

**GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY:
TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL
CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL
CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

Human Rights Watch

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ACKNOWLEDGEMENTS ii
FOREWORD..... iii

**CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR
RWANDA**

TABLE OF CONTENTS 1
SUMMARY OF JUDGMENTS AGAINST THE ACCUSED..... 9
LISTING OF CASES INCLUDED..... 11
TOPICAL DIGEST 12
ALPHABETICAL INDEX..... 90

**CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE
FORMER YUGOSLAVIA**

TABLE OF CONTENTS 98
SUMMARY OF JUDGMENTS AGAINST THE ACCUSED..... 113
LISTING OF CASES INCLUDED..... 120
TOPICAL DIGEST 122
ALPHABETICAL INDEX..... 267

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FOREWORD

This book contains separate digests of the jurisprudence of the ICTR (ICTR Digest) and the ICTY (ICTY Digest). The book provides quick summaries or actual quotes from the Tribunals' judgments, which are organized topically. The digests focus on case law regarding genocide, crimes against humanity, war crimes, individual responsibility, command responsibility, and sentencing. They do not address all issues arising in a case, such as evidentiary rulings or other motion practice, and only include judgments publicly available through October 1, 2003, for the ICTR Digest, and July 30, 2003, for the ICTY Digest. The ICTR Digest additionally includes the judgment in *Prosecutor v. Nabimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, widely known as the "Media Case," issued on December 3, 2003. Many of the judgments quoted contain citations to other judgments or documents. Human Rights Watch has not reproduced those here. Please refer to the official judgments for these additional citations.

This book does not contain analysis of or commentary on the decisions themselves. The digests are quick reference tools to assist practitioners and researchers as they familiarize themselves with the case law interpreting the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute)* and the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute).** They are not designed to substitute for reading the actual decisions. The decisions of the ICTR can be found on the website of the ICTR at <http://www.ictt.org/>, and the decisions of the ICTY can be found on the website of the ICTY at <http://www.un.org/icty/index.html>.

* *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/Res/955 (1994), as amended, found at <http://www.ictt.org/ENGLISH/basicdocs/statute.html>.

** *See* Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/Res/827 (1993), as amended, found at <http://www.un.org/icty/legaldoc/index.htm>.

**CASE LAW OF THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

SUMMARY OF JUDGMENTS AGAINST THE ACCUSED	9
LISTING OF CASES INCLUDED	11
I) GENOCIDE (Article 2)	12
a) Statute.....	12
b) Generally.....	12
i) elements.....	12
ii) genocide is international customary law and <i>jus cogens</i>	12
c) Mental state (<i>mens rea</i>) (special intent or <i>dolus specialis</i>).....	13
i) generally.....	13
(1) defined.....	13
(2) intent required prior to commission of acts.....	13
(3) intent can be inferred.....	13
(4) factors in assessing mental state (<i>mens rea</i>).....	14
(5) specific plan not required, but is strong evidence of intent.....	14
ii) “intent to destroy in whole or in part”.....	15
(1) considerable number required or substantial part of the group.....	15
(2) actual extermination of entire group not required.....	15
(3) not necessary to establish genocide throughout country.....	15
(4) destruction.....	15
(a) sexual violence as destruction.....	15
iii) “a national, ethnical, racial, or religious group, as such”.....	16
(1) meant to cover any stable and permanent group.....	16
(a) whether group membership is subjective or objective.....	16
(2) interpretation of “as such”.....	17
(3) national group.....	17
(4) ethnical/ethnic group.....	17
(a) application.....	17
(b) association of ethnic group with political agenda.....	18
(5) racial group.....	18
(6) religious group.....	18
(7) mistreatment of persons not included in enumerated group not genocide.....	19
iv) application.....	19
d) Underlying offenses.....	20
i) killing members of the group.....	20
(1) elements.....	20
(2) intent required.....	20
(3) causation.....	21
(4) application.....	21

ii) causing serious bodily or mental harm to members of the group.....	21
(1) general definition	21
(2) no requirement of permanency or irremediability.....	22
(3) rape and sexual violence can qualify	22
(4) threats during interrogation can qualify.....	22
(5) intent to inflict “serious mental harm” required.....	22
iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part	22
iv) imposing measures intended to prevent births within the group.....	23
v) forcibly transferring children of the group to another group	23
e) Punishable acts.....	24
i) genocide.....	24
ii) conspiracy to commit genocide	24
(1) definition	24
(2) mental state (<i>mens rea</i>)	24
(3) conspiracy need not be successful.....	24
(4) a formal agreement is not needed	24
(5) conspiracy can be inferred/knowledge requirement.....	24
(6) institutional coordination.....	25
(7) conspiracy is an inchoate offense.....	25
(8) whether court may convict for both genocide and conspiracy to commit genocide for same acts.....	25
(9) application.....	25
iii) direct and public incitement to commit genocide.....	26
(1) direct	26
(2) public	26
(3) mental state (<i>mens rea</i>) for inciting genocide.....	27
(4) incitement need not be successful/causal relationship not required to find incitement.....	27
(5) application.....	28
(a) distinguishing incitement from legitimate use of media.....	29
a. importance of tone.....	29
b. importance of context	29
c. distinguish informative use	30
d. distinguish legitimate civil defense.....	30
e. ethnic expressions should receive more scrutiny	30
f. international law is point of reference.....	30
iv) attempt to commit genocide.....	30
v) complicity in genocide.....	30
(1) definition	30
(a) complicity requires a positive act	31
(2) mental state (<i>mens rea</i>)	31
(a) complicity in genocide does not require genocide’s special intent	31
(3) genocide required.....	32
(4) principal perpetrator need not be identified or convicted.....	32
(5) same person cannot be convicted of genocide and complicity regarding the same act	32

(6) difference between complicity and individual criminal responsibility for genocide	32
II) CRIMES AGAINST HUMANITY (Article 3).....	33
a) Statute.....	33
b) Elements	33
i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health (element 1).....	33
ii) the act must be committed as part of a “widespread or systematic attack” (element 2).....	34
(1) attack.....	34
(2) random acts or acts committed for personal reasons excluded.....	34
(3) “widespread <i>or</i> systematic” not both	34
(4) widespread	34
(5) systematic	35
(a) whether plan or policy required	35
(6) application.....	35
iii) the act/attack must be committed against members of the civilian population (element 3)	36
(1) confusion whether term is “act” or “attack”.....	36
(2) civilian defined	36
(3) presence of non-civilians does not strip population of its civilian character.....	37
(4) population	37
iv) the attack must be on national, political, ethnic, racial or religious grounds (discriminatory grounds) (element 4).....	37
(1) political grounds.....	38
(2) national, ethnical, racial, religious grounds	38
v) mental state (<i>mens rea</i>) (element 5)	38
(1) knowledge that the accused’s act is part of a widespread or systematic attack on a civilian population.....	38
(2) discriminatory intent not required for acts other than persecution.....	38
vi) both state and non-state actors covered.....	39
c) Underlying offenses	39
i) the individual acts contain their own elements and need not contain the elements of crimes against humanity	39
ii) murder.....	39
(1) defined.....	39
(2) mental state (<i>mens rea</i>)	40
iii) extermination	40
(1) defined.....	40
(2) mental state (<i>mens rea</i>)	41
(3) application.....	42
iv) enslavement.....	42

v)	deportation.....	42
vi)	imprisonment.....	42
vii)	torture	42
	(1) defined.....	42
	(2) rape can be torture.....	43
	(3) no “public official requirement”.....	43
viii)	rape and sexual violence.....	43
	(1) defined.....	43
	(2) mental state (<i>mens rea</i>).....	44
ix)	persecutions on political, racial and religious grounds	44
	(1) elements.....	44
	(2) intent/mental state (<i>mens rea</i>).....	45
	(3) persecution also defined in terms of impact.....	45
	(4) persecution is broader than incitement	45
	(5) perpetrator can be held accountable for both persecution and extermination	45
	(6) application.....	46
	(a) application to hate speech.....	46
x)	other inhumane acts.....	46
	(1) defined.....	46
	(a) generally	46
	(b) sexual violence included	47
	(c) third party suffering	47
	(2) mental state (<i>mens rea</i>).....	47
	(a) generally	47
	(b) mental state for third party suffering.....	48
	(3) application.....	48
III)	WAR CRIMES (Article 4).....	48
a)	Statute.....	48
b)	Generally.....	49
	i) applicability needs to be assessed	49
	ii) Common Article 3 and list of prohibited acts in Statute are part of customary international law; alternatively, Rwanda was party to the Geneva Conventions and Protocols, and criminalized the enumerated acts.....	49
	iii) individual criminal responsibility applies.....	50
	iv) “serious violation” required; list of prohibited acts in Article 4 of the Statute are serious violations	50
c)	Elements	50
	i) armed conflict requirement (element 1)	51
	(1) armed conflict of a non-international character required.....	51
	(a) “armed conflict of a non-international nature” defined.....	51
	(b) internal disturbances excluded.....	52
	(2) application of Common Article 3 and Additional Protocol II depend on objective criteria	53

(3) type of conflict required for Additional Protocol II - additional requirements.....	53
(a) armed forces.....	54
(b) responsible command.....	54
(c) “sustained and concerted military operations” and implementing Additional Protocol II	54
ii) link between the accused and the armed forces - rejected.....	54
(1) civilians can be liable for war crimes.....	55
iii) geographic jurisdiction (<i>ratione loci</i>) (element 2)	55
(1) once criteria are met, apply to whole state, not just “theatre of combat”	55
iv) personal jurisdiction (<i>ratione personae</i>) (element 3).....	56
(1) class of victims - civilians protected.....	56
(2) the presence of non-civilians does not deprive the population of its civilian character	56
(3) analyze whether the victim was directly taking part in the hostilities.....	57
v) nexus between the crime and the armed conflict (element 4).....	57
(1) direct connection required/offense must be closely related to the hostilities	57
(2) actual hostilities not required in area of crimes; actual hostilities not required at exact time of crimes	58
vi) mental state (<i>mens rea</i>) (element 5)	58
d) Underlying offenses	58
i) violence to life, health and physical or mental well-being of persons, in particular, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment	58
(1) murder	58
(2) torture	58
ii) collective punishments	59
iii) taking of hostages.....	59
iv) acts of terrorism	59
v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault	59
(1) outrages upon personal dignity includes sexual violence.....	59
(2) humiliating and degrading treatment	59
(3) rape.....	59
(4) indecent assault	60
vi) pillage	60
vii) 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	60
viii) threats to commit any of the foregoing acts	60
IV) INDIVIDUAL CRIMINAL RESPONSIBILITY (Article 6(1))	60
a) Statute.....	60

b) Generally.....	60
i) required elements	60
ii) crime must have actually occurred for Article 6(1) liability, but not for genocide.....	60
iii) individual and command responsibility distinguished.....	61
iv) planning, instigating, ordering, committing, aiding, abetting read disjunctively.....	61
v) can be liable for acts committed by others.....	61
c) Participation: that the accused’s conduct contributed to the commission of an illegal act (element 1).....	61
i) generally - contribution must be substantial	61
ii) planning.....	62
iii) instigating/inciting.....	62
(1) generally.....	62
(2) no “direct and public” requirement	62
iv) ordering.....	62
v) committing.....	63
vi) aiding and abetting.....	63
(1) defined.....	63
(2) either aiding <i>or</i> abetting alone suffices.....	63
(3) mental state (<i>mens rea</i>)	63
(a) specific intent required for aiding and abetting genocide	63
(4) assistance must substantially contribute/have substantial effect	64
(5) assistance need not be indispensable.....	64
(6) assistance need not be at same time offense committed.....	64
(7) presence not required.....	64
(8) mere encouragement can suffice	65
(9) presence combined with authority can constitute assistance.....	65
vii) acting with common criminal purpose: may give rise to liability for “committing” or “aiding and abetting”	65
d) Mental state (<i>mens rea</i>) (element 2).....	65
e) Application	66
V) COMMAND RESPONSIBILITY (Article 6(3)).....	67
a) Statute.....	67
b) Generally.....	67
i) liability for both individual criminal responsibility and command responsibility possible.....	67
c) Elements	67
i) the existence of a superior-subordinate relationship of effective control (element 1).....	68
(1) superior-subordinate relationship.....	68
(2) effective control	68
(3) consider <i>de facto</i> as well as <i>de jure</i> control/formal status alone not determinative	68
(4) applies to civilian as well as military commanders.....	69

(5) whether civilians require control similar to military for culpability	69
ii) mental state (<i>mens rea</i>) (element 2)	70
(1) knowledge or constructive knowledge that the crime was about to be or was being, or had been committed	70
(2) responsibility is not based on strict liability	71
(3) different test for mental state of civilian and military commanders	71
iii) the failure to take necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator (element 3)	71
(1) attempts to prevent or punish must be considered except where the accused ordered the crimes	72
d) Application	72
VI)DEFENSES.....	73
a) Alibi and special defenses.....	73
i) excerpts from Rule 67: reciprocal disclosure of evidence.....	73
ii) burden of proof for alibi defense	73
iii) notice for alibi defense	73
iv) rebuttal for alibi defense.....	74
VII)CHARGING, CONVICTING AND SENTENCING.....	74
a) Cumulative charges and convictions	74
i) cumulative charges permitted.....	74
ii) cumulative convictions based on same conduct permitted only where crimes involve a materially distinct element.....	74
iii) application – multiple convictions.....	75
(1) permitted for genocide and crimes against humanity.....	75
(2) permitted for genocide, crimes against humanity and war crimes.....	76
b) Sentencing/penalties.....	76
i) instruments governing penalties	76
(1) Article 23: Penalties	76
(2) Rule 101 of the Rules of Procedure and Evidence.....	76
ii) generally.....	77
(1) considerations in Statute and Rules not mandatory nor exhaustive.....	77
(2) only prison sentences dispensed.....	77
(3) restitution	77
(4) goal of penalties: retribution, deterrence, rehabilitation, protecting society, justice, ending impunity, promoting reconciliation, and restoring peace.....	78
iii) determining penalties.....	78
(1) taking account of Rwandan law/practice.....	78
(2) ranking of crimes: genocide is “crime of crimes,” then crimes against humanity; war crimes are lesser	79

(3) gradation in sentencing: imposing highest penalties on those who planned or ordered atrocities, or those who committed crimes with especial zeal or sadism	79
(4) range of sentences.....	80
(5) single sentence: discretionary.....	80
iv) individualization of penalties.....	81
(1) aggravating circumstances.....	82
(2) mitigating circumstances.....	85
(a) generally	85
(b) application	85
VIII) MISCELLANEOUS.....	87
a) “Equality of arms” between the parties is not the same as equality of means and resources	87
b) Presumption of impartiality attaches to judge and tribunal.....	87
c) Selective prosecution.....	88
d) Guilty plea: conditions for accepting a plea agreement.....	88
i) guilty plea must be voluntary.....	88
ii) guilty plea must be informed.....	89
iii) guilty plea must be unequivocal.....	89
ALPHABETICAL INDEX.....	90

SUMMARY OF JUDGMENTS AGAINST THE ACCUSED

Jean-Paul Akayesu, former bourgmestre (mayor) of the Taba commune, was convicted of genocide, crimes against humanity (extermination, murder, rape, torture, and other inhumane acts), and direct and public incitement to commit genocide. He was sentenced to life imprisonment. The Appeals Chamber affirmed the verdict of guilty entered against Akayesu on all counts.

Ignace Bagilishema, former bourgmestre of the Mabanza commune which belonged to the Kibuye Prefecture, was unanimously acquitted on three counts, including genocide, and found not guilty by the majority of the Chambers of the remaining four charges which included complicity in genocide and crimes against humanity. Thus, he was acquitted on all counts. The Appeals Chamber affirmed the acquittal with regard to all counts.

Jean-Bosco Barayagwiza, high ranking board member of the Comite d'Initiative of the Radio Television Libre des Mille Collines (RTLM) and founding member of the Coalition for the Defence of the Republic (CDR), was convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution). The Trial Chamber found that he should have been sentenced to life imprisonment, but by order of the Appeals Chamber, the Trial Chamber granted him a reduction in sentence. Accordingly, Barayagwiza was sentenced to imprisonment for a period of thirty-five years.

Jean Kambanda, former prime minister of the Interim Government of Rwanda, pled guilty to the six counts against him: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (murder and extermination). He was sentenced to life imprisonment. The Appeals Chamber affirmed the conviction against Kambanda on all counts.

Clement Kayishema, former prefect of Kibuye Prefecture, was convicted of genocide and sentenced to life imprisonment. The Appeals Chamber affirmed the verdict of guilty entered against Kayishema on all counts.

Alfred Musema, former director of the Gisovu Tea Factory and economic leader in his prefecture, was convicted of genocide and crimes against humanity (extermination and rape). He was sentenced to life imprisonment. The Appeals Chamber affirmed the verdict of guilty entered against Musema for genocide and extermination as a crime against humanity, but overturned the conviction for rape as a crime against humanity.

Ferdinand Nahimana, founder and ideologist of the RTLM, was convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution). He was sentenced to life imprisonment.

Hassan Ngeze, owner and chief editor of the newspaper *Kangura*, was convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution). He was sentenced to life imprisonment.

Eliezer Niyitegeka, former minister of information of Rwanda's Interim Government, was convicted of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and crimes against humanity (murder, extermination, and other inhumane acts). He was sentenced to imprisonment for the remainder of his life. The appeal was pending at the time of publication of this document.

Elizaphan Ntakirutimana, a senior pastor of the Seventh-Day Adventist Church, was convicted of aiding and abetting genocide and sentenced to imprisonment for a period of ten years. The appeal was pending at the time of publication of this document.

Gerard Ntakirutimana, a medical doctor practicing at the Mugonero Adventist Hospital, was convicted of genocide and crimes against humanity (murder). He was sentenced to imprisonment for a period of twenty-five years. The appeal was pending at the time of publication of this document.

Georges Ruggiu, a Belgian journalist, pled guilty to the crime of direct and public incitement to commit genocide and crimes against humanity (persecution). He was sentenced to imprisonment for a period of twelve years on each count to be served concurrently.

Georges Rutaganda, former second vice-president of the youth wing of the Interahamwe militia, was convicted of genocide and crimes against humanity (extermination, and murder). He was sentenced to life imprisonment. The Appeals Chamber confirmed the conviction for genocide and extermination as a crime against humanity, but overturned the conviction for murder as a crime against humanity. The Appeals Chamber entered two new convictions for murder as a violation of Common Article 3 of the Geneva Conventions. The appeal decision was not publicly available at the time of publication.

Obed Ruzindana, former businessman in Kigali, was convicted of genocide and sentenced to imprisonment for a period of twenty-five years. The Appeals Chamber affirmed that conviction.

Laurent Semanza, former bourgmestre of Bicumbi commune, was convicted of complicity to commit genocide and of crimes against humanity (extermination, torture and murder). He was sentenced to imprisonment for a period of twenty-five years. The appeal was pending at the time of publication of this document.

Omar Serushago, a former *de facto* leader of the Interahamwe in Gisenyi Prefecture, pled guilty to genocide and crimes against humanity (murder, extermination, and torture). He was sentenced to imprisonment for a single term of fifteen years. The Appeals Chamber affirmed the sentence.

LISTING OF CASES INCLUDED

This compendium was completed on October 1, 2003, and includes the following cases:

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998.

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), October 2, 1998.

Prosecutor v. Akayesu, Case No. ICTR-96-4-A (Appeals Chamber), June 1, 2001.

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T (Trial Chamber), June 7, 2001.

Prosecutor v. Kambanda, Case No. ICTR-97-23 (Trial Chamber), September 4, 1998.

Prosecutor v. Kambanda, Case No. ICTR-97-23-A (Appeals Chamber), October 19, 2000.

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T (Trial Chamber), May 21, 1999.

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A (Appeals Chamber), June 1, 2001.

Prosecutor v. Musema, Case No. ICTR-96-13-A (Trial Chamber), January 27, 2000.

Prosecutor v. Musema, Case No. ICTR-96-13-A (Appeals Chamber), November 16, 2001.

Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T (Trial Chamber), December 3, 2003.*

Prosecutor v. Niyitegeka, Case No. ICTR-96-14 (Trial Chamber), May 16, 2003.

Prosecutor v. Ntakirutimana and Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T (Trial Chamber), February 21, 2003.

Prosecutor v. Ruggiu, Case No. ICTR-97-32-I (Trial Chamber), June 1, 2000.

Prosecutor v. Rutaganda, Case No. ICTR-96-3 (Trial Chamber), December 6, 1999.

Prosecutor v. Semanza, Case No. ICTR-97-20 (Trial Chamber), May 15, 2003.

Prosecutor v. Serushago, Case No. ICTR-98-39 (Trial Chamber), February 5, 1999.

Prosecutor v. Serushago, Case No. ICTR-98-39-A (Appeals Chamber), April 6, 2000.

* Although this case was issued after October 2003, it was added to the ICTR Digest due to its jurisprudential importance.

I) GENOCIDE (ARTICLE 2)

a) Statute

ICTR Statute, Article 2:

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

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

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

3. The following acts shall be punishable:

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

b) Generally

i) elements

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T (Trial Chamber), June 7, 2001, para. 55: The Chamber “considers that a crime of genocide is proven if it is established beyond reasonable doubt, firstly, that one of the acts listed under Article 2(2) of the Statute was committed and, secondly, that this act was committed against a specifically targeted national, ethnical, racial or religious group, with the specific intent to destroy, in whole or in part, that group. Genocide therefore invites analysis under two headings: the prohibited underlying acts and the specific genocidal intent or *dolus specialis*.”

ii) genocide is international customary law and *jus cogens*

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T (Trial Chamber), May 21, 1999, para. 88: “[T]he crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.”

Prosecutor v. Rutaganda, Case No. ICTR-96-3 (Trial Chamber), December 6, 1999, para. 46: “The Genocide Convention is undeniably considered part of customary international

law” *See also Prosecutor v. Musema*, Case No. ICTR-96-13-A (Trial Chamber), January 27, 2000, para. 15.

c) Mental state (*mens rea*) (special intent or *dolus specialis*)

i) generally

(1) defined

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), September 2, 1998, para. 498, 517-522: “Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.’” The Chamber found that “the offender is culpable only when he has committed one of the offences charged under Article 2(2) . . . with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 164.

Rutaganda, (Trial Chamber), December 6, 1999, para. 59: A person may only be convicted of genocide if he committed one of the enumerated acts with “the specific intent to destroy, in whole or in part, a particular group.”

(2) intent required prior to commission of acts

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 91: “[T]he *mens rea* must be formed prior to the commission of the genocidal acts.” “[T]he individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 91: “It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder. The Trial Chamber opines that for the crimes of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts.”

(3) intent can be inferred

Rutaganda, (Trial Chamber), December 6, 1999, para. 61-63: “[I]ntent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 167.

Prosecutor v. Semanza, Case No. ICTR-97-20 (Trial Chamber), May 15, 2003, para. 313: “A perpetrator’s *mens rea* may be inferred from his actions.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 63: “[E]vidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention is not clear from what that person says or does. The

Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action."

(4) factors in assessing mental state (*mens rea*)

Akayesu, (Trial Chamber), September 2, 1998, para. 523-524: "[T]he Chamber considers that intent is a mental factor which is difficult, even impossible to determine," but found that "in the absence of a confession from the accused," intent may be inferred from the following factors:

- "the general context of the perpetration of other culpable acts systematically directed against that same group, whether . . . committed by the same offender or by others;"
- "the scale of atrocities committed;"
- the "general nature" of the atrocities committed "in a region or a country;"
- "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups;"
- "the general political doctrine which gave rise to the acts;"
- "the repetition of destructive and discriminatory acts;" or
- "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list . . . but which are committed as part of the same pattern of conduct."

See also Musema, (Trial Chamber), January 27, 2000, para. 166.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 93, 527: The Chamber agreed with *Akayesu* that intent might be difficult to determine. It stated that the accused's "actions, including circumstantial evidence, however may provide sufficient evidence of intent," and that "intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action." The Chamber noted the following as relevant indicators:

- "the number of group members affected;"
- "the physical targeting of the group or their property;"
- "the use of derogatory language toward members of the targeted group;"
- "the weapons employed and the extent of bodily injury;"
- "the methodical way of planning;"
- "the systematic manner of killing;" and
- "the relative proportionate scale of the actual or attempted destruction of a group."

(5) specific plan not required, but is strong evidence of intent

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 94, 276: "[A]lthough a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation." "[I]t is

virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime.” “[I]t is unnecessary for an individual to have knowledge of all details of genocidal plan or policy.” “[T]he existence of such a [genocidal] plan would be strong evidence of the specific intent requirement for the crime of genocide.”

ii) “intent to destroy in whole or in part”

(1) considerable number required or substantial part of the group

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 96-97: The Chamber held that “‘in part’ requires the intention to destroy a considerable number of individuals who are part of the group.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 64: The Chamber agreed “with the statement of the International Law Commission, that ‘the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in particular group.’ Although the destruction sought need not be directed at every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group.”

(2) actual extermination of entire group not required

Akayesu, (Trial Chamber), September 2, 1998, para. 497: “[G]enocide does not imply the actual extermination of [a] group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy ‘in whole or in part’ a national, ethnical, racial or religious group.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 48-49.

(3) not necessary to establish genocide throughout country

Akayesu, (Trial Chamber), September 2, 1998, n. 61: “[I]n a case other than that of Rwanda, a person could be found guilty of genocide without necessarily having to establish that genocide had taken place throughout the country concerned.”

(4) destruction

Semanza, (Trial Chamber), May 15, 2003, para. 315: “The drafters of the Genocide Convention . . . unequivocally chose to restrict the meaning of ‘destroy’ to encompass only acts that amount to physical or biological genocide.”

(a) sexual violence as destruction

Akayesu, (Trial Chamber), September 2, 1998, para. 731: The Chambers held that acts of sexual violence can form an integral part of the process of destruction of a group. “These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.” *See also Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 95.

iii) “a national, ethnical, racial, or religious group, as such”

(1) meant to cover any stable and permanent group

Akayesu, (Trial Chamber), September 2, 1998, para. 511, 516, 701-702: The Chamber relied on the *travaux préparatoires* of the Genocide Convention, which indicate that “the crime of genocide was allegedly perceived as targeting only ‘stable’ groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more ‘mobile’ groups which one joins through individual voluntary commitment, such as political and economic groups.” The Chamber stated that the four groups protected by the convention share a “common criterion,” namely, “that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.” “[I]t was necessary . . . to respect the intent of the drafters . . . which, according to the *travaux préparatoires*, was clearly to protect any stable and permanent group.” “[T]he Tutsi did indeed constitute a stable and permanent group and were identified as such by all.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 160-163.

Rutaganda, (Trial Chamber), December 6, 1999, para. 56: “[I]here are no generally and internationally accepted precise definitions [of] national, ethnical, racial and religious groups;” each should “be assessed in the light of a particular political, social and cultural context.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 161.

(a) whether group membership is subjective or objective

Rutaganda, (Trial Chamber), December 6, 1999, para. 57-58, 373: “[F]or the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.” The Chamber, however, held that “a subjective definition alone is not enough to determine victim groups” and, relying on the *travaux préparatoires*, held that the Genocide Convention “was presumably intended to cover relatively stable and permanent groups.” Therefore, “the Chamber holds that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the political, social and cultural context.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 160-163.

Semanza, (Trial Chamber), May 15, 2003, para. 317: “The Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused’s genocidal intent is to be determined by objective or subjective criteria or by some hybrid formulation. The various Trial Chambers of this Tribunal have found that the determination of whether a group comes within the sphere of protection . . . ought to be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria.”

(2) interpretation of “as such”

Prosecutor v. Niyitegeka, Case No. ICTR-96-14 (Trial Chamber), May 16, 2003, para. 410: The Chamber interpreted “‘as such’ to mean that the act must be committed against an individual because the individual was a member of a specific group and specifically because he belonged to this group, so that the victim is the group itself, not merely the individual.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 60: The act “must have been committed against one or more persons . . . because of their membership in [a specific] group [rather than] by reason of . . . individual identity. The victim of the act is . . . a member of a given group . . . which . . . means the victim of the crime of genocide is the group itself and not the individual alone.” See also *Akayesu*, (Trial Chamber), September 2, 1998, para. 521; *Musema*, (Trial Chamber), January 27, 2000, para. 165.

Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T (Trial Chamber), December 3, 2003, para. 948: “The individual is the personification of the group.”

(3) national group

Akayesu, (Trial Chamber), September 2, 1998, para. 512: “[A] national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”

(4) ethnical/ethnic group

Akayesu, (Trial Chamber), September 2, 1998, para. 513: “An ethnic group is generally defined as a group whose members share a common language or culture.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 98: “An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”

(a) application

Akayesu, (Trial Chamber), September 2, 1998, para. 122-124, 170-172, 701-702, n. 56, n. 57: Based on witness testimony and official classifications, the Chamber held that in Rwanda in 1994, “the Tutsi constituted a group referred to as ‘ethnic,’” and found that the Tutsi did “constitute a stable and permanent group and were identified as such by all.” The Chamber also found the following evidence sufficient to show that it was “a particular group, the Tutsi ethnic group, which was targeted”:

- evidence that at roadblocks all over the country, Tutsis were separated from Hutus and killed;
- evidence of the “propaganda campaign” by audiovisual and print media, overtly calling for the killing of Tutsis;
- classification as either Hutu or Tutsi on identity cards and birth certificates, and by law;
- individuals’ self-identification as either Hutu or Tutsi.

The Chambers held this despite its acknowledgement that the “Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population” or meet the general definition of an ethnic group, *i.e.* “members [who] speak the same language and/or have the same culture,” because both Hutu and Tutsi share the same language and culture. Also, many Hutu were also killed simply because they were “viewed as having sided with the Tutsi.”

Prosecutor v. Ntakirutimana and Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T (Trial Chamber), February 21, 2003, para. 789: In holding that Elizaphan Ntakirutimana had the requisite intent to commit genocide, the Chamber held that the Tutsi were an ethnic group.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 291: “[T]he victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were ‘members of a group,’ in this case an ethnic group.”

Semanza, (Trial Chamber), May 15, 2003, para. 422: “The Chamber took judicial notice of the fact that: ‘Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa’” and held that “the Tutsi in Rwanda were an ‘ethnic’ group.”

(b) association of ethnic group with political agenda

Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T (Trial Chamber), December 3, 2003, para. 969: “[T]he association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal animus that motivated the Accused. To the contrary, the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity, underscores the fact that their membership in the ethnic group, as such, was the sole basis on which they were targeted.”

(5) racial group

Akayesu, (Trial Chamber), September 2, 1998, para. 514: “The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 98: “A racial group is based on hereditary physical traits often identified with geography.”

(6) religious group

Akayesu, (Trial Chamber), September 2, 1998, para. 515: “The religious group is one whose members share the same religion, denomination or mode of worship.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 98: “A religious group includes denomination or mode of worship or a group sharing common beliefs.”

(7) mistreatment of persons not included in enumerated group not genocide

Akayesu, (Trial Chamber), September 2, 1998, para. 720-721: In one instance, the Chamber held that certain acts constituted “serious bodily or mental harm” when a woman was beaten, threatened and interrogated about the whereabouts of another person, but that because she was Hutu, “they cannot constitute acts of genocide against the Tutsi group.”

iv) application

Akayesu, (Trial Chamber), September 2, 1998, para. 117-121, 168-169: The Chamber found the following sufficient to demonstrate “intent to destroy, in whole or in part”:

- expert and other testimony showing statements of political leaders, songs, and popular slogans which evidenced an intent to eliminate all Tutsis in Rwanda;
- testimony on the cutting of Achilles’ tendons to prevent victims from fleeing;
- expert testimony and images of bodies thrown into a tributary of the Nile, showing the intent to return Tutsis to their alleged place of origin;
- testimony on the killing of newborns;
- testimony of proverbs and public statements advocating the killing of pregnant women, including Hutu women carrying fetuses of Tutsi men, because of the patrilinear society.

