geneva Conventions since 1949 to constitute an extension of the system of 'grave breaches' to internal armed conflicts should be recognised.,
>
> ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 202 (footnotes omitted).
>
> In the last resort, the Trial Chamber made no finding on the question of whether Article 2 of the Statute can only be applied in a situation of international armed conflict, or whether this provision is also applicable in internal armed conflicts (*ibid.*, para. 235), but indicated: 'Recognising that this would entail an extension of the concept of "grave breaches of the Geneva Conventions" in line with a more teleological interpretation, it is the view of this Trial Chamber that violations of common article 3 of the Geneva Conventions may fall more logically within Article 2 of the Statute. Nonetheless, for the present purposes, the more cautious approach has been followed' (*ibid.*, para. 317).

[4] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 70; 105 ILR 453 at 488.

[5] *Ibid.*, para. 68.

established between the offences and the armed conflict. Acts unrelated to an armed conflict – for example, a murder for purely personal reasons such as jealousy – are not considered to be war crimes.

The PrepCom engaged in intensive discussion on the question: should a mental element accompany the element describing the context and, if so, what kind of mental coverage would be required? In particular should the standard of Art. 30 ICC Statute apply? Applying the full Art. 30 standard to the element describing the context would probably have required proof that the perpetrator was aware of the existence of an armed conflict as well as its international character. The latter requirement in particular was rejected by almost all delegations.

So far, the ad hoc Tribunals have used an objective test to determine the existence and character of an armed conflict, as well as the nexus between the conduct and the conflict. Taking this approach, the ICTY has treated this element as being merely jurisdictional.[6] On the basis of that case law in particular, some delegations to the PrepCom argued that the prosecutor need not demonstrate that the perpetrator had any knowledge of the existence of an armed conflict or its international or non-international character. Other delegations argued that some form of knowledge would be required. They took the view that the cases decided by the Tribunals so far have clearly taken place in the context of an armed conflict and that the requirement of knowledge has never therefore been an issue.

After long and delicate negotiations at the PrepCom, the Working Group accepted the following package. For each crime the following two elements already mentioned are spelled out:

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

These elements are supplemented by further components in the introduction to the whole section on war crimes. It contains the following interpretative clarification, which is intended to be an integral part of the set of elements:

> With respect to [these] elements listed for each crime:
>
> There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

[6] See sources under the section 'Legal basis' below.

> 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'.

The wording of this package is rather difficult to understand. At first sight, the definition of the mental element creates the impression that full knowledge of the facts that established an armed conflict is required. This impression, which would contradict the intention of the drafters, is at least attenuated

- first, by the fact that, contrary to an earlier proposal,[7] the direct article was dropped before the term 'factual circumstances' in order to indicate that the perpetrator needs only to be aware of some factual circumstances, but definitely not all the factual circumstances that would permit a judge to conclude that an armed conflict was going on; and
- second, by the third paragraph of the introduction, i.e. '[t]here 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" '.

On that basis one can conclude only that some specific form of knowledge is required, which is below the standard of Art. 30 ICC Statute. The words 'awareness of the factual circumstances . . . that is implicit in the terms "took place in the context of and was associated with"' seem to suggest that the perpetrator needs only to know the nexus between his/her acts and an armed conflict. However, what does this mean in practice? Does the perpetrator need only to have some general awareness that his/her acts are related to a broader context, or does the prosecutor need to prove the motives of the perpetrator (personal motives or motives related to an armed conflict) in every case? In order to clarify the intentions of the drafters, it is therefore worth indicating the assumptions underlying the clarification as summarised by the sub-coordinator of the Working Group on EOC:

- There is no need to prove that the accused made any legal evaluation as to the existence of an armed conflict or its character as international or non-international.

[7] The original proposal on the mental element read as follows: 'The accused was aware of *the* factual circumstances that established the existence of an armed conflict.' (Emphasis added.)

- There is no need to prove that the accused was aware of the factual circumstances that made the armed conflict international or non-international.

This conception as to the degree of knowledge required in relation to the element describing the context was shared by almost every delegation, and is unambiguously stated in the elements.

- As to the awareness of the factual circumstances that made a situation an armed conflict and as to the proof of the nexus, the views were divided into two groups. The majority felt that it does need to be shown that the accused was aware of at least some factual circumstances.[8] Those holding this view agreed that the mental requirement as to those factual circumstances is lower than the Art. 30 standard and should be 'knew or should have known'. They recognised that in most situations, it would be so obvious that there was an armed conflict, that *no* additional proof as to awareness would be required. There might, however, be some instances where proof of some knowledge may be demanded. The other view insisted that no mental element as to the existence of an armed conflict should be required at all.

This overall picture gives at least some guidance in determining the requisite level of knowledge. There are no indications that the prosecutor must prove knowledge of a higher level than that which is reflected in the majority view. Moreover, it appears that in most cases proving the nexus objectively will be sufficient. In such circumstances, a perpetrator cannot argue that he/she did not know of the nexus.

Legal basis

The term 'international armed conflict' is defined under common Art. 2 GC in the following terms:

> . . . all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> . . . all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

[8] Some delegations argued that the perpetrator only needed to hear people shooting, others said that it would be enough if the perpetrator knew that people in uniform were around. These examples show that a very low standard of mental awareness was required by proponents of this view.

Definition of an international armed conflict

The ICTY found in the *Tadic* case that an international armed conflict 'exists whenever there is a resort to armed force between States'.[9] In the *Delalic* case it further elaborated:

> In its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that '[a]ny difference arising between two States and leading to the intervention of members of the armed forces' is an international armed conflict and '[i]t makes no difference how long the conflict lasts, or how much slaughter takes place.'[10]

In the *Tadic* case the question arose as to the conditions under which an armed conflict within the borders of one country may be qualified as international when other States get involved in that conflict. The Appeals Chamber held the following:

> It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.[11]

With regard to the necessary degree of involvement of other States (i.e. control over armed groups or individuals acting on behalf of another State) the Appeals Chamber concluded the following:

> In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a de facto State organ when performing a specific act, it is necessary to

[9] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 70; 105 ILR 453 at 488.
[10] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 208.
[11] ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-A, para. 84.

> ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[12]

Time frame and geographical scope of the armed conflict

Concerning the time frame, the ICTY stated that:

> [i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities[13] until a general conclusion of peace is reached.[14]

In the *Delalic* case the ICTY held the following:

> should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts,

[12] *Ibid.*, para. 137; confirmed by ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-A, paras. 122 ff.; ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 26. See also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 75; 122 ILR 1 at 43.

[13] Note, for example, that both GC I (Art. 5) and GC III (Art. 5) are applicable until protected persons who have fallen into the power of the enemy have been released and repatriated.

[14] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 70; 105 ILR 453 at 488.

> unrelated to the larger international armed conflict. Should the entire conflict in Bosnia and Herzegovina be considered internal, the provisions of international humanitarian law applicable in such internal conflicts apply throughout those areas controlled by the parties to the conflict, until a peaceful settlement is reached.[15]

and later on:

> Article 6 of the Fourth Geneva Convention provides for its immediate application at the outset of any armed conflict between two or more of the 'High Contracting Parties' to the Convention, this ceasing only upon the general close of military operations. Article 5 of the Third Geneva Convention provides for its application to all prisoners of war from the time they fall into the power of the enemy and until their final release and repatriation – this may be either before or after the end of the conflict itself.[16]

The geographical scope of international armed conflict is not specified explicitly in the GC. However, in that respect, the ICTY held that:

> the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited.[17]

This view was confirmed in the *Blaskic* case:

> It is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part. Like the Appeals Chamber, the Trial Chamber asserts that:
>
> > International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in

[15] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 209.
[16] *Ibid.*, para. 210.
[17] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 68; 105 ILR 453 at 487.

> 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.[18]

Link between the conduct and the armed conflict

The ICTY Prosecution stated that

> a sufficient nexus must, however, be established between the offences that occurred at the Celebici camp and the international armed conflict which gives rise to the applicability of the grave breach provisions.[19]

With respect to the necessary nexus between the acts of the accused and the armed conflict, the ICTY held the following:

> 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.[20]
>
> For an offence to be a violation of international humanitarian law, therefore, this Trial Chamber needs to be satisfied that each of the alleged acts was in fact closely related to the hostilities.[21]

In another judgment the ICTY held:

> Not all unlawful acts occurring during an armed conflict are subject to international humanitarian law. Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law. The Trial Chamber will determine whether such a connection exists between the acts allegedly perpetrated by the accused and the armed conflict. It is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue.[22]

[18] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 64 (footnote omitted); 122 ILR 1 at 40.

[19] ICTY, Prosecution's Response to Defendants' Motion, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 3.34, p. 26.

[20] ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 572; 112 ILR 1 at 183.

[21] *Ibid.*, para. 573. See also the *Tadic* case, where the Tribunal held: 'The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle' (ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 69; 105 ILR 453 at 488). Moreover, '[i]t 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', *ibid.*, para. 70; ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 193–4.

[22] ICTY, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-T, para. 45.

In the *Blaskic* case the ICTY held, in accordance with previous decisions and judgments:

> In addition to the existence of an armed conflict, it is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, 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.
>
> The foregoing observations demonstrate that a given municipality need not be prey to armed confrontation for the standards of international humanitarian law to apply there. It is also appropriate to note, as did the *Tadic* and *Celebici* Judgments, that a crime need not:
>
> > be part of a policy or practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of the war or in the actual interest of a party to the conflict.[23]

It can be seen from the above that there must be a sufficient link between the criminal act and the armed conflict. If a relevant crime is committed in the course of fighting or the take-over of a town, for example, this would render the offence a war crime. Such a direct connection to actual hostilities is not, however, required in every situation.

In the judgments rendered so far, the ad hoc Tribunals have used an objective test to determine the existence and character of an armed conflict, as well as the nexus to the conflict. With regard to this element the ad hoc Tribunals never required a mental element linked to it. Taking this approach, the ICTY, unlike the PrepCom, has apparently treated this element as being merely jurisdictional. For example, in the *Tadic* judgment, the Trial Chamber held:

> The 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 crime committed in the territory of the former Yugoslavia. *For a crime to fall within the jurisdiction of the International Tribunal a sufficient nexus*

[23] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, paras. 69 ff. (footnotes omitted); 122 ILR 1 at 41–2. See also ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 573.

> *must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.*[24]

(2) PROTECTED PERSONS/OBJECTS

Travaux préparatoires/Understandings of the PrepCom

Such person or persons/property[25] *were/was protected under one or more of the Geneva Conventions of 1949*

During the negotiations, some concern was expressed about whether the recent jurisprudence of the ICTY on protected persons under GC IV should be specifically reflected in the elements. Art. 4 GC IV defines protected persons as 'those who . . . find themselves . . . in the hands of a Party to the Conflict or Occupying Power of which they are not nationals'.

The ICTY has held that, in the context of present-day inter-ethnic conflicts, Art. 4 should be given a wider construction so that a person may be accorded protected status even if he or she is of the same nationality as his or her captors.[26] In the *Tadic* judgment, the Appeals Chamber concluded that 'not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test'.[27] This formulation relies on a teleological approach to the interpretation of Art. 4 GC IV, that emphasises that the object of the Convention is 'the protection of civilians to the maximum extent possible'. In the words of the *Tadic* judgment, the primary purpose of Art. 4

> is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they

[24] ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 572 (emphasis added); 112 ILR 1 at 183. See also ICTY, Review of the Indictment, *The Prosecutor* v. *Ivica Rajic*, IT-95-12-R61, para. 7 (108 ILR 142 at 149), where the ICTY stated under the heading 'subject-matter jurisdiction':

> In the jurisdictional phase of the case of *Prosecutor* v. *Tadic*, the International Tribunal's Appeals Chamber held that Article 2 encompasses the grave breaches provisions of the 1949 Geneva Conventions and that there are two prerequisites for its application: (a) there must be an international armed conflict in the sense of Article 2 common to the Conventions; and (b) the crime must be directed against persons or property protected under the provisions of the relevant Convention. *Prosecutor* v. *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 81, 84 (No. IT-94-1-AR72, App. Ch., 2 Oct. 1995).

See also R. W. D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (2nd edn, Transnational Publishers, Ardsley, NY, 2000), p. 51.

[25] The protection of property is only relevant in the context of Art. 8(2)(a)(iv) of the ICC Statute. All the other crimes deal with crimes committed against protected persons.

[26] ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-A, para. 166.

[27] *Ibid.*

> may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.[28]

After some discussion, the PrepCom decided that no more precision for the objective element should be included, so that the future ICC could be free to decide on whether to adopt the views expressed by the ICTY in relation to the protected status of persons under Art. 4 GC IV.

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

There was some fear that this mental element could create a threshold that was too high in relation to the problem of nationality. In this context, it must be emphasised that the ad hoc Tribunals have always determined the protected status on a purely objective basis. With respect to the required factual knowledge, however, the PrepCom has specified in a footnote that the perpetrator needs only to know that the victim belonged to an adverse party.[29] Knowledge concerning the nationality of the victim or the interpretation of the concept of nationality is not required.

In addition, the mentioned element recognises the interplay between Arts. 30 and 32 of the ICC Statute, emphasising the general rule that while ignorance of the facts may be an excuse, ignorance of the law (in this case ignorance of the Geneva Conventions and their definitions of protected persons or property) is not. Although one might argue that this explicit statement is self-evident and therefore redundant, the PrepCom felt that such a clarification would be useful.

Legal basis

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

The war crimes as defined in Art. 8(2)(a)(i)–(iii) and (v)–(viii) ICC Statute must be committed against persons regarded as protected as defined under the GC. Protected persons are defined in particular in the following provisions of the relevant GC and the 1977 Additional Protocol I (AP I), including Arts. 13, 24, 25 and 26 GC I, Arts. 13, 36 and 37 GC II, Art. 4 GC III, Arts. 4, 13 and 20 GC IV,[30] Arts. 8, 44, 45, 73, 75 and 85(3)(e) AP I.

[28] *Ibid.*, para. 168.

[29] 'With respect to nationality, it is understood that the accused needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8(2)(a).'

[30] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 81; 105 ILR 453 at 497; ICTY, Review of the Indictment, *The Prosecutor* v. *Mile Mrksic and Others*, IT-95-13-R61, 108 ILR 40 at 62, para. 22.

Persons who take a direct part in the hostilities lose their protection against direct attacks for as long as they so participate.[31]

Specific case law exists with regard to protected persons in the sense of Art. 4(1) GC IV. According to this provision, protected persons are:

> . . . those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals . . .

The case law concerns in particular interpretation of the requirement of nationality. In this regard the Appeals Chamber in the *Tadic* case held the following:

> Article 4(1) of Geneva Convention IV . . . defines 'protected persons' – hence possible victims of grave breaches – as those 'in the hands of a Party to the Conflict or Occupying Power of which they are not nationals'. In other words, subject to the provisions of Article 4(2), the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection . . . Thus already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases . . . [T]he lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality. In the cases provided for in Article 4(2), in addition to nationality, account was taken of the existence or non-existence of diplomatic protection: nationals of a neutral State or a co-belligerent State are not treated as 'protected persons' unless they are deprived of or do not enjoy diplomatic protection. In other words, those nationals are not 'protected persons' as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of 'protected persons'. This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in

[31] See Art. 51(3) AP I. With respect to the difference in terminology between 'active part in the hostilities' as used, for example, in common Art. 3 GC and 'direct part in the hostilities' as used later on in the AP the ICTR found that: 'These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous.' ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 629.

> present-day international armed conflicts . . . [I]n modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[32]

Faced with the similar problem, the ICTY in an earlier decision further clarified its interpretation of the notions of 'at a given moment and in any manner whatsoever' and 'in the hands of'. It held the following:

> The Trial Chamber has found that HB and the HVO may be regarded as agents of Croatia so that the conflict between the HVO and the Bosnian Government may be regarded as international in character for purposes of the application of the grave breaches regime. The question now is whether this level of control is also sufficient to meet the protected person requirement of Article 4 of Geneva Convention IV.
>
> The International Committee of the Red Cross's Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words 'at a given moment and in any manner whatsoever' were 'intended to ensure that all situations and all cases were covered'. International Committee of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 47 (Geneva 1958) . . . At page 47 it further notes that the expression 'in the hands of' is used in an extremely general sense.
>
> > It is not merely a question of being in enemy hands directly, as a prisoner is . . . In other words, the expression 'in the hands of' need not necessarily be understood in the physical sense; it simply

[32] ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-A, paras. 164–6 (footnotes omitted), confirmed by the ICTY in Appeals Chamber, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-A, paras. 151 ff.; ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 84 ('The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State'). See also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, paras. 126, 145 ff.; 122 ILR 1 at 58, 63.

> means that the person is in territory under the control of the Power in question.
>
> The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do . . . Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of this area. Thus, although the residents of Stupni Do were not directly or physically 'in the hands of' Croatia, they can be treated as being constructively 'in the hands of' Croatia, a country of which they were not nationals.[33]

In the *Delalic* case the ICTY made some clarifications with regard to possible gaps in the protection accorded by GC III and GC IV:

> It is important, however, to note that this finding is predicated on the view that there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied. The Commentary to the Fourth Geneva Convention asserts that:
>
> > [e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.
>
> This position is confirmed by article 50 of Additional Protocol I which regards as civilians all persons who are not combatants as defined in article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention, and article 43 of the Protocol itself.[34]

Such property was protected under one or more of the Geneva Conventions of 1949

In the case of Art. 8(2)(a)(iv) ICC Statute, the acts or omissions must be committed against property regarded as protected under the GC.

[33] ICTY, Review of the Indictment, *The Prosecutor* v. *Ivica Rajic*, IT-95-12-R61, paras. 35–7 (108 ILR 141 at 159–60). See also ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E)(I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, para. 59.

[34] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 271 ff.

It must be noted that 'protected property' is not generally defined in the GC. They contain rather a description of what cannot be attacked, destroyed or appropriated. In particular, the following provisions of the GC have to be mentioned: Arts. 19, 33–5 GC I; Arts. 22, 24, 25, 27 GC II; Arts. 18, 19, 21, 22, 33, 53, 57 GC IV.[35]

Property used for military purposes becomes a military object and loses its protection against attacks for as long as it is so used.[36]

Up to now there has been very little case law that discusses property protected by the GC in any detail. In the *Blaskic* case the ICTY discussed property protected by Art. 53 GC IV. It stated the following:

> Pursuant to Article 53 of the Fourth Geneva Convention, the extensive destruction of property by an occupying Power not justified by military necessity is prohibited. According to the [ICRC] Commentary on the Fourth Geneva Convention, this protection is restricted to property within occupied territories:
>
> > In order to dissipate any misconception in regard to the scope of Article 53 it must be pointed out that the property referred to is not accorded general protection; the Convention merely provides here for its protection in occupied territory.
>
> The Prosecution maintained that the property of the Bosnian Muslims was protected because it was in the hands of an occupying Power. The occupied territory was the part of BH territory within the enclaves dominated by the HVO, namely Vitez, Busovaca and Kiseljak. In these enclaves, Croatia played the role of occupying Power through the overall control it exercised over the HVO, the support it lent it and the close ties it maintained with it. Thus, by using the same reasoning which applies to establish the international nature of the conflict, the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory. The Defence did not specifically address this issue. Following to a large extent the reasoning of the Trial Chamber in the *Rajic* Decision, this Trial Chamber subscribes to the reasoning set out by the Prosecution.[37]

[35] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 81; 105 ILR 453 at 497; ICTY, Review of the Indictment, *The Prosecutor* v. *Mile Mrksic and Others*, IT-95-13-R61, 108 ILR 53 at 62, para. 22.

[36] See Art. 52(1) and (2) AP I.

[37] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, paras. 148–50 (footnotes omitted); 122 ILR 1 at 64. See also ICTY, Review of the Indictment, *The Prosecutor* v. *Ivica Rajic*, IT-95-12-R61, paras. 39–42; 108 ILR 142 at 160–1:

> Article 53 describes the property that is protected under the Convention in terms of the prohibitions applicable in the case of an occupation . . . The only provisions of Geneva

(3) POTENTIAL PERPETRATORS

***Travaux préparatoires*/Understandings of the PrepCom**

An initial proposal[38] made to the PrepCom suggested including a list of potential perpetrators in the EOC, on the basis of existing case law. Although not controversial in substance, the PrepCom thought that this inclusion would not be necessary. Several delegations expressed their fear that the list could be wrongly perceived as being exhaustive.

Legal basis

Concerning potential perpetrators of war crimes, the ICTY Prosecution stated, in the *Delalic* case and on the basis of certain post-Second World War trials, that

> it is not even necessary that the perpetrator be part of the armed forces, or be entitled to combatant status in terms of the Geneva Conventions,

Convention IV which assist with any definition of occupation are Articles 2 and 6. Article 2 states: 'The Convention shall also apply to all cases of partial or total occupation . . . even if the said occupation meets with no armed resistance' while Article 6 provides that Geneva Convention IV 'shall apply from the outset of any conflict or occupation mentioned in Article 2'.

The Trial Chamber has already held that Croatia may be regarded as being in control of this area. The question is whether the degree of control exercised by the HVO forces over the village of Stupni Do was sufficient to amount to occupation within the meaning of Article 53.

Once again, the Commentary on Geneva Convention IV suggests that the requirement may be interpreted to provide broad coverage. It states:

> The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation.

Commentary on Geneva Convention IV at 60. Other commentators have also suggested that a broad interpretation is warranted. One writer has suggested that there are certain common features which, when present, indicate the existence of an occupation, being:

(i) there is a military force whose presence in a territory is not sanctioned . . . ;
(ii) the military force has . . . displaced the territory's ordinary system of public order and government, replacing it with its own command structure . . . ;
(iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other . . . ;
(iv) . . . there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.

Adam Roberts, What is a Military Occupation?, vol. 53, Brit. Y. B. Int'lL., p. 249 at 274–275 (1984).

The Trial Chamber has held that the Bosnian Croats controlled the territory surrounding the village of Stupni Do and that Croatia may be regarded as being in control of this area. Thus, when Stupni Do was overrun by HVO forces, the property of the Bosnian village came under the control of Croatia, in an international conflict. The Trial Chamber therefore finds that the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV.

[38] PCNICC/1999/DP.5 of 10 February 1999.

to be capable of committing war crimes during international armed conflict.[39]

In an early British trial, the *Essen Lynching* case, civilians appeared among persons found guilty of killing three British prisoners of war, or participation therein.[40] In other post-Second World War trials, in addition to military personnel, other categories of persons were found guilty of various war crimes:

- *members of Government*: See the *Tokyo* judgment with respect to crimes committed against prisoners of war, where it was stated that:

  > A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of the prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes . . . and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.[41]

- *party officials and administrators*: See the trial of *Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and Six Others*, by a Permanent Military Tribunal at Strasbourg and the French Court of Appeal,[42] the *Justice* trial.[43]
- *industrialists and businessmen*: In the *Zyklon B* case two German industrialists, undoubtedly civilians, were sentenced to death as war criminals for having been instrumental in the supply of poison gas to concentration camps, knowing of its use there in murdering Allied

[39] ICTY, Prosecution's Response to Defendants' Motion, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 3.25, p. 22.
[40] In UNWCC, *LRTWC*, vol. I, pp. 88–92; 13 AD 287.
[41] B. V. A. Röling and C. F. Rüter (eds.), *The Tokyo Judgment* (University Press, Amsterdam, 1977), vol. I, p. 30; 15 AD 356 at 367; with respect to the responsibility for omissions see also the dissenting opinions of Judges Bernard and Röling (*ibid*., p. 493; vol. II, p. 1063).
[42] In UNWCC, *LRTWC*, vol. III, pp. 23–55, esp. pp. 24–7; 13 AD 385–7.
[43] *Ibid.*, vol. VI, pp. 1–110, esp. pp. 10–26 and 62; 14 AD 278.

nationals.[44] Other trials involving businessmen accused of war crimes committed as such were the *Flick*, *IG Farben*, and *Krupp* trials; the prosecution successfully claimed that private individuals, having no official functions, could be held guilty under international law. The judgment in the *Flick* trial included the following statements:

> Except as to some of Steinbrinck's activities the accused were not officially connected with Nazi Government, but were private citizens engaged as businessmen in the heavy industry of Germany . . . The question of the responsibility of individuals for such breaches of international law as constitute crimes, has been widely discussed and is settled by the judgment of the IMT. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign States and provides no punishment for individuals . . . But the IMT was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong, and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty. (See *The Nuremberg Trial and Aggressive War*, by Sheldon Glueck, Chapter V, pp. 60–7 inclusive, and cases there cited.) There is no justification for a limitation of responsibility to public officials.[45]

The judgment delivered in the *Krupp* trial stated, *inter alia*, that:

> The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt.[46]

[44] *Ibid.*, vol. I, pp. 93–103; 13 AD 250.
[45] *Ibid.*, vol. IX, pp. 17–18; 14 AD 266 at 268.
[46] *Ibid.*, vol. X, p. 150; 15 AD 620 at 627.

- *judges*: See, for example, the *Wagner* trial, where the accused, Huber, was sentenced to death, having been found guilty of complicity in the murder of fourteen victims, on whom he had passed unjustified death sentences which were carried out.[47]
- *prosecutors*, in the same context as judges.[48]
- *doctors and nurses*.[49]
- *executioners*, if they knew that no fair trial had been accorded to the victims or (perhaps) it was reasonable for them to assume that no such trial had been accorded.[50]
- *concentration-camp inmates* with indisputable civilian status.[51]

From these cases, one may conclude that the mere fact of being a civilian does not guarantee any protection whatsoever from charges based upon international criminal law.

[47] *Ibid.*, vol. III, pp. 27, 31, 32 and 42.
[48] *Ibid.*, vol. III, pp. 27, 31–2 and 42; *ibid.*, vol. V, p. 78; *ibid.*, vol. VI, pp. 85–6.
[49] For example: *Hadamar Trial*, in *ibid.*, vol. I, pp. 53–4; 13 AD 253.
[50] *Ibid.*, vol. I, pp. 72 and 76 and vol. V, pp. 79–81; 13 AD 250.
[51] *Ibid.*, vol. II, pp. 153–4.

5.2. Elements of specific crimes under Art. 8(2)(a) ICC Statute

Art. 8(2)(a)(i) – Wilful killing

Text adopted by the PrepCom[1]

War crime of wilful killing

1. The perpetrator killed one or more persons.[31]

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

3. The perpetrator was aware of the factual circumstances that established that protected status.[32] [33]

4. The conduct took place in the context of and was associated with an international armed conflict.[34]

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

[31] The term 'killed' is interchangeable with the term 'caused death'. This footnote applies to all elements which use either of these concepts.

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

[33] With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8(2)(a).

[34] The term 'international armed conflict' includes military occupation. This footnote also applies to the corresponding element in each crime under article 8(2)(a).

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The specific elements of this crime did not provoke long discussions. The only understanding of the PrepCom is reflected in the footnote which

[1] The finalised draft text of the EOC adopted by the PrepCom is reproduced in PCNICC/2000/1/Add.2 of 2 November 2000. The figures in brackets indicate the footnotes adopted by the PrepCom, which form an integral part of the EOC. The numbering of the PCNICC document has been retained in this commentary.

reads: 'The term "killed" is interchangeable with the term "caused death".' The term 'killed' creates the link to the 'title' of the crime, and the term 'caused death' was felt necessary to make it clear that conduct such as the reduction of rations for prisoners of war resulting in their starvation and ultimately their death is also covered by this crime. Both terms are used in the relevant case law as described below.

The term 'wilful' as contained in the definition of this crime in the Statute is not reflected in the elements of this crime. There was some discussion whether 'wilful' is identical with the standard set in Art. 30(2) of the ICC Statute or whether it has a broader meaning, i.e. whether it would be one of those cases where the Statute provides otherwise as recognised in Art. 30(1) of the Statute. The debate was not really conclusive. It is submitted that the judges – on the basis of Art. 9(3) of the ICC Statute, which provides that the elements must be consistent with the Statute – may have to depart from the elements should the 'wilful' standard be in fact different from the Art. 30 standard. It seems, however, that the majority of delegations felt that the Art. 30(2) standard would not divert from case law regarding the definition of 'wilful' quoted below.[2]

Legal basis of the war crime

The term 'wilful killing' is derived from the four GC (Arts. 50 GC I, 51 GC II, 130 GC III and 147 GC IV).

Remarks concerning the material elements

Concerning any difference between the notions of 'wilful killing' in the context of an international armed conflict (Art. 8(2)(a) ICC Statute) on the one hand, and 'murder' in the context of a non-international armed conflict (Art. 8(2)(c) ICC Statute) on the other hand, the ICTY concluded that there 'can be no line drawn between "wilful killing" and "murder" which affects their content'.[3] Therefore, the various judgments of the ICTY and the ICTR may serve as guidance for the interpretation of the elements of this offence whether the acts were committed during an international or a non-international armed conflict.

[2] See the section 'Remarks concerning the mental element' below.

[3] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 422 and 423. See also ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 233: '[T]he Trial Chamber finds that the elements of the offence of "murder" under Article 3 of the Statute are similar to those which define a "wilful killing" under Article 2 of the Statute [i.e. a grave breach of the GC], with the exception that under Article 3 of the Statute [covering violations of common Art. 3 of the GC] the offence need not have been directed against a "protected person" but against a person "taking no active part in the hostilities".'

After a review of national and international case law, the ICTY concluded in the *Delalic* case that, in relation to homicides of all natures, the material element consists of the death of the victim as a result of the actions of the perpetrator.[4]

As stated by the ICTY and the ICTR, this crime can be committed by either an act or a fault of omission.[5] Referring to several domestic legal systems, the ICTY concluded that 'the conduct of the accused must be a substantial cause of the death of the victim'.[6]

In several post-Second World War trials, as in the *W. Rohde* case, the accused were charged and most of them found guilty of killing contrary to the laws and usages of war.[7]

The following behaviours have been held to constitute war crimes:

- killing a captured member of the opposing armed forces or a civilian inhabitant of occupied territory suspected of espionage or war treason, unless his/her guilt has been established by a court of law;[8]
- reduction of rations for prisoners of war resulting in their starvation;[9]
- ill-treatment of prisoners of war in violation of the laws and usages of war, causing their death (for example, forced marches with insufficient food and medical supplies);[10]
- killing in the absence of a (fair) trial.[11] The decision for and execution of an unlawful death penalty, which means contrary especially to Arts. 100–2, 107 GC III with respect to prisoners of war, and Arts. 68, 71,

[4] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 424. See also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 153; 122 ILR 1 at 65; ICTY, Judgment, *The Prosecutor* v. *Goran Jelisic*, IT-95-10-T, para. 35.

[5] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 424; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 229; ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 12; ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 589, considering wilful killing as a crime against humanity; R. Wolfrum, 'Enforcement of International Humanitarian Law' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 532.

[6] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 424; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 229.

[7] *W. Rohde Trial*, in UNWCC, *LRTWC*, vol. V, p. 55; 13 AD 294; cf. also *Belsen Trial*, in UNWCC, *LRTWC*, vol. II, p. 126; 13 AD 267; *The Velpke Children's Home Case*, UNWCC, *LRTWC*, vol. VII, pp. 76 ff.; 14 AD 304; *G. Tyrolt and Others Trial*, UNWCC, *LRTWC*, vol. VII, p. 81.

[8] *Almelo Trial*, in UNWCC, *LRTWC*, vol. I, p. 44.

[9] Wolfrum, 'Enforcement', p. 532.

[10] *A. Heering Trial*, in UNWCC, *LRTWC*, vol. XI, pp. 79 ff.; *W. Mackensen Trial*, in *ibid.*, pp. 81 ff.

[11] *Robert Wagner and Six Others Trial*, in UNWCC, *LRTWC*, vol. III, pp. 30 ff.; *W. Rohde Trial*, in *ibid.*, vol. V, pp. 54 ff.; 13 AD 294; *O. Hans Trial*, in UNWCC, *LRTWC*, vol. III, pp. 82 ff.; 14 AD 305; *E. Flesch Trial*, in UNWCC, *LRTWC*, vol. VI, pp. 111 ff.; 14 AD 307.

> 74, 75 GC IV with respect to civilians,[12] also constitute cases of wilful killing.

One may conclude from these decisions that the notion of 'wilful killing' must be limited to those acts or omissions which are contrary to existing treaty and customary law of armed conflict.[13]

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[14]

More specifically the following case law may be quoted:

Knowledge of facts

With respect to the mental element, positive knowledge of the underlying facts is essential.[15] However, pursuant to post-Second World War trials, the responsibility of the accused can also be engaged if, due to his position or skills, he must have known the facts.[16] This view is also reflected in Arts. 28(1)(a) and 30 of the ICC Statute.

Intent

In addition, the ICTY Prosecution defined the mental element in the following terms:

> At the time of the killing the accused or a subordinate had the intent to kill or inflict grievous bodily harm upon the victim.[17]

[12] See also Arts. 76 and 78(5) AP I.

[13] See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 17.

[14] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

[15] *Zyklon B Case*, in UNWCC, *LRTWC*, vol. I, p. 101; 13 AD 250 (supplying poison gas, knowing that the gas was to be used for the killing of interned civilians); *Almelo Trial*, in UNWCC, *LRTWC*, vol. I, p. 40.

[16] *Zyklon B Case*, in UNWCC, *LRTWC*, vol. I, pp. 101 ff.; 13 AD 250. See also *von Leeb and Others Case*, UNWCC, *LRTWC*, vol. XII, p. 92; 15 AD 376: turning over prisoners of war to an organisation by which they will be killed is a war crime 'when from the surrounding circumstances and published orders, *it must have been suspected or known* that the ultimate fate of such p.o.w. was elimination by this murderous organization' (emphasis added); ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, paras. 12, 179 and 182: the accused 'must have known' about the crimes.

[17] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Kupreskic and Others*, IT-95-16-PT, para. 50, p. 16; ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 12.

In another case, the following formulation was used:

> The accused possessed the intent to kill or cause grievous bodily harm. The term 'wilful' encompasses reckless acts.[18]

In the *Delalic* case, the ICTY found that:

> While different legal systems utilise differing forms of classification of the mental element involved in the crime of murder, it is clear that some form of intention is required. However, this intention may be inferred from the circumstances,[19] whether one approaches the issue from the perspective of the foreseeability of death as a consequence of the acts of the accused, or the taking of an excessive risk which demonstrates recklessness. As has been stated by the Prosecution, the [ICRC] Commentary to the Additional Protocols expressly includes the concept of 'recklessness' within its discussion of the meaning of 'wilful' as a qualifying term in both articles 11 and 85 of Additional Protocol I . . .
>
> *[T]he Trial is in no doubt that the necessary intent, meaning mens rea, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life.*[20]

In the *Blaskic* case the ICTY held:

> The intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.[21]

[18] ICTY, the Prosecution in its Pre-trial Brief (24 February 1997, p. 22, RP 2829), cited in ICTY, Prosecution's Response to Defendants' Motion, *The Prosecutor* v. *Zejnil Delalic and Others*, para. 2.24, p. 10.

[19] This approach was chosen on several occasions in the *Delalic* case by the ICTY Prosecution when it concluded, for example, that the necessary intent was inferred from the severity of the beating. See ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 3.40, 3.52, 3.67, 3.90, 3.98, 3.113, 3.121, 3.132.

[20] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 437 and 439. A discussion of the different legal systems – common law and civil law – can be found in paras. 434 and 435. The finding was confirmed in ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 229. See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 12: 'Where an accused or a subordinate acts with the intent to inflict grievous bodily harm, the accused or subordinate possesses the requisite *mens rea* for a wilful killing if death in fact results, as one who intends to inflict serious bodily injury necessarily acts in reckless disregard of the possibility that death might result.'

[21] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 153; 122 ILR 1 at 65; see however ICTY, Judgment, *The Prosecutor* v. *Goran Jelisic*, IT-95-10-T, para. 35.

In the *Akayesu* case, the ICTR, when considering wilful killing as a crime against humanity, defined the mental element as follows:

> at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.[22]

It may be concluded from the cases rendered by the ad hoc Tribunals that the notion 'wilful' includes 'intent' and 'recklessness', but excludes ordinary negligence. This view is supported by various decisions emerging from post-Second World War trials in which it was stated in general terms that wilful neglect, if it amounts to recklessness, i.e. gross criminal or wicked negligence, or gross and criminal disregard of his/her duties, is sufficient for the *mens rea*.[23] This view is also found in the ICRC Commentary on Art. 85(3) AP I[24] and was explicitly underlined by the ICTY in the above-mentioned *Delalic* case.

In the cases of wilful killing committed by fault of omission, if death is the foreseeable consequence of such omission, intent can be inferred.[25]

[22] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 589.

[23] *Velpke Children's Home Case*, in UNWCC, *LRTWC*, vol. VII, pp. 78 ff.; 14 AD 304. A home for infant children of Polish female workers who had been deported had been established and the children were held in conditions which caused the death of many of them due to the unhygienic conditions and the lack of medical care; see also *G. Tyrolt and Others Case*, in UNWCC, *LRTWC*, vol. VII, p. 81.

[24] B. Zimmermann, 'Art. 85' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3474.

[25] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 597.

Art. 8(2)(a)(ii) – Torture or inhuman treatment, including biological experiments

(1) TORTURE

Text adopted by the PrepCom

Article 8(2)(a)(ii)–1 War crime of torture Elements[35]

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

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

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

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

An especially thorny problem as to specific grave breaches existed with regard to the crime of torture (Art. 8(2)(a)(ii) ICC Statute). Torture is defined in the Statute as a crime against humanity:

> 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

The PrepCom had to determine whether this definition should be applied to the war crime of torture. Many delegations felt that a different approach was justified by the case law of the ad hoc Tribunals. The Tribunals in several decisions based their definition of the war crime of torture on the definition given in the 1984 Convention Against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment (the Torture Convention), which they considered to reflect customary international law also for the purposes of international humanitarian law,[1] and defined the elements accordingly.[2] The Torture Convention contains the following elements, which are not included in the ICC Statute:

- [the] pain or suffering, [must be] inflicted on a person for such purposes as obtaining . . . information or a confession, punishing . . . or intimidating or coercing . . . or for any reason based on discrimination of any kind,[3]
- [the] pain or suffering [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.[4]

Some delegations to the PrepCom felt that either the purposive element or the element of official capacity or both were necessary in order to distinguish torture from the crime of inhuman treatment. Others, referring to the case law of the European Court of Human Rights in the context of torture under the European Convention on Human Rights,[5] argued that the severity of the pain or suffering inflicted should be the factor used to draw a distinction between the two crimes.

The compromise found at the end of the discussion of the issue in the PrepCom respects, to a large extent, the case law of the ad hoc Tribunals: it incorporates the purposive element by repeating the illustrative list of the Torture Convention,[6] and drops the reference to official capacity. The elements as drafted do not preclude that the further clarifications given by the ICTY may be taken into consideration (see below).

With regard to the omission of the element of official capacity, the PrepCom went a step further than the ad hoc Tribunals at the time, but clearly followed the trend set by them, which had already softened the standard contained in the Torture Convention to a certain extent. In the

[1] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 459.

[2] *Ibid.* and para. 494. In a later judgment, the ICTY described some specific elements that pertain to torture as 'considered from the specific viewpoint of international criminal law relating to armed conflicts', ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 162; 121 ILR 218 at 264.

[3] In the following 'purposive element'. [4] In the following 'element of official capacity'.

[5] See the section 'Legal basis of the war crime', below.

[6] A narrower description of the purposive element provisionally accepted after the first reading – namely, 'The accused inflicted the pain or suffering for the purpose of: obtaining information or a confession, punishment, intimidation or coercion, or obtaining any other similar purpose' (PCNICC/1999/L.5/Rev.1/Add.2 of 22 December 1999) – was eventually rejected.

Delalic case the ICTY held:

> Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.[7]

The vast majority of delegations to the PrepCom took the view that while war crimes necessarily take place in the context of an armed conflict and, in most cases, involve persons acting in an 'official capacity',[8] the inclusion would create the unintended impression that non-State actors are not covered. This would greatly restrict the crime, particularly in non-international armed conflicts involving rebel groups. Given the fact that it was the understanding of the PrepCom that the definition of torture should be identical for international and non-international armed conflicts, this argument had considerable weight.

The remaining issues discussed by the PrepCom were less controversial. Element 1, describing the inflicted pain or suffering, remained uncontested throughout the negotiations of the PrepCom. The wording is the same as in the Torture Convention definition and the definition of torture as a crime against humanity in the Statute. In relation to the use of the word 'severe' in this element, paragraph 4 of the General Introduction to the Elements of Crimes applies, according to which it is not necessary that the perpetrator completed a particular value judgement.

A few delegations pointed out that the definition of torture as a crime against humanity contains the requirement that the victim must be 'in the custody or under the control of the accused', which should be included as an element also for the war crime of torture. This proposal did not gain much support. On the basis of the inclusion of the footnote 'As element 3 requires that all victims must be "protected persons" under one or more of the Geneva Conventions of 1949, these elements do not include the custody or control requirement found in the elements of article 7(1)(e)', the delegations which were in favour of the insertion of custody or control as an element withdrew the proposal.[9]

[7] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 473.

[8] In this context it was recognised by the PrepCom that all government soldiers act in an official capacity.

[9] PCNICC/1999/DP.4/Add.2 of 4 February 1999, p. 4 and PCNICC/1999/WGEC/DP.5 of 23 February 1999.

Legal basis of the war crime

The crime 'torture or inhuman treatment, including biological experiments' is derived directly from Arts. 50, 51, 130 and 147 of the four GC.

General aspects

The ICTY (in the *Delalic*[10] and *Furundzija*[11] cases) and the ICTR derived the elements of this crime essentially from the definition of torture under Art. 1(1) of the Torture Convention,[12] which reads as follows:

> For the purpose of this Convention, the term '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 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.

The Tribunal considered this definition as representing customary international law. After comparing the three existing definitions of torture, that is, under Art. 1(1) of the Torture Convention, the Declaration on the Protection from Torture[13] and the Inter-American Convention,[14] it

[10] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 459. See also R. Wolfrum, 'Enforcement of International Humanitarian Law' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 532.

[11] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 162; 121 ILR 218 at 264; ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-A, para. 111; 121 ILR 303 at 318.

[12] UN Doc. A/RES/39/46 of 10 December 1984.

[13] Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. GA Res. 3452 (XXX) of 9 December 1975.

[14] 1985 Inter-American Convention to Prevent and Punish Torture adopted at Cartagena de Indias, Colombia, by the OAS on 9 December 1985, 25 ILM (1986) 519, Art. 2:

> For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.
>
> The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

The Inter-American Commission on Human Rights stated in Case 10.970 Peru, 1996, dealing with the interpretation of torture under the meaning of Art. 5 of the American Convention on Human

concluded that:

> the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus which the Trial Chamber considers to be representative of customary international law.[15]

In the *Furundzija* judgment, the ICTY Trial Chamber spelled out some specific elements that pertain to torture as 'considered from the specific viewpoint of international criminal law relating to armed conflicts'. Thus, the Trial Chamber considers that the elements of torture in an armed conflict require that torture:

> (i) consists of the infliction by act or omission of severe pain or suffering, whether physical or mental; in addition
> (ii) this act or omission must be intentional;
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person; or at discriminating, on any ground, against the victim or a third person;
> (iv) it must be linked to an armed conflict;
> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.[16]

This finding was confirmed in the same case by the Appeals Chamber.[17]

With respect to the addition of the purpose of humiliation under (iii), the ICTY Trial Chamber held in the above-mentioned judgment that it is

> warranted by the general spirit of international humanitarian law; the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such international treaties as the Geneva Conventions and Additional Protocols,

Rights, that in the inter-American sphere, acts constituting torture are established in the cited Convention, IAYHR 1996, vol. 1, p. 1174.

[15] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 459.

[16] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 162; 121 ILR 218 at 264.

[17] ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-A, para. 111: The Appeals Chamber supports the conclusion of the Trial Chamber that 'there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention', and takes the view that the definition given in Article 1 reflects customary international law . . . The Trial Chamber correctly identified the . . . elements of the crime of torture in a situation of armed conflict. [Footnotes omitted.]

> which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from 'outrages upon personal dignity'. The notion of humiliation is, in any event, close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture.[18]

In a later judgment, the ICTY departed from the findings confirmed by its Appeals Chamber. In general terms it held:

> In attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law. In particular, when referring to definitions which have been given in the context of human rights law, the Trial Chamber will have to consider two crucial structural differences between these two bodies of law:
>
> (i) Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities . . .
>
> (ii) Secondly, that part of international criminal law applied by the Tribunal is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences.
>
> The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.[19]

More specifically with regard to torture, it stated:

> Three elements of the definition of torture contained in the Torture Convention are, however, uncontentious and are accepted as representing the status of customary international law on the subject:
>
> (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
>
> (ii) This act or omission must be intentional.

[18] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 163; 121 ILR 218 at 265.
[19] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 470 (footnotes omitted).

(iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.

On the other hand, [the following] elements remain contentious:

(i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.

. . .

(iii) The requirement, if any, that the act 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.

The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law. The issue does not need to be resolved here, because the conduct of the accused is appropriately subsumable under the above-mentioned purposes.

. . . The Trial Chamber concludes 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 is of the view 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.[20]

On that basis the Trial Chamber defined the elements as follows:

(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.

(ii) The act or omission must be intentional.

(iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[21]

As can be seen from these elements, the ICTY found that the crime can be committed by act and omission.[22]

[20] *Ibid.*, paras. 483–96 (footnotes omitted). [21] *Ibid.*, para. 497 (footnotes omitted).
[22] See also ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 494.

Remarks concerning the material elements

Level of severity of pain or suffering required

It is difficult to establish precisely the threshold level of suffering or pain required in order for other forms of mistreatment to constitute torture, as the jurisprudence of international courts dealing mainly with violations of human rights is not clear on this point.

The European Court of Human Rights found in *Ireland* v. *The United Kingdom* that the 'distinction [between "torture", "inhuman treatment" and "degrading treatment" within the meaning of Art. 3 of the European Convention on Human Rights] derives principally from a difference in the intensity of the suffering inflicted'.[23] 'Torture' presupposes a 'deliberate inhuman treatment causing very serious and cruel suffering'.[24] It is implicit in that case that mental anguish alone may constitute torture provided that the resulting suffering is sufficiently serious; suffering caused by bodily injury is not essential.

In *Selmouni* v. *France* the Court held that the 'severity' of the pain or suffering is, 'in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'[25] '[H]aving regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (see, among other authorities, the following judgments: Tyrer v. the United Kingdom, 25 April 1978, Series A no. 26, pp. 15–16, § 31; Soering . . . p. 40, § 102; and Loizidou v. Turkey, 23 March 1995, Series A no. 310, pp. 26–27, § 71), the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights

[23] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, p. 66; 58 ILR 188 at 265. See also ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, p. 186: ' "torture" . . . is generally an aggravated form of inhuman treatment'. In its more recent judgments, the Court endorsed the definition of the Torture Convention, expressly including the purposive element. In doing so it stressed this element's relevance in distinguishing between 'torture' on the one hand and 'inhuman and degrading' treatment on the other, ECtHR, *Ilhan* v. *Turkey*, Judgment of 27 June 2000, http://www.echr.coe.int/Eng/Judgments.htm, para. 85; ECtHR, *Salman* v. *Turkey*, Judgment of 27 June 2000, http://www.echr.coe.int/Eng/Judgments.htm, para. 114; ECtHR, *Akkoc* v. *Turkey*, Judgment of 10 October 2000, http://www.echr.coe.int/Eng/Judgments.htm, para. 115.

[24] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, p. 66; 58 ILR 188 at 265; ECtHR, *Aksoy* v. *Turkey*, Reports of Judgments and Decisions, 1996-VI, p. 2279.

[25] ECtHR, *Selmouni* v. *France*, Judgment of 28 July 1999, Reports of Judgments and Decisions, 1999-V, para. 100.

and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'[26]

Neither the Inter-American Commission nor the Inter-American Court of Human Rights has attempted to define 'torture' in the sense of Art. 5 of the American Convention on Human Rights 'Pact of San José, Costa Rica' of 22 November 1969.[27] The Inter-American Court, like the UN Human Rights Committee, applied these concepts directly to the facts in a number of cases, limiting itself to concluding whether or not there had been a violation of the obligations. The Commission nevertheless referred to the definition provided under the Inter-American Convention to Prevent and Punish Torture.[28] It used the element 'an intentional act through which physical and mental pain and suffering is inflicted on a person'.[29] A level of severity of pain or suffering was not established.

At the time of writing the UN Human Rights Committee had not given specific definitions of the terms 'torture' and 'cruel, inhuman or degrading treatment or punishment' under Art. 7 ICCPR.[30] The Committee applied these concepts directly to the facts of the case in order to conclude whether or not there had been a violation, without any conceptual discussion.

Although the threshold level of suffering or pain has never been clearly established, the following non-exhaustive list of examples indicates which conduct may constitute torture:

• *Ad hoc tribunals:*

– interrogation of a victim, under threat to his/her life;[31]
– rape and sexual assault under certain conditions.[32]

[26] *Ibid.*, para. 101.

[27] S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D. Harris and S. Livingstone (eds.), *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998), p. 228.

[28] See IACiHR, Case 10.970 Peru, Report 5/96, IAYHR 1996, vol. 1, p. 1174.

[29] *Ibid.*

[30] See D. McGoldrick, *The Human Rights Committee* (Oxford University Press, Oxford, 1991), pp. 364, 367, 370; M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (N. P. Engel, Kehl, Strasbourg and Arlington, 1993), pp. 134 ff. At least one commentator states that 'Art. 1(1) of the 1984 UN Convention against Torture contains a definition of torture that, although not binding for Art. 7, can be drawn upon as an interpretational aid', Nowak, *CCPR Commentary*, p. 129.

[31] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 682.

[32] *Ibid.*, para. 597:

> Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.

• *European Court/Commission of Human Rights*

– rape and sexual assault under certain conditions;[33]
– detention over three days, keeping the detainee blindfolded, beatings during questioning, parading the victim naked and, on one occasion, pummelling him with high-pressure water while spinning him around in a tyre;[34]
– keeping the victim blindfolded during interrogation, which caused disorientation; suspending the victim by the arms, which were tied together behind the back; giving the victim electric shocks, exacerbated by throwing water over him; and beatings, slapping and verbal abuse;[35]
– in *The Greek* case, the Commission referred to 'non-physical torture', which it described as 'the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault'.[36] Evidence that the Commission considered under this heading, without concluding that any amounted to torture on the facts, involved

See also ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 495 ff.:

> The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of, a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.
>
> Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria.

See also ICTY, Review of the Indictment, *The Prosecutor* v. *Dragan Nikolic*, IT-94-2-R61, para. 33; 108 ILR 21 at 37.

[33] ECtHR, *Aydin* v. *Turkey*, Reports of Judgments and Decisions, 1997-VI, pp. 1891 ff., paras. 83, 86:

> [w]hile being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of illtreatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally . . .
>
> Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. Indeed the court would have reached this conclusion on either of these grounds taken separately.

[34] *Ibid.*, para. 84.

[35] ECtHR, *Aksoy* v. *Turkey*, Reports of Judgments and Decisions, 1996-VI, p. 2279, para. 60.

[36] ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, p. 461.

mock executions and threats of death, various humiliating acts and threats of reprisal against a detainee's family.

• *Human Rights Committee*

– beating, electric shocks and mock executions;[37]
– application of electric shocks, use of *submarino* (putting the detainee's hooded head into foul water), insertion of bottles or barrels into detainee's anus, forcing the victim to remain standing, hooded, and handcuffed with a piece of wood in the mouth for several days and nights;[38]
– forcing prisoners to remain standing for extremely long periods of time (*plantones*), beatings and lack of food;[39]
– holding the detainee incommunicado for more than three months whilst keeping him blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss and eye infection;[40]
– treatment resulting in a broken jawbone and perforated eardrums;[41]
– beatings with rubber truncheons, near-asphyxiation in water, psychological torture including threats of torture or violence to friends or relatives, or of dispatching the victim to Argentina to be executed, threats of having to witness the torture of friends, mock amputations.[42]

• *Inter-American system*[43]

– rape and sexual assault under certain conditions;[44]
– mock burials, mock executions, deprivation of food and water;[45]

[37] *Muteba* v. *Zaire*, Communication No. 124/1982, Report of the Human Rights Committee, UN Doc. A/39/40, pp. 182 ff.; 79 ILR 253. See also *Gilboa* v. *Uruguay*, Communication No. 147/1983, Report of the Human Rights Committee, UN Doc. A/41/40, pp. 128 ff.

[38] *Grille Motta* v. *Uruguay*, Communication No. 11/1977, Report of the Human Rights Committee, UN Doc. A/35/40, pp. 132 ff.

[39] *Setelich* v. *Uruguay*, Communication No. 63/1979, Report of the Human Rights Committee, UN Doc. A/37/40, pp. 114 ff.; 69 ILR 183.

[40] *Weinberger* v. *Uruguay*, Communication No. 28/1978, Report of the Human Rights Committee, UN Doc. A/36/40, pp. 114 ff.

[41] *López Burgos* v. *Uruguay*, Communication No. 52/1979, Report of the Human Rights Committee, UN Doc. A/36/40, pp. 176 ff.; 68 ILR 29.

[42] *Estrella* v. *Uruguay*, Communication No. 74/1980, Report of the Human Rights Committee, UN Doc. A/38/40, pp. 150 ff.; 78 ILR 40.

[43] For additional examples from the inter-American system, refer to Davidson, 'Civil and Political Rights', pp. 228 ff.

[44] IACiHR, Case 10.970 Peru, Report 5/96, IAYHR 1996, vol. 1, pp. 1170 ff., in finding that the acts in question amounted to torture, stated:

> [r]ape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

See also IACiHR, Case 7481 Bolivia, IACiHR Annual Report 1981–2, p. 36.

[45] IACiHR, Case 7823 Bolivia, IACiHR Annual Report 1981–2, p. 42.

– threats of removal of body parts, exposure to the torture of other victims;[46]
– keeping prisoners naked for lengthy periods of time and denying them appropriate medical treatment;[47]
– *submarino*.[48]

• *The 1986 Report of the Special Rapporteur on Torture*[49] also mentions the following:

– beating, extraction of nails, teeth, etc., burns, electric shocks, suspension, suffocation, exposure to excessive light or noise, sexual aggression, administration of drugs in detention or psychiatric institutions, prolonged denial of rest or sleep, prolonged denial of food, prolonged denial of sufficient hygiene, prolonged denial of medical assistance; total isolation and sensory deprivation, being kept in constant uncertainty in terms of space and time, threats to torture or kill relatives, total abandonment and simulated executions.

Official involvement

With respect to the necessary official involvement, in the *Delalic* case the ICTY stated that:

> [t]he incorporation of this element in the definition of torture contained in the Torture Convention again follows the Declaration on Torture and develops it further by adding the phrases 'or with the consent or acquiescence of' and 'or person acting in an official capacity'. It is thus stated in very broad terms and extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law, when it occurs.[50]

This element is also emphasised in the following international and national sources:

– ICTY, Indictment (amended), *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, p. 3; ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24, p. 12; ICTY, Amended Indictment, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-I, para. 22, pp. 6–7; ICTY, Redacted Indictment, *Sikirica and Others* case, IT-95-8-PT, para. 7, p. 2;

[46] IACiHR, Case 7824 Bolivia, IACiHR Annual Report 1981–2, p. 44.
[47] Davidson, 'Civil and Political Rights', p. 228, referring to IACiHR, Case 7910 Cuba, IACiHR Res. No. 13/82, 8 March 1982, OEA/Ser.L/V/II.55. doc. 28, 8 March 1982; see also Case 5154 Nicaragua, IACiHR Annual Report 1982–3, p. 101.
[48] IACiHR, Case 9274 Uruguay, IACiHR Annual Report 1984–5, p. 121.
[49] Report of the Special Rapporteur, Mr P. Kooijmans, appointed pursuant to Commission on Human Rights, UN Doc. Res. 1985/33, E/CN.4/1986/15, 19 February 1986, para. 119.
[50] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 474.

- ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 593;
- *Doe* v. *Karadzic*, United States District Court, Southern District of New York, nos. 93 Civ. 0878 (PKL), 93 Civ. 1163 (PKL), 7 September 1994, 866 F. Supp., pp. 741 ff.; 104 ILR 135;
- *Kadic* v. *Karadzic*:[51] the Court of Appeals reaffirmed that 'torture and summary executions – when not perpetrated in the course of genocide or war crimes – are proscribed by international law only when committed by state officials or under color of law' (para. 11). The Court went on by stating that 'it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists' (para. 15);
- the Inter-American Commission on Human Rights in Case 10.970 (Peru) also stated: '[torture] must be committed by a public official or by a private person acting at the instigation of the former'.[52]

With respect to the element referring to the official capacity, in the *Delalic* case the ICTY specified the following:

> Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.[53]

In the *Kunarac and Others* case, the ICTY, however, rejected the requirement of official capacity for the following reasons:

> the Torture Convention requires that the pain or suffering 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. As was already mentioned, the Trial Chamber must consider each element of the definition 'from the specific viewpoint of international criminal law relating to armed conflicts'. In practice, this means that the Trial Chamber must

[51] United States Court of Appeals, Second Circuit, nos. 1541, 1544, Dockets 94-9035, 94-9069, 13 October 1995, 70 F. 3d 243, 245, paras. 11, 15; 104 ILR 149 at 156, 158.
[52] IACiHR, Case 10.970 Peru, Report 5/96, IAYHR 1996, vol. 1, p. 1174.
[53] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 473.

identify those elements of the definition of torture under human rights law which are extraneous to international criminal law as well as those which are present in the latter body of law but possibly absent from the human rights regime. The Trial Chamber draws a clear distinction between those provisions which are addressed to states and their agents and those provisions which are addressed to individuals. Violations of the former provisions result exclusively in the responsibility of the state to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. On the other hand, violations of the second set of provisions may provide for individual criminal responsibility, regardless of an individual's official status. While human rights norms are almost exclusively of the first sort, humanitarian provisions can be of both or sometimes of mixed nature . . .

Several humanitarian law provisions fall within the first category of legal norms, expressly providing for the possibility of state responsibility for the acts of its agents: thus, Article 75 . . . of Additional Protocol I provides that acts of violence to the life, health, or physical or mental well-being of persons such as murder, torture, corporal punishment and mutilation, outrages upon personal dignity, the taking of hostages, collective punishments and threats to commit any of those acts when committed by civilian or by military agents of the state could engage the state's responsibility. The requirement that the acts be committed by an agent of the state applies equally to any of the offences provided under paragraph 2 of Article 75 and in particular, but no differently, to the crime of torture.

This provision should be contrasted with Article 4 . . . of Additional Protocol II. The latter provision provides for a list of offences broadly similar to that contained in Article 75 of Additional Protocol I but does not contain any reference to agents of the state. The offences provided for in this Article can, therefore, be committed by any individual, regardless of his official status, although, if the perpetrator is an agent of the state he could additionally engage the responsibility of the state. The Commentary to Additional Protocol II dealing specifically with the offences mentioned in Article 4(2)(a) namely, violence to the life, health, or physical or mental well-being of persons, in particular murder and cruel treatment such as torture, states:

> The most widespread form of torture is practised by public officials for the purpose of obtaining confessions, but torture is not only condemned as a judicial institution; *the act of torture is reprehensible in itself, regardless of its perpetrator*, and cannot be justified in any circumstances.

The Trial Chamber also notes Article 12 . . . of 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, which provides that members of the armed forces and other defined persons who are wounded or sick shall be respected and protected in all circumstances. In particular, paragraph 2 of this Article provides that the wounded or sick shall not be tortured. The Commentary to this paragraph adds the following:

> The obligation [of respect and protection mentioned in paragraph 1] applies to all combatants in an army, whoever they may be, and also to non-combatants. *It applies also to civilians*, in regard to whom Article 18 specifically states: 'The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence.' A clear statement to that effect was essential in view of the special character which modern warfare is liable to assume (dispersion of combatants, isolation of units, mobility of fronts, etc.) and which may lead to closer and more frequent contacts between military and civilians. It was necessary, therefore, and more necessary today than in the past, that the principle of the inviolability of wounded combatants should be brought home, *not only to the fighting forces, but also to the general public*. That principle is one of the fine flowers of civilization, and should be implanted firmly in public morals and in the public conscience.

A violation of one of the relevant articles of the [ICTY] Statute will engage the perpetrator's individual criminal responsibility. In this context, the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences. The involvement of the state in a criminal enterprise generally results in the availability of extensive resources to carry out the criminal activities in question and therefore greater risk for the potential victims. It may also trigger the application of a different set of rules, in the event that its involvement renders the armed conflict international. However, the involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question. This principle was clearly stated in the *Flick* judgment:

> But the International Military Tribunal was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that

> international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty [. . .] There is no justification for a limitation of responsibility to public officials.

Likewise, the doctrine of 'act of State', by which an individual would be shielded from criminal responsibility for an act he or she committed in the name of or as an agent of a state, is no defence under international criminal law. This has been the case since the Second World War, if not before. Articles 1 and 7 of the Statute make it clear that the identity and official status of the perpetrator is irrelevant insofar as it relates to accountability. Neither can obedience to orders be relied upon as a defence playing a mitigating role only at the sentencing stage. In short, there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes.

> The Trial Chamber also points out that those conventions, in particular the human rights conventions, consider torture per se while the Tribunal's Statute criminalises it as a form of war crime, crime against humanity or grave breach. The characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it.[54]

Pain or suffering arising only from, inherent in or incidental to lawful sanctions are not included

Although the ICTY considered the definition of the Torture Convention as representative of customary international law, it did not deal with the last part of the definition, i.e. 'pain or suffering arising only from, inherent in or incidental to lawful sanctions are not included'. It must be emphasised that

[54] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, paras. 488–95.

the Inter-American Convention to Prevent and Punish Torture contains similar language in its Art. 2(2):

> The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Relation to other offences of mistreatment

According to the ICTY, in the *Delalic* case,

> torture is the most specific of those offences of mistreatment constituting 'grave breaches' and entails acts or omissions, by or at the instigation of, or with the consent or acquiescence of an official, which are committed for a particular prohibited purpose and cause a severe level of mental or physical pain or suffering.[55]

The Tribunal distinguished 'torture' from the war crime of 'wilfully causing great suffering or serious injury to body or health' primarily on the basis that the alleged acts or omissions do not need to be committed for a prohibited purpose, as required for the war crime of torture.[56]

The ECtHR found that:

> the word 'torture' is often used to describe inhuman treatment, which has a purpose . . . and it is generally an aggravated form of inhuman treatment.[57]

While the Court did not seem to rely on the purpose requirement in the ensuing case law, it stressed this element's relevance in distinguishing between 'torture' on the one hand and 'inhuman and degrading' treatment on the other in the more recent judgments.[58] The Court concluded

[55] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 442.

[56] *Ibid.*; see also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 14.

[57] ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, p. 186.

[58] ECtHR, *Ilhan* v. *Turkey*, Judgment of 27 June 2000, http://www.echr.coe.int/Eng/Judgments.htm, para. 85: 'Further, in determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment . . . p. 66, § 167). In addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the UN Convention).'

therein that ill-treatment which would seem to qualify as torture on the basis of the *Selmouni* approach to the threshold, i.e. deliberate inhuman treatment causing very serious and cruel suffering,[59] is to be categorised as inhuman and degrading treatment because the nature of the purpose underlying its infliction was not sufficiently closely linked to extracting a confession.[60]

Remarks concerning the mental element including the prohibited purpose

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[61]

More specifically the following case law may be quoted:

Concerning the various listed purposes forming part of the mental element of this crime, the ICTY expressed the following view:

> The use of the words 'for such purposes' in the customary definition of torture [the definition contained in the Torture Convention], indicates that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative.[62]

As a consequence of this view, the Tribunal explicitly named 'humiliation' in the *Furundzija* case as another example of such purposes not mentioned in the definition of the Torture Convention.[63]

See also ECtHR, *Salman* v. *Turkey*, Judgment of 27 June 2000, http://www.echr.coe.int/Eng/Judgments.htm, para.114; ECtHR, *Akkoc* v. *Turkey*, Judgment of 10 October 2000, http://www.echr.coe.int/Eng/Judgments.htm, para. 115.

[59] ECtHR, *Selmouni* v. *France*, Judgment of 28 July 1999, Reports of Judgments and Decisions, 1999-V, paras. 96, 100, 101.

[60] ECtHR, *Egmez* v. *Cyprus*, Judgment of 21 December 2000, http://www.echr.coe.int/Eng/Judgments.htm, para, 78; ECtHR, *Denizci and Others* v. *Cyprus*, Judgment of 21 May 2001, http://www.echr.coe.int/Eng/Judgments.htm, para. 384.

[61] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

[62] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 470; ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, p. 186. In the *Musema* judgment the ICTR defined torture along the lines of the Torture Convention with a non-exhaustive list, ICTR, Judgment, *The Prosecutor* v. *Alfred Musema*, ICTR-96-13-T, para. 285.

[63] See above, ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 163; 121 ILR 218 at 265. In the *Kunarac and Others* case, the ICTY took a somewhat more cautious approach:

> The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law. The issue does not need

In addition, the ICTY emphasised that:

> there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominant or sole purpose.[64]

A review of the ICTY jurisprudence indicates that a distinction must be made between a prohibited purpose and one that is purely private. According to the Tribunal:

> the rationale behind this distinction is that the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law.[65]

However,

> [o]nly in exceptional cases should it . . . be possible to conclude that the infliction of severe pain or suffering by a public official during armed conflicts would not constitute torture . . . on the ground that he acted for purely private reasons.[66]

(2) INHUMAN TREATMENT

Text adopted by the PrepCom

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

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

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

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

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

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

to be resolved here, because the conduct of the accused is appropriately subsumable under the above-mentioned purposes.

ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 485.

[64] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 470; see also ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 486.

[65] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 471, with further reference.

[66] *Ibid.*, with further reference.

Commentary

Travaux préparatoires/Understandings of the PrepCom

The initial proposals by several delegations to the PrepCom described the impermissible conduct required for inhuman treatment in quite different ways.[67] There were two approaches. On the one hand it was suggested that the perpetrator had to commit an act that forcibly subjected a protected person to extreme physical or mental pain or suffering grossly inconsistent with universally recognised principles of humanity and generally accepted rules of international law, and, in addition, that as a result death or serious bodily or mental harm occurred. On the other hand, reflecting the relevant case law of the ad hoc Tribunals so far, it was proposed that the act or omission must cause serious physical or mental suffering or injury to a protected person, or constitute a serious attack on human dignity. The majority of delegations felt that the threshold contained in the former proposal would be too high and therefore inconsistent with the Statute. As a compromise, the PrepCom agreed, as in the case of torture, to use the word 'severe' in order to describe the gravity of the pain or suffering inflicted. This choice conveys the impression that the gravity of the pain or suffering is not a distinguishing element between torture and inhuman treatment. Comparing the elements of torture and inhuman treatment, it is the purposive element of the war crime of torture that distinguishes the two offences. This is a departure from the case law of the ad hoc Tribunals, which refers to 'severe' pain or suffering for the crime of torture, and 'serious' pain or suffering for the crime of inhuman treatment. As to the element of severity, paragraph 4 of the General Introduction to the Elements of Crimes applies, according to which the perpetrator does not have to complete a particular value judgement personally.

Some delegations expressed the view that the criminal conduct should not be limited to the infliction of severe physical or mental pain, but should also include conduct constituting 'a serious attack on human dignity'. This opinion is largely based on the jurisprudence of the ICTY quoted below, which has recognised that serious attacks on human dignity may constitute inhuman treatment.[68] The PrepCom, however, decided not to include attacks on human dignity in the definition of acts constituting inhuman treatment, because the war crime of 'outrages upon personal dignity, in

[67] See PCNICC/1999/DP.4/Add.2 of 2 February 1999 and PCNICC/1999/WGEC/DP.5 of 23 February 1999 on the one hand, and PCNICC/1999/DP.5 of 10 February 1999 on the other.

[68] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 544; ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 155; 122 ILR 1 at 65; and ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 256.

particular humiliating and degrading treatment' would cover such conduct. This interpretation is not problematic in the context of the ICC, but may have unintended implications for the interpretation of the GC. If serious attacks on human dignity are included in the concept of inhuman treatment, as the case law of the ad hoc Tribunals clearly shows, the 'grave breaches' regime and mandatory universal jurisdiction will apply. This means that States are obliged to search for and prosecute alleged perpetrators regardless of their nationality and where the act has been committed. If, however, such attacks are covered only by the crime of 'outrages upon personal dignity', the concept of permissive universal jurisdiction applies and States are only obliged to suppress such conduct on their territory or by their nationals.

Legal basis of the war crime

The crime 'torture or inhuman treatment, including biological experiments' is derived directly from Arts. 50, 51, 130 and 147 of the four GC.

Remarks concerning the material element

The ICTY, in the *Delalic* case,held that 'in order to determine the essence of the offence of inhuman treatment, the terminology must be placed within the context of the relevant provisions of the Geneva Conventions and Additional Protocols'.[69] It considered the prohibition of inhuman treatment in the context of Arts. 12 GC II, 13, 20, 46 GC III, 27, 32 GC IV, common Art. 3 GC and Arts. 75 AP I, 4, 7 AP II according to which protected persons 'shall be humanely treated'. Any conduct contrary to the behaviour prescribed in these provisions shall constitute inhuman treatment. For example, according to Art. 12 GC II, protected persons:

> shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.

Pursuant to Art. 13 GC III, *inter alia*,

> no prisoner of war may be subjected to physical mutilation, or to medical or scientific experiments of any kind which is not justified [by his state of health] . . . prisoners of war must at all times be protected, particularly against acts of violence or intimidation, and against insults and public curiosity.

[69] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 520.

Art. 27 GC IV gives further examples of conduct incompatible with the notion of humane treatment, such as 'all acts of violence or threats thereof' and 'insults and public curiosity'.

Art. 32 GC IV prohibits:

> taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

From these provisions, the ICTY concluded that:

> humane treatment is the cornerstone of all four Conventions, and is defined in the negative in relation to a general, non-exhaustive catalogue of deplorable acts which are inconsistent with it, these constituting inhuman treatment.[70]

The term 'treatment' is understood by the ICTY in 'its most general sense as applying to all aspects of man's life'.[71]

In sum, the ICTY found that:

> *inhuman treatment is an* intentional *act or omission*, that is an act which, judged objectively, is deliberate and not accidental, *which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.* The plain and ordinary meaning of the term inhuman treatment in the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' in the Convention fall. *Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.*[72]

[70] *Ibid.*, para. 532.

[71] *Ibid.*, para. 524, citing J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 27, p. 204; ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 26, p. 13.

[72] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 543 (emphasis added). The view was confirmed in ICTY, Judgment,*The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, paras. 154, 186; 122 ILR 1 at 65, 73; ICTY, Judgment, *The Prosecutor* v. *Goran Jelisic*, IT-95-10-T, para. 41; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 256.

According to the ICTY, 'all acts found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment'. However, inhuman treatment is not limited to acts described by the other two offences. It 'extends further to other acts which violate the basic principle of humane treatment, and *particularly the respect for human dignity*'.[73]

In the *Blaskic* case, the ICTY held that the following specific conduct constituted inhuman treatment:

– the use of detainees to dig trenches;[74]
– the use of detainees as human shields.[75]

A review of the decisions of human rights bodies provides no further clarification in that respect. Up to 1998 the UN Human Rights Committee had not defined the terms used in Art. 7 ICCPR nor delineated the boundaries between these terms.[76] Neither the Inter-American Commission nor the Inter-American Court of Human Rights has attempted to differentiate precisely the terms 'torture' and 'inhuman treatment' in Art. 5 of the American Convention on Human Rights.[77] The Inter-American Court, like the UN Human Rights Committee, applied these concepts directly to the facts in a number of cases, limiting itself to concluding whether or not there had been a violation of the right to humane treatment.

The ICTY Prosecution defined the elements of this crime as follows:

> 1. The accused or his subordinate(s) committed a specified act or omission upon a protected person; . . . and
>
> 3. The physical, intellectual, or moral integrity of the protected person was impaired, or the protected person otherwise suffered indignities, pain or suffering.

ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 25, p. 12.

[73] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 544 (emphasis added). The view was confirmed in ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 155; 122 ILR 1 at 65; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 256.

[74] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 713; 122 ILR 1 at 218: 'the use of detainees to dig trenches at the front under dangerous circumstances must be characterised as inhuman or cruel treatment. The motive of their guards is of little significance . . . [The detainees] suffered as a result of being used as human shields.' See also ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 800.

[75] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 716; 122 ILR 1 at 219: 'the Trial Chamber is of the view that . . . the villagers . . . served as human shields for the accused's headquarters . . . Quite evidently, this inflicted considerable mental suffering upon the persons involved. As they were Muslim civilians or Muslims no longer taking part in combat operations, the Trial Chamber adjudges that, by this act, they suffered inhuman treatment . . . and, consequently, cruel treatment.' See also ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 800.

[76] See McGoldrick, *Human Rights Committee*, pp. 364, 370; Nowak, *CCPR Commentary*, pp. 134 ff.

[77] Davidson, 'Civil and Political Rights', p. 230.

Following the approach in the *Delalic* and *Furundzija* cases, which used human rights law to define 'torture' as a war crime, the following human rights cases could be helpful in determining the required level of severity for 'inhuman treatment':

– The ECtHR found in general terms that

> ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [European Convention on Human Rights]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[78]

Conduct giving rise to inhuman treatment may take various forms, including:

- *physical assault*: for example, ECtHR, *Ireland* v. *The United Kingdom*, where four detainees were found to have contusions and bruising which were caused by severe beatings by members of the security force in Northern Ireland during interrogation;[79] ECiHR, *The Greek* case, where, in addition to *falanga* and severe beating of all parts of the body, the assaults included 'the application of electric shock, squeezing of the hand in a vice, pulling out of hair from the head or pubic region, or kicking of the male genital organs, dripping water on the head, and intense noises to prevent sleep';[80] the Commission concluded that these acts constitute ill-treatment or torture.
- *the use of psychological interrogation techniques*: for example, ECtHR, in *Ireland* v. *The United Kingdom*, with respect to wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink, stated: 'The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering . . . and led to acute psychiatric disturbances during interrogation.'[81]

[78] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, p. 65; 58 ILR 188 at 264; ECtHR, *Tyrer* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 26, p. 14; 58 ILR 339 at 352; ECtHR, *Selçuk and Asker* v. *Turkey*, Reports of Judgments and Decisions, 1998-II, p. 910.

[79] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, pp. 45, 67–8; 58 ILR 188 at 266–7.

[80] ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, p. 500.

[81] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, p. 66; 58 ILR 188 at 265.

- *the detention of a person in inhuman conditions*: for example, in ECiHR, *The Greek* case, overcrowding, and inadequate heating, toilets, sleeping arrangements, food, recreation and provision for contact with the outside world.[82] These deficiencies were found in different combinations and were not all present in each of the several places of detention where the ECiHR found that they constituted inhuman treatment.

  Solitary confinement, or segregation, of persons in detention, is not in itself inhuman treatment. It is permissible for reasons of security or discipline or to protect the segregated prisoner from other prisoners or *vice versa*.[83] It may also be justified in the interests of the administration of justice – for example, to prevent collusion between prisoners in respect of pending proceedings.[84] In each case, 'regard must be had to the surrounding circumstances, including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned'.[85] It is recognised, however, that 'complete sensory isolation coupled with complete social isolation can no doubt destroy the personality' and therefore constitute inhuman treatment.[86]
- *the deportation or extradition of a person who faces a real risk of inhuman treatment in another country*: for example, ECiHR, *Abdulmassih and Bulus* v. *Sweden* – if a person is ill, his extradition or deportation may cause him such suffering as to amount to inhuman treatment.[87] In *Soering* v. *UK*, the Court held that it would be a violation to return a person to another State 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[88]

[82] ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, pp. 467 ff. In this respect see also the descriptions in ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 3.326–3.404.

[83] ECiHR, *Ensslin, Baader and Raspe* v. *FRG*, Decisions and Reports, vol. 14, p. 64; ECiHR, *McFeeley et al.* v. *UK*, Decisions and Reports, vol. 20, p. 44; ECiHR, *Kröcher and Möller* v. *Switzerland*, Decisions and Reports, vol. 34, p. 24; CM Res DH (83) 15.

[84] ECiHR, *X* v. *FRG*, Collection of Decisions, vol. 44, p. 115.

[85] ECiHR, *Ensslin, Baader and Raspe* v. *FRG*, Decisions and Reports, vol. 14, p. 109.

[86] *Ibid.*; see also ECiHR, *Kröcher and Möller* v. *Switzerland*, Decisions and Reports, vol. 34, p. 24 Com Rep; CM Res DH (83) 15.

[87] ECiHR, *Abdulmassih and Bulus* v. *Sweden*, Decisions and Reports, vol. 35, p. 57.

[88] ECtHR, *Soering* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 161, para. 91; 98 ILR 270 at 303.

- In the *Selçuk and Asker* case, the ECtHR considered the *destruction of homes and property depriving the inhabitants of their livelihoods* as inhuman treatment:

> Their homes and most of their property were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored, and no assistance was provided to them afterwards . . . Bearing in mind in particular the manner in which the applicants' homes were destroyed and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment.[89]

– The ECtHR qualified threats of torture in certain circumstances at least as inhuman treatment.[90]
– According to the ECtHR, 'as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading'.[91]

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[92]

[89] ECtHR, *Selçuk and Asker* v. *Turkey*, Reports of Judgments and Decisions, 1998-II, p. 910; see also ECtHR, *Akdivar and Others* v. *Turkey*, Reports of Judgments and Decisions, 1996-IV, p. 1192.
[90] ECtHR, *Case of Campbell and Cosans*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 48, p. 12; 67 ILR 480 at 492.
[91] ECtHR, *Herczegfalvy* v. *Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 244, p. 26 (the case concerned a person who was incapable of taking decisions).
[92] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

More specifically the following case law on inhuman treatment may be quoted:

The ICTY held that

> inhuman treatment is an intentional act or omission, that is an act that, judged objectively, is deliberate and not accidental.[93]

The ICTY Prosecution stated explicitly in the *Delalic* case that:

> Recklessness would constitute a sufficient form of intention.[94]

(3) BIOLOGICAL EXPERIMENTS

Text adopted by the PrepCom

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

1. The perpetrator subjected one or more persons to a particular biological experiment.

2. The experiment seriously endangered the physical or mental health or integrity of such person or persons.

3. The intent of the experiment was non-therapeutic and it was neither justified by medical reasons nor carried out in such person's or persons' interest.

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

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

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

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

[93] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 543. The ICTY Prosecution defined the mental element of this crime as follows:

> The accused or his subordinate(s) intended to unlawfully impair the physical, intellectual or moral integrity of the protected person or otherwise subject him or her to indignities, pain, suffering out of proportion to the treatment expected of one human being to another.

ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 25, p. 12.

[94] ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, Annex 1, p. A1–6.

Commentary

Travaux préparatoires/Understandings of the PrepCom

There were no particular understandings of the PrepCom linked to this crime. The term 'subjected' in Element 1 is taken from Art. 13 GC III. An initial proposal,[95] which required death or serious bodily or mental harm to the protected person as a result of a biological experiment, was rejected by the PrepCom as being too high a threshold. Instead, Element 2 incorporates the 'grave breach' threshold of Art. 11(4) AP I, which requires only that the physical or mental health or integrity of a person is seriously endangered. Here, in relation to the word 'seriously', it needs to be emphasised that, according to paragraph 4 of the General Introduction to the EOC, the perpetrator does not have to complete such a value judgement. Element 3 is largely derived from the initial proposal mentioned above. It combines aspects from Art. 11(3) AP I ('non-therapeutic') as well as Arts. 13 GC III and 32 GC IV, while not repeating the language and all the substance contained therein. Some delegations, however, preferred a closer reflection of the GC language. In particular they suggested that the same language as in Art. 8(2)(b)(x) of the ICC Statute be used. Eventually, the text of the initial proposal was accepted as a compromise, with some small modifications.

It seems that the term 'not justified by medical reasons' is quite general and would also include 'not justified by the medical, dental or hospital treatment' as used in Element 3 of the war crime under Art. 8(2)(b)(x)–1 and –2. However, by stating that the purpose of the experiment 'was non-therapeutic', it is made clear that, unless the experiment is done to improve the state of health of the recipient, it is unlawful and the conduct would come within the field of application of this war crime.[96] The same idea is expressed in Art. 13 GC III, which prohibits 'medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned', and Art. 32 GC IV, which prohibits 'medical or scientific experiments not necessitated by the *medical treatment* of a protected person'. As pointed out in the ICRC Commentary on these articles, doctors are not prevented from 'using new forms of treatment for medical reasons with the sole object of improving the patient's condition. It must be permissible to use new medicaments and

[95] PCNICC/1999/DP.4/Add.2 of 4 February 1999.

[96] For an explanation of the term 'for therapeutic purposes' as used in Art. 11(3) of AP I see Y. Sandoz, 'Art. 11' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 487.

methods invented by science, provided that they are used only for therapeutic purposes.'[97]

Legal basis of the war crime

The term 'torture or inhuman treatment, including biological experiments' is derived directly from Arts. 50, 51, 130 and 147 of the four GC.

Art. 11(2)(b) AP I deals with the protection of the 'physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty' and addresses specifically medical or scientific experiments.

Remarks concerning the material element

There is no relevant recent jurisprudence on special elements of this offence. However, one may deduce from the plain and ordinary meaning of the word 'including' in the formulation of the offence, that the elements forming part of 'inhuman treatment' are of relevance in cases of commission of, or participation in, biological experiments.

In addition, one may refer to the relevant treaty provisions of the GC and AP I which served as a basis for the above-mentioned elements of this crime.

Art. 13 GC III states the following:

> . . . In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Art. 32 GC IV stipulates that:

> . . . This prohibition [of taking any measures of such a character as to cause the physical suffering or extermination of protected persons] applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person.

Art. 11 AP I states that:

> 1. . . . it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted

[97] J. S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, Geneva, 1960), Art. 13, p. 141; Pictet, *Commentary IV*, Art. 32, p. 224.

> 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.
>
> 2. It is, in particular, prohibited to carry out on such persons, even with their consent:
>
> . . .
>
> (b) medical or scientific experiments;
>
> . . .
>
> except where these acts are justified in conformity with the conditions provided for in paragraph 1.
>
> . . .
>
> 4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

In contrast with Arts. 50, 51, 130 and 147 of the four GC, the above provisions contain the term 'medical or scientific experiments'. As the term 'biological experiments' is not specified in any provision of the GC or AP, the above-cited excerpts may serve as an indication of the content of this offence.

The above-mentioned elements of this crime are derived from Arts. 13 GC III and 32 GC IV as well as Art. 11 AP I. Several Geneva Convention Acts also refer to Art. 11 AP I in order to define this offence.[98]

In one post-Second World War trial (the *Doctors' Trial*[99]), the judgment outlined ten basic principles to be observed while performing medical experiments, in order to satisfy moral, ethical and legal concepts. In sum, these principles are as follows:

- the 'voluntary consent of the human subject is absolutely essential'[100] and it must be given freely and by a person who has legal capacity; the 'duty and responsibility of ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment'; it cannot be delegated to another;

[98] UK Geneva Conventions (Amendment) Act (1995), Canada Geneva Conventions Act (1965) and amendments (1990), Australia Geneva Conventions Act (1957), Section 7; Spanish Código Penal, Art. 609.