Niyitegeka, (Trial Chamber), May 16, 2003, para. 427: In finding Niyitegeka guilty of conspiracy to commit genocide, the Chamber held as follows: “Considering the Accused’s participation and attendance at meetings . . . to discuss the killing of Tutsi in Bisesero, his planning of attacks against Tutsi in Bisesero, his promise and distribution of weapons to attackers to be used in attacks against Tutsi, his expression of support . . . of the Prime Minister, Jean Kambanda, and the Interim Government, and actions or inactions in failing to protect the Tutsi population, and his leadership role in conducting and speaking at the meetings . . . the Chamber finds that the Accused had the requisite intent, together with his co-conspirators, to destroy, in whole or in part, the Tutsi ethnic group.”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 436-437: In finding Niyitegeka guilty of direct and public incitement to commit genocide, the Chamber held as follows: “Considering the Accused’s spoken words, urging the attackers to work, thanking, encouraging and commending them for the ‘work’ they had done, ‘work’ being a reference to killing Tutsi . . . the Chamber finds that the Accused had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group.”

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 957-969: “In ascertaining the intent of the Accused, the Chamber has considered their individual statements and acts, as well as the message they conveyed through the media they controlled.” “[The] *Kangura* [newspaper] and RTL [radio station] explicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction. Demonizing the Tutsi as having inherently evil qualities, equating the ethnic group with ‘the enemy’ and portraying its women as seductive enemy agents, the media called for

the extermination of the Tutsi ethnic group as a response to the political threat that they associated with Tutsi ethnicity.” “The genocidal intent in the activities of the CDR [political party that depicted the Tutsi population as the enemy] was expressed through the phrase ‘*tubatsembasembe*’ or ‘let’s exterminate them’, a slogan chanted repeatedly at CDR rallies and demonstrations. At a policy level, CDR communiques called on the Hutu population to ‘neutralize by all means possible’ the enemy, defined to be the Tutsi ethnic group.” “The editorial policies as evidenced by the writings of *Kangura* and the broadcasts of RTLM constitute, in the Chamber’s view, conclusive evidence of genocidal intent. Individually, each of the Accused made statements that further evidence his genocidal intent.” “[T]he Chamber finds beyond a reasonable doubt that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze acted with intent to destroy, in whole or in part, the Tutsi ethnic group.”

d) Underlying offenses

i) killing members of the group

(1) elements

Semanza, (Trial Chamber), May 15, 2003, para. 319: “[I]n addition to showing that an accused possessed an intent to destroy the group as such, in whole or in part, the Prosecutor must show the following elements: (1) the perpetrator intentionally killed one or more members of the group, without the necessity of premeditation; and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.”

(2) intent required

Akayesu, (Trial Chamber), September 2, 1998, para. 500-501: The Chamber noted that the French version of the Statute uses “*meurtre*” while the English version uses “killing.” The Chamber found that “killing” was “too general since it could . . . include both intentional and unintentional homicides whereas the term ‘*meurtre*’ . . . is more precise.” Thus, the Chamber held that “‘*meurtre*’ is homicide committed with the intent to cause death.”

Compare Rutaganda, (Trial Chamber), December 6, 1999, para. 50: “Article 2(2)(a) of the Statute, like the corresponding provisions of the Genocide Convention, refers to ‘*meurtre*’ in the French version and to ‘killing’ in the English version. In the opinion of the Chamber, the term ‘killing’ includes both intentional and unintentional homicides, whereas the word ‘*meurtre*’ covers homicide committed with the intent to cause death. Given the presumption of innocence, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the Accused should be adopted, and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder in the Criminal Code of Rwanda, which provides, under Article 311, that ‘Homicide committed with intent to cause death shall be treated as murder.’” *See also Musema*, (Trial Chamber), January 27, 2000, para. 155; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 57-58.

Compare Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A (Appeals Chamber), June 1, 2001, para. 151: “[T]here is virtually no difference” between the terms “killing”

and “*meurtre*” as either term is linked to the intent to destroy in whole or in part. Both should refer to intentional but not necessarily premeditated murder.

(3) causation

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 952-953: “The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. [T]his does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.” “The Chamber accepts that this moment in time [the downing of the President’s plane and the death of President Habyarimana] served as a trigger for the events that followed. That is evident. But if the downing of the plane was the trigger, then RTLM [radio station], [the] *Kangura* [newspaper] and CDR [political party that depicted the Tutsi population as the enemy] were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. [T]he killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, *Kangura* and CDR, before and after 6 April 1994.”

(4) application

Akayesu, (Trial Chamber), September 2, 1998, para. 114-116: The Chamber found the following evidence of widespread killings throughout Rwanda sufficient to show both “killing” and “causing serious bodily harm to members of a group”:

- testimony regarding “heaps of bodies . . . everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed;”
- testimony stating that “many wounded persons in the hospital . . . were all Tutsi and . . . apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles’ tendon, to prevent them from fleeing;”
- testimony that the “troops of the Rwandan Armed Forces and of the Presidential Guard [were] going into houses in Kigali that had been previously identified in order to kill” and testimony of other murders elsewhere;
- “photographs of bodies in many churches” in various areas;
- testimony regarding “identity cards strewn on the ground, all of which were marked ‘Tutsi.’”

ii) causing serious bodily or mental harm to members of the group

(1) general definition

Akayesu, (Trial Chamber), September 2, 1998, para. 504: “[S]erious bodily or mental harm” means, *inter alia*, “acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 108-113: The meanings of “serious bodily harm” and “serious mental harm” should be “determined on a case-by-case basis, using a common sense approach.” The meaning of “causing serious bodily

harm” is largely self-explanatory, and “could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.” “[C]ausing serious mental harm should be interpreted on a case-by-case basis in light of the relevant jurisprudence.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 51: “[S]erious bodily or mental harm” “include[s] acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 156; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 59.

(2) no requirement of permanency or irremediability

Akayesu, (Trial Chamber), September 2, 1998, para. 502: The harm did not need to be “permanent and irremediable.” See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 108; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 51; *Musema*, (Trial Chamber), January 27, 2000, para. 156; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 59; *Semanza*, (Trial Chamber), May 15, 2003, para. 320-322.

Compare *Semanza*, (Trial Chamber), May 15, 2003, para. 321: “Serious mental harm” means “more than minor or temporary impairment of mental faculties.”

See also Section (I)(d)(i)(4) above for application.

(3) rape and sexual violence can qualify

Akayesu, (Trial Chamber), September 2, 1998, para. 706-707, 731-734, 688: Rape and other acts of sexual violence constitute infliction of “serious bodily or mental harm” on members of the group. See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 108; *Musema*, (Trial Chamber), January 27, 2000, para. 156.

(4) threats during interrogation can qualify

Akayesu, (Trial Chamber), September 2, 1998, para. 711-712: Death threats during interrogation, alone or coupled with beatings, constitute infliction of “serious bodily or mental harm” inflicted on members of the group. See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 108.

(5) intent to inflict “serious mental harm” required

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 112: “The Chamber considers that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental harm in pursuit of the specific intention to destroy a group in whole or in part.”

iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

Akayesu, (Trial Chamber), September 2, 1998, para. 505-506: This phrase means “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.” This includes, “*inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum

requirement.” See also *Rutaganda*, (Trial Chamber), December 6, 1999, para. 52; *Musema*, (Trial Chamber), January 27, 2000, para. 157.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 115-116: “[D]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” “include[s] circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion” and “methods of destruction which do not immediately lead to the death of members of the group.” “[T]he conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period.”

But see Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 548: The Chamber held that although the Tutsi group in Kibuye were “deprived of food, water and adequate sanitary and medical facilities,” “these deprivations were *not* the deliberate creation of conditions of life . . . intended to bring about their destruction” because these “deprivations . . . were a result of the persecution of the Tutsis, with the intent to exterminate them within a short period of time thereafter.” Furthermore, the Chambers found that the times periods “were not of sufficient length or scale to bring about destruction of the group.”

iv) imposing measures intended to prevent births within the group

Akayesu, (Trial Chamber), September 2, 1998, para. 507-508: “[I]mposing measures intended to prevent births within the group” include: “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example . . . is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.” The Chamber noted that the measures may be mental as well as physical. “For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.” See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 117; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 53; *Musema*, (Trial Chamber), January 27, 2000, para. 158.

v) forcibly transferring children of the group to another group

Akayesu, (Trial Chamber), September 2, 1998, para. 509: “[T]he objective [of this act] is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.” See also *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 118; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 54; *Musema*, (Trial Chamber), January 27, 2000, para. 159.

e) Punishable acts

i) genocide

See discussion above.

ii) conspiracy to commit genocide

(1) definition

Musema, (Trial Chamber), January 27, 2000, para. 191: “[C]onspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.” See also *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 798; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 423; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1041.

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1042: “The offence of conspiracy requires the existence of an agreement, which is the defining element of the crime of conspiracy.”

(2) mental state (*mens rea*)

Musema, (Trial Chamber), January 27, 2000, para. 192: The *mens rea* of the crime of conspiracy to commit genocide “rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” The “requisite intent for the crime of conspiracy to commit genocide is . . . the intent required for the crime of genocide, that is the *dolus specialis* of genocide.”

(3) conspiracy need not be successful

Musema, (Trial Chamber) January 27, 2000, para. 194: The “crime of conspiracy to commit genocide is punishable, even if it fails to produce a result . . . even if the substantive offence, in this case genocide, has not actually been perpetrated.”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 423: “[T]he act of conspiracy itself is punishable, even if the substantive offence has not actually been perpetrated.”

(4) a formal agreement is not needed

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1045: “The essence of the charge of conspiracy is the agreement among those charged. [T]he existence of a formal or express agreement is not needed to prove the charge of conspiracy.”

(5) conspiracy can be inferred/knowledge requirement

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1047: “[C]onspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework. A coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose.”

(6) institutional coordination

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1048: “[C]onspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other. Institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action.”

(7) conspiracy is an inchoate offense

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1044: “[C]onspiracy is an inchoate offence, and as such has a continuing nature that culminates in the commission of the acts contemplated by the conspiracy.”

(8) whether court may convict for both genocide and conspiracy to commit genocide for same acts

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1043: “The Appeals Chamber in *Musema* has affirmed that distinct crimes may justify multiple convictions, provided that each statutory provision that forms the basis for a conviction has a materially distinct element not contained in the other. The Chamber notes that planning is an act of commission of genocide, pursuant to Article 6(1) of the Statute. The offence of conspiracy requires the existence of an agreement, which is the defining element of the crime of conspiracy. Accordingly, the Chamber considers that the Accused can be held criminally responsible for both the act of conspiracy and the substantive offence of genocide that is the object of the conspiracy.”

But see Musema, (Trial Chamber), January 27, 2000, para. 198: “[T]he accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts.”

(9) application

Niyitegeka, (Trial Chamber), May 16, 2003, para. 428: “Bearing in mind that the Accused and others acted together as leaders of attacks against Tutsi . . . taking into account the organized manner in which the attacks were carried out, which presupposes the existence of a plan, and noting, in particular, that the Accused sketched a plan for an attack in Bisesero at a meeting . . . to which the people in attendance . . . agreed, the Chamber finds that the above facts evidence the existence of an agreement [*i.e.*, conspiracy] between the Accused and others . . . to commit genocide.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1049-1055: “Nahimana, Barayagwiza and Ngeze consciously interacted with each other, using the institutions they controlled to promote a joint agenda, which was the targeting of the Tutsi population for destruction. There was public presentation of this shared purpose and coordination of efforts to realize their common goal.” “The Chamber finds that Nahimana, Ngeze and Barayagwiza, through personal collaboration as well as interaction among institutions within their control, namely RTLM [radio station], [the] *Kangura* [newspaper] and CDR [political party that depicted the Tutsi population as the enemy], are guilty of conspiracy to commit genocide. . . .”

iii) direct and public incitement to commit genocide

Akayesu, (Trial Chamber), September 2, 1998, para. 559: “[D]irect and public incitement must be defined . . . as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.”

Akayesu, (Trial Chamber), September 2, 1998, para. 555: “Incitement is defined in Common law systems as encouraging or persuading another to commit an offence” and “[o]ne line of authority . . . would also view threats or other forms of pressure as a form of incitement.” “Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication.” Under Civil law, the elements of provocation are “direct” and “public.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1017: “[T]he crime of direct and public incitement to commit genocide, like conspiracy, is an inchoate offence that continues in time until the completion of the acts contemplated.”

(1) direct

Akayesu, (Trial Chamber), September 2, 1998, para. 557: Incitement must “assume a direct form and specifically provoke another to engage in a criminal act.” “[M]ore than mere vague or indirect suggestion goes to constitute direct incitement.” “Under Civil law systems, provocation, the equivalent of incitement, is regarded as . . . direct where it is aimed at causing a specific offence to be committed. The prosecution must prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence.” “[I]ncitement may be direct, and nonetheless implicit.” *See also Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431.

Akayesu, (Trial Chamber), September 2, 1998, para. 557-558: The “direct” element of incitement “should be viewed in the light of its cultural and linguistic context.” The Chamber will assess it “on a case-by-case basis, in light of the culture of Rwanda and the specific circumstances of the instant case.” It would do this “by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.” *See also Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1011.

(2) public

Akayesu, (Trial Chamber), September 2, 1998, para. 556: Whether incitement is “public” should be evaluated on the basis of two factors: “the place where the incitement occurred and whether or not assistance was selective or limited.” In Civil law systems, words are “public where they [are] spoken aloud in a place that [is] public by definition.” “According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of

the general public at large by such means as the mass media, for example, radio or television.” See also *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I (Trial Chamber), June 1, 2000, para. 17; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431.

(3) mental state (*mens rea*) for inciting genocide

Akayesu, (Trial Chamber), September 2, 1998, para. 560: The crime of inciting genocide requires “the intent to directly prompt or provoke another to commit genocide,” and this “implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging.” This means that “the person who is inciting to commit genocide must himself have the special intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” See also *Ruggiu*, (Trial Chamber), June 1, 2000, para. 14; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431; *Nabimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1012.

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1001: “Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the jurisprudence – whether or not the purpose in publicly transmitting the material was of a bona fide nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities). The actual language used in the media has often been cited as an indicator of intent.”

(4) incitement need not be successful/causal relationship not required to find incitement

Akayesu, (Trial Chamber), September 2, 1998, para. 562: Even where “incitement failed to produce the result expected by the perpetrator,” unsuccessful acts of incitement can be punished. See also *Ruggiu*, (Trial Chamber), June 1, 2000, para. 16; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 431; *Nabimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1013.

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1015 and 1029: “In *Akayesu*, the Tribunal considered in its legal findings on the charge of direct and public incitement to genocide that ‘there was a causal relationship between the Defendant’s speech to [the] crowd and the ensuing widespread massacres of Tutsis in the community.’ The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement. [W]hen this potential is realized, a crime of genocide as well as incitement to genocide has occurred.” “With regard to causation . . . incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1007: “In considering whether particular expression constitutes a form of incitement on which restrictions would be justified, the international jurisprudence does not include any specific causation requirement linking the expression at issue with the demonstration of a direct effect.”

(5) application

Niyitegeka, (Trial Chamber), May 16, 2003, para. 436-437: “Considering the Accused’s spoken words, urging the attackers to work, thanking, encouraging and commending them for the ‘work’ they had done, ‘work’ being a reference to killing Tutsi . . . the Chamber finds that the Accused had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group” and found him responsible for “inciting attackers to cause the death and serious bodily and mental harm of Tutsi refugees.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1031-1034: “RTL [radio station] broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase ‘heating up heads’ captures the process of incitement systematically engaged in by RTL, which after 6 April 1994 was also known as ‘Radio Machete.’ The nature of radio transmission made RTL particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active.”

“[T]he Chamber notes the broadcast of 4 June 1994, by Kantano Habimana, as illustrative of the incitement engaged in by RTL. Calling on listeners to exterminate the *Inkotanyi*, who would be known by height and physical appearance, Habimana told his followers, ‘Just look at his small nose and then break it.’ The identification of the enemy by his nose and the longing to break it vividly symbolize the intent to destroy the Tutsi ethnic group.”

The Chamber “found beyond a reasonable doubt that Nahimana was responsible for RTL programming” and found him “guilty of direct and public incitement to genocide . . . pursuant to Article 6(1) and Article 6(3) of the Statute.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1035: “The killing of Tutsi civilians was promoted by the CDR [a political party that depicted the Tutsi population as the enemy], as evidenced by the chanting of ‘*tubatsembatse*’ or ‘let’s exterminate them,’ by Barayagwiza himself and by CDR members and *Impuzamugambi* in his presence at public meetings and demonstrations. The reference to ‘them’ was understood to mean the Tutsi population. The killing of Tutsi civilians was also promoted by the CDR through the publication of communiqués and other writings that called for the extermination of the enemy and defined the enemy as the Tutsi population. The Chamber notes the direct involvement of Barayagwiza in this call for genocide. Barayagwiza was at the organizational helm of CDR. He was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for the killing of Tutsi civilians.” The Chamber found “Barayagwiza guilty of direct and public incitement to genocide” pursuant to Article 6(1) and Article 6(3) of the Statute.

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1036-1038: “Many of the writings published in [the] *Kangura* [newspaper] combined ethnic hatred

and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices. The [article entitled] *Appeal to the Conscience of the Hutu* and the cover of *Kangura* No. 26 are two notable examples in which the message clearly conveyed to the readers of *Kangura* was that the Hutu population should ‘wake up’ and take the measures necessary to deter the Tutsi enemy from decimating the Hutu. The Chamber notes that the name *Kangura* itself means ‘to wake up others.’ What it intended to wake the Hutu up to is evidenced by its content, a litany of ethnic denigration presenting the Tutsi population as inherently evil and calling for the extermination of the Tutsi as a preventive measure. The Chamber notes the increased attention in 1994 issues of *Kangura* to the fear of an RPF attack and the threat that killing of innocent Tutsi civilians that would follow as a consequence.” “As founder, owner and editor of *Kangura*, Hassan Ngeze directly controlled the publication and all of its contents . . . Ngeze used the publication to instill hatred, promote fear, and incite genocide. It is evident that *Kangura* played a significant role, and was seen to have played a significant role, in creating the conditions that led to acts of genocide.” The Chamber found Ngeze, for his role as founder, owner and editor of *Kangura*, guilty of direct and public incitement to genocide pursuant to Article 6(1) of the Statute.

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1039: “Hassan Ngeze often drove around with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority. For these acts, which called for the extermination of the Tutsi population, the Chamber finds Hassan Ngeze guilty of direct and public incitement to genocide” pursuant to Article 6(1) of the Statute.

(a) distinguishing incitement from legitimate use of media

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1020-1021: “[I]t is critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred.” “[S]peech constituting ethnic hatred results from the stereotyping of ethnicity combined with its denigration.”

a. importance of tone

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1022: “[T]he accuracy of the statement is only one factor to be considered in the determination of whether a statement is intended to provoke rather than to educate those who receive it. The tone of the statement is as relevant to this determination as is its content.”

b. importance of context

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1022: “The Chamber also considers the context in which the statement is made to be important. A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement.”

c. distinguish informative use

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1024: “The Chamber recognizes that some media are advocacy-oriented and considers that the issue of importance to its findings is not whether the media played an advocacy role but rather the content of what it was actually advocating. In cases where the media disseminates views that constitute ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from these is necessary to avoid conveying an endorsement of the message and in fact to convey a counter-message to ensure that no harm results from the broadcast. The positioning of the media with regard to the message indicates the real intent of the message, and to some degree the real message itself.”

d. distinguish legitimate civil defense

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1025: “The Chamber accepts that the media has a role to play in the protection of democracy and where necessary the mobilization of civil defence for the protection of a nation and its people. What distinguishes both *Kangura* and RTLM from an initiative to this end is the consistent identification made by the publication and the radio broadcasts of the enemy as the Tutsi population. Readers and listeners were not directed against individuals who were clearly defined to be armed and dangerous. Instead, Tutsi civilians and in fact the Tutsi population as a whole were targeted as the threat.”

e. ethnic expressions should receive more scrutiny

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1008: “The special protections for this kind of speech [speech of the so-called ‘majority population,’ in support of the government] should accordingly be adapted, in the Chamber’s view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.”

f. international law is point of reference

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1010: “The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.”

iv) attempt to commit genocide

v) complicity in genocide

(1) definition

Semanza, (Trial Chamber), May 15, 2003, para. 393, 395: “[P]rior jurisprudence has defined the term complicity as aiding and abetting, instigating, and procuring.” “[C]omplicity to commit genocide in Article 2(3)(e) refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.”

Akayesu, (Trial Chamber), September 2, 1998, para. 533-537: The Chamber defined complicity “per the Rwandan Penal Code,” listing the following as elements of complicity in genocide:

- “complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
- complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide.”

See also *Musema*, (Trial Chamber), January 27, 2000, para. 179; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 69-70.

(a) complicity requires a positive act

Akayesu, (Trial Chamber), September 2, 1998, para. 485, 546-548: “[C]omplicity requires a positive act, i.e., an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action.”

(2) mental state (*mens rea*)

Akayesu, (Trial Chamber), September 2, 1998, para. 538-539, 544: “The intent or mental element of complicity implies . . . that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.” He is not required to “wish that the principal offence be committed.” “[A]nyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.” Thus, “the *mens rea* . . . required for complicity in genocide is *knowledge* of the genocidal plan.”

Semanza, (Trial Chamber), May 15, 2003, para. 395: “The accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide, including all its material elements.”

(a) complicity in genocide does not require genocide’s special intent

Akayesu, (Trial Chamber), September 2, 1998, para. 540-545: “[T]he intent of the accomplice is . . . to knowingly aid or abet one or more persons to commit the crime of genocide.” “Therefore . . . an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” Thus, “an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.” *Musema*, (Trial Chamber), January 27, 2000, para. 183; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 71.

(3) genocide required

Akayesu, (Trial Chamber), September 2, 1998, para. 527-531: “[C]omplicity can only exist when there is a punishable, principal act, in the commission of which the accomplice has associated himself. Complicity, therefore, implies a predicate offence committed by someone other than the accomplice.” “[F]or an accused to be found guilty of complicity of genocide, it must, first of all, be proven . . . that the crime of genocide has, indeed, been committed.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 170-173.

(4) principal perpetrator need not be identified or convicted

Akayesu, (Trial Chamber), September 2, 1998, para. 531: A person can be tried for complicity in genocide “even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 174.

(5) same person cannot be convicted of genocide and complicity regarding the same act

Akayesu, (Trial Chamber), September 2, 1998, para. 532: “[A]n individual cannot . . . be both the principal perpetrator of a particular act and the accomplice thereto.” “[T]he same individual cannot be convicted of both crimes for the same act.” *Musema*, (Trial Chamber), January 27, 2000, para. 175; *Bagilishema* (Trial Chamber), June 7, 2001, para. 67.

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1056: “[T]he crime of complicity in genocide and the crime of genocide are mutually exclusive, as one cannot be guilty as a principal perpetrator and as an accomplice with respect to the same offence.”

(6) difference between complicity and individual criminal responsibility for genocide

Akayesu, (Trial Chamber), September 2, 1998, para. 546-548: Individual criminal responsibility under Article 6(1) of the ICTR Statute covers “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute.” These require specific genocidal intent, namely, “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such,” whereas complicity in genocide does not. Another difference is that, “complicity requires a positive act, i.e., an act of commission”

But see Semanza, (Trial Chamber), May 15, 2003, para. 394: “[T]here is no material distinction between complicity in Article 2(3)(e) [complicity in genocide] of the Statute and the broad definition accorded to aiding and abetting in Article 6(1). The Chamber further notes that the *mens rea* requirement for complicity to commit genocide in Article 2(3)(e) mirrors that for aiding and abetting and the other forms of accomplice liability in Article 6(1).”

II) CRIMES AGAINST HUMANITY (ARTICLE 3)

a) Statute

ICTR Statute, Article 3:

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

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

b) Elements

Akayesu, (Trial Chamber), September 2, 1998, para. 578: Crimes against humanity can be broken down into four essential elements, namely: “(i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (ii) the *act* must be committed as part of a wide spread [sic] or systematic attack; (iii) the act must be committed against members of the civilian population; (iv) the *act* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.” (emphasis added)

Compare Akayesu, (Trial Chamber), September 2, 1998, para. 595: “a) [the underlying act] must be perpetrated as part of a widespread or systematic attack; b) the *attack* must be against the civilian population; c) the *attack* must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds.” (emphasis added)

Semanza, (Trial Chamber), May 15, 2003, para. 326: “A crime against humanity must have been committed as part of a widespread or systematic *attack* against any civilian population on discriminatory grounds.”¹ (emphasis added)

i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health (element 1)

Akayesu, (Trial Chamber), September 2, 1998, para. 578: “[T]he act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 66; *Musema*, (Trial Chamber), January 27, 2000, para. 201.

¹ Note that the latter formulation in *Akayesu* and the formulation in *Semanza* where “attack” is used rather than “act” more closely follow the Statute.

ii) the act must be committed as part of a “widespread or systematic attack” (element 2)

Semanza, (Trial Chamber), May 15, 2003, para. 326: “A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds. Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.”

(1) attack

Akayesu, (Trial Chamber), September 2, 1998, para. 581: An “attack” is an “unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute An attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 70; *Musema*, (Trial Chamber), January 27, 2000, para. 205; *Semanza*, (Trial Chamber), May 15, 2003, para. 327.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 122: The Chamber defined “attack” as “the event in which the enumerated crimes must form part,” noting that “within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape, and deportation.”

(2) random acts or acts committed for personal reasons excluded

Akayesu, (Trial Chamber), September 2, 1998, para. 578-579: The act must be committed as “part of a wide spread [sic] or systematic attack and not just a random act of violence.” *See also Rutaganda* (Trial Chamber), December 6, 1999, para. 67.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 122-123, n.28: “The elements of the attack effectively exclude . . . acts carried out for purely personal motives and those outside of a broader policy or plan.” “Either of these conditions [widespread or systematic] will serve to exclude isolated or random inhumane acts committed for purely personal reasons.”

(3) “widespread or systematic” not both

Akayesu, (Trial Chamber), September 2, 1998, para. 579, n. 144: The attack must contain one of the alternate conditions of being widespread or systematic, not both, as in the French text of the Statute. “Customary international law requires only that the attack be either widespread or systematic.” *See also Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 123 & n. 26; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 68; *Musema*, (Trial Chamber), January 27, 2000, para. 203; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 77; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 804; *Semanza*, (Trial Chamber), May 15, 2003, para. 328; *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 439.

(4) widespread

Akayesu, (Trial Chamber), September 2, 1998, para. 580: “The concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with

considerable seriousness and directed against a multiplicity of victims.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 69; *Musema*, (Trial Chamber), January 27, 2000, para. 204; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 804.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 123: “A widespread attack is one that is directed against a multiplicity of victims.” *See also Bagilishema* (Trial Chamber), June 7, 2001, para. 77.

(5) systematic

(a) whether plan or policy required

Akayesu, (Trial Chamber), September 2, 1998, para. 580: “The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 69; *Musema*, (Trial Chamber), January 27, 2000, para. 204.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 123: “A systematic attack means an attack carried out pursuant to a preconceived policy or plan.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 77.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 124, 581: “For an act of mass victimisation to be a crime against humanity, it must include a policy element. [T]he requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. Additionally, the requirement that the attack must be committed against a ‘civilian population’ . . . demands some kind of plan and, the discriminatory element of the attack is . . . only possible as a consequence of a policy.”

But see Semanza, (Trial Chamber), May 15, 2003, para. 329: “‘Systematic’ describes the organized nature of the attack. [T]he . . . ICTY recently clarified that the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, but that the existence of such a plan is not a separate legal element of the crime.”

(6) application

Akayesu, (Trial Chamber), September 2, 1998, para. 173: The “widespread” requirement was met, in part, because of the scale of the events that took place. “Around the country, a massive number of killings took place within a very short time frame. Tutsi were clearly the target of the attack.” The systematic nature of the attack was evidenced by the “unusually large shipments of machetes into the country shortly before it occurred;” “the structured manner in which the attack took place;” the fact that

“[t]eachers and intellectuals were targeted first;” and the fact that through the “media and other propaganda, Hutu were encouraged systematically to attack Tutsi.”

iii) the act/attack must be committed against members of the civilian population (element 3)

(1) confusion whether term is “act” or “attack”

Semanza, (Trial Chamber), May 15, 2003, para. 326: “A crime against humanity must have been committed as part of a widespread or systematic *attack* against any civilian population on discriminatory grounds.” (emphasis added). *See also Akayesu*, (Trial Chamber), September 2, 1998, para. 595.

But see Akayesu, (Trial Chamber), September 2, 1998, para. 578: “[T]he *act* must be committed against members of the civilian population.” (emphasis added). *See also Akayesu*, (Trial Chamber), September 2, 1998, para. 582; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 80.

See also Section (II)(b) above.

(2) civilian defined

Akayesu, (Trial Chamber), September 2, 1998, para. 582: “Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 72; *Musema*, (Trial Chamber), January 27, 2000, para. 207.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 127-129: Because crimes against humanity may be committed “inside or outside the context of an armed conflict,” “the term civilian must be understood within the context of war as well as relative peace.” Thus, “a wide definition of civilian is applicable and, in the context of the situation of Kibuye *Prefecture* where there was no armed conflict, includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 80: “The requirement that the prohibited acts must be directed against a civilian ‘population’ does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity.” “Instead the ‘population’ element is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting crimes under national penal legislation, do not rise to the level of crimes against humanity.”

Semanza, (Trial Chamber), May 15, 2003, para. 330: “A civilian population must be the primary object of the attack.”

(3) presence of non-civilians does not strip population of its civilian character

Akayesu, (Trial Chamber), September 2, 1998, para. 582: “Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 72; *Musema*, (Trial Chamber), January 27, 2000, para. 207.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 128: “[T]he targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population.” *Bagilishema*, (Trial Chamber), June 7, 2001, para. 79; *Semanza*, (Trial Chamber), May 15, 2003, para. 330.

(4) population

Semanza, (Trial Chamber), May 15, 2003, para. 330: “The term ‘population’ does not require that crimes against humanity be directed against the entire population of a geographic territory or area. The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.”

iv) the attack must be on national, political, ethnic, racial or religious grounds (discriminatory grounds) (element 4)

Bagilishema, (Trial Chamber), June 7, 2001, para. 81: “[T]he qualifier ‘on national, political, ethnic, racial or religious grounds,’ which is peculiar to the ICTR Statute should, as a matter of construction, be read as a characterisation of the nature of the ‘attack’ rather than of the *mens rea* of the perpetrator. The perpetrator may well have committed an underlying offence on discriminatory grounds identical to those of the broader attack; but neither this, nor for that matter any discriminatory intent whatsoever, are prerequisites of the crime, so long as it was committed as part of the broader attack.”

Semanza, (Trial Chamber), May 15, 2003, para. 331: “Article 3 of the Statute requires that the attack against the civilian population be committed ‘on national, political, ethnical, racial or religious grounds.’ Acts committed against persons outside the discriminatory categories may nevertheless form part of the attack where the act against the outsider supports or furthers or is intended to support or further the attack on the group discriminated against on one of the enumerated grounds.”

But see Akayesu, (Trial Chamber), September 2, 1998, para. 578: “[T]he act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.”

Compare Akayesu, (Trial Chamber), September 2, 1998, para. 595: “[T]he *attack* must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds.” (emphasis added)

(1) political grounds

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 130: “Political grounds include party political beliefs and political ideology.”

(2) national, ethnical, racial, religious grounds

See Sections (I)(c)(iii)(3) – (6) above.

v) mental state (*mens rea*) (element 5)

(1) knowledge that the accused’s act is part of a widespread or systematic attack on a civilian population

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 133-134: “The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act” “[T]he accused must have acted with knowledge of the broader context of the attack Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.” *See also Ruggiu*, (Trial Chamber), June 1, 2000, para. 19-20; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 94.

Niyitegeka, (Trial Chamber), May 16, 2003, para. 442: “[T]he crime must be committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The Accused need not act with discriminatory intent, but he must know that his act is part of this widespread or systematic attack.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 133-134: To be held liable, the perpetrator must have “actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 71; *Musema*, (Trial Chamber), January 27, 2000, para. 206.

But see Section (II)(b)(ii)(5)(a) above, discussing whether a plan or policy is required.

(2) discriminatory intent not required for acts other than persecution

Prosecutor v. Akayesu, Case No. ICTR-96-4-A (Appeals Chamber), June 1, 2001, para. 447-469: The Appeals Chamber ruled that the Trial Chamber had committed an error of law in finding that intent to discriminate on national, political, ethnic, racial or religious grounds was an essential element for crimes against humanity. “Article 3 . . . does not require that all crimes against humanity . . . be committed with a discriminatory intent.” The Appeals Chamber held that “Article 3 restricts the jurisdiction of the Tribunal to crimes against humanity committed in a specific situation, that is, ‘as part of a

widespread or systematic attack against any civilian population' on discriminatory grounds.”

Semanza, (Trial Chamber), May 15, 2003, para. 332: “There is no requirement that the enumerated acts other than persecution be committed with discriminatory intent.”

vi) both state and non-state actors covered

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 125-126: Stating that “crimes against humanity are . . . ‘instigated or directed by a Government or by any organization or group,’” the Chamber held that the “Tribunal’s jurisdiction covers both State and non-State actors.”

c) Underlying offenses

i) the individual acts contain their own elements and need not contain the elements of crimes against humanity

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 135: “The crimes themselves need not contain the three elements of the attack (i.e. widespread or systematic, against any civilian population, on discriminatory grounds), but must form *part of* such an attack. Indeed, the individual crimes contain their own specific elements.”

For discussion of the requirement that the acts be committed as part of a “widespread or systematic attack,” see Section (II)(b)(ii), ICTR Digest.

ii) murder

(1) defined

Akayesu, (Trial Chamber), September 2, 1998, para. 589: “The Chamber defines murder as the unlawful, intentional killing of a human being. The requisite elements of murder are:

1. the victim is dead;
2. the death resulted from an unlawful act or omission of the accused or a subordinate;
3. 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.”

See also Rutaganda, (Trial Chamber), December 6, 1999, para. 80-81; *Musema*, (Trial Chamber), January 27, 2000, para. 215.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 136-140: “The accused is guilty of murder if the accused, engaging in conduct which is unlawful:

1. causes the death of another;
2. by a premeditated act or omission;
3. intending to kill any person or,
4. intending to cause grievous bodily harm to any person.”

See also Bagilishema, (Trial Chamber), June 7, 2001, para. 84.

(2) mental state (*mens rea*)

Semanza, (Trial Chamber), May 15, 2003, para. 334-339: “[T]he Chamber considers that it is premeditated murder (*assassinat*) that constitutes a crime against humanity in Article 3(a) Premeditation requires that, at a minimum, the accused held a deliberate plan to kill prior to the act causing death, rather than forming the intention simultaneously with the act. The prior intention need not be held for very long; a cool moment of reflection is sufficient. [T]he requirement that the accused must have known that his acts formed part of a wider attack on the civilian population generally suggests that the murder was pre-planned. [T]he accused need not have premeditated the murder of a particular individual; for crimes against humanity it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 137-140: The Chamber disagreed with the Trial Chamber holding in *Akayesu*, and stated that “Assassinat” in the French version of the Statute, and not “Murder,” (in the English version of the Statute) was the correct term. The Chamber noted that “premeditation is always required for assassinat” whereas it is not with “murder.” “If in doubt, a matter of interpretation should be decided in favour of the accused; in this case, the inclusion of premeditation is favourable to the accused.” The Chamber thus held that “murder and assassinat should be considered together in order to ascertain the standard of *mens rea*.” “When murder is considered along with assassinat the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing.” The Chamber held that “[t]he result is premeditated when the actor formulated his intent to kill after a cool moment of reflection,” and that “[t]he result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.” See also *Bagilishema*, (Trial Chamber), June 7, 2001, para. 84.

But see *Akayesu*, (Trial Chamber), September 2, 1998, para. 588: “Customary International Law dictates that it is the act of ‘Murder’ that constitutes a crime against humanity and not ‘Assassinat.’ There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation.” See also *Rutaganda*, (Trial Chamber), December 6, 1999, para. 79; *Musema*, (Trial Chamber), January 27, 2000, para. 214.

See also discussion of murder under Article 4, Section (III)(d)(i)(1), ICTR Digest.

iii) extermination

(1) defined

Akayesu, (Trial Chamber), September 2, 1998, para. 591-592: “Extermination is . . . directed against a group of individuals” and it “differs from murder in that it requires an element of mass destruction which is not required for murder.” The Chamber defined the following as essential elements of extermination:

- (1) “the accused or his subordinate participated in the killing of certain named or described persons; (2) the act or omission was unlawful and

intentional; (3) the unlawful act or omission must be part of a widespread or systematic attack; (4) the attack must be against the civilian population; (5) the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.”

See also Rutaganda, (Trial Chamber), December 6, 1999, para. 83-84; *Musema*, (Trial Chamber), January 27, 2000, para. 218; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 812-813.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 144: The Chamber defined the requisite elements of extermination: (1) “[t]he actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s);” (2) “having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and;” (3) “being aware that his act(s) or omission(s) forms part of a mass killing event;” (4) “where, his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 89.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, n. 8. to para. 645: “It is important to note that an accused may be guilty of extermination . . . when sufficient evidence is produced that he or she killed a single person as long as this killing was a part of a mass killing event.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 84: “[T]his act or omission includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 450: “[T]he material element of extermination ‘consists of any one act or combination of acts which contributes to the killing of a large number of individuals.’”

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1061: “The Chamber agrees that in order to be guilty of the crime of extermination, the Accused must have been involved in killings of civilians on a large scale but considers that the distinction is not entirely related to numbers. The distinction between extermination and murder is a conceptual one that relates to the victims of the crime and the manner in which they were targeted.”

(2) mental state (*mens rea*)

Semanza, (Trial Chamber), May 15, 2003, para. 341: “[I]n the absence of express authority in the Statute or in customary international law, international criminal liability should be ascribed only on the basis of intentional conduct. [T]he mental element for extermination is the intent to perpetrate or participate in a mass killing.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 144: The mental state for extermination is that the accused “intended the killing” or was “reckless or grossly

negligent as to whether the killing would result,” and was “aware that his act(s) or omission(s) form[] part of a mass killing event.”

(3) application

Niyitegeka, (Trial Chamber), May 16, 2003, para. 454: “[B]y his participation in attacks against Tutsi, and his acts of shooting at Tutsi refugees, which contributed to the killing of a large number of individuals, and his killing of the three persons, the Accused is . . . responsible . . . for extermination committed as part of a widespread and systematic attack on the civilian Tutsi population on ethnic grounds”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1062: “Both [the] *Kangura* [newspaper] and RTLM [radio station] instigated killings on a large-scale. The nature of media, particularly radio, is such that the impact of the communication has a broad reach, which greatly magnifies the harm that it causes. The activities of the CDR [political party that depicted the Tutsi population as the enemy] and its *Impuzamugambi* [the youth wing of CDR], being by nature group rampages of violence, also caused killing on a large-scale, often following meetings and demonstrations.” The Chamber concluded that this constituted extermination.

iv) enslavement

v) deportation

vi) imprisonment

vii) torture

(1) defined

Akayesu, (Trial Chamber), September 2, 1998, para. 593-595, 681: “The Tribunal interprets the word ‘torture’. . . in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” “The Chamber defines the essential elements of torture as:

- (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:
 - (a) to obtain information or a confession from the victim or a third person;
 - (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
 - (c) for the purpose of intimidating or coercing the victim or the third person;
 - (d) for any reason based on discrimination of any kind.
- (ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.”²

² *But see* case law discussed in Section (II)(c)(vii)(3) ICTR Digest, eliminating the public official requirement.

“The Chamber finds that torture is a crime against humanity if the following further elements are satisfied:

- a) Torture must be perpetrated as part of a widespread or systematic attack;
- b) the attack must be against the civilian population;
- c) the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds.”

(2) rape can be torture

Akayesu, (Trial Chamber), September 2, 1998, para. 597, 687: “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.”³

(3) no “public official requirement”

Semanza, (Trial Chamber), May 15, 2003, para. 342-343: “In *Akayesu*, the Trial Chamber relied on the definition of torture found in the . . . Convention Against Torture The ICTY Appeals Chamber has since explained that while the definition contained in the Convention Against Torture is reflective of customary international law . . . , it is not identical to the definition of torture as a crime against humanity. [T]he ICTY Appeals Chamber has confirmed that, outside the framework of the Convention Against Torture, the ‘public official’ requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity.” Thus, the Chamber rejected the ‘public official’ requirement.

See also discussion of torture under Article 4, Section (III)(d)(i)(2), ICTR Digest.

viii) rape and sexual violence

(1) defined

Akayesu, (Trial Chamber), September 2, 1998, para. 596-598, 686-688: “[R]ape is a form of aggression and . . . the central elements of the crime of rape cannot be captured in a mechanical description of object and body parts 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. . . .” “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 on a person under circumstances which are coercive.” “Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. [For example,] [t]he incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard . . . in front of a crowd, constitutes sexual violence.” “[C]oercive circumstances need not be evidenced by a show of physical force. Threats,

³ *Id.*

intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances”

Musema, (Trial Chamber), January 27, 2000, para. 220-221, 226-229: The Chamber adopted the definition of rape and sexual violence set forth in *Akayesu*, and further stated that “variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual.” Concurring with the approach set forth in *Akayesu*, the Chamber stated that the “essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.” Since “there is a trend in national legislation to broaden the definition of rape” and an ongoing evolution and incorporation of the understanding of rape into principles of international law, “a conceptual definition is preferable to a mechanical definition of rape” because it will “better accommodate evolving norms of criminal justice.”

Compare Semanza, (Trial Chamber), May 15, 2003, para. 344-345: “The *Akayesu* Judgement enunciated a broad definition of rape The Appeals Chamber of the ICTY . . . affirmed a narrower interpretation defining the material element of rape . . . as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.” “While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber. [T]he Chamber recognises that other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity . . . such as torture, persecution, enslavement, or other inhumane acts.”

(2) mental state (*mens rea*)

Semanza, (Trial Chamber), May 15, 2003, para. 346: “The mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.”

See also discussion of rape and sexual violence as causing serious bodily or mental harm to members of the group under Article 2, Section (I)(d)(ii)(3), rape as torture under Article 3, Section (II)(c)(vii)(2), sexual violence as other inhumane acts under Article 3, Section (II)(c)(x)(1)(b), sexual violence as an outrage upon personal dignity under Article 4, Section (III)(d)(v)(1), and rape as an outrage upon personal dignity under Article 4, Section (III)(d)(v)(3), ICTR Digest.

ix) persecutions on political, racial and religious grounds

(1) elements

Ruggiu, (Trial Chamber), June 1, 2000, para. 21: Quoting the ICTY, the Trial Chamber “summarized the elements that comprise the crime of persecution as follows: a) those elements required for all crimes against humanity under the Statute, b) a gross or blatant

denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, c) discriminatory grounds.”

Semanza, (Trial Chamber), May 15, 2003, para. 347-350: “Persecution may take diverse forms and does not necessarily require a physical act.” “[P]ersecution may include acts enumerated under other sub-headings of crimes against humanity, such as murder or deportation, when they are committed on discriminatory grounds. Persecution may also involve a variety of other discriminatory acts, not enumerated elsewhere in the Statute, involving serious deprivations of human rights.” “[T]he enumerated grounds of discrimination for persecution in Article 3(h) . . . do not include national or ethnic grounds, which are included in the list of discriminatory grounds for the attack contained in the chapeau of Article 3.”

(2) intent/mental state (*mens rea*)

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1071: “[T]he crime of persecution specifically requires a finding of discriminatory intent on racial, religious or political grounds. The Chamber notes that this requirement has been broadly interpreted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to include discriminatory acts against all those who do not belong to a particular group.”

(3) persecution also defined in terms of impact

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1073: “[T]he crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence.”

(4) persecution is broader than incitement

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1078: “[P]ersecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms.”

(5) perpetrator can be held accountable for both persecution and extermination

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1080: “The Chamber notes that persecution when it takes the form of killings is a lesser included offence of extermination. The nature of broadcasts, writings, and the activities of CDR is such, however, that the same communication would have caused harm of varying degrees to different individuals. An RTL broadcast, *Kangura* article, or CDR demonstration that led to the extermination of certain Tutsi civilians inflicted lesser forms of harm on others, constituting persecution. The Chamber considers that these actions by the Accused therefore constitute multiple and different crimes, for which they can be held separately accountable.”

(6) application

Ruggiu, (Trial Chamber), June 1, 2000, para. 22: In the case at hand, the Trial Chamber discerned “a common element” when examining the acts of persecution admitted to by the accused. “Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually from humanity itself.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1071: “[I]n Rwanda the targets of attack were the Tutsi ethnic group and the so-called ‘moderate’ Hutu political opponents who supported the Tutsi ethnic group. The Chamber considers that the group against which discriminatory attacks were perpetrated can be defined by its political component as well as its ethnic component.” “RTLM, *Kangura* and CDR . . . essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity. [T]he discriminatory intent of the Accused falls within the scope of the crime against humanity of persecution on political grounds of an ethnic character.”

(a) application to hate speech

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1072: In citing the elements of persecution as held by *Ruggiu*, the Trial Chamber held that “hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute.” “Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.”

x) other inhumane acts

(1) defined

(a) generally

Akayesu, (Trial Chamber), September 2, 1998, para. 585: The list of acts enumerated in Article 3(a)-(h) of the Statute is not exhaustive. “Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 77.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 148-151: “Other inhumane acts include those crimes against humanity that are not otherwise specified in Article 3 . . . but are of comparable seriousness” and “comparable gravity” to the other enumerated acts. “These will be acts or omissions that deliberately cause serious mental

or physical suffering or injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim.” Whether an act “rise[s] to the level of inhumane acts should be determined on a case-by-case basis.” *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 92.

Musema, (Trial Chamber), January 27, 2000, para. 232: “[T]he inhumane act or omission must: (a) [b]e directed against member(s) of the civilian population; (b)[t]he perpetrator must have discriminated against the victim(s), on one or more of the enumerated discriminatory grounds; (c) [t]he perpetrator’s act or omission must form part of a widespread or systematic attack and the perpetrator must have knowledge of this attack.”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 460: “[T]he Accused must be found to have participated in the commission of inhumane acts on individuals, being acts of similar gravity to the other acts enumerated in the Article, such as would cause serious physical or mental suffering or constitute a serious attack on human dignity.”

(b) sexual violence included

Akayesu, (Trial Chamber), September 2, 1998, para. 688, 697: “Sexual violence falls within the scope of ‘other inhumane acts,’ set forth [in] Article 3(i) of the Tribunal’s Statute.” Akayesu was “judged criminally responsible under Article 3(i) for the following other inhumane acts: (i) the forced undressing of [a woman] outside the bureau communal, after making her sit in the mud . . . ; (ii) the forced undressing and public marching of [a woman] naked at the bureau communal; (iii) the forced undressing of [three women] and the forcing of the women to perform exercises naked in public near the bureau communal.”

See also discussion of rape and sexual violence as causing serious bodily or mental harm to members of the group under Article 2, Section (I)(d)(ii)(3), rape and sexual violence under Article 3, Section (II)(c)(viii), sexual violence as an outrage upon personal dignity under Article 4, Section (III)(d)(v)(1), ICTR Digest.

(c) third party suffering

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 153: The Chamber acknowledged that “a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends.”

(2) mental state (*mens rea*)

(a) generally

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 154, 583: “[F]or an accused to be found guilty of crimes against humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act, and with knowledge that the act is perpetrated within the overall context of the attack.”

(b) mental state for third party suffering

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 153: “[T]o find an accused responsible for [third party suffering] under crimes against humanity, it is incumbent on the Prosecutor to prove the *mens rea* on the part of the accused.” “[I]nhumane acts are . . . those which *deliberately* cause serious mental suffering.” The *mens rea* is “the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result.” Consequently, “if at the time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.”

(3) application

Niyitegeka, (Trial Chamber), May 16, 2003, para. 465, 467: “[T]he acts committed with respect to Kabanda [decapitation, castration and piercing his skull with a spike] and the sexual violence to the dead woman’s body [insertion of a sharpened piece of wood into her genitalia] are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole.”

“[B]y his act of encouragement during the killing, decapitation and castration of Kabanda, and the piercing of his skull, and his association with the attackers who carried out these acts, and his ordering of Interahamwe to perpetrate the sexual violence on the body of the dead woman, the Accused is . . . responsible for inhumane acts committed as part of a widespread and systematic attack on the civilian Tutsi population on ethnic grounds.”

III) WAR CRIMES (ARTICLE 4)

a) Statute

ICTR Statute, Article 4:

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

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

- g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- h) Threats to commit any of the foregoing acts.”

b) Generally

i) applicability needs to be assessed

Akayesu, (Trial Chamber), September 2, 1998, para. 604-607: The Security Council took a more expansive approach in drafting the ICTR Statute than the ICTY Statute, insofar as they “included within the subject-matter jurisdiction of the . . . Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 . . . includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, [and] for the first time criminalizes common article 3 of the four Geneva Conventions.” “[A]n essential question which should be addressed . . . is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law.” The Chamber also noted the Secretary General’s statement at the establishment of the ICTY that “in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are beyond any doubt part of customary law.” The Chamber found it necessary to assess the applicability of Common Article 3 and Additional Protocol II individually.

ii) Common Article 3 and list of prohibited acts in Statute are part of customary international law; alternatively, Rwanda was party to the Geneva Conventions and Protocols, and criminalized the enumerated acts

Akayesu, (Trial Chamber), September 2, 1998, para. 608-609, 616: The Chamber concluded that Common Article 3 is customary law, noting that most states’ penal codes “have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.” The Chamber also noted that the ICTY Trial Chamber in the *Tadic* judgment⁴ held that Common Article 3 was customary international humanitarian law, as did the ICTY Appeals Chamber.⁵ However, the Chamber also noted the Secretary General’s statement that Additional Protocol II “as a whole was not deemed . . . to have been universally recognized as customary international law,” and stated that the Appeals Chamber in *Tadic* “concurred with this view inasmuch as many provisions of . . . Protocol [II] can now be regarded as declaratory of existing rules or as having crystallized in emerging rules of customary law, but not all.” However, it did conclude that “[t]he list in Article 4 of the Statute . . .

⁴ *Prosecutor v. Tadic*, Case No. IT-94-1 (Trial Chamber), May 7, 1997, para. 609.

⁵ *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 116, 134.

comprises *serious* violations of the fundamental humanitarian guarantees which . . . are recognized as part of international customary law.”

But see Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 156-158, 597-598: It was unnecessary to consider whether the instruments were “considered customary international law that imposes criminal liability for their serious breaches.” Rwanda was a party to the Conventions and they were in force prior to the events. Furthermore, “all the offences enumerated in Article 4 of the Statute, also constituted crimes under the laws of Rwanda.” Also, the Rwandan Patriotic Front (RPF) “had stated to the International Committee of the Red Cross (ICRC) that it was bound by the rules of international humanitarian law.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 86-90: The Court relied on the judgments in *Akayesu* and *Kayishema and Ruzindana* in holding that, “at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the guarantees provided for by the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 242; *Semanza*, (Trial Chamber), May 15, 2003, para. 353.

iii) individual criminal responsibility applies

Akayesu, (Trial Chamber), September 2, 1998, para. 611-617: “[I]t is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.”

iv) “serious violation” required; list of prohibited acts in Article 4 of the Statute are serious violations

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 184: “The competence of the Chamber is limited to serious violations of Common Article 3 and Protocol II.” The Chamber held that “‘serious violations’ should be interpreted as breaches involving grave consequences” and that the list of prohibited acts in Article 4 “undeniably should be recognised as serious violations entailing individual criminal responsibility.”

Akayesu, (Trial Chamber), September 2, 1998, para. 616: “The Chamber understands the phrase ‘serious violation’ to mean ‘a breach of rule protecting important values [which] must involve grave consequences for the victim.’” *See also Musema*, (Trial Chamber), January 27, 2000, para. 286; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 102; *Semanza*, (Trial Chamber), May 15, 2003, para. 370.

Rutaganda, (Trial Chamber), December 6, 1999, para. 106: A “‘serious violation’ is one which breaches a rule protecting important values with grave consequences for the victim. The fundamental guarantees included in Article 4 of the Statute represent elementary considerations of humanity. Violations thereof would, by their very nature, be deemed serious.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 288.

c) Elements

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 169: “[I]n order for an act to breach Common Article 3 and Protocol II,” the following elements must be shown:

(1) “armed conflict . . . of a non-international character,” (2) a “link between the accused and the armed forces,” (3) “the crimes must be committed *ratione loci* and *ratione personae*,” and (4) “there must be a nexus between the crime and the armed conflict.”

But see Akayesu, (Appeals Chamber), June 1, 2001, para. 425-445 holding that the second element is not required. *See also* Section (III)(c)(ii) below, for discussion of cases rejecting the link between the accused and the armed forces.

i) armed conflict requirement (element 1)

(1) armed conflict of a non-international character required

Akayesu, (Trial Chamber), September 2, 1998, para. 601-602: “Common Article 3 applies to ‘armed conflicts not of an international character.’” Internal disturbances are not covered. *See also Bagilishema*, (Trial Chamber), June 7, 2001, para. 99.

Rutaganda, (Trial Chamber), December 6, 1999, para. 91: “Offences alleged to be covered by Article 4 of the Statute must, as a preliminary matter, have been committed in the context of a conflict of a non-international character satisfying the requirements of Common Article 3, which applies to ‘armed conflict not of an international character’”

(a) “armed conflict of a non-international nature” defined

Akayesu, (Trial Chamber), September 2, 1998, para. 619-621, 625: The Chamber quoted the ICTY Appeals Chamber in *Tadic* stating that “an armed conflict exists whenever there is [. . .] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [. . .] in the case of internal conflicts, a peaceful settlement is reached.”⁶ “[A]n armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict.”

The Chamber also noted the ICRC commentary on Common Article 3 which suggests useful criteria for determining armed conflicts:

“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. 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.

(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

⁶ *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70.

(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.”

Citing International Committee of the Red Cross, Commentary I Geneva Convention, Article 3, Para. 1 - Applicable Provisions.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 170: “An armed conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, in accordance with Protocol II, should be considered as a non-international armed conflict.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 92-93: “[C]onflicts referred to in Common Article 3 are armed conflicts with armed forces on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but take place within the confines of a single country.” “[W]hether or not a situation can be described as an ‘armed conflict,’ meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis. Hence, in dealing with this issue, the *Akayesu* Judgement suggested an ‘evaluation test,’ whereby it is necessary to evaluate the intensity and the organization of the parties to the conflict to make a finding on the existence of an armed conflict. This approach also finds favour with the Trial Chamber in this instance.”

Musema, (Trial Chamber), January 27, 2000, para. 247-248: “[A] non-international conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory.” “The expression ‘armed conflicts’ introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State.”

(b) internal disturbances excluded

Akayesu, (Trial Chamber), September 2, 1998, para. 620: The term “armed conflict” “suggests the existence of hostilities between armed forces organized to a greater or lesser extent,” which necessarily “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.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 92: “[I]t is clear that mere acts of banditry, internal disturbances and tensions, and unorganized and short-lived insurrections are to be ruled out.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 171: “Certain types of internal conflicts, which fall below a minimum threshold, are not recognised by Article 1(2) of Protocol II as non-international armed conflict, namely, ‘situations of internal

disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 248.

(2) application of Common Article 3 and Additional Protocol II depend on objective criteria

Akayesu, (Trial Chamber), September 2, 1998, para. 603: “[T]he ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict . . . [O]n the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills respective pre-determined criteria.”

Akayesu, (Trial Chamber), September 2, 1998, para. 624: Conditions required to apply Additional Protocol II “have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 101: “Whether a conflict meets the material requirements of [Common Article 3 and Additional Protocol II] is a matter of objective evaluation of the organization and intensity of the conflict and of the forces opposing one and another.”

Semanza, (Trial Chamber), May 15, 2003, para. 357: “Classification of a conflict as one to which Common Article 3 and/or Additional Protocol II applies depends on an analysis of the objective factors set out in the respective provisions.”

(3) type of conflict required for Additional Protocol II - additional requirements

Rutaganda, (Trial Chamber), December 6, 1999, para. 91: “Offences alleged to be covered by Article 4 of the Statute must, as a preliminary matter, have been committed in the context of a conflict of a non-international character satisfying the requirements of Common Article 3, which applies to ‘armed conflict not of an international character.’” “Additional Protocol II [applies] to conflicts which ‘take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.’”

Akayesu, (Trial Chamber), September 2, 1998, para. 601-602, 622-623: The following conditions must be met for Additional Protocol II to apply:

- “(i) an armed conflict took place in the territory of a High Contracting Party . . . between its *armed forces* and dissident armed forces or other organized armed groups;
- (ii) the dissident armed forces or other organized armed groups were under *responsible command*;
- (iii) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out *sustained and concerted military operations*; and

(iv) the dissident armed forces or other organized armed groups were able to *implement Additional Protocol II*.” (emphasis added). See also *Rutaganda*, (Trial Chamber), December 6, 1999, para. 95; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 100; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 171.

Rutaganda, (Trial Chamber), December 6, 1999, para. 94: “[C]onflicts covered by Additional Protocol II have a higher intensity threshold than Common Article 3 If an internal armed conflict meets the material conditions of Additional Protocol II, it then also automatically satisfies the threshold requirements of the broader Common Article 3.”

(a) armed forces

Akayesu, (Trial Chamber), September 2, 1998, para. 625: “Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, ‘armed forces’ of the High Contracting Party is to be defined broadly so as to cover all armed forces as described within national legislations.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 256.

(b) responsible command

Akayesu, (Trial Chamber), September 2, 1998, para. 626: “[R]esponsible command . . . entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 257.

(c) “sustained and concerted military operations” and implementing Additional Protocol II

Akayesu, (Trial Chamber), September 2, 1998, para. 626: The “armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 258.

ii) link between the accused and the armed forces - rejected

Akayesu, (Appeals Chamber), June 1, 2001, para. 425-445: The Appeals Chamber held that the Trial Chamber erred as a matter of law by (a) applying the “public agent or government representative test” in interpreting Article 4 and (b) holding that “the category of persons likely to be held responsible for violations of Article 4 . . . includes ‘only . . . individuals . . . 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 fulfill the war efforts.’”

“[T]he Trial Chamber erred on a point of law in restricting the application of common Article 3 to a certain category of persons.” “[I]n actuality authors of violations of common Article 3 will likely fall into one of these categories” since “common Article 3 requires a close nexus between violations and the armed conflict.”⁷ “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 relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute.”

Semanza, (Trial Chamber), May 15, 2003, para. 358-362: “Common Article 3 and Additional Protocol II . . . do not specify classes of potential perpetrators, rather they indicate who is bound by the obligations imposed thereby.” “[F]urther clarification in respect of the class of potential perpetrators is not necessary in view of the core purpose of Common Article 3 and Additional Protocol II: the protection of victims. [T]he protections of Common Article 3 imply effective punishment of perpetrators, whoever they may be.” “[C]riminal responsibility for acts covered by Article 4 of the Statute does not depend on any particular classification of the alleged perpetrator.”

(1) civilians can be liable for war crimes

Musema, (Trial Chamber), January 27, 2000, para. 274-275: It is “well-established that the post-World War II Trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favoured 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, the Accused, as a civilian, “could fall in the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II.”

iii) geographic jurisdiction (*ratione loci*) (element 2)

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 169: “[T]he crimes must be committed *ratione loci*”

(1) once criteria are met, apply to whole state, not just “theatre of combat”

Rutaganda, (Trial Chamber), December 6, 1999, para. 102-103: “[T]he requirements of Common Article 3 and Additional Protocol II apply in the whole territory where the conflict is occurring and are not limited to the ‘war front’ or to the ‘narrow geographical context of the actual theater of combat operations.’” *See also Akayesu*, (Trial Chamber), September 2, 1998, para. 635; *Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 182-183; *Musema*, (Trial Chamber), January 27, 2000, para. 284; *Semanza*, (Trial Chamber), May 15, 2003, para. 367.

Bagilishema, (Trial Chamber), June 7, 2001, para. 101: “Once the material requirements of Common Article 3 or Additional Protocol II have been met, these instruments will

⁷ For discussion of the nexus requirement, see Section (III)(c)(v), ICTR Digest.

immediately be applicable not only within the limited theatre of combat but also in the whole territory of the State engaged in the conflict. Consequently, the parties engaged in the hostilities are bound to respect the provisions of these instruments throughout the relevant territory.”

iv) personal jurisdiction (*ratione personae*) (element 3)

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 169: “[T]he crimes must be committed . . . *ratione personae*”

(1) class of victims - civilians protected

Semanza, (Trial Chamber), May 15, 2003, para. 363-366: “[B]oth Common Article 3 and Additional Protocol II protect persons not taking an active part in the hostilities. The ICTY Appeals Chamber emphasised that Common Article 3 covers ‘any individual not taking part in the hostilities.’ This is also the position taken by this Tribunal.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 859: “The provision [Article 4(a)] seeks to protect persons not taking an active part in the hostilities in armed conflicts not of an international character.”

Akayesu, (Trial Chamber), September 2, 1998, para. 629: The Chamber held that “persons taking no active part in the hostilities,” (from Common Article 3(1)), and “all persons who do not take a direct part or who have ceased to take part in hostilities,” (from Article 4 of Additional Protocol II) may be treated synonymously.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 605-608: The enumerated Articles of Protocol II would protect “interned or detained persons, deprived of their liberty for reasons related to the armed conflict,” “wounded, sick and shipwrecked persons,” “religious and medical personnel,” as well as the civilian population and individual civilians.

(2) the presence of non-civilians does not deprive the population of its civilian character

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 179-180: “[A]ll persons who are not combatants might be considered civilians.” The Chamber noted “that there is a certain distinction between the terms ‘civilians’ and ‘civilian population.’ There are civilians who accompany the armed forces or are attached to them. Civilians could even be among combatants who take a direct part in the hostilities. There is clear confirmation of this fact in Protocol II which stipulates that, ‘civilians shall enjoy the protection afforded by this part unless and for such time as they take a direct part in the hostilities.’ However, the civilian population as such does not participate in the armed conflict. Article 50 of Protocol I emphasises, ‘the presence within the civilian population of individuals who do not come within the definition of civilian does not deprive the population of its civilian character.’”