[99] Also known as *K. Brandt and Others Case.* Cited in UNWCC, *LRTWC,* vol. VII, pp. 49–50; 14 AD 296 at 297.

[100] *Ibid*. See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, pp. 11 ff.; see also Art. 3 ECHR, Art. 5 ACHR and Art. 7 ICCPR.

- the 'experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature';
- the 'experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease';
- 'all unnecessary physical and mental suffering and injury' should be avoided;
- '[n]o experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur';
- the 'degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment';
- '[p]roper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability or death';
- the 'experiment should be conducted only by scientifically qualified persons';
- '[d]uring the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible';
- '[d]uring the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe . . . that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject'.

For further detail see discussion under section 'Art. 8(2)(b)(x)-2'.

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[101]

[101] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

More specifically the following case law on biological experiments may be quoted:

In the *K. Brandt* case the indictment used the terms 'unlawfully, wilfully, and knowingly committed war crimes . . . involving medical experiments'.[102] Besides the above-quoted general finding of the ICTY in the *Blaskic* case, there appears to be no judgment which clearly specifies the required mental element; however, Art. 11(4) AP I, which requires a 'wilful act or omission', and the Commentary thereon may be helpful in determining the mental element of this offence. Since there must be a wilful act or omission for it to be a grave breach, negligence is excluded. Moreover, the adjective 'wilful' also excludes persons with an immature or greatly impaired intellectual capacity, or persons acting without knowing what they are doing. On the other hand, the concept of recklessness – that is, the person in question accepts the risk in full knowledge of what he/she is doing – is included in the concept of wilfulness.[103]

[102] In *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, pp. 11 ff.; the same formula was used in the indictment in the *Milch Trial*, in UNWCC, *LRTWC*, vol. VII, p. 28; 14 AD 299. In this case Judge Musmanno said in a concurring opinion with respect to medical experiments: 'In order to find Milch guilty on this count of the indictment, it must be established that – 1. Milch had knowledge of the experiments; 2. That, having knowledge, he knew they were criminal in scope and execution; 3. That he had this knowledge in time to act to prevent the experiments; 4. That he had the power to prevent them', US Military Tribunal, 1947, in: *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. II, p. 856. These statements were made as to the responsibilities of a high commander.

[103] Sandoz, 'Art. 11' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 493.

Art. 8(2)(a)(iii) – Wilfully causing great suffering, or serious injury to body or health

Text adopted by the PrepCom

War crime of wilfully causing great suffering

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The element describing the conduct and the consequence (1.) is basically a reproduction of Art. 8(2)(a)(iii) of the Rome Statute. It contains one additional clarification, which is derived from the ICTY case law. The term 'physical or mental' is linked only to pain or suffering, while the ICTY linked it also to 'injury'. Delegations felt it would be difficult to conceive of 'mental injury'.

The term 'wilful' as contained in the definition of this crime in the Statute is not reflected in the Elements of Crimes. There was some discussion whether 'wilful' is identical with the standard set in Art. 30 of the ICC Statute or whether it has a broader meaning. As to the ensuing consequences see debate under section 'Art. 8(2)(a)(i) – Wilful killing'.

Legal basis of the war crime

The term 'wilfully causing great suffering, or serious injury to body or health' is derived directly from Arts. 50, 51, 130 and 147 of the four GC.[1]

General remarks

The ICTY Prosecution separated the offence 'wilfully causing great suffering, or serious injury to body or health' into 'wilfully causing great suffering' on the one hand, and 'wilfully causing serious injury to body or health' on

[1] It should be noted that in addition to the specific protection required by the GC, case law as well as human rights law standards may be relevant for the interpretation of these provisions, especially with respect to degrading treatment or punishment.

the other hand. In doing so, it defined 'wilfully causing great suffering' in the case against *Aleksovski* in the following terms:

1. The accused or his subordinate(s) committed a specified act or omission upon a protected person; and
2. The accused or his subordinate(s) committed the act or omission with the intention of unlawfully inflicting great suffering; and
3. Great suffering actually occurred.[2]

and in the case of *Kovacevic*:

1. The accused or a subordinate committed a specified act or omission upon the victim;
2. The accused or a subordinate committed the act or omission with the intention of unlawfully inflicting great suffering;
3. Great suffering was thereby inflicted.[3]

The ICTY Prosecution defined 'wilfully causing serious injury to body or health' in the case against *Aleksovski* in the following terms:

1. The accused or his subordinate(s) committed a specified act or omission upon a protected person; and
2. The accused or his subordinate(s) intentionally and unlawfully inflicted serious injury to the body or health of the protected person.[4]

In the *Delalic* case, the ICTY indicated that the construction of the phrase 'wilfully causing great suffering, or serious injury to body or health' shows that this is one offence, the elements of which are framed in the alternative:

> the offence of wilfully causing great suffering, or serious injury to body or health constitutes an *act or omission* that is intentional, being an act which, judged objectively, is deliberate and not accidental, which *causes serious mental or physical suffering or injury*.[5]

In the *Blaskic* case, the ICTY held:

> This offence is an intentional *act or omission* consisting of *causing great suffering or serious injury to body or health, including mental health* . . . An analysis of the expression 'wilfully causing great suffering

[2] ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 40, pp. 17 ff.
[3] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 14.
[4] ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 45, p. 19.
[5] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 511 (emphasis added).

> or serious injury to body or health' indicates that it is a single offence whose elements are set out as alternative options.[6]

Remarks concerning the material element

The Tribunal, in the *Delalic* case, elaborated further on various parts of the elements:

Causing great suffering

According to the ICTY, the notion 'causing great suffering' encompasses more than mere physical suffering, and includes moral suffering. The suffering incurred can be mental or physical.[7]

With respect to the notion 'great', the ICTY referred to the plain and ordinary meaning of the word, which is defined in the *Oxford English Dictionary* as 'much above average in size, amount or intensity'.[8]

Causing serious injury to body or health

Concerning the notion 'serious', the ICTY based its findings again on the plain and ordinary meaning of the word as defined in the *Oxford English Dictionary*: 'not slight or negligible'.[9]

The ICTR stated that:

> [c]ausing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.[10]

[6] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 156; 122 ILR 1 at 65–6 (emphasis added, footnotes omitted).

[7] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 509. The Tribunal refers to the ordinary meaning of the words 'wilfully causing great suffering', which are not qualified by the words 'to body or health', as is the case with 'causing injury'. ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 244. See also ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, Annex 1, p. A1–7; ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 15.

[8] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 510.

[9] *Ibid.*

[10] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 502; see also ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, Annex 1, p. A1–7. In the context of crimes against humanity the ICTY held in the *Krstic* case:

> The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the Akayesu Judgment, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.

ICTY, Judgment, *The Prosecutor* v. *Radislav Krstic*, IT-98-33-T, para. 488 (footnote omitted).

The ICTY Prosecution stated:

> This offence entails the infliction of injury which, while not necessarily causing death, will produce long-lasting and significant effects with respect to the victim's physical integrity or their physical or mental health.[11]

The same material elements were considered in the *Eichmann* case. The District Court of Jerusalem found that the following behaviour constituted serious bodily or mental harm of members of the group:

> the enslavement, starvation, deportation and persecution . . . and . . . their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.[12]

Relation to torture

In the *Delalic* case, the ICTY found that:

> [t]he offence of wilfully causing great suffering or serious injury to body or health is distinguished from torture primarily on the basis that the alleged acts or omissions need not be committed for a prohibited purpose such as is required for the offence of torture.[13] . . .
>
> It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.[14]

In the *Blaskic* case, the ICTY held:

> This category of offences includes those acts which do not fulfil the conditions set for the characterisation of torture, even though acts of torture may also fit the definition given.[15]

[11] ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 45, p. 19.

[12] *Attorney General of the Government of Israel* v. *Adolph Eichmann*, District Court of Jerusalem, 12 December 1961, quoted in 36 ILR 1 at 340, cited in ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 503.

[13] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 442; see also ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 41, p. 18.

[14] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 511.

[15] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 156; 122 ILR 1 at 65 (footnotes omitted).

Relation to inhuman treatment

In the *Kordic and Cerkez* case, the ICTY found that:

> This crime is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual's human dignity are not included within this offence.[16]

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[17]

More specifically, the following case law on wilfully causing great suffering or serious injury may be quoted:

In the *Delalic* case, the ICTY held that the act or omission must be intentional, which means 'an act which, judged objectively, is deliberate and not accidental'.[18]

[16] ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 245.
[17] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.
[18] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 511; see also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 156; 122 ILR 1 at 65–6.

Art. 8(2)(a)(iv) – Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

Text adopted by the PrepCom

War crime of destruction and appropriation of property

1. The perpetrator destroyed or appropriated certain property.

2. The destruction or appropriation was not justified by military necessity.

3. The destruction or appropriation was extensive and carried out wantonly.

4. Such property was protected under one or more of the Geneva Conventions of 1949.

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

Art. 8(2)(a) repeats established language from the GC. Nevertheless, it proved difficult to draft the elements. This may have resulted from the fact that the 'grave breaches' provisions refer back to various articles of the GC which establish a different level of protection for distinct categories of property. It was decided, however, to adopt a generic approach for the elements of this crime, without spelling out the specific standards. The elements are therefore drafted directly from Art. 8(2)(a)(iv), following the structure indicated in the General Introduction. The meaning of 'not justified by military necessity' as contained in Element 2 is crucial in this regard. It is important to indicate that military necessity covers only measures that are lawful in accordance with the laws and customs of war. Consequently, a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question and to the extent it is provided for.[1] An attempt to define 'appropriation', suggested by some delegations, was abandoned

[1] For example, see the differences in Art. 53 GC IV relating to property in occupied territories on the one hand and the protection of civilian hospitals against attacks under Arts. 18 and 19 GC IV on the other hand.

because the majority of delegations felt that the term was loaded with different connotations in different legal systems, and that it would be preferable to rely on the judges.

It was not really discussed whether Element 2 is an exception to the approach taken in paragraph 6 of the General Introduction. Before the General Introduction was negotiated, some delegations felt that it should not be mentioned as an element, while others insisted on having it included simply because it is contained in the Statute's definition.

In application of paragraph 6 of the General Introduction, the requirement of 'unlawfulness' as contained in the definition of the crime in the ICC Statute has not been repeated.

Element 3 clarifies that the qualifier 'extensive', which excludes, for example, an isolated incident of pillage from this crime, applies to both alternatives – appropriation and destruction.[2]

Legal basis of the war crime

This offence constitutes a grave breach under the 1949 Geneva Conventions (Arts. 50 GC I, 51 GC II and 147 GC IV). However, it also refers to an extensive and detailed law contained in other rules of the GC and the 1907 Hague Regulations.[3] Therefore, the determination of what constitutes conduct that is unlawful under international law must be seen in light of specific provisions of the GC and Hague Regulations, which are mentioned in the following paragraphs. This war crime concerns only property specifically protected by the GC, in particular medical property (such as units and establishments), property of aid societies and property in occupied territories.[4] The destruction of property during the conduct of hostilities is generally dealt with under Art. 8(2)(b) of the ICC Statute.

[2] In this connection, one may bear in mind paragraph 4 of the General Introduction to the Elements of Crimes, which affirms that the perpetrator does not have to complete personally the value judgement connoted in the word 'extensive'.

[3] In this respect Art. 154 GC IV stipulates:

> In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

However, it should be noted that the Nuremberg Tribunal and, more recently, the International Court of Justice have deemed the Hague Regulations to constitute customary international law. Therefore, the Hague Regulations must be applied even by States not bound by them.

[4] See in this regard ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 335 ff.

Remarks concerning the material elements of this offence

The following conclusions may be drawn from the various sources examined below. The sources in brackets refer to the supporting sources which are further analysed below.

(1) Destruction and appropriation of property can be committed through a wide range of actions. The following conduct may, *inter alia*, constitute 'destruction': to set fire to property, to destroy, pull down, mutilate or damage (cf. post-Second World War trials). The following conduct may, *inter alia*, constitute 'appropriation': to take, obtain, or withhold property, theft, requisition, plunder, spoliation (cf. the ICTY Prosecution, post-Second World War trials). A definite transfer of title as to the property seized or exploited is not necessary (cf. post-Second World War trials).

(2) Property that cannot lawfully be appropriated obviously cannot lawfully be destroyed.

(3) Both private and public property are protected by specific provisions (Art. 53 GC IV, post-Second World War trials, Hague Regulations; the view of the ICTY Prosecution is not clear on this point).

(4) The amount of unlawful destruction must be extensive for it to amount to an international crime (the ICTY Prosecution). The ICRC Commentary on GC IV specifies that the appropriation of property must also be extensive; an isolated act would not be enough to constitute a grave breach.[5]

(5) In general, only destruction in occupied territories by the Occupying Power is prohibited (cf. Arts. 53 GC IV, Arts. 42–56 Hague Regulations, post-Second World War trials). However, the following provisions are not limited to destruction in occupied territories: Art. 23(g) Hague Regulations, Arts. 19, 20, 33, 36, 37 GC I, Arts. 22, 23, 39, 40 GC II and Arts. 18, 21, 22 GC IV with respect to medical establishments; Art. 34 GC I with respect to property of aid societies; Art. 33 GC IV with respect to reprisals.

(6) The lawfulness of destruction and appropriation is dependent on the necessities of war (ICC Statute, Arts. 34, 50 GC I, Art. 51 GC II, Arts. 53, 57, 147 GC IV, Arts. 23(g), 52 Hague Regulations, post-Second World War trials, the ICTY Prosecution with various formulations) except in the case of Arts. 19, 20, 33 GC I, Arts. 22, 23 GC II, Arts. 18, 21, 33 GC IV and Art. 56 Hague Regulations. Therefore, it is difficult to formulate

[5] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 601.

material elements as a general rule that would apply to all possible cases of destruction that would be prohibited.

(7) Acts constituting in particular plunder or spoliation must be committed without the consent of the owner and the economic substance of the belligerent occupied territory must be injured by the occupant or put to the service of his war effort (cf. post-Second World War trials).

Destruction

Until now, there are only two findings by the ad hoc Tribunals on this offence. In the *Blaskic* case the ICTY held, concerning *destruction of property in occupied territory by the Occupying Power*, the following:

> An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of 'extensive' is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.[6]

In the *Kordic and Cerkez* case it defined the elements as follows:

> either:
>
> (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949,[7] regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or

[6] ICTY, Judgment,*The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 157 (footnote omitted); 122 ILR 1 at 66.

[7] In this regard the Trial Chamber stated:

> Several provisions of the Geneva Conventions identify particular types of property accorded general protection thereunder. For example, Article 18 of Geneva Convention IV provides that 'civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of an attack, but shall at all times be respected and protected by the parties to the conflict'. (*See also* Chapters III, V and VI of Geneva Convention I (protecting medical units, vehicles, aircraft, equipment and material) and Article 22 et seq. (protecting hospital ships) and Article 38 et seq. (protecting medical transports) of Geneva Convention II.) While property thus protected is presumptively immune from attack, the Conventions identify certain highly exceptional circumstances where the protection afforded to such property will cease (*See* in relation to medical units and establishments, Articles 21 and 22 of Geneva Convention I; in relation to the material of mobile medical units, Article 33 of Geneva Convention I; in relation to medical transports, Article 36 of Geneva Convention I; and, in relation to military hospital ships, Articles 34 and 35 of Geneva Convention II.).

(ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 336.)

(ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory;[8] and the destruction occurs on a large scale; and

(iii) the destruction is not justified by military necessity.[9]

The ICTY Prosecution, in the case of *The Prosecutor* v. *Milan Kovacevic*,[10] considered that the following constituted the material elements of this offence:

– The accused or the subordinate wantonly and unlawfully destroyed real or personal property or took, obtained, or withheld such property from the possession of the owner or any other person.
– The amount of destruction was extensive and under the circumstances exceeded that required by military necessity.

The question of destruction of property is dealt with in particular in the following Articles of the GC. The conditions set forth in these provisions can be an indication for the elements of this crime.

• Rules according special protection for medical units and establishments:[11]

Art. 19 GC I:

> Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict . . .

Art. 20 GC I:

> Hospital ships entitled to the protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, shall not be attacked from the land.

Art. 33 GC I:

> . . . The buildings, material and stores of fixed medical establishments of the armed forces . . . shall not be intentionally destroyed.

Art. 36 GC I:

> Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical

[8] In this regard the Trial Chamber mentioned Art. 53 GC IV. *Ibid.*, para. 337. [9] *Ibid.*, para. 341.
[10] ICTY, Prosecutor's Pre-trial Brief, IT-97-24-PT, p. 16.
[11] Other provisions to be considered in this context are Arts. 14 and 15 GC IV.

> personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned . . .

Art. 37 GC I:

> . . . medical aircraft of Parties to the conflict may fly over the territory of neutral Powers, land on it in case of necessity, or use it as a port of call . . . They will be immune from attack only when flying on routes, at heights and at times specifically agreed upon between the Parties to the conflict and the neutral Power concerned . . .

Art. 22 GC II:

> Military hospital ships . . . may in no circumstances be attacked or captured, but shall at all times be respected and protected, on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed . . .[12]

Art. 23 GC II:

> Establishments ashore entitled to the protection of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 shall be protected from bombardment or attack from the sea.

Art. 39 GC II:

> Medical aircraft . . . may not be the object of attack, but shall be respected by the Parties to the conflict, while flying at heights, at times and on routes specifically agreed upon between the Parties to the conflict concerned . . .[13]

Art. 18 GC IV:

> Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict . . .

[12] Arts. 24–7 give similar protection to other types of hospital ships, their lifeboats and to coastal rescue craft.

[13] Since 1949 further protection from attacks has been accorded to medical aircraft. This will be commented on under Art. 8(b)(xxiv) and (e)(ii) ICC Statute.

Art. 21 GC IV:

> Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18 . . .

Art. 22 GC IV:

> Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned . . .[14]

• Protection against reprisals:

Art. 33 GC IV:

> . . . Reprisals against protected persons and their property are prohibited.

• Protection of property in occupied territories:

Art. 53 GC IV:

> *Any destruction* by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, *is prohibited, except where such destruction is rendered absolutely necessary by military operations*. [Emphasis added.][15]

Hence, the Hague Regulations continue to apply. They provide further details with respect to destruction of property and are also relevant for the determination of the lawfulness or unlawfulness of various forms of destruction. The following rules of the Hague Regulations must be taken into account:

• Art. 23(g) Hague Regulations (1907):

> In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . to destroy or seize the enemy's property,

[14] See previous footnote.

[15] For an interpretation of this provision in relation to Art. 23(g) Hague Regulations see ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 337.

> *unless such destruction or seizure be imperatively demanded by the necessities of war*. [Emphasis added.]

- Art. 46 Hague Regulations (1907), which states that '... private property ... must be respected. Private property cannot be confiscated.'
- Art. 56 of the 1907 Hague Regulations reads as follows:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

The following cases from post-Second World War trials deal with destruction of property in specific circumstances, that is, the destruction of inhabited buildings and of public monuments.

In the case of *F. Holstein and Twenty-three Others*,[16] dealing with the destruction of inhabited buildings,[17] the accused were found guilty under Art. 434 of the French Penal Code of 'wantonly set[ting] fire to buildings, vessels, boats, shops, works, when they are inhabited or used as habitations' and under Art. 23(g) of the 1907 Hague Regulations,[18] as well as under Art. 46 of the 1907 Hague Regulations.

In the case of *K. Lingenfelder*,[19] the accused was found guilty of destroying public monuments under Art. 257 of the French Penal Code, which makes it a crime to 'destroy, pull down, mutilate or damage monuments, statues or other objects dedicated to public utility or embellishment, and erected by public authority, or with their permission'.[20] This provision of the French Penal Code gives effect to Art. 56 of the 1907 Hague Regulations.

In sum, these cases deal with offences against private and public property. The accused were found guilty on the basis that they committed, in particular, violations of Arts. 23(g), 46 and 56 of the Hague Regulations, as cited above. It is important to underline that although the cases from

[16] In UNWCC, *LRTWC*, vol. VIII, pp. 22 ff.; 13 AD 261.
[17] See also similar findings in the *H. Szabados Trial*, in UNWCC, *LRTWC*, vol. IX, pp. 59 ff.; 13 AD 261.
[18] In the *W. List Trial* the tribunal also quotes this provision for the *actus reus*, in 15 AD 632 at 648–9.
[19] In UNWCC, *LRTWC*, vol. VIII, pp. 67–8; 13 AD 254.
[20] See also *Trial of the German Major War Criminals* (ITN, 1946), Judgment of the International Military Tribunal for the Trial of German Major War Criminals, p. 53; 13 AD 203 at 215, referring to Art. 56 Hague Regulations as constituting the *actus reus*.

post-Second World War trials and the provisions of the 1907 Hague Regulations use a slightly different language from that used by the ICC Statute and the underlying provisions from the GC, they are helpful in determining the elements of this crime.

Appropriation

There are no provisions in the GC which specifically clarify the notion of 'appropriation of property'. However, some rules deal with specific acts of appropriation and set up special conditions for determining the lawfulness or unlawfulness of certain behaviours. In particular the following have to be considered:

- According to Arts. 15(1) GC I, 18(1) GC II, 16(2) and 33(2) GC IV, protected persons, in particular sick or dead persons, shall be protected against pillage. The notion of 'pillage' is not further defined.
- Art. 34 GC I rules on the requisition of real and personal property of aid societies and states:

> The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.

- Art. 57 GC IV:

> The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.
>
> The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

- Protection of objects of personal use:

Art. 18 GC III:

> All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain

> in their possession, even if such effects and articles belong to their regulation military equipment . . .
>
> Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.
>
> Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt . . .
>
> The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply . . .

Art. 97 GC IV:

> Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure . . .
>
> Articles which have above all a personal or sentimental value may not be taken away . . .
>
> On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.
>
> Family or identity documents in the possession of internees may not be taken away without a receipt being given . . .

As it follows from Art. 154 GC IV cited above, the provisions of GC IV supplement Sections II and III of the Hague Regulations. Therefore, in particular the following norms of the Hague Regulations – containing further restrictions – are also relevant for the determination of the lawfulness or unlawfulness of various forms of appropriation:[21]

[21] Other rules not explicitly cited are: Arts. 48, 51, 52, 55 and 56 Hague Regulations.

- Art. 46 Hague Regulations states that '. . . private property . . . must be respected. Private property cannot be confiscated.'
  According to Art. 47 Hague Regulations, '[p]illage is formally forbidden'.
- Art. 52 Hague Regulations:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country . . .

- Art. 53 Hague Regulations:

> An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
>
> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

- Art. 55 Hague Regulations:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country . . .

The following cases from post-Second World War trials specifically refer to these rules for the description of the material elements of plunder, spoliation and exploitation. It is important to note that, with respect to terminology, the Tribunal in the *IG Farben* case found that:

> the Hague Regulations do not specifically employ the term 'spoliation', but we do not consider this matter to be one of legal significance. As employed in the indictment, the term is used interchangeably with the words 'plunder' and 'exploitation' . . . [T]he term 'spoliation' . . . applies

> to the widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that 'spoliation' is synonymous with the word 'plunder' as employed in Control Council Law 10, and that it embraces offences against property in violation of the laws and customs of war.[22]

Hence, it appears that the terms 'plunder', 'spoliation' and 'exploitation' may be used interchangeably with the term 'appropriation'.[23]

In the *IG Farben* trial,[24] the accused was charged and found guilty of 'unlawfully, wilfully and knowingly' ordering, abetting and taking a consenting part in the *plunder of public and private property, exploitation, spoliation and other offences against property* in countries and territories which came under the belligerent occupation in Germany. The Tribunal stated that 'to exploit the military occupancy by acquiring private property against the will and consent of the former owner' is a violation of international law unless the action is 'expressly justified by any applicable provisions of the Hague Regulations'.[25] The Tribunal referred to Arts. 46–7, 52–3 and 55 of the 1907 Hague Regulations to establish the material elements of the offence. It found that '[t]he foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy'.[26]

The Tribunal also held that it is:

> of the essence of the crime of plunder or spoliation that the owner be *deprived* of his property *involuntarily and against his will*.[27]

There must be a proof that

> action by the owner is not voluntary because his consent is obtained by threats, intimidations, pressure, or by exploiting the position or power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will.[28]

[22] *IG Farben Trial*, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. VIII, 1952, p. 1133; 15 AD 668 at 673.
[23] See also P. Verri, *Dictionary of the International Law of Armed Conflict* (ICRC, Geneva, 1988), p. 85.
[24] In UNWCC, *LRTWC*, vol. X, pp. 42 ff.; 15 AD 668 at 672.
[25] UNWCC, *LRTWC*, vol. X, p. 44; 15 AD 668 at 673.
[26] UNWCC, *LRTWC*, vol. X, p. 44; 15 AD 668 at 672.
[27] UNWCC, *LRTWC*, vol. X, p. 46 (emphasis added); 15 AD 668 at 673.
[28] UNWCC, *LRTWC*, vol. X, p. 47; 15 AD 668 at 675.

In that respect, the mere presence of the military occupant is not enough to assume there is pressure.[29]

In the case of *Flick and Five Others*,[30] the Tribunal stated that, under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear. The prosecutor stated that, concerning private property, the decisive test is the finality or result of the transactions (i.e. the plants seized were operated in such a manner as to injure the French economy and promote the German war economy) but the Tribunal based its decision on the fact that the plants were operated without the consent of the lawful owner.[31] With respect to public property, Art. 55 Hague Regulations, according to which the Occupying Power has only a right of usufruct over such property, and that only for the duration of the occupation, was quoted.[32]

In the *A. Krupp* trial,[33] the accused was charged with 'unlawfully, wilfully and knowingly'[34] participating 'in the plunder of public and private property, exploitation, spoliation, devastation and other offences against property and civilian economies of countries and territories' under belligerent occupation.[35] The Tribunal quoted Arts. 45–52 of the 1907 Hague Regulations to establish the material elements.[36] The Tribunal further specified the material elements of this offence in the following manner:

- As a rule,

  > [s]poliation of private property, then, is *forbidden under two aspects*; *firstly*, the individual private owner of property must not be deprived of it; *secondly*, the economic substance of the belligerent occupied territory must not be taken over by the occupant or put to the service of his war effort – always with the proviso that there are exemptions from this rule which is strictly limited to the needs of the army of occupation insofar as such needs do not exceed the economic strength of the occupied territory.[37]

- Such an exemption is provided for in Art. 43 of the 1907 Hague Regulations, which 'permits the occupying power to expropriate either

[29] UNWCC, *LRTWC*, vol. X, p. 47; 15 AD 668 at 675.
[30] In UNWCC, *LRTWC*, vol. IX, p. 22; 14 AD 226. [31] UNWCC, *LRTWC*, vol. IX, p. 41.
[32] *Ibid.*, pp. 41 ff. [33] In UNWCC, *LRTWC*, vol. X, pp. 69 ff.; 15 AD 620.
[34] UNWCC, *LRTWC*, vol. X, p. 74; 15 AD 620. [35] UNWCC, *LRTWC*, vol. X, p. 73; 15 AD 620.
[36] UNWCC, *LRTWC*, vol. X, pp. 132 ff.; 15 AD 620 at 622.
[37] UNWCC, *LRTWC*, vol. X, p. 135 (emphasis added); 15 AD 620 at 623.

public or private property to preserve and maintain public order and safety'.[38]

- These exemptions must not be discriminatory. Any transaction based on discriminatory laws affecting property rights of individuals will constitute a violation of Art. 46 of the 1907 Hague Regulations.[39]
- A definite transfer of title as to the property seized or exploited is not necessary, '[i]f, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and deprives him from lawfully exercising his prerogatives as owner, it cannot be said that his property "is respected" under Article 46 [of the 1907 Hague Regulations]'.[40]
- With respect to public property, it is the result of the deprivation of property which is the decisive test: '[t]hough the results in the latter case were achieved through the contracts imposed upon others, the illegal result, namely, the deprivation of property, was achieved just as though material had been physically removed and shipped to Germany'.[41]

Theft

In the case of *Bommer*,[42] the offences of theft, according to Art. 379 of the French Penal Code (defined therein as 'fraudulent removal of property'), and receiving stolen goods, according to Art. 460 of the French Penal Code (defined as 'knowingly receiving things taken, misappropriated or obtained by means of a crime or delict'), were treated as war crimes for which the Tribunal convicted the accused.

In the *C. Baus* case,[43] too, theft according to Art. 379 of the French Penal Code and abuse of confidence according to Arts. 406–8 of the French Penal Code were treated as war crimes.

Abusive and illegal requisition of property

In the *P. Rust* case,[44] the accused was found guilty of abusive and illegal requisitioning of French property, an instance of pillage in time of war, under Art. 221 of the French Penal Code of Military Justice and Art. 2(8) of the Ordinance of 1944 for the prosecution of war criminals. These provisions give effect to Art. 52 of the Hague Regulations of 1907.

[38] UNWCC, *LRTWC*, vol. X, p. 135; 15 AD 620 at 623.
[39] *Ibid*.
[40] UNWCC, *LRTWC*, vol. X, pp. 137 ff.; 15 AD 623.
[41] UNWCC, *LRTWC*, vol. X, p. 138; 15 AD 620 at 625.
[42] In UNWCC, *LRTWC*, vol. IX, pp. 62 ff.; 13 AD 254.
[43] UNWCC, *LRTWC*, vol. IX, pp. 68–71; 13 AD 254.
[44] UNWCC, *LRTWC*, vol. IX, pp. 71–4; 15 AD 684.

In sum, the above-cited cases deal with offences against private and public property. The accused were found guilty on the basis that they committed in particular violations of Arts. 46, 47, 52, 53 and 55 Hague Regulations. Again, it is important to underline that although the cases from post-Second World War trials and the provisions of the 1907 Hague Regulations use a slightly different language from that used by the ICC Statute and the underlying provisions from the GC, they are helpful in determining the elements of this crime.

Remarks concerning the mental element

The mental element is described by the ICC Statute as 'wantonly'.

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[45]

More specifically the following sources concerning '[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' may be quoted:

With regard to destruction of protected property, the ICTY required in the *Kordic and Cerkez* case that

> the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[46]

In the case of *The Prosecutor* v. *Milan Kovacevic*,[47] the Prosecution of the ICTY considered the following to constitute the mental elements of the present offence (appropriation):

> The taking, obtaining, or withholding of such property by the accused or a subordinate was committed with the intent to deprive another person of the use and benefit of the property, or to appropriate the property for the use of any person other than the owner.

The *mens rea* required in the above-cited post-Second World War cases is that the offence must be committed 'wilfully and knowingly', as was

[45] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.
[46] ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 341.
[47] ICTY, Prosecutor's Pre-trial Brief, IT-97-24-PT, p. 16.

decided in the case of *Flick and Five Others* (at pp. 3 ff.), the *IG Farben* trial and the *A. Krupp* trial. In the *H. Rauter* case,[48] the accused was found guilty of 'intentionally' taking the necessary measures to carry out the systematic pillage of the Netherlands population.

[48] In UNWCC, *LRTWC*, vol. XIV, pp. 89 ff.; 16 AD 526 at 544.

Art. 8(2)(a)(v) – Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power

Text adopted by the PrepCom

War crime of compelling service in hostile forces

1. The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

For the war crime of 'compelling a prisoner of war or other protected person to serve in the forces of a hostile Power' the PrepCom decided to combine the language of the 'grave breaches' provisions with Art. 23 of the 1907 Hague Regulations. The prohibited conduct is described as: 'The perpetrator coerced one or more persons [protected under one or more of the Geneva Conventions], by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.' The word 'otherwise' indicates that the aspect dealt with in the Hague Regulations – 'to take part in military operations against that person's own country or forces' – is just one particular example of the prohibited conduct described in the GC – 'serve in the forces of a hostile power'. Some delegations wanted a clear indication that the crime is not limited to compelling a protected person to act against his/her country or forces, but also against other countries or forces, in particular allied countries and forces. In the end the PrepCom felt that this particular case would be covered by 'otherwise serve in the forces of a hostile power'.[1]

The interplay between 'to take part in military operations' and 'serve in the forces of a hostile power' recognises that no formal enrolment is required.

[1] This interpretation seems to be well founded with respect to the Geneva Conventions. See H.-P. Gasser, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 264.

It became obvious that there is a large overlap between the 'grave breaches' crime defined in Art. 8(2)(a)(v) ICC Statute and the crime defined in Art. 8(2)(b)(xv) ICC Statute, which is based solely on Art. 23 of the 1907 Hague Regulations. This led to drafting and interpretation difficulties.

The initial US proposal[2] as well as the initial Swiss–Hungarian proposal[3] indicated that permissible prisoner-of-war or civilian labour as defined in the GC (especially Arts. 49–57 GC III and 51–2 GC IV) is not covered by this crime. For instance, in accordance with Arts. 49 ff. GC III, the Detaining Power may compel prisoners of war to do certain types of work. Art. 51 GC IV allows the Occupying Power to oblige protected persons in occupied territory to perform specifically defined labour. Paragraph 2 of this provision, however, clearly states that inhabitants of occupied territories may not be compelled to do 'work which would involve them in the obligation of taking part in military operations'. This clarification is not reflected in the elements of this war crime. It is submitted that either the term 'serve in the forces of a hostile power', which encompasses taking part in military operations, has to be interpreted narrowly as not including permissible labour, or, if a broader interpretation of the term is followed, the Court will have to address this issue on the basis of paragraph 6 of the General Introduction.

Legal basis of the war crime

The term 'compelling a prisoner of war or other protected person to serve in the forces of a hostile Power' is derived directly from Arts. 130 GC III and 147 GC IV.

Remarks concerning the material element

Compelling a prisoner of war or a civilian

As concerns the notion of 'compelling', in the *Weizsäcker and Others* case, the US Military Tribunal found in 1949 that:

> it is not illegal to recruit prisoners of war who volunteer to fight against their own country, but pressure or coercion to compel such persons to enter into the armed services obviously violates international law.[4]

Not permissible as prisoner of war or civilian labour

The second component of this crime concerning permitted and prohibited labour for prisoners of war is taken from Arts. 49–57 GC III, in particular Arts. 50 and 52. In this respect Art. 52 GC III prohibits labour which is

[2] PCNICC/1999/DP.4/Add.2 of 4 February 1999. [3] PCNICC/1999/DP.5 of 10 February 1999.
[4] 16 AD 357.

unhealthy or dangerous in nature. For example, the removal of mines or similar devices is considered as dangerous labour under this provision. Art. 51 GC IV sets forth conditions for permitted labour of civilians.

In accordance with Art. 23 of the Hague Regulations, it is forbidden for the belligerent country to 'compel 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'.[5]

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[6]

More specifically, the following case law on 'compelling a prisoner of war or other protected person to serve in the forces of a hostile Power' may be quoted:

In the *Milch* case the accused was charged with 'unlawfully, wilfully, and knowingly' participating in 'plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations'. He was found guilty in this respect.[7]

[5] See R. Wolfrum, 'Enforcement of International Humanitarian Law' in Fleck, *Handbook*, p. 534.
[6] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.
[7] In UNWCC, *LRTWC*, vol. VII, pp. 27 ff.; 14 AD 299 at 300–2.

Art. 8(2)(a)(vi) – Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial

Text adopted by the PrepCom

War crime of denying a fair trial

1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

With regard to the crime 'wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial' the prohibited conduct is defined as '[t]he 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'. This element clarifies what is meant by a deprivation of the rights of a fair and regular trial, namely the denial of judicial guarantees. It must be emphasised that a vast majority of States supported the view that the crime may also be committed if judicial guarantees other than those explicitly mentioned in the GC (for example, the presumption of innocence and other guarantees contained only in the 1977 Additional Protocols) are denied. Therefore, the words 'in particular' were included in the element.

The PrepCom agreed that for depriving a person of a fair and regular trial there is no requirement, as was suggested in two initial proposals, that the perpetrator caused a punishment to be imposed on that person.[1]

The term 'wilful' as contained in the definition of this crime in the Statute is not reflected in the elements of this crime. As to the ensuing consequences see the debate under section 'Art. 8(2)(a)(i) – Wilful killing'.

[1] PCNICC/1999/DP.4/Add.2 of 4 February 1999 and PCNICC/1999/WGEC/DP.5 of 23 February 1999.

Legal basis of the elements of crime
This offence constitutes a grave breach under the 1949 Geneva Conventions (Arts. 130 GC III and 147 GC IV).

Remarks concerning the material element
The main judicial guarantees, which are an indication of what constitutes a fair trial, laid down in the 1949 Geneva Conventions and since then in the Additional Protocols of 1977 are as follows:

- the right of the accused to be judged by an independent and impartial court (Art. 84(2) GC III, Art. 75(4) AP I, Art. 6(2) AP II);
- the right of the accused to be promptly informed of the offences with which he/she is charged (Art. 104 GC III, Art. 71(2) GC IV, Art. 75(4)(a) AP I, Art. 6(2)(a) AP II);
- the rights and means of defence, such as the right to be assisted by a qualified lawyer chosen freely and by a competent interpreter (Arts. 99 and 105 GC III, Arts. 72 and 74 GC IV, Art. 75(4)(a) and (g) AP I, Art. 6(2)(a) AP II);
- the principle of individual criminal responsibility (Art. 87 GC III, Art. 33 GC IV, Art. 75(4)(b) AP I, Art. 6(2)(b) AP II);
- the principle of *nullum crimen sine lege* (i.e. no crime without law) (Art. 99(1) GC III, Art. 67 GC IV, Art. 75(4)(c) AP I, Art. 6(2)(c) AP II);
- the presumption of innocence (Art. 75(4)(d) AP I, Art. 6(2)(d) AP II);
- the right of the accused to be present at his/her trial (Art. 75(4)(e) AP I, Art. 6(2)(e) AP II);
- the right of the accused not to testify against himself/herself or to confess guilt (Art. 75(4)(f) AP I, Art. 6(2)(f) AP II);
- the principle of *non bis in idem* (i.e. no punishment more than once for the same act) (Art. 86 GC III, Art. 117(3) GC IV, Art. 75(4)(h) AP I);
- the right of the accused to have the judgment pronounced publicly (Art. 75(4)(i) AP I);
- the right of the accused to be informed of his rights of appeal (Art. 106 GC III, Art. 73 GC IV, Art. 75(4)(j) AP I, Art. 6(3) AP II);
- prohibition of 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 Art. 3 to the GC).

It has to be noted that a number of human rights treaty provisions[2] which contain similar principles may be of relevance for the interpretation

[2] See Arts. 5, 6 and 7 ECHR; Arts. 7, 8 and 9 ACHR; Arts. 9, 14, 15 and 16 ICCPR.

of this war crime, in particular since there is a very extensive and detailed case law interpreting these provisions.[3]

It should also be noted that there are specific procedural requirements relating to the death penalty (Arts. 100, 101 GC III, 74, 75 GC IV) and, in addition, there are further procedural and legal requirements in relation to judicial proceedings against prisoners of war and civilian internees in both GC III and GC IV.[4]

Several post-Second World War cases indicate which material elements are to be considered when determining whether the trial was unfair.

In the case of *S. Sawada and Three Others*,[5] the accused were charged with 'knowingly, unlawfully and wilfully' denying the status of prisoners of war and holding a trial in violation of the laws and customs of war. According to the case commentator, the following factors were considered by the Commission:

– to be tried 'on false and fraudulent charges' and 'upon false and fraudulent evidence';
– not to be afforded 'the right to counsel';
– to be denied 'the right to interpretation of the proceedings into English';
– to be denied 'an opportunity to defend themselves' (pp. 12–13).

In the same case, other factors, such as the fact that the victims were not told they were being tried nor of the charges against them, and that they were not shown the documents used as evidence, may have been taken into account in deciding that the victims were not given a right to a fair trial (pp. 12–13).

In the cases of *S. Ohashi*[6] and *E. Shinohara*,[7] the judge-advocate held that the notion of 'fair trial' supposes the following:

– consideration by a tribunal comprised of one or more men who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and, if they are soldiers, their military knowledge, honestly endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him;
– the accused should know the exact nature of the charge against him;
– he should know what is alleged against him by way of evidence;
– he should have full opportunity to give his own version of the case and to produce evidence to support it;

[3] For more detail see analysis under section, 'Art. 8(2)(c)(iv)'.
[4] In particular Arts. 99(1), 102–5 and 107 GC III; 64–70 and 77 GC IV.
[5] In UNWCC, *LRTWC*, vol. V, pp. 1 ff.; 13 AD 302 at 303–4.
[6] UNWCC, *LRTWC*, vol. V, pp. 25 ff.; 13 AD 383. [7] UNWCC, *LRTWC*, vol. V, pp. 32 ff.

– the court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty;
– the punishment should not be one which outrages the sentiments ofhumanity.

In the case of *H. Isayama and Seven Others*,[8] the accused were found guilty of 'wilfully, unlawfully and wrongfully' committing cruel, inhuman and brutal atrocities against prisoners of war, by permitting and participating in an illegal and false trial and unlawfully killing the said prisoners of war, in violation of the laws and customs of war. The judgment was rendered without any express opinion on the charges, but according to the commentator the following criteria were considered:

– the evidence brought against the victims was falsified;
– little or no evidence connecting the victims with the alleged illegal bombing was produced apart from the falsified statements;
– the right to a defence counsel was denied;
– the opportunity to obtain evidence or witnesses on their own behalf was denied;
– the greater part of the proceedings was not interpreted;
– the trials were completed in one day.

In the case of *T. Hisakasu and Five Others*,[9] the illegality of the trials, according to the commentator, rested on the following facts:

– no defence counsel was provided to the victim, who was in no position to secure one himself;
– he had no opportunity to prepare a defence or secure evidence;
– no witnesses appeared, and the evidence of the Major denying intentionally attacking a civilian boat was ignored;
– the entire proceedings lasted no more than two hours.

In the case of *J. Altstötter and Others*,[10] the tribunal held that

> the trials of the accused . . . did not approach a semblance of fair trial or justice. The accused . . . were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied of the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No

[8] *Ibid.*, pp. 60 ff. [9] *Ibid.*, pp. 66 ff. [10] In UNWCC, *LRTWC*, vol. VI, pp. 1 ff.; 14 AD 278.

> indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from the beginning to end were secret and no public record was allowed to be made of them.[11]

These elements indicate that the trial was unfair.

In the case of *H. Latza and Two Others*,[12] on re-judgment (the first judgment having been quashed[13]), the following criteria were held to be necessary for a fair trial:

- the court must be impartial and not bound by orders from above;
- the accused must be acquainted with the concrete points of the charges against them;
- the accused must be given the opportunity to explain themselves, to state their case freely and to counter each point of the charge;
- the evidence submitted must be manifestly adequate to sustain the verdict and sentence;
- the accused must be given the opportunity to offer and submit their counter-evidence[14].

On appeal to the Supreme Court, it was held that the violation of a single requirement for fair trial as listed above does not necessarily lead to an unfair trial, the court having to weigh in each instance whether the outcome amounted to denial of a fair trial.[15]

Summary

It appears from the above-cited cases that the elements required to ensure a fair and regular trial include, but are not limited to, the following:

- the right to counsel;
- the right to prepare a defence (including the right to present witnesses and evidence);

[11] UNWCC, *LRTWC*, vol. VI, p. 97. [12] In UNWCC, *LRTWC*, vol. XIV, pp. 49 ff. (at p. 57); 17 ILR 438.

[13] In the first judgment the proceedings were held to be unlawful for the following reasons:
- the victims were not given a counsel for their defence;
- they had been arrested on the day of the trial and had not been able to prepare their defence;
- the Standgericht accepted as proof evidence produced indirectly by the prosecutor, who had maintained that the witnesses could not be called, for safety reasons;
- the judges had not used their right and duty to adjourn the trial for further evidence;
- at least two of the victims were sentenced to death on insufficient evidence for acts which, from the standpoint of international law, were hardly punishable by death.

On the *mens rea*, the accused were found guilty on the grounds that they had acted 'intentionally with the full understanding that by their conduct they had caused another person's death' (UNWCC, *LRTWC*, vol. XIV, pp. 58–9).

[14] *Ibid.*, p. 68. [15] *Ibid.*, p. 85.

– the right to be informed of the charges against the accused;
– the right to have a judgment rendered by an independent and impartial court;
– the right to an interpreter;
– the length of the trial may be considered in evaluating the fairness of the proceedings (for example, a very short trial may indicate that the accused did not have sufficient time to prepare an adequate defence).

These judicial guarantees are also included in the GC and their AP, as indicated above. Since the offence defined under the ICC Statute is derived from Arts. 130 GC III and 147 GC IV, one may conclude that at least the judicial guarantees mentioned in these GC are crucial for determining whether the trial was fair.

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[16]

More specifically, the following case law on 'wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial' may be quoted.

As concerns the mental element, the offence must be committed 'wilfully and knowingly', as shown in the following previously cited cases:

– *S. Sawada and Three Others* ('knowingly, unlawfully and wilfully');
– *J. Altstötter and Others* (in this case, it was held that the *mens rea* of the offence was 'unlawfully, wilfully and knowingly' committing these acts);
– *H. Isayama and Seven Others* ('wilfully, unlawfully and wrongfully').

[16] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

Art. 8(2)(a)(vii) – Unlawful deportation or transfer or unlawful confinement

(1) UNLAWFUL DEPORTATION OR TRANSFER

Text adopted by the PrepCom

Article 8(2)(a)(vii)–1 War crime of unlawful deportation and transfer

1. The perpetrator deported or transferred one or more persons to another State or to another location.

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

Concerning the crime 'unlawful deportation or transfer', the PrepCom adopted the interpretation that Art. 147 GC IV, which must be read in conjunction with Art. 49 GC IV, prohibits all forcible transfers, including those within an occupied territory, as well as deportations of protected persons from occupied territory.[1] In application of paragraph 6 of the General Introduction, the requirement of 'unlawfulness' as contained in the definition of the crime in the ICC Statute has not been repeated. Arts. 45 and 49 GC IV set forth the conditions for unlawfulness.

The PrepCom took the view that the requirement suggested by some delegations that a protected person must be transferred from his/her 'lawful place of residence', as contained in the definition of the crime against humanity of deportation or forcible transfer (Art. 7(2)(d) of the ICC Statute), is not an element of unlawful deportation or transfer as defined in the GC.

Legal basis of the war crime

The term 'unlawful deportation or transfer or unlawful confinement' has been incorporated directly from Art. 147 of GC IV.

[1] The relevant element reads as follows: 'The perpetrator deported or transferred one or more persons to another State or *to another location*.' (Emphasis added.) See in this regard B. Zimmermann, 'Art. 85' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3502, especially note 28.

Remarks concerning the material element

Up to now, there have been no findings on the elements of this offence by the ad hoc Tribunals. However, in the case against *Kovacevic*,[2] the ICTY Prosecution indicated the material element of this crime as follows:

> The accused or a subordinate unlawfully deported or forcibly transferred a protected person from the territory where the protected person was present, to a place outside that territory.

In the case against *Simic and Others* it defined the material element as follows:

> (i) that victims were unlawfully deported or transferred from the territory where they were lawfully present, to a place outside that territory.[3]

The question of deportation and forcible transfer is dealt with in Arts. 45 and 49 GC IV. The conditions set forth in these provisions can be an indication of the lawfulness of the perpetrator's act.[4]

Art. 45 GC IV states the following:

> (1) *Protected persons shall not be transferred to a Power which is not a party to the Convention.*
>
> (2) This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.
>
> (3) *Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.* If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.

[2] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 15.

[3] ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E)(I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, para. 72.

[4] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 599, and R. Wolfrum, 'Enforcement of International Humanitarian Law' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford 1995), p. 534, state that the war crime mentioned in Art. 147 GC IV refers to breaches of Arts. 45 and 49 GC IV.

> (4) *In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.*
>
> (5) The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law. [Emphasis added.]

Art. 49 GC IV reads as follows:

> (1) *Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.*
>
> (2) *Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.* Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> . . .
>
> (5) The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
>
> (6) *The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.* [Emphasis added.][5]

With regard to Art. 49(1) GC IV the ICTY Prosecution highlighted the following:

> Although the main purpose of Article 49 was to prohibit mass population movements, it also explicitly prohibits individual deportations and forcible transfers . . .
>
> Under the Geneva Conventions *all* types of forcible 'relocations' of civilians are forbidden. This is confirmed by the ICRC Commentary to Protocol I which states that Article 49 of the Fourth Convention prohibits *all* forcible transfers, including forcible transfers within occupied territory . . .

[5] This offence has been reaffirmed and modified in AP I in Art. 85(4)(a), which prohibits 'the transfer 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, in violation of Article 49 of the Fourth Convention'. See ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 15.

> It is clear, therefore, that any deportation or transfer is forbidden under the Geneva Conventions, whether within another area of the occupied territory or to any other country. Accordingly, the crime of unlawful deportation or transfer is committed as soon as people are forcibly removed from their ordinary residences for purposes not permitted by international humanitarian law.
>
> Under Geneva Convention IV, the transfer of protected persons is only permissible in two circumstances, which, according to the ICRC Commentary, must be closely related to the conduct of actual military hostilities. First, evacuation may be ordered where the safety of the population demands such action. Second, imperative military reasons can justify the transfer of protected persons, but only for so long as these reasons continue to exist.
>
> In either situation, protected persons can only be transferred within the occupied territory, unless it is impossible to do so. Moreover, the transfer must be temporary, and the transferred persons be allowed to return to their homes as soon as the exceptional circumstances have ended.[6]

In a later judgment the ICTY addressed the crime of deportation and forcible transfer in the context of crimes against humanity. It made the following interpretation of the relevant provisions of the Geneva Conventions:

> Article 49 of the Fourth Geneva Convention . . . allow[s] total or partial evacuation of the population 'if the security of the population or imperative military reasons so demand'. Article 49 however specifies that '[p]ersons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased'.[7]

On the facts the Tribunal held that since 'citizens . . . were not returned to their homes as soon as hostilities in the area in question had ceased' or, more precisely, since 'active hostilities . . . had already ceased by the time people were bussed out . . . , [s]ecurity of the civilian population can . . . not be presented as the reason justifying the transfer'.[8]

As to the forcible nature of the population transfer the Tribunal found:

> The commentary to Article 49 of Geneva Convention IV suggests that departures motivated by the fear of discrimination are not necessarily

[6] ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E) (I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, paras. 74–8 (footnotes omitted). See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 15.

[7] ICTY, Judgment, *Prosecutor* v. *Radislav Krstic*, IT-98-33-T, para. 524 (footnote omitted).

[8] *Ibid.*, para. 525.

in violation of the law:

> [T]he Diplomatic Conference preferred not to place an absolute prohibition on transfers of all kinds, as some might up to a certain point have the consent of those being transferred. The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorise voluntary transfers by implication, and only to prohibit 'forcible' transfers.

However, the finalised draft text of the elements of the crimes adopted by the Preparatory Commission for the International Criminal Court provides that:

> [t]he 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.[9]

On the facts the Tribunal asked whether the persons concerned exercised 'a genuine choice to go'.[10]

A number of decisions from post-Second World War trials have elaborated on the lawfulness of deportations, and can be useful in clarifying the elements of this crime:

In the *A. Krupp* case, the US Military Tribunal adopted the following statement of Judge Phillips in his concurring opinion in the *Milch* trial,[11]

> [D]eportation of civilians from one nation to another during times of war becomes a crime [i]f the *transfer is carried out without a legal title*, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting . . . [I]t is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulations.
>
> The second condition under which deportation becomes a crime occurs when the *purpose of the displacement is illegal*, such as deportations for the purpose of compelling the deportees to manufacture weapons for

[9] *Ibid.*, paras. 528 ff. (footnotes omitted). [10] *Ibid.*, para. 530.

[11] *Milch Trial*, in UNWCC, *LRTWC*, vol. VII, pp. 45–6, 55–6, which was based on the interpretation of Control Council Law No. 10; 14 AD 299 at 302.

> use against their homeland or to be assimilated in the working economy of the occupying country.
>
> The third condition under which deportation becomes illegal occurs whenever *generally recognized standards of decency and humanity are disregarded*.[12]

The three conditions emphasised above may help in interpreting this war crime. In this context, the following findings of the US Military Tribunal in the *Von Leeb and Others* case provide additional guidance with respect to an unlawful purpose:

> There is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power.[13]

In sum, one may conclude that for there to be a war crime, it has to be determined that:

(1) the deportation has been carried out unlawfully in violation of international conventions; or
(2) generally recognised standards of decency and humanity have been disregarded.

The cited provisions of the GC can be an indication in this respect.

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[14]

More specifically, the following case law on 'unlawful deportation or transfer' may be quoted:

With respect to the mental element, in several post-Second World War trials the accused were found guilty on the basis that they committed

[12] *A. Krupp Trial*, in UNWCC, *LRTWC*, vol. X, pp. 144 ff. (emphasis added); 15 AD 620 at 626.
[13] *Von Leeb and Others Case*, 15 AD 376 at 394. In another case, the accused were found guilty of participating in the enslavement and deportation for purposes of slave labour of the civilian population of territory under the belligerent occupation of, or otherwise controlled by, Germany, *IG Farben Trial*, in UNWCC, *LRTWC*, vol. X, pp. 4 ff.; 15 AD 668 at 679.
[14] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

the offences 'wilfully and knowingly in violation of international conventions'.[15]

The ICTY Prosecution stated that

> as part of the *mens rea* requirement, the accused or a subordinate must have been aware of, or wilfully blind to, the facts that would render the deportation or transfer unlawful.[16]

In another case it defined the mental element as

> (ii) the unlawful deportation or transfer was committed wilfully.[17]

(2) UNLAWFUL CONFINEMENT

Text adopted by the PrepCom

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

1. The perpetrator confined or continued to confine one or more persons to a certain location.

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The term 'confine . . . to a certain location' reflects the compromise reached by the PrepCom with regard to two different proposals: one proposal[18] required that the perpetrator 'confined or otherwise restrained the liberty of a person'; the other proposal[19] required that the perpetrator 'imprisoned such person . . . within a confined area'. The PrepCom agreed that the latter proposal would be too narrow and not consistent with the GC, which cover not only imprisonments or detentions in prisons or detention camps, but

[15] *Flick and Five Others Case*, in UNWCC, *LRTWC*, vol. IX, p. 3; 14 AD 266; *IG Farben Trial*, in UNWCC, *LRTWC*, vol. X, pp. 4 ff.; 15 AD 668 at 676; *A. Krupp Trial*, in UNWCC, *LRTWC*, vol. X, pp. 74 ff.; 15 AD 620 at 627.

[16] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 16.

[17] ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E)(I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, para. 72.

[18] PCNICC/1999/DP.5 of 10 February 1999.

[19] PCNICC/1999/DP.4/Add.2 of 4 February 1999.

also measures of 'assigned residence'. The first proposal was criticised because some delegations felt that 'otherwise restrained the liberty' would be too broad and not consistent with the principle of legality. The compromise, however, assures that measures of assigned residence are covered.

Element 1 contains a further important clarification. The prohibited conduct is defined therein as: 'The perpetrator confined or continued to confine one or more persons to a certain location.' The words 'continued to confine' are intended to cover cases where a protected person has been lawfully confined in accordance with, in particular, Arts. 27, 42 and 78 GC IV, but the confinement becomes unlawful at a certain moment. According to the ICTY in the *Delalic* case, a confinement only remains lawful if certain procedural rights, which may be found in Art. 43 GC IV, are granted later on to the persons detained. Since Arts. 27, 42 and 78 GC IV leave a great deal to the discretion of the detaining party concerning the initiation of such measures of confinement, the tribunal concluded that:

> the [detaining] party's decision that [internment or placing in assigned residence of an individual is] required must be 'reconsidered as soon as possible by an appropriate court or administrative board'.[20]

It added that the judicial or administrative body must bear in mind that such measures of detention should only be taken if absolutely necessary for security reasons. If this was initially not the case, the body would be bound to vacate them. The tribunal concluded that:

> the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires.[21]

Referring to Art. 78 GC IV relative to the confinement of civilians in occupied territory, which safeguards the basic procedural rights of the person concerned, the Tribunal found that 'respect for these procedural rights is a fundamental principle of the convention as a whole'.[22]

Therefore, '[a]n initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV'[23] or, in the case of confinement of civilians in occupied territory, as prescribed in Art. 78 GC IV.

[20] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 580.
[21] *Ibid.*, para. 581. [22] *Ibid.*, para. 582.
[23] *Ibid.*, para. 583. This view was confirmed by the ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 322.

These considerations expressed by the ICTY in the *Delalic* case are now clearly covered in the document on EOC.

In application of paragraph 6 of the General Introduction, the requirement of 'unlawfulness' as contained in the definition of the crime in the ICC Statute has not been repeated. The Court will need to consider in particular the conditions included in Arts. 27, 42, 43 and 78 of GC IV.

Legal basis of the war crime

The term 'unlawful deportation or transfer or unlawful confinement' has been incorporated directly from Art. 147 of GC IV.

Remarks concerning the material element

The ICTY in the *Delalic* case interpreted this war crime in the context of the following provisions: Arts. 5, 27, 41–3 and 78 GC IV. It did not formulate the elements of this crime in a very specific manner, but limited its findings to a detailed discussion and a more general conclusion, which describes – as will be shown below – the material elements.

Legality of confinement of civilians[24]

Elaborating on the legality of confinement of civilians, the ICTY found that measures of assigned residence or internment can constitute lawful confinement in limited cases. It emphasised the provisions of Art. 41 GC IV which states, *inter alia*, that 'the Power in whose hands protected persons may be . . . may not have recourse to any other measure of control more severe than that of assigned residence or internment'. Therefore, the Tribunal held that the internment of civilians can be admissible subject to strict rules, which are to be found primarily in Arts. 42 and 43 GC IV:[25]

Art. 42:

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

[24] In several post-Second World War trials, 'wrongful internment of civilians', i.e. internment 'under inhumane conditions' (see Commonwealth of Australia War Crimes Act 1945, in UNWCC, *LRTWC*, vol. V, p. 95 (no. IX); Chinese 'Law Governing the Trial of War Criminals', 1946, in UNWCC, *LRTWC*, vol. XIV, p. 154 (no. 19)); 'indiscriminate mass arrest' (*S. Motomura and Others Case*, in UNWCC, *LRTWC*, vol. XIII, pp. 138, 140, 142 ff.; 14 AD 309); and 'illegal detention' (*H. A. Rauter Trial*, in UNWCC, *LRTWC*, vol. XIV, pp. 89, 107, 109; 16 AD 526 at 532; and *Trial of W. Zuhlke*, in UNWCC, *LRTWC*, vol. XIV, pp. 139, 154; 15 AD 415 and 499) were regarded as war crimes.

[25] ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 322. See also in this respect Art. 79 GC IV, which stipulates:

> The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68 and 78.

> If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Art. 43:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.
>
> Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

These rules are based on the general reservation of Art. 27(4) GC IV, permitting '*such measures of control and security as may be necessary as the result of war*' (emphasis added). As the notion of 'security' remains vague in the above-mentioned provisions, and, according to the ICTY, it is not susceptible of being more precisely defined, the Tribunal concluded that:

> The measure of activity deemed prejudicial to the internal or external security of the State which justifies internment or assigned residence is left largely to the authorities of that State itself.[26]

The ICTY defined the general limitation in the following terms:

> Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate*

[26] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 574.

> *reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.[27]

According to the ICTY:

> the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures, the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.[28]

With respect to lawful confinement in occupied territories, the ICTY referred to Art. 78 GC IV. Based on that provision, it found that:

> internment and assigned residence, whether in the occupying power's national territory or in the occupied territory, are exceptional measures to be taken only after careful consideration of each individual case. Such measures are never to be taken on a collective basis.[29]

On the basis of the discussion outlined above, the ICTY concluded in general terms:

> the confinement of civilians during armed conflict may be permissible in limited cases, but has in any event to be in compliance with the provisions of articles 42 and 43 of Geneva Convention IV. The security of the State concerned might require the internment of civilians and, furthermore, the decision of whether a civilian constitutes a threat to the security of the State is largely left to its discretion. However, it must be borne in mind that the measure of internment for reasons of security is an exceptional one and can never be taken on a collective basis.[30]

Procedural safeguards

According to the ICTY in the *Delalic* case, confinement remains lawful only if certain procedural rights, which may be found in Art. 43 GC IV, are granted to the persons detained. Since the GC IV leaves a great deal to the

[27] *Ibid.*, para. 576.
[28] *Ibid.*, para. 577. This view was confirmed by the ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 327. ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 284. See also ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, Annex 1, pp. A1–8 ff.
[29] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 578.
[30] *Ibid.*, para. 583; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 285 and 289.

discretion of the party in the matter of the initiation of such measures, the Tribunal concluded that:

> the [detaining] party's decision that [internment or placing in assigned residence of an individual] are required must be 'reconsidered as soon as possible by an appropriate court or administrative board'.[31]

It added that the judicial or administrative body must bear in mind that such measures of detention should only be taken if absolutely necessary for security reasons. If this was initially not the case, the body would be bound to vacate them. The Tribunal concluded that:

> the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires.[32]

Referring to Art. 78 GC IV relative to the confinement of civilians in occupied territory, which safeguards the basic procedural rights of the person concerned, the Tribunal found that 'respect for these procedural rights is a fundamental principle of the convention as a whole'.[33]

Therefore, '[a]n initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV'[34] or, in the

[31] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 580. More specifically the Appeals Chamber held in this case:

> The Appeals Chamber recalls that Article 43 of Geneva Convention IV provides that the decision to take measures of detention against civilians must be 'reconsidered as soon as possible by an appropriate court or administrative board.' Read in this light, the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the minimum time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a 'definite suspicion' of the nature referred to in Article 5 of Geneva Convention IV.

ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 328. Under para. 329 the Appeals Chamber defined requirements the court or board must meet under Art. 43 GC IV:

– it must have 'the necessary power to decide finally on the release of prisoners whose detention could not be considered as justified for any serious reason';
– as to the onus of justifying detention of civilians, it 'is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view'.

[32] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 581.

[33] *Ibid.*, para. 582.

[34] *Ibid.*, para. 583. This view was confirmed by the ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 322.

case of confinement of civilians in occupied territory, as prescribed in Art. 78 GC IV.

On the basis of the analysis summarised in the preceding sections, the ICTY Appeals Chamber held:

> Thus the detention or confinement of civilians will be unlawful in the following two circumstances:
>
> (i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, ie they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and
>
> (ii) where 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.[35]

Legality of confinement of other protected persons

With respect to the legality of confinement of other protected persons, extensive and detailed provisions contained in other parts of the GC must be considered. They deal in particular with the conditions and modalities of confinement,[36] as well as necessary judicial guarantees.[37] The most important provisions are listed below without further comment.

Art. 28 GC I:

> Personnel designated in Articles 24 [medical personnel, chaplains attached to the armed forces] and 26 [staff of National Red Cross Societies and those of other Voluntary Aid Societies] who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require . . .

Art. 30 GC I:

> Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the Party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit . . .

[35] ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-A, para. 322.

[36] Some of these modalities are also relevant to the offence of the prohibition of inhuman treatment.

[37] Some of these guarantees are also relevant to the offence of depriving a protected person of a fair and regular trial.

Art. 32 GC I:

> Persons designated in Article 27 [medical personnel of a recognized Society of a neutral country] who have fallen into the hands of the adverse Party may not be detained . . .

Art. 37 GC I:[38]

> . . . Unless agreed otherwise between the neutral Power and the Parties to the conflict, the wounded and sick who are disembarked, with the consent of the local authorities, on neutral territory by medical aircraft, shall be detained by the neutral Power, where so required by international law, in such a manner that they cannot again take part in operations of war . . .

Art. 36 GC II:

> The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected; they may not be captured during the time they are in the service of the hospital ship, whether or not there are wounded and sick on board.

Art. 37 GC II:

> The religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 shall, if they fall into the hands of the enemy, be respected and protected; they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick. They shall afterwards be sent back as soon as the Commander-in-Chief, under whose authority they are, considers it practicable . . .
>
> If, however, it prove necessary to retain some of this personnel owing to the medical or spiritual needs of prisoners of war, everything possible shall be done for their earliest possible landing.
>
> Retained personnel shall be subject, on landing, to the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

[38] See also Art. 40 GC II. In addition, Art. 5 GC II indicates that neutral Powers are to apply, by way of analogy, the provisions of GC II 'to the wounded, sick and shipwrecked, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict received or interned in their territory, as well as to dead persons found'. Arts. 15 and 17 GC II add to this general rule specific rules relating to the duties of neutral States. In addition, it has to be emphasised that persons who have fallen into the power of a neutral State are to be treated in accordance with Hague Conventions V and XIII of 1907 and GC II. With respect to whether persons captured from vessels or aircraft may be confined, see paras. 161–8 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), together with a commentary explaining the legal basis of the provisions, pp. 224–33.

Art. 21 GC III:

> The Detaining Power may subject prisoners of war to internment . . . Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary . . .

Art. 22 GC III:

> Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.
>
> Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.
>
> The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

Art. 23 GC III:

> No prisoner of war may at any time be sent to, or detained in, areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.
>
> Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population . . .

Art. 25 GC III:

> Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health. . . .
>
> The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

Art. 87 GC III:

> Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden . . .

Art. 90 GC III:

> The duration of any single punishment shall in no case exceed thirty days. Any period of confinement awaiting the hearing of a disciplinary offence or the award of disciplinary punishment shall be deducted from an award pronounced against a prisoner of war.
>
> The maximum of thirty days provided above may not be exceeded, even if the prisoner of war is answerable for several acts at the same time when he is awarded punishment, whether such acts are related or not.
>
> The period between the pronouncing of an award of disciplinary punishment and its execution shall not exceed one month.
>
> When a prisoner of war is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.

Art. 91 GC III:

> . . . Prisoners of war who have made good their escape in the sense of this Article and who are recaptured, shall not be liable to any punishment in respect of their previous escape.

Art. 95 GC III:

> A prisoner of war accused of an offence against discipline shall not be kept in confinement pending the hearing unless a member of the armed forces of the Detaining Power would be so kept if he were accused of a similar offence, or if it is essential in the interests of camp order and discipline . . .

Art. 97 GC III:

> Prisoners of war shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.
>
> All premises in which disciplinary punishments are undergone shall conform to the sanitary requirements set forth in Article 25. A prisoner of war undergoing punishment shall be enabled to keep himself in a state of cleanliness, in conformity with Article 29.

> Officers and persons of equivalent status shall not be lodged in the same quarters as non-commissioned officers or men.
>
> Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.

Art. 103 GC III:

> Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.
>
> Any period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty.
>
> The provisions of Articles 97 and 98 of this Chapter shall apply to a prisoner of war whilst in confinement awaiting trial.

Art. 109 GC III:[39]

> Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article . . .

Art 118 GC III:

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities . . .

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes

[39] Arts. 110, 114, 115 GC III indicate further details on the repatriation of wounded and sick prisoners of war.

both guilty intent and recklessness which may be likened to serious criminal negligence.[40]

There seems to be no specific case law on the mental element of this crime to date.[41]

[40] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

[41] The ICTY Prosecution described the mental element as follows:

> The accused intended to unlawfully confine the victim, and in so doing was aware of, or recklessly blind to, the factual circumstances that would render the confinement unlawful.

ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, Annex 1, p. A1–8.

Art. 8(2)(a)(viii) – Taking of hostages

Text adopted by the PrepCom

War crime of taking hostages

1. The perpetrator seized, detained or otherwise held hostage one or more persons.

2. The perpetrator threatened to kill, injure or continue to detain such person or persons.

3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

With regard to the war crime of 'taking of hostages' it is worth noting that the elements of this offence are largely based on the definition in the 1979 International Convention against the Taking of Hostages ('the Hostages Convention'),[1] which is not a treaty of international humanitarian law and which was drafted in a different legal context. However, as in the case of the crime of torture, the definition of the crime of hostage-taking was adapted by the PrepCom to the context of the law of armed conflict. According to Article 1(1) of the Hostages Convention,

> any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the 'hostage') in order to compel a third party, namely a State, an international organisation, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage

commits the crime of hostage-taking. Taking into account the case law from the Second World War, this definition was considered to be too narrow.

[1] 18 ILM (1979) 1457.

The text in the EOC, therefore, defines the specific mental element in the following terms, adding the emphasised element:

> 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.

It seems that Element 1 may also be a bit broader than the definition in the Hostages Convention in so far as it adds the catch-all formulation 'or otherwise held hostage'.

The other changes from the Hostages Convention have no substantive impact. Given the ensuing list, the words 'a third party, namely' were felt to be superfluous. The term 'legal person' was considered to be the correct term instead of 'judicial person'. There is also no obvious difference in meaning between the verbs 'to refrain' and 'to abstain'.

Legal basis of the war crime

The offence of hostage-taking is a grave breach under the 1949 Geneva Conventions (Art. 147 GC IV).

Remarks concerning the material elements

In the *Blaskic* case, the ICTY was less specific than the PrepCom and defined the crime in the following terms:

> Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. However, . . . detention may be lawful in some circumstances, *inter alia* to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was *perpetrated in order to obtain a concession or gain an advantage*. The elements of the offence are similar to those of Article 3(b) of the Geneva Conventions covered under Article 3 of the Statute.[2]

[2] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 158 (emphasis added, footnotes omitted); 122 ILR 1 at 66. See also ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 312 ff.:

> It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement . . .
>
> The additional element that must be proved to establish the crime of unlawfully taking civilians hostage is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a 'threat either to prolong the hostage's detention or to put him to death'. In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition. The Trial Chamber in the Blaskic case phrased it in these terms: 'The Prosecution must establish that, at the time

The most comprehensive trial at Nuremberg on hostages was the 'Hostages Trial', the *W. List and Others* case.[3] In that decision, hostages were defined as

> those persons of the civilian population who are *taken into custody* for the purpose of *guaranteeing with their lives* the future good conduct of the population of the community from which they are taken. [Emphasis added.]

The GC do not contain further clarification which could be used for determining the elements of this crime. Art. 34 GC IV simply states: 'The taking of hostages is prohibited.'

The ICRC Commentary on GC IV defines hostages as

> *persons illegally deprived of their liberty*, a crime which most penal codes take cognisance of and punish.[4]

The Commentary also states that there is an additional feature to this offence, i.e. *the threat either to prolong the hostage's detention or to put him to death*.

Hostages are defined in the ICRC Commentary on Art. 75 of AP I as

> persons who find themselves, willingly or unwillingly, *in the power of the enemy* and who answer *with their freedom or their life* for compliance with the orders of the latter and for upholding the security of its armed forces.[5]

The offence of hostage-taking is also prohibited under the Hostages Convention. According to Article 1(1) of the Convention, the crime is committed by

> any person who *seizes or detains* and *threatens to kill, to injure or to continue to detain* another person (the 'hostage') in order to compel

of the supposed detention, the allegedly censurable act was *perpetrated in order to obtain a concession or gain an advantage.'*

Consequently, the Chamber finds that an individual commits the offence of taking civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition. [Footnote omitted.]

[3] In UNWCC, *LRTWC*, vol. VIII, pp. 34 ff., 60 ff., 76–8 (commentator); 15 AD 632 at 642.

[4] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 600 (emphasis added).

[5] C. Pilloud and J. S. Pictet, 'Art. 75' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3051 (emphasis added). This source can be of further assistance in the interpretation of this offence because Art. 75 AP I ('The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: . . . (c) the taking of hostages . . .') does not add any further element to Art. 34 GC IV; therefore, the terms in both rules must be understood in the same way.

> a third party, namely a State, an international organisation, a natural or judicial person, or a group of persons, *to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage*. [Emphasis added.]

It appears from these various sources that the elements of this offence are: unlawful deprivation of liberty (i.e. seizing or detaining or taking into custody) and threat of death, injury or further detention in order to compel a third party to act or abstain to act (as a condition for the release of the hostage).

Remarks concerning the mental element

As a general rule, the Trial Chamber of the ICTY held, in relation to the mental element applicable to the grave breaches of the GC, that:

> [A]ccording to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.[6]

There seems to be no specific case law on the mental element of this crime to date. The formulation in the Convention against the Taking of Hostages ('in order to . . .') can be seen as an indication for the necessary intent.

[6] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 152; 122 ILR 1 at 64.

6. Article 8(2)(b) ICC Statute – Other serious violations of the laws and customs applicable in international armed conflict

6.1. Elements common to all crimes under Article 8(2)(b) ICC Statute

Text adopted by the PrepCom

- 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.

Commentary

These two elements describing the subject-matter jurisdiction for war crimes under Art. 8(2)(b) of the ICC Statute, i.e. 'other serious violations of the laws and customs applicable in international armed conflict', are drafted in the same way for all crimes in this section. They are defined in exactly the same manner as for the crimes defined under Art. 8(2)(a). Reference may therefore be made to the commentary on that section (5.1.).[1]

In this context, some clarification as to the notions 'war crimes', 'grave breaches' and 'other serious violations' used in the Statute seems to be warranted. It is important to emphasise that not all war crimes are in fact grave breaches, which are specifically listed in the Geneva Conventions, and in AP I for the States Party to it. War crimes cover both 'grave breaches' and other serious violations of the laws and customs applicable in armed conflict – be that conflict international or non-international. While this distinction is not important in the context of the ICC Statute because the Statute does not stipulate different consequences for the two categories, it is relevant for the national implementation of international humanitarian law. Although under customary international law all war crimes are

[1] See section 5.1. (1) on p. 18.

subject to permissive universal jurisdiction, the GC and AP I introduced compulsory universal jurisdiction for particularly serious war crimes, referred to as 'grave breaches'.[2]

[2] See also ICTY, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, paras. 79 ff.; 105 ILR 453 at 495.

6.2. Elements of specific crimes under Art. 8(2)(b) ICC Statute

Art. 8(2)(b)(i) – Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

Text adopted by the PrepCom

War crime of attacking civilians

1. The perpetrator directed an attack.

2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.

3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom discussed rather intensively whether this war crime requires a result, as Art. 85(3) AP I does for the grave breaches of the AP I defined in that provision, i.e. *causing death or serious injury to body or health*. The majority of delegations pointed out that during the negotiations at the Diplomatic Conference in Rome the result requirement was consciously left out. For the crime to be committed it would be sufficient that, for example, an attack was launched against the civilian population or individual civilians, even though, due to the failure of the weapon system, the intended target was not hit. Therefore, a proposal containing a result requirement had been rejected. The minority, however, argued that it had always been tacitly understood that the grave breach threshold would be applicable. If there is a weapon failure the conduct should only be charged as an attempt. The PrepCom, however, followed the majority view and refused to require that the attack must have a particular result.

Another contentious issue was how to interpret the formulation 'intentionally directing an attack against the civilian population'. It was debated whether the term 'intentionally' was related solely to directing an attack or also to the object of the attack. In the end the PrepCom adopted the latter approach.

The crime thus demands that the perpetrator intended to direct an attack (this follows from the application of Art. 30(2)(a) ICC Statute, which requires that the perpetrator meant to engage in the conduct described, in conjunction with para. 2 of the General Introduction) and that he/she intended the civilian population or individual civilians to be the object of the attack. The latter intent requirement explicitly stated in the elements also appears to be an application of the default rule contained in Art. 30. In this particular case the standard defined in sub-para. 2(b) of that article applies, i.e. the perpetrator means to cause the consequence or is aware that it will occur in the ordinary course of events. On the basis of para. 2 of the General Introduction, the insertion of Element 3 seems to be unnecessary, but it was justified in particular by the fact that the term 'intentionally' is contained in the Statute and the insertion would add more clarity.

Legal basis of the war crime

The term 'intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' is to a large extent derived from Art. 51(2) AP I ('The civilian population as such, as well as individual civilians, shall not be the object of attack') and Art. 85(3)(a) AP I ('The following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: (a) making the civilian population or individual civilians the object of attack'). In contrast to the latter provision, the offence as defined in the Statute does not make reference to a specific result, e.g. death or serious injury to body or health. Since this result requirement has been explicitly added elsewhere in the Statute, namely in Art. 8(2)(b)(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*' (emphasis added)), one might conclude that, compared to the grave breach provision, a lower threshold was chosen on purpose in order to emphasise that Art. 8(2)(b)(i) of the Statute is primarily based on Art. 51(2) AP I. This reflects the fact that not all war crimes are grave breaches.

General remarks

The following conclusions may be drawn from the various sources examined below:

This offence is not limited to attacks against individual civilians. It essentially encompasses attacks that are not directed against a specific military

objective or combatants or attacks employing indiscriminate weapons or attacks effectuated without taking necessary precautions to spare the civilian population or individual civilians, especially *failing to seek precise information* on the objects or persons to be attacked. The required *mens rea* may be inferred from the fact that the necessary precautions (in the sense of Art. 57 AP I, e.g. the use of available intelligence to identify the target) were not taken before and during an attack. This would apply to all the war crimes relating to an unlawful attack against persons or objects protected against such attacks discussed later on.

Remarks concerning the material elements

At the time of writing, there have been only three ICTY judgments touching on the question of attacks against the civilian population. In the *Blaskic* case the ICTY held:

> As proposed by the Prosecution, the Trial Chamber deems that the attack must have caused deaths and/or serious bodily injury within the civilian population . . . The parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons . . . Targeting civilians . . . is an offence when not justified by military necessity. Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces.[1]

The implication in this judgment that the targeting of the civilian population or civilian property would not be an offence when justified by military necessity is rather surprising and somewhat confusing. Under both customary international law and treaty law (Arts. 51(2) and 85(3)(a) AP I), the prohibition on directing attacks against the civilian population or civilian objects is absolute (see also the Rome Statute's definition). There is no room to invoke military necessity as a justification. If the reference to military necessity was, however, meant to cover those cases where civilians take a direct part in hostilities and therefore lose their protection against attacks for the time of their participation (Art. 51(3) AP I),[2] it would be correct to say that these civilians may be the object of an attack. On the facts, the Tribunal examined in practice whether a particular village or

[1] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 180; 122 ILR 1 at 71–2. See also ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 328.

[2] This appears to be the approach adopted by the Trial Chamber in ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 326.

town contained no military objectives in order to establish that the crime had been committed.[3]

The *Kupreskic* judgment, where the ICTY went into more detail, contains a more straightforward statement of the law. It held the following:

> *The protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended in . . . exceptional circumstances: (i) when civilians abuse their rights;* (ii) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; . . .
>
> In the case of clear abuse of their rights by civilians, international rules operate to lift that protection which would otherwise be owed to them. Thus, for instance, under Article 19 of the Fourth Geneva Convention, the special protection against attacks granted to civilian hospitals shall cease, subject to certain conditions, if the hospital '[is used] to commit, outside [its] humanitarian duties, acts harmful to the enemy', for example if an artillery post is set up on top of the hospital. Similarly, if a group of civilians takes up arms in an occupied territory and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down in Article 4(A)(2) of the Third Geneva Convention of 1949.[4]

In the *Kordic and Cerkez* case, the ICTY Prosecution defined the material elements of 'unlawful attacks on civilians' as follows:

- An attack resulted in civilian deaths, serious injury to civilians, or a combination thereof; . . .
- The attack was . . . directed at the civilian population or individual civilians.[5]

[3] For example, para. 402. A similar test has been applied in ICTY, Review of the Indictment, *The Prosecutor* v. *Ivica Rajic*, IT-95-12-R61, 108 ILR 141 at 164, paras. 54 ff.:

> Several witness statements report that Stupni Do had no military significance. The village had no militia to speak of; the 'defence force' was made up almost entirely of village residents who came together to defend themselves . . . Moreover, the evidence submitted indicates that Stupni Do was located off the main road and its destruction was not necessary to fulfil any legitimate military objectives . . .
>
> There is no evidence that there was a military installation or any other legitimate target in the village.
>
> Accordingly, the evidence presented by the Prosecutor provides a reasonable basis for a finding that there was wanton destruction of the village of Stupni Do, wilful killing of its civilian residents, destruction of property, and a deliberate attack on the civilian population as a whole, all of which were unjustified by military necessity.

[4] ICTY, Judgment, *The Prosecutor* v. *Zoran Kupreskic and Others*, IT-95-16-T, paras. 522–3.

[5] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 48. Also quoted in ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 322.

and in the *Blaskic* case:

> a.) an attack resulted in civilian deaths or serious injury to civilians, or a combination thereof.[6]

In a proceeding under Rule 61 of the ICTY Rules of Procedure, the ICTY Trial Chamber confirmed the indictment in the *Martic* case.[7] The Chamber held that the prohibition on attacking civilians was clearly stated in Arts. 51(2) and 85(3)(a) AP I in relation to international armed conflicts and in Art. 13(2) AP II in relation to non-international armed conflicts.[8]

Attack

The term 'attack' is defined in Art. 49(1) AP I and 'means acts of violence against the adversary, whether in offence or in defence'.

The concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Questions relating to the responsibility for unleashing the conflict are of a completely different nature. Therefore, the terms 'offence' and 'defence' must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter; in particular, they are unrelated to the concept of aggression or the first use of armed force.

Civilian population/Civilian

According to Art. 50 AP I,

> 1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
>
> 2. The civilian population comprises all persons who are civilians.
>
> 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

[6] Quoted in W. J. Fenrick, 'A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in *The Prosecutor* v. *Tihomir Blaskic*' (2000) 13 *Leiden Journal of International Law* 939.

[7] ICTY, Review of the Indictment, *The Prosecutor* v. *Milan Martic*, IT-95-11-R61, 108 ILR 39 at 43. Count III of the indictment (para. 17) states that '[o]n 3 May 1995, MILAN MARTIC, as president of the self-proclaimed RSK, knowingly and wilfully ordered an unlawful attack against the civilian population and individual civilians of Zagreb causing at least two deaths and numerous injuries to the civilian population and individual civilians of Zagreb, and in doing so, MILAN MARTIC violated the laws and customs governing the conduct of war, a crime recognised by Articles 3 and 7(1) of the Tribunal Statute'.

[8] *Ibid.*, para. 8, p. 44. See also ICTY, Review of the Indictment, *The Prosecutor* v. *Ivica Rajic*, IT-95-12-R61, 108 ILR 141 at 162, para. 48.

However, according to Art. 51(3) AP I, civilians are only protected against attacks unless and for such time as they take a direct part in hostilities.

In the context of common Art. 3 GC and the respective provisions of AP II the ICTR found that *the phrase 'direct part in hostilities' has evolved from the notion 'active part in the hostilities'* of common Art. 3. The Tribunal concluded in this respect:

> *These phrases* are so similar that, for the Chamber's purposes, they *may be treated as synonymous*.[9]

NB: In this regard the US Air Force Pamphlet states:

> Civilian immunity requires a corollary obligation on the part of the civilians not to take a direct part in hostilities. This very strict condition means they must not become combatants. For example, taking a direct part in hostilities covers acts of war intended by their nature and purpose to strike at enemy personnel and material. Thus a civilian taking part in fighting, whether singly or as a member of a group, loses the immunity given civilians.[10]

See also in this context Art. 79 AP I – Measures of protection for journalists:

> 1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
>
> 2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4(A)(4) of the Third Convention . . .

With respect to the concepts of 'civilian population as such' and 'individual civilians', the following finding of a US Military Tribunal in the *Ohlendorf* case (*Einsatzgruppen Trial*) after the Second World War is of help:

> A city is bombed for tactical purposes: communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations, it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of hostile

[9] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 629 (emphasis added).
[10] US Department of the Air Force, AF Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations* (1976), p. 5–8.

> battle action. The civilians are not individualised. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women and children and shooting them.[11]

The judgment reflects the present law in so far as it indicates that the prohibition of attacks against the civilian population or civilians does not prohibit civilian casualties absolutely. Attacks aimed at military objectives (objects and combatants)[12] may cause collateral civilian damage. This collateral damage is not unlawful if the conditions of the rule of proportionality as expressed in Art. 51(5)(b) AP I are respected. Attacks that affect the civilian population are also not unlawful as long as they are not indiscriminate in nature.

Situations in which civilians are to be found in the vicinity of military objectives are nowadays specifically addressed in Art. 51(4) and (5) AP I:

> 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
> (a) those which are not directed at a specific military objective;
> (b) those which employ a method . . . of combat which cannot be directed at a specific military objective; or
> (c) those which employ a method . . . of combat the effects of which cannot be limited as required by this Protocol;
>
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
>
> 5. Among others, the following types of attacks are to be considered as indiscriminate:
> (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
> (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

[11] Cited in UNWCC, *LRTWC*, vol. XV, p. 111; 15 AD 656 at 660–1.

[12] As will be shown below, it can hardly be said that an attack effected without taking the necessary precautionary measures to spare the civilian population or individual civilians constitutes an attack aimed at a military objective.

The first example in para. 5 allows the attacker to treat several military objectives in a populated area as one military objective if the objectives are not clearly separated or distinct. The second example in para. 5 allows attacks against military objectives if the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would not be excessive in relation to the concrete and direct military advantage anticipated.

Such attacks may not be considered as attacks against the civilian population as such or against individual civilians, even if civilian casualties occur.

Prohibition of the use of indiscriminate weapons

The ICJ, in its Advisory Opinion on the legality of the threat or use of nuclear weapons, held:

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.[13]

The Court thus equated the use of indiscriminate weapons with a deliberate attack on civilians. The only existing treaty definition of an 'indiscriminate weapon' may be seen in Art. 51(4)(b) and (c) AP I describing the characteristics of indiscriminate 'means of combat' as those:

> (b) . . . which employ a . . . means of combat which cannot be directed at a specific military objective; or
> (c) . . . which employ a . . . means of combat the effects of which cannot be limited as required by this Protocol;
> and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

In the *Martic* case (Rule 61 proceeding), the ICTY Trial Chamber held in the context of the prohibition on attacking civilians:

> [E]ven if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law.[14]

[13] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 78.
[14] ICTY, Review of the Indictment, *The Prosecutor* v. *Milan Martic*, IT-95-11-R61, 108 ILR 39 at 47, para. 18.

In addition to Art. 35(2) AP I, the Chamber explicitly referred to Arts. 51(4)(b) and 51(5)(b) AP I.[15] With respect to the Prosecution's allegation that, in retaliation for a previous attack, the accused ordered the bombardment of civilians in Zagreb using Orkan rockets delivering cluster bombs, it found:

> In respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military targets but to terrorize the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law.[16]

The requirement to take precautions with a view to sparing civilians

According to the ICRC Commentary on the grave breach as defined in Art. 85(3)(a) AP I, another element – not explicitly mentioned – is a constituent of the offence:

> All precautions must be taken with a view to sparing civilians, both in planning and in carrying out an attack.[17]

This requirement seems to be well founded.[18] In two early decisions of the Tribunal arbitral mixte gréco-allemand in 1927 this position was clearly expressed. In the *Coenca frères c. Etat allemand* case, the Tribunal held:

> Att. qu'il appert des documents versés au procès:
> 1° Que le bombardement de Salonique en janvier 1916 a eu lieu sans avis préalable de la partie des autorités allemandes;
> 2° Que l'attaque a eu lieu la nuit;
> 3° Que le ballon dirigeable a lancé les bombes d'une altitude d'environ 3.000 mètres;
>
> Att. qu'il est un des principes généralement reconnus par le droit des gens que les belligérants doivent respecter autant que possible, la population civile ainsi que les biens appartenant aux civils;
>
> Att. que la Convention de La Haye de 1907, en s'inspirant de ce principe, a, dans l'art. 26 du Règlement concernant les lois et coutumes de la guerre sur terre, ordonné au commandant des troupes assaillantes avant d'entreprendre le bombardement, et sauf le cas d'attaque de vive force, de faire tout ce qui dépend de lui pour en avertir les autorités;
>
> Att. qu'évidemment les auteurs de ladite convention ont, en exigeant un tel avis préalable, voulu accorder aux autorités de la ville menacée la

[15] *Ibid.* [16] *Ibid.*, para. 31, pp. 52 ff.

[17] B. Zimmermann, 'Art. 85' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3475.

[18] See also ICTY, Judgment, *The Prosecutor* v. *Zoran Kupreskic and Others*, IT-95-16-T, paras. 524 ff.

possibilité soit d'éviter le bombardement en offrant la capitulation de la ville, soit de faire évacuer cette ville par la population civile;

. . .

Att. que l'obscurité de la nuit, l'altitude de 3.000 mètres et le fait que pendant l'occupation Salonique n'allumait pas ses lumières, ont dû empêcher de diriger les bombes avec précision nécessaire pour épargner les habitations de la population civile et les dépôts de marchandises;

Att. qu'il résulte de tout ce qui précède que le bombardement litigieux doit être considéré comme étant contraire au droit international.[19]

An indication of necessary precautions is given in Art. 57 AP I:

> 2. With respect to attacks, the following precautions shall be taken:
> (a) those who plan or decide upon an attack shall:
> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
> (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
> (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
> . . .
> 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all

[19] *Recueil des décisions des Tribunaux arbitraux mixtes* (Paris, 1928), vol. VII, pp. 687 ff.; for English language digest see 4 AD 570. See also the *C. Kiriadolou c. Etat allemand* case, in *Recueil des décisions des Tribunaux arbitraux mixtes* (Paris, 1930), vol. X, pp. 102 ff.; 5 AD 516.

> reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
>
> 5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.[20]

The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign indicates that

> The practical application of [the] principle [of distinction] is effectively encapsulated in Article 57 of Additional Protocol [I] which, in part, obligates those who plan or decide upon an attack to 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects'. The obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations.[21]

Reprisals against the civilian population as such, or individual civilians

According to Art. 51(6) AP I,

> Attacks against the civilian population or civilians by way of reprisals are prohibited.

In the *Kupreskic* judgment the ICTY examined in much detail the question as to whether the prohibition of reprisals against the civilian population or individual civilians reflects customary international law:

> As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the

[20] A more recent formulation of what is meant by these rules of Art. 57 AP I may be found in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge 1995), no. 46, p. 122:

> With respect to attacks, the following precautions shall be taken:
>
> (a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
>
> (b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
>
> (c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage; and
>
> (d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

[21] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign, para. 29.

adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the US, France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.

The question of reprisals against civilians is a case in point. It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers.

In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals

against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanisation of armed conflict is amongst other things confirmed by the works of the United Nations International Law Commission on State Responsibility. Article 50(d) of the Draft Articles on State Responsibility, adopted on first reading in 1996, prohibits as countermeasures any 'conduct derogating from basic human rights'.

It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing compliance with international law is at present more widely available and, more importantly, is beginning to prove fairly efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts. This means serves the purpose of bringing to justice those who are responsible for any such crime, as well as, albeit to a limited extent, the purpose of deterring at least the most blatant violations of international humanitarian law. Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion. With regard to the formation of a customary rule, two points must be made to demonstrate that *opinio iuris* or *opinio necessitatis* can be said to exist. First, even before the adoption of the First Additional Protocol of 1977, a number of States had declared or laid down in their military manuals that reprisals in modern warfare are only allowed to the extent that they consist of the use, against enemy armed forces, of otherwise prohibited weapons – thus a contrario admitting that reprisals against civilians are not allowed. In this respect one can mention the United States military manual for the Army (*The Law of Land Warfare*), of 1956, as well as the Dutch 'Soldiers Handbook' (*Handboek voor de Soldaat*) of 1974. True, other military manuals of the same period took a different position, admitting reprisals against civilians not in the hands of the enemy belligerent. In addition, senior officials of the United States Government seem to have taken a less clear stand in 1978, by expressing doubts about the workability of the prohibition of reprisals against civilians. The fact remains, however, that elements of a widespread *opinio necessitatis* are discernible in international dealings. This is confirmed, first of all, by the adoption, by a vast majority, of a Resolution of the UN General Assembly in 1970 which stated that 'civilian populations, or individual members thereof, should not be the object of reprisals'. A further

confirmation may be found in the fact that a high number of States have ratified the First Protocol, thereby showing that they take the view that reprisals against civilians must always be prohibited. It is also notable that this view was substantially upheld by the ICRC in its Memorandum of 7 May 1983 to the States parties to the 1949 Geneva Conventions on the Iran–Iraq war and by Trial Chamber I of the ICTY in *Martic*.

Secondly, the States that have participated in the numerous international or internal armed conflicts which have taken place in the last fifty years have normally refrained from claiming that they had a right to visit reprisals upon enemy civilians in the combat area. It would seem that such claim has been only advanced by Iraq in the Iran–Iraq war of 1980–1988 as well as – but only *in abstracto* and hypothetically, by a few States, such as France in 1974 and the United Kingdom in 1998. The aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.

The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on subparagraph d of Article 14 (now Article 50) of the Draft Articles on State Responsibility, which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that Article 3 common to the four 1949 Geneva Conventions 'prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment'. It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, Common Article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held in *Nicaragua*, it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.[22]

[22] ICTY, Judgment, *The Prosecutor* v. *Zoran Kupreskic and Others*, IT-95-16-T, paras. 527–34 (footnotes omitted).

In the *Martic* case, the ICTY Trial Chamber (Rule 61 proceeding) held:

> the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.[23]

In addition to Art. 51(6) AP I, the Chamber based its findings on the following considerations:

> The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered wrongful. The International Court of Justice considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law (*Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua* v. *United States of America*, merits, *ICJ Reports, 1986*, paragraph 220).
>
> The prohibition on reprisals against the civilian population or individual civilians which is applicable to all armed conflicts, is reinforced by the texts of various instruments. General Assembly resolution 2675 . . . posits that 'civilian populations, or individual members thereof, should not be the object of reprisals' . . . Although [Additional] Protocol II does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision. Prohibited behaviour must remain so 'at any time and in any time and in any place whatsoever'. The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of 'collective punishment' in paragraph 2(b) of Article 4 of Protocol II.[24]

NB: The view that the prohibition of reprisals against the civilian population is an integral part of customary international law is not uncontested.

[23] ICTY, Review of the Indictment, *The Prosecutor* v. *Milan Martic*, IT-95-11-R61, 108 ILR 39 at 47.
[24] *Ibid.*, paras. 15 ff.

In this regard reference may be made to a specific reservation by the UK upon its ratification of AP I:

> The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[25]

Remarks concerning the mental element

The ICTY Prosecution defined the mental element of 'unlawful attacks on civilians' in the *Kordic and Cerkez* case as follows:

- The civilian status of the population or individual persons killed or seriously injured was known or should have been known.
- The attack was wilfully[26] directed at the civilian population or individual civilians.[27]

[25] Corrected letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom.

[26] In the *Simic and Others* case the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence', ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

[27] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 48. Quoted also in ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 322.

In the *Blaskic* case the Prosecution 'maintained that the *mens rea* which characterises all the violations of Article 3 of the Statute [relevant to the unlawful attack charges] . . . is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likenable to serious criminal negligence';[28] and, more specifically for the unlawful attack charge, that:

> b.) the civilian status of the population or individual persons killed or seriously injured was known or should have been known;
> c.) the attack was wilfully directed at the civilian population or individual civilians.[29]

The Prosecution derived the mental element 'wilful' from Art. 85(3) AP I and interpreted it in the same way as the ICRC Commentary on that provision as including both intention and recklessness. An underlying reason was that AP I imposes a wide range of duties on superiors to ensure that their forces comply with the law and to ensure precautions are taken to avoid attacks being directed against civilians.[30]

In the latter case, the ICTY held:

> Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians . . . were being targeted.[31]

In the *Martic* case (Rule 61 proceeding), count III of the indictment (para. 17) stated that '[o]n 3 May 1995, MILAN MARTIC, as president of the self-proclaimed RSK, *knowingly and wilfully* ordered an unlawful attack against the civilian population and individual civilians'.[32]

In the same case, the ICTY Trial Chamber referred to Art. 85(3)(a) AP I to describe the mental element, i.e. 'wilfully'.[33]

According to the Commentary on the AP,

> [i]t is a grave breach . . . to make the civilian population or individual civilians, *knowing their status*, the object of attack when the attack is *wilfully* directed against them [and when the consequences defined in the opening sentence follow (when committed wilfully, in violation of

[28] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 179; 122 ILR 1 at 71.
[29] Quoted in Fenrick, 'First Attempt', p. 939. [30] *Ibid.*, p . 940.
[31] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 180; 122 ILR 1 at 72.
[32] ICTY, *The Prosecutor* v. *Milan Martic*, IT-95-11, Count III of the indictment (emphasis added).
[33] ICTY, Review of the Indictment, *The Prosecutor* v. *Milan Martic*, IT-95-11-R61, 108 ILR 39 at 44, para. 8.

> the relevant provisions of this Protocol, and causing death or serious injury to body or health)].[34]

The notion of 'wilfully' is defined in the Commentary as follows:

> [T]he accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions).[35]

With respect to the latter (failing to take the necessary precautions), the above-cited provisions in Art. 57 AP I may be a further indication of what may be required from the perpetrator.

On the basis of these sources, one might argue that the wilfulness of the conduct may be inferred from the fact that the necessary precautions (e.g. the use of available intelligence) were not taken before and during an attack.

[34] Zimmermann, 'Art. 85' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3476.
[35] *Ibid.*, no. 3474 (footnotes omitted).

Art. 8(2)(b)(ii) – Intentionally directing attacks against civilian objects, that is, objects which are not military objectives

Text adopted by the PrepCom

War crime of attacking civilian objects

1. The perpetrator directed an attack.

2. The object of the attack was civilian objects, that is, objects which are not military objectives.

3. The perpetrator intended such civilian objects to be the object of the attack.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

As for all war crimes involving certain unlawful attacks, the PrepCom discussed rather intensively whether this war crime requires actual damage to civilian objects as a result. The vast majority of delegations pointed out that during the negotiations at the Diplomatic Conference in Rome a result requirement was consciously left out. For the crime to be committed it would be sufficient that, for example, an attack was launched against a civilian object, even though, due to the failure of the weapon system, the intended target was not hit. Therefore, a proposal containing a result requirement had been rejected in Rome. Given that AP I does not contain a corresponding grave breach provision requiring a result, there was not much opposition to that view. The PrepCom therefore followed the majority view and refused to require that the attack must have a particular result.

With regard to the interpretation of 'intentionally directing attacks against', see comments made under section 'Art. 8(2)(b)(i)', subsection '*Travaux préparatoires*/Understandings of the PrepCom'.

Legal basis of the war crime

The term 'intentionally directing attacks against civilian objects, that is, objects which are not military objectives' is derived to a large extent from Art. 52(1) AP I ('Civilian objects shall not be the object of attack or of reprisals').

Remarks concerning the material elements

At the time of writing, there have been only two ICTY judgments touching on the question of attacks against civilian objects. In the *Blaskic* case the ICTY held:

> As proposed by the Prosecution, the Trial Chamber deems that the attack must have caused . . . damage to civilian property. The parties to the conflict are obliged to attempt to distinguish between military targets and . . . property. Targeting . . . civilian property is an offence when not justified by military necessity . . . Civilian property covers any property that could not be legitimately considered a military objective.[1]

The implication in this judgment that the targeting of civilian property would not be an offence when justified by military necessity is rather confusing. Both under customary international law and treaty law (Art. 52 AP I) the prohibition on directing attacks against the civilian population or civilian objects is absolute (see also the Rome Statute's definition). There is no room to invoke military necessity as a justification. If the reference to military necessity was, however, meant to cover those cases where civilian property makes an effective contribution to military action and its total or partial destruction offers a definite military advantage,[2] it would be correct to say that this property may be the object of an attack because it has become a military objective. Another aspect that the Tribunal may have had in mind was the fact that specific objects, such as hospitals, lose their protection if they are used for purposes other than those defined by their normal duties to commit acts harmful to the enemy. In any event, when examining the facts, the Tribunal looked only at whether military objectives were situated in a particular village or town in order to establish whether the crime had been committed.[3]

[1] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 180 (footnote omitted); 122 ILR 1 at 71–2.

[2] This appears to be the approach adopted by the Trial Chamber in ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 327.

[3] For example, ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, paras. 402 ff. A similar test has been applied in ICTY, Review of the Indictment, *The Prosecutor* v. *Ivica Rajic*, IT-95-12-R61, 108 ILR 142 at 164, paras. 54–7:

> Several witness statements report that Stupni Do had no military significance. The village had no militia to speak of; the 'defence force' was made up almost entirely of village residents who came together to defend themselves . . . Moreover, the evidence submitted indicates that Stupni Do was located off the main road and its destruction was not necessary to fulfil any legitimate military objectives . . .
>
> There is no evidence that there was a military installation or any other legitimate target in the village.
>
> Accordingly, the evidence presented by the Prosecutor provides a reasonable basis for a finding that there was wanton destruction of the village of Stupni Do, wilful killing of its civilian residents, destruction of property, and a deliberate attack on the civilian population as a whole, all of which were unjustified by military necessity.

The *Kupreskic* judgment, where the ICTY went into more detail, contains a more straightforward statement of the law. It held the following:

> *The protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended in . . . exceptional circumstances: (i) when civilians abuse their rights*; (ii) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; . . .
>
> In the case of clear abuse of their rights by civilians, international rules operate to lift that protection which would otherwise be owed to them. Thus, for instance, under Article 19 of the Fourth Geneva Convention, the special protection against attacks granted to civilian hospitals shall cease, subject to certain conditions, if the hospital '[is used] to commit, outside [its] humanitarian duties, acts harmful to the enemy', for example if an artillery post is set up on top of the hospital.[4]

Certain other sources may be helpful in interpreting various elements of this offence.

The ICTY Prosecution defined the material element of 'unlawful attacks on civilian objects' in the *Kordic and Cerkez* case as follows:

- An attack resulted in damage to civilian objects;
- The attack was . . . directed at civilian objects.[5]

In the *Blaskic* case it chose the following terms:

> a.) an attack resulted in damage to civilian objects.[6]

Before we look at specific sources dealing with this offence, it must be noted that the sources cited under section 'Art. 8(b)(i)', subsection 'Legal basis of the war crime' with respect to indiscriminate attacks and necessary precautions with a view to sparing civilians apply also to this crime.

Attack

The term 'attack' is defined in Art. 49(1) AP I and 'means acts of violence against the adversary, whether in offence or in defence'.

As pointed out above, the concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms 'offence' and 'defence'

[4] ICTY, Judgment, *The Prosecutor* v. *Zoran Kupreskic and Others*, IT-95-16-T, paras. 522 ff.

[5] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

[6] Quoted in W. J. Fenrick, 'A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in *The Prosecutor* v. *Tihomir Blaskic*' (2000) 13 *Leiden Journal of International Law* 939.

must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

Civilian objects

According to Art. 52(1) second sentence, civilian objects are all objects which are not military objectives as defined in Art. 52(2) AP I.[7] The latter provision reads as follows:

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[8]

Moreover, as provided by Art. 52(3) AP I,

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Remarks concerning the mental element

In the *Blaskic* case, the ICTY held:

> Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that . . . civilian property [was] being targeted.[9]

The ICTY Prosecution defined the mental element of 'unlawful attacks on civilian objects' in the *Kordic and Cerkez* case as follows:

- The civilian character of the objects damaged was known or should have been known;
- The attack was wilfully[10] directed at civilian objects.[11]

[7] See also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 180; 122 ILR 1 at 71–2.

[8] With regard to that definition, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign indicates that 'the Protocol I definition of military objective . . . provides the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks . . . The definition is . . . generally accepted as part of customary law', para. 42.

[9] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 180; 122 ILR 1 at 72.

[10] In the *Simic and Others* case, the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence'. ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

[11] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

In the *Blaskic* case the Prosecution 'maintained that the *mens rea* which characterises all the violations of Article 3 of the Statute [relevant to the unlawful attack charges] . . . is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likenable to serious criminal negligence';[12] and, more specifically for this unlawful attack charge, that:

b.) the civilian character of the objects damaged was known or should have been known;
c.) the attack was wilfully directed at civilian objects.[13]

The Prosecution derived the mental element 'wilful' from Art. 85(3) AP I and interpreted it in the same way as the ICRC Commentary on that provision as including both intention and recklessness. An underlying reason was that AP I imposes a wide range of duties on superiors to ensure that their forces comply with the law and to ensure that precautions are taken to prevent attacks being directed against civilian objects.[14]

The sources cited under Art. 8(b)(i) ICC Statute with respect to the notion of 'wilful' also apply to this offence.

[12] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 179; 122 ILR 1 at 71.
[13] Quoted in Fenrick, 'First Attempt', p. 939. [14] *Ibid.*, p. 940.

Art. 8(2)(b)(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

Text adopted by the PrepCom

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

1. The perpetrator directed an attack.

2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.

3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.

4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.

5. The perpetrator was aware of the factual circumstances that established that protection.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

As for all war crimes involving certain unlawful attacks, the PrepCom discussed rather intensively whether this war crime requires actual damage to personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission as a result. The majority of delegations pointed out that during the negotiations at the Diplomatic Conference in Rome a result requirement was consciously left out. For the crime to be committed it would be sufficient that, for example, an attack was launched against any of the objectives mentioned in this crime, even though, due to the failure of the weapon system, the intended target was not hit. Therefore, a proposal containing a result requirement had been rejected in Rome. The PrepCom followed the majority view and refused to require that the attack must have a particular result.

Initial attempts by some delegations to define the different standards of protection for the persons and objects protected by this crime were ultimately not pursued, hence the elements largely repeat the language of the Statute.

With regard to the interpretation of 'intentionally directing attacks against', see comments made under section 'Art. 8(2)(b)(i)', subsection '*Travaux préparatoires*/Understandings of the PrepCom'.

Element 5 clarifies the requisite mental element linked to Element 4. Although it is not explicitly stated here as it was in other cases, this element also recognises the interplay between Arts. 30 and 32 ICC Statute, emphasising the general rule that while ignorance of the facts may be an excuse, ignorance of the law (in this case ignorance of the rules defining the protection of the persons or property) is not.

Legal basis of the war crime

This offence addresses two different kinds of conduct: attacks against humanitarian assistance missions and attacks against peacekeeping missions. Since both categories of victims derive their protected status from different sources, a separate approach is necessary with regard to each category.

There is no specific reference to this war crime in the treaties of international humanitarian law describing the forms of criminalised conduct.

(1) Peacekeeping missions

The GC and AP I address the protection of relief operations in various provisions, but do not specifically address the protection of peacekeeping missions established in accordance with the Charter of the United Nations. However, the 1994 Convention on the Safety of United Nations and Associated Personnel prohibits attacks against United Nations and associated personnel, their equipment and premises. Art. 7(1) of this convention on the duty to ensure the safety and security of United Nations and associated personnel reads as follows:

> United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.

Art. 9 of the Convention is the basis for criminal prosecution:

> 1. The intentional commission of:
> (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

(b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
(c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
(d) An attempt to commit any such attack; and
(e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack,

shall be made by each State Party a crime under its national law.

(2) Humanitarian assistance missions

The protection of relief personnel is specifically dealt with in Art. 71 AP I, which provides, in para. 2:

> [Personnel participating in relief actions] shall be respected and protected.

See also Art. 70(2)–(4) AP I:

> 2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
> 3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2: . . .
> (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
> 4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

Attacks against such personnel, their installations, material, units or vehicles constitute a crime since such attacks would be equated to attacking civilians or civilian objects.

Regarding the protection of medical personnel participating in humanitarian assistance missions, their installations, material, units or vehicles,

the GC and AP I contain specific rules (see references below under section 'Art. 8(2)(b)(xxiv)', subsection 'Legal basis of the war crime').

Remarks concerning the material elements

Attack

The term 'attack' is defined in Art. 49(1) AP I and 'means acts of violence against the adversary, whether in offence or in defence'.

As pointed out above, the concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms 'offence' and 'defence' must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

Humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations

(1)Peacekeeping missions

There is no specific case law clarifying these concepts. As pointed out above, the GC and AP I do not specifically address the protection of peacekeeping missions established in accordance with the Charter of the United Nations. However, certain provisions of the 1994 Convention on the Safety of United Nations and Associated Personnel may afford some guidance in defining the elements of this crime under the ICC Statute. The rules governing the prohibition of attacks have been quoted above. Art. 1 of the Convention contains useful indications concerning the definition of protected personnel. However, it must be stressed that the Convention limits the field of application of these definitions to the Convention itself and the personal field of application is not necessarily identical to the crime defined under the ICC Statute.

Art. 1 reads as follows:

> For the purposes of this Convention:
>
> (a) 'United Nations personnel' means:
>
> (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation;
>
> (ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;

(b) 'Associated personnel' means:
  (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations;
  (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency;
  (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency,
  to carry out activities in support of the fulfilment of the mandate of a United Nations operation;
(c) 'United Nations operation' means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control:
  (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or
  (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation . . .

In his Agenda for Peace the UN Secretary General defined the concept of 'peace-keeping' as follows:

> Peace-keeping is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.[1]

However, he pointed out at the outset that

> [t]he established principles and practices of peace-keeping have responded flexibly to new demands of recent years.[2]

The new aspects of recent mandates were addressed in a supplement to the Agenda for Peace.[3]

[1] UN Doc. A/47/277-S/24111, 17 June 1992, para. 20. [2] *Ibid.*, para. 50.
[3] UN Doc. A/50/60-S/1995/1, 25 January 1995, paras. 33 ff.

(2) Humanitarian assistance missions
There is no specific definition of a humanitarian assistance mission in the various treaties of international humanitarian law. As indicated above, there are rules dealing with relief personnel, in particular Arts. 70 and 71 AP I, which read as follows:

Art. 70 AP I – Relief actions

> 1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions . . .

Art. 71 AP I – Personnel participating in relief actions

> 1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties . . .

These rules and the various rules dealing with medical personnel cited under section 'Art. 8(2)(b)(xxiv)', subsection 'Legal basis of the war crime' give the necessary guidance in this regard.

As long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict

(1) General remarks
The protection of civilians and civilian objects is more specifically dealt with in Arts. 51(3) and 52(2) AP I. According to Art. 51(3),

> [c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

From this, one may conclude that civilians lose their protection when and as long as they take a direct part in hostilities.[4]

Art. 52(2) AP I indicates when an object is no longer entitled to protection as a civilian object:

> . . . In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make

[4] With regard to UN personnel this element is also reflected in Art. 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel.

> an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

From this rule one may conclude that an object is entitled to protection, unless and for such time as it is used to make an effective contribution to the military action of a party to a conflict.

(2) Peacekeeping missions
With respect to peacekeeping missions, these general rules must be linked to Art. 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel, which reads as follows:

> This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

On the basis of these rules, the personnel of peacekeeping missions are entitled to protection, unless and for such time as they take a direct part in hostilities, i.e. are engaged as combatants. Thus, the protection does not cease, in particular, if such persons use armed force only in exercise of their right to individual self-defence. Installations, material, units or vehicles of peacekeeping missions are entitled to protection, unless and for such time as they are used specifically for these combatant purposes.

(3) Humanitarian assistance missions
There are specific rules in the GC and AP I on medical units, such as hospitals, equipment, etc. (see references under section 'Art. 8(2)(b)(xxiv)', subsection 'Legal basis of the war crime') and relief units (in particular the above-cited Arts. 70 and 71 AP I), as well as their personnel, which describe more particularly the conditions under which the units or personnel lose their protection.

In sum, the personnel of humanitarian assistance missions lose their protection if they *commit, outside their humanitarian function, acts harmful to the enemy* (see especially Art. 13(2) AP I). Installations, material, units or vehicles of humanitarian assistance missions lose their protection *if they are used to commit, outside the missions' humanitarian function,*

acts harmful to the enemy (see, for example, Arts. 21 GC I, 34 GC II, 19 GC IV, 13 AP I).

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. The sources mentioned for the crimes defined under Art. 8(2)(b)(i) and (ii), however, are equally relevant for this crime.

Art. 8(2)(b)(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

Text adopted by the PrepCom

War crime of excessive incidental death, injury, or damage

1. The perpetrator launched an attack.

2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[36]

3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[37]

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The elements of this crime reproduce to a large extent the language of the Statute. Nevertheless, they also contain some important clarification, which was reached after lengthy and difficult discussions.

As with other crimes involving unlawful attacks, the PrepCom had to solve the question as to whether this war crime requires a result as Art. 85(3) AP I does for the grave breaches listed in that provision. Again, several delegations repeated their view that it had always been the tacit understanding in Rome that the grave breach threshold would apply. If, however, no result occurs, the conduct should only be charged as an attempt under the conditions set forth in Art. 25(3)(f) ICC Statute. They claimed that this interpretation was supported by the wording of the Rome Statute: the words 'such attack *will* cause' (emphasis added) would suggest not only that a result needs to occur, but also that the damage or injury needs to be excessive as described in the Statute (which would be a higher threshold than for AP I, which requires only that death or serious injury to body or health occur, without demanding a particular amount). The majority of delegations argued, however, that, for the crime to be committed, it would be sufficient that, for example, an attack was launched against a military objective, even though, due to the failure of the weapon system, the expected incidental damage or injury did not occur. In the end, the PrepCom followed the majority view and refused to require that the attack have a particular result. This understanding is expressed by the formulation 'The attack was such that it would cause'.

The PrepCom also discussed the question as to what is meant by the term 'launch'. One delegation claimed that 'to launch an attack' has a broader meaning than 'to direct an attack'. The launching would also include the planning phase, while the directing would describe the act of the attack itself. This view remained uncontested.

Another controversial issue concerned the inclusion and content of a commentary on the phrase 'concrete and direct overall military advantage'. While several delegations stated that they would prefer not to include any commentary on this phrase, other delegations wished to retain some kind of explanatory footnote. In the end, after some difficult informal consultations, footnote 36 was incorporated into the final text for the elements of this war crime.

Its wording reflects a compromise in particular between the interests of two groups of States which did not necessarily touch on the same aspects.

The whole package therefore includes several different clarifications. In essence, the sentence 'The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict' is meant to emphasise essentially that

> [i]n order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; moreover, even after those conditions are fulfilled, the incidental civilian losses and damages must not be excessive.[1]

The sentences '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' clarify both the fact that international humanitarian law applies to armed conflicts regardless of the cause of the conflict or the motives of the parties thereto, and the difference between *ius ad bellum*, which is irrelevant in this context, and *ius in bello*, which is relevant, in assessing the proportionality requirement of this crime.These statements are a correct reflection of existing law and should be clear even without a commentary. The clarification is nevertheless very valuable.

Explanation of the term 'overall' is contained in the sentence 'Such advantage may or may not be temporally or geographically related to the object of the attack.' It may, however, invite abusive interpretations of the concept 'concrete and direct military advantage'. In informal consultations the need for this sentence was highlighted to cover attacks where the military advantage is planned to materialise at a later time and in a different place (by way of example, reference was made to feigned attacks during World War II to permit the allied forces to land in Normandy[2]). The first sentence, containing the requirement of foreseeability, was meant to exclude advantages which are vague and, more importantly, to exclude reliance on *ex post facto* justifications. It emphasises that the evaluation of whether the collateral damage or injury is likely to be excessive must be undertaken

[1] See C. Pilloud and J. S. Pictet, 'Art. 51' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 1979.

[2] See W. A. Solf, 'Art. 52' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), pp. 324 ff.

before the decision to launch the attack. Therefore, launching one or more attacks on the blithe assumption that at the end of the day the collateral damage or injury will not be excessive would not respect the law. This interpretation is required by the words 'concrete and direct'. When AP I was negotiated, '[t]he expression "concrete and direct" was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded'.[3]

Several delegations emphasised that the term 'overall' could not refer to long-term political advantages or the winning of a war *per se*.

Subsequent discussions concerned the evaluation that has to be made by the perpetrator with regard to the excessiveness of the civilian damage. Some delegations felt that Element 3 of this crime ('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') needed to be given further precision to clarify the relevant value judgement in light of the fourth paragraph of the General Introduction.

These delegations claimed that the perpetrator must personally make a value judgement and come to the conclusion that the civilian damage would be excessive. Other delegations, however, referred to the fact that the words 'of such an extent as to be', which are not contained in the Statute but were added to the EOC, were meant – at least in the eyes of those who suggested the insertion – to make it clear that the perpetrator need only know the extent of the damage he/she will cause and the military advantage anticipated. Whether the damage was excessive should be determined by the court on an objective basis from the perspective of a reasonable commander. Without intensive discussions in the formal Working Group or informal consultations as to its rationale, footnote 37 was inserted almost at the end of the PrepCom:

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

[3] Pilloud and Pictet, 'Art. 57' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 2209.

This footnote left some ambiguities. The first sentence merely indicates that a value judgement must have been made as described in Element 3. The judges will need to decide what is required by the description in Element 3, in particular the consequences to be drawn from the added words 'of such an extent as to be'. The meaning of the second sentence also allows diverging interpretations. Those who insisted on a more objective evaluation understood the formulation 'an evaluation of that value judgement' as referring to an external evaluation by the Court. The Court would have to make an objective analysis of the judgement 'based on the requisite information available to the perpetrator at the time'. The other view interpreted the second sentence as merely highlighting the fact that the value judgement by the perpetrator must be made on the basis of the information available at the time. In the view of a few delegations, which favoured a more subjective approach, the footnote would probably exclude not only criminal responsibility for a perpetrator who believes that a particular incidental damage will not be excessive, even if he/she is wrong, but also for those who do not know that an evaluation of the excessiveness has to be made. As to the latter one might question whether this is compatible with the rule that ignorance of the law is no excuse.

However, there seemed to be agreement between States that this footnote should not lead to the result of exonerating a reckless perpetrator who knows perfectly well the anticipated military advantage and the expected incidental damage or injury, but gives no thought to evaluating the possible excessiveness of the incidental injury or damage. It was argued that by refusing to evaluate the relationship between the military advantage and the incidental damage or injury, he/she has made the value judgement required by this element. Therefore, if the court finds that the damage would be excessive, the perpetrator will be guilty.

There is probably no doubt that a court will respect judgements that are made reasonably and in good faith on the basis of the requirements of international humanitarian law. In any case, an unreasonable judgement or an allegation that no judgement was made, in a case of clearly excessive death, injury or damage, would simply not be credible. It is submitted that the court would then, and it would be entitled to do so, infer the mental element based on that lack of credibility. As indicated in the footnote, the court must decide such matters on the basis of the information available to the perpetrator at the time.

The meaning of the term 'at the time' in footnote 37 was intentionally left without further precision, so that the judges would determine whether

the moment of launching or directing the attack would be the appropriate time, or some earlier moment.

Contrary to other crimes relating to the conduct of hostilities, the term 'intentionally' contained in the Statute is not reflected in the elements. The general view was that in this particular case the term is a mere surplusage with no additional meaning. While Art. 30(2)(a) ICC Statute would directly apply to Element 1, the mental element linked with Element 2 ('knowledge') stems from the statutory definition of the crime.

Legal basis of the war crime

The term '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' is derived to a large extent from Arts. 51(5)(b) and 85(3)(b), as well as Arts. 35(3) and 55(1), AP I.

With respect to the definition of collateral damage, the words 'clearly' and 'overall' are added to the conventional definition in AP I, which reads as follows:

> an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
>
> (Arts. 51(5)(b) and 57(2)(a)(iii).)

Further, the original 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the 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 (Art. 3(3)(c)) and the amended Protocol of 3 May 1996 (Art. 3(8)(c)) contain the same language as in AP I. There are no legal sources using the terminology contained in the Statute.

With regard to damage to the environment, the Statute seems to combine the elements of Arts. 35(3) and 55 AP I (widespread, long-term and severe) with the principle of proportionality, although these seem to be two distinct rules under current international law: on the one hand the prohibition to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (as reflected in the mentioned provisions of AP I), and, on the other hand, the prohibition to employ methods or means of

warfare which are intended, or may be expected, to cause damage to the environment in violation of the principle of proportionality.[4] Thus, it is questionable whether a new threshold for this war crime has been created in the Statute. In addition, it should be noted that there is a third rule based on customary international law which provides that '[d]amage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited'.[5]

Remarks concerning the material elements

The ICTY dealt with aspects of the offence 'launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct military advantage anticipated' in only one judgment. The ICTR has not rendered any decision on this war crime to date.

In the *Kupreskic* case, the ICTY held the following:

> *The protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended in . . . exceptional circumstances:* . . . (ii) *when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians*; . . . .
>
> *In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable*

[4] This latter rule on disproportionate damage seems to reflect customary international law: see, for example, L. C. Green, 'The Environment and the Law of Conventional Warfare' (1991) 24 *Canadian Yearbook of International Law* 222 ff.; G. Plant, *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict* (Belhaven, London and New York, 1992), p. 17; R. A. Falk, 'The Environmental Law of War: an Introduction' in Plant, *Environmental Protection*, pp. 84 ff.; F. P. Feliciano, 'Marine Pollution and Spoliation of Natural Resources as War Measures: A Note on Some International Law Problems in the Gulf War' (1995) 39 *Ateneo Law Journal* no. 2, 27 ff.; the majority of experts who participated in the first Meeting of Experts on the Protection of the Environment in Time of Armed Conflict, initiated by the ICRC (see UN Doc. A/47/328, 31 July 1992, para. 54); and the 1994 Guidelines for Military Manuals and Instructions prepared by the ICRC (see UN Doc. A/49/323, 19 August 1994, Annex, para. II.4.), endorsed by the UN General Assembly in 1996 (UN Doc. A/Res/51/157, 30 January 1997, Annex, para. 19).

[5] See, for example, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), no. 44 with commentary, p. 122; UN General Assembly Resolution 47/37 of 25 November 1992; the Guidelines for Military Manuals and Instructions prepared by the ICRC (UN Doc. A/49/323, 31 July 1992, Annex, para. III.8. and 9.), endorsed by the UN General Assembly in 1996 (UN Doc. A/Res/51/157, 30 January 1997, Annex, para. 19); P. Fauteux, 'The Use of the Environment as an Instrument of War in Occupied Kuwait', in H. B. Schiefer (ed.), *Verifying Obligations Respecting Arms Control and Environment: A Post Gulf War Assessment* (Department of External Affairs, Ottawa, 1992), pp. 59 ff.; S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 118.

care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle, already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War, has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. *In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted* using indiscriminate means or methods of warfare, or *in such a way as to cause indiscriminate damage to civilians. These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law*, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol. Admittedly, even these two provisions leave a wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party. Nevertheless this is an area where the 'elementary considerations of humanity' rightly emphasised by the International Court of Justice in the *Corfu Channel*, *Nicaragua* and *Legality of the Threat or Use of Nuclear Weapons* cases should be fully used when interpreting and applying loose international rules, on the basis that they are illustrative of a general principle of international law.

More specifically, *recourse might be had to the celebrated Martens Clause* which, in the authoritative view of the International Court of Justice, has by now become part of customary international law. True, this Clause may not be taken to mean that the 'principles of humanity' and the 'dictates of public conscience' have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. *In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.*

As an example of the way in which the Martens Clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In

> other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, *in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity*.[6]

In addition to these findings, certain other sources may be helpful in interpreting various elements of this offence.

Attack

The term 'attack' is defined in Art. 49(1) AP I and 'means acts of violence against the adversary, whether in offence or in defence'.

As pointed out above, the concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms 'offence' and 'defence' must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

Incidental loss of life or injury to civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated

As emphasised above, the addition of the words 'clearly' and 'overall' in the definition of collateral damage is not reflected in any existing legal source. Therefore, the addition must be understood as not changing existing law. This fact was already expressed by the ICRC at the Rome Conference. It further stated:

> The word 'overall' could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have

[6] ICTY, Judgment, *The Prosecutor* v. *Zoran Kupreskic and Others*, IT-95-16-T, paras. 522–6 (emphasis added, footnotes omitted).

> an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word 'overall' is redundant.[7]

The following sources may give further guidance with respect to specific aspects of the rule of proportionality.

With respect to the notion of military advantage, several States made declarations under AP I:

A number of States expressed their understanding that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.[8] Australia and New Zealand more specifically stated at the time of ratification, in almost identical wording:

> In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the 'military advantage' are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term 'military advantage' involves a variety of considerations including the security of attacking

[7] UN Doc. A/CONF.183/INF/10 of 13 July 1998.

[8] Belgium: 'With respect to Articles 51 and 57, the Belgian Government interprets the "military advantage" mentioned therein as being that expected from an attack considered in its totality.'

Canada: 'It is the understanding of the Government of Canada in relation to sub-paragraph 5(b) of Article 51, paragraph 2 of Article 52, and clause 2(a)(iii) of Article 57 that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.'

Germany: 'In applying the rule of proportionality in Article 51 and Article 57, "military advantage" is understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.' Notification by the depositary addressed to the ICRC on 15 February 1991 (translation provided by Germany upon ratification).

Italy: 'In relation to paragraph 5(b) of Article 51 and paragraph 2(a)(iii) of Article 57, the Italian Government understands that the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack'.

Netherlands: 'It is the understanding of the Government of the Kingdom of the Netherlands that military advantage refers to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.' Notification by the depositary addressed to the ICRC on 10 July 1987.

Spain: 'It is the understanding [of the Spanish Government] that the "military advantage" which these articles mention refers to the advantage expected from the attack as a whole and not from isolated parts of it.' Notification by the depositary addressed to the ICRC on 24 November 1989.

UK: 'In the view of the United Kingdom, the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.' Corrected letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom.

> forces. It is further the understanding of Australia that the term 'concrete and direct military advantage anticipated', used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.[9]

However, to the knowledge of the author, no official explanation is given by these States as to the meaning of 'attack as a whole'. It certainly cannot mean in the sense of the whole conflict. Such an interpretation could hardly be reconciled with the meaning of the words 'concrete and direct',[10] and it would confuse 'proportionality' as required by the *ius ad bellum* rules of self-defence with the rules of proportionality in attack in the *ius in bello*. In the latter instance, which is relevant to the crime under consideration here, the commander must be able reasonably to foresee, before launching the attack on a target, its military utility, the likely civilian casualties and whether the latter would be excessive. In order to determine how to judge the value of a military target, the following legal writings, which support the above-mentioned declarations, may be quoted:

Solf concludes the following:

> Whether a definite military advantage would result from an attack must be judged in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation. It is not necessary that the contribution made by the object to the Party attacked be related to the advantage anticipated by the attacker from the destruction, capture or neutralization of the object. Thus, prior to the 1944 cross channel operation, the Allies attacked a large number of bridges, fuel dumps, airfields and other targets in the Pas de Calais. These targets made an effective contribution to German military action in that area. The primary military advantage of these attacks anticipated by the Allies, however, was not to reduce German military strength in that area, but to deceive the Germans into believing that the Allied amphibious assault would occur in the Pas de Calais instead of the beaches of Normandy. Therefore, the military advantage expected from these air raids was not related to their value to the adverse Party.[11]

[9] Notification by the depositary addressed to the ICRC on 24 June 1991 (Australia); notification by the depositary addressed to the ICRC on 12 February 1988 (New Zealand).

[10] 'Concrete' means specific, not general; perceptible to the senses. See Solf, 'Art. 57' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 365. 'Direct' means 'without intervening condition or agency'. A remote advantage to be gained at some unknown time in the future is not to be included in the proportionality equation. See *ibid.*; and *San Remo Manual*, no. 46.5, p. 124.

[11] Solf, 'Art. 52' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, pp. 324 ff.

Oeter describes the purpose of the German declaration in the following terms:

> The separate action within an operation, that could be described as a specific 'attack', is hardly ever an end in itself. Normally such an action is directed towards a goal which lies outside the single action, as a part of the complex mosaic of a bigger integrated operation conceived in a kind of division of labour, and thus depends in its purpose on the aggregate strategy of the party to the conflict. The aggregate military operation of the belligerent may not be divided up into too many individual actions, otherwise the operative purpose for which the overall operation was designed slips out of sight. It is this elementary condition of any sensible interpretation of the concept of 'military advantage' which the German Government . . . took into account . . .[12]
>
> [The German interpretative declaration] means that the point of reference of the required balancing is not the gain of territory or other advantage expected from the isolated action of a single unit, but the wider military campaign of which that action forms part. Only in the framework of the more complex overall campaign plan of a belligerent can one assess the relative military value of the specific purpose of an individual attack . . . [A]ctions of individual units . . . must be placed in their operational context.[13]

With respect to collateral damage or injury, the Australian military manual states the following:

> Collateral damage or injury would be unlawful in any instance in which such injury or damage becomes so excessive as to clearly indicate wilful intent or wanton disregard for the safety of the civilian population. The military advantage must not be measured in isolation, but rather on the basis of its contribution to the overall operation or campaign of which it is a part, including destruction or neutralization of the war-making capacity of the enemy. A direct military advantage is, therefore, anticipated if the commander has an honest and reasonable expectation that the attack will make a relevant and proportionate contribution to attainment of the purposes of the overall operation. Deference must be paid to the judgments of responsible commanders, based on information available to them at the time, and taking into account the urgent and difficult circumstances under which such judgments must be made.[14]

[12] Oeter, 'Methods and Means of Combat', p. 162. [13] *Ibid*., p. 119.
[14] Australian Defence Force, *Law of Armed Conflict – Commander's Guide*, Operations Series ADFP 37 Supplement 1-Interim edn, 7 March 1994, p. 9–10.

The Canadian military manual states:

> The military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole, and not only from isolated or particular parts of that campaign or operation. A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation. Military advantage may include a variety of considerations including the security of the attacking forces.[15]

From these sources one may conclude that the military value of an object may be determined by taking into account the broader purpose of a particular military operation that may consist of various individual actions.

On the other hand, it must also be emphasised that the same scale has to be applied with regard to both the military advantage and the corresponding civilian casualties.[16] This means that the foreseeable military advantage of a particular military operation must be weighed against the foreseeable civilian casualties of such an operation.

Widespread, long-term and severe damage to the natural environment

This subsection deals with some specific problems concerning the notions of 'widespread', 'long-term', 'severe' and 'environment'. With regard to the questions arising from the combination of elements of Arts. 35(3) and 55 AP I on the one hand and the rule of proportionality on the other hand, see the introductory remarks under the section 'Legal basis of the war crime'.

In its advisory opinion on the legality of the threat or use of nuclear weapons, the ICJ referred to some aspects of the protection of the natural environment. The Court confirmed that States, when exercising their right of self-defence under international law,

> must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

[15] Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, http://www.dnd.ca/jag/operational_pubs_e.html@top, p. 4–3.

[16] M. Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht mit besonderer Beachtung der Regeln zum Schutze der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* (Helbing & Lichtenhahn, Basle and Frankfurt am Main, 1990), p. 415, with further references.

> This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that: 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'[17]

It further stated:

> The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.
>
> These are powerful constraints for all the States having subscribed to these provisions.
>
> General Assembly resolution 47/37 of 25 November 1992 on the 'Protection of the Environment in Times of Armed Conflict' is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that 'destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law'. Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution '[a]ppeals to all States that have not yet done so to consider becoming parties to the relevant international conventions'.[18]

The ILC particularly dealt with the concepts of 'widespread', 'long-term', 'severe' and 'natural environment' in its Report on the work of its forty-third session, 1991. According to the Commentary on Art. 26 of the Draft,

> [t]he words 'natural environment' should be taken broadly to cover the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment. These words therefore cover the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and

[17] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 30; 110 ILR 163 at 192.

[18] *Ibid.*, paras. 31 ff.

> other biological elements . . . [A]rticle 2 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques . . . defines the expression 'environmental modification technique' as 'any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space'.[19]

In the view of the ILC, the expression 'widespread, long-term and severe damage' describes

> the extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage. It was explained in the Commission that the word 'long-term' should be taken to mean the long-lasting nature of the effects and not the possibility that the damage would occur a long time afterwards.[20]

In its 1993 Report to the UN General Assembly, the ICRC noted concerning the threshold set by Arts. 35(3) and 55 AP I:

> The question as to what constitutes 'widespread, long-term and severe' damage and what is acceptable damage to the environment is open to interpretation. There are substantial grounds, including from the travaux préparatoires of Protocol I, for interpreting 'long-term' to refer to decades rather than months. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be.[21]

NB: The German military manual gives this definition:

> 'Widespread', 'long-term' and 'severe' damage to the natural environment is a major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war.[22]

The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign states that:

> in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause

[19] GAOR, 46th Session, Supplement no. 10 (A/46/10), p. 276.
[20] *Ibid.* See also A/CN.4/SR.2241, 22 August 1991, pp. 15, 18.
[21] UN Doc. A/48/269, p. 9. See also A/47/328, 31 July 1992, paras. 20, 63.
[22] *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, no. 403, p. 37.

> grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. . . .[23]

Remarks concerning the mental element

As in Art. 85(3)(b) AP I, the ICC Statute presupposes that the attack was launched in the knowledge that the consequences described occur. With respect to the phrase 'in the knowledge', the ICRC Commentary on Art. 85 AP I points out:

> This sub-paragraph . . . adds the words 'in the knowledge' . . . therefore there is only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness.[24]

NB: In contrast, Art. 51(5) of AP I prohibits attacks 'which may be expected to cause' the aforesaid damage and loss. The threshold for conduct constituting a violation of international humanitarian law is therefore lower than for a war crime.

With regard to evaluating the excessiveness of collateral damage, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign indicates that an objective test has to be applied:

> It is suggested that the determination of relative values must be that of the 'reasonable military commander'.[25]

[23] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign, para. 22.
[24] B. Zimmermann, 'Art. 85' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3479.
[25] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign, para. 50.

Art. 8(2)(b)(v) – Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives

Text adopted by the PrepCom

War crime of attacking undefended places[38]

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.

2. Such towns, villages, dwellings or buildings were open for unresisted occupation.

3. Such towns, villages, dwellings or buildings did not constitute military objectives.

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

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

[38] 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.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The terms 'bombarding' and 'by whatever means' contained in the statutory definition of this crime were not repeated in the elements in order to avoid an *a contrario* interpretation for other war crimes. War crimes like those in Arts. 8(2)(b)(i), (ii), (iii) and (iv) include the term 'attack' without the qualifier 'by whatever means'. This omission in the statutory definitions does not, however, mean that these crimes would cover only attacks launched by using a more limited range of means or only particular means of attack. The term 'attack' is defined in Art. 49(1) AP I, which provides the basis for the terminology chosen, as covering any 'acts of violence against the adversary, whether in offence or in defence'. Therefore, the PrepCom felt that the terms 'bombarding' and 'by whatever means', which provided an additional clarification in 1907 when Art. 25 of the Hague Regulations was drafted, would be an unnecessary surplusage in the case of the present crime.

An initial text proposal[1] suggested defining the elements of this crime on the basis of the wording of Art. 59 AP I because it was thought that

[1] PCNICC/1999/WGEC/DP.20 of 30 July 1999.

that provision would contain the 'modern' description of the essence of Art. 25 of the 1907 Hague Regulations. After some discussion, however, the PrepCom decided to stick closely to the Hague language and not to use the wording of Art. 59 AP I, in particular not to incorporate the conditions set forth in para. 2 of that provision. It was argued *inter alia* that the scope of application of the Hague Regulations is broader than that of AP I. In the end, in order to guarantee consistency between the Statute and the elements, the PrepCom felt that the elements should be formulated in a way closer to the wording of the Statute. Footnote 38, however, is based, with small modifications, on Art. 59(3) AP I. It was emphasised that the insertion of this footnote would not allow for an *a contrario* conclusion that with regard to other crimes where the footnote is not included, the presence 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 by itself render a locality a military objective. On the basis of this understanding, and the fact that Art. 59 AP I contains this indication, the footnote was acceptable.

The formulation 'open for unresisted occupation' is a definition of the term 'undefended' in the sense of this war crime.

An earlier draft contained an element emphasising that the perpetrator only needs to be aware of the factual circumstances rendering the town, village, dwelling or building undefended.[2] This view was generally accepted. In the second reading, when the General Introduction to the EOC document was implemented (para. 2), this element was deleted, since it was considered redundant given the default rule of Art. 30 ICC Statute. It was deleted on the understanding that no standard for the mental element higher than the one in the former draft would apply.

Legal basis of the war crime

The term 'attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives' is directly derived from Art. 25 of the 1907 Hague Regulations with the sole exception that the words 'and which are not military objectives' have been added.

Remarks concerning the material elements

Attack

The term 'attack' is defined in Art. 49(1) AP I and 'means acts of violence against the adversary, whether in offence or in defence'.

[2] PCNICC/1999/L.5/Rev.1/Add.2 of 22 December 1999.

As pointed out above, the notion of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms 'offence' and 'defence' must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

By whatever means

According to the US Air Force Pamphlet, the term was added in the Hague Regulations to cover air bombardment.[3]

Non-defended locality

In the aftermath of the Second World War, the Tokyo District Court dealt with Art. 25 of the 1907 Hague Regulations in the *Shimoda* case, analysing attacks by nuclear weapons. The Court looked at the lawfulness of indiscriminate bombing as a method of warfare. However, most of the judgment referred to the law applicable at the time and this involved an outdated distinction between bombing defended and undefended cities. Therefore, the findings of the Court are of limited relevance to the present state of law. There may be a certain interest in the statement on defended cities in so far as it contains the definition of a defended city and emphasises that only military objectives may be attacked in such a city:

> In principle, a defended city is a city which resists an attempt at occupation by land forces. A city even with defence installations and armed forces cannot be said to be a defended city if it is far away from the battlefield and is not in immediate danger of occupation by the enemy. Since there is no military necessity for indiscriminate bombardment, only bombing of military objectives there is permissible.[4]

With regard to the current status of international law, a possible conclusion that the indiscriminate bombing of a defended city on or near the battlefield could be lawful is unfounded.

Art. 59 AP I gives a more recent indication of what constitutes an undefended locality or place, such as towns, villages, dwellings or buildings as listed in Art. 25 of the 1907 Hague Regulations and thus the ICC Statute as well.

As pointed out in the ICRC Commentary, Art. 59(1) AP I

> reiterates almost entirely the rule contained in Article 25 of the Hague Regulations of 1907. Under this paragraph, which confirms and codifies

[3] US Department of the Air Force, AF Pamphlet 110–31, *International Law – The Conduct of Armed Conflict and Air Operations* (1976), p. 5–12.

[4] *Ryuichi Shimoda and Others* v. *The State* (1966) 32 ILR 626 at 631, para. 7.

customary law, a locality becomes a non-defended locality whenever the conditions laid down in the following paragraphs are met. Unilateral declarations and agreements merely serve to confirm this situation.[5]

Paragraph 1 lays down the rule, which must be obeyed even in the absence of a declaration or an agreement and the article continues by defining the conditions with which a non-defended locality must comply.[6]

Art. 59 AP I reads as follows:

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.

2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact[7] which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;

(b) no hostile use shall be made of fixed military installations or establishments;

(c) no acts of hostility shall be committed by the authorities or by the population; and

(d) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down

[5] C. Pilloud and J. S. Pictet, 'Art. 59' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 2263; see also S. Oeter, 'Kampfmittel und Kampfmethoden' in D. Fleck (ed.), *Handbuch des Humanitären Völkerrechts in bewaffneten Konflikten* (Verlag C. H. Beck, Munich, 1994), pp. 150 ff.

[6] Pilloud and Pictet, 'Art. 59' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 2267.

[7] The words used are based on a definition given by a special Working Group of the Diplomatic Conference: Report of a mixed group, March 1975, cf. *Official Records*, vol. XV, p. 338, CDDH/II/266–CDDH/III/255, Annex A: ' "Contact Area" means, in an armed conflict, that area where the most forward elements of the armed forces of the adverse Parties are in contact with each other.'

in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

In sum, the following elements are constituent of a non-defended locality:

- the inhabited place must be open for occupation[8] (NB: this presupposes that the inhabited place must be near or in a zone where adverse armed forces are present);
- all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
- no hostile use shall be made of fixed military installations or establishments;
- no acts of hostility shall be committed by the authorities or by the population; and
- no activities in support of military operations shall be undertaken.

It should be understood that whenever these conditions are not fulfilled a place may not be considered as undefended and entitled to protection under this rule. However, the attacking party must respect other applicable rules for the protection of civilians and civilian objects. Thus, an attack

[8] This principle has already been confirmed in the *Ohlendorf Case* (*Einsatzgruppen Trial*): 'a city is assured of not being bombed by the law-abiding belligerent if it is declared an open city', see UNWCC, *LRTWC*, vol. XV, p. 111; 15 AD 656 at 661. See also M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley and Los Angeles, 1959), p. 332.

may still be a crime under other rules of Art. 8(2)(b) of the ICC Statute, in particular Art. 8(2)(b)(i), (ii) and (iv).

The declaration mentioned in para. 2 has only declaratory value, whereas an agreement in accordance with Art. 59(5) AP I would be constituent.

NB: Additional guidance for the interpretation of this offence may be drawn from various military manuals, which confirm *grosso modo* the results of the above-cited sources.

The US military manual indicates:

> An undefended place, within the meaning of Article 25, HR, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance. In order to be considered as undefended, the following conditions should be fulfilled:
>
> (1) armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;
>
> (2) no hostile use shall be made of fixed military installations or establishments;
>
> (3) no acts of hostility shall be committed by the authorities or by the population; and
>
> (4) no activities in support of military operations shall be undertaken.
>
> The presence, in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place.[9]

The Swiss military manual states:

> Au moyen de déclarations particulières réciproques, les Parties au conflit peuvent désigner les localités non défendues . . . Ces localités . . . doivent cependant répondre aux conditions suivantes:
>
> a) tous les combattants, ainsi que les armes et le matériel militaire mobiles devront avoir été évacués;
>
> b) il ne doit pas être fait un usage hostile des installations ou des établissements militaires fixes;

[9] US Department of the Army, Field Manual, FM 27-10, *The Law of Land Warfare* (1956), No. 39, as amended on 15 July 1976. See also US Department of the Air Force, AF Pamphlet 110-31, p. 5–12. See also, in Canadian Military Manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, http://www.dnd.ca/jag/operational_pubs_e.html@top, pp. 4–11; Australian Defence Force, *Law of Armed Conflict – Commander's Guide*, Operations Series, ADFP 37 Supplement 1-Interim edn, 7 March 1994, p. 9–5.

c) les autorités et la population ne commettront pas d'actes d'hostilité;
d) aucune activité à l'appui d'opérations militaires ne doit être entreprise;
e) les localités . . . doivent être marquées.[10]

The UK military manual reads as follows:

> An undefended or open town is a town which is so completely undefended from within or without [artillery or minefields] that the enemy may enter and take possession of it without fighting or incurring casualties.[11]
>
> A town may be considered defended if a military force is in occupation of or marching through it.[12]

Military objective

Military objectives in so far as objects are concerned are defined in Art. 52(2) AP I. The provision reads as follows:

> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Moreover, as provided for in Art. 52(3) AP I,

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

NB: Comparing the constituent elements for a non-defended locality and the definition of a military objective, a non-defended locality cannot be considered a military objective that may be lawfully attacked. Since the adversary has deliberately excluded such a place from his military activities and it is open for occupation, it cannot make an effective contribution to military action. The intended military advantage could be achieved by

[10] Art. 31(2), *Règlement suisse, Lois et coutumes de la guerre (Extrait et commentaire)*, Règlement 51.7/II f (1987), p. 10.
[11] *The Law of War on Land being Part III of the Manual of Military Law* (HMSO, 1958), p. 97.
[12] *Ibid.*, p. 96.

mere occupation without combat activity, and a bombardment or an attack using armed force would be evidently unnecessary.[13]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

With respect to Art. 85(3)(d) AP I defining the act of making non-defended localities and demilitarised zones the object of attack as a grave breach when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health, the ICRC Commentary indicates that the attacker must be aware of its status as a non-defended locality,[14] i.e. aware of the underlying facts.

[13] Oeter, 'Kampfmittel und Kampfmethoden', p. 150 with further references.

[14] B. Zimmermann, 'Art. 85' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3490.

Art. 8(2)(b)(vi) – Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion

Text adopted by the PrepCom

War crime of killing or wounding a person hors de combat

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

Commentary

Travaux préparatoires/Understandings of the PrepCom

The PrepCom eventually agreed that the terminology of Art. 41 AP I would be a correct 'translation' of the old language stemming from the Hague Regulations. The concept of 'hors de combat' was understood in a broad sense, not only covering the situations mentioned in Art. 23(c) of the Hague Regulations, but also, for example, those mentioned in Arts. 41 and 42 AP I.

Element 3 follows the approach taken by the PrepCom in the context of other crimes relating to persons protected against a particular conduct.[1]

Legal basis of the war crime

The phrase 'killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion' is directly derived from Art. 23(c) of the Hague Regulations. A more recent formulation of this offence may be seen in Art. 41(1) and (2) AP I, prohibiting attacks against persons *hors de combat*.

Remarks concerning the material elements

It should be noted that there is a considerable overlap between this offence as contained in Art. 8(2)(b)(vi) of the Statute (Art. 23(c) of the Hague Regulations), Art. 8(2)(a)(i) of the Statute (Wilful killing) and Art. 8(2)(b)(xii) of the Statute (Declaring that no quarter will be given). This overlap becomes apparent in the case law cited below.

[1] See section 5.1., subsection (2) 'Protected persons/objects'.

Many of the decisions in the aftermath of the Second World War related to cases of killing prisoners of war. The indictments and judgments very often made reference to Art. 23(c) of the Hague Regulations and Art. 2 of the 1929 Geneva Convention.[2]

In the *Dostler* case the US Military Commission found that the illegality of orders to kill prisoners of war must be known. As the Commentator of the UNWCC pointed out by referring to Art. 2(3) of the 1929 Geneva Convention relative to the Treatment of Prisoners of War: 'No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal.'[3]

In addition to these judgments, one case from after the First World War[4] is of some interest. One accused was charged with having issued an order to the effect that all prisoners and wounded were to be killed. The alleged orders were:

> No prisoners are to be taken from to-day onwards; all prisoners, wounded or not, are to be killed

and

> All the prisoners are to be massacred; the wounded, armed or not, are to be massacred; even men captured in large organised units are to be massacred. No enemy must remain alive behind us.[5]

The other accused was charged with having passed on the above-mentioned order. The Tribunal found that there was no proof that such an order was given.[6] Therefore, the first accused was acquitted. However, the second accused acted in the mistaken idea that the order had been issued. He was not conscious of the illegality of such an order. The Tribunal held as follows:

> So pronounced a misconception of the real facts seems only comprehensible in view of the mental condition of the accused . . . But this merely explains the error of the accused; it does not excuse it . . . Had he applied

[2] See *inter alia* the *Jaluit Atoll Case*, in UNWCC, *LRTWC*, vol. I, pp. 72 ff.; 13 AD 286; *Dreierwalde Case*, in UNWCC, *LRTWC*, vol. I, pp. 82, 86 (killing of prisoners of war); *Thiele and Steinert Case*, in *ibid.*, vol. III, p. 57; 13 AD 305 (killing of prisoners of war); *Schosser, Goldbrunner and Wilm Case*, in UNWCC, *LRTWC*, vol. III, pp. 65 ff.; 13 AD 254 (killing of an unarmed prisoner of war with no reference to a specific provision); *A. Bury and W. Hafner Case*, in UNWCC, *LRTWC*, vol. III, pp. 62 ff.; 13 AD 306 (killing of prisoners of war); *K. Meyer Case*, in UNWCC, *LRTWC*, vol. IV, pp. 97 ff.; 13 AD 332 (order to kill prisoners of war); *K. Rauer and Others Case*, in UNWCC, *LRTWC*, vol. IV, pp. 113 ff. (killing of prisoners of war).

[3] In UNWCC, *LRTWC*, vol. I, p. 31; 13 AD 280.

[4] *Karl Stenger and Benno Crusius Case*, in C. Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Study of the German Mentality* (H. F. & G. Witherby, London, 1921), pp. 151 ff.

[5] *Ibid.*, p. 152. [6] *Ibid.*, p. 159.

> the attention which was to be expected from him, what was immediately clear to many of his men would not have escaped him, namely, that the indiscriminate killing of all wounded was a monstrous war measure, in no way to be justified.[7]

Other post-Second World War cases dealt with the killing of shipwrecked members of a crew or persons who had parachuted in distress.

In the *P. Back* case the accused – a civilian – was charged with violating 'the laws and usages of war by wilfully, deliberately and feloniously killing an American airman . . . who had parachuted to earth . . . in hostile territory and was then without any means of defence'. The unarmed airman had been forced to descend by parachute. The accused was found guilty.[8]

In the *Peleus* trial the accused were charged with '[c]ommitting a war crime in that . . . [they] in violation of the laws and usages of war were concerned in the killing of members of the crew of [a] steamship [they had sunk] . . . by firing and throwing grenades at them'. The prosecution clarified that the accused had not violated the laws and usages of war by sinking the ship, but only by firing and throwing grenades at the survivors of the sunken ship.[9] The accused were found guilty.

The facts in one post-First World War trial were quite similar. In the *Llandovery Castle* case a hospital ship had been sunk and the U-boat commander had attempted to eliminate all traces of the sinking in order to conceal his criminal act altogether.[10] The German Reichsgericht in Leipzig held that the killing of enemies contrary to Art. 23(c) of the 1907 Hague Regulations or, in similar circumstances, at sea, constitutes an offence against international law in regard to which the defence of superior orders affords no justification.[11]

In the *von Ruchteschell* trial, the accused was charged with (i) continuing to fire (on a vessel) after the enemy had indicated his surrender, (ii) sinking enemy merchant vessels without making any provision for the safety of the survivors, (iii) ordering the firing at survivors. The accused was found guilty in one case of (i) and (ii); the charge in (iii) was dropped by the prosecutor because one witness could not be brought before the court.[12] The central question with regard to (i) was whether there are generally recognised ways of indicating surrender at sea.[13] An analysis of the present law may be found

[7] *Ibid.*, pp. 160 ff. [8] In UNWCC, *LRTWC*, vol. III, p. 60; 13 AD 254.
[9] In UNWCC, *LRTWC*, vol. I, p. 2; 13 AD 248. [10] In UNWCC, *LRTWC*, vol. I, p. 19; 2 AD 436.
[11] 2 AD 436; see L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, p. 338, footnote 3.
[12] In UNWCC, *LRTWC*, vol. IX, pp. 82, 85, 86; 13 AD 247–8. [13] UNWCC, *LRTWC*, vol IX, p. 89.

in the *San Remo Manual*, referring to the same case:

> The adversary is obliged to give quarter once it is evident that the vessel wishes to surrender. There is no one agreed method of signalling a wish to surrender, but there are a number of methods that are generally recognized:
> – hauling down its flag;
> – hoisting a white flag;
> – surfacing in the case of submarines;
> – stopping engines and responding to the attacker's signals;
> – taking to life boats;
> – at night, stopping the vessel and switching on its lights.[14]

In the *Karl-Heinz Moehle* trial, a British Military Court found that the mere passing on of an order that subordinate U-boat commanders were to destroy ships and their crews was a war crime and the accused was found guilty.[15] In his capacity as Korvetten Kapitaen, it fell upon the accused to brief U-boat commanders prior to their going out on operational patrols. Part of his briefing was to acquaint the U-boat commanders with an order originating from the German U-boat command. This so-called 'Laconia Order' was in the nature of a standing order which was read regularly to the U-boat commanders. It was never given to them in writing. The order stated:

> (1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
> (2) Orders for bringing in captains and chief engineers still apply.
> (3) Rescue the shipwrecked only if their statements would be of importance for your boat.
> (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.[16]

With regard to this specific 'Laconia Order', the International Military Tribunal found in another judgment (of Admiral Doenitz) that the order was ambiguous. However, in the *Moehle* case, the accused removed this ambiguity by commenting on the order when passing it on, and by giving

[14] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), no. 47.57, p. 135.
[15] In UNWCC, *LRTWC*, vol. IX, pp. 75, 78, 80; 13 AD 246.
[16] UNWCC, *LRTWC*, vol. IX, p. 75.

examples which undoubtedly must have given the impression that the policy of the Naval High Command was to kill ships' crews: First, the accused briefed the U-boat commanders not to rescue shipwrecked persons. Then they were told, as an example of why this should be the correct policy, of the case of a commander who was severely reprimanded for not having shot at a raft with five British airmen on it, because 'it was highly probable that the airmen would be rescued by the enemy and would once more go into action'. The Court found that if survivors were not rescued because it would be dangerous for the U-boat to do so, then it was not illegal. It also found, however, that an order to kill survivors was clearly illegal, and, furthermore, that a commander had a duty to save the lives of the crew if he could. According to the Court, the order the accused passed on, in conjunction with the mentioned example, could be interpreted by a reasonable subordinate in only one way, namely, as an order to kill survivors.[17]

Although this case is cited by some authors as a violation of Art. 23(c) of the Hague Regulations,[18] there is reason to relate the conduct also to Art. 23(d) of the Hague Regulations (Art. 8(2)(b)(xii) of the Statute – Declaring that no quarter will be given).

In this context, on the basis of the above-cited case law of the First and Second World Wars, the *San Remo Manual* states that attacks on liferafts and lifeboats of abandoned vessels are prohibited.[19] According to the Commentary:[20]

> [t]he protection of these vessels against attack is based on the prohibition of attacking the shipwrecked which is a well established rule of customary international law.[21] The duty to protect the shipwrecked applies to all persons,[22] whether military or civilian, who are in danger at sea as a result of misfortune affecting them or the vessel or aircraft[23] carrying them.[24] It is irrelevant that the persons concerned may be fit and therefore possibly in a position to participate in hostilities again, for attacking them would be a war crime.[25] On the other

[17] *Ibid.*, p. 80.
[18] E. David, *Principes de droit des conflits armés* (2nd edn, Bruylant, Brussels, 1999), p. 231.
[19] *San Remo Manual*, no. 47, p. 125. [20] *Ibid.*, no. 47.58, p. 136.
[21] See the judgements in *The Llandovery Castle* (German Reichsgericht) 1921, 16 AJIL 708, 1922; *The Peleus Case* [in UNWCC, *LRTWC*], vol. I, p. 1; the trials of Von Ruchteschell [in UNWCC, *LRTWC*], vol. IX, p. 82 and Moehle [in UNWCC, *LRTWC*], vol. IX, p. 75 . . . See also Arts. 12 and 18 GC II.
[22] GC II Art. 12 indicates that this rule applies to persons that are shipwrecked for any cause and includes forced landings at sea by and from aircraft.
[23] The protection of persons parachuting in distress is codified in Art. 42 of AP I.
[24] AP I Art. 8(b).
[25] See, for example, the judgment in the case of Karl-Heinz Moehle [in UNWCC, *LRTWC*], vol. IX, p. 75.

hand this protection ceases if they actually start committing hostile acts again.[26]

A more recent indication of the material elements of this offence may be seen in Art. 41(1) and (2) AP I, since those rules reaffirm Art. 23(c) of the 1907 Hague Regulations.[27] The provision reads as follows:

> 1. A person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack.
> 2. A person is 'hors de combat' if:
> (a) he is in the power of an adverse Party;
> (b) he clearly expresses an intention to surrender; or
> (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
> provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

These rules also reaffirm the provisions of the GC and reinforce Part II of AP I, which prohibit attacks directed against the wounded, sick and shipwrecked (Arts. 12 GC I, 12 GC II), as well as prisoners of war (Arts. 5, 13 GC III). As Solf has pointed out, '[u]nder customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless'.[28]

On this basis, a specific problem with regard to prisoners of war arose during the negotiations on Art. 41 AP I. It is described in the ICRC Commentary in the following terms:

> The essential problem concerned how to create a concrete link between the moment when an enemy soldier is no longer a combatant because he is *hors de combat*, and the moment when he becomes a prisoner of war because he has 'fallen into the power' of his adversary. This precise moment is not always easy to determine exactly. According to the text of 1929 (Article 1), the Convention only applied to persons 'captured' by the enemy, which might have led to the belief that they first should

[26] AP I Art. 8(b). The commission of acts of hostility will always deprive a protected vessel of its immunity; see para. 48(a) and the commentary thereto.
[27] W. A. Solf, 'Art. 41' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), p. 219.
[28] *Ibid.*, pp. 219 ff.

> have been taken into custody in order to be protected. The expression adopted in 1949, 'fallen into the power', seems to have a wider scope, but it remains subject to interpretation as regards the precise moment that this event takes place. The central question was to avoid any gap in this protection, whatever interpretation was followed. This question was finally resolved by an overlapping clause: Article 41 prohibits the attack on an enemy *hors de combat* from the moment that he is rendered *hors de combat* and with no time-limit, i.e., the provision even protects the prisoner of war whose security is dealt with in the Third Convention. In this way the enemy *hors de combat* is protected at whatever moment he is considered to have 'fallen into the power' of his adversary.
>
> Article 41 thus purposefully overlaps the Third Geneva Convention. It is a perfect illustration of the interrelation between Hague law and Geneva law.[29]

With respect to the change of terminology – 'killing or wounding' in Art. 23(c) of the 1907 Hague Regulations and 'to be made the object of attack' in Art. 41 AP I – the ICRC Commentary cites a report of the Working Group at the Diplomatic Conference:

> this change was designed to make clear that what was forbidden was the deliberate attack against persons 'hors de combat', not merely killing or injuring them as the incidental consequence of attacks not aimed at them 'per se'.[30]

Therefore, the accidental killing or wounding of such persons due to their presence among or in proximity to combatants actually engaged, by fire directed against the latter, is not unlawful.[31]

With regard to the change of 'enemy' in Art. 23(c) of the 1907 Hague Regulations into 'person' in Art. 41 AP I, the ICRC Commentary presumes:

> Perhaps it is because a person *hors de combat* can no longer be considered as an enemy that the Conference has also abandoned here the terminology of Article 23(c) of the Hague Regulations in favour of the word 'person', suggested during the second session of the Conference of Government Experts . . . Whatever the reason for this modification, there is no possible ambiguity in Article 41, paragraph 1. The rule protects both regular combatants and those combatants who are considered to be

[29] J. de Preux, 'Art. 41' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), nos. 1602 ff.

[30] *Ibid.*, no. 1605.

[31] Solf, 'Art. 41' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, pp. 219 ff.

> irregular, both those whose status seems unclear and ordinary civilians. There are no exceptions and respect for the rule is also imposed on the civilian population, who should, like the combatants, respect persons *hors de combat*.[32]

In addition to Art. 41 AP I, Art. 42 AP I is of particular interest. The latter contains a specific provision on parachutists in distress. This rule, which reads as follows,

> 1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
> 2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
> 3. Airborne troops are not protected by this Article.

confirms the above-cited *Back* case and covers situations in the air, i.e. when a person is incapable of defending or not involved in hostile acts.

NB: The British military manual defines the term 'at discretion' in Art. 23(c) of the 1907 Hague Regulations as meaning 'unconditionally'.[33]

Remarks concerning the mental element

In most of the above-cited post-Second World War trials, 'wilfully' constituted the mental element of the crime.[34]

In the *Dreierwalde* case the Court found that no crime would have been committed if the accused could have 'reasonably believed' that the prisoners of war were trying to escape. A mere 'subjective fear' of such an escape is not sufficient.[35]

Under AP I there is a difference between Art. 41(1) and Art. 85(3)(e). Art. 41(1) prohibits attacks against '[a] person *who is recognized or who, in the circumstances, should be recognized to be* hors de combat' (emphasis added). On the other hand, Art. 85(3)(e) indicates as a grave breach the fact of 'making a person the object of attack *in the knowledge* that he is *hors de combat*' (emphasis added).

[32] De Preux, 'Art. 41' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 1606.
[33] *The Law of War on Land being Part III of the Manual of Military Law* (HMSO, 1958), p. 43.
[34] The *Jaluit Atoll Case*, in UNWCC, *LRTWC*, vol. I, p. 72; 13 AD 286; *P. Back Case*, in UNWCC, *LRTWC*, vol. III, p. 60; 13 AD 254; *Schosser, Goldbrunner and Wilm Case*, in UNWCC, *LRTWC*, vol. III, p. 65; 13 AD 254; *K. Meyer Case*, in UNWCC, *LRTWC*, vol. IV, p. 31; 13 AD 332.
[35] *Dreierwalde Case*, in UNWCC, *LRTWC*, vol. I, pp. 82, 86.

Art. 8(2)(b)(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

Text adopted by the PrepCom

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

1. The perpetrator used a flag of truce.

2. The perpetrator made such use in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.

3. The perpetrator knew or should have known of the prohibited nature of such use.[39]

4. The conduct resulted in death or serious personal injury.

5. The perpetrator knew that the conduct could result in death or serious personal injury.

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

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

[39] This mental element recognizes the interplay between article 30 and article 32. The term 'prohibited nature' denotes illegality.

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

1. The perpetrator used a flag, insignia or uniform of the hostile party.

2. The perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.

3. The perpetrator knew or should have known of the prohibited nature of such use.[40]

4. The conduct resulted in death or serious personal injury.

5. The perpetrator knew that the conduct could result in death or serious personal injury.

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

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

[40] This mental element recognizes the interplay between article 30 and article 32. The term 'prohibited nature' denotes illegality.

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

1. The perpetrator used a flag, insignia or uniform of the United Nations.

2. The perpetrator made such use in a manner prohibited under the international law of armed conflict.

3. The perpetrator knew of the prohibited nature of such use.[41]

4. The conduct resulted in death or serious personal injury.

5. The perpetrator knew that the conduct could result in death or serious personal injury.

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

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

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

Article 8(2)(b)(vii)–4 War crime of improper use of the distinctive emblems of the Geneva Conventions

1. The perpetrator used the distinctive emblems of the Geneva Conventions.

2. The perpetrator made such use for combatant purposes[42] in a manner prohibited under the international law of armed conflict.

3. The perpetrator knew or should have known of the prohibited nature of such use.[43]

4. The conduct resulted in death or serious personal injury.

5. The perpetrator knew that the conduct could result in death or serious personal injury.

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

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

[42] 'Combatant purposes' in these circumstances means purposes directly related to hostilities and not including medical, religious or similar activities.

[43] This mental element recognizes the interplay between article 30 and article 32. The term 'prohibited nature' denotes illegality.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

Intense discussion concerned the meaning of the term 'improper use'. While it was accepted in the end that 'improper use' in essence means 'use in violation of international law', it remained controversial which use of a particular sign, insignia, etc., would be improper. For example, it was perfectly possible to identify the key elements of the improper use of a flag of truce, namely 'to feign an intention to negotiate when there was no such intention'. 'To negotiate' was understood in the sense of 'entering into communication with the enemy'. However, this was not so easy to do in respect of other items. With regard to the use of a flag, insignia or uniform of a hostile party, no common understanding of the meaning of the use of such items 'while engaged in attack' could be reached. While some delegations had a very narrow reading, other delegations followed a very broad understanding of the term 'attack'. In order to solve the impasse the PrepCom decided to add the qualifier 'in a manner prohibited under the international law of armed conflict'. The relevant element now reads as follows: 'The perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.' This compromise leaves the contentious issue unresolved, and it will be up to the judges to interpret the meaning of 'while engaged in attack'. The phrase 'in a manner prohibited under the international law of armed conflict' therefore does not add a further requirement. It is meant to indicate that the phrase 'while engaged in attack' has to be interpreted within the established framework of international humanitarian law. The other situations covered by the corresponding provision of AP I (use 'in order to shield, favour, protect or impede military operations') were not included in the elements because several delegations expressed some doubts as to whether the use in such situations would be prohibited under customary international law.

The same conclusion applies to Element 2 of the war crime of improper use of the distinctive emblems of the Geneva Conventions. The addition of 'in a manner prohibited under the international law of armed conflict' creates the wrong impression that there might be uses for combatant purposes which are not prohibited under international humanitarian law. It is, however, intended to emphasise the fact that the term 'for combatant purposes' must be interpreted within the established framework of international humanitarian law. Taking into account the content of footnote 42, which defines combatant purposes, the addition seems to be even more superfluous.

Closely related to this issue was the question of the requisite mental element linked with the concept of 'improper use'. A few delegations insisted that knowledge of the improper use, i.e. use in a manner prohibited under the international law of armed conflict, would be required. In their view, a mistake of law should negate the mental element in every case. The majority of delegations rejected this view and argued that this approach would encourage not teaching the requirements of the law of armed conflict concerning, for example, the proper use of the distinctive emblem, thereby favouring ignorance of the law. Since detailed provisions of the law of armed conflict define proper uses, soldiers are under an obligation to know these details. As a compromise the PrepCom eventually accepted the suggestion that for variations 1, 2 and 4 of the crime the perpetrator would be guilty if he/she knew or should have known of the prohibited nature of the use. With respect to variation 3, full knowledge of the prohibited nature is required. This distinction was justified because, according to the view expressed by several States, the regulations on the use of the UN flag, insignia or uniform are laid down in several dispersed regulatory instruments and are not clear enough. Therefore, the general view was that a 'should-have-known' standard would be inappropriate.

Further substantive discussions concerned the question whether a mental element should be linked to the element 'The conduct resulted in death or serious personal injury', and, if so, what level of knowledge or intent would be required. One delegation stated that it was never intended that Art. 30 of the Statute would apply to this element or that any mental element would be linked to it. The perpetrator should be guilty when the result occurs independently of what he/she knew or could have known. Otherwise, this crime would be redundant because essentially it would be the crime of 'wilful killing' or 'murder'. Several delegations supported this view and argued that the Art. 30 threshold should not apply to the result of the conduct, i.e. that although death or serious injury must result from the conduct in order for this crime to come before the ICC, the result should not form part of an intent/knowledge requirement.

Other delegations stated that they did not feel that the application of Art. 30(2)(b) to the 'result' element in the crimes of improper use would create an insurmountable threshold, and that this interpretation would be consistent with the language of Art. 8 of the Statute.

As a compromise the PrepCom eventually agreed to include an Element 5 in all variations of this war crime, which was designed to lower the threshold of Art. 30 of the Statute by indicating that the perpetrator was aware that the result of death or injury *could* occur.

Legal basis of the war crime

The phrase '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' is derived to a large extent from Art. 23(f) Hague Regulations as well as Arts. 38, 39 AP I with respect to the perpetrator's conduct, and Art. 85(3)(f) AP I with respect to the result that renders the conduct a grave breach.

According to Art. 23 of the 1907 Hague Regulations,

> it is especially forbidden . . .
>
> (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention.

Art. 38 AP I reads as follows:

> 1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
>
> 2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

According to Art. 39 AP I,

> 1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
>
> 2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

Art. 85(3) AP I reads as follows:

> 3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, *and causing death or serious injury to body or health:* . . .
>
> (f) 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 recognized by the Conventions or this Protocol. [Emphasis added.]