(3) analyze whether the victim was directly taking part in the hostilities

Rutaganda, (Trial Chamber), December 6, 1999, para. 100-101, n. 32: “[T]he civilian population comprises all persons who are civilians,” which is to say that the “civilian population is made up of persons who are not combatants or persons placed *hors de combat*, in other words, who are not members of the armed forces.” “[I]f civilians take a direct part in the hostilities, they then lose their right to protection as civilians *per se* and could fall within the class of combatant. To take a ‘direct’ part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.” Since the class of civilians is broadly defined “it will be a matter of evidence on a case-by-case basis to determine whether a victim has the status of civilian.”

Semanza, (Trial Chamber), May 15, 2003, para. 363-366: “The question to be answered... is whether, at the time of the alleged offence, the alleged victim was directly taking part in the hostilities. If the answer is negative, the alleged victim was a person protected by Common Article 3 and Additional Protocol II. To take a direct part in hostilities means, for the purposes of these provisions, to engage in acts of war that strike at personnel or equipment of the enemy armed forces.”

v) nexus between the crime and the armed conflict (element 4)

Akayesu, (Appeals Chamber), June 1, 2001, para. 438, n. 807: The ICTY Appeals Chamber has developed the test that “[t]here must be a nexus between the violations and the armed conflict.” See also *Bagilishema*, (Trial Chamber), June 7, 2001, para. 105.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 169: “[T]here must be a nexus between the crime and the armed conflict.”

(1) direct connection required/offense must be closely related to the hostilities

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 185-190: “[O]nly offences, which have a nexus with the armed conflict,” are covered. “[T]he term ‘nexus’ should not be understood as something vague and indefinite. A direct connection between the alleged crimes . . . 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.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 104-105: The Chamber held that “there must be a nexus between the offence and the armed conflict” and “[b]y this it should be understood that the offence must be closely related to the hostilities or committed in conjunction with the armed conflict.” The Prosecutor has the burden of proving beyond a reasonable doubt that, “on the basis of the facts, such a nexus exists between the crime committed and the armed conflict.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 259-262; *Bagilishema*, (Trial Chamber), June 7, 2001, para. 105; *Semanza*, (Trial Chamber), May 15, 2003, para. 368-369.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 598-604: The Prosecution failed to establish a nexus between the armed conflict and the alleged offense. The “allegations show only that the armed conflict had been used as pretext to unleash an official policy of genocide.” “[S]uch allegations cannot be considered as evidence of a direct link between the alleged crimes and the armed conflict.”

(2) actual hostilities not required in area of crimes; actual hostilities not required at exact time of crimes

Bagilishema, (Trial Chamber), June 7, 2001, para. 105: “[I]t is not necessary that actual armed hostilities have broken out in Mabanza *commune* and Kibuye Prefecture for Article 4 of the Statute to be applicable. Moreover, it is not a requirement that fighting was taking place in the exact time-period when the acts the offences alleged occurred were perpetrated.”

vi) mental state (*mens rea*) (element 5)

For discussion of mental state, see Section (III)(d)(i)(1) (murder) and Section (III)(d)(i)(2) (torture), ICTR Digest.

d) Underlying offenses

i) violence to life, health and physical or mental well-being of persons, in particular, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment

(1) murder

Musema, (Trial Chamber), January 27, 2000, para. 215: The elements of murder under Article 4(a) of the Statute are: “(a) [t]he victim is dead; (b) [t]he death resulted from an unlawful act or omission of the Accused or a subordinate; (c) [a]t 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 as to whether or not death ensues.”

Semanza, (Trial Chamber), May 15, 2003, para. 373: “Murder under Article 4 refers to the intentional killing of another which need not be accompanied by a showing of premeditation. The Chamber reaches this conclusion having considered the use of the term ‘*meurtre*’ as opposed to ‘*assassinat*’ in the French version of the Statute.”

See also discussion of murder under Article 3, Section (II)(c)(ii), ICTR Digest.

(2) torture

Musema, (Trial Chamber), January 27, 2000, para. 285: The elements of torture under Article 4(a) of the Statute are: “Intentionally inflicting severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession, or punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person

acting in an official capacity. It does not include pain or suffering only arising from, inherent to or incidental to, lawful sanctions.”

See also discussion of torture under Article 3, Section (II)(c)(vii), ICTR Digest.

ii) collective punishments

iii) taking of hostages

iv) acts of terrorism

v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault

(1) outrages upon personal dignity includes sexual violence

Akayesu, (Trial Chamber), September 2, 1998, para. 688: “Sexual violence falls within the scope of . . . ‘outrages upon personal dignity,’ set forth in Article 4(e) of the Statute.”

See also discussion of rape and sexual violence as causing serious bodily or mental harm to members of the group under Article 2, Section (I)(d)(ii)(3), and rape and sexual violence under Article 3, Section (II)(c)(viii), sexual violence as other inhumane acts under Article 3, Section (II)(c)(x)(1)(b), ICTR Digest.

(2) humiliating and degrading treatment

Musema, (Trial Chamber), January 27, 2000, para. 285: The elements of “humiliating or degrading treatment” under Article 4(e) are: “Subjecting victims to treatment designed to subvert their self-regard. Like outrages upon personal dignity, these offences may be regarded as a lesser forms of torture; moreover ones in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority.”

(3) rape

Musema, (Trial Chamber), January 27, 2000, para. 285, 220-221, 226: The elements of rape under Article 4(e) of the Statute are: “[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive [V]ariations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual [T]he essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.”

See also discussion of rape and sexual violence as causing serious bodily or mental harm to members of the group under Article 2, Section (I)(d)(ii)(3), rape as torture under Article 3, Section (II)(c)(vii)(2), and rape and sexual violence under Article 3, Section (II)(c)(viii), ICTR Digest.

(4) indecent assault

Musema, (Trial Chamber), January 27, 2000, para. 285: The elements of “indecent assault” under Article 4(e) of the Statute are: “The accused caused the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual.”

vi) pillage

vii) 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

viii) threats to commit any of the foregoing acts

IV) INDIVIDUAL CRIMINAL RESPONSIBILITY (ARTICLE 6(1))

a) Statute

ICTR Statute, Article 6:

“1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

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

b) Generally

i) required elements

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 198: There is a “two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6(1). This test required the demonstration of (i) participation . . . that the accused’s conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime.”

ii) crime must have actually occurred for Article 6(1) liability, but not for genocide

Akayesu, (Trial Chamber), September 2, 1998, para. 473: “[T]he principle of individual criminal responsibility . . . implies that the planning or preparation of the crime actually leads to its commission.” Thus, a person can only be liable under Article 6(1) covering “Individual Criminal Responsibility,” if the offense was actually committed, except in the case of the crime of genocide, for which there can be attempt liability. *See also Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, n. 80; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 34; *Musema*, (Trial Chamber), January 27, 2000, para. 115.

Rutaganda, (Trial Chamber), December 6, 1999, para. 34: “However, . . . Article 2(3) . . . on the crime of genocide, provides for prosecution for attempted genocide.”

Semanza, (Trial Chamber), May 15, 2003, para. 378: “Pursuant to Article 6(1), a crime within the Tribunal’s jurisdiction must have been completed before an individual’s participation in that crime will give rise to criminal responsibility. Article 6(1) does not criminalize *inchoate* offences, which are punishable only for the crime of genocide pursuant to Article 2(3)(b), (c), and (d).”

iii) individual and command responsibility distinguished

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 202: The Chamber distinguished individual, from command responsibility, saying that individual responsibility is based “not on the duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.”

iv) planning, instigating, ordering, committing, aiding, abetting read disjunctively

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 193-197, 207: The Chamber rejected the defense’s argument that “‘planning, instigation, ordering, committing,’ should be read cumulatively, but separately from, ‘aiding and abetting,’” and “that ‘aiding and abetting’ should also be read cumulatively.” The Chamber instead chose to read the phrases disjunctively, holding that individual criminal responsibility only requires that “any one of the modes of participation delineated in Article 6(1) . . . be shown.” “[E]ach of the modes of participation may, independently, give rise to criminal responsibility.”

Akayesu, (Trial Chamber), September 2, 1998, para. 484: “[E]ither aiding or abetting alone is sufficient to render the perpetrator criminally liable.”

v) can be liable for acts committed by others

Rutaganda, (Trial Chamber), December 6, 1999, para. 35: The Chamber found that “the Accused may . . . be held criminally liable for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed or aided and abetted another in the commission of such acts.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 117.

c) Participation: that the accused’s conduct contributed to the commission of an illegal act (element 1)

i) generally - contribution must be substantial

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 199: “What constitutes the *actus reus* and the requisite contribution inevitably varies with each mode of participation set out in Article 6(1). What is clear is that the contribution to the undertaking be a substantial one, and this is a question of fact for the Trial Chamber to consider.”

Semanza, (Trial Chamber), May 15, 2003, para. 379: “To satisfy Article 6(1), an individual’s participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime.”

ii) planning

Akayesu, (Trial Chamber), September 2, 1998, para. 480: “[P]lanning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.” *See also Rutaganda*, (Trial Chamber), December 6, 1999, para. 37; *Musema*, (Trial Chamber), January 27, 2000, para. 119.

Bagilishema, (Trial Chamber), June 7, 2001, para. 30: “An individual who participates directly in planning to commit a crime under the Statute incurs responsibility for that crime even when it is actually committed by another person. The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.”

Semanza, (Trial Chamber), May 15, 2003, para. 380: “‘Planning’ envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime. The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.”

iii) instigating/inciting

(1) generally

Bagilishema, (Trial Chamber), June 7, 2001, para. 30: “An individual who instigates another person to commit a crime incurs responsibility for that crime. By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime. Proof is required of a causal connection between the instigation and the *actus reus* of the crime.” *See also Semanza*, (Trial Chamber), May 15, 2003, para. 381.

(2) no “direct and public” requirement

Akayesu, (Appeals Chamber), June 1, 2001, para. 474-483: The Appeals Chamber ruled that the *Akayesu* Trial Chamber erred as a matter of law in finding that the term “instigated” under Article 6(1) must be “direct and public.” The Appeals Chamber noted the discrepancy between the English and French versions of the statute, both original, which use “instigated” and “incite” respectively, and held that the two terms are synonymous. “Direct and public” instigation was not required.

iv) ordering

Akayesu, (Trial Chamber), September 2, 1998, para. 483: “Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda, ordering is a form of complicity through instructions given to the direct perpetrator of an offence.”

See also *Rutaganda*, (Trial Chamber), December 6, 1999, para. 39; *Musema*, (Trial Chamber), January 27, 2000, para. 121.

v) committing

Rutaganda, (Trial Chamber), December 6, 1999, para. 41: “[A]n accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 123.

Semanza, (Trial Chamber), May 15, 2003, para. 383: “‘Committing’ refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute.”

vi) aiding and abetting

(1) defined

Akayesu, (Trial Chamber), September 2, 1998, para. 484: “Aiding” and “abetting” are not synonymous. “Aiding means giving assistance to someone.” “Abetting . . . would involve facilitating the commission of an act by being sympathetic thereto.” See also *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 787.

Semanza, (Trial Chamber), May 15, 2003, para. 384: “The terms ‘aiding’ and ‘abetting’ refer to distinct legal concepts. The term ‘aiding’ means assisting or helping another to commit a crime, and the term ‘abetting’ means encouraging, advising, or instigating the commission of a crime.”

(2) either aiding or abetting alone suffices

Akayesu, (Trial Chamber), September 2, 1998, para. 484: “[E]ither aiding or abetting alone is sufficient to render the perpetrator criminally liable.”

(3) mental state (*mens rea*)

Bagilishema, (Trial Chamber), June 7, 2001, para. 32: “An accomplice must *knowingly* provide assistance to the perpetrator of the crime, that is, he or she must know that it will contribute to the criminal act of the principal. Additionally, the accomplice must have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.”

(a) specific intent required for aiding and abetting genocide

Akayesu, (Trial Chamber), September 2, 1998, para. 485: “[W]hen dealing with a person [a]ccused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such; whereas . . . the same requirement is not needed for complicity in genocide.”

See also discussion of mental state (*mens rea*) for Article 6(1) generally, Section (IV)(d), ICTR Digest.

(4) assistance must substantially contribute/have substantial effect

Rutaganda, (Trial Chamber), December 6, 1999, para. 43: “[A]iding and abetting include all acts of assistance in either physical form or in the form of moral support; nevertheless, . . . any act of participation must substantially contribute to the commission of the crime. The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 126; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 787.

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “For an accomplice to be found responsible for a crime under the Statute, he or she must assist the commission of the crime; the assistance must have a *substantial effect* on the commission of the crimes.”

(5) assistance need not be indispensable

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “The Chamber . . . agrees with the view expressed in *Furundzija*, that the assistance given by the accomplice need not constitute an indispensable element, i.e. a *conditio sine qua non*, of the acts of the perpetrator.”

(6) assistance need not be at same time offense committed

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “The assistance need not be provided at the same time that the offence is committed.”

Semanza, (Trial Chamber), May 15, 2003, para. 385: “[T]he assistance may be provided before or during the commission of the crime.”

(7) presence not required

Akayesu, (Trial Chamber), September 2, 1998, para. 484: “[I]t is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 43: “[I]t is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the offence.” See also *Musema*, (Trial Chamber), January 27, 2000, para. 125.

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “[T]he participation in the commission of the crime does not require actual physical presence or physical assistance.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 200: “It is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be a direct one. That is to say . . . the role of the individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with ‘aiding’ or ‘abetting’ of a crime.”

(8) mere encouragement can suffice

Bagilishema, (Trial Chamber), June 7, 2001, para. 33: “Mere encouragement or moral support by an aider and abettor may amount to ‘assistance.’ The accomplice need only be ‘concerned with the killing.’”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 200-201: “[A]n approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct” may be held liable.

Semanza, (Trial Chamber), May 15, 2003, para. 385, 386: “This encouragement or support may consist of physical acts, verbal statements, or, in some cases, mere presence as an ‘approving spectator.’” “Criminal responsibility as an ‘approving spectator’ does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.”

(9) presence combined with authority can constitute assistance

Bagilishema, (Trial Chamber), June 7, 2001, para. 34: The Chamber held that “presence, when combined with authority, may constitute assistance (the *actus reus* of the offence) in the form of moral support” and that “an approving spectator who is held in such respect by other perpetrators that his presence encourages them in their conduct, may be guilty in a crime against humanity.” The Chamber noted that “[i]nsignificant status may, however, put the ‘silent approval’ below the threshold necessary for the *actus reus*.” See also *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 461.

vii) acting with common criminal purpose: may give rise to liability for “committing” or “aiding and abetting”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 203-205: Where “a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realization of this purpose may be held criminally responsible . . . and . . . [d]epending upon the facts of a given situation, the culpable individual may, under such circumstances, be held criminally responsible either as a direct perpetrator of, or as an aider and abettor to, the crime in question.” The Chamber concluded that “the members of such a group would be responsible for the result of any acts done in furtherance of the common design where such furtherance would be probable from those acts,” and stated that “the accused need not necessarily have the same *mens rea* as the principal offender.”

d) Mental state (*mens rea*) (element 2)

Akayesu, (Trial Chamber), September 2, 1998, para. 479: “[T]he forms of participation referred to in Article 6(1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 198: “[K]nowledge or intent” requires “awareness by the actor of his participation in a crime.”

Semanza, (Trial Chamber), May 15, 2003, para. 388: “The accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal’s crime including the *mens rea*.”

Semanza, (Trial Chamber), May 15, 2003, para. 389: “In the case of the ‘approving spectator,’ the individual must know that his presence would be seen by the perpetrator of the crime as encouragement or support. The requisite *mens rea* may be established from the circumstances including prior like behaviour, failure to punish, or verbal encouragement.”

See also Section (IV)(c)(vi)(3), ICTR Digest, discussing mental state for aiding and abetting.

e) Application

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 974: “The Chamber notes Nahimana’s particular role as the founder and principal ideologist of RTLM [radio station].” “Nahimana was less actively involved in the daily affairs of RTLM after 6 April 1994, but RTLM did not deviate from the course he had set for it before 6 April 1994. [T]he broadcasts intensified after 6 April and called explicitly for the extermination of the Tutsi population. The programming of RTLM after 6 April built on the foundations created for it before 6 April. RTLM did what Nahimana wanted it to do. It was ‘instrumental in awakening the majority population’ and in mobilizing the population to stand up against the Tutsi enemy. RTLM was Nahimana’s weapon of choice, which he used to instigate the killing of Tutsi civilians. For this reason the Chamber finds Nahimana guilty of genocide pursuant to Article 6(1).”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 954, 975: “Barayagwiza was one of the principal founders of CDR [political party that depicted the Tutsi population as the enemy] and played a leading role in its formation and development. He was a decision-maker for the party. The CDR had a youth wing, called the *Impuzamugambi*, which undertook acts of violence, often together with the *Interahamwe* . . . against the Tutsi population. The killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of ‘*tubatsembatseme*’ or ‘let’s exterminate them’ by Barayagwiza himself and by CDR members in his presence at public meetings and demonstrations. The reference to ‘them’ was understood to mean the Tutsi population. Barayagwiza supervised roadblocks manned by the *Impuzamugambi*, established to stop and kill Tutsi. The Chamber notes the direct involvement of Barayagwiza in the expression of genocidal intent and in genocidal acts undertaken by members of the CDR and its *Impuzamugambi*. Barayagwiza was at the organizational helm. He was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians. [T]he Chamber finds . . . Barayagwiza guilty of instigating acts of genocide committed by CDR members and *Impuzamugambi*, pursuant to Article 6(1).”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 955-956, 977A: “Ngeze . . . ordered the *Interahamwe* in Gisenyi to kill Tutsi civilians. Many were killed in the attacks that happened immediately thereafter and later on the same day. . . .

[T]he Chamber finds that Ngeze ordered the killing of Tutsi civilians.” “Ngeze helped secure and distribute, stored, and transported weapons to be used against the Tutsi population. He set up, manned and supervised roadblocks . . . that identified targeted Tutsi civilians who were subsequently taken to and killed. . . . [T]he Chamber finds that Ngeze aided and abetted the killing of Tutsi civilians.” “As founder, owner and editor of *Kangura*, a publication that instigated the killing of Tutsi civilians, and for his individual acts in ordering and aiding and abetting the killing of Tutsi civilians, the Chamber finds . . . Ngeze guilty of genocide, pursuant to Article 6(1).”

V) **COMMAND RESPONSIBILITY (ARTICLE 6(3))**

a) **Statute**

Article 6:

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

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

b) **Generally**

i) **liability for both individual criminal responsibility and command responsibility possible**

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 210: “The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive. The Chamber must, therefore, consider both forms of responsibility charged in order to fully reflect the culpability of the accused in light of the facts.”

c) **Elements**

Bagilishema, (Trial Chamber), June 7, 2001, para. 38: The Chamber held that the “three essential elements of command responsibility” are: “(i) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime; and, (ii) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and, (iii) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.”

i) the existence of a superior-subordinate relationship of effective control (element 1)

(1) superior-subordinate relationship

Semanza, (Trial Chamber), May 15, 2003, para. 401: “A superior-subordinate relationship requires a formal or informal hierarchical relationship where a superior is senior to a subordinate. The relationship is not limited to a strict military command style structure.”

(2) effective control

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 229-231: “The principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3).” The Chamber agreed with the ICTY’s decision in *Prosecutor v. Mucic et al.*, where it was held that “the superior have [sic] effective control over the persons committing the [crimes], in the sense of having the material ability to prevent and punish the commission of these offences.” “[T]he ability to prevent and punish a crime is a question that is inherently linked with the given factual situation.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 45: “[T]he essential element is not whether a superior had authority over a certain geographical area, but whether he or she had effective control over the individuals who committed the crimes”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 819: “Article 6(3) provides that civilian leaders may incur criminal responsibility for acts committed by their subordinates or others under their ‘effective control.’”

(3) consider *de facto* as well as *de jure* control/formal status alone not determinative

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 217-223: The Chamber held that it is “under a duty . . . to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*.” “The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.” The Chamber must “be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility.” The Chamber noted that concentrating upon the *de jure* powers of the accused would improperly represent the situation at the time, and could prejudice either side by improperly representing the authority of the accused. “Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to [find] command responsibility.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 39: “A position of command is a necessary condition for the imposition of command responsibility, but the existence of such a position cannot be determined by reference to formal status alone.” “The factor that determines liability is the actual possession, or non-possession, of a position of command over subordinates.” “[A]lthough a person’s *de jure* position as a commander in

certain circumstances may be sufficient to invoke responsibility under Article 6(3), ultimately it is the actual relationship of command (whether *de jure* or *de facto*) that is required for command responsibility.” “[D]ecisive criterion in determining who is a superior is his or her ability, as demonstrated by duties and competence, to effectively control his or her subordinates.”

Musema, (Trial Chamber), January 27, 2000, para. 141: “[A] civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law.” See also *Niyitegeka*, (Trial Chamber), May 16, 2003, para. 472.

(4) applies to civilian as well as military commanders

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 213-215: “[T]he application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one.” The Statute “makes no limited reference to the responsibility to be incurred by military commanders alone; [r]ather the more generic term of ‘superior’ is used.” The use of “‘Head[s] of State or Government’ or ‘responsible Government officials’ in Article 6(2), clearly reflects the intention of the drafters to extend this provision of superior responsibility beyond military commanders.” The Chamber stated that “[t]he jurisprudence also supports this interpretation” and cited the *Kambanda* and *Serushago* cases at the ICTR which involved the former prime minister and a “prominent local civilian” and militia leader pleading guilty to charges under 6(3).

Musema, (Trial Chamber), January 27, 2000, para. 148: The Chamber held that the “definition of individual criminal responsibility . . . applies not only to the military but also to persons exercising civilian authority as superiors.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 976: “The Chamber notes that in *Musema*, the Tribunal found that superior responsibility extended to non-military settings. . . .”

Compare Akayesu, (Trial Chamber), September 2, 1998, para. 491: “[I]n the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious . . . [I]t is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.”

(5) whether civilians require control similar to military for culpability

Bagilishema, (Trial Chamber), June 7, 2001, para. 42-43: The Chamber held that while the “doctrine of command responsibility extends beyond the responsibility of military commanders to encompass civilian superiors in positions of authority,” it agreed with the approach articulated by the International Law Commission and the ICTY’s decision in *Prosecutor v. Mucic et al.*, that “the doctrine of command responsibility ‘extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.’” “[F]or a civilian

superior's degree of control to be 'similar to' that of a military commander, the control over subordinates must be 'effective,' and the superior must, have the 'material ability' to prevent and punish any offences." "[T]he exercise of *de facto* authority must be accompanied by 'the trappings of the exercise of *de jure* authority.'" The Chamber also held that "these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action," and that "[i]t is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence."

But see Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 819: "Article 6(3) provides that civilian leaders may incur criminal responsibility for acts committed by their subordinates or others under their 'effective control,' although the control exercised need not be of the same nature as that exercised by a military commander."

ii) mental state (*mens rea*) (element 2)

(1) knowledge or constructive knowledge that the crime was about to be or was being, or had been committed

Akayesu, (Trial Chamber), September 2, 1998, para. 479, 489: It is not required "that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention." "[I]t is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent."

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 225: "The *mens rea* . . . requires that for a superior to be held criminally responsible for the conduct of his subordinates he must have known, or had reason to know, of their criminal activities."

Bagilishema, (Trial Chamber), June 7, 2001, para. 46: The Chamber held that "a superior possesses or will be imputed the *mens rea* required to incur criminal liability where: he or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes; or, he or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or, the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known." *See also Semanza*, (Trial Chamber), May 15, 2003, para. 405.

(2) responsibility is not based on strict liability

Bagilishema, (Trial Chamber), June 7, 2001, para. 44: “As to the *mens rea*, the standard that the doctrine of command responsibility establishes for superiors who fail to prevent or punish crimes committed by their subordinates is not one of strict liability.”

Semanza, (Trial Chamber), May 15, 2003, para. 404: “Criminal liability based on superior responsibility will not attach on the basis of strict liability simply because an individual is in a chain of command with authority over a given geographic area. While the individual’s position in the command hierarchy is considered a significant indicator that the superior knew or had reason to know about the actions of his subordinates, knowledge will not be presumed from the status alone.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 45: “Although an individual’s command position may be a significant indicator that he or she knew about the crimes, such knowledge may not be presumed on the basis of his or her position alone.”

(3) different test for mental state of civilian and military commanders

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 227-228: The Chamber differentiates between “military commanders and other superiors.” A military commander has a “more active duty . . . to inform himself of the activities of his subordinates when he ‘knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.’” For all other superiors, they must have “known, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.” The Chamber stipulated that this does not “demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control.”

iii) the failure to take necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator (element 3)

Bagilishema, (Trial Chamber), June 7, 2001, para. 38: The third element is “the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.”

Bagilishema, (Trial Chamber), June 7, 2001, para. 47-50: Noting that Article 6(3) states that a superior is expected to take “necessary and reasonable measures” to prevent or punish crimes under the Statutes, the Chamber held “‘necessary’ to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and, ‘reasonable’ to be those measures which the commander was in a position to take in the circumstances.”

The Chamber held that a “superior may be held responsible for failing to take only such measures that were within his or her powers,” and that “it is the commander’s degree of effective control – his or her material ability to control subordinates – which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop, or punish the subordinates’ crimes.” “Such a material ability must not be considered abstractly, but must be evaluated on a case-by-case basis, considering all the circumstances.”

The Chamber noted that “the obligation to prevent or punish does not provide the Accused with alternative options,” and that “[f]or example, where the Accused knew or had reason to know that his or her subordinates were about to commit crimes and failed to prevent them, the Accused cannot make up for the failure to act by punishing the subordinates afterwards.”

The Chamber held that “in the case of failure to punish, a superior’s responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law,” and that “command responsibility for failure to punish may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates.” *See also Semanza*, (Trial Chamber), May 15, 2003, para. 406-407.

(1) attempts to prevent or punish must be considered except where the accused ordered the crimes

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 223-224: The Chamber held that it is only necessary to consider whether the accused “knew or had reason to know and failed to prevent or punish the commission of the crimes” when he did not in fact order them. When the accused ordered the crimes, “then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.” “However, in all other circumstances, the Chamber must give full consideration to the elements of ‘knowledge’ and ‘failure to prevent and punish.’”

d) Application

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 970-973: “Nahimana and Barayagwiza were, respectively, ‘number one’ and ‘number two’ in the top management of the radio. They represented the radio at the highest level in meetings with the Ministry of Information; they controlled the finances of the company; and they were both members of the Steering Committee, which functioned in effect as a board of directors for RTLM [radio station].” “While the Chamber recognizes that Nahimana and Barayagwiza did not make decisions in the first instance with regard to each particular broadcast of RTLM, these decisions reflected an editorial policy for which they were responsible.” “After 6 April 1994, although the evidence does not establish the same level of active support, it is . . . clear that Nahimana and Barayagwiza knew what was happening at RTLM and failed to exercise the authority vested in them as office-holding members of the governing body of RTLM, to prevent the genocidal harm that was caused by RTLM programming.” “Nahimana and Barayagwiza had superior responsibility for the broadcasts of RTLM,” however “Nahimana has not been charged for genocide pursuant to Article 6(3)” and “[o]nly Barayagwiza is so charged.” “For his active engagement in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM, the Chamber finds . . . Barayagwiza guilty of genocide pursuant to Article 6(3).”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 976-977: “Barayagwiza had superior responsibility over members of the CDR [political party that depicted the Tutsi population as the enemy] and its militia, the *Impuzamugambi*, as

President of CDR at Gisenyi Prefecture and from February 1994 as President of CDR at the national level. He promoted the policy of CDR for the extermination of the Tutsi population and supervised his subordinates, the CDR members and *Impuzamugambi* militia, in carrying out the killings and other violent acts. For his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugambi*, the Chamber finds Barayagwiza guilty of genocide pursuant to Article 6(3).”

VI) DEFENSES

a) Alibi and special defenses

i) excerpts from Rule 67, ICTR Rules of Procedure and Evidence: reciprocal disclosure of evidence

“(A) As early as reasonably possible and in any event prior to the commencement of the trial:

ii) the defence shall notify the Prosecutor of its intent to enter:

- (a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
- (b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on any of the above defences.”

ii) burden of proof for alibi defense

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 234: “[T]he burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects notwithstanding that the Defence raised alibi. After all, the accused is presumed innocent until the Prosecution has proved his guilt under Article 20(3) of the Statute. The accused is only required to raise the defence of alibi and fulfil the specific requirements of Rule 67(A)(ii) of the Rules.”

iii) notice for alibi defense

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 235-239: Rule 67 required the Defense “to notify the Prosecution about their intent to rely upon the defence of alibi.” In the case at hand, the defense did not inform the prosecutor prior to the commencement of trial and the prosecutor filed a motion requesting compliance with Rule 67(A)(ii). The Chamber held that “where good cause is not shown, for the application of Rule 67(B), the Trial Chamber is entitled to take into account this failure

when weighing the credibility of the defence of alibi and/or any special defences presented.” In the case at hand, the Chamber held that “despite the non-compliance with its order” it would “consider the defence of alibi.”

iv) rebuttal for alibi defense

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 239-240: Rule 85 permits the Prosecution to bring evidence to rebut the alibi. The Chamber noted that they “will accord no extra weight to the accused’s defence of alibi merely because the Prosecution did not call witnesses in rebuttal.”

VII) CHARGING, CONVICTING AND SENTENCING

a) Cumulative charges and convictions

i) cumulative charges permitted

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 863-864: “Cumulative charging is generally permissible, as it is not possible to determine which charges will be proven against an Accused prior to the presentation of the evidence.” *See also Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1089.

Rutaganda, (Trial Chamber), December 6, 1999, para. 117: The Chamber held that genocide, crimes against humanity, and war crimes “have disparate ingredients and . . . their punishment is aimed at protecting discrete interests [and thus] multiple offenses may be charged on the basis of the same acts in order to capture the full extent of the crimes committed by an accused.” *See also Musema*, (Trial Chamber), January 27, 2000, para. 297.

ii) cumulative convictions based on same conduct permitted only where crimes involve a materially distinct element

Prosecutor v. Musema, Case No. ICTR-96-13-A (Appeals Chamber), November 16, 2001, para. 358-370: The Appeals Chamber affirmed the test laid out in the *Celebici* Appeal Judgment as the one to be applied “in determining when multiple convictions based on the same set of facts may be entered or affirmed”:

“reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two

provisions, one of which contains an additionally materially distinct element, then a conviction should be entered only under that provision.”

“In applying this test, *all* the legal elements of the offences, including those contained in the provisions’ introductory paragraph must be taken into account.” In response to a request by the prosecutor to the Appeals Chamber “to confirm that multiple convictions under different Articles of the Statute are always permitted,” the Appeals Chamber “decline[d] to give its opinion on the issue and limit[ed] its findings to the issues raised on appeal.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 863-864: “Cumulative convictions are permissible only if the crimes involved comprise materially distinct elements.” *See also Nabimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1090.

Rutaganda, (Trial Chamber), December 6, 1999, para. 110-119: The Chamber re-affirmed the test set out by the Trial Chamber in *Akayesu*, establishing when a person can be charged and convicted for two or more offenses in relation to the same facts. The Chamber disagreed with the majority finding in *Kayishema and Ruzindana* which held that the cumulative charges were improper because the crimes involved some of the same elements, the evidence relied upon to prove them was the same, and the protected social interests were the same.

iii) application – multiple convictions

(1) permitted for genocide and crimes against humanity

Musema, (Appeals Chamber), November 16, 2001, para. 369-370: The Appeals Chamber held that “convictions for genocide and extermination as a crime against humanity, based on the same set of facts, are permissible,” and held that “cumulative charging is generally permitted.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 864: “[T]he two offences [genocide and a crime against humanity (murder)] comprise materially distinct elements. For example, the *mens rea* of genocide is the intent to destroy, in whole or in part, an ethnic or racial group, which element is not required for a crime against humanity. The *mens rea* of a crime against humanity (murder) is the knowledge that the murder is part of a widespread or systematic attack against a civilian population on discriminatory grounds.”

Nabimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1090: “[T]he three Accused are guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and crimes against humanity (persecution and extermination). As these offences comprise materially distinct elements . . . convictions on these counts will be entered against the three Accused.”

But see Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 577-578, 590: In this particular case, the accused persons could not be convicted “for genocide as well as for crimes against humanity based on murder and extermination because the later two offences are subsumed fully by the counts of genocide.” Although all the necessary elements for both exist, “the crimes against humanity in question are completely absorbed by the crime of genocide. All counts for these crimes are based on the same facts and the same criminal conduct. These crimes were committed at the same massacre sites, against the same people, belonging to the Tutsi ethnic group with the same intent to destroy this group in whole or in part.”

(2) permitted for genocide, crimes against humanity and war crimes

Akayesu, (Trial Chamber), September 2, 1998, para. 468-470: “[G]enocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II have different [constituent] elements and, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or protected extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are . . . never co-extensive. [I]t is legitimate to charge these crimes in relation to the same set of facts. [I]t may . . . be necessary to record a conviction for more than one of these in order to fully reflect what crimes an accused committed.” These crimes are not “lesser included offences of each other.” Thus, “multiple convictions for these offences in relation to the same set of facts [are] permissible.”

b) Sentencing/penalties

i) instruments governing penalties

(1) Article 23, ICTR Statute: Penalties

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

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

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

(2) Rule 101 of the Rules of Procedure and Evidence, ICTR

“(A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as

- (i) Any aggravating circumstances;
- (ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
- (iii) The general practice regarding prison sentences in the courts of Rwanda;
- (v) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.”

ii) generally

(1) considerations in Statute and Rules not mandatory nor exhaustive

Rutaganda, (Trial Chamber), December 6, 1999, para. 458-459: “[A]s far as the individualization of penalties is concerned, the judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and the Rules. Here again, their unfettered discretion in assessing the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent Similarly, the factors referred to in the Statute and in the Rules cannot be interpreted as having to be applied cumulatively in the determination of the sentence.” *See also Ruggiu*, (Trial Chamber), June 1, 2000, para. 34; *Prosecutor v. Kambanda*, Case No. ICTR-97-23 (Trial Chamber), September 4, 1998, para. 29-31.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentencing Judgment para. 3-4: The enumerated circumstances set out in the Statute and the Rules “are not necessarily mandatory or exhaustive. It is a matter of individualising the penalty considering the totality of the circumstances.” The Chamber also held that it had “unfettered discretion to go beyond the circumstances stated in the Statute and Rules to ensure justice in matters of sentencing.” *See also Ruggiu*, (Trial Chamber), June 1, 2000, para. 35.

(2) only prison sentences dispensed

Kambanda, (Trial Chamber), September 4, 1998, para. 10: “[T]he only penalties the Tribunal can impose on an accused who pleads guilty or is convicted as such are prison terms up to and including life imprisonment The Statute of the Tribunal excludes other forms of punishment such as the death sentence, penal servitude or a fine.” *See also Prosecutor v. Serushago*, Case No. ICTR-98-39 (Trial Chamber), February 5, 1999, Sentence para. 12; *Rutaganda*, (Trial Chamber), December 6, 1999, para. 448.

(3) restitution

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 880: “[T]he Tribunal may impose . . . the restitution of property or proceeds acquired by criminal conduct.” *See also Kambanda*, (Trial Chamber), September 4, 1998, para. 22.

(4) goal of penalties: retribution, deterrence, rehabilitation, protecting society, justice, ending impunity, promoting reconciliation, and restoring peace

Rutaganda, (Trial Chamber), December 6, 1999, para. 456: “[I]t is clear that the penalties imposed on accused persons found guilty . . . must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on [the] other hand, at deterrence, namely to dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.” *See also Kambanda*, (Trial Chamber), September 4, 1998, para. 28; *Musema*, (Trial Chamber), January 27, 2000, para. 986.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentencing Judgment para. 2: “The Chamber must impose sentences on convicted persons for retribution, deterrence, rehabilitation, and to protect society.” *See also Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003, para. 882 and 887.

Niyitegeka, (Trial Chamber), May 16, 2003, para. 484: “Specific emphasis is placed on general deterrence, so as to demonstrate ‘that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights.’”

Ruggiu, (Trial Chamber), June 1, 2000, para. 32-33: “The objective in creating the Tribunal is to prosecute and punish the perpetrators of the atrocities in Rwanda, to put an end to impunity, and thereby to promote national reconciliation and restoration of peace. The jurisprudence of the ICTR with regard to penalties has addressed the principal aims of sentencing, namely retribution, deterrence, rehabilitation and justice.”

iii) determining penalties

(1) taking account of Rwandan law/practice

Kambanda, (Trial Chamber), September 4, 1998, para. 11, 18, 22-24, 41: “Neither . . . the Statute nor . . . the Rules determine any specific penalty for each of the crimes. The determination of sentences is left to the discretion of the Chamber, which should take into account . . . the general practice regarding prison sentences in the courts of Rwanda.” The Trial Chamber “has recourse only to prison sentences applicable in Rwanda” and not the death penalty. “Reference to the Rwandan sentencing practice is intended as a guide to determining an appropriate sentence and does not fetter the discretion of the judges of the Trial Chamber to determine the sentence.” *See also Serushago*, (Trial Chamber), February 5, 1999, Sentence para. 18.

Prosecutor v. Serushago, Case No. ICTR-98-39-A (Appeals Chamber), April 6, 2000, para. 30: “It is settled jurisprudence of the ICTR that the requirement that ‘the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda’ does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.” *See also Ruggiu*, (Trial Chamber), June 1, 2000, para. 31.

Rutaganda, (Trial Chamber), December 6, 1999, para. 454: The Chamber held that “[r]eference to the practice of sentencing in Rwanda and to the Organic law is for purposes of guidance. While referring as much as practicable to such practice of sentencing, the Chamber maintains its unfettered discretion to pass sentence on persons found guilty.”⁸ *See also Musema*, (Trial Chamber), January 27, 2000, para. 984.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentencing Judgment para. 6-7: “Rwandan law empowers its courts to impose the death penalty for persons convicted . . . of [g]enocide . . . and to impose a life sentence for persons convicted of . . . intentional homicide or . . . serious assault against the person causing death.” The Chamber held that “the general practice regarding prison sentences in Rwanda represents one factor supporting this Chamber's imposition of the maximum and very severe sentences, respectively” on Kayishema and Ruzindana.

(2) ranking of crimes: genocide is “crime of crimes,” then crimes against humanity; war crimes are lesser

Kambanda, (Trial Chamber), September 4, 1998, para. 12-14, 16: “[T]he Statute does not rank the various crimes . . . and thereby, the sentence to be handed down.” “In theory, the sentences are the same for each of the three crimes, namely a maximum term of life imprisonment.” However, “[t]he Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity.” The Chamber found it difficult “to rank genocide and crimes against humanity in terms of their respective gravity” and held that crimes against humanity and genocide are “crimes which particularly shock the collective conscience.” However, the Chamber stated that the “crime of genocide is unique because of its element of *dolus specialis* (special intent)” and held that “genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.” *See also Serushago*, (Trial Chamber), February 5, 1999, Sentence para. 13-15; *Musema*, (Trial Chamber), January 27, 2000, para. 979-981.

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentence para. 8-9: Genocide is “an offence of the most extreme gravity.” Previous ICTR judgments held “that genocide constitutes the ‘crime of crimes.’”

(3) gradation in sentencing: imposing highest penalties on those who planned or ordered atrocities, or those who committed crimes with especial zeal or sadism

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 884: “[T]he principle of gradation in sentencing . . . enables the Tribunals to distinguish between crimes which are of the most heinous nature, and those which, although reprehensible and deserving severe penalty, should not receive the highest penalties. The imposition of the highest penalties upon those at the upper end of the sentencing scale, such as

⁸ The “Organic law” refers to the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes Against Humanity committed since 1 October 1990, adopted in 1996.

those who planned or ordered atrocities, or those who committed crimes with especial zeal or sadism, enables the Chamber to punish, deter, and consequently stigmatize those crimes at a level that corresponds to their overall magnitude and reflects the extent of the suffering inflicted upon the victims.” *See also Njyitegeka*, (Trial Chamber), May 16, 2003, para. 486.

(4) range of sentences

Semanza, (Trial Chamber), May 15, 2003, para. 562-564: “The . . . practice of awarding a single sentence for the totality of an accused’s conduct makes it difficult to determine the range of sentences for each specific crime. [Yet] it is possible to ascertain general ranges of sentences Principal perpetrators convicted of either genocide or extermination as a crime against humanity, or both, have been punished with sentences ranging from fifteen years’ imprisonment to life imprisonment. Secondary or indirect forms of participation have generally resulted [sic] a lower sentence.” “[R]ape as a crime against humanity has resulted in specific sentences between twelve years and fifteen years. Torture as a crime against humanity has been punished with specific sentences between five years and twelve years. Murder as a crime against humanity has been punished by specific fixed term sentences ranging from twelve years to twenty years. In other cases, convictions for these crimes have formed part of a single sentence of a fixed term or of life imprisonment for the totality of the conduct of the Accused.”

Semanza, (Trial Chamber), May 15, 2003, para. 559: “The penalty of life imprisonment, the highest penalty available at this Tribunal, should be reserved for the most serious offenders.”

(5) single sentence: discretionary

Prosecutor v. Kambanda, Case No. ICTR-97-23-A (Appeals Chamber), October 19, 2000, para 101-102: “[N]othing in the Statute or Rules expressly states that a Chamber must impose a separate sentence for each count on which an accused is convicted.” “[T]he Statute is sufficiently liberally worded to allow for a single sentence to be imposed. Whether or not this practice is adopted is within the discretion of the Chamber [A] Chamber is not prevented from imposing a global sentence in respect of all counts for which an accused has been found guilty.”

Musema, (Trial Chamber), January 27, 2000, para. 989: The Chamber noted that “nothing in the Statute or the Rules requires a separate penalty for each proven count” and that “the Chamber may impose one penalty for all the counts on which the accused has been found guilty.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 917: “[E]ven where the crimes may be characterized in different ways, the imposition of a single sentence will usually be appropriate in cases in which the offences may be recognized as belonging to a single criminal transaction. However, the decision whether to impose a single sentence is left entirely to the discretion of the Chamber, so long as the fundamental consideration in imposing sentence is the totality of the criminal conduct of the accused.”

Niyitegeka, (Trial Chamber), May 16, 2003, para. 483: “In the case of an accused convicted of multiple crimes . . . the Chamber may, in its discretion, impose a single sentence or one sentence for each of the crimes. The imposition of a single sentence will usually be appropriate in cases in which the offences may be recognized as belonging to a single criminal transaction. In the case of multiple sentences, the Chamber will determine whether the sentences shall be served consecutively or concurrently.” See also *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003, para. 1104.

iv) individualization of penalties

Kambanda, (Trial Chamber), September 4, 1998, para. 29: “[I]t is true that ‘among the joint perpetrators of an offence or among the persons guilty of the same type of offence, there is only one common element: the target offence which they committed with its inherent gravity. Apart from this common trait, there are, of necessity fundamental differences in their respective personalities and responsibilities: their age, their background, their education, their intelligence, their mental structure It is not true that they are *a priori* subject to the same intensity of punishment.’”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentence para. 10-12: “Article 23(2) of the Statute provides that the Trial Chamber should take into account the individual circumstances of the convicted person in determining the sentence.” In this case, the Chamber considered “previous criminal convictions” with respect to the two accused persons, and “the possibility of . . . rehabilitation” and “relatively young age” with respect to Ruzindana.

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 883: “Application of these principles [Article 23 of the Statute and Rule 101(B) of the Rules] allows the Chamber to fulfill its ‘overriding obligation to individualize [the] penalty,’ with the aim that the sentence be proportional to the gravity of the offence and the degree of responsibility of the offender.”

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Trial Chamber), October 2, 1998: “[A]s far as the individualisation of penalties is concerned, the Judges cannot limit themselves to the factors mentioned in the statutes and the Rules. Here again their unfettered discretion to evaluate the facts and attendance circumstances should enable them to take into account any other factor that they deem pertinent.”

Akayesu, (Appeals Chamber), June 1, 2001, para. 416: “The right to take into account other pertinent factors goes hand in hand with the overriding obligation to individualize a penalty to fit the individual circumstances of the accused, the overall scope of his guilt and the gravity of the crime the overriding consideration being that the sentence to be imposed must reflect the totality of the accused’s criminal conduct.”

Semanza, (Trial Chamber), May 15, 2003, para. 560: The Chamber’s “overarching obligation [is] to tailor the sentence to the gravity of the crime and to the individual circumstances of the offender.”

(1) aggravating circumstances

Kambanda, (Trial Chamber), September 4, 1998, para. 42-44: “The heinous nature of the crime of genocide and its absolute prohibition makes its commission inherently aggravating. The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact.” “Abuse of positions of authority or trust is generally considered an aggravating factor.”

Kambanda, (Trial Chamber), September 4, 1998, para. 61-62: The Chamber considered the following as aggravating circumstances: the “intrinsic gravity” of the crimes for which Kambanda is responsible, and “their widespread, atrocious and systematic character, [which] is particularly shocking to the human conscience;” the fact that he committed the crimes “knowingly and with premeditation;” and that he abused the “duty and authority” entrusted to him as Prime Minister “to protect the population.” The Chamber held that the “aggravating circumstances . . . negate the mitigating circumstances, especially since . . . Kambanda occupied a high ministerial post, at the time he committed the . . . crimes.”

Serushago, (Trial Chamber), February 5, 1999, Sentencing Judgment para. 27-30: The Chamber considered the following as aggravating circumstances: the “extreme gravity” of the offenses because genocide is considered the “crime of crimes;” Serushago’s individual criminal responsibility because he played a leading role in the commission of the crimes and because he personally murdered four Tutsi; the fact that he gave orders as a *de facto* leader and several victims were executed on his orders; his voluntary participation; and the fact that he “committed the crimes knowingly and with premeditation.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentencing Judgment para. 13-18: The Chamber considered the following to be aggravating circumstances: voluntary commission of and participation in the offenses; the “zeal” with which the crimes were committed (*i.e.*, attacking places traditionally regarded as safe havens); the “heinous means” by which killings were committed; the “methodical and systematic execution of . . . [the] crimes;” “the behaviour . . . after the criminal act, . . . notably [the] inaction to punish the perpetrators” or smiling or laughing as survivors testified during trial; the irreparable harm suffered by victims and their families; the assertion of an alibi defence and the denial of guilt at all times; and most significantly, “the abuse of power and betrayal of . . . high level office.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 468-470: The Chamber considered the following to be aggravating circumstances: the gravity of the crimes because genocide is the “crime of crimes;” the abuse of Rutaganda’s position of authority; and the “important leading role” he played in the execution of the crimes (which included weapon distribution, positioning of the *Interahamwe* at Nyanza and inciting and ordering the killings of Tutsis, and killing someone by striking him on the head with a machete).

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 900-905: The Chamber considered the following to be aggravating circumstances: that as a highly respected personality and a man wielding certain authority within the Seventh Day

Adventist Church, Elizaphan Ntakirutimana “abused the trust placed in him;” he “distanced himself from his Tutsi pastors and his flock in the hour of their need;” and his presence at the scenes of attack could only be construed by attackers as an approval of their actions.

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 910-912: The Chamber considered the following to be aggravating circumstances: Gerard Ntakirutimana was a prominent personality, one of the few individuals in his area of origin to have achieved a higher education; as a medical doctor, “he took lives instead of saving them;” he “abused the trust placed in him;” his crimes were committed over a lengthy period of time; “he personally shot at Tutsi refugees;” “he participated in the attack against a safe haven;” and in several instances, he was found to have led attackers against Tutsi refugees.

Ruggiu, (Trial Chamber), June 1, 2000, para. 47-51: The Chamber considered the following to be aggravating circumstances: the gravity of the offenses (genocide and crimes against humanity); the role of the accused in the commission of the offenses (the accused, who was a journalist and broadcaster, played a crucial role in the incitement of ethnic hatred and violence and his broadcasts incited massacres of the Tutsi population); and the fact that even once the accused became aware that the broadcasts were contributing to the massacres, he made a deliberate choice to continue his employment with the radio station.

Musema, (Trial Chamber), January 27, 2000, para. 1001-1004: The Chamber considered the following to be aggravating circumstances: that the offenses for which Musema was found guilty are “extremely serious” (genocide); “he led attackers who killed a large number of Tutsi refugees;” he “was armed with a rifle and used the weapon during the attacks;” he “took no steps to prevent tea factory employees or vehicles from taking part in the attacks” (as Director of the Gisovu Tea Factory, Musema exercised legal and financial control over its employees); as a figure of authority who wielded considerable power in the region, he “was in a position to take reasonable measures to help in the prevention of crimes;” he “did nothing to prevent the commission of the crimes;” and he “took no steps to punish the perpetrators over whom he had control.”

Akayesu, (Trial Chamber), October 2, 1998: The Chamber considered the following to be aggravating factors: Akayesu “consciously chose to participate in the systematic killings in Taba;” his status as burgomaster made him the most senior government personality in Taba and in this capacity he was responsible for protecting the population, which he failed to do; he “publicly incited people to kill;” he ordered the killing of a number of persons; he participated in the killings; and he supported the rape of many women in the bureau communal through his presence and acts.

Semanza, (Trial Chamber), May 15, 2003, para. 566-573: The Chamber considered the following to be aggravating factors: the number of victims killed as a result of Semanza’s conduct with respect to the appropriate sentence for complicity in genocide; and the “influence and relative importance” of Semanza in his commune.

Niyitegeka, (Trial Chamber), May 16, 2003, para. 499: The Chamber considered the following to be aggravating circumstances: Niyitegeka was a “well-known and influential figure in his native prefecture of Kibuye, where his crimes were committed,” and he “abused the trust placed in him by the population;” he held an official position at the national level at the time the crimes were committed and instead of promoting peace and reconciliation in his capacity as Minister of Information, he actively participated in the commission of massacres and influenced others to commit crimes while also, in some instances, giving instructions to attackers or acting as one of their leaders; the callous nature of some of the murders; the fact that he “joined in the jubilation over the killing, decapitation and castration of Kabanda, and the piercing of his skull through the ears with a spike;” the cruel and insensitive disregard for human life and dignity shown by the order he gave for a sharpened piece of wood to be inserted into the genitalia of a dead Tutsi woman; and the “prolonged nature of his participation in widespread and systematic attacks against defenseless civilians.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1099: The Chamber considered the following to be aggravating circumstances: Nahimana “was fully aware of the power of words, and he used the radio – the medium of communication with the widest public reach – to disseminate hatred and violence;” “[h]e was motivated by his sense of patriotism and the need he perceived for equity for the Hutu population [b]ut instead of following legitimate avenues of recourse, he chose a path of genocide;” “he betrayed the trust placed in him as an intellectual and a leader;” and “[w]ithout a firearm, machete or any physical weapon, he caused the deaths of thousands of innocent civilians.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1100: The Chamber considered the following to be aggravating circumstances: Barayagwiza “is a lawyer by training and in his book professes a commitment to international human rights standards;” “he deviated from these standards and violated the most fundamental human right, the right to life;” “[h]e did so both through the institutions he created, and through his own personal acts of participation in the genocide;” and “[h]e was the lynchpin of the conspiracy, collaborating closely with both Nahimana and Ngeze.”

Nahimana, Barayagwiza and Ngeze, (Trial Chamber), December 3, 2003, para. 1101: The Chamber considered the following to be aggravating circumstances: “as owner and editor of a well-known newspaper in Rwanda, [Ngeze] was in a position to inform the public and shape public opinion towards achieving democracy and peace for all Rwandans;” “[i]nstead of using the media to promote human rights, he used it to attack and destroy human rights;” “Ngeze did not respect the responsibility that comes with” the freedom of expression; “[h]e abused the trust of the public by using his newspaper to instigate genocide;” although “Ngeze saved Tutsi civilians from death by transporting them across the border out of Rwanda,” “[h]is power to save was more than matched by his power to kill;” and “[h]e poisoned the minds of his readers, and by words and deeds caused the death of thousands of innocent civilians.”

(2) mitigating circumstances

(a) generally

Kambanda, (Trial Chamber), September 4, 1998, para. 36-37, 56-58: The Chamber held that “substantial co-operation by the accused with the Prosecutor could only be one mitigating circumstance, among others, when the accused pleads guilty plea [sic] or shows sincere repentance.” The Chamber stressed that “the principle must always remain that the reduction of the penalty stemming from the application of mitigating circumstances must not in any way diminish the gravity of the offence.” The Chamber held that “a finding of mitigating circumstances relates to assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime.” “The degree of magnitude of the crime is still an essential criterion for evaluation of sentence.” “A sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender.”

(b) application

Kambanda, (Trial Chamber), September 4, 1998, para. 61-62: The Chamber considered the following as mitigating circumstances: Kambanda’s past and present cooperation with the Prosecutor; the fact that his guilty plea “is likely to encourage other individuals to recognize their responsibilities during the tragic events;” and that guilty pleas are “generally considered, in most national jurisdictions, including Rwanda, as a mitigating circumstance.” The Chamber held that the “aggravating circumstances surrounding the crimes committed by . . . Kambanda negate the mitigating circumstances especially since . . . Kambanda occupied a high ministerial post, at the time he committed the . . . crimes.”

Serushago, (Trial Chamber), February 5, 1999, Sentencing Judgment para. 31-42: The Chamber considered the following as mitigating circumstances: Serushago’s “cooperation with the Prosecutor;” his “voluntary surrender;” his “guilty plea;” “his family and social background” (*i.e.*, “the political background of his family played a crucial role in his involvement with the . . . militia” and strong ties of friendship between his father and the president led him to “play a prominent role in *Interahamwe* circles”); assistance given to certain Tutsis victims; individual circumstances, including his young age, his six children, two of whom are very young, and the possibility of his rehabilitation; and his “[p]ublic expression of remorse and contrition.” The Chamber held “that exceptional circumstances in mitigation surrounding the crimes . . . may afford him some clemency.”

Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, Sentencing Judgment para. 19-23: The Chamber held that “mitigating circumstances may include: cooperating with the Prosecutor; surrendering to authorities; admitting guilt . . . ; demonstrating remorse for victims,” and the fact that the accused was not a “*de jure* official.”

Rutaganda, (Trial Chamber), December 6, 1999, para. 471-473: The Chamber considered the following to be mitigating circumstances: assistance given by Rutaganda to certain individuals (helping people to evacuate and providing food and shelter to some refugees), and his poor health. The Chamber held that the “aggravating factors

outweigh the mitigating factors” especially since “Rutaganda occupied a high position in the *Interahamwe*” and he “knowingly and consciously participated in the commission of such crimes and never showed remorse for what he inflicted upon the victims.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 895-898: The Chamber considered the following to be mitigating circumstances: Elizaphan Ntakirutimana was “a highly respected personality within the Seventh Day Adventist Church of the West-Rwanda Field” and until 1994 he, as a pastor, led an “exemplary life as a church leader;” he was a “highly religious and tolerant person,” who showed no ethnic bias, including in times of unrest and ethnic tension, for over half a century; during the events of 1994, he did not personally participate in killings, nor was he found to have fired on refugees or even carried a weapon; his age of 78 years; and his frail health.

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 908-909: The Chamber considered the following to be mitigating circumstances: Gerard Ntakirutimana was a person of good character and he did not profess or show any ethnic bias until April 1994; and he provided or offered shelter to several Tutsi, including a colleague and friends, a house-help and orphaned children.

Ruggiu, (Trial Chamber), June 1, 2000, para. 53-80: The Chamber considered the following to be mitigating circumstances: Ruggiu’s guilty plea; the accused’s cooperation with the prosecutor; the absence of a criminal record; the character of the accused; his regret and remorse; the accused’s assistance to victims; the accused’s position with *Radio Television Libres des Mille Collines* and in political life (*i.e.*, he was a subordinate at the radio station and played no part in formulating editorial policy); and the fact that he did not personally participate in the killings. The Chamber held that these “circumstances . . . operate as mitigatory factors to warrant some clemency,” but still stated that “[m]itigation of punishment in no way reduces the gravity of the crime or the guilty verdict against a convicted person.”

Musema, (Trial Chamber), January 27, 2000, para. 1005-1008: The Chamber considered the following to be mitigating circumstances: Musema “admitted the genocide against the Tutsi people in Rwanda in 1994;” he “expressed his distress about the deaths of so many innocent people and paid tribute to all victims of the tragic events;” he expressed deep regret that the facilities of the Gisovu Tea Factory (of which he was Director) may have been used by the perpetrators of atrocities; his co-operation through his admission of facts pertaining to the case facilitated an expeditious trial; and his continuous co-operation throughout the trial which contributed to proceedings without undue delay. The Chamber held that “the aggravating circumstances outweigh the mitigating circumstances, especially as on several occasions Musema personally led attackers to attack large numbers of Tutsi refugees.” The Chamber further held that Musema “knowingly and consciously participated in the commission of crimes and never showed remorse for his personal role in the atrocities.”

Akayesu, (Trial Chamber), October 2, 1998: The Chamber considered the following to be mitigating factors: Akayesu was “not a very high official in the government hierarchy in

Rwanda;” his influence and power was not commensurate with the events; he expressed sympathy for the victims of the genocide; and he identified himself with the survivors of the events.

Semanza, (Trial Chamber), May 15, 2003, para. 579-584: The Chamber considered the following to be mitigating factors: prior character and accomplishments of Semanza (bringing prosperity and development to his region).

Niyitegeka, (Trial Chamber), May 16, 2003, para. 495-498: The Chamber considered as mitigating circumstances the fact that Niyitegeka intervened and saved from the *Interahamwe* militia, the lives of a group of refugees. However, the Chamber held that this carried limited weight since he also took the lives of others. The Chamber also considered that Niyitegeka was “a person of good character prior to the events” and as a public figure and a member of the Mouvement Democratique Republicain (MDR), he advocated democracy and opposed ethnic discrimination. Again, however, the Chamber held that this carried little weight because when faced with the choice between participating in massacres of civilians or holding fast to his principles, Niyitegeka chose the path of ethnic bias and participated in the massacres.

VIII) MISCELLANEOUS

a) “Equality of arms” between the parties is not the same as equality of means and resources

Kayishema and Ruzindana, (Appeals Chamber), June 1, 2001, para. 63-71: During proceedings before the Trial Chamber, Kayishema filed a motion calling for full equality of arms between the prosecution and the defence in terms of the means and facilities placed at their disposal. The Appeals Chamber held that the Trial Chamber did not commit an error in law in dismissing the motion. “The right of an accused to a fair trial implies the principle of equality of arms between the Prosecution and Defence” and “the Trial Chamber rightly held that [t]he notion of equality of arms is laid down in Article 20 of the Statute,” specifically Article 20(2) and Article 20(4). However, “equality of arms . . . does not necessarily amount to the material equality of possessing the same financial and/or personal resources.” The Appeals Chamber quoted the ICTY Appeals Chamber in *Tadic* which held that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”⁹ The Appeals Chamber also endorsed the ruling by the Trial Chamber in the *Kayishema* case which held that the rights of the accused and equality between the parties should not be confused with the equality of means and resources, and that the rights of the accused should not be interpreted to mean that the defence is entitled to the same means and resources as the prosecution. *See also Kayishema and Ruzindana*, (Trial Chamber), May 21, 1999, para. 20, 55-60.

b) Presumption of impartiality attaches to judge and tribunal

Akayesu, (Appeals Chamber), June 1, 2001, para. 91: “[T]here is a presumption of impartiality that attaches to a Judge or a Tribunal and, consequently, partiality must be

⁹ *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), July 15, 1999, para. 48.

established on the basis of adequate and reliable evidence. “[I]n the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal can disabuse their minds of any irrelevant personal beliefs or predispositions. It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the Judge in question] was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality.”

c) Selective prosecution

Akayesu, (Appeals Chamber), June 1, 2001, para. 94-96: “[I]nvestigation and prosecution’ of persons responsible for serious violations within the jurisdiction of the Tribunal fall to the Prosecutor and . . . it is her responsibility to ‘assess the information received or obtained and decide whether there is sufficient basis to proceed.’” “[I]n many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. [T]he Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation in indictments.” To show the Prosecutor is proceeding on a selective basis, “the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor’s policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted.”

Ntakirutimana and Ntakirutimana, (Trial Chamber), February 21, 2003, para. 870-871: “Article 15(2) of the Statute requires the Prosecutor to act independently and prevents her from seeking or receiving instructions from a government or any other source. According to the standard articulated by the ICTY Appeals Chamber in *Delalic*, where an appellant alleged selective prosecution, he or she must demonstrate that the Prosecutor improperly exercised her prosecutorial discretion in relation to the appellant himself or herself. It follows that the Accused . . . must show that the Prosecutor’s decision to prosecute them or to continue their prosecution was based on impermissible motives, such as ethnicity or political affiliation, and that she failed to prosecute similarly situated suspects of different ethnicity or political affiliation. In view of the failure of the Defence to adduce any evidence to establish that the Prosecutor had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute the Accused, the Chamber does not find it necessary to consider the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued.”

d) Guilty plea: conditions for accepting a plea agreement

i) guilty plea must be voluntary

Kambanda, (Appeals Chamber), October 19, 2000, para. 61: “[A] voluntary plea requires two elements, namely that ‘an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty’ and ‘the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentences.’”

ii) guilty plea must be informed

Kambanda, (Appeals Chamber), October 19, 2000, para. 75: “[T]he standard for determining whether a guilty plea is informed is . . . that the accused must understand the nature of a guilty plea and the consequences of pleading guilty in general, the nature of the charges against him, and the distinction between any alternative charges and the consequences of pleading guilty to one rather than the other.”

iii) guilty plea must be unequivocal

Kambanda, (Appeals Chamber), October 19, 2000, para. 84-86: “[W]hether a plea of guilty is equivocal must depend on a consideration, *in limine*, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law.” A guilty plea is unequivocal when the accused is aware that the plea could not be refuted by any line of defence.