Remarks concerning the material elements

The above-mentioned provisions of AP I may give some indication concerning the material elements. However, there is additional specific customary international law, in particular in the field of naval and air warfare. As Solf correctly points out, '[w]hether any particular use of an emblem, sign or signal is an "improper use" will depend not only on the terms of Arts. 37 and 38, but also on international custom and on the provisions of the Convention or Protocol applying to the particular emblem'.[1]

(1) Improper use of a flag of truce

Art. 38 AP I reads as follows:

> 1. . . . It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce . . .

Art. 37 on the prohibition of perfidy provides:

> 1. . . . Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
>
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender.

Comparing these provisions, one might conclude that not every misuse of the flag of truce constitutes perfidy. By choosing the formulation of Art. 23(f) of the 1907 Hague Regulations and thus referring to improper use, the ICC Statute covers a wider range of prohibited conduct: the prohibition of abuse of flags constitutes an all-embracing prohibition against any abuse of such signs.[2] However, under the ICC Statute, these types of conduct are only criminal if they result in death or serious personal injury.

[1] See W. A. Solf, 'Art. 38' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), pp. 209 ff. See also M. Bothe, 'Flags and Uniforms in War', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore and Tokyo, 1995), vol. II, p. 403.

[2] S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 202 with further references. See also Solf, 'Art. 38' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 209.

Arts. 32–4 of the Hague Regulations contain specific provisions with regard to flags of truce. In particular, they specify that it is a white flag that indicates the desire to enter into communication with the adverse party (and not necessarily surrender). Details on how the flag of truce is to be used are indicated in these articles.[3]

NB:

- The German military manual states:

> Misusing the flag of truce constitutes perfidy and is thus a violation of international law [Art. 23(f) Hague Regulations; Arts. 37(1)(a), 38(1) AP I]. The flag of truce is misused, for instance, if soldiers approach an enemy position under the protection of the flag of truce in order to attack.[4]

- The US military manual also gives some clarification:

> Flags of truce must not be used surreptitiously to obtain military information or merely to obtain time to effect a retreat or secure reinforcements or to feign a surrender in order to surprise an enemy.[5]

(2) Improper use of the flag or of the military insignia and uniform of the enemy

With regard to this conduct there are distinct sources dealing specifically with land warfare, naval warfare and air warfare.

[3] Art. 32:
A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.
Art. 33:
The commander to whom a parlementaire is sent is not in all cases obliged to receive him. He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.
In case of abuse, he has the right to detain the parlementaire temporarily.
Art. 34:
The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.
In this context, it should be noted, however, that the use of modern methods of communication could be covered by applying the same ideas *mutatis mutandis*.

[4] *Humanitarian Law in Armed Conflicts-Manual*, DSK VV207320067, The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, no. 230.

[5] US Department of the Army, Field Manual, FM 27-10, *The Law of Land Warfare* (1956), p. 23.

(a) Land warfare
According to Art. 39 AP I,

> 1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
>
> 2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
>
> 3. Nothing in this Article or in Article 37, paragraph 1(d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

In contrast to this provision, the crime defined under the ICC Statute covers only the improper use of the flag or of the military insignia and uniform of the enemy, and not of neutral or other States not Parties to the conflict.

In the *O. Skorzeny and Others* case the accused were charged with 'participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States'.[6] All were acquitted. However, no legal reasoning has been given.

According to the commentator, the Tribunal had to determine whether the wearing of enemy uniforms was or was not a legal ruse of war by distinguishing between the use of enemy uniforms in actual fighting and such use during operations other than actual fighting. He points out that on the use of enemy uniform during actual fighting the law is clear, and he quotes Lauterpacht: 'As regards the use of the national flag, the military insignia and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe.' The Defence, also quoting Lauterpacht, pleaded that the Brigade had had instructions to reach their objectives under cover of darkness and in enemy uniforms, but that as soon as they were detected, they were to discard their American uniforms and fight under their true colours.[7]

The commentator on this case emphasises that on the use of enemy uniforms other than in actual fighting, the law is uncertain. Some writers at the time held the view that until the actual fighting starts the combatants

[6] In UNWCC, *LRTWC*, vol. IX, p. 90. [7] *Ibid.*, p. 92.

may use enemy uniforms as a legitimate ruse of war; others thought that the use of enemy uniforms was illegal even before the actual attack. Art. 23(f) of the 1907 Hague Regulations does not carry the law on that point any further, since it does not generally prohibit the use of enemy uniforms but only the improper use, and leaves open the question as to which uses are proper and which are improper.[8]

Since the procedure applicable in this case did not require any finding from the Court other than guilty or not guilty, no safe conclusions can be drawn from the acquittal of all accused. The probable basis for acquittal was that, under the American manual at the time, they had not violated the law of war, in the absence of proof beyond a reasonable doubt that they had actually opened fire against American troops.[9]

However, this controversy seems to be decided by the rules contained in Art. 39 AP I, which refers to 'engaging in attacks or in order to shield, favour, protect or impede military operations'.[10] As indicated by the ICRC Commentary, '[t]he prohibition formulated in Article 39, "while engaging in attacks or in order to shield, favour, protect or impede military operations", includes the preparatory stage to the attack'.[11] However, it is not

[8] *Ibid.*, pp. 92 ff.

[9] *Ibid.*, p. 93. See also W. A. Solf, 'Art. 39' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 213, n. 2.

[10] Bothe, 'Flags and Uniforms in War', p. 403.

[11] J. de Preux, 'Art. 39' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 1575. For a more detailed description of the negotiating history, see *ibid.*, nos. 1573 ff. (footnotes omitted):

> Traditionally the use of the emblems of nationality of the enemy in combat was strictly prohibited by the laws of war. Lieber's code leave [*sic*] no room for doubt in this respect. However, Article 23(f) of the Hague Regulations of 1907 merely prohibited their 'improper use', which left ample room for controversy. The famous *Skorzeny* case could only further stir up feelings about this issue. The prohibition on 'improper use' is not a pure and simple prohibition; it is only a relative prohibition. It requires a definition of the term 'improper'. The first ICRC draft, presented to the Government Experts in 1972, retained in Article 33 the rule as it had been worded in The Hague, adding that the use of national emblems of the enemy is always forbidden in combat. The experts themselves were divided on this question. Some preferred a pure and simple prohibition, believing that the Hague formula had given rise to excessive misuse. At most, they considered that an exception might be made in situations such as those dealt with in the Third Convention (prisoners of war) and in occupied territory. Others maintained that only the use with the intention of directly facilitating acts of combat should be prohibited. There was a general opinion that there was undoubtedly a reciprocal military advantage in formulating a prohibition. Finally, the draft presented by the ICRC to the Diplomatic Conference proposed the prohibition of the use of the enemy flags, military insignia and uniforms in order to shield, favour or impede military operations (Article 37). The controversy arose again between those who wished to limit the prohibition to attacks, and those who favoured a more restrictive concept. The final wording is a compromise between these two positions in the sense that it responds to the concerns of the former as well as those of the latter.

clear whether such conduct is just a violation of international humanitarian law, which seems to be uncontroversial, or whether it amounts to a war crime, as attacking whilst wearing enemy uniform clearly does.[12]

In addition, it must be repeated that under the ICC Statute, improper use is only criminal if it results in death or serious personal injury.

NB:

- The British military manual states on the meaning of 'improper' the following:

  > [T]heir employment is forbidden during a combat, that is, the opening of fire whilst in the guise of the enemy. But there is no unanimity as to whether the uniform of the enemy may be worn and his flag displayed for the purpose of approach or withdrawal.[13]

- The US military manual indicates the following view:
  National flags or insignia may be used; what is prohibited is improper use: 'It is certainly forbidden to employ them during combat, but their use at other times is not forbidden.'[14]

(b) Naval warfare
As indicated above, AP I does not cover the law of naval warfare (Art. 39(3) AP I). The following rules described in the *San Remo Manual* reflect the status of customary international law in this field:

> Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag. . . .[15]

This text, which covers attacks, i.e., acts of violence committed against the adversary, whether these acts are offensive or defensive (Article 49 – Basic rule and field of application, paragraph 1), and all situations directly related to military operations, put an end to the long-standing uncertainty arising from both the imprecise text of The Hague, and from unclear customary law, as well as from the *Skorzeny* case. However, the fact remains that certain delegations at the Diplomatic Conference considered that any regulation which did not limit itself to attacks would go beyond existing law, although this opinion was not shared by the Conference.

[12] For examples of permitted use and limitations, see de Preux, 'Art. 39' in Sandoz, Swinarski and Zimmermann *Commentary on the Additional Protocols*, no. 1576, and Solf, 'Art. 39' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 214.

[13] *The Law of War on Land being Part III of the Manual of Military Law* (HMSO, 1958), p. 103.

[14] US Department of the Army, Field Manual, FM 27–10, p. 23.

[15] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), no. 110, p. 184. The complete rule reads as follows:
Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag and at all times from actively simulating the status of:
(a) hospital ships, small coastal rescue craft or medical transports;
(b) vessels on humanitarian missions;

NB:

The US *Commander's Handbook on the Law of Naval Operations* (NWP 1-14M) states:

> Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.[16]

The German military manual indicates:

> Ruses of war are permissible also in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags or military emblems (Art. 39(3) AP I). Before opening fire, however, the true flag shall always be displayed.[17]

(c) Air warfare

The following sources indicate the law specifically applicable to air warfare.

The *San Remo Manual* states:

> Military and auxiliary aircraft are prohibited at all times from feigning exempt, civilian or neutral status.[18]

The commentary points out that, contrary to warships, where the use of a false flag was prohibited only during an attack under the traditional law, aircraft have never been entitled to bear false markings.[19]

Art. 19 of the 1923 Hague Rules of Air Warfare confirms this view:

> The use of false external marks is forbidden.

(c) passenger vessels carrying civilian passengers;
(d) vessels protected by the United Nations flag;
(e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
(f) vessels entitled to be identified by the emblem of the red cross or red crescent; or
(g) vessels engaged in transporting cultural property under special protection.

The latter actions by warships, although not necessarily qualifying as perfidy, are prohibited under the law of armed conflict. It should be noted that in order to commit a violation, the warship must actively endeavour to establish its identity as one of the vessels mentioned under this paragraph. The list of vessels included in this paragraph is exhaustive, *ibid.*, nos. 110.2 ff.

[16] *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M), (1995), p. 12-1 (12.5.1).

[17] *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, no. 1018.

[18] *San Remo Manual*, no. 109, p. 184.

[19] *Ibid.*, 'Preliminary remarks', p. 184.

NB:

With regard to neutral flags, insignia and uniforms, the US *Commander's Handbook on the Law of Naval Operations* (NWP 1-14M) holds the view that:

> Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited[20]

and with regard to enemy flags, insignia and uniforms it states that

> The use in combat of enemy marking by belligerent military aircraft is forbidden.[21]

A commentary on that rule indicates:

> This rule may be explained by the fact that an aircraft, once airborne, is generally unable to change its markings prior to actual attack as could a warship. Additionally, the speed with which an aircraft can approach a target (in comparison with warships) would render ineffective any attempt to display true markings at the instant of attack.[22]

(3) Improper use of the flag or of the military insignia and uniform of the United Nations

Art. 38 AP I reads as follows:

> . . . 2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Art. 37 AP I on the prohibition of perfidy specifically states:

> 1. . . . Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
> . . .
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations . . .

Comparing these provisions, one might conclude that not every misuse of the flag or of the military insignia and uniform of the United Nations

[20] *The Commander's Handbook on the Law of Naval Operations*, p. 12-1 (12.3.2).
[21] *Ibid.* (12.5.2).
[22] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (NWP 9[Rev. A]/FMFM 1-10), 1989, p. 12-8, n. 14.

constitutes perfidy. By choosing the formulation of Art. 23(f) of the 1907 Hague Regulations and thus referring to improper use, the ICC Statute covers a wider range of prohibited conduct: the prohibition of abuse of the flag or of the military insignia and uniform of the United Nations constitutes an all-embracing prohibition against any abuse of such signs.[23] However, it has to be clarified whether 'improper use' is identical with a use not authorised by the UN as mentioned in Art. 38 AP I.

With regard to naval warfare, the following rule described in the *San Remo Manual* reflects customary international law in this field:

> Warships and auxiliary vessels, however, are prohibited . . . at all times from actively simulating the status of:
>
> . . .
>
> (d) vessels protected by the United Nations flag; . . .[24]

As stated above, under the ICC Statute, these types of conduct are criminal only if they result in death or serious personal injury.

(4) Improper use of the distinctive emblems of the Geneva Conventions

Art. 38 AP I reads as follows:

> 1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol . . .

In the *H. Hagendorf* case the accused was charged with the 'wrongful use of the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem'.[25] For the *actus reus* the commentator on this case referred to Art. 23(f) of the 1907 Hague Regulations. The weapon was used in violation of Arts. 7 and 8 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[26] The Court ascertained the improper use of arms by the accused under the shield of the Red Cross insignia. The commentator evaluated the judgment as follows:

> It is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems and by the Conventions, in the absence of an attack upon them. This constituted unlawful belligerency, and a criminal course of action.

[23] See Solf, 'Art. 38' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 209.
[24] *San Remo Manual*, no. 110, pp. 184 ff.
[25] In UNWCC, *LRTWC*, vol. XIII, p. 146; 13 AD 333.
[26] UNWCC, *LRTWC*, vol. XIII, p. 147.

> It should be observed that not every violation of the Conventions concerning the use of the Red Cross insignia would of necessity constitute a punishable act. The need for maintaining a distinction between mere violations of rules of warfare, on the one hand, and war crimes on the other – the latter being the only ones to entail penal responsibility and sanctions – is urged by authoritative writers, such as Professor Lauterpacht. In the opinion of the learned author war crimes are [such] violations of the laws of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity. (H. Lauterpacht, The Law of Nations and the Punishment of War Crimes, British Year Book of International Law, 1944, pp. 77–78). Violations not falling within this description would remain outside the sphere of war crimes and consequently of acts liable to penal proceedings.[27]

This reasoning shows that not every misuse of the distinctive emblems of the Geneva Conventions amounts to a war crime, but only the abusive use.

With regard to the law of naval warfare, the following rule described in the *San Remo Manual* reflects customary international law in this field:

> Warships and auxiliary vessels, however, are prohibited . . . at all times from actively simulating the status of:
> (a) hospital ships, small coastal rescue craft or medical transports;
> (b) vessels on humanitarian missions; . . .
> (f) vessels entitled to be identified by the emblem of the red cross or red crescent.[28]

NB:

- The US military manual gives some clarification on the improper use of the distinctive emblem of the GC:

> The following are examples of the improper use of the emblem: Using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants;

[27] *Ibid.*, p. 148. [28] *San Remo Manual*, no. 110, pp. 184 ff.

> displaying the emblem on vehicles containing ammunition or other nonmedical stores; and in general using it for cloaking acts of hostility.[29]

- With regard to naval warfare, the German military manual states that:

> it is prohibited to misuse the emblem of the Red Cross or to give a ship, in any other way, the appearance of a hospital ship for the purpose of camouflage. It is also prohibited to make improper use of other distinctive signs equal in status with that of the Red Cross (Art. 45 GC II; Art. 37 AP I). . .[30]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. Art. 85(3)(f) AP I requires a wilful conduct.

[29] US Department of the Army, Field Manual, FM 27-10, p. 23.
[30] *Humanitarian Law in Armed Conflicts – Manual*, no. 1019.

Art. 8(2)(b)(viii) – The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

Text adopted by the PrepCom

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

1. The perpetrator:

(a) Transferred,[44] directly or indirectly, parts of its own population into the territory it occupies; or

(b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

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

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

[44] The term 'transfer' needs to be interpreted in accordance with the relevant provisions of international humanitarian law.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The negotiations concerning this war crime proved to be very difficult. The offence as contained in this provision consists of two alternatives:

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

The main points of controversy in the context of the first alternative were the following:

- Is this crime limited to forcible transfers, although the Statute uses the formulation 'transfer, directly or indirectly'?
- Is this crime limited to transfer of population on a large scale?
- Must the economic situation of the local population be worsened and their separate identity be endangered by the transfer?

- What link must there be between the perpetrator and the Occupying Power?

Eventually the PrepCom decided not to solve these questions in the EOC document. Most delegations preferred to stay as close as possible to the wording of the Statute and therefore favoured an initial text proposal by Costa Rica, Hungary and Switzerland[1]. The addition of a footnote to that proposal, linked to the term 'transferred', allowed the adoption of the text. The footnote emphasises that '[t]he term "transfer" needs to be interpreted in accordance with the relevant provisions of international humanitarian law'. The PrepCom consciously left the interpretation to the judges.

The proposal by Costa Rica, Hungary and Switzerland required that the perpetrator 'transferred, directly or indirectly, parts of its own population into the territory it occupies'. This element omitted the words 'by the Occupying Power' contained in the Statute. Instead, the words 'its own population' refer back to the person of the perpetrator only, without clarifying a link to the Occupying Power. In order to solve this issue, Switzerland orally amended its text proposal by suggesting '[t]he perpetrator transferred . . . parts of the population of the occupying power . . . '. This suggestion, however, was not included in the final text. The PrepCom decided to stick with the formulation in the original Costa Rican/Hungarian/Swiss proposal. The result appears therefore to be ambiguous.

Contrary to the statutory language, the proposal by Costa Rica, Hungary and Switzerland, as well as the final text, also omitted the term 'civilian' in front of the term 'population'. Given that the substantive discussions were held among some interested delegations, it is not clear whether the omission was a conscious decision, and if so for what reason, or a mere drafting error.

The element for the second alternative of the war crime is a mere reproduction of statutory language. It was not harmonised with the elements of Art. 8(2)(a)(vii)-1, despite the fact that this alternative of Art. 8(2)(b)(viii) is a mere repetition of that crime.

Legal basis of the war crime

The crime 'the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or

[1] PCNICC/1999/WGEC/DP.8 of 19 July 1999.

the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory' is directly derived from Art. 85(4)(a) AP I, with two exceptions: the words 'directly or indirectly' are inserted and the reference to Art. 49 GC IV is omitted.

General remarks

As indicated above, the offence as defined in Art. 8(2)(b)(viii) of the ICC Statute deals with two situations:

- the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies.

  This part of Art. 8(2)(b)(viii) ICC Statute criminalises a violation of Art. 49(6) GC IV ('The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies') and is not included in Art. 8(2)(a)(vii) ICC Statute.

- the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

  According to the ICRC Commentary on AP I, this particular offence as defined in Art. 85(4)(a) AP I:

  > is merely a repetition of Article 147 of the Fourth Convention, and Article 49 of that Convention, to which reference is made, continues to apply unchanged.

  The wording of Art. 49(1) GC IV ('Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive') prohibits explicitly the deportation or transfer outside the occupied territory. However, the prohibition seems not to be limited to these situations. With respect to displacements inside the occupied territory, the ICRC Commentary states that:

  > Article 49 of the Fourth Convention prohibits all forcible transfers, as well as deportations of protected persons from occupied territory (paragraph 1).[2]

  and

[2] B. Zimmermann, 'Art. 85' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3502.

> by using the word 'nevertheless', paragraph 2 [of Art. 49 GC IV] clearly shows that paragraph 1 also prohibits forcible transfers within occupied territory. On the basis of Commentary IV, pp. 278–280 and 599 it may be concluded that such a forcible transfer was already a grave breach within the meaning of Article 147; W. A. Solf and E. R. Cummings, op. cit., pp. 232–233, hold this view; E. J. Roucounas, op. cit., p. 116, holds the opposite view.[3]

The formulation chosen in Art. 85(4)(a) AP I, and thus in Art. 8(2)(b)(viii) ICC Statute, clarifies explicitly that both deportation or transfer outside the occupied territory and displacements inside the occupied territory constitute a war crime.[4]

Therefore, this part of Art. 8(2)(b)(viii) ICC Statute may be seen as a mere repetition of Art. 8(2)(a)(vii) – Unlawful deportation or transfer.

To date there have been no findings on the elements of this crime by the ad hoc Tribunals.

The question of deportation and forcible transfer is dealt with in Arts. 45 and 49 GC IV. Art. 147 GC IV qualifies the offence 'unlawful deportation or transfer of a civilian' as a grave breach. This offence has been reaffirmed and modified in AP I in Art. 85(4)(a). The conditions set forth in these provisions can be an indication for the elements of this crime.[5]

Remarks concerning the material elements

(1) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies

In comparison to Art. 85(4)(a) AP I, the words 'indirectly or directly' are added to the offence described in the ICC Statute. The inclusion of 'indirect' in the Statute seems to indicate that the population of the Occupying Power need not necessarily be physically forced or otherwise compelled. Therefore, it appears that acts of inducement or facilitation may fall under this war crime. The fact that the transfer must be carried out 'by the Occupying Power' appears to require government involvement. With respect

[3] *Ibid.*, n. 28.

[4] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, pp. 15 ff.; ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E)(I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, para. 75.

[5] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 599, and R. Wolfrum, 'Enforcement of International Humanitarian Law' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 534, state that the war crime contained in Art. 147 GC IV refers to breaches of Arts. 45 and 49 GC IV.

to individual criminal responsibility this offence seems to presuppose that the conduct of the perpetrator must be imputable to the Occupying Power. Therefore, individuals acting in their private capacity would not be criminally responsible.

The phrase 'parts of its own civilian population' seems to require the transfer of a certain number of individuals as a constituent element of this offence.

(2) The deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

As indicated above, this part of Art. 8(2)(b)(viii) ICC Statute is a mere repetition of Art. 8(2)(a)(vii). Thus, the case law quoted and the conclusions stated under the latter section also apply to this offence. In sum, the following points are the main elements:

- The wording of the offence refers only to 'population of the occupied territory'. Therefore, the nationality of the victims seems to be of no relevance. The phrase 'parts of the population' appears to require that the deportation or transfer must include more than just one person.
- The displacement of all or parts of the population of the occupied territory is lawful only under the conditions set out in Art. 49(2) GC IV ('Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.')

  Therefore, only the security of the population of the occupied territory or imperative military reasons can justify total or partial evacuation of an occupied area.[6]

  With respect to the security interests of the evacuated population, the ICRC Commentary indicates:

> If . . . an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power

[6] See ICTY, Judgment, *The Prosecutor* v. *Radislav Krstic*, IT-98-33-T, paras. 524 ff.; ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E)(I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, para. 77.

> has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge.[7]

With respect to evacuations justified on the basis of imperative military reasons, the ICRC Commentary refers to situations 'when the presence of protected persons in an area hampers military operations' and overriding military considerations make the evacuation imperative.[8] Evacuations permitted under these circumstances may only take place within the bounds of the occupied territory, except when for material reasons this is impossible.

- The fact that Art. 49(2) GC IV requires that protected persons be transferred back to their homes as soon as hostilities in the area in question have ceased shows the temporary character of a permitted evacuation.[9]
- An additional element for determining the lawfulness of an evacuation may be found in Art. 49(3) GC IV. In accordance with that provision:

> [t]he Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.[10]

NB: A special ruling for children is contained in Art. 78 AP I:

> 1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom

[7] Pictet, *Commentary IV*, Art. 147, p. 280.

[8] *Ibid.* See also ICTY, Judgment, *The Prosecutor* v. *Radislav Krstic*, IT-98-33-T, para. 426.

[9] ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E)(I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, para. 78.

[10] This element was also stressed in the *A. Krupp* case by the US Military Tribunal which adopted the following statement of Judge Phillips in his concurring opinion in the *Milch Trial* (in UNWCC, *LRTWC*, vol. VII, pp. 45-6, 55-6; 14 AD 299 at 302), which was based on the interpretation of Control Council Law No. 10: '[D]eportation becomes illegal . . . whenever *generally recognized standards of decency and humanity are disregarded*', *A. Krupp Trial*, in UNWCC, *LRTWC*, vol. X, pp. 144 ff. (emphasis added); 15 AD 620 at 626.

> are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.
>
> 2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

Remarks concerning the mental element

With respect to the mental element, in several post-Second World War trials dealing with deportation, the accused were found guilty on the basis that they committed the offences 'wilfully and knowingly'.[11]

The ICTY Prosecution stated that:

> as part of the *mens rea* requirement, the accused or a subordinate must have been aware of, or wilfully blind to, the facts that would render the deportation or transfer unlawful.[12]

In another case it defined the mental element as:

> (ii) the unlawful deportation or transfer was committed wilfully.[13]

It seems that there are no additional requirements for the mental element besides those mentioned in Art. 30 of the ICC Statute.

[11] *Flick and Five Others Case*, in UNWCC, *LRTWC*, vol. IX, p. 3; 14 AD 266 at 269; *IG Farben Trial*, in UNWCC, *LRTWC*, vol. X, pp. 4 ff.; 15 AD 668; *A. Krupp Trial*, in UNWCC, *LRTWC*, pp. 74 ff; 15 AD 620.

[12] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 16.

[13] ICTY, Prosecutor's Pre-trial Brief Pursuant to Rule 65 ter (E)(I), *The Prosecutor* v. *Blagoje Simic and Others*, IT-95-9-PT, para. 72.

Art. 8(2)(b)(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

Text adopted by the PrepCom

War crime of attacking protected objects[45]

1. The perpetrator directed an attack.

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

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

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

[45] 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.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

As in the case of all war crimes involving certain unlawful attacks the PrepCom discussed whether this war crime requires as a result actual damage to the objects mentioned. The majority of delegations were against a result requirement and this was eventually accepted. The material elements largely reproduce statutory language and were not controversial. The only addition to the statutory language is contained in a footnote, which is largely built upon the substance of Art. 59(3) AP I. Given that Art. 59 AP I applies to non-defended localities, some delegations questioned the relevance of that provision for this war crime. Nevertheless, the PrepCom eventually agreed to include the footnote. It was emphasised that the insertion of this footnote would not allow for an *a contrario* conclusion that with regard to other crimes where the footnote is not included, the

presence of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order renders a locality a military objective. On the basis of this understanding the footnote was acceptable.

With regard to the interpretation of 'intentionally directing attacks against', see comments made under section 'Art. 8(2)(b)(i)', subsection '*Travaux préparatoires*/Understandings of the PrepCom'.

Legal basis of the war crime

The term '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' is derived to a large extent from Arts. 27 and 56 of the 1907 Hague Regulations and numerous provisions of the GC on the protection of hospitals and places where the sick and wounded are collected.

Remarks concerning the material element

In its judgment in the *Kordic and Cerkez* case the ICTY did not explicitly define the material elements. It did, however, make reference to Art. 27 of the 1907 Hague Regulations, Art. 53 AP I and Art. 1 of the 1954 Cultural Property Convention, as well as to the Roerich Pact.[1] In addition, it considered this crime to be a *lex specialis* with regard to attacks against civilian objects.[2]

Attack

The term 'attack' is defined in Art. 49(1) AP I and 'means acts of violence against the adversary, whether in offence or in defence'.

As pointed out above, the concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms 'offence' and 'defence' must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

Buildings dedicated to religion, education, art, science or charitable purposes, historic monuments

(a) General protection

The ICTY Prosecution defined the elements of the offence 'destruction or wilful damage to institutions dedicated to religion or education' under the

[1] ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 359 ff.
[2] *Ibid.*, para. 361.

ICTY Statute in the following terms:

> 1. Institutions dedicated to religion or education were destroyed;
> . . .
> 3. The institutions destroyed or wilfully damaged were protected under international humanitarian law . . . [3]

In one post-Second World War trial – the *Weizsäcker and Others* case – the Military Tribunal referred to Art. 56(2) of the 1907 Hague Regulations:

> All seizure of, destruction or wilful damage done to institutions of this character [religious and charitable], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[4]

This general rule, which must be read in connection with Art. 27 of the Hague Regulations:

> In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.
>
> It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

is still valid under customary international law. However, a number of rules giving specific protection to specific objects have developed since then.

(b) Specific protections

• *Cultural or religious objects*

The following provision of AP I contains specific rules on historic monuments, works of art or places of worship:

Art. 53:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is

[3] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

[4] In 16 AD 344 at 357.

prohibited:

(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;[5]

(b) to use such objects in support of the military effort;

(c) to make such objects the object of reprisals.

As pointed out in the ICRC Commentary on this provision,

> [t]he protection laid down in this article is accorded 'without prejudice' to the provisions of other relevant international instruments. From the beginning of the discussions regarding Article 53 it was agreed that there was no need to revise the existing rules on the subject, but that the protection and respect for cultural objects should be confirmed. It was therefore necessary to state at the beginning of the article that it did not modify the relevant existing instruments. For example, this means that in case of a contradiction between this article and a rule of the 1954 Convention the latter is applicable, though of course only insofar as the Parties concerned are bound by that Convention. If one of the Parties is not bound by the Convention, Article 53 applies. Moreover, Article 53 applies even if all the Parties concerned are bound by another international instrument insofar as it supplements the rules of that instrument.
>
> The Diplomatic Conference adopted Resolution 20, which stresses the fundamental importance of the Hague Convention of 1954, and states that the adoption of Article 53 will not detract from the application of that Convention in any way; moreover, it urges States which have not yet done so to become Parties to it.[6]

[5] With regard to the phrase 'cultural or spiritual heritage of peoples' the ICRC Commentary states:

> It was stated that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.
>
> In general the adjective 'cultural' applies to historic monuments and works of art, while the adjective 'spiritual' applies to places of worship. However, this should not stop a temple from being attributed with a cultural value, or a historic monument or work of art from having a spiritual value. The discussions in the Diplomatic Conference confirmed this. However, whatever the case may be, the expression remains rather subjective. In case of doubt, reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is.
>
> Thus all objects of sufficient artistic or religious importance to constitute the heritage of peoples are protected.

C. F. Wenger, 'Art. 53' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), nos. 2064 ff.

[6] *Ibid.*, nos. 2046 ff.

With regard to other instruments, especially the above-cited general rules as contained in the Hague Regulations, the Commentary points out:

> Even for States Parties to the Hague Convention of 1954 these provisions remain applicable to cultural property not covered by the more recent Convention . . .[7]

CULTURAL PROPERTY

The Hague Convention of 1954 for the Protection of Cultural Property, which defines cultural property in Art. 1 as follows:

> For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:
>
> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
>
> (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments'

may be a further indication, especially Art. 4, which reads as follows:

> 1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.
>
> 2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

[7] *Ibid.*, no. 2060.

NB: The recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property[8] explains further the latter paragraph as follows:

> Article 6 Respect for cultural property
>
> With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:
>
> (a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
>
> i. that cultural property has, by its function, been made into a military objective; and
>
> ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
>
> (b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;
>
> ...

A special case is dealt with in Article 12:

> Immunity of cultural property under enhanced protection
>
> The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.

The AP I and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property contain specific criminality clauses: Art. 85(4)(d) AP I states that

> making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction

[8] Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict adopted on 26 March 1999 (The Hague).

> thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b) [to use such objects in support of the military actions], and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives

is a grave breach. Thereby, it goes beyond the requirements of the 'normal' war crime derived from the Hague Regulations, making it a particularly serious war crime.

Art. 15(1) of the Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property defines serious violations of this Protocol as follows:

> 1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
> a) making cultural property under enhanced protection the object of attack;
> b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
> c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
> d) making cultural property protected under the Convention and this Protocol the object of attack;
> e) theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention.

Paras. (a)–(c) are in effect defined as grave breaches, since they result in mandatory universal jurisdiction (see Art. 16(1) of the Protocol). Paras. (b) and (c) were seen by negotiators as new treaty rules, while para. (a) reflects Art. 85(4) AP I. Paras. (d) and (e) were drafted as normal war crimes, reflecting existing customary international law.

RELIGIOUS OBJECTS

Religious objects may fall under the above-cited protections defined in AP I or the Hague Convention of 1954 on the Protection of Cultural Property if they 'constitute the cultural or spiritual heritage of peoples' (AP I) or fulfil the conditions set forth in Art. 1 of the Hague Conventions. However, it has to be indicated that they remain protected under customary international law without these additional qualifications in accordance with the general rules derived from the Hague Regulations.

OBJECTS DEDICATED TO EDUCATION AND SCIENCE

These objects may also fall under the above-cited protections defined in AP I or the Hague Convention of 1954 on the Protection of Cultural Property if they 'constitute the cultural or spiritual heritage of peoples' (AP I) or fulfil the conditions set forth in Art. 1 of the 1954 Hague Convention. However, if they do not fall under those definitions, they are protected under customary international law in accordance with the general rules derived from the Hague Regulations and the rules on the protection of civilian objects.

In the *Kordic and Cerkez* case the ICTY held:

> The Trial Chamber notes that educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples (in the sense of Art. 1 of the 1954 Hague Convention) in that they are without exception centres of learning, arts, and sciences, with their valuable collections of books and works of arts and science. The Trial Chamber also notes one international treaty which requires respect and protection to be accorded to educational institutions in time of peace as well as in war (i.e. the Roerich Pact).[9]

Hospitals and places where the sick and wounded are collected

The following rules accord protection for hospitals and places where the sick and wounded are collected (rules on hospital ships and aircraft are included on the assumption that the ordinary meaning of the term 'place' could cover those objects):

Art. 19 GC I:

> Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict . . . [10]

Art. 20 GC I:

> Hospital ships entitled to the protection of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, shall not be attacked from the land.

Art. 21 GC I:

> The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to

[9] ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 360.
[10] See also Art. 21 AP I.

commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

Art. 22 GC I:

The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19:

(1) That the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge.
(2) That in the absence of armed orderlies, the unit or establishment is protected by a picket or by sentries or by an escort.
(3) That small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in the unit or establishment.
(4) That personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof.
(5) That the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.

Art. 23 GC I:

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war . . .

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention,[11] with such amendments as they may consider necessary.

[11] Annex I. Draft Agreement Relating to Hospital Zones and Localities:
Art. 11:
In no circumstances may hospital zones be the object of attack. They shall be protected and respected at all times by the Parties to the conflict.
Art. 4:
Hospital zones shall fulfil the following conditions:
(a) They shall comprise only a small part of the territory governed by the Power which has established them.
(b) They shall be thinly populated in relation to the possibilities of accommodation.
(c) They shall be far removed and free from all military objectives, or large industrial or administrative establishments.

Art. 14 GC IV and Annex I to that Convention establish a similar regime for hospital and safety zones and localities.

Art. 22 GC II:

> Military hospital ships, that is to say, ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them, may in no circumstances be attacked . . . on condition that their names and descriptions have been notified to the Parties to the conflict ten days before those ships are employed.[12]

Art. 23 GC II:

> Establishments ashore entitled to the protection of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 shall be protected from bombardment or attack from the sea.

Art. 34 GC II:

> The protection to which hospital ships and sick-bays are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded . . .

Art. 35 GC II:

> The following conditions shall not be considered as depriving hospital ships or sick-bays of vessels of the protection due to them:
>
> (1) The fact that the crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded.
>
> (2) The presence on board of apparatus exclusively intended to facilitate navigation or communication.

(d) They shall not be situated in areas which, according to every probability, may become important for the conduct of the war.

Art. 5:

Hospital zones shall be subject to the following obligations:

(a) The lines of communication and means of transport which they possess shall not be used for the transport of military personnel or material, even in transit.

(b) They shall in no case be defended by military means.

[12] Arts. 24-7 give similar protection to other types of hospital ships, their lifeboats and the coastal rescue craft.

(3) The discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service.
(4) The fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians.
(5) The transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.

Art. 18 GC IV:

> Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.[13]

Art. 19 GC IV:

> The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.
>
> The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

Art. 12 AP I – Protection of medical units[14]

1. Medical units shall be respected and protected at all times and shall not be the object of attack.
2. Paragraph 1 shall apply to civilian medical units, provided that they:
(a) belong to one of the Parties to the conflict;

[13] See also Art. 56(2) GC IV.

[14] Art. 8(e) AP I contains the following definition:
'Medical units' means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.
The principal aim of Art. 12 AP I is to extend to all civilian medical units the protection which hitherto applied to all military medical units on the one hand (cf. Art. 19 GC I), but only to civilian hospitals on the other (cf. Art. 18 GC IV).

(b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
(c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.

4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

Art. 13 AP I – Discontinuance of protection of civilian medical units

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:
(a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
(b) that the unit is guarded by a picket or by sentries or by an escort;
(c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
(d) that members of the armed forces or other combatants are in the unit for medical reasons.

Arts. 24–31 AP I contain the modern law on the protection of medical aircraft.

In one post-Second World War trial – the *Kurt Student* case – the accused was charged with bombing 'a hospital which was marked with a Red Cross'.[15] According to the commentator of the UNWCC, the acts alleged by the charges were clear breaches of international law. Since the Tribunal never specifically quoted the precise provisions violated, the commentator set out the relevant articles of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field: Arts. 6, 9, 19, 20, 22.[16] Art. 6 in particular describes the *actus reus*:

[15] In UNWCC, *LRTWC*, vol. IV, p. 118; 13 AD 296. [16] UNWCC, *LRTWC*, vol. IV, pp. 120 ff.

'Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents.'

Loss of protection

The above-mentioned objects are only protected provided they are not military objectives as defined in Art. 52(2) AP I (see section 'Art. 8(2)(b)(v)', subsection 'Legal basis of the war crime').

Moreover, as provided in Art. 52(3) AP I,

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

However, it should be noted that in relation to medical and cultural objects, precise indications are given as to when those objects lose their protection,[17] and further conditions are stipulated before they may be attacked.[18]

Remarks concerning the mental element

The ICTY, in the *Blaskic* case, defined the mental element of the offence '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' as described in Art. 3(d) of the ICTY Statute as follows:

> The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts.[19]

The ICTY did not indicate why it chose the term 'intentionally' instead of 'wilfully' as may be derived from the ICTY Statute.

[17] For cultural property see Art. 4(2) of the 1954 Hague Convention in connection with Art. 6(a) and (b) of the Second Protocol thereto and Art. 13 of that Protocol; for hospitals and places where the sick and wounded are collected, see Arts. 21 first sentence, 22 GC I; 34 first sentence, 35 GC II; 19(1) first sentence and (2) GC IV; 13(1) first sentence and (2) AP I. With regard to hospital ships, see also *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), nos. 48, 49, pp. 136–9. With regard to medical aircraft, see also *San Remo Manual*, nos. 54, 57, 58, pp. 143–6.

[18] For cultural property, see Art. 4(2) of the 1954 Hague Convention in connection with Art. 6(c) and (d) of the Second Protocol thereto and Art. 13 of that Protocol; for hospitals and places where the sick and wounded are collected, see Arts. 21 second sentence GC I; 34 second sentence GC II; 19(1) second sentence GC IV; 13(1) second sentence AP I. With regard to hospital ships, see also *San Remo Manual*, nos. 50, 51, pp. 139–41.

[19] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 185; 122 ILR 1 at 73.

In the *Kordic and Cerkez* case, it held

> The destruction or damage is committed wilfully and the accused intends by his acts to cause the destruction or damage of institutions dedicated to religion or education and not used for a military purpose.[20]

The ICTY Prosecution defined the mental element of the offence 'destruction or wilful[21] damage to institutions dedicated to religion or education' in the following terms:

> The destruction or damage was committed wilfully.[22]

[20] ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 361.

[21] In the *Simic and Others* case the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

[22] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

Art. 8(2)(b)(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

This war crime consists of two alternatives – the subjecting to physical mutilation and the subjecting to medical or scientific experiments – which will be discussed separately.

(1) PHYSICAL MUTILATION

Text adopted by the PrepCom

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

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

2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.

3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.[46]

4. Such person or persons were in the power of an adverse party.

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The elements essentially reproduce statutory language. Certain clarifications from Art. 11 AP I, the origin of this war crime, were

added:

- In Element 2, on the basis of Art. 11(4) AP I, the words 'physical or mental' were added in front of the term 'health'.
- The first sentence of the footnote is derived from Art. 11(2) AP I, the second sentence from Art. 11(1) AP I.

Contrary to the other alternative of Art. 8(2)(b)(x) – medical or scientific experiments – the words 'or integrity', also contained in Art. 11(4) AP I, were not added after 'health' in Element 2. It was argued by a number of delegations that 'integrity' in Art. 11(4) AP I was relevant only to medical or scientific experiments, not to physical mutilation.

Some delegations wanted to specify the term 'mutilation'. The PrepCom therefore decided to explain the notion by adding certain examples of mutilation in Element 1, namely permanently disfiguring the person or disabling or removing an organ or appendage. The words 'in particular' were included in order to highlight that these were only illustrative examples of mutilation.

Legal basis of the war crime

The offence 'physical mutilation' is derived in its essence from Art. 11(2)(a) in connection with Art. 11(4) AP I.

Remarks concerning the material elements

Physical mutilation

The term 'physical mutilation' or, in some instances, 'mutilation' is used in several provisions of the GC (Arts. 13(1) GC III, 32 GC IV, common Art. 3) and in the AP (Arts. 11(2)(a), 75(2)(a)(iv) AP I, 4(2)(b) AP II). No further definition is given. The ICRC Commentaries on these provisions consider this term as more or less self-explanatory.[1]

The verb 'to mutilate' is defined in the *Cambridge International Dictionary of English* (1995) as to 'damage severely, esp. by violently removing a part' (p. 933) and in the *Oxford Advanced Learner's Dictionary* (1992) as to 'injure, damage or disfigure somebody by breaking, tearing or cutting off a necessary part' (p. 819). These definitions refer to an act of physical violence. Therefore, the terms 'physical mutilation' in Art. 8(2)(b)(x) and 'mutilation' in Art. 8(2)(c)(i) of the ICC Statute must be understood to have synonymous meanings.

[1] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 32, pp. 233 ff.: ' "Corporal punishment and mutilation". – These expressions are sufficiently clear not to need lengthy comment. Like torture, they are covered by the general idea of "physical suffering". Mutilation, a particularly reprehensible and heinous form of attack on the human person . . . '.

The Commentary on the AP mentions in particular amputations and injury to limbs as examples of physical mutilations.[2] With respect to 'justified' mutilation it states:

> However, there are some logical exceptions if the procedures are 'justified in conformity with the conditions provided for in paragraph 1 [of Art. 11 AP I]', i.e., essentially, as we have seen, if they are conducive to improving the state of health of the person concerned.
>
> In this sense it is clear that some mutilations may be indispensable, such as the amputation of a gangrenous limb.[3]

NB: There are no indications that the term 'mutilation' as used for offences committed in an international armed conflict has a different meaning than in the context of a non-international armed conflict, and by the same token in the case of Art. 8(2)(c)(i) and (e)(xi) ICC Statute.

Person in the power of an adverse party

The personal field of application of this offence may be determined in accordance with Art. 11 AP I, which uses the same terminology. According to the ICRC Commentary, the concept of 'person in the power of an adverse party' encompasses mainly

> prisoners of war, civilian internees, persons who have been refused authorization to leave the territory of this adverse Party, and even all persons belonging to a Party to the conflict who simply find themselves in the territory of the adverse Party. The term 'territory of the adverse Party' is used here to mean the territory in which this Party exercises public authority de facto. However, enemy aliens need not necessarily have anything to do directly with the authorities: the simple fact of being in the territory of the adverse Party, as defined above, implies that one is 'in the power' of the latter. In other words, as specified in the commentary on the fourth Convention, the expression 'in the power' should not necessarily be taken in the literal sense; it simply signifies that the person is in the territory under control of the Power in question. Finally, the inhabitants of territory occupied by the adverse Party are also in the power of this adverse Party.[4]

[2] Y. Sandoz, 'Art. 11' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 478.

[3] *Ibid.*, nos. 479 ff. [4] *Ibid.*, no. 468 (footnote omitted).

Neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest

This wording is directly derived from Art. 13 GC III and differs slightly from the terms of Art. 11(1) AP I ('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').

Up to now there has been no case law specifying these concepts. However, the following guidelines adopted by the World Medical Assembly[5] may be a tool for clarifying the terms:

> *World Medical Association Regulations In Time Of Armed Conflict*
>
> 1. Medical ethics in time of armed conflict is identical to medical ethics in time of peace, as established in the International Code of Medical Ethics of the World Medical Association. The primary obligation of the physician is his professional duty; in performing his professional duty, the physician's supreme guide is his conscience.
>
> 2. The primary task of the medical profession is to preserve health and safe life. Hence it is deemed unethical for physicians to:
>
> a) Give advice or perform prophylactic, diagnostic or therapeutic procedures that are not justifiable in the patient's interest.
>
> b) Weaken the physical or mental strength of a human being without therapeutic justification.
>
> c) Employ scientific knowledge to imperil health or destroy life.
>
> 3. Human experimentation in time of armed conflict is governed by the same code as in time of peace; it is strictly forbidden on all persons deprived of their liberty, especially civilian and military prisoners and the population of occupied countries.
>
> . . .
>
> *Rules Governing the Care of Sick and Wounded, Particularly in Time of Conflict*
>
> A. 1. Under all circumstances, every person, military or civilian must receive promptly the care he needs without consideration of sex, race, nationality, religion, political affiliation or any other similar criterion.
>
> 2. Any procedure detrimental to the health, physical or mental integrity of a human being is forbidden unless therapeutically justifiable . . .

[5] Adopted by the 10th World Medical Assembly, Havana, Cuba, October 1956. Edited by the 11th World Medical Assembly, Istanbul, Turkey, October 1957, and amended by the 35th World Medical Assembly, Venice, Italy, October 1983, in http://www.wma.net/e/policy/17–50_e.html.

Cause death to or seriously endanger the health of such person or persons

The act or omission must cause death or seriously endanger the health or integrity of the persons concerned. Art. 11(4) AP I is more specific in referring to 'physical or mental health' and to the person's integrity.

The wording of the ICC Statute emphasises that the health does not necessarily have to be affected by the act or omission, but it must be endangered.[6] In the absence of any case law, it is difficult to be more specific on this point. To know whether a person's health has or has not been seriously endangered is a matter of judgement, and a tribunal should settle this on the basis not only of the act or omission concerned, but also on the foreseeable consequences to the state of health of the person subjected to them.[7]

Remarks concerning the mental element

There appears to be no case law on the mental element of this crime to date. However, Art. 11(4) AP I, which requires a 'wilful act or omission', and the Commentary thereon may be helpful to determine the mental element of this offence. Since there must be a wilful act or omission for it to be a grave breach, negligence is excluded. Moreover, the adjective 'wilful' also excludes persons with an immature or greatly impaired intellectual capacity or persons acting without knowing what they are doing. On the other hand, the concept of recklessness – that is, the person in question accepts the risk in full knowledge of what he is doing – is included in the concept of wilfulness.[8]

(2) MEDICAL OR SCIENTIFIC EXPERIMENTS

Text adopted by the PrepCom

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

1. The perpetrator subjected one or more persons to a medical or scientific experiment.

2. The experiment caused death or seriously endangered the physical or mental health or integrity of such person or persons.

3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.

4. Such person or persons were in the power of an adverse party.

[6] According to Sandoz, 'Art. 11' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 493, health must be 'clearly and significantly endangered'.
[7] See also *ibid.*, no. 493. [8] *Ibid.*

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

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

Footnote 46 is also linked to Element 3, as indicated in its second sentence:

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The elements essentially reproduce statutory language. Certain clarifications from Art. 11 AP I, the origin of this war crime, were added:

- In Element 2, on the basis of Art. 11(4) AP I, the words 'physical or mental' were added in front of the term 'health'. The PrepCom decided to include the endangerment of a person's integrity, which it had not done for the elements relating to subjecting someone to physical mutilation.
- The first sentence of the footnote is derived from Art. 11(2) AP I, the second sentence from Art. 11(1) AP I.

Legal basis of the war crime

The offence 'subjecting persons who are in the power of an adverse party 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' is derived directly from Art. 11(1), (2) and (4) AP I.

Art. 11(1) and (2)(b) AP I deals with the protection of the 'physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty', and specifically addresses medical and scientific experiments.

Remarks concerning the material elements

There is no relevant recent jurisprudence on special elements of this offence to date other than that quoted under section 'Art. 8(2)(a)(ii)', subsection 'Legal basis of the war crime' specifically dealing with biological experiments.

However, one may refer to the relevant treaty provisions of the GC and AP I which contain the above-mentioned elements of this crime.

Art. 13 GC III states the following:

> . . . In particular, *no prisoner of war may be subjected* to physical mutilation or *to medical or scientific experiments* of any kind which are *not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.* [Emphasis added.]

Art. 32 GC IV stipulates:

> . . . This prohibition [of taking any measures of such a character as to cause the physical suffering or extermination of *protected persons in the sense of Art. 4 GC IV*] applies not only to murder, torture, corporal punishments, mutilation and *medical or scientific experiments not necessitated by the medical treatment of a protected person* . . . [Emphasis added.]

Art. 11 AP I states that:

> 1. . . . it is prohibited to subject the persons described in this Article [*persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 of AP I*] to 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.*
>
> 2. It is, *in particular, prohibited* to carry out on such persons, *even with their consent:*
>
> . . .
>
> (b) *medical or scientific experiments*;
>
> . . .
>
> except where these acts are justified in conformity with the conditions provided for in paragraph 1.
>
> . . .
>
> 4. Any *wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends* and which either violates any

> of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol. [Emphasis added.]

As in the case of biological experiments, the term 'medical or scientific experiments of any kind' is not further specified. In one post-Second World War trial, the Tribunal found that the accused performed numerous medical experiments, and it mentioned the following groups of experiments: 'castration experiments, sterilization experiments, experiments causing premature termination of pregnancy, experiments on artificial semination, experiments aimed at cancer research, other experiments (*i.e.*, injecting women with hormones)'.[9]

With respect to the other elements, 'person in the power of an adverse party', 'neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest' and 'cause death to or seriously endanger the health of such person or persons', see the section above on 'Mutilation'. In addition to the above-cited 'World Medical Association Regulations In Time Of Armed Conflict' and the basic moral, ethical and legal principles listed in the *Medical* case[10] dealing with medical experiments, a more recent formulation of medical ethics for the specific problem of biomedical research may be found in the World Medical Association's Recommendations Guiding Physicians In Biomedical Research Involving Human Subjects:[11]

> The purpose of biomedical research involving human subjects must be to improve diagnostic, therapeutic and prophylactic procedures and the understanding of the aetiology and pathogenesis of disease . . . Because

[9] The *Hoess Trial*, in UNWCC, *LRTWC*, vol. VII, pp. 14 ff.; 13 AD 269. See also the *Milch Trial*, in UNWCC, *LRTWC*, vol. VII, pp. 32 ff.; 14 AD 299. Allegations of responsibility for illegal experiments were also made in the trial of *K. Brandt and Others*, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, pp. 11 ff.; 14 AD 298 (high-altitude experiments, freezing experiments, malaria experiments, mustard-gas experiments, sulphanilamide experiments, bone, muscle and nerve regeneration and bone transplantation experiments, sea-water experiments, sterilisation experiments, spotted-fever experiments, poison experiments) and in the *O. Pohl and Others Case*, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. V; 14 AD 290.

[10] Cited in UNWCC, *LRTWC*, vol. VII, pp. 49–50; 14 AD 296 at 297. For the text see section 'Art. 8(2)(a)(ii)', subsection 'Legal basis of the war crime' dealing with biological experiments.

[11] Adopted by the 18th World Medical Assembly, Helsinki, Finland, June 1964, and amended by the 29th World Medical Assembly, Tokyo, Japan, October 1975; 35th World Medical Assembly, Venice, Italy, October 1983; 41st World Medical Assembly, Hong Kong, September 1989; and the 48th General Assembly, Somerset West, Republic of South Africa, October 1996, in http://www.wma.net/e/policy/17-c_e.html. See also 'International Ethical Guidelines for Biomedical Research Involving Human Subjects', prepared by the Council for International Organizations of Medical Sciences in collaboration with the World Health Organization, 1993.

it is essential that the results of laboratory experiments be applied to human beings to further scientific knowledge and to help suffering humanity, the World Medical Association has prepared the following recommendations as a guide to every physician in biomedical research involving human subjects. They should be kept under review in the future. It must be stressed that the standards as drafted are only a guide to physicians all over the world. Physicians are not relieved from criminal, civil and ethical responsibilities under the laws of their own countries.

I. Basic Principles

1. Biomedical research involving human subjects must conform to generally accepted scientific principles and should be based on adequately performed laboratory and animal experimentation and on a thorough knowledge of the scientific literature.

2. The design and performance of each experimental procedure involving human subjects should be clearly formulated in an experimental protocol which should be transmitted for consideration, comment and guidance to a specially appointed committee independent of the investigator and the sponsor . . .

3. Biomedical research involving human subjects should be conducted only by scientifically qualified persons and under the supervision of a clinically competent medical person. The responsibility for the human subject must always rest with a medically qualified person and never rest on the subject of the research, even though the subject has given his or her consent.

4. Biomedical research involving human subjects cannot legitimately be carried out unless the importance of the objective is in proportion to the inherent risk to the subject.

5. Every biomedical research project involving human subjects should be preceded by careful assessment of predictable risks in comparison with foreseeable benefits to the subject or to others. Concern for the interests of the subject must always prevail over the interests of science and society.

6. The right of the research subject to safeguard his or her integrity must always be respected. Every precaution should be taken to respect the privacy of the subject and to minimize the impact of the study on the subject's physical and mental integrity and on the personality of the subject.

7. Physicians should abstain from engaging in research projects involving human subjects unless they are satisfied that the hazards involved are believed to be predictable. Physicians should cease any investigation if the hazards are found to outweigh the potential benefits.

8. [publication of the results of the research]

9. In any research on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort it may entail. He or she should be informed that he or she is at liberty to abstain from participation in the study and that he or she is free to withdraw his or her consent to participation at any time. The physician should then obtain the subject's freely-given informed consent, preferably in writing.

10. When obtaining informed consent for the research project the physician should be particularly cautious if the subject is in a dependent relationship to him or her or may consent under duress. In that case the informed consent should be obtained by a physician who is not engaged in the investigation and who is completely independent of this official relationship.

11. In case of legal incompetence, informed consent should be obtained from the legal guardian in accordance with national legislation. Where physical or mental incapacity makes it impossible to obtain informed consent, or when the subject is a minor, permission from the responsible relative replaces that of the subject in accordance with national legislation.

Whenever the minor child is in fact able to give a consent, the minor's consent must be obtained in addition to the consent of the minor's legal guardian.

12. The research protocol should always contain a statement of the ethical considerations involved and should indicate that the principles enunciated in the present Declaration are complied with.

II. Medical Research Combined With Professional Care (Clinical Research)

1. In the treatment of the sick person, the physician must be free to use a new diagnostic and therapeutic measure, if in his or her judgement it offers hope of saving life, re-establishing health or alleviating suffering.

2. The potential benefits, hazards and discomfort of a new method should be weighed against the advantages of the best current diagnostic and therapeutic methods.

3. In any medical study, every patient – including those of a control group, if any – should be assured of the best proven diagnostic and therapeutic method. This does not exclude the use of inert placebo in studies where no proven diagnostic or therapeutic method exists.

4. The refusal of the patient to participate in a study must never interfere with the physician–patient relationship.

5. If the physician considers it essential not to obtain informed consent, the specific reasons for this proposal should be stated in the experimental protocol for transmission to the independent committee (I, 2).

6. The physician can combine medical research with professional care, the objective being the acquisition of new medical knowledge, only to the extent that medical research is justified by its potential diagnostic or therapeutic value for the patient.

. . .

Remarks concerning the mental element

In the *K. Brandt* case the indictment used the terms 'unlawfully, wilfully, and knowingly committed war crimes . . . involving medical experiments'.[12] There appears to be no judgment that clearly specifies the required mental element, although Art. 11(4) AP I, which requires a 'wilful act or omission', and the Commentary thereon may be helpful for determining the mental element of this offence. Since there must be a wilful act or omission for it to be a grave breach, negligence is excluded. Moreover, the adjective 'wilful' also excludes persons with an immature or greatly impaired intellectual capacity, or persons acting without knowing what they are doing. On the other hand, the concept of recklessness – that is, the person in question accepts the risk in full knowledge of what he is doing – is included in the concept of wilfulness.[13]

[12] In *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, pp. 11 ff.; 14 AD 296; the same formula was used in the indictment in the *Milch Trial*, in UNWCC, *LRTWC*, vol. VII, p. 28; 14 AD 299. In this case Judge Musmanno said, in a concurring opinion with respect to medical experiments: 'In order to find Milch guilty on this count of the indictment, it must be established that – 1. Milch had knowledge of the experiments; 2. That, having knowledge, he knew they were criminal in scope and execution; 3. That he had this knowledge in time to act to prevent the experiments; 4. That he had the power to prevent them.' In *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. II, p. 856. These statements were made as to the responsibilities of a high commander.

[13] Sandoz, 'Art. 11' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 493.

Art. 8(2)(b)(xi) – Killing or wounding treacherously individuals belonging to the hostile nation or army

Text adopted by the PrepCom

War crime of treacherously killing or wounding

1. The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.

2. The perpetrator intended to betray that confidence or belief.

3. The perpetrator killed or injured such person or persons.

4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.

5. Such person or persons belonged to an adverse party.

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

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

Commentary

Travaux préparatoires/Understandings of the PrepCom

The PrepCom decided without much debate to use essentially the substance and language of Art. 37 AP I (prohibition of perfidy) to clarify the meaning of 'treachery' for the purposes of this war crime. On the basis of the statutory language, contrary to Art. 37 AP I, the crime is limited to killing or wounding; the capture of an adversary by resorting to perfidy is excluded.

The special intent, different from the default rule of Art. 30 ICC Statute, is indicated in Element 2.

Legal basis of the war crime

The term 'killing or wounding treacherously individuals belonging to the hostile nation or army' is directly derived from Art. 23(b) of the Hague Regulations.

Remarks concerning the material elements

The scope of this offence is not very clear. Art. 23(b) of the Hague Regulations, which is derived from the customary law prohibition of perfidy,[1] does not contain a definition of treacherous conduct. Examples

[1] See W. A. Solf, 'Art. 37' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), p. 203.

mentioned by Oppenheim are the following:

> no assassin must be hired, and no assassination of combatants be committed; a price may not be put on the head of an enemy individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made; no treacherous simulation of sickness or wounds is permitted.[2]

Greenspan cites the following:

> acts of assassination, the hiring of assassins, putting a price on an enemy's head, offering a reward for an enemy 'dead or alive', proscription and outlawry of an enemy, treacherous request for quarter, and the treacherous simulation of death, wounds, or sickness, or pretended surrender, for the purpose of putting the enemy off his guard and then attacking him.[3]

NB:

- US Air Force Pamphlet 110-31 states:

  > Assassination. Article 23(b) HR . . . has been construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for any enemy 'dead or alive'. Obviously it does not preclude lawful attacks by lawful combatants on individual soldiers or officers of the enemy.[4]

- The US Field Manual and the Australian military manual state with regard to the prohibition of perfidy:

  > [This means] prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy's head, as well as offering a reward for an enemy dead or alive.[5]

- The British military manual, indicating that ruses are not forbidden, gives the following examples for treacherous conduct:

[2] L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, p. 342.
[3] M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley and Los Angeles, 1959), p. 317.
[4] US Department of the Air Force, AF Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations* (1976), p. 5–12.
[5] US Department of the Army, Field Manual, FM 27-10, *The Law of Land Warfare* (1956), p. 17; Australian Defence Force, *Law of Armed Conflict-Commander's Guide*, Operation Series, ADFP 37 Supplement 1-Interim edn, 7 March 1994, pp. 5-3 and 9-4.

> For instance, it would be treachery for a soldier to sham wounded or dead and then to attack enemy soldiers who approached him without hostile intent, or to pretend that he had surrendered and afterwards to open fire upon or attack an enemy who was treating him as hors de combat or a prisoner.[6]

The objectives of the negotiations leading to AP I were to reaffirm the Hague Regulations' prohibitions of perfidy as unambiguously as possible, to define perfidy using objective and understandable criteria, and to provide examples of prohibited perfidy in order to further clarify the definition and to distinguish perfidy from permissible ruses by defining ruses and providing illustrative examples.[7]

The result was Art. 37 AP I, according to which

> 1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
>
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
>
> (b) the feigning of an incapacitation by wounds or sickness;
>
> (c) the feigning of civilian, non-combatant status; and
>
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
>
> 2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

In the first sentence, para. 1 reaffirms the explicit prohibition of Art. 23(b) of the Hague Regulations against the perfidious killing or wounding of adversaries. However, it extends the prohibition to the capture of the enemy as a result of the perfidious conduct. Destruction of property as a

[6] *The Law of War on Land being Part III of the Manual of Military Law* (HMSO, 1958), p. 42.

[7] Solf, 'Art. 37' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 203 with further references in n. 10.

consequence of such conduct is not prohibited in either rule. Considering the examples given above which constitute perfidy under Art. 23(b) of the Hague Regulations, it becomes obvious that Art. 37 AP I contains a narrower prohibition. The different forms of conduct summarised under the term 'assassination' in the US Air Force Pamphlet and recognised in the literature are not covered by Art. 37 AP I, since such an act would not involve any reliance by the victim on confidence that international law protects him/her.

The implications for the traditional rule as formulated in the Hague Regulations are not clear. Ipsen, for example, concludes:

> The fact that Art. 37 has been accepted by the vast majority of States indicates that there is no customary international law prohibition of perfidy with a wider scope than that of Art. 37.[8]

Apart from the problematic field of assassinations, it seems to be uncontroversial that perfidious acts are constituted by two elements. First, the act in question must objectively be of a nature to cause or at least to induce the confidence of an adversary. This confidence must be created because of a precisely specified legal protection that either the adversary himself is entitled to or that is a protection which he is legally obliged to accord. As pointed out by Art. 37 AP I, this protection must be prescribed by rules of international law applicable in armed conflict. Secondly, the definition contains a subjective element. The act inviting confidence must be carried out intentionally in order to mislead the adversary into relying upon the protection he expects.[9] With respect to this 'intent to betray' confidence, the Report of the Diplomatic Conference states that:

> the requisite intent would be an intent to kill, injure or capture by means of the betrayal of confidence.[10]

Examples of perfidious conduct are given in the third sentence of para. 1. This list is illustrative only. The Report of the Committee at the Diplomatic Conference indicated that it had selected a short list of particularly clear examples, deliberately avoiding debatable or borderline cases.[11]

[8] K. Ipsen, 'Perfidy' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore and Tokyo, 1997), vol. III, p. 980. However, the terms 'treachery' and 'perfidy' are used on an equal footing in the original 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices in Art. 6 and in its amended version in Art. 7.

[9] Solf, 'Art. 37' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, pp. 204 ff.; Ipsen, 'Perfidy', p. 978.

[10] *Official Records*, vol. XV, CDDH/236/Rev.1, para. 16.

[11] *Ibid.*, para. 15.

The wording of Art. 37 AP I leaves the question open as to whether the scope of the prohibition is restricted only to accomplished acts, or whether it is extended to acts committed against an adversary with intent to kill, injure or capture him, but which do not achieve any of these results.[12] However, the wording of Art. 23(b) of the Hague Regulations which is the basis of this war crime under the Statute seems to require death or injury as the result of the conduct.

Para. 2 of Art. 37 AP I states that ruses of war are permissible, defines ruses and provides illustrative examples. Ruses of war are essentially distinguished from perfidious acts *in so far as they do not invite the confidence of an adversary with respect to protection under international law applicable in armed conflicts*.

NB:

- US Air Force Pamphlet 110-31 offers this definition:

  > Perfidy or treachery involves acts inviting the confidence of the adversary that he is entitled to protection or is obliged to accord protection under international law, combined with intent to betray that confidence. Such acts include the following:
  >
  > (i) the feigning of a situation of distress, notably through the misuse of an internationally recognized sign;
  > (ii) feigning of a cease-fire, a humanitarian negotiation or surrender; and
  > (iii) the feigning by combatants of civilian, noncombatant status.[13]

- A specific description of prohibited perfidy in naval warfare is given in the *San Remo Manual*:

  > Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:
  >
  > (a) exempt, civilian, neutral or protected United Nations status;
  > (b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.[14]

[12] See Ipsen, 'Perfidy', p. 980.
[13] US Department of the Air Force, AF Pamphlet 110-31, p. 5–12.
[14] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), no. 111, p. 186.

The Commentary thereon explains:

> The crucial element in the examples listed is that while protected status is simulated by a warship or military aircraft, an act of hostility is prepared and executed.[15]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. However, reference must be made to the explanations under the previous section on the constituent elements of the definition of perfidy dealing with the necessary intent.

[15] *Ibid.*, no. 111.2, p. 186.

Art. 8(2)(b)(xii) – Declaring that no quarter will be given

Text adopted by the PrepCom

War crime of denying quarter

1. The perpetrator declared or ordered that there shall be no survivors.

2. Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.

3. The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom decided to paraphrase the concept of 'no quarter' by essentially using the modern language from Art. 40 AP I ('there shall be no survivors'). It was agreed that there was no need for a result (e.g. that in a particular situation no survivors were left), but that a declaration or an order as such would be sufficient for the completion of the crime. Several delegations emphasised that it would not merit the attention of the ICC if the declaration was made for no purpose by someone with neither the authority nor the means to enforce it. Therefore, Elements 2 and 3 were added.

On the basis of the wording of the Statute, the element defining the conduct refers only to the declaration or order, but not, as included in Art. 40 AP I, to the actual conduct of hostilities on the basis that there shall be no survivors. However, it must be emphasised that such conduct would generally be covered by either the war crime of wilful killing (Art. 8(2)(a)(i)), if protected persons are the victims, or the war crime of killing or wounding a person *hors de combat* (Art. 8(2)(b)(vi)). With regard to the latter, it should be pointed out that the PrepCom interpreted 'persons *hors de combat*' as including parachutists in distress (Art. 42(1) AP I).[1]

Legal basis of the war crime

The phrase 'declaring that no quarter will be given' is directly derived from Art. 23(d) Hague Regulations (Art. 40 AP I reaffirms this rule by using a

[1] See sections on *travaux préparatoires* of Art. 8(2)(b)(vi) and Art. 8(2)(c) – Common elements.

more modern language, and extends its scope explicitly to the threat that no quarter will be given: 'It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.'[2]).

Remarks concerning the material elements

The prohibition against refusing quarter is a very long-standing customary rule and is directly linked with the crime under Art. 8(2)(b)(vi) of the Statute. It constitutes in essence a logical expression of the principle that the legal use of military violence is strictly limited to what is required by military necessity. Only for so long as the enemy combatant participates in hostilities is he/she to be considered as a valid target of attack. Even without the specific provision of Art. 40 AP I (Art. 23(d) of the 1907 Hague Regulations), attacks on those *hors de combat* would thus have been regarded as unlawful acts under Art. 41 AP I.[3] The only addition in Art. 23(d) Hague Regulations or Art. 40 AP I is that not only the commission of the acts, but also the order or threat, amounts to a war crime.

Because of the overlap between Arts. 23(c) of the Hague Regulations (Art. 41 AP I) and 23(d) of the Hague Regulations (Art. 40 AP I), the cases cited under the section 'Art. 8(2)(b)(vi)', subsection 'Legal basis of the war crime' have to be taken into account.

In addition to those judgments, the *Karl Stenger and Benno Crusius* case[4] from after the First World War is of some interest. One accused was charged with having issued an order to the effect that all prisoners and wounded were to be killed. The alleged orders were:

> No prisoners are to be taken from to-day onwards; all prisoners, wounded or not, are to be killed,

and

> All the prisoners are to be massacred; the wounded, armed or not, are to be massacred; even men captured in large organised units are to be massacred. No enemy must remain alive behind us.[5]

[2] J. de Preux, 'Art. 40' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 1594; W. A. Solf, 'Art. 40' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), p. 216.

[3] De Preux, 'Art. 40' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 1591.

[4] *Karl Stenger and Benno Crusius Case*, in C. Mullins, *The Leipzig Trials: An Account of the War Criminals Trials and a Study of the German Mentality* (H. F. and G. Witherby, London, 1921), pp. 151 ff.

[5] *Ibid.*, p. 152.

The accused was acquitted because it could not be proved that he gave this order.[6]

Beyond the issue of the killing of individuals who surrender, an additional specific problem appears in the context of the conduct of hostilities, namely the question as to whether the making of surrender impossible by choosing particular methods or means of warfare amounts to a refusal of quarter.

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

[6] *Ibid.*, p. 159.

Art. 8(2)(b)(xiii) – Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war

Text adopted by the PrepCom

War crime of destroying or seizing the enemy's property

1. The perpetrator destroyed or seized certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The elements reproduce to a large extent the language from the Rome Statute, with some modifications:

The term 'enemy's property' was circumscribed by the term 'property of a hostile party' – to the knowledge of this author, not for substantive reasons.

After very controversial discussions the term 'imperatively demanded by the necessities of war', derived from the Hague Regulations and contained in the Statute, was replaced by 'military necessity'. Several delegations took the view that 'military necessity' reflects modern language, but means essentially the same as the treaty language. Other delegations were a bit more cautious and pointed out that even in the GC not only is the term 'military necessity' used, but also wording similar to that of the Hague Regulations. For example, while Arts. 49 and 53 GC IV contain the phrases 'imperative military reasons'/'rendered absolutely necessary by military operations', Art. 147 GC IV uses 'military necessity'.[1] Other delegations stated that if the term 'military necessity' is used in the elements, then it should be preceded by the term 'imperative'. This prompted a few delegations to claim that there is no gradation within the concept of 'military necessity'. Others argued that adjectives like

[1] See also Art. 17 AP II, which uses the formulation 'imperative military reasons so demand'.

'imperative' are more commonly used only in relation to special protection granted to very specific objects, such as in Art. 4 of the 1954 Convention on the Protection of Cultural Property. Given that this war crime deals with property in general, the use of words like 'imperative' would not be appropriate.

Despite these divergent views, the current text was adopted in the end. In this context it was stressed that a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question. When this possibility is explicitly provided for, it can only be invoked to the extent that it is provided for. Military necessity cannot justify any derogation from rules that are drafted in a peremptory manner.[2] This particular clarification helped the delegations to accept the text.

Following the approach chosen for the war crime under Art. 8(2)(a)(iv), Element 3 was added. It highlights the fact that under international humanitarian law not every seizure or destruction is prohibited. The element serves as a *renvoi* to specific rules defining the protection against seizure or destruction.

Several delegations expressed the concern that applying Art. 30 of the ICC Statute, as required by para. 2 of the General Introduction, to Element 3 could create the possibility for a mistake of law defence. Therefore, again following the approach adopted for the war crime under Art. 8(2)(a)(iv), Element 4 was added. As in the case of the war crimes defined under Art. 8(2)(a),[3] this mental element recognises the interplay between Arts. 30 and 32 of the Statute, emphasising the general rule that, while ignorance of the facts may be an excuse, ignorance of the law (in this case of the rules relating to the protection of property against seizure or destruction) is not. Several delegations, however, expressed the view during negotiations that no mental element should be linked to Element 3; it was considered a

[2] See in this regard J. de Preux, 'Art. 35' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), nos. 1389 and 1405. See also, for example, the Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in http://www.dnd.ca/jag/operational_pubs_e.html@top, p. 2-1:

> The concept of military necessity justifies the application of force not forbidden by International Law, to the extent necessary, for the realization of the purpose of armed conflict . . . Military necessity is not a concept that can be considered in isolation. In particular, it does not justify violation of the LOAC, as military necessity was a factor taken into account when the rules governing the conduct of hostilities were drafted . . . Military necessity cannot justify actions absolutely prohibited by law, as the means to achieve military victory are not unlimited. Armed conflict must be carried on within the limits set by international law.

[3] See section 5.1., subsection (2) 'Protected persons/objects'.

purely objective element not requiring mental coverage. These delegations eventually accepted the text as adopted.

Several proposals suggested qualifying the term 'property' by 'private or public', in order to emphasise that both types of property are protected against seizure or destruction by the relevant rules. This clarification was initially inserted in the Rolling Text, but eventually deleted, as it was agreed that the term 'property' would cover both public and private property.

Legal basis of the war crime

The wording of this offence is directly derived from Art. 23(g) Hague Regulations. The Hague Regulations contain an extensive and detailed law for the protection of enemy property. Since Art. 154 GC IV stipulates:

> In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague,

both the Hague Regulations and the relevant provisions of the 1949 Geneva Conventions must be taken into account for the interpretation of this offence, mainly the determination of what constitutes conduct which is unlawful under international law. This war crime concerns all kinds of enemy property.

While the destruction of property during the conduct of hostilities is more specifically dealt with under other provisions of Art. 8(2)(b) of the ICC Statute, there is a certain overlapping of this offence with Art. 8(2)(a)(iv), especially as regards destruction of property. While the concept of 'appropriation' seems to be quite well defined, this is not the case with the term 'seizure'. In light of the various definitions given for the concept of 'seizure', the terms 'seizure' and 'appropriation' seem to have different meanings. With respect to 'destruction', there are no indications that the term must be interpreted in a different way for these two offences. However, the offence described under Art. 8(2)(b)(xiii) seems to have a more general scope than that under Art. 8(2)(a)(iv), since it also covers the law on the conduct of hostilities as contained in AP I and reflected in other crimes under this Statute. Besides, the threshold for constituting a war crime is slightly different: in Art. 8(2)(a)(iv) the destruction/appropriation must be 'extensive' and 'not justified by military necessity and carried out unlawfully and wantonly'

while Art. 8(b)(xiii) criminalises destruction/seizure not imperatively demanded by the necessities of war.[4]

Remarks concerning the material elements

The following conclusions may be drawn from the various sources examined below. The sources in brackets refer to the supporting sources, which are further analysed below.

- Destruction of property can be committed by means of a large range of actions. The following acts may constitute 'destruction': *inter alia* to set fire to property, to destroy, pull down, mutilate or damage (cf. post-Second World War trials).
- Property that cannot lawfully be seized obviously cannot lawfully be destroyed.
- Both private and public property are protected by specific provisions (Art. 53 GC IV, post-Second World War trials, Hague Regulations).
- In general, the lawfulness of destruction and seizure depends on the necessities of war (ICC Statute, Arts. 34, 50 GC I, Art. 51 GC II, Arts. 53, 57, 147 GC IV, Arts. 23(g), 52 Hague Regulations, post-Second World War trials, the ICTY Prosecution with various formulations). However, many other rules contained especially in the GC and AP I regulating the conduct of hostilities define a specific threshold determining the lawfulness of destruction/seizure. Therefore, it is difficult to formulate material elements as a general rule which would apply to all possible cases of destruction or seizure that would be prohibited.

(1) Destruction

In the *Kordic and Cerkez* case, the ICTY defined the elements of the offence 'wanton destruction not justified by military necessity' under Art. 3 of the ICTY Statute as follows:

(i) the destruction of property occurs on a large scale;
(ii) the destruction is not justified by military necessity.[5]

In the case of *The Prosecutor* v. *Milan Kovacevic*,[6] the ICTY Prosecution considered that the following constituted the material elements of 'extensive destruction and/or appropriation of property, not justified by military

[4] With respect to Art. 23(g) Hague Regulations, the Court in the *F. Holstein and Twenty-three Others* case stated that its 'careful phraseology is usually interpreted to mean that "imperative demands of the necessities of war" may occur only in the course of active military operations'. In UNWCC, *LRTWC*, vol. VIII, p. 30; 13 AD 261.

[5] ICTY, Judgment, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 346.

[6] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 16.

necessity carried out unlawfully and wantonly' (see Art. 8(2)(a)(iv) ICC Statute):

- The accused or the subordinate wantonly and unlawfully destroyed real or personnel property or took, obtained, or withheld such property from the possession of the owner or any other person;
- The amount of destruction was extensive and under the circumstances exceeded that required by military necessity.

In the case of *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, it defined the specific elements in the following terms:

- The occurrence of extensive destruction of property;
- The destruction was not justified by military necessity;
- The property destroyed was protected property pursuant to the Geneva Conventions.[7]

In the same case it defined the following as the specific elements of the offence 'wanton destruction or devastation' under Art. 3 of the ICTY Statute:

- The occurrence of destruction or devastation of property;
- The destruction or devastation of property was not justified by military necessity.[8]

Under this offence, the ICTY Prosecution, in the above-cited case of *The Prosecutor* v. *Milan Kovacevic* dealing with wanton destruction or devastation of cities, towns, or villages, addressed specifically Art. 23(g) of the 1907 Hague Regulations. It stated that

> [a]ny destruction or devastation of cities, towns or villages that occurred during active military operations must be required by military necessity in that this destruction or devastation is closely connected with the overcoming of the enemy forces. The US Army's 1956 *Law of Land Warfare*, interpreting Article 23(g) of the 1907 Hague Regulations, stipulates that '[d]evastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army.' (United States Army, *Law of Land Warfare* (GPO: 1956), para. 56).[9]

[7] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 46.
[8] *Ibid.*, p. 49.
[9] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 20. For the specific elements of 'wanton destruction of cities, towns, or villages, or devastation not justified by military necessity', see p. 19.

As pointed out above, there are no indications that the term 'destruction' has a different meaning under Art. 8(2)(b)(xiii) than under Art. 8(2)(a)(iv). Thus, the case law of several post-Second World War trials as well as the provisions of the GC and Hague Regulations already mentioned under the latter section and the conditions set forth in these provisions must be considered in order to determine the elements of this crime. In addition to the cases already cited, the following case addresses more specifically the problem of 'scorched earth' policies under this offence:

In the *W. List and Others* case, one accused was specifically charged with 'the wanton destruction of cities, towns and villages, . . . and the commission of other acts of devastation not warranted by military necessity, in the occupied territories'.[10] The acts were committed during his retreat from Finland to Western Norway. The accused believed that the hostile army was right behind him, and he ordered complete devastation so that there would be nothing to assist the hostile army in its pursuit of him. He was wrong. The enemy army was not in immediate pursuit of him; it was several days behind him, and there was plenty of time for him to escape with his troops. Nevertheless, he carried out the 'scorched earth' policy that provided the basis for this charge of the indictment. On the facts, the Tribunal found the following:

> Villages were destroyed. Isolated habitations met a similar fate. Bridges and highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication and transport facilities was had . . . The destruction was as complete as an efficient army could do it . . . While the Russians did not follow up the retreat to the extent anticipated, there are physical evidences that they were expected to do so . . . [T]here are mute evidences that an attack was anticipated.[11]

As to the legal problems, the Tribunal held:

> There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject,

[10] In UNWCC, *LRTWC*, vol. VIII, pp. 35 ff.; 15 AD 632.
[11] UNWCC, *LRTWC*, vol. VIII, p. 68; 15 AD 632 at 648.

> we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.[12]

More specifically addressing Art. 23(g) of the 1907 Hague Regulations, the Tribunal held:

> The Hague Regulations prohibited 'The destruction or seizure of enemy property except in case where this destruction or seizure is urgently required by the necessities of war.' Article 23(g). The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exceptions contained in Article 23(g). We are not called upon to determine whether urgent military necessity for the devastation and destruction ... actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time.[13]

NB: This finding of the post-Second World War Tribunal must be read nowadays specifically in the context of Art. 54(5) AP I, which states:

> In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

As indicated in the *List and Others* case, 'scorched earth' policies exercised by an Occupying Power withdrawing from occupied territory were judged legitimate if required by imperative military necessity. Art. 54 AP I changes that situation as regards objects indispensable to the survival of the civilian population: in the case of imperative military necessity a belligerent Power may in an extreme case even destroy these objects in

[12] UNWCC, *LRTWC*, vol. VIII, pp. 68 ff. [13] *Ibid.*, p. 69.

that part of its own territory which is under its control. On the other hand, it may not carry out such destruction in the part of its territory which is under enemy control. In other words, an occupation army which is withdrawing may, if military operations render it absolutely necessary, carry out destructions (bridges, railways, roads, airports, ports etc.) with a view to preventing or slowing down the advance of enemy troops, but may not destroy indispensable objects such as supplies of foodstuffs, crops ripe for harvesting, drinking water reservoirs and water distribution systems, or remove livestock. Any 'scorched earth' policy carried out by an Occupying Power, even when withdrawing from such territory, must not affect such objects.

Besides, as pointed out above, the interpretation of this offence in Art. 8(2)(b)(xiii) has to take into account the crimes relating to destruction of property as listed in other parts of Art. 8(b) of the Statute, which set up specific conditions for the lawfulness of destruction.

(2) Seizure

There are no provisions in the treaties of international humanitarian law which specifically clarify the concept of 'seizure of property'.

The ICRC Commentary states in this regard:

> There is a distinction in law between seizure and requisition. Seizure applies primarily to State property which is war booty; requisition only affects private property. There are, however, certain cases mentioned in Article 53, paragraph 2, of the Hague Convention in which private property can also be seized; but such seizure is only sequestration, to be followed by restitution and indemnity, whereas requisition implies a transfer of ownership.[14]

However, it should be noted that this choice of terminology is not necessarily shared in the literature. A review of leading international writers shows that there is no single meaning for the terms 'seizure' and 'requisition', and there is not always a clear distinction between these terms in the laws of armed conflict.[15] According to its legal context

[14] J. S. Pictet (ed.), *Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva, 1958), Art. 34, p. 296 (n. 2).

[15] With respect to terminology, the following different views may be found in the literature:
– seizure and requisition must be distinguished on the basis of the nature of the goods appropriated: articles susceptible of a direct military use are seized; articles not susceptible of a direct military use but useful for the needs of the occupying or advancing army are requisitioned. As the interference with private rights is stronger in the second case, the legal conditions to effect a requisition are stricter (e.g. M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley and Los Angeles, 1959), pp. 293 ff., 296, 300 ff.;

(e.g. occupation, military operations, sea prizes), the meaning and legal effect vary.

The following rules contained in various instruments of international humanitarian law deal particularly with specific acts of seizure/requisition and set up special conditions for their lawfulness or unlawfulness. In accordance with Art. 154 GC IV cited above, the provisions of GC IV supplement Sections II and III of the Hague Regulations. Therefore, specific norms of the Hague Regulations – containing further restrictions – are also relevant for determining the lawfulness or unlawfulness of seizure.

Public movable property

• Art. 53 Hague Regulations:

> An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
>
> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

F. A. Freiherr von der Heydte, *Völkerrecht, Ein Lehrbuch* (Kiepenheuer & Witsch, Cologne, 1960), vol. II, pp. 324 ff.);

– the notion of seizure is confined to war at sea, requisition to war on land (e.g. L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, pp. 407 ff., 474–6);
– seizure is linked to public property, requisition to private property (e.g. P. Fauchille, *Traité de droit international public* (8th edn, Rousseau, Paris, 1921-6), vol. II, pp. 254 ff., 281 ff.);
– requisition covers all acts of appropriation of articles for the needs of the army, seizure covers movable property taken as war booty (e.g. L. H. Woolsey, 'Forced Transfer of Property in Enemy Occupied Territories', (1943) 37 *American Journal of International Law* 285);
– the difference between requisition and seizure is *ratione personae* and eventually *ratione materiae: 'Ratione personae*, seizure extends to the property of the State and that of private persons. Requisition, however, is limited to the property of private persons and local authorities in occupied territories. *Ratione materiae*, the emphasis in seizure and requisition is on movables but, in the case of requisition, the wording of Article 52 [Hague Regulations] is sufficiently wide to include immovables' (e.g. G. Schwarzenberger, *International Law – As Applied by International Courts and Tribunals*: *The Law of Armed Conflict* (Sterens & Sons, London, 1968), vol. II, p. 269; see also pp. 291 ff.);
– requisition seems to be a technical term involving a legal regime, seizure being the concrete act of taking.

- Art. 56 Hague Regulations:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

- Art. 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:[16]

> The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

- Art. 14(1) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:

> Immunity from seizure, placing in prize, or capture shall be granted to:
>
> (a) cultural property enjoying the protection provided for in Article 12 [Transport under Special Protection] or that provided for in Article 13 [Transport in Urgent Cases];
>
> (b) the means of transport exclusively engaged in the transfer of such cultural property.

With respect to the protection of State archives and public records, see G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press, Minneapolis, 1957), pp. 183 ff.

Public immovable property

- Art. 55 Hague Regulations:

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country . . .

[16] See also the recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999), especially Arts. 9, 15.

Private property

- Art. 46 Hague Regulations states that '. . . private property . . . must be respected. Private property cannot be confiscated.'
- Art. 53(2) Hague Regulations:

> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Protection of objects of personal use

- Art. 18 GC III (prisoners of war):

> All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment . . .
>
> Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.
>
> Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given . . .
>
> The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security . . .

- Art. 97 GC IV (internees):

> Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure . . .
>
> Articles which have above all a personal or sentimental value may not be taken away . . .
>
> On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their

> accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.
>
> Family or identity documents in the possession of internees may not be taken away without a receipt being given . . .

Property of aid societies, hospitals

- Art. 34 GC I rules on the requisition of real and personal property of aid societies and states:

> The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured.

- Art. 57 GC IV:

> The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.
>
> The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.

In the *A. Krupp* trial the Tribunal addressed one aspect of the legality of seizure under the Hague Regulations, quoting from J. W. Garner, *International Law and the World War* (Longmans, London and New York, 1920), vol. II, footnote on p. 126:

> The authorities are all in agreement that the right of requisition as recognised by the Hague Convention is understood to embrace only such territory occupied and does not include the spoliation of the country and the transportation to the occupant's own country of raw materials and machinery for use in his home industries . . . The Germans contended that the spoliation of Belgian and French industrial establishments and the transportation of their machinery to Germany was a lawful act of war under [Art.] 23(g) of the Hague Convention which allows a military occupant to appropriate enemy private property whenever it is 'imperatively demanded by the necessities of war'. In consequence of the Anglo-French blockade which threatened the very existence of

> Germany it was a military necessity that she should draw in part on the supply of raw materials and machinery available in occupied territory. But *it is quite clear from the language and context of Art. 23(g) as well as the discussions on it in the Conference, that it was never intended to authorise a military occupant to despoil on an extensive scale the industrial establishments of occupied territory or to transfer their machinery to his own country for use in his home industries. What was intended merely was to authorise the seizure or destruction of private property only in exceptional cases when it was an imperative necessity for the conduct of military operations in the territory under occupation.* This view is further strengthened by Art. 46 which requires belligerents to respect enemy private property and which forbids confiscation, and by Art. 47 which prohibits pillage.[17]

The Tribunal also rejected the Defence's contention that 'the laws and customs of war do not prohibit the seizure and exploitation of property in belligerently occupied territory, so long as no definite transfer of title was accomplished . . . [I]f, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and deprives him from lawfully exercising his prerogative as owner, it cannot be said that his property "is respected" under Article 46 as it must be.'[18]

Remarks concerning the mental element

In the *Blaskic* case, the ICTY defined the mental element of the offence 'devastation of property not justified by military necessity' as contained in Art. 3(b) of the ICTY Statute as follows:

> the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.[19]

In the *Kordic and Cerkez* case it defined the mental element for wanton destruction not justified by military necessity in the following terms:

> the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[20]

In the case of *The Prosecutor* v. *Milan Kovacevic*[21] the Prosecution of the ICTY considered the following to constitute the mental element of 'extensive destruction and/or appropriation of property, not justified by

[17] In UNWCC, *LRTWC*, vol. X, pp. 136 ff.; 15 AD 620. [18] UNWCC, *LRTWC*, vol. X, p. 137.
[19] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 183; 122 ILR 1 at 72.
[20] ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 346.
[21] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 16.

military necessity carried out unlawfully and wantonly' (see Art. 8(2)(a)(iv) ICC Statute):

> The taking, obtaining, or withholding of such property by the accused or a subordinate was committed with the intent to deprive another person of the use and benefit of the property, or to appropriate the property for the use of any person other than the owner.

However, it seems questionable whether this special intent requirement applies also to the offence of 'destroying or seizing the enemy's property'.

In the *Kordic and Cerkez* case[22] the ICTY Prosecution defined the mental element of the offences 'extensive destruction and/or appropriation of property, not justified by military necessity carried out unlawfully and wantonly' and 'wanton destruction or devastation' in the following way:

> The destruction [or devastation] was committed wilfully.[23]

The *mens rea* required in the above-cited post-Second World War cases is that the offence must be committed 'wilfully and knowingly', as was decided in the case of *Flick and Five Others* (pp. 3 ff.), the *IG Farben* trial and the *A. Krupp* trial.

With respect to the question of knowledge of facts and mistake of facts concerning military necessity, see the above-cited parts of the *W. List and Others* case under the subsection 'Destruction'.

[22] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 46, 49.

[23] In the *Simic and Others* case the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

Art. 8(2)(b)(xiv) – Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party

Text adopted by the PrepCom

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

1. The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions.

2. The abolition, suspension or termination was directed at the nationals of a hostile party.

3. The perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom extensively debated the requisite conditions of a declaration in the sense of this war crime. It agreed that the declaration needed to be susceptible of having effects in practice. The crime should not cover declarations made by persons who do not have the authority to make such declaration. Therefore, the term 'effected' was used in Element 1. However, there appears to be no requirement that in fact a national of the hostile party tried to invoke a right or to take action in a court of law without success as a result of such a declaration. For the crime to be committed it would be enough, for example, if an administrative act were taken that would prevent a national of the hostile party from taking such action, should he/she desire to do so. Element 1 is drafted in such a way that the *actus reus* may cover both national legislation in a country which would prevent enemy foreigners from taking legal action, and administrative acts taken by the Occupying Power in occupied territory (there was a controversy earlier in this regard: see the section 'Legal basis of the war crime' below).

There was some discussion about the requisite mental element linked to Element 2. The Rolling Text after the first reading required in Element 2, without a separate third element, that '[t]he abolition, suspension or termination was *knowingly* directed at the nationals of a hostile party' (emphasis added). However, a footnote was added to say that some delegations were

of the view that 'knowingly' in this element meant 'intentionally'. Despite opposition by some delegations, which claimed that the intent requirement would raise the threshold unacceptably, eventually those delegations in favour of 'intentionally' prevailed and Element 3 was drafted accordingly. It seems that the view in favour of 'knowingly' would be correct if Element 2 describes a circumstance in the sense of Art. 30(3) ICC Statute. If, however, the view that prevailed is correct, Art. 30(2) ICC Statute would further define the requisite intent.

Legal basis of the war crime

The term 'declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party' is directly derived from Art. 23(h) Hague Regulations.

Remarks concerning the material elements

The rule in Art. 23(h) Hague Regulations was added in 1907 at the suggestion of two German delegates. The purpose of the provision, according to one of its initiators, was not limited to protecting corporeal property from confiscation but had in view 'the whole domain of obligations, by prohibiting all legislative measures which in time of war, would place the subject of an enemy state in a position of being unable to enforce the execution of a contract by resort to the courts of the adverse party'.[1]

In other words, its object was to prohibit belligerents from depriving enemy subjects by legislation or otherwise of the means of enforcing their legal rights through resort to courts.

English and American authorities[2] have, however, placed a different interpretation on the meaning of Art. 23(h) of the 1907 Hague Regulations and the matter has been the subject of much controversy.

One commentator describes this controversy as follows:

> A serious academic controversy has centered for several decades around the provisions of Article 23-h of the 1907 Hague Regulations . . . This sentence has been interpreted to mean that enemy aliens could not be forbidden access to the courts of the belligerent nation in which they resided, while others have asserted that the provision is simply an instruction to the commanders of occupying forces in enemy territory. The present writer's opinion coincides with the prevailing Anglo-American

[1] Quoted in J. W. Garner, 'Treatment of Enemy Aliens', (1919) 13 *American Journal of International Law* 24.

[2] See also in this context, F. A. Campbell, in N. Politis, 'Lois et coutumes de la guerre sur terre: L'interpretation anglaise de l'article 23h du Règlement de La Haye' (1911) 18(3) *Revue générale de droit international public* 253 ff. Additional references to the Anglo-American interpretation may be found in Garner, 'Treatment of Enemy Aliens', p. 25, n. 10.

interpretation which regards the sentence as a mere prohibition laid down specifically for the commander of a force of occupation against the exclusion of the inhabitants of an occupied area from the courts of the territory concerned. The governing case for this point of view is *Porter* v. *Freudenberg* (Great Britain, Court of Appeal, 1915) in which it was held that Article 23-h

> . . . is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights . . . [quoted in J. W. Garner, *International Law and the World War* (Longmans, London and New York, 1920), vol. I, p. 120].

Continental writers on international law have disagreed strongly with this 'narrow' view and have maintained that the provision also refers to the standing of enemy aliens in the courts of a belligerent country. Regardless of the merits of these opposing attitudes, it can be stated definitely that the indigenous courts cannot be used by the inhabitants of an occupied territory to sue the occupant, even in the case of contracts entered into between such inhabitants and the occupation authorities. Owing to his military supremacy and his alien character, an occupant is not subject to the laws or to the courts of the occupied enemy state, nor have native courts jurisdiction over members of the occupying forces.[3]

A further indication of what constitutes the material elements may be found in Oppenheim's treatise on international law:

> [T]he British and American interpretation of Article 23(h) of the Hague Regulations is that it prohibits an occupant of enemy territory from declaring extinguished, suspended, or unenforceable in a court of law the rights and the rights of action of the inhabitants; and Article 43[4] provides that the occupant must respect, unless absolutely prevented, the laws in force in the country. But an occupant may, where necessary, set up military courts instead of the ordinary courts; and in case, and in so far as, he permits the administration of justice by the ordinary courts,

[3] G. von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press, Minneapolis, 1957), p. 108 (footnotes omitted). With respect to the question of the power, or lack of power, of indigenous courts to enforce lawful orders of an occupant and the problem of whether such courts have the right to review legislative acts of the occupant with respect to their validity under the Hague Regulations, see *ibid.*, pp. 109 ff.

[4] 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

> he may nevertheless, so far as it is necessary for military purposes, or for the maintenance of public order and safety, temporally alter the laws, especially the Criminal Law, on the basis of which justice is administered as well as the laws regarding procedure. Moreover, in the exceptional cases in which the law of the occupied State is such as to flout and shock elementary conceptions of justice and of the rule of law, the occupying State must be deemed entitled to disregard it . . .
>
> There is no doubt that an occupant may suspend the judges as well as other officials. However, if he does suspend them, he must temporarily appoint others in their place. If they are willing to serve under him, he must respect their independence according to the laws of the country. He has, however, no right to constrain the courts to pronounce their verdicts in his name, although he need not allow them to pronounce verdicts in the name of the legitimate Government.[5]

Continental writers almost without exception have expressed themselves in favour of, or assumed that, the German interpretation referred to above is the correct one. As an example, Dr Sieveking, discussing the force of Art. 23(h) before the International Law Association at its meeting in 1913, may be quoted:

> [T]here can be no doubt whatever as to the meaning of this Article: an alien enemy shall henceforth have a persona in judicio standi in the courts of the other belligerent for all his claims, whether they originated before or during the war; his claim shall henceforth no longer be dismissed or suspended on account of his being an alien enemy; he shall be entitled to a judgment on the merits of the case, and this judgment shall be immediately enforceable. It has been argued that this article merely conveys instructions to officers commanding in the field and in no way touches the dealings of the Home Government and the law at home. If this were so it would mean that the German delegates proposed an article devoid of any meaning.[6]

[5] L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, pp. 445 ff. He describes the development of the *persona standi in judicio* on enemy territory in the following terms:

> Formerly the rule prevailed everywhere that an enemy subject had no *persona standi in judicio*, and was, therefore *ipso facto* by the outbreak of war, prevented from either taking or defending proceedings in the courts. This rule dated from the time when war was considered such a condition between belligerents as justified hostilities by all the subjects of one belligerent against all the subjects of the other . . . Since the rule that enemy subjects are entirely *ex lege* had everywhere vanished, the rule that they might not take or defend proceedings in the courts had in many countries . . . likewise vanished before the First World War.

Ibid., p. 309.

[6] Quoted in Garner, 'Treatment of Enemy Aliens', p. 24. Other writers supporting the continental interpretation are, *inter alia*: Bonfils, Ullmann (*Völkerrecht* (2nd edn, 1908), p. 474), Wehberg,

With respect to criminal laws and courts handling criminal cases, Art. 64 GC IV gives further guidance:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

However, the controversial question of civil and commercial courts has not been mentioned in the GC[7] or any other more recent instrument of international humanitarian law.

With respect to Art. 64(1) second sentence, the ICRC Commentary points out:

> A. 'The rule'. – Owing to the fact that the country's courts of law continue to function, protected persons will be tried by their normal judges, and will not have to face a lack of understanding or prejudice on the part of people of foreign mentality, traditions or doctrines.
>
> The continued functioning of the courts of law also means that the judges must be able to arrive at their decisions with complete independence. The occupation authorities cannot therefore, subject to what is stated below, interfere with the administration of penal justice or take any action against judges who are conscientiously applying the law of their country.
>
> B. 'Reservations'. – There are nevertheless two cases – but only two – in which the Occupying Power may depart from this rule and intervene in the administration of justice.

de Visscher, Politis ('Lois et contumes de la guerre sur terre', pp. 256 ff.), Despagnet, Kohler, Strupp, Noldeke and Théry; for the references, see Garner, 'Treatment of Enemy Aliens', p. 27, n. 10.

[7] See in this respect J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 64, pp. 335 ff.

> 1. . . . the occupation authorities have the right to suspend or abrogate any penal provisions contrary to the Convention, and in the same way they can abolish courts or tribunals which have been instructed to apply inhumane or discriminatory laws.
>
> 2. The second reservation is a consequence of 'the necessity for ensuring the effective administration of justice', especially to meet the case of the judges resigning, as Article 56 gives them the right to do for reasons of conscience. The Occupying Power, being the temporary holder of legal power, would then itself assume responsibility for penal jurisdiction.
>
> For this purpose it may call upon inhabitants of the occupied territory, or on former judges, or it may set up courts composed of judges of its own nationality; but in any case the laws which must be applied are the penal laws in force in the territory.[8]

Remarks concerning the mental element

There seems to be no case law to date relating to the mental element.

[8] *Ibid.*, p. 336 (footnote omitted).

Art. 8(2)(b)(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

Text adopted by the PrepCom

War crime of compelling participation in military operations

1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person's own country or forces.

2. Such person or persons were nationals of a hostile party.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The elements essentially reproduce the language of the Rome Statute with the following exceptions. As in the case of the war crime defined under Art. 8(2)(a)(v), the term 'compelled' was circumscribed by 'coerced . . . by act or threat'. The term 'operations of war', derived from the old language of the 1907 Hague Regulations, was replaced by the modern term 'military operations', which can be found in Art. 51(2) GC IV dealing with essentially the same subject matter.

The phrase 'even if they were in the belligerent's service before the commencement of the war', which had been included in the ICC Statute, was omitted in the elements. The PrepCom concluded that the fact that the prohibition is defined in absolute terms in the elements made it superfluous to mention one particular highlighted example, which is undoubtedly included by the wording as adopted. This approach has been taken consistently throughout the EOC.

Legal basis of the war crime

The term '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' is directly derived from Art. 23 second sentence Hague Regulations.

Since this war crime is closely linked to the war crime of 'compelling a prisoner of war or other protected person to serve in the forces of a hostile

Power' in Art. 8(2)(a)(v), the case law cited under that section must be taken into account.

Remarks concerning the material elements

As concerns the notion of 'compelling', in the *Weizsäcker and Others* case, the US Military Tribunal found in 1949 that:

> it is not illegal to recruit prisoners of war who volunteer to fight against their own country, but pressure or coercion to compel such persons to enter into the armed services obviously violates international law.[1]

In the following post-Second World War trials, the accused were found guilty of war crimes:

- In the *Wagner* case, the Court ruled on 'incitement' to enrol in the German forces. It based its ruling on French law, i.e. Art. 75(4) of the French Penal Code: 'Any Frenchman who, in time of war, incites soldiers or sailors to pass into the service of a foreign power, facilitates such an act, or carries out enrolments for the benefit of a power at war with France' is guilty of treason.[2]
- In the *Milch* case, the accused was found guilty of participating in 'plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations'. These acts were considered contrary to the 1907 Hague Regulations and the 1929 Geneva Convention relative to the Treatment of Prisoners of War.[3]
- In the *T. Koschiro* case, prisoners of war were employed for prohibited work in that they built ammunition dumps or depots, that being contrary to Art. 6 of the 1907 Hague Regulations and Art. 31 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War.[4]
- Dealing with forced labour of civilians, the Tribunal stated in the *Von Leeb and Others* case:

> Under the articles above quoted [Arts. 43, 46, 47, 49, 50, 53 of the 1907 Hague Regulations], it is apparent that the compulsory labour of the civilian population for the purpose of carrying out military operations against their own country was illegal.[5]

[1] In 16 AD 344 at 357. [2] In UNWCC, *LRTWC*, vol. III, pp. 23 ff. (40, 41, 50 ff.).
[3] In UNWCC, *LRTWC*, vol. VII, p. 28; 14 AD 299 at 300-2. [4] In UNWCC, *LRTWC*, vol. XI, p. 2.
[5] In UNWCC, *LRTWC*, vol. XII, p. 93; 15 AD 376 at 393.

It added:

> Under the same articles the compulsory recruitment from the population of an occupied country for labour in the Reich was illegal.[6]

> With respect to labour of prisoners of war, in the same case, the Tribunal found that (compulsory) employment of prisoners of war in the armament industry was illegal – but that not all of the accused knew that it was going to take place when they ordered those prisoners to be transferred to Germany.[7]

NB: Arts. 49-57 GC III, in particular Arts. 50 and 52, deal specifically with permitted and prohibited labour for prisoners of war. In this respect Art. 52 GC III prohibits labour that is unhealthy or dangerous in nature. For example, the removal of mines or similar devices is considered as dangerous labour under this provision. Art. 51 GC IV sets forth conditions for permitted labour of civilians.

Remarks concerning the mental element

In the *Milch* case the accused was charged with 'unlawfully, wilfully, and knowingly' participating in 'plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations'. He was found guilty in this respect.[8]

[6] UNWCC, *LRTWC*, vol. XII, p. 93.
[7] *Ibid.*, p. 89. [8] In UNWCC, *LRTWC*, vol. VII, pp. 27 ff.; 14 AD 299 at 300–2.

Art. 8(2)(b)(xvi) – Pillaging a town or place, even when taken by assault

Text adopted by the PrepCom

War crime of pillaging

1. The perpetrator appropriated certain property.

2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.[47]

3. The appropriation was without the consent of the owner.

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

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

[47] As indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The difficulty in drafting the elements of this crime consisted in distinguishing pillage, which is absolutely prohibited, from other behaviours that are subject to different rules, namely, on the one hand, the taking of war booty (i.e. the seizure of military equipment from the enemy), which is allowed under international humanitarian law; and, on the other hand, the war crimes of appropriation of protected property (Art. 8(2)(a)(iv)) and seizure of protected property (Art. 8(2)(b)(xiii)).

In the course of negotiations some delegations claimed that the essence of pillage would be the appropriation or seizure of property not justified by military necessity. However, as pointed out by several delegations, this approach would have created difficulties in distinguishing the crime of pillaging from the crimes defined under Art. 8(2)(b)(xiii) and Art. 8(2)(a)(iv). Secondly, these delegations emphasised that mentioning 'military necessity' in relation to pillage was unfounded: an element referring to military necessity would introduce an extra element and create the result of permitting an evaluation, whereas an absolute prohibition exists. Thirdly, a reference to military necessity would criminalise the taking of military equipment when no necessity could be shown for this, whereas international humanitarian law allows the taking of war booty without the need for justification. These delegations suggested that the essence of pillage was the taking of civilian property for personal use. Eventually the PrepCom decided to define more precisely the prohibited conduct.

In the compromise achieved, the property protected is not limited to civilian property as suggested by several delegations. The second part of Element 2 is the result of the criticism expressed with regard to the first draft, which included a reference to military necessity.[1] Due to the importance some delegations accorded to the reflection of the concept of military necessity in the elements, the PrepCom included this in a footnote instead of in the main text.

The terms 'private' and 'personal' in this element were used in order to be broad enough to include cases where property is given to third persons and not only used by the perpetrator.

The phrase 'even when taken by assault', which had been included in the ICC Statute, was omitted in the elements. The PrepCom concluded that the fact that the prohibition is defined in absolute terms in the elements made it superfluous to mention one particular highlighted example, which is undoubtedly included by the wording as adopted. This approach has been taken consistently throughout the EOC.

The elements as drafted pose at least two problems. First, as a result of the referral to all types of property, the taking of war booty appears to be criminalised (this might, however, be corrected by applying para. 6 of the General Introduction relating to 'unlawfulness' and by applying the second part of Element 2; it appears to be generally accepted now that even war booty must be handed over to the authorities, i.e. cannot be taken for *private or personal use*). Second, comparing the elements of Art. 8(2)(a)(iv) and Art. 8(2)(b)(xvi), one might question whether the intent to deprive the owner of his or her property is only an element of pillage or whether it is not also inherent in the concept of appropriation and therefore should either have been an element of both crimes or not have been mentioned at all in either.

Legal basis of the war crime

The phrase 'pillaging a town or place, even when taken by assault' is derived directly from Art. 28 of the 1907 Hague Regulations.

Remarks concerning the material elements

'Pillage' and the terms 'plundering', 'looting' and 'sacking' are very often used synonymously. None has been defined adequately for the purposes of international law.

The ICTY Prosecution in the *Delalic* case considered that the following constituted the material elements of the offence 'plunder of public or

[1] PCNICC/1999/L.5/Rev.1/Add.2 of 22 December 1999.

private property' as listed under Art. 3(e) of the ICTY Statute:

– The accused must be linked to one side of the conflict.
– The accused unlawfully destroyed, took, or obtained any public or private property belonging to institutions or persons linked to the other side of the armed conflict.[2]

Later on, in the *Kordic and Cerkez* case, the ICTY Prosecution defined the elements in a different manner and mentioned only one specific material element:

– Public or private property was unlawfully or violently acquired.[3]

In its judgment in the *Delalic* case, the ICTY specifically dealt with the war crime of plunder. It described in general terms the rules aimed at protecting property rights in times of armed conflict, without naming explicitly the elements of these offences. Nevertheless, these findings may give some guidance in the determination of the elements of the crime 'pillaging a town or place, even when taken by assault' as contained in the ICC Statute.

> [I]nternational law today imposes *strict limitations on the measures which a party to an armed conflict may lawfully take in relation to private and public property of an opposing party*. The *basic norms* in this respect, which form part of customary international law, are contained *in the Hague Regulations, articles 46 to 56* which are broadly aimed at preserving the inviolability of public and private property during military occupation. In relation to private property, the fundamental principle is contained in article 46, which provides that private property must be respected and cannot be confiscated. While subject to a number of well-defined restrictions, such as the right of an occupying power to levy contributions and make requisitions, this rule is reinforced by article 47, which unequivocally establishes that '[p]illage is forbidden'. Similarly, article 28 of the Regulations provides that '[t]he pillage of a town or place, even when taken by assault, is prohibited'.[4]
>
> The principle of respect for private property is further reflected in the four Geneva Conventions of 1949. [Reference is made to Arts. 15 GC I, 18 GC II, 18 GC III.] Likewise, article 33 of Convention IV categorically affirms that '[p]illage is prohibited'. It will be noted that this prohibition is of general application, extending to the entire territories of the

[2] ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, A1-11.
[3] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 50.
[4] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 587 (emphasis added, footnotes omitted).

parties to a conflict, and is thus not limited to acts committed in occupied territories.[5]

In the following, the ICTY addressed the terminological question of whether the acts alleged in the indictment (plunder of money, watches and other valuable property belonging to persons at the Celebici camp), if at all criminal under international law, constituted the specific offence of 'plunder'. It held:

> In this connection, it is to be observed that *the prohibition against the unjustified appropriation of public and private enemy property* is general in scope, and *extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory*. Contrary to the submissions of the Defence, the fact that it was acts of the latter category which were made the subject of prosecutions before the International Military Tribunal at Nürnberg and in the subsequent proceedings before the Nürnberg Military Tribunals *does not demonstrate the absence of individual criminal liability under international law for individual acts of pillage committed by perpetrators motivated by personal greed*. In contrast, when seen in a historical perspective, it is clear that the prohibition against pillage was directed precisely against violations of the latter kind. Consistent with this view, isolated instances of theft of personal property of modest value were treated as war crimes in a number of trials before French Military Tribunals following the Second World War. Commenting upon this fact, the United Nations War Crimes Commission correctly described such offences as 'war crimes of the more traditional type'.
>
> While the Trial Chamber, therefore, must reject any contention made by the Defence that the offences against private property alleged in the Indictment, if proven, could not entail individual criminal responsibility under international law, it must also consider the more specific assertion that the acts thus alleged do not amount to the crime of 'plunder'. In this context, it must be observed that the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'. Thus, whereas article 47 of the Hague Regulations and article 33 of Geneva Convention IV by their terms prohibit the act of 'pillage', the Nürnberg Charter, Control Council Law No. 10 and the Statute of the International Tribunal all make reference to the war crime of 'plunder of public and private property'. *While it may*

[5] *Ibid.*, para. 588 (footnotes omitted).

be noted that the concept of pillage in the traditional sense implied an element of violence not necessarily present in the offence of plunder, it is for the present purposes not necessary to determine whether, under current international law, these terms are entirely synonymous. The Trial Chamber reaches this conclusion on the basis of its view that the latter term, as incorporated in the Statute of the International Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'.[6]

In sum the ICTY found the following:

- the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organised seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory; in both cases it entails individual criminal responsibility;
- the protection of property is subject to a number of well-defined restrictions, such as the right of an Occupying Power to levy contributions and make requisitions;
- the concept of pillage in the traditional sense implied an element of violence;
- the term 'plunder', as incorporated in the ICTY Statute, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'.

In accordance with Art. 154 GC IV cited above, the provisions of GC IV supplement Sections II and III of the Hague Regulations. Therefore, both the Hague Regulations and the relevant provisions of the 1949 Geneva Conventions must be taken into account for the interpretation of this offence, mainly the determination of what constitutes conduct which is unlawful under international law.

The 1907 Hague Regulations postulate the principle of respect for private property and expressly prohibit any act of pillage (Arts. 28 and 47).

[6] *Ibid.*, paras. 590 ff. (emphasis added, footnotes omitted). See also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 184; 122 ILR 1 at 72. ICTY, Judgment, *The Prosecutor* v. *Goran Jelisic*, IT-95-10-T, para. 48; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 351–3.

Art. 28 of the 1907 Hague Regulations formally prohibits pillage of a town or place, even when taken by assault, whereas Art. 47 stipulates that '[p]illage is formally forbidden'. The latter provision applies to all occupied enemy territory. A specific protection is given to cultural property in Art. 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict:

> The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.[7]

According to Arts. 15(1) GC I, 18(1) GC II, 16(2) and 33(2) GC IV protected persons, in particular sick or dead persons, shall be protected against pillage. The prohibition of pillage in Art. 33 GC IV more specifically applies to the entire territories of the parties involved in the conflict and to any person, without restriction. The ICRC Commentary on that provision states:

> This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay. Paragraph 2 of Article 33 is extremely concise and clear; it leaves no loophole. The High Contracting Parties prohibit the ordering as well as the authorization of pillage. They pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage. Consequently, they must take all the necessary legislative steps. The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories. It guarantees all types of property, whether they belong to private persons or to communities or the State. On the other hand, it leaves intact the right of requisition or seizure.[8]

Besides the right of requisition or seizure, weapons and military equipment of the enemy found on the battlefield may be lawfully taken as war booty.[9] However, a number of military manuals and

[7] See also the recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999), especially Arts. 9, 15.

[8] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 33, pp. 226 ff.

[9] See, for example, L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, pp. 401 ff.

national legislation provide that booty must be handed over to the authorities.[10]

In an attempt to clarify the term 'pillage' by examining historical examples, linguistic usage and military regulations, a commentator elaborated the following definition:

> (a) in a narrow sense, the unauthorized appropriation or obtaining by force of property . . . in order to confer possession of it on oneself or a third party;
>
> (b) in a wider sense, the unauthorized imposition of measures for contributions or sequestrations, or an abuse of the permissible levy of requisitions (e.g. for private purposes), each done either through taking advantage of the circumstances of war or through abuse of military strength. In the traditional sense, pillage implied an element of violence. The notion of appropriation or obtaining against the owner's will (presumed or expressed), with the intention of unjustified gain, is inherent in the idea of pillage so that it is also perceived as a form of theft through exploitation of the circumstances and fortunes of war.[11]

The following cases from post-Second World War trials specifically refer to the above-cited rules of the 1907 Hague Regulations for the description of the material elements of plunder, pillage, spoliation and exploitation. Although the elements of Art. 28 of the Hague Regulations are not specifically elaborated, the findings of the Tribunals may have an indicative value. With respect to terminology, the Tribunal in the *IG Farben* case found that:

> the Hague Regulations do not specifically employ the term 'spoliation', but we do not consider this matter to be one of any legal significance. As employed in the indictment, the term is used interchangeably with the words 'plunder' and 'exploitation' . . . [T]he term 'spoliation' . . . applies

[10] For example, Australia's Defence Force manual provides that seized property belongs to the capturing State, Australian Defence Force, *Law of Armed Conflict-Commander's Guide*, Operations Series, ADFP 37 Supplement-Interim edn, 7 March 1994, p. 12–4, para. 1224. New Zealand's military manual states that all enemy public movable property captured or found on the battlefield is known as booty and becomes the property of the capturing State, New Zealand Defence Force, Headquarters, Directorate of Legal Services, *Interim Law of Armed Conflict Manual*, DM 112 (Wellington, November 1992), p. 5–35. According to Arts. 15, 38 and 45 of the Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, seized property and war booty can only be used to benefit the army or the country and cannot be taken for personal gain.

[11] A. Steinkamm, 'Pillage' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore and Tokyo, 1997), vol. III, p. 1029. See also, for example, the Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in http://www.dnd.ca/jag/operational_pubs_e.html@top, p. 6-5.

> to the widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that 'spoliation' is synonymous with the word 'plunder' as employed in Control Council Law 10, and that it embraces offences against property in violation of the laws and customs of war.[12]

Hence, it appears that the terms 'plunder', 'pillage', 'spoliation' and 'exploitation' were used interchangeably with the term 'appropriation'.[13]

Therefore, the case law cited under section 'Art. 8(2)(a)(iv)', subsection 'Legal basis of the war crime' describing the term 'appropriation' may be a further indication of what constitutes pillage.

The following post-Second World War trials deal explicitly with pillage without giving further clarification:

In the *F. Holstein and Twenty-three Others* case[14] the accused were found guilty under Art. 221 of the French Code of Military Justice ('pillage committed in gangs by military personnel with arms or open force').

In the *P. Rust* case,[15] the accused was found guilty of abusive and illegal requisitioning of French property, a case of pillage in time of war, under Art. 221 of the French Code of Military Justice and Art. 2(8) of the Ordinance of 1944 for the prosecution of war criminals. These provisions give effect to Art. 52 of the Hague Regulations of 1907.

In the *H. Szabados* case, the accused was found guilty of pillage (i.e. the looting of personal belongings and other property of the civilians evicted from their homes prior to the destruction of the latter) under Art. 440 of the French Code.[16]

Art. 28 of the 1907 Hague Regulations was quoted for the *actus reus* in the *T. Sakai* case.[17]

Pillage is defined more precisely in the following military manuals:

Australia's Defence Force manual defines pillage as 'the violent acquisition of property for private purposes' or 'the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually armed forces, for private purposes'.[18] Canada's military

[12] *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. VIII, p. 1133; 15 AD 668 at 673.

[13] See also 'Digest of Laws and Cases', in UNWCC, *LRTWC*, vol. XIV, p. 126; P. Verri, *Dictionary of the International Law of Armed Conflict* (ICRC, Geneva, 1988), p. 85.

[14] In UNWCC, *LRTWC*, vol. VIII, p. 31; 13 AD 261.

[15] In UNWCC, *LRTWC*, vol. IX, pp. 71 ff.; 15 AD 684.

[16] In UNWCC, *LRTWC*, vol. IX, pp. 60 ff.; 13 AD 261.

[17] In UNWCC, *LRTWC*, vol. XIV, p. 7; 13 AD 222.

[18] Australian Defence Force, *Law of Armed Conflicts-Commander's Guide*, paras. 743 and 1224.

manual defines pillage as 'the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually soldiers, for private purposes'.[19] In the 'Military Handbook' and 'Military Manual' of the Netherlands pillage is defined as 'stealing goods (or property) belonging to civilians'.[20] The military manual of the Socialist Federal Republic of Yugoslavia considered the appropriation of private property, *inter alia*, as pillage.[21] New Zealand's military manual states that 'pillage, the violent acquisition of property for private purposes, is prohibited'.[22]

Remarks concerning the mental element

The ICTY Prosecution in the *Delalic* case considered that the following constituted the mental elements of the offence 'plunder of public or private property' under Art. 3(e) of the ICTY Statute:

– The destruction, taking, or obtaining by the accused of such property was committed with the intent to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner.

Later on in the *Kordic and Cerkez* case,[23] the ICTY Prosecution defined the mental element in a different manner:

– The property was acquired wilfully.[24]

In the *H. A. Rauter* case,[25] the accused was found guilty of 'intentionally' taking the necessary measures to carry out the systematic pillage of the Netherlands population.

[19] Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, p. 12–8.

[20] *Toepassing Humanitair Oorlogsrecht*, Voorschift No. 27-412/1, Koninklijke Landmacht, Ministerie van Defensie (1993), p. IV-5; *Handboek Militair* (Ministerie van Defensie, 1995), p. 7–43.

[21] *Propisi o Primeri Pravila Medjunarodnog Ratnog Prava u Oruzanim Snagama SFRJ*, Savezni Sekretarijat za Narodnu Odbranu (Pravna Uprava, 1988), Point 92.

[22] New Zealand Defence Force, *Interim Law of Armed Conflict Manual*, p. 5–35.

[23] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 50.

[24] In the *Simic and Others* case the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

[25] In UNWCC, *LRTWC*, vol. XIV, pp. 89 ff.; 16 AD 526.

Art. 8(2)(b)(xvii) – Employing poison or poisoned weapons

Text adopted by the PrepCom

War crime of employing poison or poisoned weapons

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.

2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

Due to the very brief wording of the Rome Statute for the war crime of 'employing poison or poisoned weapons' (Art. 8(2)(b)(xvii)), it was necessary for the EOC to explain the requirements under this crime in more detail. However, in order to avoid the difficult task of negotiating a definition of poison, the text adopted includes a specific threshold with regard to the effects of the substance: 'The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.' These effects must be the consequence of the toxic features of the substance. A number of delegations opposed the threshold 'serious' in the elements requiring 'serious damage to health', but eventually joined the consensus.

Legal basis of the war crime

The phrase 'employing poison or poisoned weapons' is directly derived from Art. 23(a) of the Hague Regulations.

The prohibition of poison is probably the most ancient prohibition of a means of combat in international law. Since the late Middle Ages the use of poison has always been strictly prohibited.[1] An early reference to this

[1] Y. Sandoz, *Des armes interdites en droit de la guerre* (Imprimerie Grounauer, Geneva, 1975), pp. 11 ff.; S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 138.

prohibition is found in Art. 70 of the Lieber Code (1863):

> The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

Remarks concerning the material elements

Although there are different interpretations of the meaning of 'poison or poisoned weapons', it should be noted that there is at least a considerable overlap with the offence described in Art. 8(2)(b)(xviii) – Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.[2] This connection was noted by both the Tokyo District Court in the *Shimoda* case and the ICJ Advisory Opinion on the legality of the threat or use of nuclear weapons, both of them indicating that the prohibition of poison has not been interpreted widely so as to encompass nuclear weapons.[3]

With regard to the ordinary meaning of the word 'poison', the following definitions may be useful:

The term 'poison' is defined in the *Cambridge International Dictionary of English* as 'a substance that causes illness or death if taken into a living thing, esp. a person's or animal's body'.[4]

According to the *Oxford English Dictionary*, 'poison' means:

> Any substance which, when introduced into or absorbed by a living organism, destroys life or injures health, irrespective of mechanical means or direct thermal changes. Popularly applied to a substance capable of destroying life by rapid action, and when taken in small quantity.[5]

[2] See L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, p. 342; Sandoz, *Des armes interdites en droit de la guerre*, p. 28, concludes that asphyxiating gases are poison; Oeter, 'Methods and Means of Combat', p. 148, establishes that the prohibition of poisonous gases is included in the prohibition of poison or poisoned weapons. M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley and Los Angeles, 1959), p. 359, referring to Art. 23(a) of the Hague Regulations, states: 'Gas and bacteriological warfare may be regarded as particular instances of infringements against the general prohibition of poison or poisoned weapons in war.'

[3] *Ryuichi Shimoda and Others* v. *The State*, 32 ILR 626 at 633, para. 2(11); ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, paras. 55 ff.; 110 ILR 163 at 198. See, however, Dissenting Opinion of Judge Weeramantry, III. 12; 110 ILR 458–62; and Dissenting Opinion of Judge Koroma; 110 ILR 506–31.

[4] *Cambridge International Dictionary of English* (Cambridge University Press, Cambridge, 1995), p. 1090.

[5] *Oxford English Dictionary* (Oxford, 1933; reprinted in 1978), vol. VII, p. 1056.

NB: The *Oxford Manual on the Laws of War on Land* drafted by the Institute of International Law on 9 September 1880[6] states in Art. 8:

> It is forbidden:
> (a) To make use of poison, in any form whatever.

- The US military manual defines poison in the following terms:

> Poisons are biological or chemical substances causing death or disability with permanent effects when, in even small quantities, they are ingested, enter the lungs or bloodstream, or touch the skin.[7]

- The British and Canadian military manuals state with regard to the prohibition of poison:

> Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated. The poisoning or contamination of water is not made lawful by posting up a notice informing the enemy that the water has been thus polluted.[8]

- The German military manual provides in this regard:

> The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or similar devices is prohibited [Geneva Gas Protocol 1925; Art. 23 (a) Hague Regulations]. This prohibition also applies to toxic contamination of water-supply installations and foodstuffs [Art. 54, (2) AP I; Art. 14 AP II] and the

[6] With respect to the legal value of this *Manual*, it is worth citing the following paragraph from the preface:

> The Institute, too, does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a 'Manual' suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies.
>
> Rash and extreme rules will not, furthermore, be found therein. The Institute has not sought innovations in drawing up the 'Manual'; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable.

[7] US Department of the Air Force, AF Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations* (1976), p. 6-5.

[8] *The Law of War on Land being Part III of the Manual of Military Law* (HMSO, 1958), p. 42. See also Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in http://www.dnd.ca/jag/operational_pubs_e.html@top, p. 5-2.

use of irritant agents for military purposes. This prohibition does not apply to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions.[9]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

[9] *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, no. 434. See also K. Strupp, *Das Internationale Landkriegsrecht* (J. Baer, Frankfurt am Main, 1914), p. 58; Greenspan, *Modern Law of Land Warfare*, p. 317.

Art. 8(2)(b)(xviii) – Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices

Text adopted by the PrepCom

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

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

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.[48]

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The war crime of 'employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' (Art. 8(2)(b)(xviii)) is derived from the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, and covers chemical weapons. The PrepCom intensively debated the scope of the prohibition in the Geneva Gas Protocol, as reaffirmed subsequently on several occasions, and, in particular, the question of whether the prohibition also covered riot control agents. In this context it was also debated how far developments in the law relating to chemical warfare since 1925 could be reflected in the elements, taking into account the decision in Rome to exclude a reference to the 1993 Chemical Weapons Convention.

With regard to riot control agents, some States argued that any use of such agents in international armed conflict is prohibited. Among these delegations some took the view that the initial 1925 Geneva Gas Protocol already prohibited such use, while others argued that the law under the Gas Protocol with regard to riot control agents might not have been completely clear, but that the adoption of the 1993 Chemical Weapons Convention had confirmed the prohibition of the use of riot control agents

as a method of warfare.[1] Even amongst these delegations there were diverging views as to the meaning of the notion 'method of warfare'. At the other end of the spectrum a few delegations considered that the use of these agents was permitted in certain circumstances during armed conflict. In the end, the controversy was not entirely solved. The PrepCom did not define the specific gases, liquids, materials or devices, but chose a similar approach as for the war crime of 'employing poison or poisoned weapons'.

As a compromise, it was accepted that the gases, substances[2] or devices covered were defined by reference to their effects, namely as causing 'death or serious damage to health in the ordinary course of events'.[3] This would mean that the use of riot control agents in most circumstances would not be covered by this effect-oriented definition. Delegations in favour of this compromise justified it by emphasising that the ICC is designed to deal only with 'the most serious crimes of concern to the international community as a whole'. Whilst many took the view that these elements would prevent the prosecution of some actions that might be unlawful under existing international law, proponents of the compromise claimed that all offences 'of serious concern' would be within the terms of the elements as drafted. Given that many delegations feared that the threshold of 'death or serious damage to health' would have limiting effects on the law governing chemical weapons,[4] a footnote was added to ensure that the elements were

[1] See Art. I(5) of the Convention, which explicitly states that '[e]ach State Party undertakes not to use riot control agents as a method of warfare'. Riot control agents (RCAs) are defined as '[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure'.

[2] In the EOC the term 'substance' is used to cover both 'liquids' and 'materials' as contained in the statutory language. It was not the intention of the drafters to limit in any way the scope of application by this change.

[3] The specific elements read as follows: '1. The perpetrator employed a gas or other analogous substance or device. 2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.'

[4] See Art. II of the 1993 Chemical Weapons Convention:

> 1. 'Chemical Weapons' means the following, together or separately:
>
> (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
>
> (b) Munitions and devices, specifically designed *to cause death or other harm through the toxic properties of those toxic chemicals* specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; . . .
>
> 2. 'Toxic Chemical' means:
>
> Any chemical which through its chemical action on life processes can *cause death, temporary incapacitation or permanent harm* to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere. [Emphasis added.]

to be considered as specific to the war crime in the ICC Statute and not to be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to development, production, stockpiling and use of chemical weapons.

In addition to this controversy there was some discussion about the need to reproduce in the EOC the word 'device' contained in both the terms of the ICC Statute and the 1925 Geneva Gas Protocol. While some delegations were in favour of deleting the word 'device', others argued that this would give rise to the risk of limiting the scope of the crime. The PrepCom followed the latter view. This approach seems to be justified. As pointed out in a commentary to the Geneva Gas Protocol, including its *travaux préparatoires*: '[The term "device"] marks once more the intention of the authors to give to their definition a comprehensive and open-ended character', since otherwise '[i]t could be claimed, for instance, that . . . an aerosol, which is a suspension of solid particles or liquid droplets in air, is neither a gas nor a liquid, a material or a substance'.[5]

Legal basis of the war crime

The phrase 'employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' is directly derived from the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ('use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices'), which reaffirmed *inter alia* the Declaration (IV, 2) concerning Asphyxiating Gases, The Hague, 29 July 1899: 'The Contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.' As Oppenheim points out, the 'Declaration gave expression, in this particular sphere, to the customary rules prohibiting the use of poison and of material causing unnecessary suffering',[6] which had been codified in Art. 23(a) and (c) of the Hague Regulations. After the use of gases in the First World War, articles in various peace treaties reiterated and in some respects enlarged the prohibition embodied in the 1899 Declaration. For example, Art. 171 of the 1919 Treaty of Versailles stated: 'The use of asphyxiating, poisonous

[5] SIPRI (ed.), *The Problem of Chemical and Biological Warfare*, vol. III: *CBW and the Law of War* (Stockholm, 1973), p. 45. See J. Spaight, *Air Power and War Rights* (3rd edn, 1947), quoted in M. Whiteman, *Digest of International Law* (US Gov. Printing Office, Washington, 1968), vol. X p. 459 (quoted in the section 'Legal basis of the war crime').

[6] L. Oppenheim, *International Law. A Treatise*, ed. H. Lauterpacht (7th edn, Longmans, London, 1952), vol. II, p. 342.

or other gases and all analogous liquids, materials or devices being prohibited . . .'. Therefore, the preamble of the 1925 Geneva Protocol indicates that it reaffirmed an existing rule:

> Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and
>
> Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and
>
> To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations.

Remarks concerning the material elements

As indicated above, States have elaborated on the prohibition of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices in the context of the above-mentioned international legal instruments.

The 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare indicates that it extends the scope of the prohibition to bacteriological agents:

> That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare and agree to be bound as between themselves according to the terms of this declaration.

Therefore, one might conclude that these agents are not included in the prohibition as stated in the ICC Statute. However, it should be indicated that the use of such agents would probably amount to an attack on civilians within the meaning of Art. 8(2)(b)(i) of the ICC Statute because of the impossibility of biological agents being able to distinguish between civilians and combatants.

Since the 1925 Geneva Protocol includes the prohibition of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, it is useful for the determination of the elements of the crime as defined under the ICC Statute to look at the interpretations given to the original rule as reaffirmed in the said Protocol.

An explanation of the interpretation of the 1925 Protocol is given in the German military manual:

> The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or similar devices is prohibited [Gas Protocol 1925; Art. 23 (a) Hague Regulations]. This prohibition also applies to toxic contamination of water-supply installations and foodstuffs (Art. 54, para. 2 AP I; Art. 14 AP II) and the use of irritant agents for military purposes. This prohibition does not apply to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions.[7]

The Commentary to this rule further clarifies:

> There is no dispute as to the basic rule: the use of chemical weapons is prohibited. A prohibition on wartime use of potentially lethal substances, which cause asphyxiating or poisoning effects, had already been codified in Art. 23 [para.] a of the Hague Regulations (prohibition against using poison or poisoned weapons . . .) . . . The Geneva Protocol of 17 June 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare thus consolidated the general prohibition of poisonous weapons in 1925 and explicitly outlawed all use of the gas weapon . . .
>
> The general prohibition against the use of poisonous gases – which now constitutes a rule of customary law – applies not only to their direct use against enemy combatants, but extends also to the toxic contamination of water-supply installations and foodstuffs. This could in theory be deduced from the pre-existing general prohibition of poison and poisoned weapons in Art. 23 [para.] a Hague Regulations; nowadays it is expressly provided for in Arts. 54, para. 2 AP I and 14 AP II . . .
>
> Concerning the category of 'irritant agents', which is included in the scope of the prohibition by sentence 2 of the above-cited Section 434 of the Manual, it should be noted that a serious dispute continues as to whether these substances were covered by the traditional prohibition of chemical weapons . . . Art. 1, para. 5 of the Chemical Weapons Convention of 1993 now settles the controversy by explicitly prohibiting the use of 'irritant' agents in warfare . . . The most important point concerning all these disputes about the definition of 'poisonous gases' (clarified to a large extent by the new Chemical Weapons Convention) is the intentional design of a weapon in order to inflict poisoning as a means of

[7] *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, no. 434.

> combat. Only in so far as the poisoning effect is the intended result of the use of the substances concerned does the use of such munitions qualify as a use of 'poisonous gases'. If the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism intended principally to cause totally different results (as e.g. the use of nuclear weapons), then the relevant munition does not constitute a 'poisonous gas'.[8]

The Canadian military manual states:

> In respect of chemical weapons, the Gas Protocol must be read in conjunction with the 1993 Chemical Weapons Convention.[9]

and later on:

> Chemical weapons, which include toxic chemicals and their precursors (those chemicals which can cause death, permanent harm or temporary incapacity to humans or animals) and munitions or devices designed to carry such chemicals, are banned.
>
> The use of riot control agents, including tear gas and other gases that have debilitating but non-permanent effects, as a means of warfare is prohibited.[10]

Spaight indicates:

> The Gas Protocol prohibits . . . not only poisonous and asphyxiating gases but also 'other gases' and (to emphasise the comprehensiveness of the prohibition) 'all analogous liquids, materials or devices.' It condemns, therefore, not only lethal but also non-toxic or anaesthetic gases. The argument that, because the effect of a gas is not to kill but merely to stupefy temporarily those within its radius of action, its use is permissible, cannot be sustained in face of the definite terms of the treaty.[11]

For further interpretations see C. Rousseau, *Le droit des conflits armés* (A. Pedone, Paris, 1983), pp. 119 ff.

With respect to whether nuclear weapons are forbidden by virtue of the prohibitions in the 1925 Protocol, the ICJ, in its Advisory Opinion on the legality of the threat or use of nuclear weapons, held:

> Nor does the 1925 Protocol specify the meaning to be given to the term 'analogous materials or devices'. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose

[8] S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), pp. 148 ff. (footnotes omitted).

[9] Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in http://www.dnd.ca/jag/operational_pubs_e.html@top, p. 1–3.

[10] *Ibid.*, p. 5-3.

[11] Spaight, *Air Power and War Rights*, p. 459.

prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899 . . . or the 1925 Protocol.[12]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

[12] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, paras. 55 ff.; 110 ILR 163 at 198. See, however, Dissenting Opinion of Judge Weeramantry, III. 12; 110 ILR 458–62; and Dissenting Opinion of Judge Koroma; 110 ILR 506–31.

Art. 8(2)(b)(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

Text adopted by the PrepCom

War crime of employing prohibited bullets

1. The perpetrator employed certain bullets.

2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

Some discussion focused on the question as to whether the design or the effect of a particular bullet is the decisive criterion for the prohibition derived from the Hague Declaration, which is the origin of this war crime. An initial proposal that required that the bullet be 'designed to expand or flatten easily in the human body' was rejected by the PrepCom. The requirement of a design element was considered incompatible with the Statute. Instead, the effect of the bullet was identified as the decisive criterion. This explains the choice of the words in Element 2 which elaborates the statutory language in parts.

The addition of the words 'that their use violates the international law of armed conflict because' essentially was meant to be a reminder that expanding bullets are not prohibited absolutely, but may be lawfully used in certain domestic law enforcement operations.

Bullets with a hard envelope which does not entirely cover the core or is pierced with incisions were considered only as examples of prohibited bullets covered by this crime. In accordance with the approach taken for other crimes, this example was not included in the elements despite the fact that it is mentioned in the Statute.

Intensive discussions of the PrepCom focused on the extent of knowledge required by the perpetrator and the kinds of perpetrators that should in practice be caught by this war crime. It was generally recognised that the crime can be committed primarily by

- those who choose to issue ammunition as described in the definition of this crime, and commanders who are aware of the type of ammunition used, because both are under an obligation to ensure that no unlawful weapons will be used; and
- soldiers who manipulate their munitions or realise that the munitions have been manipulated by a third person.

However, soldiers who receive standardised munitions from their competent authorities, and who use them in good faith in the expectation that the munitions are in conformity with international law, should be excluded from this crime's scope of application.

Applying the Art. 30(3) ICC Statute standard (i.e. awareness that a circumstance exists) to Element 2 was considered problematic. It would have meant that the perpetrator must be aware that the bullet expands or flattens easily in the human body. However, such a requirement would in fact necessitate precise knowledge of wound ballistics beyond the experience of most. This standard of knowledge was therefore considered too high. At the other end of the spectrum, arguments that no mental element should be linked to that element would have meant that the mental coverage would have been limited to Element 1, merely requiring awareness by the perpetrator that a bullet was being used. This would have created, in effect, an offence of strict liability. Such an approach was therefore rejected. Multiple solutions were proposed and rejected. Among them was a proposal suggesting a standard of 'knew or should have known', which has been considered appropriate in other circumstances for other crimes. Some delegations argued, however, that this would be an unwarranted departure from Art. 30. Another proposal, which required that the perpetrator be aware of the prohibited status of the bullet, was rejected because it would have introduced an unacceptable mistake of law defence. The compromise found was inspired by the philosophy behind the prohibition of the weapons covered by Art. 8(2)(b)(xix). The preamble to the above-mentioned 1899 Declaration mentions the 'sentiments which found expression in the Declaration of St Petersburg' of 1868, which refers to 'the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'. The essence of this part of the

St Petersburg Declaration was incorporated in Element 3, which requires the perpetrator to have been 'aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect'. It was felt that this solution properly reflected the general view as to the potential perpetrators described above.

Legal basis of the war crime

The phrase 'employing bullets which expand or flatten easily in the human body' is directly derived from the Declaration (IV, 3) concerning Expanding Bullets, The Hague, 29 July 1899 ('The Contracting Parties agree to abstain from the use of 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.' The authentic French text reads as follows: 'Les Puissances contractantes s'interdisent l'emploi de balles qui s'épanouissent ou s'aplatissent facilement dans le corps humain, telles que les balles à enveloppe dure dont l'enveloppe ne couvrirait pas entièrement le noyau ou serait pourvue d'incisions.')

Remarks concerning the material elements

The German military manual states:

> It is prohibited to use bullets which expand or flatten easily in the human body (e.g. dum-dum bullets) (Declaration Concerning Expanding Bullets of 1899). This applies also to the use of shotguns, since shot causes similar suffering unjustified from the military point of view. It is also prohibited to use projectiles of a nature
> – to burst or deform while penetrating the human body;
> – to tumble early in the body; or
> – to cause shock waves leading to extensive tissue damage or even lethal shock
> [Arts. 35 (2) and 51 (4) (c) AP I; Art. 23 (e) Hague Regulations].[1]

The commentary thereon explains:

> One could reasonably argue, as the German administration for example does, that the use of shotguns has essentially to be regarded as prohibited under these provisions, since shot inflicts extremely painful wounds which cause grave difficulties in medical treatment, but is not much more efficient in its effects than normal infantry munition. Nevertheless, no real consensus has developed on this issue. The same could be said

[1] *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, no. 407.

> of other variants of recently developed infantry weapons and munitions which cause excessive injuries without achieving particularly impressive military advantages: projectiles which burst or deform while penetrating the human body; projectiles which tumble early in the human body (causing particularly severe internal injuries); and weapons and munitions which cause shock waves leading to extensive tissue damage or even lethal shock. The analogy with the dum-dum bullets outlawed in 1899 is obvious, and a prohibition under the general ground of 'excessive suffering' suggests itself.[2]

The German interpretation may be of relevance also with regard to this war crime under the ICC Statute. The words 'such as' in Art. 8(2)(b)(xix) of the ICC Statute clearly indicate that the list of prohibited bullets is not exhaustive, but illustrative. With regard to the test to be applied to other types of bullets, the preamble of the Hague Declaration, which is the basis of this crime, gives further guidance by stating that

> [t]he undersigned [were] inspired by the sentiments which found expression in the Declaration of St Petersburg of 29 November (11 December) 1868.

These 'sentiments' are expressed in the St Petersburg Declaration in the following manner:

> Considering:
>
> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity . . .

On this basis, one might conclude that the intentions of the St Petersburg Declaration, which are still valid, although not necessarily the technical specifications laid down at that time, must be considered in evaluating other bullets which might also fall under this crime.

[2] S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 123.

The importance of the intentions of the St Petersburg Declaration was also stressed at an Expert Meeting in Geneva (29–30 March 1999) organised by the ICRC on exploding bullets. There was a general consensus that:

- the prohibition on the intentional use against combatants of bullets which explode upon impact with the human body, which originated in the 1868 St Petersburg Declaration, continues to be valid;
- the targeting of combatants with such bullets, the foreseeable effect of which is to explode upon impact with the human body, would be contrary to the object and purpose of the St Petersburg Declaration;
- there is no military requirement for a bullet designed to explode upon impact with the human body.

Analysing the legality of a particular bullet that would 'explode on impact in a human body if it meets any degree of resistance, such as personnel equipment, an armored vest, or bone', the US Department of the Army concluded that a bullet 'that will explode on impact with the human body would be prohibited by the law of war from use for antipersonnel purposes'.[3]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

[3] Memorandum for US Army Armament Research, Development and Engineering Center, 19 February 1998.

Art. 8(2)(b)(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

Text adopted by the PrepCom

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**
Given that so far no annex to the Rome Statute exists which includes weapons, projectiles and material and methods of warfare as mentioned in Art. 8(2)(b)(xx), the PrepCom did not attempt to draft specific elements of this crime.

Legal basis of the war crime
The phrase 'weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering' is directly derived from Art. 35(2) AP I (Art. 23(e) of the 1907 Hague Regulations). The phrase 'weapons, projectiles and material and methods of warfare which are inherently indiscriminate in violation of the international law of armed conflict' is based on the concepts as expressed in Arts. 48 and 51(4) and (5) AP I.

Neither the ICTY nor the ICTR has rendered any decision on whether a specific means of warfare is of a nature to cause superfluous injury or unnecessary suffering or is inherently indiscriminate. However, the Statute does not give such general jurisdiction to the Court because the specific weapons need to be agreed on in an annex. The remarks below give some guidance as to how States may choose to add specific weapons based on the two customary rules indicated.

Remarks concerning the elements

Before going into more detail on the substance of the two customary rules, it is worth quoting the ICJ with regard to conceptual matters:

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.
>
> . . .
>
> In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.
>
> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*ICJ Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[1]

(1) Weapons of a nature to cause superfluous injury or unnecessary suffering

There are only very few clear statements in the relevant sources that particular weapons, projectiles and material and methods of warfare are of a nature to cause superfluous injury or unnecessary suffering. For example,

[1] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, paras. 78 ff.; 110 ILR 163 at 207.

the British and US military manuals indicate:

> Under this heading [prohibition to employ arms, projectiles or material calculated to cause unnecessary suffering] may be included such weapons as lances with a barbed head, irregularly-shaped bullets, projectiles filled with broken glass, and the like. The scoring of the surface of bullets, the filing off of the end of their hard case, and the smearing on them of any substance likely to inflame a wound, are also prohibited.[2]

The Commentary on the German military manual states that the prohibition of weapons 'the primary effect of which is to injure by fragments which in the human body escape detection by X-rays'[3] 'is the only specific prohibition of a weapon in the tradition of . . . [Art. 23 (e) Hague Regulations] which met unanimous approval by state representatives'.[4] However, it also indicates that the 'prohibition of poisoned weapons and the use of poison as a means of warfare, which had been so deeply rooted in medieval custom, could be seen as a precursor . . . The bans on the use of poisonous gases as a means of warfare provided for by the Geneva Gas Protocol of 1925 and the Biological Weapons Convention of 1972 were further steps on the way to a total ban on the use of certain particularly barbaric weapons.'[5]

The US Air Force Pamphlet states:

> International agreements may give specific content to the principle in the form of specific agreements to refrain from the use of particular weapons or methods of warfare. Thus, international law has condemned dum dum or exploding bullets because of types of injuries and inevitability of death. Usage and practice has also determined that it is per se illegal to use projectiles filled with glass or other materials inherently difficult to detect medically, to use any substance on projectiles that tend unnecessarily to inflame the wound they cause, to score the surface or to file off the ends of the hard cases of bullets which cause them to expand upon contact and thus aggravate the wound they cause.[6]

[2] *The Law of War on Land being Part III of the Manual of Military Law* (HMSO, 1958), p. 41; US Department of the Army, Field Manual, FM 27-10, *The Law of Land Warfare* (1956), p. 18.

[3] See Protocol I to the UN 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.

[4] S. Oeter, 'Methods and Means of Combat' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, Oxford, 1995), p. 123.

[5] *Ibid.*, pp. 113 ff.

[6] US Department of the Air Force, AF Pamphlet 110–31, *International Law – The Conduct of Armed Conflict and Air Operations* (1976), p. 6-2.

The Australian Defence Force, Operations Series, *Commander's Guide*, states:

> Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion . . .
>
> Munitions which produce fragments undetectable by X-ray machines, such as glass, are prohibited based upon the principle of unnecessary suffering . . .
>
> Hollow point weapons are prohibited because they cause gaping wounds which lead to unnecessary suffering. Issued weapons and ammunition should never be altered.[7]

The USSR manual noted:

> Prohibited means of warfare include various kinds of weapons of indiscriminate character and/or those that cause unnecessary suffering:
>
> a) bullets that expand or flatten easily in the human body;
> b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
> c) projectiles weighing less than 400 grams, which are either explosive or charged with fulminating or inflammable substances;
> d) poisons or poisoned weapons;
> e) asphyxiating, poisonous or other similar gases and bacteriological means;
> f) bacteriological (biological) and toxin weapons;
> g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury . . . [8]

The ICRC Commentary contains the following statement:

> The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St Petersburg and The Hague, are not very numerous. They include:
>
> 1. explosive bullets and projectiles filled with glass, but not explosives contained in artillery missiles, mines, rockets and hand grenades;
> 2. 'dum-dum' bullets, i.e., bullets which easily expand or flatten in the human body, such as bullets with a hard envelope which does

[7] Australian Defence Force, *Law of Armed Conflict – Commander's Guide*, Operations Series, ADFP 37 Supplement 1 – Interim edn, 7 March 1994, pp. 3-1 ff.

[8] *Manual on the Application of the Rules of International Humanitarian Law by Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister, no. 75 (1990), para. 6.

not entirely cover the core or is pierced with incisions or bullets of irregular shape or with a hollowed out nose;
3. poison and poisoned weapons, as well as any substance intended to aggravate a wound;
4. asphyxiating or deleterious gases;
5. bayonets with a serrated edge, and lances with barbed heads;
6. hunting shotguns are the object of some controversy, depending on the nature of the ammunition and its effect on a soft target.[9]

Later on, it also states:

> Fragmentation projectiles of which the fragments cannot be traced by X-rays are prohibited as they are of a nature to cause superfluous injury or unnecessary suffering.[10]
>
> Napalm, small-calibre projectiles, and certain blast and fragmentation weapons can also result in superfluous injury or unnecessary suffering, in the sense of the provision contained in this article, even though up to now no regulations have been adopted on this subject.[11]

Since then, other weapons have been mentioned as violating the rule prohibiting the use of weapons of a nature to cause unnecessary suffering or superfluous injury. In particular, experts have expressed support for the idea that the antipersonnel use of laser weapons to blind would go against that rule.[12] Blinding laser weapons are now prohibited by treaty[13] because of their inhumane effects although not all States were of the view that they were already prohibited by virtue of this customary rule.

Furthermore, the preamble of the Ottawa Treaty[14] states:

> Basing themselves on the principle of international humanitarian law . . . that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants.

[9] J. de Preux, 'Art. 35' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 1419.

[10] *Ibid.*, no. 1435. Oeter, 'Methods and Means of Combat', p. 123.

[11] De Preux, 'Art. 35' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 1438.

[12] Oeter, 'Methods and Means of Combat', p. 116.

[13] Protocol on Blinding Laser Weapons (Protocol IV to 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), 13 October 1995.

[14] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.

This statement may be an indication that anti-personnel mines might also be considered as weapons of a nature to cause superfluous injury or unnecessary suffering.

From a more conceptual point of view, the court's finding in the *Shimoda* case is of particular interest:

> [J]udging from the fact that the St Petersburg Declaration declares that '. . . considering that the use of a weapon which increases uselessly the pain of people who are already placed out of the battle and causes their death necessarily is beyond the scope of this purpose, and considering that the use of such a weapon is thus contrary to humanity . . .' and that article 23(e) of the Hague Regulations respecting War on Land prohibits 'the employment of such arms, projectiles, and materials as cause unnecessary injury', we can safely see that besides poison, poison-gas and bacterium the use of the means of injuring the enemy which causes at least the same or more injury is prohibited by international law.[15]

Since the application of this war crime under the ICC Statute depends on the elaboration and acceptance by State Parties of an annex naming the weapons prohibited, going beyond the sources generally referred to in this study, it seems useful to indicate general tools for making judgements on particular weapons.

Since 1868 the principle that the only legitimate purpose of war is to weaken the military forces of an opponent has been an accepted element of international humanitarian law.[16] At that time it was established that this purpose would be served by disabling enemy combatants and that it would 'be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable'.[17] This principle has been reaffirmed in various international instruments in the form of a prohibition on the use of 'weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'.[18] In 1996 the International Court of Justice stated that this rule constitutes one of the 'intransgressible principles of international customary law' and is a fundamental rule 'to be observed by all States'.[19]

[15] *Ryuichi Shimoda and Others* v. *The State*, 32 ILR 626 at 634, para. 2(11).

[16] Even before 1868, a prohibition of poison or poisoned weapons had been part of ancient laws of war in India, Greece, Rome and the Middle East based on their excessive effects. The 1863 'Lieber Instructions' to Federal forces in the US Civil War also 'wholly excluded' this means of warfare on the same basis.

[17] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, Russia, 29 November (11 December) 1868.

[18] Art. 35(2) AP I.

[19] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, no. 95, para. 79; 110 ILR 163 at 207 f.

The concept of 'superfluous injury and unnecessary suffering'[20] relates to the design-dependent effects of specific weapons 'of a nature to cause'[21] these effects. Although much of humanitarian law is aimed at protecting civilians from the effects of armed conflict, this rule of customary international law constitutes one of the few measures intended to protect combatants from certain weapons which are deemed abhorrent or which inflict more suffering than required for their military purpose.

The International Committee of the Red Cross in 1999 proposed as a tool, to help in making judgements as to whether specific weapons may cause superfluous injury and unnecessary suffering, the findings of an objective study of the health effects of weapons used in conflicts during the past fifty years, as contained in the SIrUS Project.[22] The group of experts who worked on the SIrUS Project, most of whom were health professionals, collated data relating to the effects of weapons used in conflicts over the last fifty years. These data originated from both military medical publications and the ICRC wound database of 26,636 weapon-injured.

The SIrUS Project has established that the following effects of weapons on humans have *not* been seen commonly as a result of armed conflicts in the last five decades:

- disease other than that resulting from physical trauma from explosions or projectiles;
- abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles);
- permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated antipersonnel mines – now widely prohibited);
- disfigurement specific to the kind of weapon;
- inevitable or virtually inevitable death in the field or a high hospital mortality level;
- grade 3 wounds among those who survive to hospital;
- effects for which there is no well-recognised and proven medical treatment which can be applied in a well-equipped field hospital.

[20] Both terms are translations from the single French concept of 'maux superflus' contained in the 1899 and 1907 Hague Regulations (Art. 23(e)). The French term contains both elements of the English terms.

[21] This term is translated from the original French 'propres à causer' which is the sole authentic version of the 1899 and 1907 Hague Regulations (Art. 23(e)). The term was incorrectly translated into the English 'calculated to cause' in the 1907 Hague Regulations (IV) which introduced a subjective element of the weapon designer's intention. This error was corrected when the original 'of a nature to cause' was restated in Art. 35(2) AP I.

[22] SIrUS = **S**uperfluous **I**njury or **U**nnecessary **S**uffering.

As the rule prohibiting superfluous injury or unnecessary suffering requires an evaluation that the injury or suffering is excessive compared with the military value, in 1999 the ICRC proposed the following method of evaluation to the 27th Red Cross and Red Crescent Conference:

- establish whether the weapon in question would cause any of the above effects as a function of its design (i.e. the effects listed as having not been seen commonly in armed conflicts over the last fifty years) and if so:
- weigh the military utility of the weapon against these effects, and
- determine whether the same purpose could reasonably be achieved by other lawful means that do not have such effects.[23]

The Plan of Action adopted during the 27th Conference called for consultations between States and the ICRC to determine the extent to which the SIrUS Project could assist States in reviewing the legality of weapons they intend to acquire, develop or deploy:

> Para 21. States which have not done so are encouraged to establish mechanisms and procedures to determine whether the use of weapons, whether held in their inventories or being procured or developed, would conform to the obligations binding on them under international humanitarian law . . .
>
> States and the ICRC may engage in consultations to promote these mechanisms, and in this regard analyse the extent to which the ICRC SIrUS (Superfluous Injury or Unnecessary Suffering) Project Report to the 27th Conference and other available information may assist States.

As a part of this process of consultation, a meeting of governmental experts was organised on the SIrUS Project and Legal Reviews of Weapons in Jongny sur Vevey on 29–31 January 2001. The meeting did not adopt any conclusions or recommendations; however, there was a convergence of views, reflected in an agreed summary report, that

> there is a need for particularly rigorous legal reviews of weapons which injure by means and cause effects with which we are not familiar.[24]

[23] ICRC, 'The SIrUS Project and Reviewing the Legality of New Weapons', Background Paper prepared by the ICRC, June 1999.

[24] Summary Report by the ICRC, Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, Jongny sur Vevey, Switzerland (29–31 January 2001), p. 8.

(2) Weapons that are inherently indiscriminate

Such weapons are described in Art. 51(4)(b) and (c) AP I, which establish absolute standards (indicated by the word 'cannot'):

> Indiscriminate attacks are:
>
> . . .
>
> (b) those which employ a method or means of combat which *cannot* be directed at a specific military objective; or
>
> (c) those which employ a method or means of combat the effects of which *cannot* be limited as required by this Protocol. [Emphasis added.]

As in the case of weapons of a nature to cause superfluous injury or unnecessary suffering, there are only a very few clear statements in the relevant sources that particular weapons are inherently indiscriminate.

According to the ICRC Commentary on Art. 51(4)(b),

> As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are an example of this.[25]

Later on it states under the title of Art. 51(4)(c):

> [T]here are some weapons which by their very nature have an indiscriminate effect. The example of bacteriological means of warfare is an obvious illustration of this point. There are also other weapons which have similar indiscriminate effects, such as poisoning sources of drinking water.[26]

Solf refers to the following:

> Attaching incendiary or antipersonnel bombs to free floating balloons, or using long range missiles with only a rudimentary guidance system are examples of this type of weapon.[27]

[25] C. Pilloud and J. S. Pictet, 'Art. 51' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 1958. See also Swedish Ministry of Defence (ed.), *International Humanitarian Law in Armed Conflict* (Regeringskansliets, Offsetcentral, Stockholm, 1991), p. 45.

[26] Pilloud and Pictet, 'Art. 51' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 1965.

[27] W. A. Solf, 'Art. 51' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), p. 305.

The US Air Force Pamphlet states:

> Indiscriminate weapons are those incapable of being controlled, through design or function, and thus can not, with any degree of certainty, be directed at military objectives. For example, in World War II German V-1 rockets, with extremely primitive guidance systems yet generally directed towards civilian populations, and Japanese incendiary balloons without any guidance systems were regarded as unlawful . . . Biological warfare is a universally agreed illustration of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated.[28]

The Australian Defence Force, *Law of Armed Conflict – Commander's Guide*, Operations Series, notes:

> Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion . . .
>
> Because of their potential to be indiscriminate in application, poison and poisoned weapons are prohibited.[29]

The USSR manual stated:

> Prohibited means of warfare include various kinds of weapons of indiscriminate character and/or those that cause unnecessary suffering:
>
> a) bullets that expand or flatten easily in the human body;
> b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
> c) projectiles weighing less than 400 grams, which are either explosive or charged with fulminating or inflammable substances;
> d) poisons or poisoned weapons;
> e) asphyxiating, poisonous or other similar gases and bacteriological means;
> f) bacteriological (biological) and toxin weapons;
> g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury.[30]

[28] US Department of the Air Force, AF Pamphlet 110-31, p. 6-3. See also *Ibid.*, p. 6-4, on biological weapons.
[29] Australian Defence Force, *Law of Armed Conflict – Commander's Guide*, pp. 3-1 ff.
[30] *Manual on the Application of the Rules of International Humanitarian Law by Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister, no. 75 (1990), para. 6.

The Canadian military manual stipulates:

> Weapons that are indiscriminate in their effect are prohibited. A weapon is indiscriminate if it might strike or affect legitimate targets and civilians or civilian objects without distinction. Therefore, a weapon that cannot be directed at a specific legitimate target or the effects of which cannot be limited as required by the LOAC is prohibited. For example, it may be argued that the Scud missile used in the Gulf War falls in that category . . .
>
> Poison or poisoned weapons are illegal because of their potential to be indiscriminate . . .
>
> Both bacteriological and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion.[31]

The preamble of the Ottawa Treaty states:

> Basing themselves on the principle of international humanitarian law that . . . prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and *on the principle that a distinction must be made between civilians and combatants.* [Emphasis added.]

This statement may be an indication that anti-personnel mines might also be weapons that are inherently indiscriminate or at least weapons that, by their nature, produce indiscriminate effects.[32] Equally, a number of States asserted during the years leading up to the adoption of the Ottawa Treaty that they considered antipersonnel mines to be indiscriminate weapons.

Greenspan states in this regard:

> Mines in the nature of booby traps are, in general, to be condemned, since usually they are indiscriminate in dealing out death and injury.[33]

The rule prohibiting the use of indiscriminate weapons was also addressed in the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons. The ICJ as a whole judged

[31] Canadian military manual, Office of the Judge Advocate, *The Law of Armed Conflict at the Operational and Tactical Level*, in http://www.dnd.ca/jag/operational_pubs_e.html@top, pp. 5-2 ff.

[32] See also, with respect to dumb mines, Solf, 'Art. 51' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 305.

[33] M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkeley and Los Angeles, 1959), p. 363.

the rule to be customary and introduced it in the Opinion as follows:

> States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.[34]

The Court thus equated the use of indiscriminate weapons with a deliberate attack on civilians.[35] According to this finding, any weapon can be tested against these criteria and if it falls foul of them, its use would be prohibited without there being a need for any special treaty or even State practice prohibiting the use of that particular weapon.

It is crucial to determine what precisely the Court meant by 'incapable of distinguishing between civilian and military targets'. It is obvious that a weapon, being an inanimate object, cannot itself make such a distinction, for this process requires thought. The above-cited language of Art. 51(4)(b) and (c) AP I is more accurate in this regard.

The Protocol presents two possibilities in sub-paragraphs (b) and (c), either of which would render the weapon illegal. The phrase used in the Opinion – 'incapable of distinguishing between civilian and military targets' – could apply to either or both. It may be argued that weapons do violate the first criterion, i.e. that they cannot be aimed at a specific military objective, if in fact what one is referring to is the accuracy of the delivery system.

The second test in Art. 51(4) AP I would render a weapon unlawful if its effects 'cannot be limited as required by this Protocol', which presumably means, especially in the light of the paragraph's final phrase, that the effects do not otherwise violate the principle of distinction.

However, the meaning of this rule is not undisputed. One hypothesis could be the other criteria of 'indiscriminate attacks' found in Art. 51(5) AP I, which in effect can be translated as the principle of proportionality (sub-para. (b)) and the prohibition of area bombardment (sub-para. (a)). Both of these are incontestably customary law rules. Although not impossible, it is very difficult to use proportionality to test whether a weapon is indiscriminate in nature. To do so, one would have to decide in advance if any use of the weapon in question would inevitably lead to civilian casualties

[34] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 78; 110 ILR 163 at 207.

[35] See also in this regard Judge Higgins, who clearly stated:

> The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack.

Dissenting Opinion of Judge Higgins, para. 24; 110 ILR 532 at 537.

or civilian damage which would be excessive in relation to any military objective that could be attacked using that weapon. As far as the prohibition of area bombardment is concerned, this rule, as formulated in the Protocol, would also be difficult to use as a test, for the words of Art. 51(5)(a) AP I presuppose the intention to attack several distinct military objectives in a populated area, treating them as if they were one objective. One cannot assume this when deciding on the nature of any particular weapon. Since the wording of Art. 51(4)(c) AP I ('cannot be limited') suggests an absolute standard, while Art. 51(5)(a) and (b) AP I refer to the circumstances of a particular attack, one might have doubts whether this hypothesis is correct.

The second hypothesis is not to try to find the answer in other parts of Art. 51 of the Protocol, but rather to decide on the basis of the essential meaning of the principle of distinction. This principle presupposes the choice of targets and weapons in order to achieve a particular objective that is lawful under humanitarian law and that respects the difference between civilian persons and objects on the one hand, and combatants and military targets on the other. This requires both planning and a sufficient degree of foreseeability of the effects of attacks. Indeed, the principle of proportionality itself requires expected outcomes to be evaluated before the attack. None of this is possible if the weapon in question has effects which are totally unforeseeable, because, for example, they depend on the effect of the weather. It is submitted that the second test of 'indiscriminate weapons' is meant to cover cases such as these, where the weapon, even when targeted accurately and functioning correctly, is likely to take on 'a life of its own' and randomly hit combatants or civilians to a significant degree.

In this regard the following indications contained in the ICJ Advisory Opinion on nuclear weapons as well as the Separate and Dissenting Opinions of the judges may be of particular interest.

For a decision on the indiscriminate character of nuclear weapons, the Court's findings on their nature became pivotal. On the basis of the scientific evidence presented to the Court, it concluded in the Opinion that:

> In applying this law to the present case, the Court cannot . . . fail to take into account certain unique characteristics of nuclear weapons . . .
>
> . . . nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. *By its very nature* that process . . . releases not only immense quantities of heat and energy, but also powerful and prolonged radiation . . . These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons *cannot be contained in either space or time*. They have the potential to

> destroy all civilisation and the entire ecosystem of the planet . . . The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.[36] [Emphasis added.]

In its Opinion, the Court assessed nuclear weapons' legality as follows:

> [T]he principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.[37]

The logic between the last two sentences in this quotation is unclear. More insight into the judges' understanding of the term 'indiscriminate' may be found in the individual judges' analyses of whether nuclear weapons are indiscriminate by nature.

Three judges seem to have decided that nuclear weapons are not necessarily indiscriminate by nature, by using only the first criterion derived from Art. 51(4)(b) AP I, i.e. when considering the accuracy of the delivery system, at least certain types of nuclear weapons can be aimed at a specific military objective. Of these three judges, only Judge Higgins, in her Dissenting Opinion, attempted to define indiscriminate weapons, as follows:

> it may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs.[38]

[36] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 35; 110 ILR 163 at 193.
[37] ICJ, Legality of the threat or use of nuclear weapons, Advisory Opinion of 8 July 1996, para. 95; 110 ILR 163 at 212.
[38] Dissenting Opinion of Judge Higgins, para. 24; 110 ILR 532 at 537.

On applying this to nuclear weapons, she said:

> Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful.[39]

Judge Guillaume did not add much to the definition given by the Court and gave no reasons whatsoever for his conclusion as regards nuclear weapons in his Separate Opinion, in which he stated:

> Customary humanitarian law . . . contains only one absolute prohibition: the prohibition of so-called 'blind' weapons which are incapable of distinguishing between civilian targets and military targets. But nuclear weapons obviously do not necessarily fall into this category . . .
>
> With regard to nuclear weapons of mass destruction, it is clear however that the damage which they are likely to cause is such that their use could not be envisaged except in extreme cases.[40]

The third judge, Vice-President Schwebel, stated:

> While it is not difficult to conclude that the principles of international humanitarian law – . . . discrimination between military and civilian targets – govern the use of nuclear weapons, it does not follow that the application of those principles . . . is easy.[41]

However, since Judge Schwebel then went on to speculate on different types of uses and which of these might be lawful or not, it is clear that he, too, had decided that nuclear weapons were not by nature indiscriminate:

> The use of nuclear weapons is, for the reasons examined above, exceptionally difficult to reconcile with the rules of international law applicable in armed conflict, particularly the principles and rules of international humanitarian law. But that is by no means to say that the use of nuclear weapons, in any and all circumstances, would necessarily and invariably conflict with those rules of international law.[42]

Among the eight judges who stated that the use of any type of nuclear weapon would infringe the rules of humanitarian law, some referred explicitly to the rule prohibiting indiscriminate weapons. They seemed

[39] *Ibid.* [40] Individual Opinion of Judge Guillaume, para. 5; 110 ILR 237 at 239.
[41] Dissenting Opinion of Vice-President Schwebel; 110 ILR 261 at 270.
[42] Dissenting Opinion of Vice-President Schwebel; 110 ILR 261 at 271.

to base their positions primarily on the extensively destructive nature of these weapons, and in particular the radiation that uncontrollably affects civilians and combatants alike. It is particularly worth citing three of the judges who voted in favour of the Opinion:

Judge Fleischhauer stated that:

> [t]he nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict . . . the nuclear weapon cannot distinguish between civilian and military targets.[43]

President Bedjaoui found that

> [n]uclear weapons can be expected – in the present state of scientific development at least – to cause indiscriminate victims among combatants and non-combatants alike . . . The very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used. Until scientists are able to develop a 'clean' nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate effects and constitute an absolute challenge to humanitarian law. Atomic warfare and humanitarian law therefore appear to be mutually exclusive: the existence of the one automatically implies the non-existence of the other.[44]

Judge Herczegh wrote that

> [t]he fundamental principles of international humanitarian law, rightly emphasized in the reasons of the advisory opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons. International humanitarian law does not recognize any exceptions to these principles.[45]

Judge Weeramantry – dissenting from the Advisory Opinion – elaborated his conceptual view on the rule in greater detail. He stated *inter alia*:

> However, the nuclear weapon is such that non-discrimination is built into its very nature. A weapon that can flatten a city and achieve by itself the destruction caused by thousands of individual bombs, is not a weapon that discriminates. The radiation it releases over immense

[43] Separate Opinion of Judge Fleischhauer, para. 2; 110 ILR 255 at 256.
[44] Declaration of President Bedjaoui, para. 20; 110 ILR 218 at 223.
[45] Declaration of Mr Herczegh; 110 ILR 225 at 225.

> areas does not discriminate between combatant and non-combatant, or indeed between combatant and neutral states.[46]

In this context he made reference to a resolution of the International Law Institute, passed at its Edinburgh Conference in 1969. The acts described as prohibited by *existing law* included the following:

> the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of *weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable* . . . , as well as of 'blind' weapons . . . (Para. 7)[47]

Setting aside the reasons for the way the Opinion has been formulated and based on the statements of the judges themselves, the majority found nuclear weapons to be indiscriminate in nature primarily by virtue of their pernicious uncontrollable effects which meant that no proper distinction could be made between civilians and civilian objects on the one hand, and combatants and military objectives on the other. As such this interpretation will be useful for the evaluation of other weapons.

[46] Dissenting Opinion of Judge Weeramantry, III, 10(c); 110 ILR 379 at 449.
[47] *Ibid.* (emphasis added). For the resolution, see *Annuaire de l'IDI* (1969), vol. II, p. 377.

Art. 8(2)(b)(xxi) – Committing outrages upon personal dignity, in particular humiliating and degrading treatment

Text adopted by the PrepCom

War crime of outrages upon personal dignity

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.[49]

2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

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

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

[49] 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.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom defined the *actus reus* of this crime as the humiliation, degradation or otherwise the violation of dignity of the person. Art. 8(2)(b)(xxi) of the ICC Statute treats humiliation and degradation as examples of an outrage upon personal dignity as shown by the use of the term 'in particular'. In order to avoid limiting this war crime to these two examples and to cover other types of outrages upon a person's dignity, the PrepCom decided to add in Element 1 'or otherwise violated the dignity of one or more persons'.