ALPHABETICAL INDEX

A

Acts must be inhumane, crimes against humanity	33
Acts must be part of a widespread or systematic attack, crimes against humanity	34
Acts/attacks must be committed against members of civilian population, crimes against humanity	36
Aggravating circumstances, sentencing.....	82
Aiding and abetting, individual criminal responsibility for	63
Aiding and abetting, mental state.....	63
Alibi and special defenses	73
Alibi defense, burden of proof.....	73
Alibi defense, notice for	73
Alibi defense, rebuttal for	74
Armed conflict requirement, war crimes	51
Attacks must be on national, political, ethnic, racial or religious grounds, crimes against humanity	37
Attempt to commit genocide	30

B

C

Causing serious bodily or mental harm to members of the group (as genocide).....	21
Charging, convicting and sentencing.....	74
Civilian commanders	69
Collective punishments (as a war crime)	59
Command responsibility, control required for culpability.....	69
Command responsibility, <i>de facto</i> and <i>de jure</i> command	68
Command responsibility, effective control.....	68
Command responsibility, elements.....	67
Command responsibility, failure to prevent or punish.....	71
Command responsibility, generally.....	67
Command responsibility, mental state	70
Command responsibility, statute.....	67
Command responsibility, superior-subordinate relationship.....	68
Committing, individual criminal responsibility for	63
Common criminal purpose, individual criminal responsibility for	65
Complicity in genocide.....	30
Complicity in genocide, mental state.....	31
Conspiracy to commit genocide	24
Conspiracy to commit genocide, mental state.....	24
Control required for culpability, command responsibility	69
Convictions, cumulative	74
Convictions, multiple.....	75
Crimes against humanity, acts must be inhumane	33
Crimes against humanity, acts must be part of a widespread or systematic attack	34

Crimes against humanity, acts/attacks must be committed against members of civilian population.....	36
Crimes against humanity, attacks must be on national, political, ethnic, racial or religious grounds.....	37
Crimes against humanity, deportation	42
Crimes against humanity, elements	33
Crimes against humanity, enslavement.....	42
Crimes against humanity, extermination.....	40
Crimes against humanity, imprisonment	42
Crimes against humanity, mental state.....	38
Crimes against humanity, murder	39
Crimes against humanity, other inhumane acts	46
Crimes against humanity, persecutions on political, racial and religious grounds.....	44
Crimes against humanity, rape and sexual violence	43
Crimes against humanity, statute	33
Crimes against humanity, torture.....	42
Crimes against humanity, underlying offenses.....	39
Cumulative charges and convictions	74
Cumulative charges permitted.....	74
 D	
<i>De facto</i> and <i>de jure</i> command, command responsibility.....	68
Defenses	73
Degrading treatment (as the war crime of an outrage upon personal dignity)	59
Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (as genocide).....	22
Deportation (as a crime against humanity).....	42
Direct and public incitement to commit genocide.....	26
Direct and public incitement to commit genocide, mental state for inciting genocide.....	27
<i>Dolus specialis</i> or special intent for genocide.....	13
 E	
Effective control, command responsibility	68
Elements, acts must be inhumane, crimes against humanity.....	33
Elements, acts must be part of a widespread or systematic attack, crimes against humanity	34
Elements, acts/attacks must be committed against members of civilian population, crimes against humanity.....	36
Elements, armed conflict requirement, war crimes	51
Elements, attacks must be on national, political, ethnic, racial or religious grounds, crimes against humanity	37
Elements, command responsibility.....	67
Elements, crimes against humanity	33
Elements, genocide	12
Elements, geographic jurisdiction or <i>ratione loci</i> , war crimes	55
Elements, individual criminal responsibility.....	60

Elements, link between accused and armed forces rejected, war crimes.....	54
Elements, nexus between crime and armed conflict, war crimes	57
Elements, personal jurisdiction or <i>ratione personae</i> , war crimes	56
Elements, war crimes.....	50
Enslavement (as a crime against humanity)	42
Equality of arms principle.....	87
Ethnic/ethnic group, genocide	17
Extermination (as a crime against humanity).....	40
Extermination, mental state for crime against humanity	41

F

Failure to take necessary and reasonable measures to prevent crime or to punish perpetrator, command responsibility.....	71
Forcibly transferring children of the group to another group (as genocide)	23

G

Genocide, causing serious bodily or mental harm to members of the group.....	21
Genocide, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.....	22
Genocide, elements.....	12
Genocide, ethnic/ethnic group.....	17
Genocide, forcibly transferring children of the group to another group	23
Genocide, generally.....	12
Genocide, imposing measures intended to prevent births within the group.....	23
Genocide, intent to destroy, in whole or in part	15
Genocide, killing members of the group.....	20
Genocide, mental state, special intent or <i>dolus specialis</i>	13
Genocide, national, ethnic, racial, or religious group	16
Genocide, national group.....	17
Genocide, racial group.....	18
Genocide, religious group.....	18
Genocide, statute.....	12
Genocide, underlying offenses.....	20
Geographic jurisdiction or <i>ratione loci</i> , element, war crimes	55
Goal of penalties, sentencing.....	78
Guilty plea, conditions for	88
Guilty plea, must be informed.....	89
Guilty plea, must be unequivocal.....	89
Guilty plea, must be voluntary	88

H

Humiliating or degrading treatment (as the war crime of an outrage upon personal dignity).....	59
---	----

I

Imposing measures intended to prevent births within the group (as genocide)	23
Imprisonment (as a crime against humanity).....	42

Indecent assault (as the war crime of an outrage upon personal dignity)	60
Individual criminal responsibility, aiding and abetting	63
Individual criminal responsibility and command responsibility, distinguished	61
Individual criminal responsibility, committing	63
Individual criminal responsibility, common criminal purpose	65
Individual criminal responsibility, generally	60
Individual criminal responsibility, instigating/inciting	62
Individual criminal responsibility, mental state	65
Individual criminal responsibility, ordering.....	62
Individual criminal responsibility, participation	61
Individual criminal responsibility, planning	62
Individual criminal responsibility, required elements	60
Individual criminal responsibility, statute	60
Instigating/inciting, individual criminal responsibility for.....	62
Intent to destroy, in whole or in part, genocide	15

J

K

Killing members of the group (as genocide).....	20
---	----

L

Liability for both individual criminal responsibility and command responsibility	67
Link between accused and armed forces rejected, war crimes	54

M

Mental state, for civilian and military commanders, command responsibility.....	71
Mental state (<i>mens rea</i>), for aiding and abetting	63
Mental state (<i>mens rea</i>), for command responsibility	70
Mental state (<i>mens rea</i>), for complicity in genocide.....	31
Mental state (<i>mens rea</i>), for conspiracy to commit genocide	24
Mental state (<i>mens rea</i>), for crimes against humanity	38
Mental state (<i>mens rea</i>), for direct and public incitement to commit genocide.....	27
Mental state (<i>mens rea</i>), for extermination as a crime against humanity	41
Mental state (<i>mens rea</i>), for individual criminal responsibility	65
Mental state (<i>mens rea</i>), for murder as a crime against humanity	40
Mental state (<i>mens rea</i>), for other inhumane acts as a crime against humanity	47
Mental state (<i>mens rea</i>), for persecutions on political, racial and religious grounds as a crime against humanity	45
Mental state (<i>mens rea</i>), for rape and sexual violence as a crime against humanity	44
Mental state (<i>mens rea</i>), for war crimes.....	58
Mental state, special intent or <i>dolus specialis</i> for genocide.....	13
Military commanders	69
Mitigating circumstances, sentencing.....	85
Murder (as a crime against humanity)	39
Murder (as a war crime)	58

N	
National, ethnical, racial, or religious group, genocide.....	16
National group, genocide.....	17
Nexus between crime and armed conflict, war crimes.....	57
O	
Ordering, individual criminal responsibility for.....	62
Other inhumane acts (as a crime against humanity)	46
Other inhumane acts, mental state for crime against humanity.....	47
Outrages upon personal dignity (as a war crime)	59
P	
Participation, individual criminal responsibility for	61
Passing of sentences and the carrying out of executions without previous judgments (as a war crime)	60
Penalties, determining penalties	78
Penalties, goals	78
Penalties, governing instruments	76
Penalties, individualization.....	81
Persecutions on political, racial and religious grounds (as a crime against humanity).....	44
Persecutions on political, racial and religious grounds, mental state for crime against humanity	45
Personal jurisdiction, <i>ratione personae</i> , war crimes	56
Pillage (as a war crime)	60
Planning, individual criminal responsibility for	62
Presumption of impartiality attaches to judge and tribunal.....	87
Prison sentences	77
Q	
R	
Racial group, genocide.....	18
Ranking of crimes	79
Rape (as the war crime of an outrage upon personal dignity).....	59
Rape (as the crime against humanity of torture)	43
Rape and sexual violence (as a crime against humanity)	43
Rape and sexual violence, mental state for crime against humanity.....	44
Rape and sexual violence, qualifies as causing serious bodily or mental harm to members of the group, genocide	22
Reciprocal disclosure of evidence.....	73
Religious group, genocide	18
Restitution, penalties.....	77
Rwandan law/practice, impact on sentencing.....	78
S	
Selective prosecution	88

Sentencing, aggravating circumstances	82
Sentencing, goal of penalties	78
Sentencing/penalties.....	76
Sentencing, gradation.....	79
Sentencing, mitigating circumstances.....	85
Sentencing, range of sentences.....	80
Sexual violence (as the crime against humanity of other inhumane acts).....	47
Sexual violence (as the war crime of an outrage upon personal dignity).....	59
Single sentence.....	80
Special defenses	73
Special intent or <i>dolus specialis</i> , genocide	13
Statute, command responsibility, Article 6(3).....	67
Statute, crimes against humanity, Article 3.....	33
Statute, genocide, Article 2	12
Statute, individual criminal responsibility, Article 6(1)	60
Statute, war crimes, Article 4.....	48
Superior-subordinate relationship, command responsibility.....	68
 T	
Taking of hostages (as a war crime)	59
Terrorism (acts of, as a war crime).....	59
Threats to commit, a war crime	60
Torture (as a crime against humanity).....	42
Torture (as a war crime).....	58
 U	
Underlying offenses, crimes against humanity.....	39
Underlying offenses, genocide	20
Underlying offenses, war crimes.....	58
 V	
Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment (as a war crime)	58
 W	
War crimes, acts of terrorism	59
War crimes, armed conflict requirement	51
War crimes, collective punishments	59
War crimes, elements.....	50
War crimes, generally.....	49
War crimes, geographic jurisdiction or <i>ratione loci</i>	55
War crimes, link between accused and armed forces rejected.....	54
War crimes, mental state	58
War crimes, murder	58
War crimes, nexus between crime and armed conflict.....	57
War crimes, outrages upon personal dignity	59

War crimes, passing of sentences and carrying out of executions without previous judgments.....	60
War crimes, personal jurisdiction or <i>ratione personae</i>	56
War crimes, pillage	60
War crimes, statute.....	48
War crimes, taking of hostages	59
War crimes, threats to commit.....	60
War crimes, torture	58
War crimes, underlying offenses	58
War crimes, violence to life, health and physical or mental well-being of persons, in particular, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment	58

X

Y

Z

**CASE LAW OF THE
INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

SUMMARY OF JUDGMENTS AGAINST THE ACCUSED	113
LISTING OF CASES INCLUDED	120
I) WAR CRIMES: GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949 (Article 2)	122
a) Statute.....	122
b) General elements for Article 2 crimes.....	122
i) the existence of an armed conflict (element 1).....	122
(1) armed conflict required.....	122
(2) armed conflict defined	123
(3) duration of application of international humanitarian law	123
ii) there must be a nexus between the conflict and crimes alleged (element 2).....	123
iii) the armed conflict must be international (element 3).....	123
(1) international armed conflict defined.....	123
(2) overall control test applies.....	124
(3) overall control test satisfied where a state has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support	125
(4) do not just look at the locality where the crimes occurred to determine if conflict is international.....	125
(5) application.....	126
(a) conflict between Bosnia and Herzegovina and Croatia	126
(b) conflict between Bosnia and Herzegovina and the Federal Republic of Yugoslavia (FRY).....	127
iv) the person or property at issue must be “protected” (element 4)	127
(1) protected persons defined	128
(2) use ethnicity or substance of relations and not formal nationality to determine protected status.....	128
(3) protected persons can be same nationality as captor	129
(4) “in the hands of a Party to the Conflict or Occupying Power” defined.....	129
c) Mental state (<i>mens rea</i>)	129
i) generally	129
d) Underlying offenses	130
i) willful killing.....	130
(1) defined.....	130

(2) mental state (<i>mens rea</i>)	130
ii) torture or cruel and inhuman treatment	130
(1) torture	130
(2) cruel and inhuman treatment	130
(a) generally	130
(b) cruel treatment	131
(c) inhuman treatment	131
(d) application	131
iii) rape	132
iv) willfully causing great suffering or serious injury to body or health	132
(1) defined	132
(2) requires showing of serious mental or physical injury, although need not be permanent or irremediable	132
v) extensive destruction of property not justified by military necessity	133
vi) unlawful confinement of civilians and imprisonment	134
(1) generally	134
(2) responsibility more properly allocated to those responsible for detention, not those who merely participate in it, such as those who maintain a prison	134
(3) responsibility of camp commander	135
vii) unlawful transfer	135
viii) taking civilians as hostages	135
e) Miscellaneous	136
i) occupation (relevant to unlawful labor of civilians, unlawful transfer and destruction of property)	136
(1) where “occupation” is relevant	136
(2) definition	136
(3) guidelines for determining occupation	137
(4) only applies to areas actually controlled by the occupying power	137
(5) different test would apply regarding individuals or property and other matters	137

II) WAR CRIMES: VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR (Article 3)

WAR (Article 3)	138
a) Statute	138
b) Generally	138
i) Article 3 of the Statute functions as a residual clause, covering any serious violation of humanitarian law not covered by other Articles of the Statute	138
ii) Article 3 of the Statute covers acts committed in both internal and international armed conflict	139
iii) conditions for determining which violations fall within Article 3	139
iv) violations of international humanitarian law that are covered	140
v) rationale for why Common Article 3 violations are covered	140
(1) Common Article 3 is part of customary law	140

(2) violations of Common Article 3 are serious	140
(3) Common Article 3 imposes individual criminal responsibility	141
(4) Common Article 3 is applicable to international armed conflicts	142
c) General elements for Article 3 crimes.....	142
i) there must have been armed conflict, whether internal or international (element 1).....	143
ii) there must be a close nexus between the armed conflict and alleged offense (element 2).....	143
(1) the acts of the accused must be closely related to the hostilities.....	143
(2) the armed conflict need not be causally linked to the crimes, but it must have played a substantial role	143
(3) the crimes may be temporally and geographically remote from actual fighting	144
iii) added element for Common Article 3 crimes: must be committed against civilians or civilian property	144
iv) mental state (<i>mens rea</i>).....	145
(1) generally.....	145
(2) proof of discriminatory intent or motive not required	145
d) Underlying offenses	145
i) torture.....	145
(1) defined.....	145
(2) the prohibition against torture is <i>jus cogens</i>	146
(3) severe pain and suffering must be inflicted (element 1)	146
(a) permanent injury not required.....	147
(b) mental suffering can qualify.....	147
(4) mental state (<i>mens rea</i>): the act or omission must be intentional (element 2)	147
(5) prohibited purpose or goal required (element 3)	147
(a) prohibited purpose need not be predominating or sole purpose	148
(6) whether role of public official is necessary	148
(7) application.....	149
(a) examples of acts constituting torture	149
(b) rape and other forms of sexual violence as torture.....	149
ii) rape	150
iii) cruel treatment.....	151
(1) defined.....	151
(2) mental suffering requirement lower than for torture	151
(3) prohibited purpose not required	151
(4) examples	152
iv) murder.....	152
(1) defined.....	152
(2) comparison between murder under Article 3 and willful killing under Article 2.....	152
(3) proof of dead body not required.....	153
(4) suicide as murder	153
v) violence to life and person.....	153
vi) outrages upon personal dignity	154

(1) defined.....	154
(2) requires humiliation so intense any reasonable person would be outraged.....	154
(3) humiliation must be real and serious	154
(4) murder is not an outrage upon personal dignity.....	155
(5) mental state (<i>mens rea</i>).....	155
(6) prohibited purpose not required	155
(7) discriminatory intent or motive not required.....	155
(8) examples.....	155
vii) taking of hostages.....	156
viii)wanton destruction not justified by military necessity	156
ix) plunder.....	157
(1) defined.....	157
(2) includes both large-scale seizures and appropriation by individual soldiers	157
(3) plunder must involve grave consequences for the victims/sufficient monetary value.....	158
(4) where applies	158
(5) plunder includes “pillage”.....	158
(6) application.....	159
x) destruction or willful damage to institutions dedicated to religion or education	159
xi) unlawful attacks on civilians and civilian objects.....	159
xii) unlawful labor	160
(1) defined.....	160
(2) mental state (<i>mens rea</i>).....	160
xiii)slavery.....	160
III)GENOCIDE (Article 4)	161
a) Statute.....	161
b) Defined.....	161
c) Mental state (<i>mens rea</i>): intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such	162
i) generally	162
ii) intent to destroy, in whole or in part.....	162
(1) requires an intentional attack against a group, and the intention to participate in or carry out the attack	162
(2) even if destruction was not original goal, it may become the goal.....	162
(3) destruction “in part”.....	163
(a) “substantial” part of group required	163
(b) evidence of destruction of leadership may establish intent to destroy “in part”	163
(c) genocidal intent may be limited to a geographical zone.....	164
(d) application	164
(4) no lengthy premeditation required.....	164
(5) distinguish intent from motive	164
(6) intent may be inferred.....	164

(7) no policy or plan required, but may be important factor	165
iii) “a national, ethnical, racial or religious group, as such”	165
(1) “as such”	165
(a) victims must be targeted by reason of their group membership	165
(b) the group must be targeted, not specific individuals	165
(2) groups protected by Article 4.....	166
(a) national, ethnical, racial or religious groups	166
(b) not political groups	166
(c) destroying culture and identity insufficient to show genocide, but can help show intent to destroy the group.....	166
(d) evaluate using subjective criterion: stigmatization by the community.....	167
d) Underlying offenses	167
i) killing members of the group	167
ii) causing serious bodily or mental harm to members of the group	167
iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part	167
iv) imposing measures intended to prevent births within the group	167
v) forcibly transferring children of one group to another group.....	167
IV) CRIMES AGAINST HUMANITY (Article 5)	168
a) Statute.....	168
b) General elements	168
i) the Statute requires that there must be an armed conflict (element 1).....	168
(1) whether there is any linkage required between the acts of the accused and the armed conflict	168
ii) there must be an “attack” (element 2).....	169
(1) the “attack” may be, but need not be, part of the “armed conflict”	169
(2) “attack” and “armed conflict” are distinct.....	170
(3) “attack” not limited to use of armed force	170
(4) when establishing the attack, irrelevant that the other side committed atrocities (reciprocity of obligations)	170
iii) the acts of the accused must form part of the attack (element 3).....	170
iv) the attack must be “directed against any civilian population” (element 4).....	171
(1) “directed against”	171
(a) an attack is “directed against” a civilian population if the civilian population is the primary object of the attack	171
(b) not entire population, but a “sufficient number” must be subject to the attack.....	171
(2) civilian population.....	172
(a) must be “predominantly” civilian	172
(b) presence of those involved in conflict does not deprive population of civilian nature	172

(c)	civilian includes those who were members of a resistance movement and former combatants but who are no longer taking part in hostilities	172
(d)	construe civilian population liberally.....	173
(e)	protects “any” civilian population.....	173
v)	the attack must be “widespread or systematic” (element 5).....	173
(1)	widespread <i>or</i> systematic.....	173
(2)	only the attack, not the accused’s acts, must be widespread or systematic.....	174
(3)	widespread	174
(4)	systematic.....	174
(5)	factors in assessing widespread or systematic	174
(6)	single act, if linked to a widespread or systematic attack, can qualify as a crime against humanity.....	175
(7)	whether there is plan or policy requirement.....	175
vi)	mental state (<i>mens rea</i>) (element 6).....	176
(1)	intent.....	176
(a)	the perpetrator must have intent to commit the underlying offense(s)	176
(b)	motive is irrelevant.....	176
(c)	it is irrelevant whether the accused intended his acts to be directed against the targeted population or merely the victim.....	177
(d)	discriminatory intent only required for persecution	177
(2)	knowledge	178
(a)	the perpetrator must knowingly participate in a widespread or systematic attack, <i>i.e.</i> , have knowledge of the attack and the nexus between his acts and that context.....	178
(b)	alternatively, the perpetrator must have knowledge of the attack and taken the risk his acts were part of it.....	179
(c)	knowledge of the details of the attack not required.....	180
(d)	no requirement that the perpetrator must approve of the context	180
(e)	factors from which to infer knowledge of context	180
c)	Underlying offenses	181
i)	murder.....	181
(1)	elements.....	181
(2)	“murder” under Article 5 of the Statute, compared to Articles 2 and 3	181
(3)	proof of dead body not required.....	182
(4)	suicide as murder	182
(5)	“murder” not “premeditated murder” is the underlying offense.....	182
(6)	mental state (<i>mens rea</i>).....	183
ii)	extermination	183
(1)	generally.....	183
(2)	number of individuals involved.....	183
(3)	extermination must be collective, not directed toward singled out individuals	184
(4)	mental state (<i>mens rea</i>).....	184

(a) discriminatory intent not required.....	184
iii) enslavement.....	184
(1) <i>actus reus</i> and <i>mens rea</i>	184
(2) indicia of enslavement.....	185
(a) keeping someone in captivity usually not enough.....	185
(b) duration of enslavement is a factor, but not a required element	185
(3) lack of resistance is not a sign of consent; lack of consent is not an element.....	185
iv) imprisonment.....	186
v) torture.....	186
(1) elements.....	186
(2) requirement of severe pain and suffering.....	186
(a) rape necessarily implies severe pain or suffering.....	187
(3) requirement of a prohibited purpose.....	187
(a) prohibited purpose need not be the predominating or sole purpose.....	187
(4) mental state (<i>mens rea</i>)	188
(5) role of a state official not necessary	188
vi) rape.....	188
vii) persecution	189
(1) required acts (<i>actus reus</i>)	189
(a) persecution must be of “same gravity” as other crimes enumerated in Article 5	189
(b) persecutory acts include crimes under other sub-clauses of Article 5, crimes found elsewhere in the Statute and crimes not expressly prohibited under the Statute.....	190
(c) evaluate persecution in context, looking at cumulative effect.....	190
(d) may encompass physical or mental harm or infringements upon individual freedom	191
(e) single act can constitute persecution if discriminatory intent proven	191
(f) examples of persecution.....	191
a. destruction of property or means of subsistence.....	191
b. unlawful detention of civilians.....	192
c. deportation or forcible transfer of civilians.....	192
d. harassment, humiliation and psychological abuse	192
e. murder, extermination, torture	192
f. political, social, economic rights violations generally.....	192
g. violations of the right to life, liberty and the security of person; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; and the right not to be subjected to arbitrary arrest, detention or exile	192
h. additional examples	193
i. acts that do not rise to the level of persecution.....	193
(2) mental state (<i>mens rea</i>)	194
(a) discriminatory intent required for persecution.....	194

(b)	mental state (<i>mens rea</i>) requirement for persecution higher than for other crimes against humanity, but lower than for genocide	194
(c)	intent to target group, not individuals.....	195
(d)	discriminatory intent can be shown by positive or negative criteria	195
(e)	discriminatory intent can be inferred from knowingly participating in a system or enterprise that discriminates on political, racial or religious grounds	195
(f)	no requirement of discriminatory policy	195
(g)	knowledge that one is acting in a way that is discriminatory is insufficient; must intend to discriminate	196
(h)	intent to discriminate need not be the primary intent, but must be a significant one.....	196
(i)	discriminatory intent must relate to the act charged as persecution, not the attack.....	196
(j)	discriminatory consequences required	197
viii)	other inhumane acts.....	198
(1)	generally.....	198
(2)	elements.....	198
(a)	seriousness/severity of the act	198
(b)	serious bodily or mental harm.....	199
(c)	mental state (<i>mens rea</i>)	199
(3)	equivalent to “cruel treatment” under Article 3.....	199
(4)	application.....	199
V)	INDIVIDUAL RESPONSIBILITY (Article 7(1))	200
a)	Statute.....	200
b)	Generally.....	200
i)	criminal responsibility of superiors under Article 7(1)	200
ii)	overlap of Articles 7(1) and 7(3)	200
c)	Planning, instigating, ordering, committing.....	201
i)	mental state (<i>mens rea</i>) generally	201
ii)	planning.....	201
(1)	person who committed crime cannot also be held responsible for planning it.....	202
(2)	circumstantial evidence may prove plan.....	202
iii)	instigating.....	202
(1)	generally.....	202
(2)	the act (<i>actus reus</i>).....	202
(a)	requires a clear contribution to the conduct of the other person, but unnecessary to show that the crime would not have occurred without the accused’s involvement.....	202
(b)	both positive acts and omissions may constitute instigating, as well as express and implied conduct.....	203
(3)	mental state (<i>mens rea</i>)	203
iv)	ordering.....	203
(1)	generally.....	203

(2) order may be explicit or implicit, and proven through circumstantial evidence	203
(3) order need not be given directly to person who performs the offense	203
(4) no formal superior-subordinate relationship required	204
(5) irrelevant whether the illegality of the order was apparent on its face	204
v) committing	204
(1) generally.....	204
(2) the act (<i>actus reus</i>).....	204
(a) involves direct personal or physical participation	204
(b) alternatively, can involve a culpable omission	204
(c) there can be several perpetrators of the same crime.....	205
(3) mental state (<i>mens rea</i>)	205
d) Aiding and abetting	205
i) generally	205
ii) based on customary international law	205
iii) defined.....	205
iv) the act (<i>actus reus</i>).....	206
(1) requires practical assistance, encouragement or moral support	206
(2) may occur through an omission	206
(3) must have a substantial effect on the commission of the crime.....	206
(4) presence at scene.....	207
(a) is not conclusive, unless it demonstrates a significant encouraging effect or a direct and substantial effect	207
(b) example	207
(c) position of authority and presence may, in some circumstances, be interpreted as approval of the conduct	207
(d) actual physical presence not required.....	208
(5) assistance may occur before, during or after the act is committed	208
(6) the aider and abettor will be responsible for all that naturally results from his act	208
v) mental state (<i>mens rea</i>): intent and knowledge	208
(1) aider and abettor needs to have intended to assist or facilitate, or accepted that assistance would be a possible and foreseeable consequence.....	208
(2) need not know precise crime intended or committed	209
(3) need not share principal's intent, but must be aware of essential elements of the crime, including the principal's mental state	209
(4) must have knowledge that actions will assist commission of the crime	209
(5) mental state (<i>mens rea</i>) may be deduced from circumstances, such as position of authority and presence.....	210
(6) mental state (<i>mens rea</i>) for aider and abettor of persecution.....	210
vi) difference between "aiding and abetting," and "participation in a joint criminal enterprise" (<i>i.e.</i> , acting pursuant to a common design or purpose).....	210

(1) generally.....	210
(2) elements distinguished	211
(3) mental state (<i>mens rea</i>) distinguished.....	211
(4) application: torture.....	211
e) Joint criminal enterprise/ the common purpose doctrine	212
i) generally	212
ii) three categories of common purpose doctrine	213
iii) elements	213
(1) need to establish existence of an arrangement or understanding.....	214
(a) arrangement need not be express/can be unspoken	214
(b) common plan or purpose may materialize extemporaneously.....	214
(2) level of participation in joint criminal enterprise must be significant	214
(a) level of participation for aider and abettor: must have a substantial effect.....	215
(3) responsibility for crimes outside the common purpose occurs if it was foreseeable that such a crime might be perpetrated and the accused willingly took that risk	215
(4) whether participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability.....	216
iv) mental state (<i>mens rea</i>).....	216
(1) if the crime fell within the joint criminal enterprise	216
(a) must prove common state of mind for co-perpetrator.....	216
(b) must prove knowing assistance for an aider or abettor.....	217
(2) if the crime went beyond the enterprise, need to prove that the accused was aware that the further crime was a possible consequence and that, with that awareness, he participated in that enterprise.....	217
(3) where crime requires special intent, must prove such intent	218
v) difference between participating in a joint criminal enterprise, and aiding and abetting a joint criminal enterprise.....	218
(1) generally.....	218
(2) mental state (<i>mens rea</i>) compared	218
(3) when an aider or abettor becomes a co-perpetrator.....	218
(4) application: participation in operation of a detention facility	219
VI) COMMAND RESPONSIBILITY (Article 7(3))	219
a) Statute.....	219
b) Elements	219
i) the existence of a superior-subordinate relationship (element 1)	220
(1) the superior-subordinate relationship.....	220
(a) relationship to subordinate may be direct or indirect, including command of informal structures	220
(b) relationship between commander and his subordinates need not be formalized.....	221
(c) analyze reality of the authority/actual tasks performed	221

(d)	the giving of orders or exercise of powers generally attached to a military command are strong indications an individual is a commander, but are not the sole relevant factors.....	221
(e)	effective control required: the ability to prevent and punish the crimes	221
(f)	temporary nature of military unit or ad hoc command do not exclude relationship.....	222
(g)	may be <i>de jure</i> or <i>de facto</i> power to control.....	222
(h)	degree of <i>de facto</i> authority must be equivalent to <i>de jure</i> authority.....	223
(2)	two or more superiors may be held responsible	224
(3)	application to civilian leaders: test of effective control.....	224
ii)	mental state (<i>mens rea</i>) (element 2).....	225
(1)	actual knowledge.....	225
(a)	knowledge may be proven through direct or circumstantial evidence	225
(b)	evidence required to demonstrate actual knowledge may differ based on position of authority	225
(c)	the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary	226
(d)	other indicia of knowledge.....	226
(2)	reason to know.....	226
(a)	analyze whether superior had information which would put him on notice	226
(b)	commander who exercises due diligence distinguished from situation where the absence of knowledge results from negligence.....	227
iii)	the failure of the superior to take the necessary and reasonable measures to prevent or punish (element 3)	227
(1)	measures required are limited to what is feasible, but commander must use every means in his power	227
(2)	degree of effective control will determine what is required	227
(3)	cannot make up for failure to prevent crime by punishing subordinates afterwards	228
(4)	when duties arise.....	228
(5)	what the duty to punish entails.....	228
(6)	superior need not be the person who dispenses punishment, but must take important step in disciplinary process.....	228
(7)	civilian superiors are under similar obligations	228
c)	Superior responsibility is not a form of strict liability.....	228
VII)	AFFIRMATIVE DEFENSES	229
a)	Duress does not afford a complete defense.....	229
b)	<i>Tu quoque</i> principle rejected: the argument that the adversary committed similar crimes is not a valid defense.....	230
c)	Involvement in defensive operation is not a defense	230
d)	Diminished mental responsibility is not a defense.....	230
VIII)	JURISDICTION	231
a)	Generally.....	231

IX) ETHICS	231
a) Contempt proceedings.....	231
i) Tribunal possesses “inherent jurisdiction” to deal with contempt.....	231
ii) contempt imposed for putting forward a case known to be false in material respects and manipulating witnesses	232
b) Impartiality of judges	232
i) two-pronged test for judicial bias	232
ii) high threshold required to rebut the presumption of impartiality.....	232
iii) qualifications that play an integral role in satisfying eligibility requirements do not, in the absence of the clearest contrary evidence, show bias or impartiality.....	233
iv) application	233
(1) Judge Mumba’s acting as a representative on the United Nations Commission on the Status of Women not grounds for disqualification.....	233
(2) Judge Benito’s membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture not grounds for disqualification.....	234
v) Judges not disqualified from hearing two or more trials arising out of the same series of events	234
X) CHARGING, CONVICTIONS AND SENTENCING	235
a) Cumulative charging and convictions	235
i) cumulative charging permitted	235
ii) cumulative convictions based on same conduct permitted only where crimes involve materially distinct element.....	235
iii) where crimes not materially distinct, convict under the more specific provision.....	236
iv) application	236
v) cumulative convictions of themselves involve additional punishment.....	237
b) Sentencing/penalties.....	237
i) instruments governing penalties.....	237
(1) Article 24: Penalties	237
(2) Rule 101 of the Rules of Procedure and Evidence.....	237
ii) generally	238
(1) sentencing factors	238
(2) sentence to reflect gravity of the crime	238
(3) “totality principle”/discretion to impose global, concurrent, consecutive, or a mixture of concurrent and consecutive sentences	238
(a) application	239
(4) goal of penalties	240
(a) goals are deterrence and retribution.....	240
(b) deterrence must not be accorded undue prominence	240

(c) rehabilitation is a relevant factor, but cannot play a predominant role.....	241
(d) public reprobation and stigmatization	241
(5) consistency of sentences; yet individualized sentencing.....	241
(a) consistency of sentences	241
(b) a sentence should not be capricious or excessive.....	242
(c) sentence must be individualized.....	242
(d) no established “penal regime” regarding sentencing.....	242
(e) factors for why different sentences might be imposed for same type of crime	243
(6) taking account of sentencing practices in the former Yugoslavia: should be considered, but not controlling.....	243
(a) domestic sentencing practices, other than those of the courts of the former Yugoslavia, are of little assistance.....	244
(7) ranking of crimes	244
(a) whether genocide is the most serious crime	244
(b) whether there is a distinction between the seriousness of a crime against humanity and a war crime.....	245
(c) no rule that crimes resulting in loss of life should be punished more severely than those not leading to loss of life.....	246
(8) sentence can be lengthened if discernible error.....	246
(9) must give credit for time in detention pending trial.....	246
(10) must order sentence to run from date of judgment.....	246
(11) may recommend a minimum sentence to be served before any commutation or sentence reduction.....	247
(12) factors for assessing gravity of offenses	247
(a) generally	247
(b) regarding offenses committed under Article 7(3)	248
(c) participant in a joint criminal enterprise compared to principal offender.....	248
(13) sentence should reflect the relative significance of the role of the defendant.....	248
(14) double jeopardy impacting on sentence	249
(15) discretion to impose life imprisonment.....	249
iii) aggravating and mitigating factors	249
(1) generally.....	249
(2) burden of proof.....	249
(3) aggravating factors.....	250
(a) position of the accused.....	250
(b) active and direct criminal participation.....	251
(c) role as fellow perpetrator	251
(d) discriminatory state of mind.....	252
(e) informed, voluntary, willing or enthusiastic participation in crime	252
(f) premeditation and motive.....	252
(g) egregious nature of how crime was committed.....	253
(h) sexual, violent and humiliating nature of the acts, and vulnerability of victims	253

(i)	status of the victims and effect of the crimes on them	254
(j)	active participation of superior in criminal acts of subordinate.....	254
(k)	proving responsibility under both Article 7(1) and Article 7(3).....	254
(l)	youthful age of victims, number of victims and recurrence of crimes	255
(m)	extended time period during which offenses committed.....	255
(n)	magnitude of the crime and the scale of the accused’s role.....	255
(o)	civilian detainee.....	255
(p)	character of the accused.....	256
(q)	circumstances of offenses generally	256
(r)	accused not testifying is not an aggravating factor.....	256
(4)	mitigating factors	257
(a)	generally	257
(b)	co-operation of the accused.....	257
(c)	guilty plea including remorse and reconciliation	258
(d)	duress	259
(e)	indirect or forced participation	259
(f)	diminished mental responsibility	260
(g)	voluntary surrender.....	260
(h)	post-conflict conduct.....	260
(i)	age.....	260
(j)	personal circumstances/family concerns.....	261
(k)	character of the accused.....	261
(l)	poor health: only in exceptional or rare cases.....	262
(m)	assistance to detainees or victims.....	262
(n)	lack of strength of character not a mitigating factor.....	262
XI)	MISCELLANEOUS.....	263
a)	Weight to give prior decisions	263
i)	the Appeals Chamber should follow its previous decisions, absent a cogent reason in the interests of justice	263
ii)	decisions of the Appeals Chamber are binding on Trial Chambers.....	263
iii)	decisions of Trial Chambers have no binding force on each other	263
b)	Unreasonableness is test for appellate review of Trial Chamber’s factual findings.....	263
c)	“Equality of arms” principle.....	264
d)	Lawyer-client privilege does not cover prior defense witness statements: Trial Chamber may order their disclosure	264
e)	Test for accepting guilty pleas	265
i)	whether there is a sufficient factual basis for the crime and the accused’s participation in it, and whether the elements presented establish the crime acknowledged.....	265
ii)	plea must be voluntary, informed and unequivocal.....	265
(1)	voluntary.....	266
(2)	informed.....	266

(3) unequivocal.....	266
ALPHABETICAL INDEX	267

SUMMARY OF JUDGMENTS AGAINST THE ACCUSED

Zlatko Aleksovski was commander of the prison facility at Kaonik, near Busovaca, in Bosnia and Herzegovina. He was convicted of violations of the laws or customs of war, namely outrages upon personal dignity, on the basis of his individual and superior responsibility. The Appeals Chamber overturned the Trial Chamber's finding that the accused was not responsible for the mistreatment of prisoners outside the prison compound and found that Aleksovski was also responsible for the mistreatment by the Croatian Defence Council (HVO) outside the prison and declared him guilty of aiding and abetting this mistreatment. The Appeals Chamber increased his sentence to seven years imprisonment.