Footnote 49 includes several clarifications. The reference to dead persons was made in order to cover case law from the Second World War, where an accused was convicted of having maltreated dead prisoners of war.[1] The PrepCom acknowledged that such conduct may be a crime under Art. 8(2)(b)(xxi) of the ICC Statute. The second sentence of this footnote was based on case law from human rights bodies, in which it was stated that a treatment 'will not be "degrading" unless the person concerned has

[1] See, for example, the *M. Schmid Trial*, in UNWCC, *LRTWC*, vol. XIII, pp. 151 ff.; 13 AD 333; *J. Kikuchi*, *M. Mahuchi*, *T. Yochio*, *T. Takehiko* and *T. Tisato* cases, quoted in UNWCC, *LRTWC*, vol. XIII, p. 152.

undergone – either in the eyes of others or in his own eyes – humiliation or debasement attaining a minimum level of severity'.[2] Thereby, the PrepCom recognised that outrages upon personal dignity can also be committed against mentally disabled or unconscious persons. The third sentence of the footnote underlines that the cultural background of victims should be taken into account when assessing whether the conduct amounted to an outrage upon personal dignity. This qualification was considered important because often the extent of the degradation or humiliation experienced by the victims will depend upon their cultural background. During negotiations the following examples were given. First, the victim is forced by someone to eat something that is prohibited by the religion of the victim. A second example, based on case law from the Second World War,[3] involved cutting off hair and beard and forcing a prisoner of war to smoke a cigarette. The prisoners of war were Indians of the Sikh religion, which forbids them to have their hair or beard removed or to handle tobacco.

No particular mental element accompanying the objective Element 2, which deals with the level of severity of the conduct, is included in the EOC document. On the basis of the general introduction to the EOC referring to elements involving value judgement, it is not necessary that the perpetrator has personally completed a particular value judgement with regard to the severity of the conduct. The judges will have to determine if the severity of the humiliation, degradation or other violation in question was of such degree as to amount to an outrage upon personal dignity.

Legal basis of the war crime

The phrase 'outrages upon personal dignity, in particular humiliating and degrading treatment' is derived from Art. 75(2)(b) AP I. Art. 85(4)(c) AP I defines 'practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' as grave breaches.

Remarks concerning the material elements

The wording of this crime suggests that humiliating and degrading treatment is simply an example of outrages upon personal dignity. The list is, of course, illustrative, as shown by the words 'in particular'.[4] The term

[2] ECtHR, *Case of Campbell and Cosans*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 48, p. 13; 67 ILR 480 at 492.

[3] *Tanaka Chuichi and Other* Case, in UNWCC, *LRTWC*, vol. XI, pp. 62 ff.; 13 AD 289.

[4] The ICTY mentioned as another example any serious sexual assault falling short of actual penetration. It found that the prohibition 'embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity'. ICTY, Judgment,

'outrage' is defined in the *Cambridge International Dictionary of English* (1995) as a 'shocking, morally unacceptable and usually violent action' (p. 1003).

The treatment in question must constitute an assault on the main purpose mentioned in this offence, namely a person's dignity. In this regard the ICTY held:

> An outrage upon personal dignity within Article 3 of the Statute is a species of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the genus. It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality.[5]

The ICTY Prosecution pointed out:

> The safeguarding of personal dignity was intended to be flexible enough to encompass any act or omission that degrades, humiliates, or attacks the integrity of the victim, including sexual integrity.[6]

The provisions in the GC (common Art. 3 GC, Art. 95 GC IV) and AP (Arts. 75(2)(b), 85(4)(c) AP I, 4(2)(e) AP II) which use this terminology do not give further clarifications. In the *Aleksovski* case,[7] the ICTY Prosecution, referring to the ICRC Commentary on Art. 75 AP I, as well as the ICTY in the same case,[8] described the essence of 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution

The Prosecutor v. *Anto Furundzija*, IT-95-17/1-T, para. 186, p. 73; 121 ILR 218 at 272. Following these findings, the ICTY Prosecution considered the following to be elements of sexual assault as a form of humiliating and degrading treatment:

1. Serious abuse of a sexual nature was inflicted upon the physical and moral integrity of the victim, by means of coercion, threat of force or intimidation, in a manner that is degrading and humiliating for the victim's dignity;
2. The acts or omissions were committed wilfully.

ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 53. The ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' *Ibid.*, pp. 35, 56. See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Miroslav Kvocka and Others*, IT-98-30-PT, pp. 45 ff.

[5] ICTY, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-T, para. 54 (footnote omitted).

[6] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dragoljub Kunarac*, IT-96-23-PT, pp. 28 ff.

[7] ICTY, The Prosecutor's Closing Brief, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/I-PT, para. 56, p. 23.

[8] ICTY, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-T, para. 55.

and any form of indecent assault' in the following way:

> This refers to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts.
>
> Such provisions are contained in the Conventions (common Article 3; Articles 14[9] and 52,[10] Third Convention; Article 27,[11] Fourth Convention).[12]

More specifically, the ICTY held in the *Aleksovski* case:

> An outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule. The degree of suffering which the victim endures will obviously depend on his/her temperament. Sensitive individuals tend to be more prone to perceive their treatment by others to be humiliating and, in addition, they tend

[9] Art. 14 GC III:

> Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.
>
> Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.

[10] Art. 52(2) GC III:

> No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces.

See also in this respect Art. 95(1) GC IV:

> The Detaining Power shall not employ internees as workers, unless they so desire . . . [E]mployment on work which is of a degrading or humiliating character [is] in any case prohibited.

[11] Art. 27 GC IV:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

[12] C. Pilloud and J. S. Pictet, 'Art. 75' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), nos. 3047 ff.

> to suffer from the effects thereof more grievously. On the other hand, the perpetrator would be hard-pressed to cause serious distress to individuals with nonchalant dispositions because such persons are not as preoccupied with their treatment by others and, even should they find that treatment to be humiliating, they tend to be able to cope better by shrugging it off. Thus, the same act by a perpetrator may cause intense suffering to the former, but inconsequential discomfort to the latter. This difference in result is occasioned by the subjective element. In the prosecution of an accused for a criminal offence, the subjective element must be tempered by objective factors; otherwise, unfairness to the accused would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim. Consequently, an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged.[13]

In the *Kunarac and Others* case the ICTY Trial Chamber took a different approach to the issue of lasting suffering as suggested in the aforementioned quotation:

> Insofar as this definition provides that an outrage upon personal dignity is an act which 'cause[s] serious humiliation or degradation to the victim', the Trial Chamber agrees with it. However, the Trial Chamber would not agree with any indication from the passage above that this humiliation or degradation must cause 'lasting suffering' to the victim. So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be 'lasting'. In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity. Obviously, if the humiliation and suffering caused is only fleeting in nature, it may be difficult to accept that it is real and serious. However this does not suggest that any sort of minimum temporal requirement of the effects of an outrage upon personal dignity is an *element* of the offence.[14]

However, concerning the question expressed in the *Aleksovski* case as to how the existence of humiliation or degradation could be measured, it confirmed the view that

[13] ICTY, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-T, para. 56.
[14] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 501 (footnote omitted).

> a purely subjective assessment would be unfair to the accused because the accused's culpability would be made to depend not on the gravity of the act but on the sensitivity of the victim.[15]

On this basis it understands

> an outrage upon personal dignity to be any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.[16]

Furthermore, the Tribunal gave indications in the *Aleksovski* case as to the required seriousness of the conduct:

> [T]he seriousness of an act and its consequences may arise either from the nature of the act per se or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed.[17]

In accordance with the approach in the *Delalic* and *Furundzija* cases (both cited previously) which used human rights law to define 'torture' as a war crime, the following human rights cases could be helpful for further determination of the elements of 'degrading treatment':

- *European Court/Commission of Human Rights*

– With respect to different forms of ill-treatment as mentioned in Art. 3 European Convention on Human Rights, i.e. torture, inhuman or degrading treatment or punishment, the ECtHR found in general terms that

> ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [European Convention on Human Rights]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as

[15] *Ibid.*, para. 504.
[16] *Ibid.*, para. 507. See also ICTY, Appeals Chamber, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-A, para. 37: 'The victims were not merely inconvenienced or made uncomfortable – what they had to endure, under the prevailing circumstances, were physical and psychological abuse and outrages that any human being would have experienced as such.'
[17] ICTY, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-T, para. 57 (footnote omitted).

> the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[18]

– More specifically, under the European Convention on Human Rights the term 'degrading treatment' was first defined in the *Greek* case as follows:

> Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.[19]

Later, in the case of *Ireland* v. *The United Kingdom*, the ECtHR considered five interrogation techniques as degrading

> since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[20]

With respect to degrading punishment the ECtHR mentioned, in another case, the following elements:

- the victim was treated as an object in the power of the authorities;
- the treatment constituted an assault on precisely that which is one of the main purposes of Art. 3 European Convention of Human Rights, namely a person's dignity and physical integrity;
- the punishment had adverse psychological effects;
- the victim was subjected to mental anguish.[21]

[18] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, p. 65; 58 ILR 188 at 264; ECtHR, *Tyrer* case, in Judgements and Decisions, vol. 26, p. 14; 58 ILR 339 at 352; ECtHR, *Case of Campbell and Cosans*, in Judgements and Decisions, vol. 48, p. 13; 67 ILR 480 at 492; ECtHR, *Selçuk and Asker* v. *Turkey*, Reports of Judgments and Decisions, 1998-II, p. 910.

[19] ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, p. 186. See also ECtHR, *Ireland* v. *UK*, (1976) 19 Yearbook of the Convention on Human Rights, p. 748; 58 ILR 188 at 265.

[20] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, p. 66; 58 ILR 188 at 265. See also ECtHR, *Soering* case, in Judgments and Decisions, vol. 161, para. 100, p. 39; 98 ILR 270 at 307; ECtHR, *Case of Campbell and Cosans*, in Judgments and Decisions, vol. 48, p. 13; 67 ILR 480 at 492, stating that a treatment 'will not be "degrading", unless the person concerned has undergone – either in the eyes of others or in his own eyes – humiliation or debasement attaining a minimum level of severity. This level has to be assessed with regard to the circumstances.'

[21] ECtHR, *Tyrer* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 26, pp. 16 ff.; 58 ILR 339 at 354-5.

– According to the ECtHR, 'as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading'.[22]
– Considering the case law with respect to the different forms of ill-treatment in the European Convention on Human Rights, the following should be noted: The same treatment may be both degrading and inhuman, as in the case of resort to the five interrogation techniques in *Ireland* v. *The United Kingdom* and physical assault in *Tomasi* v. *France*[23]. In the *Greek* case, the Commission supposed that 'all torture must be inhuman and degrading treatment, and inhuman treatment also degrading'.[24] However, all degrading treatment or punishment is not necessarily inhuman nor does it always amount to torture.[25]

• *Human Rights Committee and Inter-American System*

A review of the decisions of these human rights bodies gives no further clarification in that respect. At the time of writing, the UN Human Rights Committee had not defined the terms 'torture', 'cruel, inhuman treatment or degrading treatment or punishment' used in Art. 7 ICCPR nor delineated the boundaries between these terms.[26] Neither the Inter-American Commission nor the Inter-American Court of Human Rights has attempted to differentiate precisely the terms 'torture', 'inhuman treatment' and 'degrading treatment' within the meaning of Art. 5 of the American Convention on Human Rights.[27] The Inter-American Court, like the UN Human Rights Committee, applied these concepts directly to the facts in a number

[22] ECtHR, *Herczegfalvy* v. *Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 244, p. 26. (The case concerned a person who was incapable of taking decisions.)

[23] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, paras. 162 ff., pp. 66 ff.; 58 ILR 188 at 265; ECtHR,*Tomasi* v. *France*, in Judgments and Decisions, vol. 241-A, paras. 107 ff., pp. 40 ff.

[24] ECiHR, *The Greek* case, (1972) 12 Yearbook of the Convention on Human Rights, p. 186.

[25] ECtHR, *Tyrer* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 26, para. 29, p. 14; 58 ILR 339 at 352.

[26] See D. McGoldrick, *The Human Rights Committee* (Oxford University Press, Oxford, 1991), pp. 364, 370; M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (N. P. Engel, Kehl, Strasbourg and Arlington, 1993), pp. 134 ff. This commentator considers degrading treatment as being the weakest level of a violation of Art. 7 ICCPR. Referring to the case law of the ECtHR, he concludes that the severity of the suffering imposed is of less importance here than the humiliation of the victim, regardless of whether this is in the eyes of others or those of the victim himself or herself.

[27] S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D. Harris and S. Livingstone (eds.), *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998), p. 230.

of cases, limiting itself to concluding whether or not there had been a violation of the right to humane treatment.

Considering these sources, one may conclude that there is no real difference between degrading and humiliating treatment since the element of humiliation seems to be a constituent element of degrading treatment in human rights law.

The following non-exhaustive list of examples found in human rights case law indicates which conduct may constitute humiliating and degrading treatment:

- forms of racial discrimination (differential treatment of a group of persons on the basis of race);[28]
- specific psychological interrogation techniques being at the same time inhuman treatment (wall standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink);[29]
- in the *Hurtado* v. *Switzerland* case, the applicant had defecated in his trousers because of the shock caused by a stun grenade used in his arrest; the Commission concluded that there had been degrading treatment when he was not able to change his clothing until the next day and after he had been transported between buildings and questioned;[30]

  ıtem specific forms of corporal punishment;[31]
- arbitrary prison practices aimed at humiliating prisoners and making them feel insecure (repeated solitary confinement, subjection to cold, persistent relocation to different cells);[32]

[28] ECiHR, *East African Asians* cases, 3 EHRR 1973, Com Rep, p. 76; CM DH (77) 2. See also D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London and Dublin, 1995), pp. 81 ff. for a detailed analysis.

[29] ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, para. 96; 58 ILR 188 at 239.

[30] ECtHR, *Hurtado* v. *Switzerland*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 280-A, p. 14.

[31] For a detailed analysis see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, pp. 81 ff., with references to the case law, esp. ECtHR, *Tyrer* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 26 (the applicant had been sentenced to three strokes of the birch in accordance with the penal legislation of the Isle of Man), pp. 16 ff.; 58 ILR 339 at 534; ECtHR, *Costello-Roberts* v. *UK*, in Judgments and Decisions, vol. 247-C, paras. 29–32, pp. 59–60; ECiHR, *Warwick* v. *UK*, Decisions and Reports, vol. 60, Com Rep, paras. 79–89, pp. 16–17 (canings); ECtHR, *Y* v. *UK*, in Judgments and Decisions, vol. 247-A, Com Rep, paras. 37–46, pp. 12–14 (canings).

[32] *Conteris* v. *Uruguay*, Communication No. 139/1983, Report of the Human Rights Committee, UN Doc. A/40/40, paras. 9.2–10, pp. 201-2.

- women prisoners were subjected to specific humiliation in the form of hanging naked from handcuffs or being forced to maintain a certain position for long periods of time.[33]

There is also some specific case law from the post-Second World War trials which may be added:

- In the *K. Maelzer* case, the accused was charged and convicted of exposing prisoners of war in his custody to acts of violence, insults and public curiosity in breach of Art. 2(2) GC 1929. Those prisoners were forced to march through the streets of Rome in a parade emulating the tradition of ancient triumphal marches.[34]
- In the *T. Chuichi and Others* case, the accused added to ordinary acts of ill-treatment the cutting off of hair and beard, and forced a prisoner of war to smoke a cigarette. The prisoners of war were Indians of the Sikh religion, which forbids them to have their hair or beards removed or to handle tobacco (Arts. 2, 3, 16, 46(3), 54 GC 1929 and Art. 18 Hague Regulations 1907).[35]
- In the *M. Schmid* trial the accused was convicted of having wilfully, deliberately and wrongfully participated in the maltreatment of a dead prisoner of war. The latter's body was mutilated and an honourable burial was refused.[36]

Remarks concerning the mental element

In the *Aleksovski* case the ICTY held:

> Recklessness cannot suffice; the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have had the specific intent to humiliate or degrade the victim, he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.[37]

In the *Kunarac and Others* case the ICTY found that the 'Trial Chamber's observations in the *Aleksovski* case on the mental element of the offence of

[33] *Arzuada Gilboa* v. *Uruguay*, Communication No. 147/1983, Report of the Human Rights Committee, UN Doc. A/41/40, paras. 4.3 and 14, pp. 130 and 133 (also cruel treatment); *Soriano de Bouton* v. *Uruguay*, Communication No. 37/1978, Report of the Human Rights Committee, UN Doc. A/36/40, paras. 2.5 and 13, pp. 144 and 146; 62 ILR 256 at 257 and 258.

[34] In UNWCC, *LRTWC*, vol. XI, pp. 53 ff.; 13 AD 289.

[35] UNWCC, *LRTWC*, vol. XI, pp. 62 ff.

[36] In UNWCC, *LRTWC*, vol. XIII, pp. 151 ff.; 13 AD 289. See also the *J. Kikuchi*, *M. Mahuchi*, *T. Yochio*, *T. Takehiko* and *T. Tisato* cases, quoted in *ibid.*, p. 152.

[37] ICTY, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-T, para. 56.

outrages upon personal dignity do not provide an unambiguous statement of what it considered the relevant *mens rea* to be'.[38] In particular the Tribunal felt it necessary to emphasise that the mental element of the offence does not involve any specific intent to humiliate, ridicule or degrade the victims.[39] Considering the existing jurisprudence, it adopted the following view:

> The Trial Chamber is of the view that the requirement of an intent to commit the specific act or omission which gives rise to criminal liability in this context involves a requirement that the perpetrator be aware of the objective character of the relevant act or omission. It is a necessary aspect of a true intention to undertake a particular action that there is an awareness of the nature of that act. As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character – i.e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the actual consequences of the act.
>
> In practice, the question of knowledge of the nature of the act is unlikely to be of great significance. When the objective threshold of the offence is met – i.e. the acts or omissions would be generally considered to be seriously humiliating, degrading or otherwise a serious attack on human dignity – it would be rare that a perpetrator would not also know that the acts could have that effect.
>
> *In the view of the Trial Chamber, the offence of outrages upon personal dignity requires*
>
> *(i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and*
>
> *(ii) that he knew that the act or omission could have that effect.*[40]

[38] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 508.
[39] *Ibid.*, para. 509. [40] *Ibid.*, paras. 512–14 (emphasis added).

Art. 8(2)(b)(xxii) – Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions

Text adopted by the PrepCom

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

1. The perpetrator invaded[50] 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.[51]

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

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

[50] The concept of 'invasion' is intended to be broad enough to be gender-neutral.

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

Article 8(2)(b)(xxii)–2 War crime of sexual slavery[52]

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[53]

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

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

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

[52] 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.

[53] 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.

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

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

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

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

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

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

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

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

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

1. The perpetrator deprived one or more persons of biological reproductive capacity.[54]

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.[55]

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

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

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

[55] It is understood that 'genuine consent' does not include consent obtained through deception.

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

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.

3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

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

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

Commentary

Travaux préparatoires/Understandings of the PrepCom

(1) Rape

Much time was devoted by the PrepCom to the sexual crimes defined in Art. 8(2)(b)(xxii). The PrepCom decided to draft the specific material and mental elements (not related to the context of the crime) for gender crimes essentially in the same way for the war crimes under Art. 8(2)(b) in international armed conflicts and Art. 8(2)(e) in non-international armed conflicts as well as crimes against humanity under Art. 7. The task of defining the elements was quite difficult because little case law exists on this issue to date, and even where case law exists it is not always uniform. Moreover, in the case of rape, the ICTR and the ICTY defined the elements of this crime in different ways in the cases of *Akayesu* and *Furundzija* respectively. The compromise found in the EOC incorporates aspects from both judgments.

The formulation 'invaded . . . by conduct resulting in penetration' in Element 1 was chosen in order to draft the elements in a gender-neutral way and also to cover rape committed by women. This fact is emphasised in footnote 50 relating to the notion of invasion and by the enumeration of possible constellations of penetration, which includes not only cases where the victim is penetrated, but also cases where the victim is forced to penetrate the perpetrator.

Element 2 largely reflects the findings of the ICTR in the *Akayesu* case, taking into account the effect of special circumstances of an armed conflict on the victims' will:

> [C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence.[1]

Footnote 51 gives additional guidance to the notion of 'genuine consent' as contained in that element.

(2) Sexual slavery

Element 1 was largely influenced by the definition of slavery as contained in the 1926 Slavery Convention. The PrepCom, however, concluded quickly that this definition would be too narrow and outdated, and in particular that there was no requirement to treat the victim as a chattel. The extent of the necessary adaptation remained nevertheless controversial. The discussion was influenced considerably by the definition adopted in the Statute of the crime against humanity of enslavement (Art. 7(2)(c)):

> 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Eventually the PrepCom agreed that the definition of slavery in the context of sexual slavery and of enslavement should be identical. Several delegations emphasised the need to clarify the notion of 'powers attaching to the right of ownership'. Therefore, the non-exhaustive list was added in Element 1. The formulation of 'similar deprivation of liberty' again was considered to be too narrow because the word 'similar' would have a limiting effect in so far as the deprivation of liberty must be comparable to 'purchasing, selling, lending or bartering', i.e. requiring some sort of commercial or pecuniary exchange. This would have possibly excluded conduct aimed at reducing someone to a servile status and cases of forced labour. Almost until the end of the final session of the PrepCom the broader approach was contested by several delegations. Eventually footnote 53 was accepted in order to reach consensus. Its second sentence was acceptable

[1] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

because it merely repeated statutory language stemming from the definition of enslavement. The first sentence was agreed upon because of its reference to developments reflected in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, to which a considerable number of States have adhered. This would help to describe the limits of an acceptable interpretation of the term 'servile status', which was considered by several delegations as being too broad without further clarification.

As clarified by footnote 52, the crime may well be committed by several persons, e.g., the deprivation of liberty could be committed by one person and the sexual acts by another person. Attempts to spell these variations out in the elements were rejected. It was argued that this result would be achieved by applying Art. 25(3) ICC Statute, which includes the commission of a crime jointly with or through another person as well as several forms of participation in the commission of a crime. The footnote is a reminder of this because the existence of multiple perpetrators is most likely to be the case in this crime, although it could also be the case with others.

(3) Enforced prostitution

The PrepCom recognised that this crime can be committed by the use of force or coercion. The different forms of coercion included in Element 1 are inspired by Element 2 of the war crime of rape and defined accordingly.

A major point of controversy was how to distinguish enforced prostitution from sexual slavery, on the one hand, and other forms of sexual violence, on the other. In particular, it was ardently debated whether the fact that 'the perpetrator or another person obtained or expected to obtain pecuniary advantage in exchange for or in connection with the acts of a sexual nature' was an element of enforced prostitution or not. After long debates the PrepCom eventually answered in the affirmative. It added, however, the words 'or other advantage'. This was made in order to achieve a compromise between the group of delegations that objected to the requirement of pecuniary advantage and the group that insisted on it.[2] Findings from the *Awochi* case after the Second World War influenced the compromise.[3]

(4) Forced pregnancy, as defined in Art. 7(2)(f)

The one specific element of this crime essentially reproduces the definition contained in Art. 7(2)(f) ICC Statute. Several delegations wanted to clarify

[2] They argued that obtaining a pecuniary benefit would be inherent in the definition of prostitution.

[3] *W. Awochi Case*, in UNWCC, *LRTWC*, vol. XIII, p. 125; 13 AD 254.

the link between the confinement and the aspect of affecting the ethnic composition of the population or the perpetration of other grave violations of international law. Therefore, the elements were defined in the Rolling Text after the first reading as follows:

> 2. The accused confined one or more women.
> 3. Such woman or women had been forcibly made pregnant.
> 4. The accused intended to keep the woman or women pregnant in order to affect the ethnic composition of a population or to carry out another grave violation of international law.[4]

The split between Elements 1 and 2 would have clarified the fact that the perpetrator of this crime need not be the person who forcibly made the woman pregnant. As a result of the strong opposition of a few delegations against the insertion of 'to keep the woman or women pregnant in order',[5] the PrepCom decided to repeat the statutory definition in the elements without further clarification and without applying the structure as defined in para. 7 of the General Introduction, which would have required a separation of the elements describing the conduct (the perpetrator confined) from those defining a circumstance (the woman had been forcibly made pregnant) and the specific intent requirement. Applying para. 6 of the General Introduction, the requirement of 'unlawfulness' linked to the confinement was not included in the elements. For the same reason, the clarification 'This definition shall not in any way be interpreted as affecting national laws relating to pregnancy', contained in Art. 7(2)(f) of the ICC Statute, was not added.

(5) Enforced sterilisation

The elements as adopted confirm the fact that the crime can be committed against victims of either sex. The wording is gender-neutral.

[4] PCNICC/1999/L.5./Rev.1/Add.2 of 22 December 1999.

[5] Delegations that were against the addition argued, for example, that the insertion would unduly restrict the scope of the crime. It was pointed out that if a prison warden keeps women forcibly made pregnant in an internment camp in order to torture them, i.e. carrying out any other violation of international law, he/she should be guilty of forced pregnancy. This would be excluded if an intent to keep the women pregnant were required. Other delegations seemed to see the essence of the crime as making the women pregnant, and were therefore opposed to any reference to an 'intent to keep the women pregnant' because this might be interpreted as imposing an obligation on national systems to provide forcibly impregnated women access to abortion. Those in favour of the addition argued that without it the aim of the crime would be changed. In their view the crime was meant to cover the conduct that occurred in Bosnia-Herzegovina, where women of one ethnicity were raped and detained in order to force them to bear babies of another ethnicity. For an account of the *travaux préparatoires* of the Rome Diplomatic Conference, see C. Steains, 'Gender Issues' in R. S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute* (Kluwer Law International, The Hague, London and Boston, 1999), pp. 365 ff.

By defining sterilisation as the deprivation of biological reproductive capacity, the PrepCom accepted the view that sterilisation is not limited to the removal of, or operation on, organs which cause deprivation of the power of reproduction. In order to prevent the definition from covering any birth-control measure, some delegations claimed the need for a footnote which would clarify that birth-control measures would not fall under the prohibition. This approach was opposed by other delegations, which expressed the fear that a footnote saying that birth-control measures are not included could negate the crime – every sterilisation would be a birth-control measure. These delegations took the view that birth-control measures in a narrow sense could, if they had a permanent effect, amount to sterilisation. The compromise adopted by the PrepCom clarifies that the *actus reus* as defined in the EOC does not include birth-control measures, which have a non-permanent effect in practice. However, repeated short-term birth-control measures, which would have a permanent effect in practice, would be covered by the wording as adopted. In the final session of the Working Group on EOC, in the context of the equivalent crime in the crimes-against-humanity section, one delegation expressed its opposition to the content of the footnote, but declared that it would not break the consensus.

Element 2 emphasises that certain sterilisations may be lawful. The first part of that element is very similar to the elements adopted for the war crimes of medical or scientific experiments and mutilation (Art. 8(2)(b)(x)). In contrast to those crimes, consent of the victim may be a justification, but only if it is genuine. Some delegations argued that the term 'genuine consent' here should be changed to 'voluntary and informed consent'. Otherwise, situations of deception, e.g. the victim is falsely told that he is taking vitamins, would not be covered. In such situations the victim would perhaps consent to the treatment, i.e. the taking of the pills, but be ignorant of its consequences, i.e. the deprivation of reproductive capacity. Eventually the text was adopted as it stands, but the idea of the proposed amendment is reflected in a footnote that reads: 'It is understood that "genuine consent" does not include consent obtained through deception.'

(6) Any other form of sexual violence also constituting a grave breach of the Geneva Conventions

Element 1 essentially covers two situations: first, the situation where the perpetrator commits sexual acts against the victim, and second, the situation where the victim is forced or coerced to perform sexual acts. The latter was included in the elements to cover also cases of forced nudity.

Considerable debates took place with regard to the war crime of sexual violence, owing to the formulation found in the Statute '. . . also constituting a grave breach of the Geneva Conventions'. While some delegations argued that this formulation was intended only to indicate that gender crimes could already be prosecuted as grave breaches,[6] others thought that the conduct must constitute one of the crimes defined in Art. 8(2)(a) – the specifically named grave breaches of the GC – and in addition involve violent acts of a sexual nature. The majority of delegations, in an attempt to reconcile the wording of the Statute with its aim, considered the statutory formulation as an element of the crime introducing a specific threshold as to the seriousness of the crime,[7] and not as a factor requiring it also to be a grave breach listed in Art. 8(2)(a). Therefore, Element 2 was accepted.

Element 3 reflects a compromise between two opposing sides. While some delegations argued that Art. 30 ICC Statute should fully apply to the components of Element 2, other delegations took the view that no mental element would be required. In order to avoid a mistake of law defence, the PrepCom decided that 'awareness of the factual circumstances' would be the most appropriate standard.

Legal basis of the war crime

There is no single treaty reference containing all the different acts described in this war crime. The constituent parts of the crime may be found in a number of legal instruments. As the ICTY pointed out in the *Delalic* case:

> There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4(2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4(1) which states that all persons are entitled to respect for their person and honour. Moreover, article 76(1) of Additional Protocol I expressly requires that women be protected from rape, forced prostitution and any other form of indecent assault. An implicit prohibition on rape and sexual assault can also be found in article 46 of the 1907 Hague Convention (IV) that provides for the protection of family honour and rights. Finally, rape is prohibited as a crime against

[6] For this view, see *ibid.*, p. 364.

[7] See *Ibid.*, n. 27, where the author indicates that the 'grave breach' reference was also intended to indicate that only serious crimes of sexual violence should fall within the definition.

humanity under article 6(c) of the Nürnberg Charter and expressed as such in Article 5 of the Statute.

There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape.[8]

The most relevant provisions of the GC and AP read as follows:

- Art. 27(2) GC IV:

> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

- Art. 75(2)(b) AP I:[9]

> The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
> . . . outrages upon personal dignity, in particular . . . enforced prostitution . . .

- Art. 76(1) AP I:[10]

> Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

(1) Rape

Remarks concerning the material elements

The Trial Chamber of the ICTR defined rape in the *Akayesu* case as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.[11]

[8] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 476 ff. See also ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, paras. 165 ff.; 121 ILR 218 at 266.

[9] Describing the personal field of application, the ICRC Commentary points out that this provision 'applies to everybody covered by the article, regardless of sex', C. Pilloud and J. S. Pictet, 'Art. 75' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3049.

[10] Describing the personal field of application, the ICRC Commentary states: 'The rule applies quite generally and therefore covers all women who are in the territory of Parties involved in the conflict, following the example of Part II of the Fourth Convention. In fact, the provision is not subject to any further specification, unlike most of the rules contained in Section III. Thus it applies both to women affected by the armed conflict, and to others; to women protected by the Fourth Convention and to those who are not', in *ibid.*, Art. 76, no. 3151.

[11] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

In the *Delalic* case the ICTY defined the term 'rape' in the following terms:

> The Trial Chamber draws guidance on this question from the discussion in the recent judgment of the ICTR, in the case of the *Prosecutor* v. *Jean-Paul Akayesu* (hereafter *'Akayesu Judgment'*) which has considered the definition of rape in the context of crimes against humanity. The Trial Chamber deciding this case found that there was no commonly accepted definition of the term in international law and acknowledged that, while 'rape has been defined in certain national jurisdictions as non-consensual intercourse', there are differing definitions of the variations of such an act. It concluded,
>
> > that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law . . . The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed under circumstances which are coercive . . .
>
> This Trial Chamber agrees with the above reasoning, and sees no reason to depart from the conclusion of the ICTR in the *Akayesu Judgment* on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.[12]

Analysing the national criminal legislation of a number of countries,[13] the Tribunal developed in the *Furundzija* case the criteria set out by the ICTR in the *Akayesu* case[14] and confirmed by the ICTY in the *Delalic* case.[15]

[12] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 478 ff. (footnotes omitted).
[13] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, paras. 180 ff.; 121 ILR 218 at 270.
[14] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, paras. 597 ff.
[15] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, paras. 176 ff.; 121 ILR 218 at 269.

The ICTY defined the material elements of rape in the *Furundzija* case[16] as follows:

> (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.

In the *Kunarac and Others* case, the ICTY confirmed this view generally. It felt, however, a need to clarify its understanding of element (ii):

> The Trial Chamber considers that the *Furundzija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundzija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which . . . is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[17]

On the basis of the relevant law in force in different national jurisdictions, it identified the following three broad categories of factors that qualify the relevant sexual acts (as defined in the *Furundzija* case) as the crime of rape:

> (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
> (ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly

[16] *Ibid.* para. 185. See also the definition by the ICTY Prosecution quoted in that judgment (para. 174): 'rape is a forcible act: this means that the act is "accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression". This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.' (Footnote omitted.)

[17] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 438.

vulnerable or negated her ability to make an informed refusal; or

(iii) the sexual activity occurs without the consent of the victim.[18]

It concluded that

> [t]he basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.[19]

In the light of these considerations, the Trial Chamber understood that 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.[20]

The concept of 'coercive' contained in the elements as defined in the *Akayesu*, *Delalic* and *Furundzija* cases was addressed in the *Akayesu* judgment in further detail:

> [C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence.[21]

In the *Furundzija* case the Trial Chamber noted the unchallenged submission of the Prosecution in its pre-trial brief that rape is a forcible act; this means that the act is

> accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim

[18] *Ibid.*, para. 442. [19] *Ibid.*, para. 457. [20] *Ibid.*, para. 460.
[21] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

> in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression.[22]

The *UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict* defined 'rape' in the following way:

> 'Rape' should be understood to be the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape.[23]

In para. 25, the report adds that

> [l]ack of consent or the lack of capacity to consent due, for example, to coercive circumstances or the victim's age, can distinguish lawful sexual activity from unlawful sexual activity under municipal law. The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the prosecution to establish a lack of consent as an element of the crime. In addition, consent is not an issue as a legal or factual matter when considering the command responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations. The issue of consent may, however, be raised as an affirmative defense as provided for in the general rules and practices established by the International Criminal Tribunal for the Former Yugoslavia.

Remarks concerning the mental element

In the *Kunarac and Others* case the ICTY held:

> The *mens rea* is the intention to effect this sexual penetration [as the ICTY defined it in the above-quoted material elements], and the knowledge that it occurs without the consent of the victim.[24]

[22] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 174; 121 ILR 218 at 268.
[23] Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery. Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 24.
[24] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 460.

(2) Sexual slavery

Remarks concerning the material elements

Adapting the first comprehensive and now the most widely recognised definition of slavery contained in the 1926 Slavery Convention,[25] the *UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict* defined 'sexual slavery' in the following way:

> [Sexual slavery] should be understood to be the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence.
>
> The crime of slavery does not require government involvement or State action, and constitutes an international crime whether committed by State actors or private individuals. Further, while slavery requires the treatment of a person as chattel, the fact that a person was not bought, sold or traded does not in any way defeat a claim of slavery.[26]

The Special Rapporteur mentions the following examples:

> The 'comfort stations' that were maintained by the Japanese military during the Second World War. . . , the 'rape camps' . . . [for example, see ICTY, *Indictment of Gagovic and Others*, IT-96-23-I (26 June 1996)], . . . situations where women and girls are forced into 'marriage', domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors.[27]

Some additional guidance might be found in the ICTY judgment in the *Kunarac and Others* case where the Trial Chamber discussed the elements of the crime against humanity of enslavement.[28]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

[25] See Art. 1(1): 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

[26] Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery. Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, paras. 27 ff.

[27] *Ibid*., para. 30.

[28] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, paras. 515–43.

(3) Enforced prostitution

Remarks concerning the material elements

There are few legal sources clarifying the elements of 'enforced prostitution'. However, the following may be an indication.

- The ICRC Commentary on Art. 27(2) GC IV describes the term 'enforced prostitution' as 'the forcing of a woman into immorality by violence or threats'.[29]
- In the *Awochi* case, a Japanese accused who ran a club restaurant was charged with enforced prostitution and found guilty.[30] The *actus reus* was defined in Art. 1(7) of the Statute Book Decree No. 44 of 1946 on War Crimes: 'Abduction of girls and women for the purpose of enforced prostitution'. The term 'enforced' was specified as follows: '[The women] had to take up residence in a part of the club shut off for that purpose and from which they were not free to move.' If they wished to quit they 'were threatened with Kempei (Japanese Military Police), which threats . . . were rightly considered as being synonymous with ill-treatment, loss of liberty and worse'. The threats were so serious that they were 'forced through them to give themselves to the Japanese visitors . . . against their will'.[31]
- The *UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict* defined 'enforced prostitution' in the following way:

> Sexual slavery . . . encompasses most, if not all, forms of forced prostitution. The terms 'forced prostitution' or 'enforced prostitution' . . . generally [refer] to conditions of control over a person who is coerced by another to engage in sexual activity.[32]

She adds:

> As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and

[29] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 27, p. 206.
[30] *W. Awochi Case*, in UNWCC, *LRTWC*, vol. XIII, p. 123; 13 AD 254.
[31] UNWCC, *LRTWC*, vol. XIII, p. 124.
[32] Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery. Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 31.

> could more appropriately and more easily be characterized and prosecuted as slavery.[33]

- With regard to concepts like 'enforced', 'forced' or 'coercion', the sources from the ICTY and ICTR quoted under the section for the war crime of rape might also be relevant in the context of the war crime of enforced prostitution:
  The concept of 'coercive' was addressed in further detail in the *Akayesu* judgment:

  > [C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence.[34]

  In the *Furundzija* case, the Trial Chamber noted the unchallenged submission of the Prosecution in its pre-trial brief that rape is a forcible act. This means that the act is

  > accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression.[35]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

(4) Forced pregnancy, as defined in Art. 7(2)(f)

According to Art. 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.

To date there has been no specific case law on this crime as defined in the Statute.

[33] *Ibid.*, para. 33.
[34] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 688.
[35] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 174; 121 ILR 218 at 268.

(5) Enforced sterilisation

In some post-Second World War trials defendants were charged for acts of enforced sterilisation in the context of medical experiments.[36] There are no further indications of the material elements in existing case law.

(6) Any other form of sexual violence also constituting a grave breach of the Geneva Conventions

Remarks concerning the material elements

The ICTR defined sexual violence in the context of crimes against humanity in the following terms:

> Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[37]
>
> [and]
>
> Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact . . . The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence.[38]

The *UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict* defined 'sexual violence' as:

> any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts.[39]

[36] The *Hoess Trial*, in UNWCC, *LRTWC*, vol. VII, p. 15; 13 AD 269.See also the trial of *K. Brandt and Others*, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, pp. 11 ff.; 14 AD 296 at 297-8.

[37] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 598.

[38] *Ibid.*, para. 688.

[39] Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery. Systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 21. It should be indicated that the last two forms of conduct may also fall under the crime of mutilation as described in Art. 8(2)(b)(x) of the Statute.

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Overlap of crimes

The ICTR stressed that

> [l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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.[40]

The ICTY followed this approach in the *Delalic* case and pointed out

> whenever rape and other forms of sexual violence meet the... criteria [of torture as described under Art. 8(2)(a)(ii) – Torture or inhuman treatment, including biological experiments], then they shall constitute torture, in the same manner as any other acts that meet this criteria.[41]

The ICTR also held:

> Sexual violence falls within the scope of... 'outrages upon personal dignity,' set forth in Article 4(e) of the [ICTR] Statute, and 'serious bodily or mental harm,' set forth in Article 2(2)(b) of the [ICTR] Statute.[42]

In the Furundzija case the ICTY addressed the question of other serious sexual assault as also amounting to humiliating and degrading treatment. It held in this regard:

> As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.[43]

On the basis of these findings, the ICTY Prosecution considered that sexual assault amounted to humiliating and degrading treatment if it had

[40] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, paras. 597 ff.
[41] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 496.
[42] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 688.
[43] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 186; 121 ILR 218 at 272.

the following elements:

1. Serious abuse of a sexual nature was inflicted upon the physical and moral integrity of the victim, by means of coercion, threat of force or intimidation, in a manner that is degrading and humiliating for the victim's dignity;
2. The acts or omissions were committed wilfully.[44]

[44] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 53. The ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' In *ibid.*, pp. 35, 56. See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Miroslav Kvocka and Others*, IT-98-30-PT, pp. 45 ff.

Art. 8(2)(b)(xxiii) – Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations

Text adopted by the PrepCom

War crime of using protected persons as shields

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.

2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom recognised that utilising civilians and other protected persons as human shields can be effected in various ways. On the basis of the indications stemming from Art. 51(7) AP I, the PrepCom tried to cover several situations in the elements: the movement of civilians or other protected persons to military objectives – be they fixed or movable – and the movement of military objectives to a place where civilians or other protected persons are present – be it enforced or voluntary.

Element 1 is meant to cover these situations. Some delegations expressed the view that the wording of the second alternative failed to capture both the situation where civilians are already present at a certain place and the situation where civilians voluntarily move to a place, and suggested therefore that the word 'location' in Element 1 be changed to 'presence or movements'. In support of this suggested modification, reference was made to the wording of Art. 51(7) AP I: 'The presence or movements of the civilian population or individual civilians shall not be used to render . . . ', language which explicitly includes both situations.

Other delegations, however, claimed that the proposed formulations would be too restrictive, and that 'location' is not only sufficient but, indeed, is broader than 'presence' and would also cover every variation of location. The term 'location' would not have any connotation as to how the civilians or other protected persons came to a certain place. They

reiterated that what is important in this crime is not the type of movement or location being used, but the *intended use*, as expressed in Element 2. With that explanation, the proposed EOC text for this crime was accepted without change.

The primary difficulty with the elements of crime for this offence was how to cover the motive of the perpetrator as described in the Rome Statute, 'to render certain points, areas or military forces immune from military operations'.

Although the Rome Statute is not explicit on this point, the drafters felt that the 'to render immune' language would not make sense unless the intent was to shield or protect a military objective. They felt that the ordinary meaning of the word 'immune' would create too high a threshold and make the crime meaningless. According to them, the word 'immune' would mean that as a consequence of the presence of civilians or other protected persons, the points, areas or forces could under no circumstances be attacked, which would in practice be a very rare situation. In fact, the presence of protected persons would in the vast majority of cases only influence the proportionality test as defined in Arts. 51(5)(b) and 57(2)(a)(iii) AP I. Bearing in mind that the aim of the prohibition is to protect civilians and other protected persons from the effects of attacks, the decisive element of the crime would be the intention to shield. Therefore, Element 2 was adopted as quoted above. The way it is drafted, it may be qualified as a specific intent requirement.

Legal basis of the war crime

The phrase 'utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations' is derived from various provisions, in particular Arts. 23 GC III, 28 GC IV and 51(7) AP I.

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. So far the ICTY has considered the use of human shields only as a form of inhuman or cruel treatment,[45] of an outrage upon personal dignity[46] or of hostage-taking.[47]

[45] See, for example, ICTY, Judgment,*The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, paras. 186, 716; 122 ILR 1 at 73, 219; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 256.

[46] See, for example, ICTY, Judgment, *The Prosecutor* v. *Zlatko Aleksovski*, IT-95-14/1-T, para. 229.

[47] See, for example, ICTY, Judgment,*The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 750; 122 ILR 1 at 226.

Remarks concerning the material elements

Art. 23(1) GC III contains a specific rule with respect to prisoners of war:

> No prisoner of war may at any time be sent to, or detained in, areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

Art. 28 GC IV specifically treats protected persons under GC IV:

> The presence of a protected person may not be used to render certain points or areas immune from military operations.

Art. 51(7) AP I, which reads as follows:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations,

affords measures of protection to all civilians and the civilian population as a whole, thus extending to them measures which already exist for the two above-mentioned categories of persons: prisoners of war and civilians protected by GC IV.

According to the ICRC Commentary on this provision,

> [t]his paragraph develops and clarifies these various rules. The term 'movements' in particular is a new one; this is intended to cover cases where the civilian population moves of its own accord. The second sentence concerns cases where the movement of the population takes place in accordance with instructions from the competent authorities, and is particularly concerned with movements ordered by an Occupying Power, although it certainly also applies to transfers of prisoners of war, and civilian enemy subjects ordered by the authorities of a belligerent Power to move within its own territory.[48]

NB: Art. 19 GC I and Art. 12(4) AP I contain a similar rule with regard to medical units.

[48] C. Pilloud and J. S. Pictet, 'Art. 51' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 1988.

Turning to cases where these principles have been discussed, in the *Karadzic and Mladic* case at the ICTY the accused were charged with 'taking United Nations Peacekeepers hostage and using them as "human shields"'. Therefore, the accused were 'considered to be responsible for grave breaches of the Geneva Conventions (counts 13 and 15) and violations of the laws and customs of war (counts 14 and 16)'.[49] The ICTY Trial Chamber (Rule 61 proceeding) stated in its decision that

> Bosnian Serb forces selected United Nations military observers in the Pale region and used them as 'human shields'. Those observers were tied to potential targets of NATO air-strikes, specifically the munitions depot . . . , the radar facility site . . . and a nearby communication centre.[50]

In the *K. Student* case before the British Military Court, the accused was charged with using 'British prisoners of war as a screen for the advance of German troops . . . resulting in at least six of these British prisoners of war being killed.'[51] For the *actus reus*, Arts. 2, 7, 27, 31 and 32 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War were cited.[52]

In the *W. von Leeb and Others* case, a US tribunal found:

> To use prisoners of war as a shield for the troops is contrary to international law.[53]

NB: While the above-cited prohibitions address the deliberate using of human shields for military operations, Art. 58 AP I has to be distinguished from that rule. The latter provision deals with precautionary measures to be taken to remove the population from the vicinity of military objectives.

[49] 108 ILR 86 at 96, para. 20. In the indictment the ICTY Prosecution qualified the acts as follows:
Count 13: a *GRAVE BREACH* as recognised by Articles 2(h) (taking civilians as hostage), 7(1) and 7(3) of the Statute of the Tribunal.
Count 14: a *VIOLATION OF THE LAWS OR CUSTOMS OF WAR* (taking of hostages) as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal.
In regard to the UN peacekeepers used as 'human shields' on 26 and 27 May 1995, *RADOVAN KARADZIC* and *RATKO MLADIC*, by their acts and omissions, committed:
Count 15: a *GRAVE BREACH* as recognised by Articles 2(b) (inhuman treatment), 7(1) and 7(3) of the Statute of the Tribunal.
Count 16: a *VIOLATION OF THE LAWS OR CUSTOMS OF WAR* (cruel treatment) as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal.

[50] 108 ILR 86 at 96, para. 20. [51] In UNWCC, *LRTWC*, vol. IV, p. 118.
[52] *Ibid.*, p. 121. [53] In UNWCC, *LRTWC*, vol. XII, p. 104; 15 AD 376 at 395.

It stipulates:

> The Parties to the conflict shall, to the maximum extent feasible:
> (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
> (b) avoid locating military objectives within or near densely populated areas;
> (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Art. 58 AP I is based on the concept that belligerents may expect their adversaries to conduct themselves fully in accordance with their treaty obligations and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population, which is in any case in their own interest. The obligation to take precautions to protect the civilian population and civilian objects against the collateral effects of attacks is a complementary one shared by both sides to an armed conflict, in implementing the principle of distinction. Within their respective capabilities, each is obliged to do what is feasible to avoid or minimise collateral effects of attacks which cause loss of civilian life or damage to civilian property. Art. 58 AP I is the provision applicable to the Party having control over the civilian population to do what is feasible to attain this goal. It is complementary to, and interdependent with, Art. 57 AP I, which implements, in somewhat more mandatory terms, the obligations of the attacking Party in this regard. However, a violation of Art. 58 AP I does not amount to the crime under consideration here.

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8(2)(b)(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

Text adopted by the PrepCom

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

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The elements of conduct of hostilities war crimes relating to specific types of unlawful attacks against protected persons or objects (i.e. Art. 8(2)(b)(i), (ii), (iii), (ix) and (xxiv)) follow the same structure as that described for the war crime under Art. 8(2)(b)(i), i.e. they all begin with '1. The perpetrator directed an attack', then '2. The object of the attack was . . . ' and finally '3. The perpetrator intended . . . to be the object of attack.' The war crime under Art. 8(2)(b)(xxiv), however, constitutes the sole exception. In this case the initial structure was kept after the first reading of the EOC,[1] i.e. first 'The accused attacked . . . ', and then 'The accused intended the object of attack to be. . . '. There is some likelihood that this was just a drafting error, since it was claimed that the structure after the second reading was considered to be a simple application of the order indicated in paragraph 7 of the General Introduction to the EOC. The drafters claimed that restructuring effected during the second reading would not affect the substance of the original draft after the first reading.

As in the case of all war crimes dealing with certain unlawful attacks, the PrepCom discussed whether this war crime requires as a result actual

[1] See PCNICC/1999/L.5/Rev.1/Add.2 of 22 December 1999.

damage to the objects mentioned. The majority of delegations opposed a result requirement, and this was eventually accepted.

The material elements largely reproduce statutory language, but they contain significant clarifications. The text adopted adds the formulation 'or other method of identification indicating protection' in Element 1, which requires the perpetrator to have attacked an object or place 'using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions'.[2] This added language reflects the fact that the protection accorded by the GC can also be indicated by other distinctive signals such as light signals, radio signals or electronic identification as valid means of identification for medical units or transports (AP I, Annex I, Chapter III, Arts. 6-9). The PrepCom recognised that the essence of this crime is an attack against protected persons or property identifiable by any recognised means of identification.

In addition, the term 'material' was omitted. Instead, the formulation 'or other objects' was added in order to define the protected property in an all-inclusive way. Thereby it covers material and at the same time addresses fears by some delegations that hospital ships and medical aircraft might not be included otherwise (despite the fact that the elements include medical transports, and the definition of such transports as may be found in Art. 8(g) AP I would cover these means of transportation).

Legal basis of the war crime

There is no single treaty reference for this war crime. It encompasses various prohibitions of attack as contained in the GC and AP I. The relevant provisions are cited below.

Remarks concerning the material elements

Attack

The term 'attack' is defined in Art. 49(1) AP I and 'means acts of violence against the adversary, whether in offence or in defence'.

As pointed out above, the concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict. Therefore, the terms 'offence' and 'defence'

[2] Although this was not discussed by the PrepCom, it is submitted that the full Art. 30 ICC Statute standard does not apply to 'in conformity with international law', but that an approach similar to that in the war crime of improper use of the distinctive emblems of the Geneva Conventions (Art. 8(2)(b)(vii)–4) is warranted; this means that, if some form of knowledge is required, it would be sufficient that the perpetrator should have known that the use was in conformity with international law.

must be understood independently from the meaning attributed to them by the law regulating the recourse to force under the UN Charter.

Buildings, material, medical units and transport, and personnel protected by the GC and AP I using the distinctive emblems of the Geneva Conventions in conformity with international law

The GC and AP I contain a wide range of provisions regulating the protection of specific buildings, material, medical units and transport, and personnel against attacks and their legitimate use of the distinctive emblem of the GC, in particular:

Art. 24 GC I:

> Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

Art. 25 GC I:

> Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands.

Art. 26 GC I:

> The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations . . .

Art. 27 GC I:

> A recognized Society of a neutral country can only lend the assistance of its medical personnel and units to a Party to the conflict with the previous consent of its own Government and the authorization of the Party to the conflict concerned. That personnel and those units shall be placed under the control of that Party to the conflict . . .

> The members of the personnel named in the first paragraph shall be duly furnished with the identity cards provided for in Article 40 before leaving the neutral country to which they belong.

Art. 36 GC I:[3]

> Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at heights, times and on routes specifically agreed upon between the belligerents concerned. They shall bear, clearly marked, the distinctive emblem prescribed in Article 38, together with their national colours on their lower, upper and lateral surfaces . . .

NB: It should be noted that these rules on medical aircraft are outdated. The present law is reflected in the provisions of AP I mentioned later on.

Art. 39 GC I:[4]

> Under the direction of the competent military authority, the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.

Art. 40 GC I:

> The personnel designated in Article 24 [medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces] and in Articles 26 [staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24] and 27 [medical personnel of a recognized Society of a neutral country] shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Art. 41 GC I:

> The personnel designated in Article 25 [members of the armed forces specially trained for employment as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or

[3] See also Art. 39 GC II. [4] See also Art. 41 GC II.

treatment of the wounded and sick] shall wear, but only while carrying out medical duties, a white armlet bearing in its centre the distinctive sign in miniature; the armlet shall be issued and stamped by the military authority.

Military identity documents to be carried by this type of personnel shall specify what special training they have received, the temporary character of the duties they are engaged upon, and their authority for wearing the armlet.

Art. 42 GC I:

The distinctive flag of the Convention shall be hoisted only over such medical units and establishments as are entitled to be respected under the Convention, and only with the consent of the military authorities. In mobile units, as in fixed establishments, it may be accompanied by the national flag of the Party to the conflict to which the unit or establishment belongs.

Nevertheless, medical units which have fallen into the hands of the enemy shall not fly any flag other than that of the Convention. Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems indicating medical units and establishments clearly visible to the enemy land, air or naval forces, in order to obviate the possibility of any hostile action.

Art. 43 GC I:

The medical units belonging to neutral countries, which may have been authorized to lend their services to a belligerent under the conditions laid down in Article 27, shall fly, along with the flag of the Convention, the national flag of that belligerent, wherever the latter makes use of the faculty conferred on him by Article 42 . . .

Art. 44 GC I:

With the exception of the cases mentioned in the following paragraphs of the present Article, the emblem of the red cross on a white ground and the words 'Red Cross' or 'Geneva Cross' may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments, the personnel and material protected by the present Convention and other Conventions dealing with similar matters. The same shall apply to the emblems mentioned in Article 38, second paragraph, in respect of the countries which use them. The National Red Cross Societies and other societies designated in Article 26 shall

have the right to use the distinctive emblem conferring the protection of the Convention only within the framework of the present paragraph.

Furthermore, National Red Cross (Red Crescent, Red Lion and Sun[5]) Societies may, in time of peace, in accordance with their national legislation, make use of the name and emblem of the Red Cross for their other activities which are in conformity with the principles laid down by the International Red Cross Conferences. When those activities are carried out in time of war, the conditions for the use of the emblem shall be such that it cannot be considered as conferring the protection of the Convention; the emblem shall be comparatively small in size and may not be placed on armlets or on the roofs of buildings.

The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the red cross on a white ground.

. . .

Art. 42 GC II:

The personnel designated in Articles 36 [religious, medical and hospital personnel of hospital ships and their crews] and 37 [religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13] shall wear, affixed to the left arm, a water-resistant armlet bearing the distinctive emblem, issued and stamped by the military authority.

Such personnel . . . shall also carry a special identity card bearing the distinctive emblem . . .

Art. 43 GC II:

The ships designated in Articles 22 [military hospital ships], 24 [hospital ships utilized by National Red Cross Societies, by officially recognized relief societies or by private persons], 25 [hospital ships utilized by National Red Cross Societies officially recognized relief societies or private persons of neutral countries] and 27 [small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations] shall be distinctively marked as follows:

(a) All exterior surfaces shall be white.

(b) One or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.

[5] As of 1980 this emblem is no longer used in practice.

All hospital ships shall make themselves known by hoisting their national flag and further, if they belong to a neutral state, the flag of the Party to the conflict whose direction they have accepted. A white flag with a red cross shall be flown at the mainmast as high as possible.

Lifeboats of hospital ships, coastal lifeboats and all small craft used by the Medical Service shall be painted white with dark red crosses prominently displayed and shall, in general, comply with the identification system prescribed above for hospital ships.

...

All the provisions in this Article relating to the red cross shall apply equally to the other emblems mentioned in Article 41.

Art. 44 GC II:

The distinguishing signs referred to in Article 43 can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.

Art. 18 GC IV:

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Art. 19 GC IV:

> The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.
>
> The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet handed to the proper service, shall not be considered to be acts harmful to the enemy.

Art. 20 GC IV:

> Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.
>
> In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet which they shall wear on the left arm while carrying out their duties. This armlet shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.
>
> Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

Art. 21 GC IV:

> Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Art. 22 GC IV:

> Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned. They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

NB: It should be noted that these rules are outdated. The present law is reflected in the provisions of AP I mentioned later on.

Art. 6 of Annex I to GC IV:

> Hospital and safety zones shall be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts.
>
> Zones reserved exclusively for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun[6]) emblem on a white ground.

The following definitions of Art. 8 AP I give useful guidance in clarifying the terms:

> (c) 'medical personnel' means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:
>
> (i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
>
> (ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun[7]) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
>
> (iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2;
>
> . . .
>
> (e) 'medical units' means establishments and other units, whether military or civilian, organized for medical purposes, namely the

[6] See previous footnote. [7] See previous footnotes.

search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;

(f) 'medical transportation' means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;

(g) 'medical transports' means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;

(h) 'medical vehicles' means any medical transports by land;

(i) 'medical ships and craft' means any medical transports by water;

(j) 'medical aircraft' means any medical transports by air;

(k) 'permanent medical personnel', 'permanent medical units' and 'permanent medical transports' mean those assigned exclusively to medical purposes for an indeterminate period. 'Temporary medical personnel', 'temporary medical units' and 'temporary medical transports' mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms 'medical personnel', 'medical units' and 'medical transports' cover both permanent and temporary categories . . .

Art. 12 AP I – Protection of medical units:

1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph 1 shall apply to civilian medical units, provided that they:

(a) belong to one of the Parties to the conflict;

(b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or

(c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1 . . .

Art. 13 AP I – Discontinuance of protection of civilian medical units:

> 1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.
>
> 2. The following shall not be considered as acts harmful to the enemy:
>
> (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
>
> (b) that the unit is guarded by a picket or by sentries or by an escort;
>
> (c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
>
> (d) that members of the armed forces or other combatants are in the unit for medical reasons.

Art. 15 AP I – Protection of civilian medical and religious personnel:

> 1. Civilian medical personnel shall be respected and protected.
>
> . . .
>
> 5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

Art. 18 AP I – Identification:

> 1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.
>
> . . .
>
> 3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.
>
> 4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.
>
> 5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of

distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.

6. The application of the provisions of paragraphs 1 to 5 of this article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter . . .

Art. 23 AP I – Other medical ships and craft:

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol . . . [S]uch vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.

2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.

. . .

Art. 24 AP I – Protection of medical aircraft:

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

The details of the protections are to be found in Arts. 25-31. In contrast to GC IV these rules specifically distinguish between three areas: Art. 25 AP I – Medical aircraft in areas not controlled by an adverse Party; Art. 26 AP I – Medical aircraft in contact or similar zones; Art. 27 AP I – Medical aircraft in areas controlled by an adverse Party.

NB: Directing attacks against persons or objects using the signals described in the revised Annex I of 1993 to AP I in conformity with the previous rules constituting protected status should also fall within the scope of the crime under the Statute. This follows from the rationale of the Annex as it is reflected in Art. 1:

> Article 1 – General provisions
>
> 1. The regulations concerning identification in this Annex implement the relevant provisions of the Geneva Conventions and the Protocol; they are intended to facilitate the identification of personnel, material, units, transports and installations protected under the Geneva Conventions and the Protocol.
>
> 2. These rules do not in and of themselves establish the right to protection. This right is governed by the relevant articles in the Conventions and the Protocol.
>
> 3. The competent authorities may, subject to the relevant provisions of the Geneva Conventions and the Protocol, at all times regulate the use, display, illumination and detectability of the distinctive emblems and signals.
>
> 4. The High Contracting Parties and in particular the Parties to the conflict are invited at all times to agree upon additional or other signals, means or systems which enhance the possibility of identification and take full advantage of technological developments in this field.

The provisions of the Annex do not enlarge the protection of persons or objects. They are only intended to facilitate the identification of personnel, material, units, transports and installations protected under the Geneva Conventions and the Protocol.[8] Since that protection is only determined by the substantive provisions of the GC and AP, attacks against such protected objects or persons should also fall under this crime if they use the signals defined in Annex I to AP I. However, this must be limited to situations in which the attacker has the technical capacity to receive the signals. This restriction may be derived from Art. 18(2) AP I, which provides:

[8] See also in this regard Y. Sandoz, 'Art. 8' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 404:

> It had already become clear, even during the first session of the Conference of Government Experts in 1971, that the problem of the security of medical transports could only be resolved by finding solutions adapted to 'modern means of marking, pinpointing and identification'. In fact it is no longer possible today to base effective protection solely on a visual distinctive emblem. [Footnote omitted.]

> 2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.

In this paragraph there is no 'obligation' for the Parties to the conflict to adopt adequate methods and procedures. The reason is that it did not seem desirable to impose an absolute obligation which would involve excessively onerous financial or technical burdens for certain States or other Parties to the conflict. Thus States are merely urged to 'endeavour', i.e. to do all they can, to fulfil the obligation laid down here. Based on that rationale, the above-made restriction is necessary. An attack against protected objects or personnel in the sense of this article of the ICC Statute amounts to a war crime only if the technical means for identification were available.

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. The sources mentioned for the crimes defined under Act. 8(2)(b)(i) and (ii), however, are equally relevant for this crime.

Art. 8(2)(b)(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

Text adopted by the PrepCom

War crime of starvation as a method of warfare

1. The perpetrator deprived civilians of objects indispensable to their survival.

2. The perpetrator intended to starve civilians as a method of warfare.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The prohibited conduct of this war crime is defined in the elements as 'The perpetrator deprived civilians of objects indispensable to their survival.' Delegations agreed that the deprivation of not only food and drink, but also, for example, medicine or in certain circumstances blankets could be covered by this crime, if in the latter case blankets were indispensable to survival due to the very low temperature in a region. On the basis of this understanding, a footnote was inserted in an initial Rolling Text of the Working Group to underline that the intention to starve would also include the broader approach of deprivation of something necessary to live. This footnote recognised that the ordinary meaning of the word 'starvation' may have different contents. In accordance with major dictionaries, it was meant to cover not only the more restrictive meaning of starving as killing by hunger or depriving of nourishment, but also the more general meaning of deprivation or insufficient supply of some essential commodity, of something necessary to live.[1] Although the substance of the footnote was not contested (only one delegation expressed some doubts), the majority eventually considered it to be redundant and covered by the term 'objects indispensable to their survival', which would determine the meaning

[1] With regard to the different meanings of 'starvation', see M. Cottier, 'War Crimes – Para. 2(b)(xxv) Starvation of Civilians as a Method of Warfare' in O. Triffterer' (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos, Baden-Baden, 1999), no. 218, p. 256.

of starvation in Element 2 in a broad sense. The footnote was therefore dropped in the final version.

For similar reasons, delegations refrained from inserting the example given by the Statute ('impeding relief supplies as provided for under the Geneva Conventions'). It was felt that as one example of prohibited conduct it did not constitute a separate element and was covered by the general term of 'deprivation'.

This war crime does not cover every deprivation, but, as stated in Element 2, only those effected by the perpetrator with the intention of starving civilians as a method of warfare. Starvation must be interpreted broadly, as already stated above. Contrary to an initial proposal,[2] the PrepCom agreed that there is no requirement that 'as a result of the accused's acts, one or more persons died from starvation'.

Legal basis of the war crime

The phrase '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' is derived to a large extent from Art. 54 AP I.

Remarks concerning the material elements

Civilians

According to Art. 50(1) AP I,

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Starvation as a method of warfare

The ICRC Commentary on Art. 54 AP I states in this regard:

> The term 'starvation' is generally understood by everyone.[3] To use it as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies . . . Starvation is referred to here as a method of warfare, i.e., a weapon to annihilate or weaken the population.[4]

[2] PCNICC/1999/DP.4/Add.2 of 4 February 1999.

[3] Starvation is defined by the *Shorter Oxford English Dictionary* (1973) as the action of starving or subjecting to famine, i.e., to cause to perish of hunger; to deprive of or 'keep scantily supplied with food' (p. 2111) . . .

[4] C. Pilloud and J. S. Pictet, 'Art. 54' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), nos. 2089 ff.

The principle prohibiting starvation as contained in Art. 54 AP I is applicable both in occupied territories and in territories that are not occupied.

Depriving of objects indispensable to their survival

The term 'depriving' encompasses a large variety of acts or omissions. Examples may be found in Art. 54(2) AP I: 'to attack, destroy, remove or render useless'. Another conduct is mentioned in the Statute itself: 'impeding relief supplies'. As indicated by the ICRC Commentary on Art. 54 AP I,

> [i]t should be noted that the verbs 'attack', 'destroy', 'remove' and 'render useless' are used in order to cover all possibilities, including pollution, by chemical or other agents, of water reservoirs, or destruction of crops by defoliants, and also because the verb 'attack' refers, either in offence or defence, to acts of violence against the adversary, according to Article 49 (Definition of attacks and scope of application), paragraph 1.[5]

The same provision also contains a non-exhaustive list of objects indispensable to the survival of the civilian population: 'food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works'.

Art. 54(3) and (5) AP I, however, contain some exceptions:

> 3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
> (a) as sustenance solely for the members of its armed forces; or
> (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
> . . .
> 5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Paragraph 3(b) shows that even if objects indispensable to the survival of the civilian population are used in direct support of military action, the adverse Party should, when using force, ensure that the population is not reduced to starvation or compelled to move.

[5] *Ibid.*, no. 2101.

These rules obviously have an effect on sieges and blockades which cannot be undertaken for the purpose of starving the civilian population or denying their essential supplies. This is illustrated by the rules relating to blockade in naval warfare in the *San Remo Manual*:

> The declaration or establishment of a blockade is prohibited if:
> (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
> (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.[6]

Provisions concerning relief supplies as indicated below supplement these rules.

Including impeding relief supplies as provided for under the Geneva Conventions

The following provisions contained in the GC and AP I specifically address relief supplies:

• *General provisions relating to relief in favour of the civilian population*

Art. 23 GC IV:

> Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.
>
> The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:
> (a) that the consignments may be diverted from their destination,
> (b) that the control may not be effective, or
> (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through

[6] *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), para. 102.

> the release of such material, services or facilities as would otherwise be required for the production of such goods.
>
> The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.
>
> Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

This provision is supplemented by Arts. 70 and 71 AP I, which apply to the civilian population as defined in AP I (Art. 68 AP I) and which more closely reflect modern customary international law than the rather restrictive article in GC IV.

Art. 70 AP I – Relief actions:

> 1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.
>
> 2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
>
> 3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
>
> (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

(b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;

(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Art. 71 AP I – Personnel participating in relief actions:

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

Paras. 103–4 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*:

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

(a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and

(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.[7]

• *Relief to the civilian population in occupied territories*

Art. 55 GC IV:

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods . . .

Art. 59 GC IV:

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall,

[7] *Ibid.*

> however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

Art. 60 GC IV:

> Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

Art. 61 GC IV:

> The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body.
>
> Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.
>
> All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

Art. 62 GC IV:

> Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.

These rules are supplemented by Art. 69 AP I – Basic needs in occupied territories which apply to the civilian population as defined in AP I (Art. 68 AP I):

> 1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the

> Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.
>
> 2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

- *Specific rules on relief for detained persons are contained in Arts. 108 ff. and 142 GC IV*

Art. 108 GC IV contains these general principles:

> Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies . . . Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.
>
> Should military necessity require the quantity of such shipments to be limited, due notice thereof shall be given to the Protecting Power and to the International Committee of the Red Cross, or to any other organization giving assistance to the internees and responsible for the forwarding of such shipments.
>
> The conditions for the sending of individual parcels and collective shipments shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the internees of relief supplies. Parcels of clothing and foodstuffs may not include books. Medical relief supplies shall, as a rule, be sent in collective parcels.

Arts. 109 ff. GC IV explain in detail how Art. 108 GC IV is to be implemented.

In addition, Art. 142 GC IV provides:

> Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities . . . for distributing relief supplies . . . Such societies or organizations may be constituted in the

territory of the Detaining Power, or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the supply of effective and adequate relief to all protected persons.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times.

- *In addition to these rules, GC III contains special provisions concerning relief to prisoners of war*

Art. 72 GC III:

Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs,. . .

Such shipments shall in no way free the Detaining Power from the obligations imposed upon it by virtue of the present Convention.

The only limits which may be placed on these shipments shall be those proposed by the Protecting Power in the interest of the prisoners themselves, or by the International Committee of the Red Cross or any other organization giving assistance to the prisoners, in respect of their own shipments only, on account of exceptional strain on transport or communications.

The conditions for the sending of individual parcels and collective relief shall, if necessary, be the subject of special agreements between the Powers concerned, which may in no case delay the receipt by the prisoners of relief supplies . . .

With respect to collective relief shipments, see Art. 73 GC III and Annex III: Regulations Concerning Collective Relief.
Art. 74 GC III:

All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

. . . relief shipments . . . shall be exempt from any postal dues, both in the countries of origin and destination, and in intermediate countries.

If relief shipments intended for prisoners of war cannot be sent through the post office by reason of weight or for any other cause, the cost of transportation shall be borne by the Detaining Power in all the territories under its control. The other Powers party to the Convention shall bear the cost of transport in their respective territories. In the absence of special agreements between the Parties concerned, the costs connected with transport of such shipments, other than costs covered by the above exemption, shall be charged to the senders . . .

Art. 75 GC III:

Should military operations prevent the Powers concerned from fulfilling their obligation to assure the transport of the shipments referred to in Articles 70, 71, 72 and 77, the Protecting Powers concerned, the International Committee of the Red Cross or any other organization duly approved by the Parties to the conflict may undertake to ensure the conveyance of such shipments by suitable means (railway wagons, motor vehicles, vessels or aircraft, etc.). For this purpose, the High Contracting Parties shall endeavour to supply them with such transport and to allow its circulation, especially by granting the necessary safe-conducts.

Art. 125 GC III:

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities . . . for distributing relief supplies . . . Such societies or organizations may be constituted in the territory of the Detaining Power or in any other country, or they may have an international character.

The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision, on condition, however, that such limitation shall not hinder the effective operation of adequate relief to all prisoners of war.

The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times . . .

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. However, the Statute indicates that the use of starvation as a method of warfare has to be 'intentional', while 'impeding relief supplies as provided for under the Geneva Conventions' may be committed 'wilfully'.

Art. 8(2)(b)(xxvi) – Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities

Text adopted by the PrepCom

War crime of using, conscripting or enlisting children

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.

2. Such person or persons were under the age of 15 years.

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

By and large the text of the specific elements repeats the language of the Statute. However, the term 'children' is not used. Several delegations claimed that the term 'children' would have different meanings in different national and international laws. In order to avoid confusion between the Statute and these laws, the neutral word 'person' together with the age limit would be more appropriate to describe the victims of this crime. This opinion eventually prevailed.

The PrepCom debated the extent of knowledge required by the perpetrator as to the age of the persons used, conscripted or enlisted. Some States argued that no mental element should accompany Element 2. If the persons were under fifteen years old, even if the perpetrator did not know this, he or she should be guilty. Thus it would be the responsibility of someone who decided to use, conscript or enlist to satisfy himself or herself as to the age of those persons. Others claimed that this approach would be incompatible with Art. 67(1)(i) ICC Statute. In any case, there was overwhelming support for the view that a strict application of Art. 30(3) ICC Statute, requiring that the perpetrator had knowledge of a particular circumstance, namely the age of the person used, conscripted or enlisted, would not be required. As a compromise, a standard of 'knew or should have known' was adopted in Element 3.

In addition to the text adopted, several delegations wanted to include a clarification about the meaning of the term 'using them to participate actively in hostilities'. Other delegations, however, pointed out that at the Preparatory Committee that preceded the Diplomatic Conference in Rome, a footnote had been inserted in the text providing guidance for the interpretation of the concepts of 'use' and 'participation'. This footnote read as follows:

> The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology.[1]

It was argued that whilst the footnote, as with all other interpretative footnotes contained in the Committee's Report, was not included in the text of the Statute, it is part of the *travaux préparatoires* and therefore eligible to give the necessary guidance for identifying the understanding of the drafters of the Rome Statute. On the basis of these arguments the proponents of clarification in the elements did not pursue their original aim further at the PrepCom.

Legal basis of the war crime

This offence is derived from Art. 77(2) AP I, which reads as follows:

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.

Similar wording is found in Art. 38(2) and (3) of the 1989 UN Convention on the Rights of the Child:

[1] See Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, A/CONF.183/2/Add.1 (14 April 1998), p. 21; H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court' in R. S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, The Hague, London and Boston, 1999), p. 118.

> States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
>
> States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.

Remarks concerning the material elements

Conscripting or enlisting

While Art. 77(2) AP I contains the word 'recruiting', Art. 8(2)(b)(xxvi) of the ICC Statute uses the terms 'conscripting or enlisting'. The terms are not further defined. The plain and ordinary meaning of the words suggests the following:

According to the *Oxford English Dictionary*, 'to recruit' means 'to enlist new soldiers; to get or seek for fresh supplies of men for the army';[2] 'to enlist' is defined as 'to enrol on the "list" of a military body; to engage a soldier';[3] and 'to conscript' means 'to compel to military service by conscription; to enlist compulsorily'; the term 'conscription' is defined as 'enrolment or enlistment (of soldiers)'.[4]

Based on these explanations of the ordinary meaning of the terms, one may conclude that the notion of 'to enlist' comprises both the act of recruiting and the act of conscripting. The terms used seem to encompass every act – formal or *de facto* – of including persons in the armed forces. As pointed out in the ICRC Commentary on the corresponding provision for non-international armed conflicts,

> [t]he principle of non-recruitment also prohibits accepting voluntary enlistment.[5]

[2] The *Oxford English Dictionary* (Oxford, first published 1933, reprint 1978), vol. VIII, p. 277. According to the *Cambridge International Dictionary of English* (Cambridge University Press, Cambridge, 1995), the word means 'to persuade someone to become a new member of an organization, esp. the army', p. 1188; and according to the *Concise Oxford Dictionary* (1994), it means 'enlist (a person) as a recruit', p. 1004.

[3] The *Oxford English Dictionary*, vol. III, p. 191. According to the *Cambridge International Dictionary of English*, the word means 'to (cause to) join something, esp. the armed forces', p. 459, and according to the *Concise Oxford Dictionary*, it means 'enrol (=enter one's name on a list, esp. as a commitment to membership) in the armed services', p. 389.

[4] The *Oxford English Dictionary*, vol. II, p. 848. According to the *Cambridge International Dictionary of English*, the term means 'to force someone by law to serve in one of the armed forces', p. 289, and according to the *Concise Oxford Dictionary*, it means 'enlist by conscription', while 'conscription' means 'compulsory enlistment for State service, esp. military service', p. 243.

[5] S. Junod, 'Art. 4' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4557.

National armed forces

In the GC the term 'armed forces' is not specifically defined. However, as the ICRC Commentary points out, the expression 'members of the armed forces' refers to all military personnel, whether they belong to the land, sea or air forces.[6]

In Art. 43 AP I, armed forces are defined in the following terms:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Participate actively in hostilities

In contrast to the wording in Art. 77(2) AP I, 'direct part in hostilities', Art. 8(2)(b)(xxvi) ICC Statute uses the terms 'participate actively in hostilities'. In the context of common Art. 3 GC and the respective provisions of AP II, the ICTR found that *the term 'direct part in hostilities' has evolved from the phrase 'active part in the hostilities'* of common Art. 3. The Tribunal concluded in this respect:

> *These phrases* are so similar that, for the Chamber's purposes, they *may be treated as synonymous*.[7]

In the ICRC Commentary the *travaux préparatoires* of Art. 77(2) AP I are described as follows:

> The text refers to taking a 'direct' part in hostilities. The ICRC proposal did not include this word. Can this lead to the conclusion that indirect

[6] J. S. Pictet (ed.), *Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, Geneva, 1960), Art. 4, p. 51.

[7] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 629 (emphasis added).

> acts of participation are not covered? Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such.[8]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. Therefore, the mental element may be defined in accordance with Art. 30 of the ICC Statute.

With respect to the age of fifteen, a specific problem arises. It must be determined what level of knowledge the accused must have with regard to the age of the child. Must he/she know that the child is under fifteen years old? Could he/she remain unpunished if he/she does not enquire the age?

In the case *Regina* v. *Finta*, the Court held in general that

> for war crimes, the Crown would have *to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime*. That is to say the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right thinking people.
>
> *Alternatively*, the *mens rea* requirement of . . . war crimes would be met *if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences*.[9]

NB: Although relating to a different context, a further indication may be derived from national case law on indecent assault on children or similar offences where the *actus reus* encompasses a certain age limit.

- UK: In *Regina* v. *Prince,*[10] the jury found that the accused believed the victim's statement that she was eighteen and his belief was reasonable, for she looked very much older than sixteen. In fact, she was under

[8] C. Pilloud and J. S. Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3187.
[9] 104 ILR 284 at 363. [10] Law Reports 2 Crown Cases Reserved 154 (1875).

sixteen and the accused therefore brought about the *actus reus* of the crime. He was not even negligent, let alone reckless or intentional as to the girl's age. In spite of his blameless inadvertence as to this important circumstance in the *actus reus*, the accused was convicted. Therefore, the reasonable belief that the victim is over a certain age limit is not a defence if he or she is in fact under it.[11]

- Switzerland: With respect to offences requiring *dolus directus* or *dolus eventualis* the reasonable belief that the victim is over a certain age limit excludes the mental element;[12] with regard to Art. 187(4) of the 'Code pénal' which explicitly criminalises negligent conduct: 'L'auteur doit faire preuve d'une prudence accrue lorsque la victime présente un âge apparent proche de l'âge limite de protection: ce n'est que si des faits précis lui ont fait admettre que la personne avait plus de 16 ans qu'il ne sera pas punissable.'[13]
- France: With respect to an error of the actual age of the victim the accused must be acquitted if he proves the error and the error appears to be 'suffisamment plausible'.[14]
- US: Loewy points out: 'Statutory rape is generally a strict liability offence . . . Thus, even an honest and reasonable mistake as to age (or mental capacity) will not serve to exculpate the defendant. E.g. *S* v. *Superior Court of Pima County*, 104 Ariz. 440, 454 P.2d 982 (1969). There is, however, some authority to the contrary.'[15]

  With respect to the crime of statutory rape, in LaFave and Scott[16] it is stated that the majority of states 'impose[s] strict liability for sexual acts with underage complainants' (*Garnett* v. *State*, 332 Maryland 571, 632 A.2d 797 (1993)). Under such a provision, a conviction may be obtained 'even when the defendant's judgement as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age' (*Garnett* v. *State*, *ibid*.).
- Germany: At least *dolus eventualis* is required. The accused is criminally responsible if he/she did not know the age, but did not care about

[11] See J. C. Smith and B. Hogan, *Criminal Law* (7th edn, Butterworths, London, Dublin and Edinburgh, 1995), pp. 72, 471.
[12] G. Stratenwerth, *Schweizerisches Strafrecht*, BT I (4th edn, Stämpfli, Berne, 1993), p. 144.
[13] C. Favre, M. Pellet and P. Stoudmann, *Code pénal annoté* (Ed. Bis et Ter, Lausanne, 1997), p. 383; Stratenwerth, *Schweizerisches Strafrecht*, p. 144.
[14] J. Pradel and M. Danti-Juan, *Droit pénal spécial* (Ed. Cujas, Paris, 1995), p. 472. See also R. Merle and A. Vitu, *Traité de droit criminel, Droit pénal spécial* (Ed. Cujas, Paris, 1982), p. 1514; M. L. Rassat, *Droit pénal spécial* (4th edn, Dalloz, Paris, 1977), p. 474.
[15] A. H. Loewy, *Criminal Law* (2nd edn, West Publishing Co., St. Paul, MN, 1987), pp. 63 ff.
[16] W. R. LaFave and A. W. Scott, Jr, *Criminal Law* (Hornbook, Pocket Part, 1995), p. 29.

it. However, he/she must not have excluded the possibility that the victim was under the age limit. If he did not think at all about the age of the victim, there is no *dolus eventualis*. He/she must be acquitted.[17]

In sum, the picture painted by these examples is not uniform. Some countries accept a strict liability. Others require that the accused at least realised the possibility that the victim was under the age limit. However, the latter may be seen as the bottom line.

[17] A. Schönke and H. Schröder, *Strafgesetzbuch* (25th edn, Verlag C. H. Beck, Munich, 1997), para. 176, p. 1290.

7. Article 8(2)(c) ICC Statute – Violations of common Article 3 of the 1949 Geneva Conventions

7.1. Paragraph 1 of the introduction to the war crimes section

Paragraph 1 of the introduction to the war crimes section is particularly relevant to the crimes under Art. 8(2)(c). It reads as follows:

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

This paragraph emphasises that the content of Art. 8(2)(d)[1] and (f)[2] provides limitations to the jurisdiction of the Court, namely a description of situations of internal violence not covered by the Statute. Several interested delegations wanted to make sure that whenever the threshold for a non-international armed conflict as indicated in these provisions is not reached, the Court will not examine conduct occurring within a country as a possible war crime. Therefore, this paragraph was added to the introduction. Given that the PrepCom did not consider these limitations as elements of crimes, the PrepCom did not discuss the content.

[1] '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.'

[2] 'Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.'

7.2. Elements common to all crimes under Article 8(2)(c) ICC Statute

Four elements describing the subject-matter jurisdiction for war crimes under Art. 8(2)(c) of the ICC Statute are drafted in the same way for all crimes under this section and will therefore be discussed separately from the specific elements of each particular crime. Two of the four deal with the persons affected and the other two with the context in which the war crime took place.

Text adopted by the PrepCom

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

[*] The term 'religious personnel' includes those non-confessional non-combatant military personnel carrying out a similar function.

Commentary

War crimes as defined under Art. 8(2)(c) of the Statute concern conduct committed in the context of an armed conflict not of an international character 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. The formulation is largely derived from common Art. 3 of the GC.[1] It describes

[1] The term 'a person placed *hors de combat*' is defined in Art. 41(2) AP I in the following way:
A person is *hors de combat* if:
(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
provided that in any of these cases he abstains from any hostile act and does not attempt to escape.
For other persons *hors de combat* see also Art. 3(2) GC II (shipwrecked) and Art. 42 AP I (persons parachuting from an aircraft in distress).

the contextual circumstance in which the crimes under this section of the Statute take place and the potential victims of the crimes.

In the following analysis, the two elements relating to the context, i.e. the third and fourth elements as quoted above, will be treated first and the elements relating to the persons affected, i.e. the first and second elements quoted above, will be dealt with afterwards.

(1) CONTEXTUAL ELEMENT

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom did not elaborate the concept of an 'armed conflict not of an international character' in the EOC. Additional clarification as to the lower threshold can be found in Art. 8(2)(d) of the ICC Statute. The 'contextual' element and the accompanying mental element follow the concept developed for the crimes under Art. 8(2)(a). The comments already made, particularly with regard to the nexus required and the degree of mental awareness, therefore also apply in this case.

Legal basis

Definition of an armed conflict not of an international character

The term 'armed conflict not of an international character' is derived from common Art. 3 GC. The ICTY found that a non-international armed conflict 'exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[2]

Concerning the definition of internal conflicts covered by common Art. 3 GC, the ICTR held the following:

> Common Article 3 applies to 'armed conflicts not of an international character' . . . It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, . . . Common Article 3 . . . will apply once it has been established there exists an

[2] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 70; 105 ILR 453 at 488. This finding is also cited in ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 619.

> internal armed conflict which fulfils [its] respective pre-determined criteria.[3]

The bottom line of what constitutes a non-international armed conflict is defined in Art. 8(2)(d) of the Statute, which stipulates:

> 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.

With respect to the distinction between genuine armed conflicts and mere acts of banditry or unorganised and short-lived rebellions, the ICTR referred to the following non-cumulative and therefore alternative reference criteria enunciated in the ICRC Commentary on common Art. 3 GC which resulted from the various amendments discussed but not adopted during the 1949 Diplomatic Conference of Geneva, *inter alia*:

> 1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
>
> 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
>
> 3. (a) That the de jure Government has recognized the insurgents as belligerents; or
>
> (b) That it has claimed for itself the rights of a belligerent; or
>
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
>
> (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.[4]

[3] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, paras. 602–3.

[4] *Ibid.*, para. 619. The ICRC Commentary adds:

> 4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
>
> (b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.
>
> (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
>
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

J. S. Pictet (ed.), Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (ICRC, Geneva, 1958), Art. 3, p. 36.

As the ICRC Commentary and the ICTR point out, the above criteria are useful as a means of distinguishing armed conflicts from other forms of violence, but this does not mean that Article 3 is not applicable in cases where armed strife breaks out in a country but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication).[5]

The foregoing led the Tribunal to conclude that:

> [t]he term, 'armed conflict' in itself suggests the existence of *hostilities between armed forces organized to a greater or lesser extent*. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict . . ., it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.[6]

The ICTY followed a similar reasoning in the *Tadic* case by stating:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law. Factors relevant to this determination are addressed in the [ICRC Commentary on Common Art. 3 GC].[7]

In the *Delalic* case, it held:

> In the latter situation [i.e., non-international armed conflicts], in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved.[8]

Factors such as the involvement of government forces on one side or the exercise of territorial control by rebel forces are therefore not

[5] Pictet, *Commentary IV*, Art. 3, p. 36.
[6] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 120 (emphasis added).
[7] ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 562 (footnote omitted); 112 ILR 1 at 179.
[8] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 184.

indispensable.[9] However, the opposition of *armed* forces groups and *a certain intensity of the fighting* are constituent elements.[10]

Geographical scope of the armed conflict

The geographical scope of a non-international armed conflict is not specified explicitly in the GC. However, in that respect, the ICTY held that

> the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities . . . indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions . . . also suggests a broad scope.[11]

It concluded that:

> [u]ntil [a peaceful settlement is achieved], international humanitarian law continues to apply . . . in the whole territory under the control of a party, whether or not actual combat takes place there.[12]

This view is shared by the ICTR.

- In the *Akayesu* judgment, the ICTR added the restriction that:

> the crimes must not be committed by the perpetrator for purely personal motives.[13]

[9] See, for example, G. Abi-Saab, 'Non-international Armed Conflicts' in UNESCO/Henry Dunant Institute (eds.), *International Dimensions of Humanitarian Law* (Martinus, Nijhoff, Geneva, Paris and Dordrecht, 1988), p. 237; C. Greenwood, 'Scope of Application of Humanitarian Law' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press, Oxford, 1995), p. 48.

[10] See also Pictet, *Commentary IV*, Art. 3, p. 36.

[11] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 69; 105 ILR 453 at 487. The Tribunal referred especially to Art. 2(2) AP II, which deals with deprivation or restraint of liberty for reasons related to such conflict, and stated:

> Under this . . . provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language 'for reasons related to such conflict', suggests a broad geographical scope as well. This nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

This finding is also supported in ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 185; ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 635; ICTR, Judgment, *The Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, paras. 176, 182 ff.

[12] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 70; 105 ILR 453 at 488. See also ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 194: it is required neither that there be actual armed hostilities in a particular location nor that fighting be taking place in the exact time-period when the alleged acts occurred.

[13] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 636.

Therefore, there has to be a link between the conduct and the armed conflict, or in the terms of the ICTY the alleged offences must be 'committed within the context of that armed conflict'.[14] In the *Delalic* case, the Tribunal stated:

> There must be an obvious link between the criminal act and the armed conflict. Clearly, if a relevant crime was committed in the course of fighting or the take-over of a town during an armed conflict, for example, this would be sufficient to render the offence a violation of international humanitarian law. Such a direct connection to actual hostilities is not, however, required in every situation. Once again, the Appeals Chamber has stated a view on the nature of this nexus between the acts of the accused and the armed conflict. In its opinion,
>
> > [i]t 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.[15]

However, as emphasised by the ICTY,

> it is not necessary that a crime 'be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict'.[16]

In the *Kayishema/Ruzindana* case, the ICTR acknowledged the requirement of a nexus and stated:

> The Chamber is of the opinion that only offences, which have a nexus with the armed conflict, fall within this category. If there is not a direct link between the offences and the armed conflict there is no ground for the conclusion that Common Article 3 and Protocol II are violated . . . [T]he term 'nexus' should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually. No test, therefore, can be defined in abstracto. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present

[14] ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, paras. 572, 617; 112 ILR 1 at 183, 203.
[15] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 193.
[16] *Ibid.*, para. 195.

those facts and to prove, beyond a reasonable doubt, that such a nexus exists.[17]

(2) PERSONS PROTECTED

***Travaux préparatoires*/Understandings of the PrepCom**

The other two common elements define those who may be victims of a war crime for the purposes of Art. 8(2)(c) ICC Statute and the related knowledge of the perpetrator. The wording as to the victims differs from that of common Art. 3 GC and the chapeau of Art. 8(2)(c) ICC Statute. Several States took the view that the wording of common Art. 3 GC was 'ambiguous' and needed clarification in the EOC. In their view – which prevailed after long negotiations – the formulation chosen reflects the correct interpretation of common Art. 3 GC and avoids ambiguity. Many delegations were quite hesitant to accept this compromise because they feared that persons protected might be left out of the definition following this reformulation.

In contrast to common Art. 3 GC, the notion of *hors de combat* is not further clarified by the addition of examples. However it was the understanding of the drafters in informal consultations that the term *hors de combat* should not be interpreted in a narrow sense. In addition to the examples contained in common Art. 3 GC, reference was made to the content of Arts. 41 and 42 AP I.

Legal basis

As has been said, the phrase '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', contained in Art. 8(2)(c) ICC Statute, is directly derived from common Art. 3 GC. The formulation was introduced in common Art. 3 GC in order to demonstrate that only those persons who are not taking an active part in the hostilities are protected. The part beginning with 'including' was chosen in order to emphasise that even members of the armed forces are entitled to certain protection if they fulfil the conditions mentioned therein.[18]

With respect to the protection of the civilian population, this elementary point is more clearly expressed in Arts. 4 and 13(3) AP II. These provisions define the personal field of application with respect to the beneficiaries of the fundamental guarantees and the provisions concerning the conduct of hostilities: civilians lose their right to protection if they take a direct part

[17] ICTR, Judgment, *The Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, paras. 185–8.

[18] Pictet, *Commentary IV*, Art. 3, p. 40.

in hostilities, for the duration of such participation. *The term 'direct part in hostilities' has evolved from the phrase 'active part in the hostilities' of common Art. 3.* The ICTR concludes in this respect:

> *These phrases* are so similar that, for the Chamber's purposes, they *may be treated as synonymous*.[19]

According to the ICTY:

> [t]his protection embraces, at the least, all of those protected persons covered by the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces in the field and wounded and shipwrecked members of the armed forces at sea. Whereas the concept of 'protected person' under the Geneva Conventions is defined positively, the class of persons protected by the operation of Common Article 3 is defined negatively. For that reason, the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed.[20]

Thus, if the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in common Art. 3, which forms the legal basis of Art. 8(2)(c) ICC.

For the ICTY

> it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.[21]

In this specific case, the victims were in captivity or detention at the time the alleged acts took place. The Tribunal found:

> Whatever their involvement in hostilities prior to that time, each of these classes of persons cannot be said to have been taking an active part in the hostilities. Even if they were members of the armed forces . . . or otherwise engaging in hostile acts prior to capture, such persons would

[19] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 629 (emphasis added).
[20] ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 615; 112 ILR 1 at 203; see also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 177; 122 ILR 1 at 71.
[21] ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 616; 112 ILR 1 at 203.

be considered 'members of armed forces' who are 'placed *hors de combat* by detention'. [22]

(3) POTENTIAL PERPETRATORS

***Travaux préparatoires*/Understandings of the PrepCom**

As in the case of war crimes committed in international armed conflicts, the PrepCom thought that no clarification as to the potential perpetrators was necessary.

Legal basis

The ICTR found that war crimes can be committed in non-international armed conflicts by civilians as well as by the military. This conclusion was based on the following reasoning:

> The four Geneva Conventions – as well as the two Additional Protocols – as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who, by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in, the conduct of hostilities. The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.
>
> Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts. The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols . . .
>
> It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking . . . Other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or

[22] *Ibid.*

> connection with a Party to the conflict.[23] The principle of holding civilians liable for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities. Thus it is clear from the above that the laws of war must apply equally to civilians as to combatants in the conventional sense.[24]

In the *Akayesu* case the Appeals Chamber found that the Trial Chamber[25] required, irrespective of what had been quoted before, that the perpetrator was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts.[26] The Appeals Chamber held that in doing so the Trial Chamber had erred in law. It stated

> that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal

[23] See *The Hadamar* Trial, Law Reports of Trials of War Criminals ('LRTWC'), Vol. I, pp. 53–54 [13 AD 253]: 'The accused were not members of the German armed forces, but personnel of a civilian institution. The decision of the Military Commission is, therefore, an application of the rule that the provisions of the laws or customs of war are addressed not only to combatants but also to civilians, and that civilians, by committing illegal acts against nationals of the opponent, may become guilty of war crimes'; The *Essen Lynching* Case, LRTWC, Vol. I, p. 88 [13 AD 253], in which, inter alia, three civilians were found guilty of the killing of unarmed prisoners of war; and the *Zyklon B* Case, LRTWC, Vol. I, p. 103 [13 AD 250]: 'The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation . . . The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.'

[24] ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, paras. 630–4. See also ICTR, Judgment, *The Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, paras. 175 ff.; the Tribunal stipulated, however, that in the case of persons who were not members of the armed forces there must be a link between the accused and the armed forces. See also *Arrêt du Tribunal militaire de cassation du 27 avril 2001 en la cause N*, pp. 40 ff.

[25] See ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 640.

[26] ICTR, Appeals Chamber, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-A, para. 432.

responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.

In paragraph 630 of the Judgment, the Trial Chamber found that the four Conventions 'were adopted primarily to protect the victims as well as potential victims of armed conflicts'. It went on to hold that '[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces'. Such a finding is *prima facie* not without reason. In actuality authors of violations of common Article 3 will likely fall into one of these categories. This stems from the fact that common Article 3 requires a close nexus between violations and the armed conflict. This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the applications of common Article 3 and, hence of Article 4 of the Statute. In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute.

Accordingly, the Appeals Chamber finds that the Trial Chamber erred on a point of law in restricting the application of common Article 3 to a certain category of persons, as defined by the Trial Chamber.[27]

[27] ICTR, Appeals Chamber, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-A, paras. 443–5.

7.3. Elements of specific crimes under Art. 8(2)(c) ICC Statute

Art. 8(2)(c)(i) – Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

This war crime gives a number of examples of acts detrimental to life, health or physical or mental well-being.[1] The list is, of course, non-exhaustive, as shown by the words 'in particular'.

(1) MURDER OF ALL KINDS

Text adopted by the PrepCom

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

1. The perpetrator killed one or more persons.

2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel[56] taking no active part in the hostilities.

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

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

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

[56] The term 'religious personnel' includes those non-confessional non-combatant military personnel carrying out a similar function.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

It was the view of the PrepCom that there can be no difference between 'wilful killing' (Art. 8(2)(a)(i)) and 'murder'. The specific elements of the war crime defined under Art. 8(2)(c)(1)–1 are therefore drafted in the same way as for the corresponding crime in an international armed conflict.

[1] The ICTY Prosecution defined the specific elements in the following manner:

1. The occurrence of acts or omissions causing death or serious mental or physical suffering or injury;
2. The acts or omissions were committed wilfully.

ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 43–4 and 46–7.

See also ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 182; 122 ILR 1 at 72; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 260.

Legal basis of the war crime

The term 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' is derived from common Art. 3(1)(a) GC.

The ICTY concluded – with regard to any possible difference between the concepts of 'wilful killing' in the context of an international armed conflict on the one hand, and 'murder' in the context of a non-international armed conflict on the other hand – that there 'can be no line drawn between "wilful killing" and "murder" which affects their content'.[2] The various judgments of the ICTY and the ICTR analysed above in section 'Art. 8(2)(a)(i)', subsection 'Legal basis of the war crime', may serve as guidance for the interpretation of the elements of this offence, whether the acts were committed during an international or non-international armed conflict.

(2) MUTILATION

Text adopted by the PrepCom

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

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

2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.

3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

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

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

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

[2] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 422 and 423; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 233: '[T]he Trial Chamber finds that the elements of the offence of "murder" under Article 3 of the Statute are similar to those which define a "wilful killing" under Article 2 of the Statute [i.e. a grave breach of the GC], with the exception that under Article 3 of the Statute [covering violations of common Art. 3 of the GC] the offence need not have been directed against a "protected person" but against a person "taking no active part in the hostilities".' See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Slavko Dokmanovic*, IT-95-13a-PT, p. 23.

Commentary

Travaux préparatoires/Understandings of the PrepCom

The specific elements of this war crime are to a very large extent similar to those adopted for the related war crimes under Art. 8(2)(b)(x)–1 and Art. 8(2)(e)(xi)–1, with one important exception. This war crime does not require that the conduct caused death or seriously endangered the physical or mental health of the victim or victims. It covers any type of mutilation. The difference was made by the PrepCom because, in contrast to the war crimes defined under Art. 8(2)(b)(x)–1 and Art. 8(2)(e)(xi)–1, the Statute does not contain a similar result requirement for the crime under Art. 8(2)(c)(i). To the knowledge of the author, it was not discussed why the substance of footnotes 46 and 68, added to the elements of the crimes under Art. 8(2)(b)(x)–1 and Art. 8(2)(e)(xi)–1, was not included in the elements of this crime. This might be a drafting error.

Legal basis of the war crime

The term 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' is derived from common Art. 3(1)(a) GC.

Remarks concerning the material elements

Apart from common Art. 3 the term 'mutilation' or, in some instances, 'physical mutilation' is used in several provisions of the GC (Arts. 13(1) GC III, 32 GC IV) and, more lately, in the AP (Arts. 11(2)(a), 75(2)(a)(iv) AP I, 4(2)(b) AP II). No further definition is given. The ICRC Commentaries on these provisions consider this term as more or less self-explanatory.

The Commentary on Art. 32 GC IV states:

> 'Corporal punishment and mutilation'. – These expressions are sufficiently clear not to need lengthy comment. Like torture, they are covered by the general idea of 'physical suffering'. Mutilation, a particularly reprehensible and heinous form of attack on the human person . . .[3]

The Commentary on the AP mentions in particular amputations and injury to limbs as examples of physical mutilations.[4] With respect to

[3] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 32, pp. 233 ff.

[4] Y. Sandoz, 'Art. 11' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 478.

'justified' mutilation it states:

> However, there are some logical exceptions if the procedures are 'justified in conformity with the conditions provided for in paragraph 1 [of Art. 11 AP I]', i.e., essentially, as we have seen, if they are conducive to improving the state of health of the person concerned.
>
> In this sense it is clear that some mutilations may be indispensable, such as the amputation of a gangrenous limb.[5]

The verb 'to mutilate' is defined in the *Cambridge International Dictionary of English* (1995) as to 'damage severely, esp. by violently removing a part' (p. 933) and in the *Oxford Advanced Learner's Dictionary* (1992) as to 'injure, damage or disfigure somebody by breaking, tearing or cutting off a necessary part' (p. 819). These definitions refer to an act of physical violence. Therefore, the terms 'mutilation' in Art. 8(2)(c)(i) and 'physical mutilation' in Art. 8(2)(b)(x) of the ICC Statute must be understood to have synonymous meanings.

Remarks concerning the mental element

There appears to be no specific case law on the mental element of this crime to date. In the *Blaskic* case, however, the ICTY held with regard to common Art. 3(1)(a) GC, in general terms:

> The Trial Chamber considers that the *mens rea* is characterised once it has been established that the accused intended to commit violence to the life or person of the victims deliberately or through recklessness.[6]

(3) CRUEL TREATMENT

Text adopted by the PrepCom

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

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

2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

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

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

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

[5] *Ibid.*, nos. 479 ff.

[6] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 182; 122 ILR 1 at 72.

Commentary

Travaux préparatoires/Understandings of the PrepCom

It was the view of the PrepCom that there was no difference between 'inhuman treatment' (Art. 8(2)(a)(ii)–2) and 'cruel treatment'. The specific elements of the war crime under Art. 8(2)(c)(1)–3 are therefore drafted in the same way as for the corresponding crime in an international armed conflict.

Legal basis of the war crime

The term 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' is derived from common Art. 3(1)(a) GC.

Remarks concerning the material elements

Viewing the matter in the context of common Art. 3 GC and Art. 4(2) AP II, the various human rights instruments mentioned above, and the plain and ordinary meaning of the words used, the Tribunal concluded in the *Delalic* case that

> cruel treatment is treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.[7]

Therefore, according to the Tribunal,

> cruel treatment constitutes an *intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity*. As such, it carries an *equivalent meaning* and therefore the same residual function for the purpose of common article 3 of the Statute, *as inhuman treatment does in relation to grave breaches of the Geneva Conventions*. Accordingly, the *offence of torture under common article 3 of the Geneva Convention is also included within the concept of cruel treatment. Treatment that does not meet the purposive*

[7] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 551. See also *ibid.*, para. 443:

> [F]or the purpose of common article 3, all torture is encapsulated in the offence of cruel treatment. However, this latter offence extends to all acts or omissions which cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.

See also ICTY, Judgment, *The Prosecutor* v. *Goran Jelisic*, IT-95-10-T, para. 41; ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 44 and 47.

> *requirement for the offence of torture in common article 3, constitutes cruel treatment.*[8]

Consequently, the case law presented under section 'Art. 8(2)(a)(ii)' subsection 'Inhuman treatment' can also be helpful to determine certain behaviours constituting cruel treatment.

With respect to the reasoning of the ICTY the following may be added:

In the *Tadic* case[9] the Tribunal analysed the term 'cruel treatment' first of all in the context of the two introductory phrases of common Art. 3 GC ('Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction. . . . To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons . . .') and found that:

> [a]ccording to this Article the prohibition against cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in hostilities shall in all circumstances be treated humanely.[10]

In addition to the prohibition in common Art. 3 GC, cruel treatment or cruelty is proscribed by Art. 4(2) AP II, which stipulates:

> . . . the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
>
> (a) violence to the 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 . . .

This provision served as guidance for the ICTY in the *Tadic* and *Delalic* cases. In the *Tadic* judgment the Tribunal concluded that

[8] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 552 (emphasis added). ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, para. 265. For the view of the ICTY Prosecution: ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Slavko Dokmanovic*, IT-95-13a-PT, p. 24; ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Kupreskic and Others*, IT-95-16-PT, p. 17; ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 47. See also Art. 1(2) Annex of GA Declaration of 1975 (A/Res 3452(XXX) of 9 December 1975) providing that: '2. Torture constitutes an aggravated and deliberated form of cruel, inhuman or degrading treatment or punishment.'

[9] In this judgment, 'beatings of great severity and other grievous acts of violence' were qualified as cruel treatment, ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 726; 112 ILR 1 at 251.

[10] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 552.

> [t]hese instances of cruel treatment [mentioned in Art. 4], and the inclusion of 'any form of corporal punishment' demonstrate that no narrow or special meaning is here being given to the phrase 'cruel treatment'.[11]

A review of the human rights treaties and decisions of human rights bodies gives no further clarification in that respect. As with the offence of inhuman treatment no international instrument defines this offence,[12] although it is specifically prohibited by Art. 5 of the Universal Declaration of Human Rights, Art. 7 of the ICCPR, Art. 5(2) of the Inter-American Convention on Human Rights and Art. 5 of the African Charter of Human and Peoples' Rights. However, it is noteworthy that in Art. 7 ICCPR cruel treatment is very closely related to inhuman treatment.[13] In Art. 5 of the Inter-American Convention on Human Rights, containing an almost identical provision, cruel treatment is dealt with under the heading 'Right to humane treatment'. At the time of writing, the UN Human Rights Committee had not defined the terms 'torture', 'cruel, inhuman or degrading treatment or punishment' used in Art. 7 ICCPR nor delineated the boundaries between these terms.[14] Neither the Inter-American Commission nor the Inter-American Court of Human Rights has attempted to differentiate precisely the terms 'torture' and 'inhuman treatment' under the meaning of Art. 5 of the American Convention on Human Rights.[15] The Inter-American Court, like the UN Human Rights Committee, applied these concepts in a number of cases directly to the facts, limiting itself to concluding whether there had or had not been a violation of the right to humane treatment.

[11] ICTY, Judgment,*The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 725; 112 ILR 1 at 251.

[12] See J. H. Burgers and H. Danelius, *The United Nations Convention against Torture, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, Dordrecht, Boston and London, 1988), p. 122, according to whom 'it has been found impossible to find any satisfactory definition of this general concept [cruel treatment], whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation', cited in ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 724; 112 ILR 1 at 250-1. M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (N. P. Engel, Kehl, Strasbourg and Arlington, 1993), p. 131, states without further distinction that inhuman and cruel treatment 'include all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements. They also cover those practices imposing suffering that does not reach the necessary intensity.'

[13] Art. 7 ICCPR, Art. 5 of the American Convention on Human Rights, cited in ICTY, Judgment, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-T, para. 723; 112 ILR 1 at 250.

[14] See D. McGoldrick, *The Human Rights Committee* (Oxford University Press, Oxford, 1991), pp. 364, 371; Nowak, *CCPR Commentary*, pp. 129, 134 ff.

[15] S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D. Harris and S. Livingstone (eds.), *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998), p. 230.

Remarks concerning the mental element
The ICTY held that:

> cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental.[16]

The ICTY Prosecution stated explicitly in the *Delalic* case that:

> Recklessness would constitute a sufficient form of intention.[17]

(4) TORTURE

Text adopted by the PrepCom

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

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

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

3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

It was the view of the PrepCom that there can be no difference between 'torture' committed in an international armed conflict (Art. 8(2)(a)(ii)–2) and 'torture' committed in a non-international armed conflict. The specific elements of the war crime defined under Art. 8(2)(c)(1)–4 are therefore drafted in the same way as for the corresponding crime in an international armed conflict.

[16] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 552. For the view of the ICTY Prosecution, see ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Slavko Dokmanovic*, IT-95-13a-PT, p. 24.

[17] ICTY, Closing Statement of the Prosecution, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, Annex 1, pp. A1-6 and 11.

Legal basis of the war crime

The term 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' is derived from common Art. 3(1)(a) GC.

Remarks concerning the elements

Concerning any difference between the concept of 'torture' in the context of an international armed conflict (Art. 8(2)(a) ICC Statute) on the one hand, and in the context of a non-international armed conflict (Art. 8(2)(c) ICC Statute) on the other hand, the ICTY concluded that '[t]he characteristics of the offence of torture under common article 3 and under the "grave breaches" provisions of the Geneva Conventions, do not differ'.[18] Therefore, the various judgments of the ICTY and the ICTR analysed above in the section 'Art. 8(2)(a)(ii)' subsection 'Torture' may serve as guidance for the interpretation of the elements of this offence, whether the acts were committed during an international or non-international armed conflict.

For the purpose of non-international armed conflicts, it is worth repeating the elements as spelled out by the ICTY in the *Furundzija* judgment, in which it 'considered [torture] from the specific viewpoint of international criminal law relating to armed conflicts'.The Trial Chamber found that the elements of torture in an armed conflict require that torture:

(i) consists of the infliction by act or omission of severe pain or suffering, whether physical or mental; in addition
(ii) this act or omission must be intentional;
(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person; or at discriminating, on any ground, against the victim or a third person;
(iv) it must be linked to an armed conflict;
(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.[19]

With respect to the element referring to the official capacity, which might be problematic in particular in non-international armed conflicts, the ICTY held in the *Delalic* case that:

[18] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 443.
[19] ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, para. 162; 121 ILR 218 at 264.

> Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.[20]

This explains why in the *Furundzija* case the ICTY formulated the relevant element as including persons acting 'in a non-private capacity, e.g. as a de facto organ of . . . any other authority-wielding entity'.

Accordingly, in the context of non-international armed conflicts, this element also includes acts emanating from non-State actors involved in the armed conflict. Soldiers must be seen as having an official function.

However, in its last judgment (at the time of writing) dealing with torture, the ICTY Trial Chamber came to the conclusion 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.[21]

[20] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 473.
[21] ICTY, Judgment, *The Prosecutor* v. *Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1-T, para. 496.

Art. 8(2)(c)(ii) – Committing outrages upon personal dignity, in particular humiliating and degrading treatment

Text adopted by the PrepCom

War crime of outrages upon personal dignity

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.[57]

2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

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

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

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

[57] 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.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

It was the view of the PrepCom that there can be no difference between 'outrages upon personal dignity, in particular humiliating and degrading treatment' committed in an international armed conflict (Art. 8(2)(b)(xxi)) and 'outrages upon personal dignity, in particular humiliating and degrading treatment' committed in a non-international armed conflict. The specific elements of the war crime defined under Art. 8(2)(c)(ii) are therefore drafted in the same way as for the corresponding crime in an international armed conflict.

Legal basis of the war crime

The term 'outrages upon personal dignity, in particular humiliating and degrading treatment' is derived from common Art. 3(1)(c) GC.

This offence is drafted in the same way as for international armed conflicts in Art. 8(2)(b)(xxi) ICC Statute. There are no indications in relevant sources that in the context of a non-international armed conflict different forms of conduct are criminalised than in the context of an international armed conflict. Therefore, the sources quoted under section Art. 8(2)(b)(xxi) ICC Statute are of relevance in this context, too.

Art. 8(2)(c)(iii) – Taking of hostages

Text adopted by the PrepCom

War crime of taking hostages

1. The perpetrator seized, detained or otherwise held hostage one or more persons.

2. The perpetrator threatened to kill, injure or continue to detain such person or persons.

3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.

4. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

5. The perpetrator was aware of the factual circumstances that established this status.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

It was the view of the PrepCom that there can be no difference between 'taking of hostages' when committed in an international armed conflict (Art. 8(2)(a)(viii)) and 'taking of hostages' when committed in a non-international armed conflict. The specific elements of the war crime defined under Art. 8(2)(c)(iii) are therefore drafted in the same way as for the corresponding crime in an international armed conflict.

Legal basis of the war crime

The prohibition against taking hostages is provided for under common Art. 3(1)(b) GC and reiterated in Art. 4(2)(c) AP II.

The ICTY stated in the *Blaskic* case:

> The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions . . . The Commentary defines hostages as follows:
>
> > hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are

> answerable with their freedom or their life for the execution of his orders and the security of his armed forces.
>
> Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term 'hostage' must be understood in the broadest sense. The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches . . ., that is – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking.[1]

In the case against *Kordic and Cerkez*, the ICTY Prosecution indicated the specific elements of this offence as follows:

1. The occurrence of acts or omissions causing person/s to be seized, detained, or otherwise unlawfully held as hostages;
2. The acts or omissions involved a threat to injure, kill, or continue to detain such person/s in order to compel a State, military force, international organization, natural person or group of persons to act or refrain from acting, as an explicit or implicit condition for the safe release of the hostage/s;
3. The acts or omissions were committed wilfully;[2] . . .[3]

Besides, the conclusions stated under the section dealing with the offence of taking hostages (Art. 8(2)(a)(viii) ICC Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. There are no indications in the ICC Statute or the GC that this offence has different constituent elements in an international or non-international armed conflict. Both the ICTY and the ICTY Prosecution defined the specific elements for both situations in the same manner.[4]

[1] ICTY, Judgment, *The Prosecutor* v. *Tihomir Blaskic*, IT-95-14-T, para. 187 (footnotes omitted); 122 ILR 1 at 73; ICTY, Judgment, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-T, paras. 319 ff.

[2] In the *Simic and Others* case, the ICTY Prosecution defined the notion of 'wilful' as 'a form of intent which includes recklessness but excludes ordinary negligence. "Wilful" means a positive intent to do something, which can be inferred if the consequences were foreseeable, while "recklessness" means wilful neglect that reaches the level of gross criminal negligence.' ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Milan Simic and Others*, IT-95-9-PT, p. 35.

[3] ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 48.

[4] *Ibid*., pp. 45–6 and 48.

Art. 8(2)(c)(iv) – The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable

Text adopted by the PrepCom

War crime of sentencing or execution without due process

1. The perpetrator passed sentence or executed one or more persons.[58]

2. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

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

4. There was no previous judgement pronounced by a court, or the court that rendered judgement was not 'regularly constituted', that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.[59]

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

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

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The drafting of the elements of this crime was largely influenced by the content of Art. 6(2) AP II. On the basis of that provision the term 'regularly

constituted court' as contained in common Art. 3(1)(d) and thus Art. 8(2)(c)(iv) ICC Statute was defined as a court that affords the essential guarantees of independence and impartiality. The issue of whether a list of fair-trial guarantees should be included, as suggested in the Swiss/Hungarian/Costa Rican proposal, was controversial.[1] While the judicial guarantees listed[2] were generally acceptable, some States feared that even an illustrative list would suggest that rights omitted were not indispensable, others feared that there could be a discrepancy between this list of fair-trial guarantees and those contained in the Statute, and a third group took the view that a violation of only one right would not necessarily amount to a war crime. Instead of weakening the value of such a list of fair-trial guarantees by an introductory paragraph defining what was considered indispensable, States preferred not to include such a list. In addition, the concerns of the third group of States are reflected in footnote 59, which reads as follows:

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

This statement does not, however, mean that the denial of one guarantee might not amount to this crime. The court must determine whether the denial of a particular guarantee deprived a person of a fair trial.

Legal basis of the war crime

The crime of passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are generally recognised as being indispensable is derived from common Art. 3(1)(d) GC, with the sole exception of the suppression of the reference to 'civilized people' and the addition of 'generally' instead.

Remarks concerning the material elements

To date there have been no findings on the elements of this offence by the ad hoc Tribunals. Common Art. 3 GC itself does not give any clarification for the interpretation of this offence.

The following conclusions may be drawn from the various sources examined below. The expression 'a regular court affording all judicial

[1] PCNICC/1999/WGEC/DP.10 of 19 July 1999.

[2] The proposed list coincides to a very large extent with the guarantees mentioned in the next section of this commentary.

guarantees which are generally recognized as being indispensable' includes, but is not limited to, the following:

- The right to a fair (and public) hearing by an independent and impartial tribunal established by law, including the right of access to a court (see Arts. 6(2) AP II, 14(1) ICCPR, 6(1) ECHR, 8(1) ACHR).
- The right to be informed of the charges against one without delay (see Arts. 6(2)(a) AP II, 14(3)(a) ICCPR, 6(3)(a) ECHR, 8(2)(b) ACHR).
- The right to be afforded before and during the trial all necessary rights and means of defence (Art. 6(2)(a) AP II in general; see also Arts. 14(3) ICCPR, 6(3) ECHR, 8(2) ACHR), which include the following pre-trial and trial minimum guarantees:

  - The right to be brought promptly before a judge or other officer authorised by law to exercise judicial power (Arts. 9(3) ICCPR, 5(3) ECHR, 7(5) ACHR).
  - The right to proceedings before a court, in order that the court may decide without delay on the lawfulness of one's detention and order one's release (Arts. 9(4) ICCPR, 5(4) ECHR, 7(6) ACHR).
  - The right to adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing (Art. 14(3)(b) ICCPR, Art. 6(3)(b) ECHR, Art. 8(2)(c), (d) ACHR).
  - The right to defend oneself in person or through legal assistance (Arts. 14(3)(d) ICCPR, 6(3)(c) ECHR, 8(2)(d), (e) ACHR, 7(1)(c) ACHPR).
  - The right to be tried without undue delay (Arts. 14(3)(c) ICCPR, 6(1) ECHR, 8(1) and 7(1)(d) ACHR ('within a reasonable time')).
  - The right to present and examine witnesses (Arts. 14(3)(e) ICCPR, 6(3)(d) ECHR, 8(2)(f) ACHR; see also Art. 75(4)(g) AP I).
  - The right to an interpreter (Arts. 14(3)(f) ICCPR, 6(3)(e) ECHR, 8(2)(a) ACHR ('without charge')).

- No one shall be convicted of an offence except on the basis of individual penal responsibility (Art. 6(2)(b) AP II).
- The principle of *nullum crimen, nulla poena sine lege* and the prohibition of a heavier penalty than that provided at the time of the offence (Arts. 6(2)(c) AP II, 15 ICCPR, 7 ECHR, 9 ACHR, 7(2) ACHPR).
- The right to be presumed innocent (Arts. 6(2)(d) AP II, 14(2) ICCPR, 6(2) ECHR, 8(2) ACHR, 7(1)(b) ACHPR).

- The right to be tried in one's own presence (Arts. 6(2)(e) AP II, 14(3)(d) ICCPR, 8(2)(g) ACHR).
- The right not to be compelled to testify against oneself or to confess guilt (Arts. 6(2)(f) AP II, 14(3)(g) ICCPR, 8(2)(g), 8(3) ACHR).
- The right to be advised of one's judicial and other remedies and of the time-limits within which they may be exercised (Art. 6(3) AP II).
- The right of the accused to have the judgment pronounced publicly (Arts. 75(4)(i) AP I, 14(1) ICCPR, 6(1) ECHR, 8(5) ACHR).
- The principle of *ne bis in idem* (Arts. 86 GC III, 117(3) GC IV, 75(4)(h) AP I, 14(7) ICCPR, 4 of the 7th AP to the ECHR, 8(4) ACHR).

General remarks

Neither Art. 8(2)(c)(iv) ICC Statute nor common Art. 3 GC gives much guidance as to what is meant by the notions 'regularly constituted court' and 'judicial guarantees which are generally recognized as indispensable'. However, it should be noted that the wording of the chapeau of Art. 6(2) AP II is in its essence identical to common Art. 3, and thus also to Art. 8(2)(c)(iv) of the Statute. The relevance of Art. 6(2) AP II for the interpretation of common Art. 3(1)(d) GC is underlined in the ICRC Commentary on Art. 75 AP I:

> [Common] Article 3 relies on the 'judicial guarantees which are recognized as indispensable by civilized peoples', while Article 75 rightly spells out these guarantees. Thus this article, and to an even greater extent, *Article 6 of Protocol II (Penal prosecutions), gives valuable indications to help explain the terms of Article 3 on guarantees*.[3]

and on Art. 6 AP II:

> Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect. It supplements and develops *common Article 3, paragraph 1, sub-paragraph (1)(d)*, which prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. This very general rule *required clarification to strengthen the prohibition of summary justice and of convictions without trial*, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions, and for the rest is largely based on the International Covenant on Civil and Political Rights, particularly

[3] C. Pilloud and J. S. Pictet, 'Art. 75' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 3083 (emphasis added).

> Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation.[4]

From these sources it may be concluded that Art. 6(2) AP II explains common Art. 3(1)(d) GC rather than extends it. Therefore, the material elements of Art. 6(2) AP II may be an indication for the respective elements of Art. 8(2)(c)(iv) ICC Statute. In particular, it may be argued that the non-exhaustive minimum list of essential guarantees contained in Art. 6(2) AP II also applies to this crime. Following the approach in the *Delalic* and *Furundzija* cases (cited previously) where human rights law was used to define 'torture' as a war crime, the relevant case law of the respective human rights bodies may be a further indication for the interpretation of common Art. 3 GC, and thus Art. 8(2)(c)(iv) ICC Statute. This approach is even more strongly justified with respect to this offence because – as pointed out in the ICRC Commentary – Art. 6(2) AP II largely reiterates principles based on the ICCPR.

Meaning of 'regularly constituted court'

Given the fact that the Statute has *verbatim* retained the language of common Art. 3 GC, dissident armed groups are also bound to set up 'a regularly constituted court' before a sentencing can take place. Thus, special courts set up on an ad hoc basis by rebel groups are prohibited.

However, the problem of courts set up by rebel groups led to a change of wording in the drafting of Art. 6(2) AP II that was thought to clarify the general rule of common Art. 3 GC. In the ICRC Commentary on the AP II the *travaux préparatoires* are described as follows:

> [Art. 6(2) AP II] repeats paragraph 1, sub-paragraph (1)(d) of common Article 3, with a slight modification. The term 'regularly constituted court' is replaced by 'a court offering the essential guarantees of independence and impartiality'. In fact, some experts argued that it was unlikely that a court could be 'regularly constituted' under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, which was accepted without opposition.
>
> This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgment is given by 'a court offering the essential guarantees of independence and impartiality'. Sub-paragraphs (a)–(f) provide a list of such essential guarantees; as indicated by the

[4] S. Junod, 'Art. 6' in *ibid.*, no. 4597 (emphasis added).

expression 'in particular' at the head of the list, it is illustrative, only enumerating universally recognized standards.[5]

From this source one may conclude that independence and impartiality are the main features of a 'regularly constituted court'. International and regional human rights treaties mention the same guarantees (Arts. 14(1) ICCPR, 6(1) ECHR, 8(1) ACHR). As indicated above, the relevant case law of the respective human rights bodies may be a further indication for the interpretation of common Art. 3 GC, and thus Art. 8(2)(c)(iv) ICC Statute:

Human Rights Committee

- Art. 14(1) ICCPR: 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.

  The Human Rights Committee described the term 'impartiality' in the following way:

  > 'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.[6]

- The Committee considers 'that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal'.[7]
- A conviction by a special tribunal under anti-terrorist legislation composed of judges with covered faces (faceless judges) is incompatible with Art. 14. Such a tribunal cannot be seen to be impartial and independent: 'In a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed,

[5] *Ibid.*, nos. 4600 ff.
[6] *Karttunen* v. *Finland*, Communication No. 387/1989, Report of the Human Rights Committee, UN Doc. A/48/40, para. 7.2, p. 120.
[7] *Bahamonde* v. *Equatorial Guinea*, Communication No. 468/1991, Report of the Human Rights Committee, UN Doc. A/49/40, para. 9.4, p. 187.

since the tribunal, being established ad hoc, may comprise serving members of the armed forces.'[8]

According to the Human Rights Committee another element of Art. 14(1) ICCPR is the accused's general *right of access to a court*.[9]

European Court/Commission of Human Rights

- Art. 6(1) ECHR: 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

(i) *Independent* (from the executive, legislative or parties): see, for example, the *Findlay* v. *UK* case,[10] the *Ringeisen* case,[11] the *Benthem* case[12] and the *Campbell and Fell* v. *UK* case:[13]

> In determining whether a body can be considered to be independent . . ., the Court has regard to the manner of appointment of its members and the duration of their term of office . . ., the existence of guarantees against outside pressures . . . and the question whether the body presents an appearance of independence.

(ii) *Impartial*: the judges have to stand above the parties, to decide objectively and without personal influence, solely on the basis of their best knowledge and conscience. Impartiality also means lack of

[8] *Espinoza de Polay* v. *Peru*, Communication No. 577/1994, Report of the Human Rights Committee, UN Doc. A/53/40, p. 43.

[9] *Bahamonde* v. *Equatorial Guinea*, Communication No. 468/1991, Report of the Human Rights Committee, UN Doc. A/49/40, para. 9.4, p. 187.

[10] ECtHR, Reports of Judgments and Decisions, 1997-I, para. 73, p. 281, with further references. (A convening officer played a significant role in the pre-trial proceedings, appointing the members of the court martial. All the judges were military subordinates of the convening officer, who also had an important role during the proceedings, e.g. he procured the attendance of the witnesses at the trial and his agreement was necessary for some procedural steps to be taken. Moreover, he could vary the sentence imposed, which in any case was not effective until ratified by him, pp. 281 ff.) Followed by: ECtHR, *Coyne* v. *UK*, *ibid*., 1997-V, pp. 1854 ff.

[11] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 13, para. 95, p. 39; 56 ILR 442 at 478. (In this case no violation was found.)

[12] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 97, paras. 41–3, p. 18. (The judicial body was not independent because it was an administrative body acting under the authority of the minister; there was no further appeal to an independent court.)

[13] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 80, para. 78, pp. 39–40; 56 ILR 442 at 478. (No violation was found. The board members were appointed by the Home Secretary (executive), but they were not subject to any instruction. They were elected for three years and were irremovable at least in fact, even if the statute under which they were acting did not formally contain any such guarantee.)

prejudice or bias. See, for example, the *Piersack* case,[14] the *De Cubber* case[15] and the *Findlay* v. *UK* case:[16]

> there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

As to the impartiality of a jury, see the *Holm* case.[17]
(iii) A definition of a *court of law* ('tribunal') can be found in the *Belilos* case:[18]

> [A] 'tribunal' is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner . . . It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' term of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1) itself.

(iv) According to the European Court, another element of Art. 6(1) ECHR is the accused's general right of *access to a court*.[19]

Inter-American System

- Art. 8(1) ACHR: 'Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.'

[14] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 53, paras. 28 ff., pp. 13–16; 68 ILR 128 at 139–41. (No objective impartiality was found. A judge on the bench had been a former judicial officer in the Public Prosecutor's department, and had already had to deal with the case at hand.)

[15] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 86, paras. 24 ff., pp. 13–16; 81 ILR 32 at 42-5. (No objective impartiality was found. A judge of the bench had been a former investigating judge on the same case.)

[16] ECtHR, Reports of Judgments and Decisions, 1997-I, p. 281. (No impartiality was found because of the role and influence of the convening officer, p. 282. For the facts see footnote 10 above.) See also ECtHR, *Hauschildt* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 154, para. 46, p. 21.

[17] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 279-A, paras. 27 ff., pp. 13–16.

[18] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 132, para. 64, p. 29; 88 ILR 635 at 672.

[19] ECtHR, *Deweer* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 35, para. 49, p. 25; 60 ILR 148 at 172.

(i) The Commission elaborated, in a report entitled 'Measures Necessary for Rendering the Autonomy, Independence and Integrity of the Members of the Judicial Branch More Effective', the criteria which member States should implement to satisfy the requirements of *judicial independence and impartiality*. The list included the following:

a) guaranteeing the judiciary freedom from interference by the executive and legislative branches;
b) providing the judiciary with the necessary political support for performing its functions;
c) giving judges security of tenure;
d) preserving the rule of law and declaring states of emergency only when necessary and in strict conformity with the requirements of the American Convention;
e) returning to the judiciary responsibility for the disposition and supervision of detained persons.[20]

(ii) As to the meaning of *impartiality*, the Commission said:

> Impartiality presumes that the court or judge do not have preconceived opinions about the case *sub judice* and, in particular, do not presume the accused to be guilty. For the European Court, the impartiality of the judge is made up of subjective and objective elements. His subjective impartiality in the specific case is presumed as long as there is no evidence to the contrary. Objective impartiality, on the other hand, requires that the tribunal or judge offer sufficient guarantees to remove any doubt as to their impartiality in the case.[21]

(iii) In Case 11.006 (Peru), the Commission, following the judgment of the European Court of Human Rights in *Campbell and Fell*, determined that whether a court is *independent* of the executive depends on the 'manner of appointment of its members, the duration of their terms [and] the existence of guarantees against outside pressures'.[22] Furthermore, the Commission stated that 'the irremovability of judges . . . must . . . be considered a necessary corollary of their independence'.[23]

In several cases the Commission has stated that a Special Military Court is not an independent and impartial tribunal in as much

[20] IACiHR Annual Report 1992–3, p. 207.
[21] IACiHR, Case 10.970 Peru, Report 5/96, IAYHR 1996, vol. 1, pp. 1120 ff.
[22] IACiHR, Case 11.006 Peru, Report 1/95, IAYHR 1995, pp. 278 ff. [23] *Ibid.*

as it is subordinate to the Ministry of Defence, and thus to the executive.[24]

(iv) According to the Commission, another element of Art. 8(1) ACHR is the accused's general *right of access to a court*.[25]

(v) The Court emphasised in a report entitled 'Judicial Guarantees in States of Emergency' that

> [r]eading Article 8 together with Articles 7(6), 25, and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of human rights that are not subject to derogation.[26]

The Court stressed also that the 'concept of due process' in Art. 8 'should be understood as applicable, in the main, to all judicial guarantees referred to in the American Convention', even where there have been legitimate derogations from certain rights under Art. 27 ACHR.[27]

Meaning of 'judicial guarantees which are generally recognized as indispensable'

The judicial guarantees to be afforded according to common Art. 3 GC are described only by the formulation 'which are recognized as indispensable by civilized peoples', which has been replaced in the Statute by 'which are generally recognized as being indispensable'.

The Commentary on common Art. 3 states in only very general terms that:

> Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses – though that has yet to be proved – but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of errors. The Convention has rightly proclaimed that it is essential to do this even in time of war . . . [I]t is only summary justice which is intended to be prohibited. No sort of immunity

[24] IACiHR, Case 11.084 Peru, Report 27/94, IAYHR 1994, vol. 1, p. 518.
[25] IACiHR, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 Argentina, Report 28/92, IAYHR 1992, vol. 1, pp. 740 ff.
[26] IACtHR, Advisory Opinion No. 9, IAYHR 1988, para. 30, pp. 904 ff.
[27] *Ibid.*, para. 29.

> is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.

As pointed out above, in order to determine the generally recognised necessary judicial guarantees, the particular judicial guarantees under Art. 6 AP II may serve as a basis for interpretation. As indicated by the expression 'in particular' at the head of the list, it is illustrative, 'only enumerating universally recognized standards'.[28] The provision mentions the following essential judicial guarantees:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) 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 the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt.

Most of the guarantees listed in Art. 6(2)(a)–(f) are contained in international and regional human rights instruments (ICCPR, ECHR, ACHR). However, in each of these human rights treaties, there is a clause permitting derogations from the articles in question in times of emergency, but only to the degree indispensable and provided that they are not inconsistent with other international law requirements. *Common Art. 3 GC and Art. 6 AP II are not subject to any possibility of derogation or suspension*, and consequently it is these provisions that will play a decisive role in the case of armed conflict.

[28] Junod, 'Art. 6' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4601.

As the provisions in all these instruments are more or less equivalent,[29] the judicial guarantees in human rights instruments and their interpretation may serve as an additional tool for the interpretation of common Art. 3 GC. Human rights case law will be presented if it contains findings of a general nature describing the substance of the rights.

(a) Indispensable judicial guarantees listed in Art. 6 AP II

(i) [T]he procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence (Art. 6(2)(a) AP II)

On the one hand, this rule stresses that the accused must be informed as quickly as possible of the particulars of the offence alleged against him/her, and of his/her rights. Arts. 14(3)(a) ICCPR, 6(3)(a) ECHR and 8(2)(b) ACHR[30] lay down the same principle.[31] On the other hand, the accused must be in a position to exercise them and be afforded the rights and means of defence 'before and during his trial', *i.e. at every stage of the procedure*.[32] With regard to the latter, human rights law may offer an indication of what

[29] Pilloud and Pictet, 'Art. 75', in *ibid.*, no. 3092.

[30] Essentially the same right is guaranteed at the pre-trial stage. See:
Art. 9(2) ICCPR:
> Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Art. 5(2) ECHR:
> Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Art. 7(4) ACHR:
> Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

These pre-trial guarantees overlap to a certain extent with the trial guarantees.

[31] According to a commentator to the ICCPR, the right to be informed 'promptly' implies that information must be provided when the charge is lodged or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person; M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (N. P. Engel, Kehl, Strasbourg and Arlington, 1993), p. 255. See also *Kelly* v. *Jamaica*, Communication No. 253/1987, Report of the Human Rights Committee, UN Doc. A/46/40, p. 247. Human rights instruments add the element that the person concerned must be informed 'in a language which he understands' (see, for example: ECiHR, *X* v. *Austria*, Decisions and Reports, vol. 2, pp. 70 ff.: the information must take place in understandable language; this can necessitate translation of the documents testifying to the opening of the procedure, but not of the whole dossier. See also *Harward* v. *Norway*, Communication No. 451/1991, Report of the Human Rights Committee, UN Doc. A/49/40, p. 154; Nowak, *CCPR Commentary*, pp. 255 ff.).

[32] In the ICRC Commentary the following examples are mentioned: 'The right to be heard, and, if necessary, the right to call on the services of an interpreter, the right to call witnesses for the defence and produce evidence; these constitute the essential rights and means of defence.' Junod, 'Art. 6' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4602.

constitutes essential judicial guarantees before the trial on the merits and 'necessary rights and means of defence'.

SPECIFIC JUDICIAL GUARANTEES BEFORE THE TRIAL ON THE MERITS

Arts. 9 ICCPR, 5 ECHR and 7 ACHR contain specific essential pre-trial judicial guarantees. The most important in the context of a non-international armed conflict are the following:

- The right to be brought promptly before a judge or other officer authorized by law to exercise judicial power

  This guarantee is stated in Arts. 9(3) ICCPR,[33] 5(3) ECHR[34] and 7(5) ACHR.[35]

Relevant case law of human rights bodies:

HUMAN RIGHTS COMMITTEE

- According to the Human Rights Committee, the delay in bringing the arrested person before a judge under Art. 9(3) must not exceed a few days.[36]
- In Case No. 373/1989, a delay of eight days was deemed to be incompatible with this guarantee;[37] and in Case No. 597/1994, more than seven days was deemed unacceptable.[38]

[33] '*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.' (Emphasis added.) The right to a trial within a reasonable time or to release is addressed in another section below.

[34] '*Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.' (Emphasis added.) The right to a trial within a reasonable time or to release are addressed in another section below.

[35] '*Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power* and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.' (Emphasis added.) The right to a trial within a reasonable time or to release are addressed in another section below.

[36] Human Rights Committee, General Comment 8, Article 9, A/37/40, Annex V, para. 2, p. 95.

[37] *Stephens* v. *Jamaica*, Communication No. 373/1989, Report of the Human Rights Committee, UN Doc. A/51/40, p. 9.

[38] *Grant* v. *Jamaica*, Communication No. 597/1994, Report of the Human Rights Committee, UN Doc. A/51/40, p. 212.

EUROPEAN COURT/COMMISSION OF HUMAN RIGHTS

- The Commission tends to a four-day limit, and the Court to a three-day limit.[39]
- The accused must be brought before a judge or other officer authorised to exercise judicial power, i.e. who is independent of the executive and of the parties.[40]
- The function of the judicial officer must be that of 'reviewing the circumstances militating for and against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons'.[41]

♦ The right to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release

This guarantee is stated in Arts. 9(4) ICCPR,[42] 5(4) ECHR,[43] 7(6) ACHR[44] and Principle 11 of UN General Assembly Resolution 43/173 of 9 December 1988 (Annex).

[39] See J. A. Frowein and W. Peukert, *EuropäischeMenschenRechtsKonvention* (2nd edn, N. P. Engel, Kehl, Strasbourg and Arlington, 1996), pp. 123–4; for specific case law, see e.g. ECtHR, *Brogan* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 145-B, paras. 58 ff., pp. 32 ff. (four days and six hours to six days and sixteen hours); ECtHR, *De Jong* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 77, paras. 57 ff., pp. 25 ff.; 78 ILR 225 at 249 (six, seven and eleven days) – both were held to violate the Convention. See also ECtHR, *Brannigan and McBride* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 258-B, paras. 36 ff., pp. 47 ff. (six days and fourteen hours thirty minutes, four days and six hours twenty-five minutes), with respect to permissible suspensions and corresponding safeguards.

[40] ECtHR, *Schiesser* v. *Switzerland*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 34, para. 31, pp. 13 ff.; 58 ILR 684 at 696; ECtHR, *De Jong* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 77, paras. 47 ff.; 78 ILR 225.

[41] ECtHR, *Schiesser* v. *Switzerland*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 34, para. 31, p. 14; 58 ILR 684 at 696.

[42] 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful . . .'

[43] 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful . . .'

[44] '*Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.* In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished . . .' (Emphasis added.)

Relevant case law of human rights bodies:

HUMAN RIGHTS COMMITTEE

- In Communication No. 330/1988 (*Albert Berry* v. *Jamaica*) the Committee found that the period of two-and-a-half months, throughout which the detained had no opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention, was in violation of Art. 9(4) ICCPR.[45]

EUROPEAN COURT/COMMISSION OF HUMAN RIGHTS

- In the *De Jong* case, it was held that periods of six, seven and eleven days are incompatible with Art. 5(4) ECHR, which requires that 'the lawfulness of his detention shall be decided speedily'.[46]
- The accused must be able to challenge all the formal and material conditions of imprisonment.[47]
- To be of judicial character, a body must be independent both of the executive and the parties to the case.[48]
- The court must have the power to decide the release of the person.[49]
- The court must function in accordance with procedural guarantees,[50] such as:
  (a) Oral hearing[51]
  (b) Legal assistance[52]

[45] Report of the Human Rights Committee, UN Doc. A/49/40, para. 11.1, pp. 26–7.

[46] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 77, para. 58, p. 27.

[47] See Frowein and Peukert, *EuropäischeMenschenRechtsKonvention*, p. 141.

[48] ECtHR, *De Wilde and Others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 12, para. 77, p. 41; 56 ILR 351 at 380.

[49] ECtHR, *X* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 46, paras. 58 ff., pp. 25 ff.; 67 ILR 446 at 470; ECtHR, *Van Droogenbroeck* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 50, para. 49, pp. 26 ff.; 67 ILR 525.

[50] ECtHR, *De Wilde and Others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 12, paras. 76 ff., pp. 41 ff.; 56 ILR 351 at 379; see also ECtHR, *Ireland* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, paras. 84 and 200, pp. 41 and 76–7; 58 ILR 188 at 233 and 276. (In particular, the detained person 'had no right in law to appear or be legally represented before [the committee], to test the ground for internment, to examine witnesses against him or to call his own witnesses'.)

[51] ECtHR, *Sanchez-Reisse* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 107, para. 51, p. 19. (Exceptions were considered possible.) ECtHR, *Hussain* v. *UK*, Reports of Judgments and Decisions, 1996-I, paras. 59 ff., p. 271; ECtHR, *Singh* v. *UK*, Reports of Judgments and Decisions, 1996-I, pp. 296 ff.

[52] ECtHR, *Moudefo* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 141-B (COM), paras. 85 ff., pp. 41 ff.; ECtHR, *Bouamar* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 129, para. 60, p. 24 (juvenile); ECtHR, *Megyeri* v. *Germany*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 237-A, para. 23, p. 12 (mentally insane person).

(c) Adversarial proceedings[53]

(d) Time and facilities to prepare application.[54]

- The delay in which the control must be exercised – the meaning of 'speedily':[55]

  Consideration must be given to the diligence of the national authorities and any delays brought about by the conduct of the detained person as well as other factors causing delay, not in the power of the State organs.[56]

INTER-AMERICAN SYSTEM

The Court has expressed the view in its Advisory Opinion on 'Habeas Corpus in Emergency Situations' that the essential remedies for challenging the legality of detention (habeas corpus and amparo) may not be suspended in times of emergency so as to prevent their use to protect a non-derogable right.[57] It concluded that

> habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.[58]

[53] ECtHR, *Toth* v. *Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 224, para. 84, p. 23; ECtHR, *Lamy* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 151, para. 29, p. 17; ECtHR, *Hussain* v. *UK*, Reports of Judgments and Decisions, 1996-I, paras. 59 ff., p. 271; ECtHR, *Singh* v. *UK*, Reports of Judgments and Decisions, 1996-I, pp. 296 ff.

[54] ECtHR, *K* v. *Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 255-B (COM), para. 64, p. 41; ECtHR, *Farmakopoulos* v. *Belgium*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 235-A (COM), para. 53, p. 15.

[55] See Frowein and Peukert, *Europäische MenschenRechtsKonvention*, pp. 142–5; D. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London and Dublin, 1995), pp. 155–8.

[56] ECtHR, *Sanchez-Reisse* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 107, para. 56, pp. 20–1 (in this case the delays of thirty-one and forty-six days were too long); ECtHR, *Navarra* v. *France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 273-B, para. 29, pp. 28–9 (delay of the accused in filing the appeal). As to examples of delays in specific cases, see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, p. 157; and ECtHR, *Kolompar* v. *Belgium*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 235-C, paras. 42–3, pp. 56–7; 111 ILR 195 at 208: delay caused by dilatory conduct of the accused.

[57] 'Habeas Corpus in Emergency Situations', Advisory Opinion No. 8, IAYHR 1987, para. 42, p. 770; see also 'Judicial Guarantees in States of Emergency', Advisory Opinion No. 9, IAYHR 1988, paras. 24 ff., pp. 903 ff.

[58] IACtHR, 'Habeas Corpus in Emergency Situations', Advisory Opinion No. 8, IAYHR 1987, para. 36, p. 767.

NECESSARY RIGHTS AND MEANS OF DEFENCE

Arts. 14(3) ICCPR, 6(3) ECHR and 8(2) ACHR name certain minimum guarantees that are not explicitly mentioned in Art. 6(2) AP II, but that clearly form a part of this requirement:

- 'To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing' – Art. 14(3)(b) ICCPR, Art. 6(3)(b) ECHR (this provision does not lay down the right to communicate with a counsel of his own choosing) and Art. 8(2)(c) and (d) ACHR.

Relevant case law of human rights bodies:

HUMAN RIGHTS COMMITTEE

- The right applies not only to accused persons but also to their defence attorney, and it relates to all stages of the trial.[59] What adequate time means depends on the circumstances and complexity of the case.[60] The word 'facilities' means that the accused or his/her defence council is granted access to the documents, records, etc. necessary for the preparation of the defence. However, this does not give the right to be furnished with copies of all relevant documents.[61]
- The accused's right to communicate with a counsel of his/her own choosing serves solely for the preparation of the defence and is particularly relevant when the individual concerned is being held in pre-trial detention. Typical violations of this right stem from cases of incommunicado detention[62] or where an ex-officio defence attorney has been appointed for the accused against his/her will.[63]

[59] Nowak, *CCPR Commentary*, p. 256 with references.

[60] *Little* v. *Jamaica*, Communication No. 283/1988, Report of the Human Rights Committee, UN Doc. A/47/40, paras. 8.3, 8.4, p. 283.

[61] *O.F.* v. *Norway*, Communication No. 158/1983, Report of the Human Rights Committee, UN Doc. A/40/40, para. 5.5, p. 211; 79 ILR 267 at 275.

[62] *Wight* v. *Madagascar*, Communication No. 115/1982, Report of the Human Rights Committee, UN Doc. A/40/40, para. 17, p. 178; *Pietraroia* v. *Uruguay*, Communication No. 44/1977, Report of the Human Rights Committee, UN Doc. A/36/40, para. 17, p. 159; *Drescher Caldas* v. *Uruguay*, Communication No. 43/1979, Report of the Human Rights Committee, UN Doc. A/38/40, para. 14, p. 196; *Lafuente Penarrieta* v. *Bolivia*, Communication No. 176/1984, Report of the Human Rights Committee, UN Doc. A/43/40, para. 16, p. 207.

[63] *López Burgos* v. *Uruguay*, Communication No. 52/1979, Report of the Human Rights Committee, UN Doc. A/36/40, para. 13, p. 183; 68 ILR 29 at 39; *Celiberti de Casariego* v. *Uruguay*, Communication No. 56/1979, Report of the Human Rights Committee, UN Doc. A/36/40, para. 11, p. 188; 68 ILR 41 at 46; and *Estrella* v. *Uruguay*, Communication No. 74/1980, Report of the Human Rights Committee, UN Doc. A/38/40, para. 10, p. 159; 78 ILR 40 at 52.

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- The *adequacy of time*[64] will depend upon the complexity of the case,[65] the defence lawyer's workload,[66] the stage of proceedings[67] or the accused's decision to conduct his/her defence alone.[68]
- The accused's right to *adequate facilities* was explained in *Can* v. *Austria*[69] as requiring that he have 'the opportunity to organize his defence in an appropriate way and without restrictions as to the possibility to put all relevant defence arguments before the trial court'. It includes the accused's right to communicate with his/her lawyers during the pre-trial period, as well as later, to the extent necessary to prepare his/her defence.[70] The accused must be able to consult his/her solicitor orally and in writing, and they must be able to pursue the defence in the way they see as appropriate, subject to procedural rules.[71] A prisoner must be allowed to receive a visit from his/her lawyer out of the hearing of prison officers or other officials in order to convey instructions or to pass or receive confidential information relating to the preparation of his/her defence (restrictions upon visits by lawyers may be imposed if they can be justified in the public interest).[72] At least the solicitor must be able to consult the documents constituting the dossier, subject to certain exceptions (secret, security, etc.).[73]

[64] Under the European Convention on Human Rights the ECtHR held that the guarantee begins to run from the moment that a person is subject to a criminal charge. This will be from the moment that he is arrested or 'otherwise substantially affected' – ECtHR, *Corigliano* v. *Italy*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 57, para. 34, p. 13; 71 ILR 395 at 404.

[65] ECtHR, *Albert and Le Compte* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 58, para. 41, pp. 20–1; 71 ILR 411 at 428.

[66] ECiHR, *X and Y* v. *Austria*, Decisions and Reports, vol. 15, p. 163.

[67] ECiHR, *Huber* case, Collection of Decisions, vol. 46, p. 99.

[68] ECiHR, *X* v. *Austria*, Collection of Decisions, vol. 22, p. 96.

[69] Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 96, Com Rep, para. 53, p. 17.

[70] ECtHR, *Campbell and Fell* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 80, paras. 111–13, p. 49; 78 ILR 292 at 340; *Goddi* v. *Italy*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 76, paras. 27–32, pp. 11–13; 78 ILR 213 at 236-8.

[71] ECtHR, *Can* v. *Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 96, para. 53, p. 17.

[72] *Ibid.*, paras. 51–2, pp. 16 ff. (Opinion of the Court); ECtHR, *Campbell and Fell* v. *UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 80, para. 113, p. 49; 78 ILR 292 at 340.

[73] ECtHR, *Kamasinski* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 168, paras. 87 ff., pp. 39 ff. As to exceptions, see, for example, ECiHR, *Haase* v. *FRG*, Decisions and Reports, vol. 11, pp. 91–2.

INTER-AMERICAN SYSTEM

- *Adequacy of time*: In Case 10.198 (Nicaragua) the Commission inferred from the shortness of the time during which the accused had been detained, tried and sentenced that he had not been accorded the time and means for the preparation of his defence.[74]

♦ '[T]o 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' – Art. 14(3)(d) ICCPR, Art. 6(3)(c) ECHR,[75] Art. 8(2)(d) and (e) ACHR[76] and Art. 7(1)(c) ACHPR.[77]

This guarantee may be broken down into a list of individual rights:
– to defend oneself in person,
– to choose one's own counsel,
– to be informed of the right to counsel, and
– to receive free legal assistance if needed.

Relevant case law of human rights bodies:

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- According to the European Court, this guarantee applies at the pre-trial stage as well as during the trial.[78] The purpose of this guarantee is to ensure that proceedings against an accused 'will not take place without an adequate representation of the case for the defence'.[79] In terms of equality of arms, it is 'primarily to place the accused in a position to put his case in such a way that he is not at a disadvantage vis-à-vis the prosecution'.[80] The right of the accused to defend himself/herself in person has not been interpreted as allowing the accused a completely free choice.[81]

[74] IAYHR 1989, p. 348 (six weeks).
[78] ECtHR, *Imbrioscia* v. *Switzerland*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 275, para. 36, p. 13; ECtHR, *Quaranta* v. *Switzerland*, *ibid.*, vol. 205, para. 67, pp. 25 ff. (Commission); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, p. 256.
[79] ECiHR, *Pakelli* v. *FRG*, Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents, vol. 53, Com Rep, para. 84, p. 26.
[80] ECiHR, *X* v. *FRG*, No. 10098/82, 8 EHRR 1984, p. 225.
[81] See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, p. 258, with references.

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- Some indications concerning the scope of Art. 8(2)(d) and (e) ACHR may be found in the 'Exceptions to the Exhaustion of Domestic Remedies Advisory Opinion' (1990).[82] This Advisory Opinion states *inter alia* that '[s]ub-paragraphs (d) and (e) of Article 8(2) indicate that the accused has a right to defend himself personally or to be assisted by legal counsel of his own choosing and that, if he should choose not to do so, he has the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides.'

♦ 'To be tried without undue delay', Art. 14(3)(c) ICCPR, Arts. 6(1) ECHR, 8(1) ACHR and 7(1)(d) ACHPR ('within a reasonable time').

Relevant case law of human rights bodies:

HUMAN RIGHTS COMMITTEE

- Reviewing the case law of the Human Rights Committee, one can only conclude that the determination as to what a reasonable time (or undue delay) is depends on the circumstances and complexity of the case. The Committee's general comment on Art. 14 explains that 'this guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all states must take place "without undue delay" '.[83]

EUROPEAN COURT/COMMISSION OF HUMAN RIGHTS

- The Court and the Commission have said that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to its complexity, the conduct of the parties and the authorities dealing with the case.[84] 'Article 6 commands that judicial proceedings be expeditious, but

[82] IACtHR, Series A: Judgments and Opinions no. 11, 1992, paras. 25 ff., p. 28.

[83] Quoted in A. de Zayas, 'The United Nations and the guarantees of a fair trial in the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in D. Weissbrodt and R. Wolfrum (eds.), *The Right to a Fair Trial* (Springer-Verlag, Berlin and Heidelberg, 1998), p. 684. According to a commentator, the time limit begins to run when the suspect is informed that the authorities are taking specific steps to prosecute him. It ends on the date of the definitive decision, i.e. final and conclusive judgment or dismissal of the proceedings. Nowak, *CCPR Commentary*, p. 257.

[84] ECtHR, *Scopelleti* v. *Italy*, 17 EHRR 1993, p. 453; ECtHR, *Olsson* v. *Sweden* (No. 2), 17 EHRR 1992, p. 134; ECtHR, *König* v. *Federal Republic of Germany*, 2 EHRR 1978, p. 170; 58 ILR 370 at 405.

it also lays down the more general principle of the proper administration of justice.'[85]

INTER-AMERICAN SYSTEM

- With respect to the right to a hearing within a reasonable time, the Commission simply noted that a series of factors might determine the length of a trial. The factors included 'the complexity of the case, the behaviour of the accused, and the diligence of the competent authorities in their conduct of the proceedings'.[86]

NB: Besides the right of a detained person to be brought promptly before a judge or other officer authorised by law to exercise judicial power, the above-mentioned Arts. 9(3) ICCPR,[87] 5(3) ECHR[88] and 7(5) ACHR[89] also contain the right of a person detained on remand to a trial within a reasonable time or to release from detention if no trial can be held within a reasonable time.

The ECtHR found that:

- The reasonable time of pre-trial detention depends on the circumstances of the case and especially on the difficulty of the investigations, the behaviour of the accused and the handling of the case by the national authorities.[90] In the Inter-American

[85] ECtHR, *Boddaert* v. *Belgium*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 235-D, para. 39, pp. 82 ff.

[86] IACiHR, Case 11.245 Argentina, Report 12/96, IAYHR 1996, vol. 1, paras. 111 ff. p. 278.

[87] 'Anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.'

[88] 'Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article . . . shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

[89] 'Any person detained . . . shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.'

[90] See ECtHR, *Wemhoff* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 7, para. 17, p. 26; 41 ILR 281 at 306 (complexity of the case); ECtHR, *Matznetter* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 10, para. 12, pp. 34 ff.; 45 ILR 275 at 307–8 (exceptional complexity of the case); ECtHR, *Stögmüller* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 9, para. 16, p. 44; 45 ILR 232 at 273–4 (excessive length because of slowness of proceedings without good reason); ECtHR, *Tomasi* v. *France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 241-A, paras. 102 ff., p. 39.
If no trial can be held in a reasonable time, the accused has a right to be released (bail). Such bail can be refused for specific reasons:
(a) Danger of flight (ECtHR, *Stögmüller* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 9, p. 44; 45 ILR 232 at 273);

System the Commission confirmed the ECtHR jurisprudence.[91] The Human Rights Committee has interpreted Art. 9(3) ICCPR as meaning that pre-trial detention should be as short as possible.[92]

♦ 'To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him' – Art. 14(3)(e) ICCPR, Art. 6(3)(d) ECHR (almost literally) and Art. 8(2)(f) ACHR;[93] see also Art. 75(4)(g) AP I.

This guarantee may be divided into two individual rights:
– the right to examine, or have examined, the witnesses against him;
– the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

As the ICRC Commentary on Art. 75 AP I points out: 'It is clear that the possibility of examining witnesses is an essential prerequisite for an effective defence.'[94]

According to commentators on the human rights instruments: 'The right to call, obtain the attendance of and examine witnesses under the same conditions as the prosecutor is an essential element of "equality of arms" and thus of a fair trial.'[95]

Relevant case law of human rights bodies:

EUROPEAN COURT/COMMISSION OF HUMAN RIGHTS

• According to the Court 'that right means in principle the opportunity for the parties to a criminal . . . trial to have knowledge of and

(b) Interference with the course of justice (ECtHR, *Wemhoff* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 7, p. 25; 41 ILR 281 at 304-5);
(c) Prevention of crime (ECtHR, *Matznetter* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 10, p. 33; 45 ILR 275 at 305);
(d) Preservation of public order (ECtHR, *Letellier* v. *France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 207, para. 51, p. 21; ECtHR, *Kemmache* v. *France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 218, para. 52, p. 25 (reaction of society to a particularly grave crime)).

[91] See IACiHR, Case 10.037 Argentina, Report 17/89, IAYHR 1989, p. 94; IACiHR, Case 11.245 Argentina, Report 12/96, IAYHR 1996, vol. 1, pp. 258, 264 ff. The Commission stated *inter alia* that preventive detention is an exceptional measure. Only strict reasons can justify it, such as the danger of absconding, the seriousness of the crime, the potential severity of the sentence, the impediment of the preliminary investigations, e.g. by destroying evidence, or the risk of a repetition of offences.

[92] See R. Grothe, 'Protection of Individuals in the Pre-trial Procedure' in Weissbrodt and Wolfrum, *Right to a Fair Trial*, p. 709, with reference.

[94] Pilloud and Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3115.

[95] Nowak, *CCPR Commentary*, p. 261, with further references.

comment on all evidence addressed or observations filed . . . with a view to influencing the court's decision'.[96]

- The right applies to the trial. It does not apply generally at the pre-trial stage.[97] Neither the accused's right to cross-examine witnesses nor his/her right to call defence witnesses is absolute.[98] However, such limits as are set or occur must be consistent with the principle of equality of arms.[99]

♦ 'To have the free assistance of an interpreter if he cannot understand or speak the language used in court', Art. 14(3)(f) ICCPR, Art. 6(3)(e) ECHR (almost literally), Art. 8(2)(a) ACHR ('without charge').

Relevant case law of human rights bodies:

HUMAN RIGHTS COMMITTEE

- The Committee explained the range of this right as follows:

> The provision for the use of one official court language by States parties to the Covenant does not . . . violate article 14. Nor does the requirement of a fair hearing obligate State parties to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding or expressing themselves in the court language is it obligatory that the services of an interpreter be made available.[100]

[96] ECtHR, *J.J.* v. *The Netherlands*, Reports of Judgments and Decisions, 1998-II, para. 43, p. 613.

[97] ECtHR, *Can* v. *Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 96, Com Rep, para. 47; ECiHR, *Adolf* v. *Austria*, Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents, vol. 43, Com Rep, para. 64, p. 29.

[98] ECtHR, *Engel* v. *The Netherlands*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 22, para. 91, pp. 38 ff.; 58 ILR 51 at 86.

[99] *Ibid.* The obligation is to achieve equality in fact as well as in law: ECiHR, *Austria* v. *Italy*, (1963) 6 Yearbook of the Convention on Human Rights, p. 772.

[100] *Cadoret and Le Bihan* v. *France*, Communication Nos. 221/1987 and 323/1988, Report of the Human Rights Committee, UN Doc. A/46/40, p. 224; *Guesdon* v. *France*, Communication No. 219/1986, Report of the Human Rights Committee, UN Doc. A/45/40, p. 67; *Barzhig* v. *France*, Communication No. 327/1988, Report of the Human Rights Committee, UN Doc. A/46/40, para. 5.5, p. 256; *C.L.D.* v. *France*, Communication No. 439/1990, Report of the Human Rights Committee, UN Doc. A/47/40, para. 4.2, p. 433; *Z.P.* v. *Canada*, Communication No. 341/1988, Report of the Human Rights Committee, UN Doc. A/46/40, para. 5.3; *C.E.A.* v. *Finland*, Communication No. 316/1988, Report of the Human Rights Committee, UN Doc. A/46/40, para. 6.2, p. 296.

EUROPEAN COURT/COMMISSION OF HUMAN RIGHTS

- The guarantee protects persons once they are charged with a criminal offence.[101] It covers all criminal proceedings and includes the translation of documents or oral evidence which it is essential that the accused understand in order to secure a fair trial.[102] This does not involve translation of all the documents of the dossier.[103] The assistance is free in all cases, i.e. also in case of conviction.[104] It does not depend on the accused's means. The right can be waived by the accused.[105]

(ii) [N]o one shall be convicted of an offence except on the basis of individual penal responsibility (Art. 6(2)(b) AP II)

With respect to this judicial guarantee, also laid down in Art. 75(4)(b) AP I, the ICRC Commentary explains:

> This sub-paragraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. This principle is contained in every national legislation. It is already expressed in Article 33 of the fourth Convention, where it is more elegantly worded as follows: 'No protected person may be punished for an offence he or she has not personally committed' . . . The wording was modified to meet the requirement of uniformity between the texts in the different languages and, in this particular case, with the English terminology ('individual penal responsibility'). Article 75, paragraph 4(b), of Protocol I, lays down the same principle.[106]

Of course, this does not exclude cases of complicity or incitement, which are punishable offences in themselves and may lead to a conviction.

[101] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, pp. 269 ff.

[102] ECtHR, *Luedicke and Others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 29, para. 48, p. 20; 58 ILR 463 at 483.

[103] ECtHR, *Kamasinski* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 168, para. 74, p. 35.

[104] ECtHR, *Luedicke and Others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 29, paras. 38 ff., pp. 16 ff.; para. 46, p. 19; 58 ILR 463 at 479 ff., 483.

[105] ECtHR, *Kamasinski* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 168, para. 80, p. 37.

[106] Junod, 'Art. 6' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4603.

(iii) [N]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby (Art. 6(2)(c) AP II)

In addition to the prohibition of a heavier penalty than the one that was applicable at the time the offence was committed, this rule sets out two aspects of the principle that criminal law should not be retroactively applied: *nullum crimen sine lege* and *nulla poena sine lege*. AP II retained the wording of the Covenant. This solution was adopted out of a concern to establish in Protocol II fundamental guarantees for the protection of human beings that would be equivalent to those granted by the Covenant in the provisions from which no derogation may be made, even in time of public emergency threatening the life of the nation. Art. 15 of the Covenant is one of those articles.[107] These principles are also laid down in Arts. 7 ECHR, 9 ACHR and 7(2) ACHPR. The ECHR and ACHR qualify them as being non-derogable.

Relevant case law of human rights bodies:

EUROPEAN COURT/COMMISSION OF HUMAN RIGHTS

• In the *Kokkinakis* v. *Greece* case,

> [t]he Court points out that Article 7(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 court's interpretation of it, what acts and omissions will make him liable.[108]

[107] *Ibid.*, no. 4604.

[108] ECtHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 260-A, para. 52, p. 22.

(iv) [A]nyone charged with an offence is presumed innocent until proved guilty according to law (Art. 6(2)(d) AP II)

The presumption of innocence, which is implicitly contained in Art. 67 GC IV and laid down in Art. 75(4)(d) AP I, is also contained in Arts. 14(2) ICCPR, 6(2) ECHR, 8(2) ACHR and 7(1)(b) ACHPR. It is a widely recognised legal principle that it is not the responsibility of the accused to prove he/she is innocent, but of the prosecution to prove he/she is guilty.[109] In cases of doubt, the accused must be found not guilty in accordance with the ancient principle *in dubio pro reo*.[110]

Relevant case law of human rights bodies:

INTER-AMERICAN SYSTEM

- The Commission stated in Case 10.970 (Peru): 'The essential thing is therefore that the judge who hears the case is free of any prejudice concerning the accused's guilt and affords him the benefit of the doubt, i.e. does not condemn him until he is certain or convinced of his criminal liability, so that all reasonable doubt that the accused might be innocent is removed.'[111] An excessive period of pre-trial detention can be in violation of the presumption of innocence:

  > The prolonged imprisonment [in casu: over four years] without conviction, with its natural consequence of undefined and continuous suspicion of an individual, constitutes a violation of the principle of presumed innocence . . . The substantiation of guilt calls for the formulation of a judgment establishing blame in a final sentence. If the use of that procedure fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment.[112]

(v) [A]nyone charged with an offence shall have the right to be tried in his presence (Art. 6(2)(e) AP II)[113]

With respect to the drafting of Art. 75(4)(e) AP I, which is formulated in the same way as Art. 6(2)(e) AP II, the Rapporteur of Committee III noted that

[109] Pilloud and Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3108; Nowak, *CCPR Commentary*, p. 254.

[110] Nowak, *CCPR Commentary*, p. 254.

[111] IACiHR, Case 10.970 Peru, Report 5/96, IAYHR 1996, vol. 1, p. 1196. See also IACiHR, Case 11.084 Peru, Report 27/94, IAYHR 1994, vol. 1, pp. 510 ff.

[112] IACiHR, Case 11.245 Argentina, Report 12/96, IAYHR 1996, vol. 1, paras. 113 ff., pp. 278 ff.

[113] This wording is the result of a proposal in the Working Group which recommended 'everyone charged with an offence shall have the right to be tried in his presence'. The proposal

it was understood that persistent misconduct by a defendant could justify his removal from the courtroom.[114]

According to the commentators in the ICRC Commentary on the AP:

> This sub-paragraph does not exclude sentencing a defendant in his absence if the law of the State permits judgment *in absentia*.
>
> In some countries the discussions of the judges of the court are public and take place before the defendant; in other countries the discussion is held in camera, and only the verdict is made public. Finally, there are countries where the court's decision is communicated to the defendant by the clerk of the court in the absence of the judges. This sub-paragraph does not prohibit any such practices: the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections.[115]

The rule reiterates the principle laid down in Art. 14(3)(d) ICCPR. Art. 8(2)(g) ACHR contains the same judicial guarantee.

Relevant case law of human rights bodies:

EUROPEAN COURT/COMMISSION OF HUMAN RIGHTS

- A criminal trial without the presence of the accused is incompatible with Art. 6, and in case of an *in absentia* trial there must be an opportunity for the convicted person to reopen the trial.[116]
- Hearing *in absentia* is permitted if the State has acted diligently, but unsuccessfully, to give the accused effective notice of the hearing.[117] But the accused must be able to obtain a re-opening of the case: see above. It is doubtful if such a re-hearing is possible where there had been a waiver[118] or where the accused has absconded (various

was not adopted in this form because a number of delegations argued that sentences *in absentia* are allowed. The right of the accused to be present at his/her trial, which is established here, should be understood as a right which the accused is free to exercise or not. See Junod, 'Art. 6' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4609.

[114] OR vol. XV, p. 462, CDDH/407/Rev.1, para. 48.

[115] Pilloud and Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, nos. 3109 ff.

[116] ECtHR, *Colozza* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 89, para. 29, p. 15.

[117] *Ibid.*, para. 28, pp. 14 ff. *F.C.B.* v. *Italy*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 208-B, p. 21, para. 33.

[118] ECtHR, *Poitrimol* v. *France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 277-A, para. 31, p. 13.

> criminal procedures of European States do not grant such a right). The accused may waive this right by unequivocal statements provided that there are minimum standards of safeguard in that context.[119]

(vi) [N]o one shall be compelled to testify against himself or to confess guilt (Art. 6(2)(f) AP II)

This rule repeats Art. 14(3)(g) ICCPR. The Human Rights Committee explained that this provision must be understood 'in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt'.[120] The guarantee is also contained in Art. 8(3) ACHR, which reads as follows: 'A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.' It must be read together with Art. 8(2)(g) ('the right not to be compelled to be a witness against himself or to plead guilty'). Under the ECHR this judicial guarantee has been seen as one element of the right to a fair trial.[121]

(vii) [A] convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised (Art. 6(3) AP II)

In the ICRC Commentary the rationale of this provision is explained in the following terms:

> It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right of appeal against sentence pronounced upon him,

[119] *Ibid.*

[120] *Johnson* v. *Jamaica*, Communication No. 588/1994, Report of the Human Rights Committee, UN Doc. A/51/40, p. 180; *Berry* v. *Jamaica*, Communication No. 330/1988, Report of the Human Rights Committee, UN Doc. A/49/40, p. 28; *Kelly* v. *Jamaica*, Communication No. 253/1987, Report of the Human Rights Committee, UN Doc. A/46/40, p. 246; *López Burgos* v. *Uruguay*, Communication No. 52/1979, Report of the Human Rights Committee, UN Doc. A/36/40, paras. 11.5, 13, pp. 181 ff.; 68 ILR 29 at 37; *Teti Izquierdo* v. *Uruguay*, Communication No. 73/1980, Report of the Human Rights Committee, UN Doc. A/37/40, para. 9, p. 186; 70 ILR 287 at 296; *Estrella* v. *Uruguay*, Communication No. 74/1980, Report of the Human Rights Committee, UN Doc. A/38/40, para. 10, p. 159; 78 ILR 40 at 52; *Conteris* v. *Uruguay*, Communication No. 139/1983, Report of the Human Rights Committee, UN Doc. A/40/40, para. 10, p. 202; *Cariboni* v. *Uruguay*, Communication No. 159/1983, Report of the Human Rights Committee, UN Doc. A/43/40, para. 10, p. 190.

[121] For example: ECtHR, *Funke* v. *France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 256-A, para. 44, p. 22: 'the right of anyone "charged with a criminal offence" . . . to remain silent and not to contribute to incriminating himself'; ECtHR, *Serves* v. *France*, Reports of Judgments and Decisions, 1997-VI, para. 47, p. 2174.

> i.e., to guarantee the availability of such a right, as provided in the ICRC draft. However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies.[122]

NB: Art. 14(5) ICCPR,[123] Art. 8(2)(h) ACHR,[124] Art. 2 of the seventh AP to the ECHR[125] and Art. 7(1)(a) ACHPR[126] contain the right to appeal.

(b) Indispensable judicial guarantees derived from other sources
As Art. 6(2) AP II does not contain an exhaustive list, the provisions of the GC and AP I mentioned under section 'Art. 8(2)(a)(vi)' may be a further indication of indispensable guarantees.

The following guarantees – also derived from human rights instruments – are not explicitly mentioned in Art. 6 AP II:

(i) [T]he right of the accused to have the judgment pronounced publicly (Art. 75(4)(i) AP I)
According to the ICRC Commentary on the AP:

> It is an essential element of fair justice that judgments should be pronounced publicly. Of course, a clear distinction should be made between proceedings and judgment. It may be necessary because of the circumstances and the nature of the case to hold the proceedings in camera, but the judgment itself must be made in public, unless, as the Rapporteur pointed out, this is prejudicial to the defendant himself; this could be the case for a juvenile offender.[127]

[122] Junod, 'Art. 6' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4611.
[123] 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.'
[124] '[T]he right to appeal the judgment to a higher court'.
[125] 'Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law'; certain exceptions are permitted – see Art. 2(2).
[126] '[T]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.
[127] Pilloud and Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3118. See also Nowak, *CCPR Commentary*, pp. 248 ff.