General Tihomir Blaskic was former commander of the Croatian Defence Council (HVO). He was convicted for atrocities committed against Bosnian Muslims between May 1992 and January 1994, in Bosnia and Herzegovina, particularly in the Lasva Valley region. In his capacity as commander of Bosnian Croat forces, Blaskic was convicted of six counts of grave breaches of the 1949 Geneva Conventions under Article 2 of the ICTY Statute, eleven counts of violations of the laws or customs of war (of which the Prosecution withdrew one), and three counts of crimes against humanity. The crimes included, *inter alia*, persecution, unlawful attacks upon civilians and civilian objects, taking civilians as hostages, willful killing, willfully causing great suffering or serious bodily injury, murder, inhuman treatment, cruel treatment, as well as destruction, and plunder of property. Blaskic was sentenced to forty-five years imprisonment.

Mario Cerkez was former commander of a brigade in the Bosnian Croat armed forces (HVO). He was convicted of crimes against humanity, violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions. Cerkez was sentenced to fifteen years imprisonment.

Zejnir Delalic was acquitted by the Trial Chamber of twelve counts of grave breaches of the 1949 Geneva Conventions and violations of the laws or customs of war. That decision was affirmed by the Appeals Chamber.

Hazim Delic was Deputy Commander of the prison camp near the town of Celebici in central Bosnia and Herzegovina. He was convicted of grave breaches of the 1949 Geneva Conventions. In his capacity as deputy at the Celebici camp he was responsible for killing, torturing, sexually assaulting, beating, and otherwise subjecting detainees to cruel and inhumane treatment. The victims were the Bosnian Serb detainees in the Celebici camp. The Appeals Chamber affirmed the sentence of eighteen years imprisonment.

Damir Dosen was a guard shift leader at the Keraterm camp from June 3 to early August 1992. He pled guilty to persecution as a crime against humanity and was sentenced to five years imprisonment.

Drazen Erdemovic was a member of the 10th Sabotage Detachment of the Army of Republika Srpska (VRS), which killed hundreds of Bosnian Muslim civilian men from Srebrenica at the Pilica collective farm. He pled guilty to one count of violating the laws or customs of war and was sentenced to five years imprisonment.

Anto Furundzija was the local commander of a special unit of the military police of the Croatian Defence Council (HVO) known as the “Jokers.” He was convicted of two counts of violating the laws or customs of war, as a co-perpetrator of torture and as an aider and abettor of outrages upon personal dignity, including rape. Furundzija was sentenced to ten years imprisonment for the former conviction and eight years imprisonment for the latter conviction, and ordered to serve them concurrently. The Appeals Chamber affirmed the convictions and sentences.

Goran Jelusic pled guilty to fifteen counts of crimes against humanity and sixteen counts of violations of the laws or customs of war relating to murders, beatings, and the plunder of private property in the municipality of Brcko in the north-eastern part of Bosnia and Herzegovina in May 1992. The Trial Chamber acquitted Jelusic of one count of genocide to which he had pled not guilty. The Appeals Chamber held that although the Trial Chamber’s erroneous application of the standard under Rule 98 *bis* led to an incorrect assessment of the evidence on the count of genocide, it was not appropriate to reverse the acquittal and remit the case for further proceedings. As such, the Appeals Chamber affirmed the Trial Chamber’s sentence of forty years imprisonment.

Drago Josipovic, an HVO soldier, was convicted by the Trial Chamber of persecution, murder, and inhumane acts as crimes against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to ten, fifteen, and ten years imprisonment respectively on those counts, to be served concurrently for fifteen years. The Appeals Chamber partially allowed his appeal and reduced his sentence to twelve years imprisonment.

Dragan Kolundzija was a guard shift leader at the Keraterm camp from early June to July 25, 1992. He pled guilty to persecution as a crime against humanity and was sentenced to three years imprisonment.

Dario Kordic was a regional Croatian Democratic Union (HDZ) leader in Central Bosnia with particular authority in the Lasva Valley. He was convicted of crimes against humanity, violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions. He was sentenced to twenty-five years imprisonment.

Milojica Kos was a civilian mobilized to work as a reserve officer and assigned to serve as a guard shift leader at the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity, and murder and torture as violations of the laws or customs of war. The crimes were committed in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to six years imprisonment.

Radomir Kovac fought on the Republika Srpska side during the armed conflict in the Foca municipality of Bosnia and Herzegovina and was a member of a military unit formerly known as the “Dragan Nikolic unit.” He was convicted of enslavement and rape as crimes against humanity, and outrages upon personal dignity as violations of the laws or customs of war. Kovac’s criminal conduct was part of a systematic attack on the non-Serb civilian population which included the specific targeting of Muslim women, who were detained in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. Kovac was sentenced to a single sentence of twenty years imprisonment. The Appeals Chamber affirmed the decision of the Trial Chamber.

Radislav Krstic was Chief of Staff of the Drina Corps of the Army of Republika Srpska (VRS) and then its Commander during the time of the Bosnian Serb take-over of the United Nations “safe haven” of Srebrenica in July 1995. He was convicted of genocide, violations of the laws or customs of war, and crimes against humanity, and sentenced to forty-six years imprisonment.

Milorad Krnojelac was the former warden of the Foca Kazneno-Popravni Dom (the KP Dom), a large prison complex situated in the town of Foca, in the eastern part of Bosnia and Herzegovina, where a large number of non-Serb men were detained for long periods of time. He was convicted of crimes against humanity and violations of the laws or customs of war, and sentenced to a single sentence of seven and a half years imprisonment.

Dragoljub Kunarac was leader of a reconnaissance unit which formed part of the local Foca Tactical Group. He was convicted of rape and torture as crimes against humanity and rape and torture as violations of the laws or customs of war. Kunarac’s criminal conduct was part of a systematic attack on the non-Serb civilian population which included the specific targeting of Muslim women, who were detained in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. Kunarac was sentenced to a single sentence of twenty-eight years imprisonment. The Appeals Chamber affirmed the decision of the Trial Chamber.

Mirjan Kupreskic, an HVO soldier, was convicted by the Trial Chamber for persecution as a crime against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to eight years imprisonment. The Appeals Chamber reversed the conviction on the grounds of a defective indictment and inadequate evidentiary basis for a conviction, and ordered his immediate release.

Vlatko Kupreskic, a police operations officer, was convicted by the Trial Chamber for persecution as a crime against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to six years imprisonment. The Appeals Chamber reversed the conviction on evidentiary grounds, and ordered his immediate release.

Zoran Kupreskic, an HVO soldier, was convicted by the Trial Chamber for persecution as a crime against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to ten years imprisonment. The Appeals Chamber reversed the conviction on the grounds of a defective indictment and inadequate evidentiary basis for a conviction, and ordered his immediate release.

Miroslav Kvocka was a former professional policeman attached to the Omarska Police Station and Deputy Commander of the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder and torture as violations of the laws or customs of war in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to seven years imprisonment.

Esad Landzo was a guard at the prison camp near the town of Celebici in central Bosnia and Herzegovina. He was convicted of grave breaches of the 1949 Geneva Conventions. In his capacity as a guard at the Celebici camp he was responsible for killing, torturing, sexually assaulting, beating, and otherwise subjecting Bosnian Serb detainees in the Celebici camp to cruel and inhumane treatment. The Appeals Chamber affirmed the sentence of fifteen years imprisonment.

Vinko Martinovic was a commander of the Vinko Skrobo ATG (anti-terrorist group) which was a sub-unit of the Convicts' Battalion (KB), a military group which was a component of the Croatian Defence Council (HVO). He was convicted of crimes against humanity, violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions. He was sentenced to a single sentence of eighteen years imprisonment.

Zdravko Mucic was commander of the prison camp near the town of Celebici in central Bosnia and Herzegovina. He was convicted of grave breaches of the 1949 Geneva Conventions. In his capacity as commander at the Celebici camp, he was responsible for killing, torturing, sexually assaulting, beating, and otherwise subjecting detainees to cruel and inhumane treatment. The victims were the Bosnian Serb detainees in the Celebici camp. The Appeals Chamber affirmed the sentence of nine years imprisonment.

Mladen Naletilic was commander of a military group called the Convicts' Battalion (KB), which was a component of the Croatian Defence Council (HVO). He was convicted of crimes against humanity, violations of the laws or customs of war, and grave breaches of the 1949 Geneva Conventions. He was sentenced to a single sentence of twenty years imprisonment.

Dragan Papic was acquitted by the Trial Chamber on the one count of persecution as a crime against humanity for which he was tried.

Biljana Plavsic was a member of the Presidency of Republika Srpska, and, after the conflict, was President of Republika Srpska. She pled guilty to persecution as a crime against humanity and was sentenced to eleven years imprisonment.

Dragoljub Prcac was a retired policeman and crime technician mobilized to serve in the Omarska Police Station and an administrative aide to the commander of the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder and torture as violations of the laws or customs of war in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to five years imprisonment.

Mladjo Radic was a professional policeman attached to the Omarska Police Station and a guard shift leader at the Omarska camp. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder and torture as violations of the laws or customs of war in the region of Prijedor, between May 26 and August 30, 1992, and, more specifically, in the Omarska camp. He was sentenced to twenty years imprisonment.

Vladimir Santic was a military police commander and commander of the "Jokers." He was convicted by the Trial Chamber of persecution, murder, and inhumane acts as crimes against humanity for his role in the April 1993 attack on the Muslim population of the Bosnian village of Ahmici. He was sentenced to twenty-five, fifteen, and ten years imprisonment for those crimes, respectively, to be served concurrently for twenty-five years. The Appeals Chamber partially allowed his appeal and reduced his sentence to eighteen years imprisonment.

Dusko Sikirica was commander of security at the Keraterm camp between June 14 and July 27, 1992. He pled guilty to persecution as a crime against humanity and was sentenced to fifteen years imprisonment.

Milan Simic was President of the Executive Board of the Municipal Assembly of Bosanski Samac and a member of the Serb Crisis Staff for the city of Bosanski Samac. He pled guilty to two counts of torture as a crime against humanity and was sentenced to five years imprisonment.

Dusko Tadic was the former President of the Local Board of the Serb Democratic Party (SDS) in Kozarac. He was convicted on seven counts of grave breaches of the 1949 Geneva Conventions, six counts of violations of the laws or customs of war, and seven counts of crimes against humanity. The crimes were committed in 1992 in the Prijedor District and more specifically at the Omarska, Keraterm, and Trnopolje camps, in Kozarac and in the area of Jaskici and Sivci. Tadic was sentenced to twenty years imprisonment.

Stevan Todorovic, former Chief of Police in Bosanski Samac, pled guilty to persecution as a crime against humanity and was sentenced to ten years imprisonment.

Mitar Vasiljevic was a member of the Serb minority in Visegrad and organized a small paramilitary group known locally as the White Eagles, which operated with the police and various military units stationed in Visegrad. He was convicted of persecution as a crime against humanity and murder as a violation of the laws or customs of war. He was sentenced to a single sentence of twenty years imprisonment.

Zoran Vukovic was a member of the Bosnian Serb forces fighting against the Bosnian Muslim forces in the Foca municipality of Bosnia and Herzegovina, and a member of a military unit formerly known as the “Dragan Nikolic unit.” He was convicted of rape and torture as both crimes against humanity and violations of the laws or customs of war. Vukovic’s criminal conduct was part of a systematic attack on the non-Serb civilian population which included the specific targeting of Muslim women, who were detained in places like the Kalinovik School, Foca High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. Vukovic was sentenced to a single sentence of twelve years imprisonment. The Appeals Chamber affirmed the decision of the Trial Chamber.

Zoran Zigic was a civilian mobilized to work as a reserve officer who worked for a short period of time in the Keraterm camp delivering supplies. He was allowed to enter the Omarska, Keraterm, and Trnopolje camps regularly as a civilian. He was convicted by the Trial Chamber of persecution as a crime against humanity and murder, torture, and cruel treatment as violations of the laws or customs of war. The crimes occurred in

the region of Prijedor, between May 26 and August 30, 1992. Zigic was sentenced to twenty-five years imprisonment.

LISTING OF CASES INCLUDED

- Prosecutor v. Aleksovski*, Case No. IT-95-14/1 (Appeals Chamber), March 24, 2000.
Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Trial Chamber), June 25, 1999.
- Prosecutor v. Blaskic*, Case No. IT-95-14 (Trial Chamber), March 3, 2000.
- Prosecutor v. Erdemovic*, Case No. IT-96-22 (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997.
Prosecutor v. Erdemovic, Case No. IT-96-22 (Trial Chamber), March 5, 1998.
- Prosecutor v. Furundzija*, Case No. IT-95-17/1 (Appeals Chamber), July 21, 2000.
Prosecutor v. Furundzija, Case No. IT-95-17/1 (Trial Chamber), December 10, 1998.
- Prosecutor v. Jelusic*, Case No. IT-95-10 (Appeals Chamber), July 5, 2001.
Prosecutor v. Jelusic, Case No. IT-95-10 (Trial Chamber), December 14, 1999.
- Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001.
Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2 (Bureau Decision), May 4, 1998, & (Trial Chamber), May 21, 1998.
- Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber), March 15, 2002.
- Prosecutor v. Krstic*, Case No. IT-98-33 (Trial Chamber), August 2, 2001.
- Prosecutor v. Kunarac, Kovac and Vokovic*, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), June 12, 2002.
Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23 and IT-96-23/11 (Trial Chamber), February 22, 2001.
- Prosecutor v. Kupreskic et al.*, Case No. IT-95-16 (Trial Chamber), January 14, 2000.
- Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001.
- Prosecutor v. Mucic et al.*, Case No. IT-96-21 (Appeals Chamber), April 8, 2003.
Prosecutor v. Mucic et al., Case No. IT-96-21 (Appeals Chamber), February 20, 2001.
Prosecutor v. Mucic et al., Case No. IT-96-21 (Trial Chamber), November 16, 1998.
- Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34 (Trial Chamber), March 31, 2003.

Prosecutor v. Plavsic, Case No. IT-00-39&40/1 (Trial Chamber), February 27, 2003.

Prosecutor v. Rajic, Case No. IT-95-12 (Trial Chamber), Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, September 13, 1996.

Prosecutor v. Sikirica et al., Case No. IT-95-8 (Trial Chamber), November 13, 2001.

Prosecutor v. Sikirica et al., Case No. IT-95-8 (Trial Chamber), September 3, 2001.

Prosecutor v. Simic, Case No. IT-95-9/2-S (Trial Chamber), October 17, 2002.

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995.

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), January 31, 2000.

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), January 26, 2000.

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), July 15, 1999.

Prosecutor v. Tadic, Case No. IT-94-1 (Trial Chamber), November 11, 1999.

Prosecutor v. Tadic, Case No. IT-94-1 (Trial Chamber), May 7, 1997.

Prosecutor v. Todorovic, Case No. IT-95-9/1 (Trial Chamber), July 31, 2001.

Prosecutor v. Vasiljevic, Case No. IT-98-32-T (Trial Chamber), November 29, 2002.

I) WAR CRIMES: GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 1949 (ARTICLE 2)

a) Statute

ICTY Statute, Article 2:

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

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

b) General elements for Article 2 crimes

Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34 (Trial Chamber), March 31, 2003, para. 176: “Article 2 of the Statute deals with grave breaches of the Geneva Conventions of 1949. The applicability of Article 2 of the Statute is subject to four prerequisites: an armed conflict must exist; there must be a nexus between this conflict and the crimes alleged; the armed conflict must be international in scope; and the persons or property subject of grave breaches must be defined as ‘protected’ in the Geneva Conventions.”

i) the existence of an armed conflict (element 1)

(1) armed conflict required

Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2 (Trial Chamber), February 26, 2001, para. 22: “Articles 2 and 3 of the Statute set forth provisions which reflect the laws of war; plainly a pre-condition to the applicability of these Articles is the existence of an armed conflict in the territory where the crimes are alleged to have occurred.”

(2) armed conflict defined

Prosecutor v. Kunarac, Kovac and Vokovic, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), June 12, 2002, para. 56: “An ‘armed conflict’ is said to exist ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.’” *See also Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70 (same).

(3) duration of application of international humanitarian law

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70: “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.”

ii) there must be a nexus between the conflict and crimes alleged (element 2)

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 32: “[I]n order for a particular crime to qualify as a violation of international humanitarian law under Articles 2 and 3 of the Statute, the Prosecution must also establish a sufficient link between that crime and the armed conflict. In this regard, the Appeals Chamber has held that: Even if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed . . . international humanitarian law applies. 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.”

Prosecutor v. Blaskic, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 69: “[I]t 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.’”

iii) the armed conflict must be international (element 3)

(1) international armed conflict defined

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), July 15, 1999, para. 84: “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.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 66: “In the *Tadic* case, the Appeals Chamber conducted an extensive review of the applicable law as to how an internal armed conflict becomes internationalized for the purposes of Article 2 of the Statute. The Appeals Chamber held: ‘. . . 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.’”

(2) overall control test applies

Tadic, (Appeals Chamber), July 15, 1999, para. 146: “The Appeals Chamber has concluded that in general international law, three tests may be applied for determining whether an individual is acting as a *de facto* State organ. In the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of overall control by the State.”¹

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 111: *Tadic* “established that an armed conflict, which is otherwise internal, is internationalised if a foreign state exercises ‘overall control’ over the military forces of one of the parties to that conflict.”

Prosecutor v. Mucic et al., Case No. IT-96-21 (Appeals Chamber), February 20, 2001, para. 26: “The ‘overall control’ test set forth in the *Tadic* Appeal Judgement is . . . the applicable criteria for determining the existence of an international armed conflict.”

Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Appeals Chamber), March 24, 2000, para. 134, 145: “[T]he Appeals Chamber will follow its decision in the *Tadic* Judgement, since, after careful analysis, it is unable to find any cogent reason to depart from it,” and the “‘overall control’ test, set out in the *Tadic* Judgement is the applicable law.” “The ‘overall control’ test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control.”

¹ For discussion of the “effective control,” “specific instructions,” and “assimilation of individuals to State organs on account of their actual behavior within the structure of a State” tests discussed in *Tadic*, see *Tadic*, (Appeals Chamber), July 15, 1999, para. 115-137, 141-144.

(3) overall control test satisfied where a state has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support

Tadic, (Appeals Chamber), July 15, 1999, para. 137, 138: “[C]ontrol 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.” “[I]f the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.” *See also Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 184.

(4) do not just look at the locality where the crimes occurred to determine if conflict is international

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 70: “[I]nternational humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 70: “[I]t would be wrong to construe the Appeals Chamber’s decision [in *Tadic*] as meaning that evidence as to whether a conflict in a particular locality has been internationalized must necessarily come from activities confined to the specific geographical area where the crimes were committed, and that evidence of activities outside that area is necessarily precluded in determining that question.”

Blaskic, (Trial Chamber), March 3, 2000, para. 64: “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.”

(5) application

(a) conflict between Bosnia and Herzegovina and Croatia

Prosecutor v. Rajic, Case No. IT-95-12 (Trial Chamber), Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, September 13, 1996, para. 13, 26, 32: “[F]or purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one.” “[B]etween 5000 to 7000 members of the Croatian Army, as well as some members of the Croatian Armed Forces (‘HOS’), were present in the territory of Bosnia and were involved, both directly and through their relations with Croatian Community of Herceg-Bosna (‘HB’) and the Croatian Defence Council (‘HVO’), in clashes with Bosnian Government forces in central and southern Bosnia. [T]he Bosnian Croats can, for the purposes of these proceedings, be regarded as agents of Croatia in respect of discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Conventions. It appears that Croatia, in addition to assisting the Bosnian Croats . . . inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats.”

Blaskic, (Trial Chamber), March 3, 2000, para. 83-123: The Trial Chambers concluded that “[b]ased on Croatia’s direct intervention in BH [Republic of Bosnia and Herzegovina]” there was “ample proof to characterise the conflict as international,” and that Croatia’s “indirect control over the HVO [Croatian Defence Council] and HZHB [Croatian Community of Herceg-Bosna]” and “indirect intervention” would “permit the conclusion that the conflict was international.” The Trial Chamber found that “Croatia, and more specifically former President Tudjman, was hoping to partition Bosnia and exercised such a degree of control over the Bosnian Croats and especially the HVO that it is justified to speak of overall control. [T]he close ties between Croatia and the Bosnian Croats did not cease with the establishment of the HVO.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 108-146: The Trial Chamber concluded that the relevant issues were (a) whether Croatia intervened in the armed conflict between the Bosnian Muslims and the Bosnian Croats in Bosnia and

Herzegovina through its troops and, alternatively, (b) whether the HVO [Croatian Defence Council] acted on behalf of Croatia. “The Chamber concludes that the evidence in this case satisfies each of the alternative criteria set forth . . . for internationalising an internal conflict.”

(b) conflict between Bosnia and Herzegovina and the Federal Republic of Yugoslavia (FRY)

Tadic, (Appeals Chamber), July 15, 1999, para. 156, 162: “It is sufficient to show that [the Yugoslav Army] exercised overall control over the Bosnian Serb Forces. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS [the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska]. This sort of control is sufficient for the purposes of the legal criteria required by international law.” “[F]or the period material to this case (1992), the armed forces of the *Republika Srpska* were to be regarded as acting under the overall control of and on behalf of the FRY [the Federal Republic of Yugoslavia (Serbia and Montenegro)]. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an *international* armed conflict.” *See also Tadic*, (Appeals Chamber), July 15, 1999, para. 87.

Mucic et al., (Appeals Chamber), February 20, 2001, para. 33, 48, 50: “The Trial Chamber’s finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a plain application of the holding of the Appeals Chamber in *Tadic* that it ‘is indisputable that an armed conflict is international if it takes place between two or more States,’ which reflects the traditional position of international law. . . .” “Although the Trial Chamber did not formally apply the ‘overall control’ test set forth by the *Tadic* Appeal Judgement, . . . the Trial Chamber’s legal reasoning is entirely consistent with the previous jurisprudence of the Tribunal.” “The Trial Chamber came to the conclusion, as in the *Tadic* case, that the armed conflict taking place in Bosnia and Herzegovina after 19 May 1992 could be regarded as international because the FRY remained the controlling force behind the Bosnian Serbs armed forces after 19 May 1992. . . . [T]his Appeals Chamber is satisfied that the facts as found by the Trial Chamber fulfil the legal conditions as set forth in the *Tadic* case.”

iv) the person or property at issue must be “protected” (element 4)

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 176: The fourth requirement for applicability of Article 2 of the Statute is “the persons or property subject of grave breaches must be defined as ‘protected’ in the Geneva Conventions.”

(1) protected persons defined

Tadic, (Appeals Chamber), July 15, 1999, para. 168: “Protected persons” are those “who do not enjoy . . . diplomatic protection,” and “are not subject to the allegiance and control, of the State in whose hands they may find themselves.”

Blaskic, (Trial Chamber), March 3, 2000, para. 145: “[I]n those situations where civilians do not enjoy the normal diplomatic protection of their State, they should be accorded the status of protected person.”

Compare Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 147: “Article 4 of Geneva Convention IV defines protected persons as: 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.”

(2) use ethnicity or substance of relations and not formal nationality to determine protected status

Tadic, (Appeals Chamber), July 15, 1999, para. 166-169: “Th[e] legal approach [for defining protected persons], hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in 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.” It is “the substance of relations” between the parties, “not . . . their legal characterisation” which is controlling. “[T]he victims were ‘protected persons’ as they found themselves in the hands of armed forces of a State of which they were not nationals” and they “did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.”

Blaskic, (Trial Chamber), March 3, 2000, para. 126-127: The Trial Chamber followed the *Tadic* Appeals Chamber which chose a “‘legal approach hinging more on substantial relations than on formal bonds,’ . . .” “In an inter-ethnic armed conflict, a person’s ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 152: “[T]he Appeals Chamber in *Tadic* concluded 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.’ In such a case, nationality is not as crucial as allegiance to a party. [T]he Bosnian Muslim victims are protected persons since they owe no allegiance to the Bosnian Croats under whose effective control they were.”

(3) protected persons can be same nationality as captor

Mucic et al., (Appeals Chamber), February 20, 2001, para. 81, 84: “[D]epriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions.” “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.”

Aleksovski, (Appeals Chamber), March 24, 2000, para. 151: “[I]n certain circumstances, Article 4 [of Geneva Convention IV] may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.”

(4) “in the hands of a Party to the Conflict or Occupying Power” defined

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 208: The Chamber held that “the expression ‘in the hands of a party or occupying power, as it appears in Article 4 of Geneva Convention IV, refers to persons finding themselves on the territory controlled by that party or occupying power.”

c) Mental state (*mens rea*)

i) generally

Blaskic, (Trial Chamber), March 3, 2000, para. 152: “[T]he *mens rea* constituting all the violations of Article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence.”

See also discussion of the *mens rea* for willful killing, Section (I)(d)(i)(2); *mens rea* for extensive destruction of property not justified by military necessity, Section (I)(d)(v); and *mens rea* for unlawful transfer, Section (I)(d)(vii), ICTY Digest.

d) Underlying offenses

i) willful killing

(1) defined

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 229: “[I]n relation to the crime of wilful killing, the *actus reus* – the physical act necessary for the offence – is the death of the victim as a result of the actions or omissions of the accused. [T]he conduct of the accused must be a substantial cause of the death of the victim, who must have been a ‘protected person.’”

Blaskic, (Trial Chamber), March 3, 2000, para. 153: “For the material element of the offence, it must be proved that the death of the victim was the result of the actions of the accused. . . .”

(2) mental state (*mens rea*)

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 229: “To satisfy the *mens rea* for wilful killing, it must be established that the accused had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life.”

Blaskic, (Trial Chamber), March 3, 2000, para. 153: “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.”

See also discussion of murder under Article 3, Section (II)(d)(iv) and murder under Article 5, Section (IV)(c)(i), ICTY Digest.

ii) torture or cruel and inhuman treatment

(1) torture

See discussion of torture under Article 3, Section (II)(d)(i), and Article 5, Section (IV)(c)(v), ICTY Digest.

(2) cruel and inhuman treatment

(a) generally

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 246: “[O]ffences of inhuman treatment and cruel treatment are residual clauses under Articles 2 and 3 of the Statute respectively. Materially, the elements of these offences are the same.” “The

degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of ‘wilfully causing great suffering or serious injury to body or health.’”

(b) cruel treatment

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 246: “Cruel treatment is constituted by a) an intentional act or omission, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity, b) committed against a person taking no active part in the hostilities.”

(c) inhuman treatment

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 246: “Inhuman treatment is defined as a) an intentional act or omission, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity, b) committed against a protected person.” *See also Aleksovski*, (Appeals Chamber), March 24, 2000, para. 26.

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 256: “[I]nhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity. [T]he act must have been directed against a ‘protected person.’”

Blaskic, (Trial Chamber), March 3, 2000, para. 154-155: “[I]nhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity [. . .] 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 Conventions 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.” “[T]he category ‘inhuman treatment’ included not only acts such as torture and intentionally causing great suffering or inflicting serious injury to body, mind or health but also extended to other acts contravening the fundamental principle of humane treatment, in particular those which constitute an attack on human dignity.”

(d) application

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 256: “[I]njuries, inhuman treatment of detainees, and use of persons as human shields may be characterized as ‘inhuman treatment.’”