As regards holding oral proceedings in camera, Art. 14(1) ICCPR gives some clear indications:

> The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[128]

According to the ICCPR, the right to a public judgment is subject to overriding interests of juvenile persons.[129]

(ii) [T]he principle of ne bis in idem (i.e. no punishment more than once for the same act)

This principle is mentioned in Art. 86 GC III, Art. 117(3) GC IV, Art. 75(4)(h) AP I and human rights instruments (Art. 14(7) ICCPR,[130] Art. 4(3) of the seventh AP to the ECHR,[131] which is non-derogable, and Art. 8(4) ACHR[132]).

[128] See also Art. 6(1) ECHR.

[129] Art. 6(1) ECHR stipulates in this regard:

> Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Art. 8(5) ACHR reads as follows:

> Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

[130] '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.' In *A.P.* v. *Italy*, the Human Rights Committee interpreted the principle of *ne bis in idem* as having no effect whatsoever on proceedings in other States. Communication No. 204/1986, Report of the Human Rights Committee, UN Doc. A/43/40, para. 7.3, p. 244.

[131] '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.' Art. 4(2) of the seventh AP to the ECHR stipulates that under certain extraordinary circumstances a new criminal trial is permissible, even to the detriment of an acquitted or already convicted person.

[132] 'An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.'

The Commission analysed the meaning of the principle under the ACHR in Case 11.006, Peru. It named the following elements:

1. the accused must have been acquitted;
2. the acquittal must be a final judgment; and
3. the new trial must be based on the same cause that prompted the original trial.

The notion 'accused person acquitted' implies 'someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he had been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it has been determined that the acts of which he is accused are not defined as crimes'.

Considering the status of *res judicata* in international law, the ICTY Prosecution[133] followed Bin Cheng, who concluded in his standard-setting work on general principles of international law: 'There seems little, if indeed any, question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings.'[134] The ICRC Commentary on the AP points out that '[r]espect for "res judicata" is one of the basic principles of penal procedure, and it is important to uphold this principle'.[135]

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

In the context of a 'nonappealable judgment', the expression 'judgment' 'should be interpreted as any procedural act that is fundamentally jurisdictional in nature, and "non-appealable judgment" as expressing the exercise of jurisdiction that acquires the immutability and incontestability of *res judicata*'. Report 1/95, IAYHR 1995, p. 300.

[133] ICTY, Prosecutor's Response to the Trial Chamber's Request, *The Prosecutor* v. *Slavko Dokmanovic*, IT-95-13a-T, p. 18. In this response the ICTY Prosecution distinguished the traditional procedural or formal principle of *non bis in idem* from a 'substantive' *non bis in idem* principle, which would apply to a case before the question of guilt has been finally adjudicated by a court, in particular at the time of the first trial. According to the Prosecution the latter does not exist as a general principle of international law.

[134] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons, London, 1953), p. 336.

[135] Pilloud and Pictet, 'Art. 75' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 3117.

8. Article 8(2)(e) ICC Statute – Other serious violations of the laws and customs applicable in armed conflicts not of an international character

The crimes under Art. 8(2)(e) of the ICC Statute (crimes committed in non-international armed conflicts), although more limited in number, are to a large extent identical in formulation to the corresponding crimes under Art. 8(2)(b) of the ICC Statute (crimes committed in international armed conflicts). The PrepCom adopted the view that the specific elements (not the common elements relating to the subject-matter jurisdiction) accepted for the crimes under Art. 8(2)(b) should appear under the corresponding war crime under Art. 8(2)(e), unless the specific legal framework of a non-international armed conflict would preclude this.

8.1. Paragraph 1 of the introduction to the war crimes section

Paragraph 1 of the introduction to the war crimes section is particularly relevant to the crimes under Art. 8(2)(e). It reads as follows:

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

This paragraph emphasises that the content of Art. 8(2)(d)[1] and (f)[2] provides limitations to the jurisdiction of the Court, namely a description of situations of internal violence not covered by the Statute. Several interested delegations wanted to make sure that whenever the threshold for a non-international armed conflict as indicated in these provisions is not reached, the Court will not examine conduct occurring within a country. Therefore, this paragraph was added to the Introduction. Given that the PrepCom did not consider the limitations as elements of crimes, the PrepCom did not discuss the content.

[1] '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.'

[2] 'Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.'

8.2. Elements common to all crimes under Article 8(2)(e) ICC Statute

Text adopted by the PrepCom

- The conduct took place in the context of and was associated with an armed conflict not of an international character.
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Commentary

These two elements describing the subject-matter jurisdiction for war crimes under Art. 8(2)(e) of the ICC Statute, i.e. other serious violations of the laws and customs applicable in armed conflict not of an international character, are drafted in the same way for all crimes in this section. The element describing the context and the related mental element are defined in exactly the same manner as for the crimes under Art. 8(2)(c). Generally, reference may therefore be made to the Commentary in section 7.2.

There are, however, some specific points that may be addressed.

Definition of an armed conflict not of an international character

The term 'armed conflict not of an international character' is derived from common Art. 3 GC. The ICTY found that a non-international armed conflict 'exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[1] This qualification has been included in Art. 8(2)(f) ICC Statute, with one modification: the term 'protracted armed violence' has been replaced by 'protracted armed conflict'. The addition of the word 'protracted' to 'armed conflict' seems to be redundant, since protracted violence is a constituent element of an armed conflict not of an international character.[2] The issue of 'protracted armed conflict' was not discussed by the PrepCom. The above-quoted paragraph from the introduction to the war crimes section simply highlights the fact that conduct occurring in situations defined in Art. 8(2)(f) ICC Statute does not come within the jurisdiction of the Court.

With regard to the definition of internal conflicts, the elements described under section 7.2, subsection 'Legal basis', must be considered.

[1] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 70; 105 ILR 453 at 488. This finding is also cited in ICTR, Judgment, *The Prosecutor* v. *Jean Paul Akayesu*, ICTR-96-4-T, para. 619.

[2] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, para. 184.

In sum, the most important points are the following:

- the ascertainment as to whether there is a non-international armed conflict does not depend on the subjective judgement of the parties to the conflict; it must be determined on the basis of objective criteria;
- the term 'armed conflict' presupposes the existence of hostilities between armed forces or groups organised to a greater or lesser extent;
- there must be the opposition of armed forces or groups and a certain intensity of the fighting.

The latter criteria, which are closely related, are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry and unorganised and short-lived insurrections, which are not subject to international humanitarian law.

For a description of the geographical scope of the armed conflict and the potential perpetrators, see section 7.2, subsection 'Legal basis'.

8.3. Elements of specific crimes under Art. 8(2)(e) ICC Statute

Art. 8(2)(e)(i) – Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities

Text adopted by the PrepCom

War crime of attacking civilians

1. The perpetrator directed an attack.

2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.

3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(i) ICC Statute).

Legal basis of the war crime

This offence is derived to a large extent from Art. 13(2) first sentence AP II, which reads as follows:

> The civilian population as such, as well as individual civilians, shall not be the object of attack.

Remarks concerning the elements

Unlike AP I applicable to international armed conflicts, the instruments applicable to non-international armed conflicts do not define the notions of 'attack', 'civilian population' or 'civilian'. Art. 13(3) AP II stipulates in the same manner as AP I the conditions under which civilians lose their protection against attacks. ('Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.')

The question is, however, whether these terms must be interpreted in the same way in international and non-international armed conflicts.[1]

The ICTY Trial Chamber found in the *Martic* case (Rule 61 proceeding) that

> [t]here exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed, . . . the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law.[2]

Although the Tribunal did not specifically refer to the elements of crime, one might conclude from this finding that the crime is identical in international and non-international armed conflicts and therefore its constituent elements are the same for both situations.

The following ICTY finding describes more generally the difficulty in applying rules pertaining to international armed conflicts to non-international armed conflicts:

> The emergence of . . . 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.[3]

[1] With respect to the notion of 'attack' the ICRC Commentary states: 'Protocol I defines attacks. This term has the same meaning in Protocol II', S. Junod, 'Art. 4' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4783. See also in this context W. A. Solf, 'Part IV Civilian Population, Introduction' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), pp. 672 ff.

[2] ICTY, Review of the Indictment, *The Prosecutor* v. *Milan Martic*, IT-95-11-R61, 108 ILR 39 at 45, para. 11. See also ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, paras. 100 ff.; 105 ILR 453 at 507.

[3] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 126; 105 ILR 453 at 519.

Later in the same case the Tribunal held:

> Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks.[4]

This might be an indication that the following conclusions drawn for international armed conflicts apply also to non-international armed conflicts:

> This offence is not limited to attacks against individual civilians. It essentially encompasses attacks that are not directed against a specific military objective or combatants or attacks employing indiscriminate weapons or attacks effectuated without taking necessary precautions to spare the civilian population or individual civilians, especially failing to *seek precise information* on the objects or persons to be attacked.[5]

To date, no further conclusions may be drawn on the basis of existing case law regarding the applicability of these rules to non-international armed conflicts.

However, with regard to the question of reprisals against the civilian population as such, or individual civilians, the ICTY in the *Martic* case (Rule 61 proceeding) held that the prohibition applies to both international and non-international armed conflicts. Although the legal instruments applicable to non-international conflicts do not contain an explicit prohibition in this regard, the Trial Chamber found:

> [T]he rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.[6]

With respect to non-international armed conflicts, the Tribunal argued:

> Although [Additional] Protocol II does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision.

[4] *Ibid.*, para. 127.
[5] See section 'Art. 8(2)(b)(i)', subsection 'Legal basis of the war crime'.
[6] ICTY, Review of the Indictment, *The Prosecutor* v. *Milan Martic*, IT-95-11-R61, 108 ILR 39 at 47, para. 17.

> Prohibited behaviour must remain so 'at any time and in any time and in any place whatsoever'. The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of 'collective punishment' in paragraph 2(b) of Article 4 of Protocol II.[7]

NB: It must be indicated that there is no State practice or *opinio iuris* constituting customary international law that would allow reprisals in non-international armed conflicts. The concept of reprisals does not as such apply to internal armed conflicts, and therefore reprisals are prohibited.[8]

[7] *Ibid.*, paras. 15 ff. See also ICTY, Judgment, *The Prosecutor* v. *Zoran Kupreskic and Others*, IT-95-16-T, para. 534.

[8] ICRC (ed.), *Fight it Right. Modern Manual on the Law of Armed Conflict for Armed Forces* (Geneva, 1999), para. 2122, p. 170.

Art. 8(2)(e)(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

Text adopted by the PrepCom

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

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xxiv) ICC Statute). It should be stressed that, in its adoption of the specific elements of Art. 8(2)(b)(xxiv), the PrepCom was recognising, after some debate, that directing attacks against persons or objects which are using, in a non-international armed conflict, the signals described in the revised Annex I of 1993 to AP I in conformity with the rules constituting protected status also falls within the scope of this war crime under the Statute. This understanding was acceptable to all because the provisions of the Annex do not enlarge the protection of persons or objects. They are only intended to facilitate the identification of personnel, material, units, transports and installations protected under the Geneva Conventions and the Protocol.[1] If the perpetrator directs an attack against

[1] See also in this regard Y. Sandoz, 'Art. 8' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 404:

> It had already become clear, even during the first session of the Conference of Government Experts in 1971, that the problem of the security of medical transports could only

such persons or objects, it makes no difference by what means these persons or objects were identifiable for the perpetrator.

Legal basis of the war crime

There is no single treaty reference for this war crime. It encompasses various prohibitions of attack as contained in AP II. The relevant provisions are cited below. In addition, the substance of this war crime may be inferred from common Art. 3 GC which states that '[t]he wounded and sick shall be collected and cared for'. Wounded and sick may be collected and cared for only if the personnel, buildings, material, units and transport involved in such activities are protected against attacks. In accordance with common Art. 3 GC, personnel are protected if they are not taking an active part in the hostilities.

Remarks concerning the elements

The conclusions stated under the section dealing with the corresponding offence in the context of an international armed conflict (Art. 8(2)(b)(xxiv) ICC Statute) also apply to this offence when committed in the context of a non-international armed conflict. Given that both offences are formulated in exactly the same manner, on the basis of the ICC Statute one might conclude that this offence has the same special constituent elements in both international and non-international armed conflicts. The following analysis of other sources does not suggest a different conclusion.

Attack

There are no indications that the notion of attack has a divergent meaning in non-international armed conflicts from its meaning in international armed conflicts (Art. 49(1) AP I).[2]

Buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law

While the GC and AP I contain a wide range of provisions regulating the protection of specific buildings, material, medical units and transport, and

be resolved by finding solutions adapted to 'modern means of marking, pinpointing and identification'. In fact it is no longer possible today to base effective protection solely on a visual distinctive emblem. [Footnote omitted.]

[2] With respect to the notion of 'attack' the ICRC Commentary states: 'Protocol I defines attacks. This term has the same meaning in Protocol II', S. Junod, 'Art. 13' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4783. See also in this context W. A. Solf, 'Part IV Civilian Population, Introduction' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), pp. 672 ff.

personnel against attacks and their legitimate use of the distinctive emblem of the GC, treaty law offers few rules for non-international armed conflicts, and such rules are of a more general nature.

The rules in AP II, unlike AP I, do not define the terminology used in the substantial provisions. However, the following indications concerning the *travaux préparatoires* taken from the ICRC Commentary clarify that the AP I terminology applies to the corresponding terms in AP II as well:

> In the end the definitions were omitted from the final version of Protocol II as part of the proposal to simplify the text . . . This was not because of controversies about matters of substance, but in a genuine attempt to simplify the text. The Part as a whole was not called into question, even though it was negotiated on the basis of definitions which were not adopted. The terminology used is identical to that of Protocol I and the definitions given there in Article 8 (Terminology), though of course they have no binding force in Protocol II, nevertheless constitute a guide for the interpretation of the terms.[3]

The following provisions are of relevance for the offence under consideration:

Art. 9 AP II:[4]

> 1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties . . .

[3] S. Junod, 'Introduction, Part III – Wounded, Sick and Shipwrecked' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4631 (footnotes omitted). See also M. Bothe, 'Part III, Introduction' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, pp. 655 ff.; Declaration or understanding submitted by the United States upon signature of AP II: 'It is the understanding of the United States of America that the terms used in Part III of [Protocol II] which are the same as the terms defined in Article 8 of Protocol I shall so far as relevant be construed in the same sense as those definitions', *ibid.*, p. 656.

[4] Concerning the question as to who fall under the definition of medical and religious personnel, the ICRC Commentary indicates the following:

> The Working Group which studied questions relating to Articles 15, 16 and 18, to be dealt with by Committee II, considered in its report that the term 'medical personnel', as used in Protocol II, should include all the categories of persons listed in Article 8 (Terminology), sub-paragraph (d), of Protocol I. As regards religious personnel, the Working Group formally raised the question whether the term 'religious personnel' should have a wider scope than it had at that stage of the negotiations in article 15 of Protocol I (Protection of civilian medical and religious personnel), and wider than was envisaged by Article 24 of the first Convention, and in Articles 36 and 37 of the Second Convention. On the basis of an analysis of this question it was decided that religious personnel should be defined in the same way in the two Protocols.

Therefore, reference may be made, both for medical personnel and for religious personnel, to the definitions of these terms given in Art. 8 AP I. S. Junod, 'Art. 9' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, nos. 4661 ff. (footnotes omitted).

Art. 11 AP II:

> 1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
>
> 2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.[5]

Art. 12 AP II:[6]

> Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun[7] on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

NB: It is worth noting in this context the relationship between the protection accorded to the above-mentioned personnel and the use of the distinctive emblem. The question arises whether the distinctive emblem is a compulsory condition for the right to protection.

The ICRC Commentary on AP II may be quoted in this regard:

> The use of the emblem is optional; medical personnel and medical units and transports are protected in any event: such protection is expressly granted in Articles 9 (Protection of medical and religious personnel) and 11 (Protection of medical units and transports). However, it is the

[5] With regard to paragraph 2 the ICRC Commentary indicates:
> This paragraph reiterates Article 21 of the first Convention, with slight changes in the wording. In particular, Article 21 does not refer to 'hostile acts', but to 'acts harmful to the enemy'. There is no difference of substance between these two terms.

Ibid., no. 4720.
See also M. Bothe, 'Art. 11' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 664.

[6] Concerning this provision the ICRC Commentary points out:
> This provision is based on the relevant articles of the Conventions, viz., Chapter VII of the first Convention and Chapter VI of the Second Convention, both entitled 'The distinctive emblem', as well as on Articles 18, 20 and 22 of the fourth Convention: these rules were supplemented in Protocol I by Article 18 (Identification) and Annex I to that Protocol (Regulations concerning identification).

S. Junod, 'Art. 12' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4731.
See also M. Bothe, 'Art. 12' in Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts*, p. 665.

[7] Since 1980, this emblem is no longer used.

> direct interest of those enjoying protection to ensure that they can be identified, not only by the adverse party, but also by the armed forces or armed groups of their own side, particularly in a non-international armed conflict where, in most cases, the area of confrontation is not well-defined, or shifts frequently.
>
> Article 18 (Identification), paragraph 1, of Protocol I, provides that 'each Party to the conflict shall endeavour to ensure that medical and religious personnel, and medical units and transports, are identifiable'.
>
> According to Article 12 of Protocol II, 'the distinctive emblem . . . shall be displayed'. In French the future tense is used, rather than the imperative: 'le signe distinctif . . . sera arboré'. This formula shall be taken to express a right and invites use to be made thereof.[8]

Hence, the perpetrator commits a war crime under the Statute only if the persons or objects attacked are protected and use the distinctive emblem in conformity with international law.

NB: Directing attacks against persons or objects that are using the signals described in the revised Annex I of 1993 to AP I in conformity with the previous rules constituting protected status should also fall within the scope of the crime under the Statute. The provisions of the Annex do not enlarge the protection of persons or objects. They are only intended to facilitate the identification of personnel, material, units, transports and installations protected under the GC and the Protocol. Since the protection is determined only by the substantive provisions of common Art. 3 GC and AP II, attacks against such protected objects or persons should also fall under this crime if said objects or persons are using the signals defined in this Annex I to AP I. However, this must be limited to situations in which the attacker had the technical capacity to receive the signals and therefore to identify the personnel or object attacked. This restriction may indirectly be derived from Art. 18(2) AP I also for non-international armed conflicts. For further details see discussion on Art. 8(2)(b)(xxiv).

[8] Junod, 'Art. 12' in Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols*, no. 4742.

Art. 8(2)(e)(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

Text adopted by the PrepCom

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

1. The perpetrator directed an attack.

2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.

3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.

4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.

5. The perpetrator was aware of the factual circumstances that established that protection.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(iii) ICC Statute).

Legal basis of the war crime

There is no specific reference to this war crime in the treaties of international humanitarian law describing the forms of criminalised conduct. However, the substance may be inferred from common Art. 3 GC, which protects persons taking no active part in the hostilities against violence to life and person. In addition, this article provides that the wounded and sick shall be collected and cared for. If the personnel, material, units or

vehicles defined under Art. 8(2)(e)(iii) are involved in activities for the collection and care of wounded and sick, such activities may be carried out only if the personnel, material, units or vehicles are protected against attacks.

(1) Peacekeeping missions

The legal instruments of international humanitarian law do not specifically address the protection of peacekeeping missions established in accordance with the Charter of the United Nations. However, the 1994 Convention on the Safety of United Nations and Associated Personnel prohibits attacks against United Nations and associated personnel, their equipment and premises. Art. 7(1) of this Convention, on the duty to ensure the safety and security of United Nations and associated personnel, reads as follows:

> United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.

Art. 9 of the Convention is the basis for criminal prosecution:

> 1. The intentional commission of:
> (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
> (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
> (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
> (d) An attempt to commit any such attack; and
> (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack,
> shall be made by each State Party a crime under its national law.

(2) Humanitarian assistance missions

The legal instruments applicable to non-international armed conflicts do not specifically deal with the protection of relief personnel.

However, attacks against such personnel, their installations, material, units or vehicles constitute a crime, since such attacks would be equated to attacking civilians or civilian objects.

Arts. 9 and 11 of AP II contain specific rules concerning the protection of medical personnel as well as of medical units and transports.

Remarks concerning the elements

The conclusions stated under the section dealing with the corresponding crime in the context of international armed conflicts (Art. 8(2)(b)(iii) ICC Statute) also apply to a large extent to this offence when committed in the context of a non-international armed conflict. There are no indications in the ICC Statute that this offence has different special constituent elements in an international or non-international armed conflict. Both offences are formulated in exactly the same manner. Therefore, the sources relating to 'attack' and 'humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations' cited under section 'Art. 8(2)(b)(iii)', subsection 'Legal basis of the war crime', are also of relevance in this context, taking into account the specifics of internal armed conflicts.

As long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict

In the context of a non-international armed conflict, it might be more problematic to determine what is meant by 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.

The legal instruments applicable to non-international armed conflicts are not as explicit as the instruments applicable to international armed conflicts (Arts. 51(3) and 52(2) AP I) in defining the protection of civilians or civilian objects.

With regard to the protection of civilians, Art. 13(3) AP II might give the necessary guidance:

> Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

From this, one may conclude that civilians lose their protection when and as long as they take a direct part in hostilities.[1]

There is no comparable provision in AP II concerning civilian objects. However, the indication found in Art. 52(2) AP I for when an object is no

[1] With regard to UN personnel this element is also reflected in Art. 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel, which reads as follows:
> This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

longer entitled to protection as a civilian object might be of relevance in a non-international armed conflict as well, since this definition was used for both international and non-international armed conflicts in Art. 2(6) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996):

> . . . so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

This definition was also used more recently in Art. 1(6) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999, which applies to non-international armed conflicts in accordance with Art. 22:

> 'military objective' means an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

From this rule one may conclude that an object is entitled to protection, unless and for such time as it is used to make an effective contribution to the military action of a party to a conflict.

(a) Peacekeeping missions

With respect to peacekeeping missions, as in the case of international armed conflicts, the above-mentioned general rules must be linked to Art. 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel, which reads as follows:

> This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

On the basis of these rules, the personnel of peacekeeping missions are entitled to protection, unless and for such time as they take a direct part in hostilities, i.e. are engaged as combatants. Thus, the protection does not cease, in particular, if such persons only use armed force in exercise of their

right to individual self-defence. Installations, material, units or vehicles of peacekeeping missions are entitled to protection, unless and for such time as they are used specifically for these combatant purposes.

(b) Humanitarian assistance missions

In contrast to the GC and AP I provisions for international armed conflicts, there are no extensive rules on medical units, such as hospitals, equipment, etc., and relief units, as well as their personnel, which describe more particularly the conditions under which the units or personnel lose their protection.

Art. 18 AP II on relief societies and relief actions simply provides:

> 1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun[2]) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict . . .
>
> 2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

From this provision one might infer that relief missions are only protected if they are performing their functions in relation to the victims of the armed conflict and in the manner described in para. 2 of Art. 18 AP II.

Art. 11 AP II, whose scope of application is limited to medical units and transports, might be quoted in this context:

> 1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
>
> 2. *The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function*. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded. [*Emphasis added*.]

There is no such explicit rule on medical personnel specifying when their protection ceases. In this regard, the ICRC Commentary on

[2] Since 1980, this emblem is no longer used.

Art. 9 indicates:

> Naturally, respect and protection imply that personnel in enjoyment thereof must refrain from all acts of hostility and will not themselves be made the object of attacks. Article 11 (Protection of medical units and transports) specifies that the units and transports in question must be 'respected and protected at all times and shall not be the object of attack'. This point is not contained in Article 9, which merely mentions respect and protection, and this omission could give rise to different interpretations.[3]

These activities involving medical units and transports as well as medical personnel are comparable to humanitarian assistance missions. In both cases, there is reason for according protection only if no hostile acts are committed outside their humanitarian functions. Therefore, one might infer from Arts. 9 and 11 conditions under which humanitarian assistance missions lose their protection.

Even without a specific provision, at least the standard of the above-cited Art. 13(3) AP II concerning civilians would apply.

As for the wording of Art. 13(3) AP II dealing with civilians and of Art. 11(2) specifically dealing with medical units and transports, two distinct formulations are chosen to describe when a loss of protection occurs: when they 'take a direct part in hostilities' on the one hand and when 'they are used to commit hostile acts, outside their humanitarian function' on the other hand. The first standard might be helpful to determine when the personnel of humanitarian assistance missions lose their protection, and the second to determine when installations, material, units or vehicles of such missions lose their protection.

Analysing the few sources available, one might conclude that, with respect to this issue, there is no substantial difference between international and non-international armed conflicts. With regard to international armed conflicts, we reached the conclusion that the personnel of humanitarian assistance missions lose their protection if they *commit hostile acts outside their humanitarian function* (reference was made to Art. 11(2) AP I). Installations, material, units or vehicles of humanitarian assistance missions lose their protection *if they are used to commit, outside the missions' humanitarian function, acts harmful to the enemy* (reference was made to Arts. 21 GC I, 34 GC II, 19 GC IV and 13 AP I).

[3] S. Junod, 'Art. 9' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987) no. 4673 (footnotes omitted).

Art. 8(2)(e)(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

Text adopted by the PrepCom

War crime of attacking protected objects[60]

1. The perpetrator directed an attack.

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

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

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

[60] 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.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(ix) ICC Statute).

Legal basis of the war crime

The term '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' is derived to a large extent from Arts. 27 and 56 of the 1907 Hague Regulations. It must be noted, however, that the Hague Regulations do not directly apply to non-international armed conflicts. An explicit treaty reference for this offence in internal armed

conflicts does not exist. However, there are other provisions of relevance (for example, AP II, Hague Convention of 1954 for the Protection of Cultural Property) which are applicable in internal armed conflicts. These will be cited below.

Remarks concerning the elements

The conclusions stated under the section dealing with the corresponding offence in the context of international armed conflicts (Art. 8(2)(b)(ix) ICC Statute) also apply to this offence when committed in the context of a non-international armed conflict. Given that both offences are formulated in exactly the same manner, there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

However, a number of rules which might be of relevance for the interpretation of the elements of this offence have developed, giving specific protection to specific objects in times of non-international armed conflicts.

Buildings dedicated to religion, education, art, science or charitable purposes, historic monuments

(1) General protection

The above-cited Art. 56, which must be read in connection with Art. 27 of the Hague Regulations, is still valid under customary international law and applies to non-international armed conflicts as well.

(2) Specific protections

- *Cultural or religious objects*

The following provision of AP II contains specific rules on historic monuments, works of art or places of worship:

Art. 16:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.[1]

[1] On the scope of the rule of protection, the ICRC Commentary on AP II states:
Protection of cultural objects and places of worship is achieved by means of two complementary rules, each involving a prohibition:

As the ICRC Commentary on this provision points out,

> [t]he expression 'without prejudice to' means that the conditions of application of the Convention are not modified by the Protocol, only of course as far as a Contracting Party is bound by the Convention. If it is not, only Article 16 applies.[2]

> 1) it is prohibited to commit 'any acts of hostility directed against'.
> An act of hostility means any act related to the conflict which prejudices or may prejudice the physical integrity of protected objects. In fact, the article does not only prohibit the bringing about of deleterious effects as such, but any acts 'directed' against protected objects. Thus it is not necessary for there to be any damage for this provision to be violated.
> 2) it is prohibited to use protected objects in support of the military effort.
> 'Military effort' means any military activities undertaken for the conduct of hostilities. The second prohibition is the counterpart of the first, indispensable to ensure respect for this rule. If such objects were used in support of the military effort, they could become military objectives, assuming that their total or partial destruction offered the adversary a specific military advantage, and as a result their protection would become illusory. In such a situation the question is if and exactly at what moment there is a right to attack such protected objects in the event that the second prohibition is not respected. Such a possibility should not be accepted without duly taking into account the fact that the objects concerned are of exceptional interest and universal value. All possible measures should be taken to endeavour putting a stop to any use in support of the military effort (by giving due warnings, for example) in order to prevent the objects from being destroyed or damaged. In any case this is the spirit of the provision: it is an invitation to safeguard the heritage of mankind.
>
> S. Junod, 'Art. 16' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), nos. 4845 ff. (footnote omitted).

Concerning the second aspect, reference should be made also to the corresponding commentary on Art. 53 AP I, which clarifies the conditions under which a protected object may be attacked when it is used to support the military effort:

> If protected objects were used in support of the military effort, this would obviously constitute a violation of Article 53 of the Protocol, though it would not necessarily justify attacking them. To the extent that it is admitted that the right to do so does exist with regard to objects of exceptional value, such a right would depend on their being a military objective, or not, as defined in Article 52 . . . paragraph 2. *A military objective is an object which makes 'an effective contribution to military action' for the adversary, and whose total or partial destruction, capture or neutralization 'in the circumstances ruling at the time, offers a definite military advantage' for the attacker. These conditions are therefore stricter than the simple condition that they must be 'in support of the military effort'*. For example, it is not permitted to destroy a cultural object whose use does not make any contribution to military action, nor a cultural object which has temporarily served as a refuge for combatants, but is no longer used as such. In addition, all preventive measures should be taken to terminate their use in support of the military effort (warnings, injunctions etc.) in order to prevent the destruction or damage of cultural objects. However, if it is decided to attack anyway, the principle of proportionality should be respected, which means that the damage should not be excessive in relation to the concrete and direct military advantage anticipated, and all the precautions required by Article 57 . . . should be taken.
>
> C. F. Wenger, 'Art. 53' in *ibid.*, no. 2079 (emphasis added, footnote omitted).

[2] Junod, 'Art. 16' in *ibid.*, no. 4832 (footnote omitted). It should be noted that, unlike Article 53 (Protection of cultural objects and of places of worship) of AP I, the article under consideration here does not make reference to other applicable international instruments. In the absence of an

CULTURAL PROPERTY

The Hague Convention of 1954 for the Protection of Cultural Property, which defines cultural property in Art. 1, applies also to non-international armed conflicts.[3] The specific protection of such cultural property is defined in particular in Art. 4. For further details, see the discussion on the corresponding offence committed in international armed conflicts (section 'Art. 8(2)(b)(ix)', subsection 'Legal basis of the war crime').

NB: The recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property,[4] also applicable in non-international armed conflicts (Art. 22), further develops Art. 4(2) of the 1954 Convention in Art. 6 (waiver of protection). A special case of enhanced protection is dealt with in Art. 12. The Protocol contains specific criminality clauses in Art. 15(1).

For further details, see the discussion on the corresponding offence committed in international armed conflicts (section 'Art. 8(2)(b)(ix)', subsection 'Legal basis of the war crime').

RELIGIOUS OBJECTS

Religious objects may fall under the above-cited protections defined in AP II or the Hague Convention of 1954 on the Protection of Cultural Property if they *constitute the cultural or spiritual heritage of peoples* (AP II) or fulfil the conditions set forth in Art. 1 of the 1954 Hague Convention. However, it should be noted that even without these additional qualifications they remain protected under customary international law to the same extent as civilian objects.

OBJECTS DEDICATED TO EDUCATION AND SCIENCE

These objects may also fall under the above-cited protections defined in AP II or the Hague Convention of 1954 on the Protection of Cultural Property if they *constitute the cultural or spiritual heritage of peoples* (AP II) or fulfil the conditions set forth in Art. 1 of the 1954 Hague Convention. However, if they do not fall under those definitions, they are protected under customary international law to the same extent as civilian objects.

explanation on this point in the Official Records, it may be recalled that the Hague Conventions of 1907 are not specifically applicable to non-international armed conflicts. However, this does not exclude the possibility that norms or customary international law might be of relevance.

[3] Art. 19: '1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.'

[4] Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict, adopted on 26 March 1999 (The Hague).

Hospitals and places where the sick and wounded are collected

Only one specific rule contained in a treaty of international humanitarian law according protection for hospitals and places where the sick and wounded are collected is applicable to non-international armed conflicts. Art. 11 AP II reads as follows:

> 1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
> 2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

In addition, the protection may be inferred from common Art. 3 GC which states that '[t]he wounded and sick shall be collected and cared for'. The collection and care of wounded and sick may be carried out only if the hospitals and places where sick and wounded are collected are protected against attacks.

Further rules under customary international law might be of relevance.

Loss of protection

The objects listed in Art. 8(2)(e)(iv) ICC Statute are only protected provided they are not military objectives. Unlike provisions concerning international armed conflicts, there is no explicit definition of military objectives in existing treaties of international humanitarian law applicable in non-international armed conflicts (see in particular AP II). However, the definition found in Art. 52(2) AP I is relevant to non-international armed conflicts too, as it was used for both international and non-international armed conflicts in Art. 2(6) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) and more recently in Art. 1(6) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999.

With respect to medical and cultural objects it should be noted that precise indications are given as to when those objects lose their protection (for cultural property, see Art. 4(2) of the 1954 Hague Convention, together with Art. 6(a) and (b) of the Second Protocol thereto and Art. 13 of that Protocol; for hospitals and places where the sick and wounded are collected, see Art. 11 first sentence AP II) and further conditions are stipulated that

must be fulfilled before they may be attacked (for cultural property, see Art. 4(2) of the 1954 Hague Convention, together with Art. 6(c) and (d) of the Second Protocol thereto and Art. 13 of that Protocol; for hospitals and places where the sick and wounded are collected, see Art. 11 second sentence AP II).

Art. 8(2)(e)(v) – Pillaging a town or place, even when taken by assault

Text adopted by the PrepCom

War crime of pillaging

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.[61]
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[61] As indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging.

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xvi) ICC Statute).

Legal basis of the war crime

The instruments of international humanitarian law applicable to non-international armed conflicts explicitly prohibit only the pillaging of 'persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted' (Art. 4(2)(g) AP II).

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of 'pillaging a town or place, even when taken by assault' (Art. 8(2)(b)(xvi) ICC Statute) in the context of international armed conflicts also apply to a large extent to this offence when committed in the context of a non-international armed conflict. Since both offences are formulated in exactly the same manner, there are no indications in the ICC Statute that this offence has different special constituent elements in an international or

non-international armed conflict. However, it must be emphasised that there are no specific rules of international humanitarian law allowing requisitions, contributions, seizure or taking of war booty in a non-international armed conflict.

Art. 8(2)(e)(vi) – Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions

Text adopted by the PrepCom

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

1. The perpetrator invaded[62] 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.[63]

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

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

[62] The concept of 'invasion' is intended to be broad enough to be gender-neutral.

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

Article 8(2)(e)(vi)–2 War crime of sexual slavery[64]

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[65]

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

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

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

[64] 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.

[65] 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.

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

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

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

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

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

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

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

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

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

1. The perpetrator deprived one or more persons of biological reproductive capacity.[66]

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.[67]

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

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

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

[67] It is understood that 'genuine consent' does not include consent obtained through deception.

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

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.

3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xxii) ICC Statute). On the basis of the slightly different statutory language (see below), minor adjustments were made (see Element 2 of the war crime of sexual violence).

Legal basis of the war crime

There is no single treaty reference containing all the different acts described in this war crime. The constituent parts of the crime may be found in a number of legal instruments. As the ICTY pointed out in the *Delalic* case:

> There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms

> of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4(2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4(1) which states that all persons are entitled to respect for their person and honour . . .
>
> There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape.[1]

The most relevant provision of AP II reads as follows:

Art. 4(2)(e) AP II:

> outrages upon personal dignity, in particular . . . rape, enforced prostitution and any form of indecent assault.

According to Art. 4(1) AP II, persons protected against these acts are all those 'who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'. However, this reference is not included in the ICC Statute.

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of 'committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions' (Art. 8(2)(b)(xxii) ICC Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Although the wording used to describe the crime for non-international armed conflicts is slightly different, notably owing to the use of the formulation 'also constituting a serious violation of article 3 common to the four Geneva Conventions' instead of 'also constituting a grave breach of the four Geneva Conventions' for the last variation of the crime (Art. 8(2)(e)(vi)–6: War crime of sexual violence), there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

[1] ICTY, Judgment, *The Prosecutor* v. *Zejnil Delalic and Others*, IT-96-21-T, paras. 476 ff. See also ICTY, Judgment, *The Prosecutor* v. *Anto Furundzija*, IT-95-17/1-T, paras. 165 ff.; 121 ILR 218 at 266.

Art. 8(2)(e)(vii) – Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities

Text adopted by the PrepCom

War crime of using, conscripting and enlisting children

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.

2. Such person or persons were under the age of 15 years.

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

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xiii) ICC Statute). On the basis of the slightly different statutory language, the term 'an armed force or group' was used in Element 1 instead of 'the national armed forces'.

Legal basis of the war crime

This offence is derived from Art. 4(3)(c) AP II, which provides that:

> children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.

Remarks concerning the elements

In contrast to the formulation of the corresponding offence in an international armed conflict the term 'armed forces or groups'[1] is used instead

[1] Describing the *travaux préparatoires*, the ICRC Commentary points out that the term 'armed forces' of the High Contracting Party in Art. 1 AP II

> should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, 'regular armed forces', in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force).

S. Junod, 'Art. 1' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4462.

of 'national armed forces', clearly indicating that the conscription or enlistment into rebel forces as well as the active participation of children in hostilities on the rebel side also constitutes a war crime.

The conclusions stated under the section dealing with the offence of 'Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities' (Art. 8(2)(b)(xxvi) ICC Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Apart from the different wording and corresponding consequences indicated above, there are no indications in the ICC Statute or AP II that this offence has different constituent elements in an international or non-international armed conflict.

Art. 8(2)(e)(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

Text adopted by the PrepCom

War crime of displacing civilians

1. The perpetrator ordered a displacement of a civilian population.

2. Such order was not justified by the security of the civilians involved or by military necessity.

3. The perpetrator was in a position to effect such displacement by giving such order.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

Initially, the drafters looked at the elements of the war crimes defined in Art. 8(2)(a)(vii)–1: Unlawful deportation and transfer, and Art. 8(2)(b)(xii): Declaring that no quarter will be given (in order to reflect terms 'to declare' and 'to order' in a coherent manner in the EOC), which were thought to be the most similar or parallel to the Art. 8(2)(e)(viii) war crime of displacing civilians. With these as a basic starting point, the drafters created the elements of this crime which were eventually adopted by the PrepCom.

Element 1 defines the *actus reus* of this war crime, namely that the 'perpetrator ordered a displacement of a civilian population'. This was drafted to implicate the individual giving the order, not someone who simply carries out the displacement (this fact does not exclude the possibility that the person carrying out the displacement can be held individually responsible, for example, for the participation in the commission of the crime; see Art. 25 of the ICC Statute dealing with other forms of individual criminal responsibility). In addition, the wording was changed to 'a civilian population', as opposed to 'one or more civilians' as contained in the elements of Art. 8(2)(a)(vii)–1, because the drafters felt that the displacement of one person would not rise to the level of this crime. At the same time, the term 'a population', as opposed to the Statute's formulation

'the population', clarifies that the perpetrator does not need to order the displacement of the whole civilian population. The situation in between these two extremes was not further discussed.

Element 2 resembles Element 3 of Art. 8(2)(b)(xii), and addresses the question as to whether the perpetrator had the authority or power to carry out the displacement. The drafters agreed – and this view was not contested by the Working Group on EOC when the text proposal was introduced with that explanation – that the formulation '[t]he perpetrator was in a position to effect such displacement by giving such order' would cover both *de iure* and *de facto* authority to carry out the order, so that the definition would cover the individual who, for example, has effective control of a situation by sheer strength of force.

Element 3 is based on the statutory language, which is derived from Art. 17(1) first sentence AP II. Although one might argue that the element could be superfluous in light of paragraph 6 of the General Introduction to the EOC document relating to the concept of 'unlawfulness', the PrepCom decided to state that '[s]uch order was not justified by the security of the civilians involved or by military necessity'. This departure from the approach taken in other cases[1] was justified by the fact that this requirement is explicitly mentioned in the Statute and should therefore be repeated.

Legal basis of the war crime

This offence is derived from Art. 17(1) first sentence AP II, which reads as follows:

> The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.

Remarks concerning the material elements

It appears that there are no judgments from the ICTY or the ICTR concerning this offence to date. From one decision of the ICTY under Rule 61, one may conclude that the Tribunal considers 'ethnic cleansing' as an example of unlawful displacement.[2] However, in this decision the Tribunal did not specifically point out the elements of this crime.

[1] For example in the case of Art. 8(2)(a)(vii)–1: Unlawful deportation, Art. 49(2) GC IV allows evacuations or displacements justified for exactly the same reasons, namely if justified for the security of the population or by imperative military reasons. These situations excluding unlawfulness are, however, not mentioned in the elements adopted.

[2] ICTY, Review of the Indictment, *The Prosecutor* v. *Radovan Karadzic and Ratko Mladic*, IT-95-5-R61 and IT-95-18-R61, 108 ILR 85 at 115–19.

The ICRC Commentary on Art. 17 AP II points out that

> [p]aragraph 1 covers displacements of the civilian population as individuals or in groups within the territory of a Contracting Party where a conflict . . . is taking place.

This offence prohibits the forced displacement of the civilian population, except in exceptional circumstances of two kinds:

- Circumstances involving the security of the civilian population, and
- Circumstances involving imperative military reasons.

Art. 49(2) GC IV, applicable to evacuations in international armed conflicts, refers to the same circumstances. The indications given under sections 'Art. 8(2)(a)(vii)', subsection 'Unlawful deportation and transfer, Legal basis of the war crime' and 'Art. 8(2)(b)(viii)', subsection 'Legal basis of the war crime' may be useful as well for this offence.

In sum, the following indications were made under these sections:

- With respect to the security interests, '[i]f . . . an area is in danger as a result of military operations or is liable to be subjected to intense bombing', it may or must be evacuated 'partially or wholly, by placing the inhabitants in places of refuge'.[3]
- With respect to evacuations justified on the basis of imperative military reasons, the ICRC Commentary refers to situations 'when the presence of protected persons in an area hampers military operations' and overriding military considerations make the evacuation imperative.[4]

  In general terms, military necessity as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances. In this case, military necessity is qualified by referring to 'imperative military reasons'. The situation should be scrutinised most carefully, as the adjective 'imperative' reduces to a minimum cases in which displacement may be ordered.[5]

  Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group.[6]

[3] J. S. Pictet (ed.), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Art. 147, p. 280.
[4] *Ibid.*
[5] S. Junod, 'Art. 17' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4853.
[6] *Ibid.*, no. 4854.

This offence prohibits only forced movements 'for reasons related to the conflict'. In fact, displacement may prove to be necessary in certain cases of epidemics or natural disasters such as floods or earthquakes. Such circumstances are not covered by Art. 17 AP II, nor, consequently, by Art. 8(2)(e)(viii) of the ICC Statute.

An additional element for determining the lawfulness of evacuation may be found in Art. 17(1) second sentence AP II. In accordance with that provision,

> . . . all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

This element was also stressed in the context of an international armed conflict in the *A. Krupp* case by the US Military Tribunal, which adopted the following statement of Judge Phillips in his concurring opinion in the *Milch* trial,[7] which was based on the interpretation of Control Council Law No. 10:

> [D]eportation becomes illegal . . . whenever *generally recognized standards of decency and humanity are disregarded*.[8]

NB: A special ruling for children is contained in Art. 4(3)(e) AP II:

> measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

[7] *Milch Trial*, in UNWCC, *LRTWC*, vol. VII, pp. 45–6, 55–6; 14 AD 299 at 302.
[8] *A. Krupp Trial*, in UNWCC, *LRTWC*, vol. X, pp. 144 ff. (emphasis added); 15 AD 620 at 626.

Art. 8(2)(e)(ix) – Killing or wounding treacherously a combatant adversary

Text adopted by the PrepCom

War crime of treacherously killing or wounding

1. The perpetrator invited the confidence or belief of one or more combatant adversaries that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.

2. The perpetrator intended to betray that confidence or belief.

3. The perpetrator killed or injured such person or persons.

4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.

5. Such person or persons belonged to an adverse party.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xi) ICC Statute). On the basis of the slightly different statutory language, the term 'combatant adversaries' was used in Element 1 instead of 'persons'.

Legal basis of the war crime

The term 'killing or wounding treacherously a combatant adversary' is derived to a large extent from Art. 23(b) of the Hague Regulations. However, it must be noted that the Hague Regulations do not directly apply to non-international armed conflicts. An explicit treaty reference for this offence in internal armed conflicts does not exist.

Remarks concerning the elements

In a general analysis of customary international law applicable in non-international armed conflicts, the ICTY found that the prohibition of perfidy in international armed conflicts applies to internal armed conflicts as well.[1] The Tribunal did not specifically base itself on the above-cited

[1] ICTY, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, *The Prosecutor* v. *Dusko Tadic*, IT-94-1-AR72, para. 125; 105 ILR 453 at 519.

Hague rule, or the rule in Art. 37 AP I, but referred to a case brought before Nigerian courts wherein the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations.[2]

Some military manuals that apply also to non-international armed conflicts contain a definition of perfidy that reflects *grosso modo* the definition of Art. 37 AP I.[3] In a memorandum of understanding between Yugoslavia, Croatia and Serbia, the parties agreed to abide by the prohibition of perfidy as described in Art. 37 AP I. The memorandum extended, on the basis of common Art. 3 GC, the applicability of Art. 37 AP I to internal armed conflicts. A similar agreement was concluded by the parties to the conflict in Bosnia-Herzegovina.

The conclusions stated under the section dealing with the offence of '[k]illing or wounding treacherously individuals belonging to the hostile nation or army' (Art. 8(2)(b)(xi) ICC Statute) in the context of international armed conflicts also apply to a large extent to this offence when committed in the context of a non-international armed conflict. With respect to the conduct of the perpetrator (i.e. the killing or wounding by means of treachery), the offences are defined in exactly the same manner. Therefore, there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

As described in the study of Art. 8(2)(b)(xi) ICC Statute, apart from the problematic field of assassinations, it seems to be uncontroversial, on the basis of Art. 37 AP I, that perfidious or treacherous acts are constituted

[2] *Pius Nwaoga* v. *The State*, Nigeria, Supreme Court, 52 ILR 494 at 496-7. The Court found, *inter alia*:

> [t]hat the appellant and those with him were not in the rebel army uniform but were in plain clothes, appearing to be members of the peaceful private population.
>
> On these facts, if any of these rebel officers, as indeed the appellant did, commits an act which is an offence under the Criminal Code, he is liable for punishment . . . whether or not he is acting under orders.
>
> We are fortified in this view by a passage from Oppenheim's *International Law*, 7th Edition, Volume II, at page 575, dealing with War Treason, which says:
>
> Enemy soldiers – in contradistinction to private enemy individuals – may only be punished for such acts when they have committed them during their stay within a belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge, they may not, when caught, be punished for 'war treason', because their act was one of legitimate warfare. But if they exchanged their uniforms for plain clothes, and thereby appear to be members of the peaceful private population, they are liable to punishment.

[3] Argentina, Leyes de Guerra, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa (23 April 1990), para. 1.05; Australian Defence Force, Manual on Law of Armed Conflicts – Interim Edition – ADFP-37 (1994), para. 703; Presentation on the South African Approach to International Humanitarian Law, Appendix A, Chapter 4: International Humanitarian Law (The Law of Armed Conflict), (National Defence Force, 1996), para. 34c.

by two specific elements. First, the act in question must objectively be of a nature to cause or at least to induce the confidence of an adversary. This confidence must be created because of a precisely specified legal protection which the adversary himself/herself is entitled to or which the perpetrator is legally obliged to accord to the adversary. As pointed out by Art. 37 AP I, this protection must be prescribed by rules of international law applicable in armed conflict. In the context of an internal armed conflict such legal protection must be prescribed by rules of international law applicable in non-international armed conflicts. Second, the definition contains a subjective element. The act inviting confidence must be carried out intentionally in order to mislead the adversary into relying upon the protection he/she expects.[4]

With respect to the victims, however, the wording used to define the crime in a non-international armed conflict is slightly different. It uses the term 'combatant adversary' instead of 'individuals belonging to the hostile nation or army'. The term 'combatant' used in the context of a non-international armed conflict may cause some problems, since the legal instruments applicable in internal armed conflicts, including AP II, do not contain the concept of 'combatant'. There are no provisions comparable to Art. 43 AP I defining armed forces and combatants. However, common Art. 3 as well as Arts. 4(1) and 13(3) of AP II contain the essential ingredients to make a determination in so far as they make a distinction between persons taking an active/direct part in hostilities and those who do not.

One might thus conclude that combatants in non-international armed conflicts are persons taking an active/direct part in the hostilities.

NB: Comparing the wording of this offence with Art. 8(2)(b)(xi) applicable in international armed conflicts, one might ask whether the category of potential victims in internal armed conflict is more restrictive. While Art. 8(2)(b)(xi) refers to 'individuals belonging to the hostile nation or army', this crime refers only to 'combatant adversary'. This might lead to the conclusion that killing or wounding a civilian adversary (not taking an active/direct part in hostilities) by means of perfidy is not a war crime under Art. 8(2)(e)(ix) whereas – on the basis of the explicit wording – the same act would be a crime in international armed conflicts.

[4] W. A. Solf, 'Art. 37' in M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Martinus Nijhoff, The Hague, Boston and London, 1982), pp. 204 ff.; K. Ipsen, 'Perfidy' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore and Tokyo, 1997), vol. III, p. 978.

On the basis of the fact that in international armed conflict both the unqualified killing or wounding and the perfidious killing and wounding of a civilian adversary are war crimes, it may be concluded that the killing or wounding of a civilian adversary by means of perfidy might be an aggravating factor. In internal armed conflicts, however, this is not properly reflected, although at least the killing or wounding of a civilian adversary in an internal armed conflict is a war crime under Art. 8(2)(c)(i).

Art. 8(2)(e)(x) – Declaring that no quarter will be given

Text adopted by the PrepCom

War crime of denying quarter

1. The perpetrator declared or ordered that there shall be no survivors.

2. Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.

3. The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.

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

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xii) ICC Statute).

Legal basis of the war crime

Art. 4(1) third sentence AP II contains the prohibition 'to order that there shall be no survivors'. In addition, the substance of this war crime may be inferred from common Art. 3 GC which states that

> [p]ersons 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, . . . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person . . .

and that

> [t]he wounded and sick shall be collected and cared for.

These provisions clearly indicate that there must be no denial of quarter.

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of '[d]eclaring that no quarter will be given' (Art. 8(2)(b)(xii) ICC Statute) in

the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Given that both offences are formulated in exactly the same manner, there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

With respect to Art. 4(1) third sentence AP II, the ICRC Commentary supports this view:

> This is one of the fundamental rules on the conduct of combatants inspired by Hague law. It is aimed at protecting combatants when they fall into the hands of the adversary by prohibiting a refusal to save their lives if they surrender or are captured, or a decision to exterminate them. The text of the draft was more explicit and read as follows: 'It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis'. *The present wording is briefer, but does not alter the essential content of the rule*. Clearly respect for this rule is fundamental. It is a precondition governing the application of all the rules of protection laid down in the Protocol, for any guarantees of humane treatment, any rule on care to be given the wounded and sick, and any judicial guarantees would remain a dead letter if the struggle were conducted on the basis of orders to exterminate the enemy.[1]

[1] S. Junod, 'Art. 4' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4525 (emphasis added, footnotes omitted).

Art. 8(2)(e)(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

Text adopted by the PrepCom

Article 8(2)(e)(xi)–1 War crime of mutilation

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

2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.

3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.[68]

4. Such person or persons were in the power of another party to the conflict.

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

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

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

Article 8(2)(e)(xi)–2 War crime of medical or scientific experiments

1. The perpetrator subjected one or more persons to a medical or scientific experiment.

2. The experiment caused the [*sic*] death or seriously endangered the physical or mental health or integrity of such person or persons.

3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.

4. Such person or persons were in the power of another party to the conflict.

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

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

Commentary

Travaux préparatoires/Understandings of the PrepCom

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(x) ICC Statute). On the basis of the slightly different statutory language the term 'another party to the conflict' was used in Element 4 instead of 'adverse party'.

Legal basis of the war crime

According to Art. 4(2)(a) AP II, mutilation of '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted' is prohibited. Art. 5(2)(e) AP II obliges

> those who are responsible for the internment or detention of the persons referred to in paragraph 1 [persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained] . . . , within the limits of their capabilities, [to] respect the following provisions relating to such persons: . . .
>
> (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

As pointed out in the ICRC Commentary,

> [t]he aim of this [last] sentence is to prohibit medical experiments. The term 'medical procedure' means 'any procedure which has the purpose of influencing the state of health of the person undergoing it'.[1]

[1] S. Junod, 'Art. 5' in Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, Geneva, 1987), no. 4593. The whole provision reiterates Art. 11(1) AP I. The interpretation of these two purely humanitarian provisions is identical and consequently reference can also be made to the commentary on Art. 11 AP I as contained in the section on Art. 8(2)(b)(x), *ibid.*, no. 4588.

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of '[s]ubjecting 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' (Art. 8(2)(b)(x) ICC Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Although the wording used to define the crime in a non-international armed conflict is slightly different – the words 'power of another party to the conflict' instead of 'power of an adverse party' – there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

Art. 8(2)(e)(xii) – Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict

Text adopted by the PrepCom

War crime of destroying or seizing the enemy's property

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

Commentary

***Travaux préparatoires*/Understandings of the PrepCom**

The PrepCom concluded that the elements of this war crime are identical to the elements of the corresponding war crime in an international armed conflict (Art. 8(2)(b)(xiii) ICC Statute). On the basis of the slightly different statutory language, the term 'adversary' was used in Element 2 instead of 'hostile party'.

Legal basis of the war crime

The term 'destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict' is derived to a large extent from Art. 23(g) of the Hague Regulations. However, it must be noted that the Hague Regulations do not directly apply to non-international armed conflicts. An explicit treaty reference for this offence in internal armed conflicts does not exist.

Remarks concerning the elements

The conclusions stated under the section dealing with the offence of '[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the war' (Art. 8(2)(b)(xiii) ICC Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Although the wording used to define the

crime in a non-international armed conflict is slightly different – the term 'property of an adversary' is used instead of 'enemy's property', and the words 'necessities of the conflict' instead of 'necessities of war' – there are no indications in the ICC Statute or other sources that this offence has different constituent elements in an international or non-international armed conflict. However, in order to determine the lawfulness of destruction or seizure, the specific provisions applicable in non-international armed conflicts, in particular regulating the conduct of hostilities as reflected in other crimes under this Statute or as contained in AP II as well as customary international law, must be considered.

Appendix

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15 December 1999 - Original: English

Preparatory Commission for the International Criminal Court
Working Group on Elements of Crimes

New York
16–26 February 1999
26 July–13 August 1999
29 November–17 December 1999

Request from the Governments of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the text prepared by the International Committee of the Red Cross on the mental element in the common law and civil law systems and on the concepts of mistake of fact and mistake of law in national and international law*

Note verbale received on 15 December 1999 from the Permanent Missions of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretariat

The Permanent Missions of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations present their compliments to the Codification Division of the Office of Legal Affairs of the United Nations and have the honour to attach the text of a paper prepared by the International Committee of the Red Cross (see annex) in order to assist the Preparatory Commission in drafting a text on the elements of crimes for the Court. The material in the paper relates to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law.

The Permanent Missions of Belgium, Finland, Hungary, Mexico, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland to the United Nations request the circulation of the present note verbale and its annex as a document of the Preparatory Commission.

* The annex to the present document is issued in the language of submission only. Other language versions will be made available at a later date.

Annex: Paper prepared by the International Committee of the Red Cross relating to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law

CONTENTS

The mental element in the common law and civil law systems

In all modern criminal law systems an actor must fulfil two elements to be held criminally responsible: (1) through his behaviour he must have caused a certain state of affairs forbidden by criminal law (*actus reus*); (2) he must have had a defined state of mind in relation to the causing of the event or state of affairs (*mens rea*). As to this last element, the concepts into which it is subdivided differ in the common law systems from those used in the civil law systems. The purpose of the present short paper is to shed some light on this point.

I. THE COMMON LAW TRADITION

Both the English and United States Criminal Law and legal literature recognise three basic mental attitudes which are required for concluding that an actor must be held criminally responsible. They constitute the core of the overarching concept of *mens rea*.

1. Intention

Many offences require proof of a specific intention to cause a particular result. Generally, intention exists where there is either

(i) the direct intention to bring about a desired result, i.e. the actor acts with the purpose to cause the result obtained.

Example: the specific or direct intention of an actor to bring about the death of another.

(ii) the intention to bring about a desired act, plus the foresight or knowledge that a certain result is at least highly probable as a consequence of his behaviour.

Example: the intention to cause serious bodily harm with the knowledge or foresight that it will result in death. In English law, the condition of foresight or knowledge exists when either a) the result is a necessary

condition for the achievement of the purpose; or b) the result is known to be substantially certain to accompany the achievement of purpose.[1]

2. Recklessness

As stated in (1.) above, some crimes require the person intentionally or knowingly [to] commit an act or an omission. Criminal liability may also be founded on a reckless act or omission, or by recklessly causing a specific result.

Recklessness,[2] generally, consists of the state of mind of a person who does not intend to cause a harmful result but takes an unjustifiable risk of which he is aware, thus causing an unlawful result.

In English law, recklessness is satisfied if either (i) he was aware of its existence, or (ii) in the case of obvious risk he failed to give any thought. In some common law jurisdictions variations of this second component may also be termed 'wilful blindness'.

In the criminal law of the United States, to act recklessly, a person must be aware that his conduct creates a substantial risk of harm and nonetheless proceeds to act with a lack of concern regarding the danger. In the US[3] recklessness is defined as the conduct of an actor who '*consciously disregards a substantial and unjustifiable risk of harm to persons and property*'. To meet the recklessness standard in the US, generally one considers the nature and purpose of the actor's conduct, the circumstances known to him, and, whether this involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation (MPC, Sect. 2.02(2)(c)).

The difference between intention and knowledge required for certain crimes, and liability based on recklessness, depends on the level of awareness that the conduct will cause a certain result. Both levels of *mens rea* are generally considered 'subjective'. In relation to criminal negligence, though not always consistent, the distinction between recklessness and criminal negligence is the

[1] For English Law, see J. C. SMITH/B. HOGAN, *Criminal Law*, 7th edn, London/Dublin/Edinburgh, 1992, pp. 53–9, 54: '(1) *A result is intended when it is the actor's purpose (2) A court or jury may also infer that a result is intended, though it is not desired* when *(a) the result is a virtually certain consequence of the act, and (b) the actor knows that it is a virtually certain consequence*'. According to the Draft Criminal Code for England and Wales (Law Com. No. 177), 1989, cl. 18(b): '*A person acts intentionally with respect to [. . .] result when he* acts *either in order to bring it about or being aware that it will occur in the ordinary course of events*' (*ibid.*, p. 55). The Law Commission for the Reform of Criminal Law (Law Com. No. 122), 1992, proposed the following definition: '*A person* acts *[. . .] intentionally with respect to a result* when *(i) it is his purpose to cause it; or (ii) although it is not his purpose that result, he is* aware *that it would* occur *in the ordinary course of* events *if he were to succeed in his purpose of causing some other result*' (*ibid.*, p. 59).

In the United States, the Model Penal Code recognizes a similar distinction between purpose (direct intention) and acting with knowledge or foresight: see Sect. 2.02(a) and (b). C. W. THOMAS/D. M. BISHOP, *Criminal Law*, Newbury Park/London, 1987, pp. 48–52.

[2] For English Law, see SMITH/HOGAN, *op. cit.* (*supra*, n. 1), pp. 60–9.

[3] THOMAS/BISHOP, *op. cit.* (*supra*, n. 1), p. 50.

lower mental standard required for negligence. That is, that the actor should have known of the substantial and unjustifiable risk of harm resulting from his conduct. The requirement that the actor 'should' have known is generally referred to as an objective *mens rea* standard.

Recklessness does not require an actual resolve to harm, nor does it require knowledge at the time of the act that a particular harm is likely to result. Awareness that a particular harm might result is sufficient.

Example: A intends to cause bodily harm with an awareness of the risk of death, but nonetheless proceeds to act without regard to that potential danger.
In certain US jurisdictions for example, the legislature has essentially deemed certain acts to involve recklessness; e.g. liability for recklessly endangering the life of another where knowingly pointing a loaded firearm at another, though with no intention to injure.

3. Criminal negligence

Criminal negligence[4] involves the inadvertent taking of an unjustifiable risk. Being unaware of the risk, one who acts negligently has neither any desire to do harm nor any expectation that harm might result.

The main difference with recklessness is the advertent nature of the risk-taking for recklessness. For recklessness, the actor generally must be consciously aware of the risk created, whereas for negligence the actor is wrongfully unaware of that risk. As it is the inadvertent conduct that is criminalised, generally the *mens rea* element is an objective one. If the actor was unaware of the risk, but ought to have been aware, he was negligent.

Based on an objective standard, the conduct is criminalised because it constitutes a wanton disregard, or substantial departure from the standard of care that a reasonable person would observe in the situation.

The US Model Penal Code defines criminal negligence as (i) a conduct representing '*a gross deviation from the standard of care that a reasonable person would observe in the actor's situation*'; (ii) the individual is unaware but '*should be aware of a substantial and unjustifiable risk*' (Sect. 2.02(2)(c)).[5]

Example: Criminal negligence in the operation of a motor vehicle causing death. This would occur where the driving constitutes a substantial or marked departure from the standard of the ordinary person, where the actor should be aware that there is an unjustifiable risk in so doing.

[4] For English Law, see SMITH/HOGAN, *op. cit.* (*supra*, n. 1), pp. 69–70, 92.
[5] See THOMAS/BISHOP, *op. cit.* (*supra*, n. 1), p. 50.

II. THE CIVIL LAW TRADITION

1. Criminal Law systems of the Civil Law tradition distinguish sharply between intention in the broad sense and negligence.[6] Negligence, however gross, does not carry criminal responsibility unless a particular crime provides for its punishment. Criminal negligence is defined as conscious or unconscious deviation from the required standard of care which causes a result prohibited by criminal law: this may happen (i) either because the actor wrongfully does not consider the results of his action (unconscious negligence), or (ii), if the actor envisaged that occurrence, because he wrongfully relied on the idea that the result would not occur (conscious negligence).[7] The actor thus never intends, accepts or knows that the result will occur.

2. The *mens rea* qualifying for criminal responsibility is thus only that of intention in the broad sense, covering different sub-concepts to which we will immediately revert.[8] This intention in the broad sense covers all situations in which the actor acts both with will and knowledge of the underlying facts.[9] Both will and knowledge must be present in relation to all the elements of the *actus reus*. The three categories of this general intention are the following.[10]

a) Dolus directus

The concept of *dolus directus* consists basically of two variations which may be described as *dolus directus* first degree [Intention in the narrow sense, see below (i)] and *dolus directus* second degree[11] [see below (ii)].

(i) The actor has the purpose of bringing about the criminal result. It does not matter if this result is foreseen as being certain or only possible so long as the actor wants this result as it occurred. Will and knowledge apply to the same result, the will dominating.

Example: A hates B and wants to kill him. He shoots him with a revolver, B dies as a result of that act.

(ii) The actor foresees the criminal result as being certain or highly probable as a consequence of his acts. This result is not his (primary) purpose. It may be an undesired lateral consequence of the envisaged behaviour. But as the actor acts all the same he is deemed constructively to want also this lateral result.

[6] For the whole area of the *mens rea* in civil law, see the particularly well-developed German legal writings, e.g. H. H. JESCHECK, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 3rd edn, Berlin, 1982, pp. 232 *et seq.*

[7] *Ibid.*, p. 456.

[8] The substantive conceptual approach described herein is essentially the same throughout civil law countries, although specific terminology may vary.

[9] See e.g. Article 18 of the Swiss Penal Code: '*Celui-là commet intentionnellement un crime ou un délit, qui le commet avec* conscience et *volonté*'.

[10] See JESCHECK, *op. cit.* (*supra*, n. 6), pp. 238–40.

[11] In some civil law countries this concept is called 'dolus indirectus'.

Will and knowledge do not apply equally to the same matter. Knowledge of the consequences dominates, the will is defective.

Example: A places a bomb on a ship because he intends to get the sum of money at which he insured some cargo loaded on board. He knows that persons will die, although this is not his motivation. If he acts all the same, he will be deemed to have wanted these killings also through the construction of *dolus directus*.

b) Dolus eventualis

The actor foresees the result as being reasonably probable or at least possible as the consequence of his acts, and simply accepts this event in the case it occurs. He does not desire the result, but condones it in the case it happens.

Example: A drives a car in a village at an excessive speed. He may think that he might cause damage. If he internally accepts this eventuality, even if he does not care if it occurs or not, then for the purposes of the law he is deemed to have desired the result. He is thus punishable.

If the actor does not accept this result but wrongfully believes that it will not happen, he is only (grossly) negligent and may, according to the crime, not be punishable.

Example: In the case produced above, the driver may envisage the harmful result, but wrongfully think that the danger will not materialise, e.g. because he is an excellent driver, accustomed to rally-driving. In such a case, not having eventually accepted the result, he is only consciously negligent.

III. CONCLUSION: A BRIEF COMPARISON BETWEEN THE TWO LEGAL SYSTEMS

Notwithstanding the different architecture of the criminal systems and the ensuing differences between the operative concepts, it can be asserted that for the question of *mens rea* there is a substantial overlap of the notions. From the preceding analysis it can be seen that intention under common law corresponds to *dolus directus* in the first or second degree in the civil law.[12] Recklessness covers both *dolus eventualis* and some cases of gross negligence under civil law. As to this last point, there is a difference in the reach of punishable attitudes. In civil law, the cases of inadvertent recklessness fall under the heading of negligence. As negligent behaviour they are not punishable unless a specific offence criminalises such conduct. In the common law systems generally,

[12] See *supra*, II. 2. a): (i) and (ii).

inadvertent conduct is criminalised in certain circumstances as criminal negligence. Finally, the concepts of negligence are substantially analogous.

It may thus be concluded that the differences between the two systems in our context are real, but more conceptual than substantive.

The concepts of mistake of fact and mistake of law in national and international law

I. MUNICIPAL LAW

1. In both common and civil law criminal law systems *knowledge of facts* underlying the *actus reus* is an essential element for criminal liability.

In the common law systems,[1] mistake of fact is recognised as a defence. Thus, in English law, as stated in the *Morgan* case (English Court of Appeal)[2] it was held that a mistake of fact is a defence where it prevents the actor from having the *mens rea* required. Where the law requires intention or recklessness with respect to some element in the *actus reus*, a mistake, whether reasonable or not, will excuse. Where the law requires only negligence, then only a reasonable mistake can afford a defence since an unreasonable mistake is itself a negligent act. What can be added is that common law did not elaborate a general theory on the defence of mistake of fact. Thus the question turns to a large degree upon the particular characteristics and requirements of each crime.

In the civil law systems the *mens rea* of the actor must be present in relation to all the elements of the *actus reus*. Error of fact is thus considered to be a circumstance extinguishing any intention to commit the crime under consideration.[3] It follows that the actor cannot be punished for crimes which carry criminal liability only in the case of intentional commission.[4] On the other hand the actor remains punishable for negligence if (i) he could and should have avoided the error by displaying the care to be reasonably expected and if (ii) the crime provides for punishment also in the case of negligence.[5]

It can be seen that the defence of error of fact has a more general standing in the civil law systems. Its reach may thus also be larger on the substantive level.

[1] See e.g. J. C. SMITH/B. HOGAN, *Criminal Law*, 7th edn, London/Dublin/Edinburgh, 1992, pp. 215–18.

[2] *Ibid*., pp. 215–16.

[3] See e.g. Article 19 of the Swiss Criminal Code. See also P. NOLL/S. TRECHSEL, *Schweizerisches Strafrecht, Allgemeiner Teil*, I, 2nd edn, Zurich, 1986, pp. 96–100. H. H. JESCHECK, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 3rd edn, Berlin, 1978, pp. 245 *et seq.*

[4] Intention covers in this context action done with a purpose to reach the criminal result, *dolus directus* and *dolus eventualis*. On these concepts, see the Paper 'The Subjective Criminal Element in the Common Law and in the Civil Law Systems'.

[5] See e.g. Article 19(2) of the Swiss Criminal Code. Cf. NOLL/TRECHSEL, *op. cit*. (*supra*, n. 3), p. 97. JESCHECK, *op. cit*. (*supra*, n. 3), p. 248.

2. In both common and civil law criminal systems *ignorance of the law* is treated differently from ignorance of facts (even if the line between both may be difficult to draw in a specific case). It is a good defence in criminal law only under exceptional circumstances.

In the common law systems, ignorance of the law is generally held to be no defence to criminal liability.[6] This rule applies very strictly in English law. It has been held by English courts that even if it was quite impossible for the actor to know of the prohibition of law, this was no defence for him. The same is true in case of competent legal advice which was held not to be available as a defence. There are exceptions to this rule only if the *actus reus* of a particular crime is so defined as to contemplate mistake of law, excluding it from the sphere of criminal guilt.[7]

In the civil law systems, the actor incurs criminal liability only if (i) his acts correspond objectively to the behaviour prohibited by a particular crime, (ii) are illegal, and (iii) are also culpable, *i.e.* the actor has some individual fault in performing them. It must be possible to reproach the acts to the individual who committed them.[8] Such a fault, necessary for conviction, can be excluded in a particular case because of a relevant error or ignorance of law.[9] The general rule of the civil law systems is the same as that known to common law. It is expressed in the old rule of law that ignorance of the law is always at one's own risk (*ignorantia iuris nocet*).[10] Because of the condition of imputation of individual fault, the civil law systems recognised more generously some exceptions. They all have in common that the actor acts without being aware of his fault. For example, in the jurisprudence of the Swiss Federal Court, the following reasons have been recognised as a good defence: (1) wrong legal advice by officials; (2) previous acquittal by a court of law for the same behaviour; (3) a long illegal practice never challenged before; (4) completely unclear laws; (5) absence of any doubt as to the legality of the acts because of the particular circumstances and personality of the actor.[11]

[6] SMITH/HOGAN, *op. cit.* (*supra*, n. 1), pp. 80–3. In *Grant* v. *Borg* (2 A11 ER, p. 263), Lord Bridge said that '*the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word 'knowingly' in a criminal statute as requiring not merely knowledge of facts material to the offender's mind, but also knowledge of the relevant law, would be revolutionary, and, to my mind, wholly unacceptable*'.

[7] SMITH/HOGAN, *op. cit.* (*supra*, n. 1), pp. 83–5.

[8] See NOLL/TRECHSEL, *op. cit.* (*supra*, n. 3), pp. 127 *et seq.*; JESCHECK, *op. cit.* (*supra*, n. 3), pp. 363 *et seq*.

[9] See e.g. Article 20 of the Swiss Criminal Code. See also NOLL/TRECHSEL, *op. cit.* (*supra*, n. 3), pp. 140–4; JESCHECK, *op. cit.* (*supra*, n. 3), pp. 368–72.

[10] See already the Gloss *'Qui sciens' ad Codex Justinianus*, 2, 11, (12), 15.

[11] As to this last point the Federal Court (in: *Arrêts du tribunal fédéral*, vol. 104, sect. IV, pp. 221 *et seq.*) had to deal with the Trial of a 19-year-old Sicilian living for five years in Switzerland, who had had sexual intercourse with his 15-year-old Sicilian girlfriend. It was held that for the accused the only crime he knew of would have been to have such intercourse without marrying the girl. This was in fact his intention. The age-limit of 16 years was absolutely unknown to him because of his particular cultural roots.

As can be seen, the civil law systems grant the actor a larger degree of benefit for the subjective contingencies which may have obscured his awareness of acting against the law.

II. INTERNATIONAL CRIMINAL LAW

1. International Criminal Law follows to a large extent the principles developed under municipal law. The Nuremberg and Tokyo Trials may be said to have already settled the law on these points.

2. As to *ignorance of facts*, the several war crimes tribunals following World War II have been at pains to demonstrate that each accused convicted had individually knowledge of the facts underlying his crime.[12] If no knowledge or no sufficient knowledge could be proved, the accused was acquitted.[13] Even if knowledge could be proved but there was no sufficient proof of the defendant's criminal connection with the deeds, the defendant was acquitted.[14] Sometimes the tribunals insisted that the accused 'must have known' or 'could not have ignored' the facts.[15] This should not be seen as a constructive imputation of inexistent knowledge, but as a question of proof. The tribunal was satisfied in those cases that due to the circumstances the defendant knew of the facts. Thus the question is one of indirect proof.

The question of error as to facts arose in several contexts, and was solved by the tribunals by carefully scrutinising the state of mind of the accused and the credibility of the defence with regard to surrounding circumstances. It was examined, e.g. in the context of (1) executioners who thought that the executions which they carried out were legal, *i.e.* founded on a lawful death sentence;[16] (2) the shooting of prisoners of war who were thought to be trying

[12] See e.g. the *K. Brandt* (*The Medical*) *Trial*, in: *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. II, Washington (without date), pp. 194–5, 201–2, 206, 209, 224, 226, 237, 239, 256–7, 260–2, 266 271, 279, 284, 295–6. *J. Altstötter (The Justice) Trial, ibid*., vol. III, Washington, 1950, pp. 1079–81 (generally), pp. 1084, 1093–4, 1099, 1129, 1142–4, 1176. *O. Ohlendorf Trial, ibid.*, vol. IV, Washington, 1950, pp. 543, 550, 570–1, 577, 580. *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, pp. 978–80 (generally), pp. 984, 989, 995, 1007, 1009, 1017, 1020–2, 1031–1, 1033, 1036, 1039, 1043–6, 1049–50. *IG Farben Trial*, *ibid.*, vol. VIII, Washington, 1952, pp. 1155–6, 1159–60, 1162–3, 1165, 1167, 1169, 1189, 1193, 1195. See also the *Von Leeb (The High Command) Trial*, *ibid.*, vol. XI, Washington, 1950, pp. 553 *et seq.* and the *W. List Trial*, *ibid*., vol. XI, Washington, 1950, pp. 1262 *et seq.*

[13] See e.g. *K. Brandt (The Medical) Trial*, *ibid.*, vol. II, Washington (without date), pp. 218, 227, 249, 251. *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, pp. 1009, 1017. *IG Farben Trial*, *ibid.*, vol. VIII, Washington, 1952, pp. 1163–4, 1165, 1193, 1195.

[14] See e.g. *K. Brandt (The Medical) Trial*, *ibid.*, vol. II, Washington (without date), pp. 250–1, 276. *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, p. 1002. *E. Milch Trial*, *ibid.*, vol. II, Washington (without date), p. 814, per Judge Musmanno.

[15] *J. Altstötter (The Justice) Trial, ibid.*, vol. III, Washington, 1950, pp. 1106, 1116–17 (ignorance *'overtaxes the credulity of this Tribunal'*; *'could hardly have escaped the attention of [. . .]'*). *O. Pohl Trial*, *ibid.*, vol. V, Washington, 1950, p. 1055 (*'it was his duty to know'*). *Von Leeb (The High Command) Trial*, *ibid.*, vol. XI, Washington, 1950, p. 538. *W. List Trial*, *ibid.*, vol. XI, Washington, 1950, p. 1281.

[16] United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals*, vol. V, London, 1948, pp. 79–80 (in the context of the *T. Hisakasu Trial*).

to escape;[17] (3) a mistake as to the status of persons being (escaped) prisoners of war;[18] (4) *bona fide* mistakes as to the existence of the conditions of other defences, e.g. military necessity.[19] The question arose most frequently as to the duties of military commanders to control their troops: did those commanders know of the (widespread) crimes committed in the area under their command? The tribunals uphold a quite strict duty of the commanders in these cases.[20]

It can be seen that ignorance of fact is a defence in international criminal law, but that the conditions of its applications are strict. This can be easily explained from the context. It was difficult to maintain that the major war criminals appearing before the various post-World War II courts had lacked knowledge of certain quite manifest and widespread facts.

3. *Ignorance of law* is a distinct type of defence which is admitted only in even more exceptional circumstances. This holds true because the defendant is not presumed to know the facts (as to this proof must be administered), but is presumed to know the law. No legal system could rest on the opposite presumption. Thus the post-World War II tribunals never scrutinised the knowledge of law for each accused as they did for the knowledge of facts. They exceptionally raised the point in case the accused manifestly or purportedly was under the influence of such an error, which, if excusable, led to his acquittal.[21] The principle was stated in the *Flick Trial: '[The accused] must be expected to ascertain and keep within the applicable law. Ignorance thereof will not excuse guilt but may mitigate punishment.'*[22] According to the general principle *ignorantia iuris neminem excusat* the standard of proof was held to be high. In particular, it was held not being able to be discharged for crimes that offend

[17] The defence was generally denied on the facts of the case. See the synthesis of the Nuremberg case law in: *Law Reports* . . . (*supra*, n. 16), vol. XV, London, 1949, pp. 186–7.

[18] *Stalag Luft III* case, *Law Reports* . . . (*supra*, n. 16), p. XI, London, 1949, pp. 31 *et seq.*, pp. 35, 39, 44. What was pleaded was a mistake of fact, i.e. that the accused did not realise that the persons looked for were escaped prisoners of war but thought that they were spies or saboteurs. The tribunal denied such a mistake on the facts of the case.

[19] *A. Krupp Trial*, *Law Reports* . . . (*supra*, n. 16), vol. X, London, 1949, p. 148.

[20] The standard was described in the *W. List Trial*, *Law Reports* . . . (*supra*, n. 16), vol. VIII, London, 1949, p. 70: '*An army commander will not ordinarily be permitted to deny knowledge of reports at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein [. . .]*'. See also the *Yamashita Trial*, *ibid.*, vol. IV, London, 1948, pp. 3–4, 30, 33, 35 (judgment); *S. Kou* case, *Y. Sakamoto* case, *Y. Tachibana* case (*ibid.*, p. 86); *K. Meyer Trial*, *ibid.*, pp. 100, 108. *B. Masao Trial*, *ibid.*, vol. XI, London, 1949, pp. 56–61. *E. Shimichi* and *A. Hatzao* cases, *ibid.*, pp. 59–60. *Von Leeb Trial*, *ibid.*, vol. XII, London, 1949, pp. 76–7. The *Tokyo Trial*, in: B. V. A. ROELING/C. F. RUETER (eds.), *The Tokyo Judgment*, Amsterdam, 1977, pp. 30–1.

[21] See e.g. the *J. Altstötter (The Justice) Trials, Trials* . . . (*supra*, n. 12), vol. III, Washington, 1950, p. 1138 (knowledge of the violation of international law). *IG Farben Trial*, *Trials* . . . (*supra*, n. 12), vol. VIII, Washington, 1952, pp. 1157–60.

[22] *Law Reports* . . . (*supra*, n. 16), vol. IX, London, 1949, p. 23. See also the *Buck Trial*, *ibid.*, vol. V, London, 1948, p. 44.

the elementary bonds of human decency and which must thus be known to be illegal to anyone (*mala per se*).[23] On the other hand, exceptions were made in certain cases of vagueness or uncertainty of the law.[24] In the *Von Leeb (The High Command) Trial*, it was said that the accused cannot be held criminally responsible for a mere error in judgement as to disputable legal questions, that he cannot be expected to draw fine distinctions and conclusions as to the legality of superior orders.[25] In the *Latza* case, a Norwegian tribunal held that the accused had believed that national law was binding on him and therefore admitted that the accused had acted, in that particular circumstance, under an excusable misapprehension of the law.[26]

The question of mistake as to illegality was often pleaded in the context of illegal commands. If this illegality was not apparent, there could have been absence of *mens rea* to commit a crime. The accused cannot be held to draw fine legal distinctions.[27] In the *Almelo* case, the Judge Advocate said that the test was the belief of a reasonable man.[28] But if the accused had specific legal knowledge, the tribunals applied much higher standards.[29] The question of absence of *mens rea* as to such illegal commands merges largely into the broader one of superior's orders which is not to be considered here.

From the foregoing it may be concluded that ignorance of the law was accepted as an excuse in very exceptional cases where the individual could not be confronted with a reproach of personal guilt. Some of the cases, e.g. on the obscurity or vagueness of the law, use categories known to municipal jurisprudence.

III. CONCLUSION

The subjective element of *mens rea* has some role also in the law of defence pleas, especially in the cases of mistake as to the relevant incriminated facts or as to the applicable law. The knowledge of facts must be shown by the ordinary standards of proof. There is no presumption as to such knowledge. The ordinary rule on proofs in criminal cases may apply: *in dubio pro reo*, in case of doubt

[23] *Von Weizsäcker (The Ministries) Trial, Trials* . . . (*supra*, n. 12), vol. XIV, Washington, 1952, p. 339: '*[The accused] cannot be heard to say that he did not know the acts in question were not criminal. Measures which result in murder, ill-treatment, enslavement, and other inhumane acts perpetrated on prisoners of war, deportation, extermination, enslavement, and persecution on political racial, and religious grounds, and plunder and spoliation of public and private property are acts which shock the conscience of every decent man. These are crimes* per se'.

[24] See generally *Law Reports* . . . (*supra*, n. 16), vol. XV, London, 1949, pp. 183–6.

[25] *Ibid.*, vol. XII, London, 1949, pp. 73–4.

[26] *Law Reports* . . . (*supra*, n. 16), vol. XIV, London, 1949, p. 69. The tribunal found to that effect also because international law was held to be uncertain on the point at issue (*ibid.*, pp. 59–60).

[27] See above, footnote 25.

[28] *Law Reports* . . . (*supra*, n. 16), vol. I, London, 1947, p. 41.

[29] See e.g. the *J. Buhler Trial*, *Law Reports* . . . (*supra*, n. 16), vol. XIV, London, 1949, p. 38 and the *W. Von Leeb Trial*, *ibid.*, vol. XII, London, 1949, pp. 116–7.

for the accused. It is thus on the prosecution to show that the accused knew (or could not have ignored) the relevant facts. When one speaks of error or ignorance as a defence, it is generally an error or an ignorance of fact which is meant; for only an error of fact is a general defence.

On the contrary, ignorance of law is only a very exceptional defence as no criminal law could perform its functions under a broad exception of this kind. The objective of promoting essential social peace could not be reached. Moreover the individuals would be incited not to take cognisance of the law. Knowledge of the law must thus not be proved, but is presumed. Such knowledge of the law may be presumed with particular justification in such areas of the law as criminal law, dealing ordinarily with the socially most grave deviations from lawful conduct. It is then to the accused to show that in the particular circumstances and his specific situation he ignored the law for good reasons. Jurisprudence has worked out some categories where the defence holds good. If the accused does not discharge this heavy burden of proof, he cannot avoid conviction: *in dubio contra reum*, in case of doubt against the accused. All this shows the exceptional character of the defence of error of law in criminal cases.

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Note

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References to individual cases are included when they are dealt with at some length in the text or play a particularly important role. Otherwise they are dealt with collectively (eg 'post-WW II case law' or omitted from the index). No attempt is made to index the cases themselves other than in relation to the main thread of discussion. For a full record of cited cases, see the Tables of Cases (alphabetical and by jurisdiction).

Elements of Crime (EOC), apart from the General Introduction to the EOC (GI(EOC)), are not indexed as such but are treated by reference to the ICC Statute under the relevant subject headings. The absence of any reference to the mental element (mens rea) under a particular crime means there is no relevant case law or other discussion.