See also discussion of cruel treatment under Article 3, Section (II)(d)(iii), ICTY Digest.

iii) rape

See discussion of rape under Article 3, Sections (II)(d)(i)(7)(b) and (II)(d)(ii), and Article 5, Section (IV)(c)(vi), ICTY Digest.

iv) willfully causing great suffering or serious injury to body or health

(1) defined

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 245: “[T]he crime of willfully causing great suffering or serious injury to body or health constitutes an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven.” “As with all offences charged under Article 2 of the Statute, there is a further requirement that the acts must have been directed against a ‘protected person.’”

Blaskic, (Trial Chamber), March 3, 2000, para. 156: “This offence is an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health. 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. An analysis of the expression ‘wilfully causing great suffering or serious injury to body or health’ indicates that it is a single offence whose elements are set out as alternative options.”

(2) requires showing of serious mental or physical injury, although need not be permanent or irremediable

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 245: “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.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 339-343: “The Commentary to Article 147 of Geneva Convention IV describes the offence of wilfully causing great suffering as referring to suffering which is inflicted without ends in view for which torture or biological experiments are carried out. It could be inflicted for other motives such as punishment, revenge or out of sadism, and could also cover moral suffering. In describing serious injury to body or health, it states that the concept usually uses as a criterion of seriousness the length of time the victim is incapacitated for work.... This offence includes those acts that do not fulfil the conditions set for torture even though acts of torture may also fit the definition given. . . . [S]erious 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.”

v) extensive destruction of property not justified by military necessity

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 574-580: “[T]wo types of property are protected under the grave breach regime: i) property, regardless of whether or not it is in occupied territory, that carries general protection under the Geneva Conventions of 1949, such as civilian hospitals, medical aircraft and ambulances; and ii) property protected under Article 53 of the Geneva Convention IV, which is real or personal property situated in occupied territory when the destruction was not absolutely necessary by military operations. The Chamber holds that Article 2(d) of the Statute requires the destruction to be extensive regardless of whether the property is characterised as carrying general protection or is protected because it is situated on occupied territory. A single act may, in exceptional circumstances, be interpreted as fulfilling the requirement of extensiveness, as for instance the bombing of a hospital.”

“[A] crime under Article 2(d) of the Statute has been committed when: i) the general requirements of Article 2 of the Statute are fulfilled; ii) property was destroyed extensively; iii) the extensive destruction regards property carrying general protection under the Geneva Conventions of 1949, or; the extensive destruction not absolutely necessary by military operations regards property situated in occupied territory; iv) the perpetrator acted with the intent to destroy this property or in reckless disregard of the likelihood of its destruction.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 335-341: “[T]he crime of extensive destruction of property as a grave breach comprises the following elements, either: (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, 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 (ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.”

Blaskic, (Trial Chamber), March 3, 2000, para. 157: “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.”

See also discussion of “wanton destruction not justified by military necessity” under Article 3, Section (II)(d)(viii), ICTY Digest.

vi) unlawful confinement of civilians and imprisonment

(1) generally

Mucic et al., (Appeals Chamber), February 20, 2001, para. 322, 327: “[T]he exceptional measure of confinement of a civilian will be lawful only in the conditions prescribed by Article 42 [Geneva Convention IV], and where the provisions of Article 43 [Geneva Convention IV] are complied with. 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, *i.e.* 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.” “It is perfectly clear from the provisions of Geneva Convention IV . . . that there is no such blanket power to detain the entire civilian population of a party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a particular risk to the security of the State.” “[T]he 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.”

(2) responsibility more properly allocated to those responsible for detention, not those who merely participate in it, such as those who maintain a prison

Mucic et al., (Appeals Chamber), February 20, 2001, para. 342: “The Appeals Chamber is of the view that to establish that an individual has committed the offence of unlawful confinement, something more must be proved than mere knowing ‘participation’ in a general system or operation pursuant to which civilians are confined. In the Appeals Chamber’s view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has committed a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention,

accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist. The Appeals Chamber, however, does not accept that a guard's omission to take unauthorised steps to release prisoners will suffice to constitute the commission of the crime of unlawful confinement.”

(3) responsibility of camp commander

Mucic et al., (Appeals Chamber), February 20, 2001, para. 378-379: “[A] person in the position of Mucic [commander of the Celebici prison camp in the village of Celebici] commits the offence of unlawful confinement of civilians where he has the authority to release civilian detainees and fails to exercise that power, where (i) he has no reasonable grounds to believe that the detainees do not [sic] pose a real risk to the security of the state; or (ii) he knows that they have not been afforded the requisite procedural guarantees (or is reckless as to whether those guarantees have been afforded or not).” “Where a person who has authority to release detainees knows that persons in continued detention have a right to review of their detention and that they have not been afforded that right, he has a duty to release them. Therefore, failure by a person with such authority to exercise the power to release detainees, whom he knows have not been afforded the procedural rights to which they are entitled, commits the offence of unlawful confinement of civilians, even if he is not responsible himself for the failure to have their procedural rights respected.”

vii) unlawful transfer

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 519-521: “Forcible transfer is the movement of individuals under duress from where they reside to a place that is not of their choosing.” “In order [for] the Chamber to be satisfied [that] Article 2(g) of the Statute [has been proven], proof of the following is required: i) the general requirements of Article 2 of the Statute . . . ; ii) the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, lead[s] to the transfer of a person from occupied territory or within occupied territory; iii) the intent of the perpetrator to transfer a person.” “The Prosecution needs to prove the intent to have the person (or persons) removed, which implies the aim that the person is not returning.”

viii) taking civilians as hostages

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 311-314: “[A]n 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.”

Blaskic, (Trial Chamber), March 3, 2000, para. 158: “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.” “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 . . . covered under Article 3 of the Statute.”

See also discussion of “taking of hostages” under Article 3, Section (II)(d)(vii), ICTY Digest.

e) Miscellaneous

i) occupation (relevant to unlawful labor of civilians, unlawful transfer and destruction of property)

(1) where “occupation” is relevant

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 210: “Occupation is relevant in dealing with the charges of unlawful labour of civilians . . . , forcible transfer of a civilian . . . and destruction of property.”

See discussion of unlawful labor under Article 3, Section (II)(d)(xii); unlawful transfer and “extensive destruction of property not justified by military necessity” both under Article 2, Sections (I)(d)(vii) and (I)(d)(v), ICTY Digest.

(2) definition

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 214-216: “Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities. This distinction imposes more onerous duties on an occupying power than on a party to an international armed conflict.” The Chamber endorsed the definition of occupation set forth in Article 42 of the Hague Regulations: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” The Chamber stated that the “overall control test, submitted in the *Blaskic* Trial Judgement, is not applicable to the determination of the existence of an occupation. . . . [T]here is an essential distinction between the determination of a state of occupation and that of the existence of an international armed conflict. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation.”

(3) guidelines for determining occupation

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 217: The Chamber set out the following guidelines to help “determine whether the authority of the occupying power has been actually established”:

- “the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly”;
- “the enemy’s forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation”;
- “the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt”;
- “a temporary administration has been established over the territory”;
- “the occupying power has issued and enforced directions to the civilian population.”

(4) only applies to areas actually controlled by the occupying power

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 218: “[T]he law of occupation only applies to those areas actually controlled by the occupying power and ceases to apply where the occupying power no longer exercises an actual authority over the occupied area.” The court “must determine on a case by case basis whether this degree of control was established at the relevant times and in the relevant places.” “[T]here is no requirement that an entire territory be occupied, provided that the isolated areas in which the authority of the occupied power is still functioning ‘are effectively cut off from the rest of the occupied territory.’”

(5) different test would apply regarding individuals or property and other matters

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 222: The Chamber held that it “will have recourse to different legal tests to determine whether the law of occupation applies, depending on whether it is dealing with individuals or with property and other matters.” In the present case, the forcible transfer and the unlawful labor of civilians “were prohibited from the moment that they fell into the hands of the opposing power, regardless of the stage of the hostilities.”

II) WAR CRIMES: VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR (ARTICLE 3)

a) Statute

Article 3:

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

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

b) Generally

i) Article 3 of the Statute functions as a residual clause, covering any serious violation of humanitarian law not covered by other Articles of the Statute

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 87, 91: “A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all ‘violations of the laws or customs of war’; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.” “Article 3 . . . confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any ‘serious violation of international humanitarian law’ must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.”

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 68: “Article 3 of the Statute is a general and residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute.”

Prosecutor v. Jelisić, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 33: “Article 3 of the Statute is a general, residual clause which applies to all violations of humanitarian law not covered under Articles 2, 4 and 5 of the Statute provided that the rules concerned are customary.”

Prosecutor v. Furundžija, Case No. IT-95-17/1 (Trial Chamber), December 10, 1998, para. 132-133: “Article 3 has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule.” “[M]ore than the other substantive provisions of the Statute, Article 3 constitutes an ‘umbrella rule.’ While the other provisions envisage classes of offences they indicate in terms, Article 3 makes an open-ended reference to all international rules of humanitarian law: pursuant to Article 3 serious violations of any international rule of humanitarian law may be regarded as crimes falling under this provision of the Statute, if the requisite conditions are met.”

ii) Article 3 of the Statute covers acts committed in both internal and international armed conflict

Tadić, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 137: “[U]nder Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict.”

Blaskić, (Trial Chamber), March 3, 2000, para. 161: “Article 3 of the Statute applies to both internal and international conflicts.”

Furundžija, (Trial Chamber), December 10, 1998, para. 132: For purposes of Article 3 of the Statute, “[i]t is immaterial whether the breach occurs within the context of an international or internal armed conflict.”

iii) conditions for determining which violations fall within Article 3

Kunarac, Kovac and Voković, (Appeals Chamber), June 12, 2002, para. 66: “Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.” *See also Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 123.

iv) violations of international humanitarian law that are covered

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 224: “Article 3 of the Statute has been interpreted as a general and residual clause covering all violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute, and more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as ‘grave breaches’ by those Conventions; (iii) violations of common Article 3 of the Geneva Conventions (“[C]ommon Article 3”) and other customary rules on internal conflicts, and (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, *i.e.*, agreements which have not turned into customary international law.” *See also Tadic*, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 87, 89, 91.

See also Mucic et al., (Appeals Chamber), February 20, 2001, para. 136 (violations of Common Article 3 are covered by Article 3 of the Statute); *Kunarac, Kovac and Vokovic*, (Appeals Chamber), June 12, 2002, para. 68 (same); *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 228 (same); *Blaskic*, (Trial Chamber), March 3, 2000, para. 168 (same); *Tadic*, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 89 (same).

v) rationale for why Common Article 3 violations are covered

(1) Common Article 3 is part of customary law

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 98: “[S]ome treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions. . . .”

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 68: Common Article 3 “is indeed regarded as being part of customary international law.”

Blaskic, (Trial Chamber), March 3, 2000, para. 166: “Common Article 3 must be considered a rule of customary international law.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 228: “It is . . . well established that [C]ommon Article 3 has acquired the status of customary international law.”

(2) violations of Common Article 3 are serious

Blaskic, (Trial Chamber), March 3, 2000, para. 176: “[V]iolations of Article 3 of the Statute which include violations of the Regulations of The Hague and those of Common

Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute.”

(3) Common Article 3 imposes individual criminal responsibility

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 128-129: “It is true that . . . common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. [T]he International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals. Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded: ‘[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’” “Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect ‘elementary considerations of humanity’ widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.”

Mucic et al., (Appeals Chamber), February 20, 2001, para. 162, 171: “[T]he fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT [International Military Tribunal at Nuremberg] indeed followed a similar approach, as recalled in the *Tadic* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations.” “The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 228: “[I]t appears from the jurisprudence that [C]ommon Article 3 of the Statute entails individual criminal responsibility.”

Blaskic, (Trial Chamber), March 3, 2000, para. 176: Because violations of Article 3 of the Statute which include violations of the Regulations of The Hague and those of Common Article 3 are by definition serious violations, “[t]hey are thus likely to incur individual criminal responsibility in accordance with Article 7 of the Statute.” “[C]ustomary international law imposes criminal responsibility for serious violations of Common Article 3.”

(4) Common Article 3 is applicable to international armed conflicts

Mucic et al., (Appeals Chamber), February 20, 2001, para. 140-150: “It is indisputable that [C]ommon Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based.” “It is both legally and morally untenable that the rules contained in [C]ommon Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of [C]ommon Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. [S]omething which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 228: Common Article 3 “applies regardless of the internal or international character of the conflict.”

c) General elements for Article 3 crimes

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 225: “For a crime to be adjudicated under Article 3 of the Statute, two preliminary requirements must be satisfied. First, there must have been an armed conflict, whether internal or international in character, at the time the offences were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be ‘closely related’ to the hostilities.”

See also “added element for Common Article 3 crimes,” Section (II)(c)(iii), ICTY Digest.

i) there must have been armed conflict, whether internal or international (element 1)

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 22: “Articles 2 and 3 of the Statute set forth provisions which reflect the laws of war; plainly a pre-condition to the applicability of these Articles is the existence of an armed conflict in the territory where the crimes are alleged to have occurred.”

Furundzija, (Trial Chamber), December 10, 1998, para. 258: “It is well established that for international humanitarian law to apply there must first be an armed conflict. . . . For the purposes of Article 3 of the Statute, the nature of this armed conflict is irrelevant. [I]t does not matter whether the serious violation occurred in the context of an international or internal armed conflict, provided the following requirements are met: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be ‘serious,’ that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”

ii) there must be a close nexus between the armed conflict and alleged offense (element 2)

(1) the acts of the accused must be closely related to the hostilities

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 32: “[I]n order for a particular crime to qualify as a violation of international humanitarian law under Articles 2 and 3 of the Statute, the Prosecution must . . . establish a sufficient link between that crime and the armed conflict. In this regard, the Appeals Chamber has held that: ‘Even if substantial clashes were not occurring in the [specific region] at the time and place the crimes were allegedly committed . . . international humanitarian law applies. 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.’”

See also discussion of nexus between the crime and the armed conflict under Article 2, Section (I)(b)(ii), ICTY Digest.

(2) the armed conflict need not be causally linked to the crimes, but it must have played a substantial role

Kumarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 58-59: “The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or

the purpose for which it was committed.” “In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account . . . the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.”

(3) the crimes may be temporally and geographically remote from actual fighting

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 57: “There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. [T]he requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.”

Prosecutor v. Vasiljevic, Case No. IT-98-32-T (Trial Chamber), November 29, 2002, para. 25: “The requirement that the acts of the accused be closely related to the armed conflict does not require that the offence be committed whilst fighting is actually taking place, or at the scene of combat.”

iii) added element for Common Article 3 crimes: must be committed against civilians or civilian property

Prosecutor v. Kvocka et al., Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 124: “An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons ‘taking no active part in the hostilities.’”

Jelavic, (Trial Chamber), December 14, 1999, para. 34: “Common Article 3 protects ‘[p]ersons taking no active part in the hostilities’ including persons ‘placed *hors de combat* by sickness, wounds, detention, or any other cause.’ Victims of murder, bodily harm and theft, all placed *hors de combat* by their detention, are clearly protected persons within the meaning of common Article 3.”

Blaskic, (Trial Chamber), March 3, 2000, para. 180: “Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective.”

iv) mental state (*mens rea*)

(1) generally

See discussion of mental state (*mens rea*) in underlying offenses, Section (II)(d)(i)(4) (torture); (II)(d)(ii) (rape); (II)(d)(iv)(1) (murder); (II)(d)(v) (violence to life and person); (II)(d)(vi)(5) (outrages upon personal dignity); (II)(d)(viii) (wanton destruction not justified by military necessity); (II)(d)(x) (destruction or willful damage to institutions dedicated to religion or education); (II)(d)(xi) (unlawful attacks on civilians and civilian objects); (II)(d)(xii)(2) (unlawful labor); (II)(d)(xiii) (slavery), ICTY Digest.

(2) proof of discriminatory intent or motive not required

Aleksovskij, (Appeals Chamber), March 24, 2000, para. 20: “There is nothing in the undoubtedly grave nature of the crimes falling within Article 3 of the Statute, nor in the Statute generally, which leads to a conclusion that those offences are punishable only if they are committed with discriminatory intent. The general requirements which must be met for prosecution of offences under Article 3 . . . do not include a requirement of proof of a discriminatory intent or motivation.”

d) Underlying offenses

i) torture

(1) defined

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 142: The definition of torture has the following elements: “(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.” See also *Prosecutor v. Krnojelac*, Case No. IT-97-25 (Trial Chamber), March 15, 2002, para. 179.

Prosecutor v. Furundzija, Case No. IT-95-17/1 (Appeals Chamber), July 21, 2000, para. 111: “The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict: (i) . . . 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. . . .”²

(2) the prohibition against torture is *jus cogens*

Furundzija, (Trial Chamber), December 10, 1998, para. 139, 153: “It . . . seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and - if the requisite conditions are met - qua treaty law, the content of the prohibition being the same.” “Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”

(3) severe pain and suffering must be inflicted (element 1)

Kvočka et al., (Trial Chamber), November 2, 2001, para. 142-143: “[T]he severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences. A precise threshold for determining what degree of suffering is sufficient to meet the definition of torture has not been delineated. In assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim’s age, sex, or state of health will also be relevant in assessing the gravity of the harm.”

Prosecutor v. Krnojelac, Case No. IT-97-25 (Trial Chamber), March 15, 2002, para. 182: “When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to

² Furundzija goes on to require a fifth element that “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.” However, more recent decisions suggest that this is not a requirement. See Section (II)(d)(i)(6), ICTY Digest.

repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.”

(a) permanent injury not required

Kvočka et al., (Trial Chamber), November 2, 2001, para. 148: “[T]orture practices often cause permanent damage to the health of the victims, [but] permanent injury is not a requirement for torture.”

(b) mental suffering can qualify

Kvočka et al., (Trial Chamber), November 2, 2001, para. 149: “Damage to physical or mental health will be taken into account in assessing the gravity of the harm inflicted. [A]buse amounting to torture need not necessarily involve physical injury, as mental harm is a prevalent form of inflicting torture. For instance, the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture. [B]eing forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”

(4) mental state (*mens rea*): the act or omission must be intentional (element 2)

Kumarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 153-156: The Appeals Chamber explained the distinction between “intent” and “motivation.” The Appeals Chamber held that “even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.” “[A]cts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.”

(5) prohibited purpose or goal required (element 3)

Kumarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 142: The third element of torture is that “[t]he 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.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 180: “‘Torture’ constitutes one of the most serious attacks upon a person’s mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment. Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 188: “The infliction of severe pain in pursuance of a given prohibited purpose must be established beyond reasonable doubt....”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 140: “[T]he prohibited purposes listed in the Torture Convention as reflected by customary international law ‘do not constitute an exhaustive list, and should be regarded as merely representative.’” “[H]umiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law.”

(a) prohibited purpose need not be predominating or sole purpose

Kvočka et al., (Trial Chamber), November 2, 2001, para. 153: “[T]he prohibited purpose need be neither the sole nor the main purpose of inflicting the severe pain or suffering.”

Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23 and IT-96-23/11 (Trial Chamber), February 22, 2001, para. 486: “There is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. [T]he prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”

(6) whether role of public official is necessary

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 148: “[T]he public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 188: “Under international humanitarian law in general, and under Articles 3 and 5 of the Statute in particular, the presence or involvement of a state official or of any other authority-wielding person in the process of torture is not necessary for the offence to be regarded as ‘torture.’”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 139: “[T]he state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.”

But see Furundžija, (Appeals Chamber), July 21, 2000, para. 111: The fifth element of the crime of torture in a situation of armed conflict is “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.”

But see Prosecutor v. Mucic et al., Case No. IT-96-21, (Trial Chamber), November 16, 1998, para. 494-496: Torture requires the act or omission to be “committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.”

(7) application

(a) examples of acts constituting torture

Kvočka et al., (Trial Chamber), November 2, 2001, para. 144: “Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as those likely to constitute torture. Mutilation of body parts would be an example of acts *per se* constituting torture.”

(b) rape and other forms of sexual violence as torture

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 149-151: “[S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is . . . such an act. . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”

Prosecutor v. Mucic et al., Case No. IT-96-21, (Trial Chamber), November 16, 1998, para. 494-496: The Trial Chamber held that “whenever rape and other forms of sexual violence meet the [following] criteria, then they shall constitute torture.” The criteria for “the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows: (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical, (ii) which is inflicted intentionally, (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is

suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind, (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.”³

Mucic et al., (Trial Chamber), November 16, 1998, para. 495: “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. [I]t 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. [T]his is inherent in situations of armed conflict.”⁴

Kvočka et al., (Trial Chamber), November 2, 2001, para. 145: “[R]ape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.”

Furundžija, (Trial Chamber), December 10, 1998, para. 163-164: “Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, in such situations the rape may amount to torture.” “Depending upon the circumstances, under international criminal law rape may acquire the status of a crime distinct from torture.”

See also discussion of torture under Article 5, Section (IV)(c)(v), ICTY Digest.

ii) rape

Kunarac, Kovac and Voković, (Appeals Chamber), June 12, 2002, para. 127-132: “[T]he *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) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.” “Resistance” is not a requirement. “Force or threat of force

³ As to whether the involvement of a public official is required, see Section (II)(d)(i)(6), ICTY Digest.

⁴ *Id.*

provides clear evidence of non-consent, but force is not an element *per se* of rape.” “[T]here are ‘factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.’ A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”

See also discussion of rape under Article 5, Section (IV)(c)(vi), ICTY Digest.

iii) cruel treatment

(1) defined

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 265: “[T]he *Celebici* Trial Chamber found that: 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. ‘[C]ruel treatment’ is ‘equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions.’”

Blaskic, (Trial Chamber), March 3, 2000, para. 186: “[C]ruel treatment constitutes an intentional act or omission ‘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 purposes of Common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Convention.’” *See also Jelusic*, (Trial Chamber), December 14, 1999, para. 34, 41.

(2) mental suffering requirement lower than for torture

Kvočka et al., (Trial Chamber), November 2, 2001, para. 161: “[T]he degree of physical or mental suffering required to prove cruel treatment is lower than the one required for torture, though it must be at the same level as ‘wilfully causing great suffering or serious injury to body or health.’ [T]he degree of suffering required to prove cruel or inhuman treatment was not as high as that required to sustain a charge of torture.”

(3) prohibited purpose not required

Kvočka et al., (Trial Chamber), November 2, 2001, para. 226: “The requirement of a prohibited purpose which is characteristic of the offence of torture, is a materially distinct element that is not required in the offences of cruel treatment.”

(4) examples

Kvočka et al., (Trial Chamber), November 2, 2001, para. 161: “[T]he use of human shields constitutes cruel treatment under Article 3 of the Statute.”

See also discussion of cruel and inhuman treatment under Article 2, Section (I)(d)(ii)(2), ICTY Digest.

iv) murder

(1) defined

Prosecutor v. Krstić, Case No. IT-98-33 (Trial Chamber), August 2, 2001, para. 485: “Murder has consistently been defined . . . as the death of the victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death.”

Vasiljević, (Trial Chamber), November 29, 2002, para. 205: “The elements of the definition of ‘murder’ under customary international law are as follows: 1. The victim is dead. 2. The death was caused by an act or omission of the accused, or of person or persons for whose acts or omissions the accused bears criminal responsibility. 3. That act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention: to kill, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death.” *See also Krnojelac*, (Trial Chamber), March 15, 2002, para. 324 (same).

Jelić, (Trial Chamber), December 14, 1999, para. 35: “Murder is defined as homicide committed with the intention to cause death. The legal ingredients of the offence as generally recognised in national law may be characterised as follows: [a] the victim is dead, [b] as a result of an act of the accused, [c] committed with the intention to cause death.”

(2) comparison between murder under Article 3 and willful killing under Article 2

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 233: “[T]he 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, with the exception that under Article 3 of the Statute the offence need not have been directed against a ‘protected person’ but against a person ‘taking no active part in the hostilities.’” *See also Blaskić*, (Trial Chamber), March 3, 2000, para. 181.

See also discussion of willful killing under Article 2, Section (I)(d)(i), and murder under Article 5, Section (IV)(c)(i), ICTY Digest.

(3) proof of dead body not required

Krnjelac, (Trial Chamber), March 15, 2002, para. 326: “Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.”

(4) suicide as murder

Krnjelac, (Trial Chamber), March 15, 2002, para. 329: “The crucial issues [as to whether causing a person to commit suicide can be viewed as murder] are causation and intent. The relevant act or omission by the Accused or by those for whose acts or omissions the Accused bears criminal responsibility must have caused the suicide of the victim and the Accused, or those for whom he bears criminal responsibility, must have intended by that act or omission to cause the suicide of the victim, or have known that the suicide of the victim was a likely and foreseeable result of the act or omission. The Accused cannot be held criminally liable unless the acts or omissions for which he bears criminal responsibility induced the victim to take action which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence of the conduct of the Accused, or of those for whom he bears criminal responsibility.”

v) violence to life and person

Blaskic, (Trial Chamber), March 3, 2000, para. 182: Violence to life and person “is a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing), Article 2(b) (inhuman treatment) and Article 2(c) (causing serious injury to body) of the Statute.” “[T]he *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.”

But see Vasiljevic, (Trial Chamber), November 29, 2002, para. 203: “In the absence of any clear indication in the practice of states as to what the definition of the offence of ‘violence to life and person’ identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law.”

vi) outrages upon personal dignity

(1) defined

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 161: “[T]he crime of outrages upon personal dignity requires: (i) that the accused intentionally committed or participated in an act or an 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.”

(2) requires humiliation so intense any reasonable person would be outraged

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 162: “[T]he humiliation of the victim must be so intense that any reasonable person would be outraged.” The Appeals Chamber held that the Trial Chamber correctly relied not only “on the victim’s purely subjective evaluation of the act to establish whether there had been an outrage upon personal dignity, but used objective criteria to determine when an act constitutes a crime of outrages upon personal dignity.”

Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Trial Chamber), June 25, 1999, para. 56-57: With respect to the *actus reus* of “outrages upon personal dignity,” “the humiliation to the victim must be so intense that the reasonable person would be outraged.” “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.”

(3) humiliation must be real and serious

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 501: “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’; 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.”

Compare Aleksovski, (Trial Chamber), June 25, 1999, para. 54-56: “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*.” “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.”

(4) murder is not an outrage upon personal dignity

Kvočka et al., (Trial Chamber), November 2, 2001, para. 172: “[M]urder in and of itself cannot be characterized as an outrage upon personal dignity. Murder causes death, which is different from concepts of serious humiliation, degradation or attacks on human dignity. The focus of violations of dignity is primarily on acts, omission, or words that do not necessarily involve long-term physical harm, but which nevertheless are serious offences deserving of punishment.”

(5) mental state (*mens rea*)

Kumarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 164-166: “[T]he crime of outrages upon personal dignity requires that the accused knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity. [T]he crime . . . requires only a knowledge of the ‘possible’ consequences of the charged act or omission.”

Aleksovski, (Trial Chamber), June 25, 1999, para. 56: “As for the requisite degree of *mens rea* . . . 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.”

(6) prohibited purpose not required

Kvočka et al., (Trial Chamber), November 2, 2001, para. 226: “The requirement of a prohibited purpose which is characteristic of the offence of torture, is a materially distinct element that is not required in the offence of outrages upon personal dignity.”

(7) discriminatory intent or motive not required

Aleksovski, (Appeals Chamber), March 24, 2000, para. 28: “[I]t is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive.”

(8) examples

Aleksovski, (Trial Chamber), June 25, 1999, para. 229: “[T]he use of detainees as human shields or trench-diggers constitutes an outrage upon personal dignity.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 173: “[I]nappropriate conditions of confinement,” “perform[ing] subservient acts,” being “forced to relieve bodily functions in their clothing,” and “endur[ing] the constant fear of being subjected to physical, mental, or sexual violence” in camps were held to be outrages upon personal dignity.

Furundžija, (Trial Chamber), December 10, 1998, para. 172-173: “Rape may . . . amount to . . . a violation of the laws or customs of war” and “Article 3 of the Statute covers outrages upon personal dignity including rape.”

vii) taking of hostages

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 319-320: “[T]he elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostage as described by Article 2(h).”

Blaskić, (Trial Chamber), March 3, 2000, para. 187: “The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is - persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. [T]o 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.”

See also discussion of “taking of hostages” under Article 2, Section (I)(d)(viii), ICTY Digest.

viii) wanton destruction not justified by military necessity

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 346-347: “[T]he elements for the crime of wanton destruction not justified by military necessity charged under Article 3(b) of the Statute are satisfied where: (i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction. [W]hile property situated on enemy territory is not protected under the Geneva Conventions, and is therefore not included in the crime of extensive destruction of property listed as a grave breach of the Geneva Conventions, the destruction of such property is criminalised under Article 3 of the Statute.”

Blaskić, (Trial Chamber), March 3, 2000, para. 183: “Similar to the grave breach constituting part of Article 2(d) of the Statute, the devastation of property is prohibited except where it may be justified by military necessity. So as to be punishable, the

devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.”

See also discussion of “extensive destruction of property not justified by military necessity” under Article 2, Section (I)(d)(v), ICTY Digest.

ix) plunder

(1) defined

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 612: “This crime has been defined as ‘willful and unlawful appropriation of property,’ and, as enshrined in Article 3(e) of the Statute, it may affect both private and public property.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 617: “Plunder as a crime under Article 3(e) of the Statute has been committed when: i) the general requirements of Article 3 of the Statute, including the seriousness of the violation, are fulfilled; ii) private or public property was appropriated unlawfully and willfully.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 352: “The essence of the offence [of plunder] is defined by *Celebici* as ‘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.””

Jelusic, (Trial Chamber), December 14, 1999, para. 48: “Plunder is defined as the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto.”

(2) includes both large-scale seizures and appropriation by individual soldiers

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 612-613: “The term [plunder] is general in scope, comprising not only large-scale seizures of property within the framework of systematic economic exploitations of occupied territory but also acts of appropriation committed by individual soldiers for their private gain. . . . [P]lunder does not require the appropriation to be extensive or to involve a large economic value.” *Kunarac* “held that the word ‘plunder’ . . . would require a theft at least committed by at least one person.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 352: “Such acts of appropriation include both widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain.”

Jelisić, (Trial Chamber), December 14, 1999, para. 48: “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.’ [T]he individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators.”

Blaskić, (Trial Chamber), March 3, 2000, para. 184: “The prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to the ‘organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.’”

(3) plunder must involve grave consequences for the victims/sufficient monetary value

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 613-614: “[P]lunder must involve grave consequences for the victims, thus amounting to a ‘serious violation.’” *Celebici* held that “in order for the dispossession to involve grave consequences for the victim(s), the property has to be of ‘sufficient monetary value.’” “Plunder may be a serious violation not only when one victim suffers severe economic consequences because of the appropriation, but also, for example, when property is appropriated from a large number of people.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 352: “[T]he prohibition against unjustified appropriation of private or public property constitutes a rule protecting important values.’ To measure that importance, *Celebici* refers to ‘sufficient monetary value’ of the property so appropriated as to involve ‘grave consequences for the victims.’”

(4) where applies

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 615: “Article 3(e) of the Statute proscribes plunder committed on the entire territory of the parties to a conflict.... [T]he prohibition of pillage is not limited to acts committed in occupied territories. . . .”

(5) plunder includes “pillage”

Blaskić, (Trial Chamber), March 3, 2000, para. 184: “Plunder ‘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) application

Jelisić, (Trial Chamber), December 14, 1999, para. 49: “[T]he accused stole money, watches, jewellery and other valuables from the detainees upon their arrival at Luka camp by threatening those who did not hand over all their possessions with death. The accused was sometimes accompanied by guards . . . but he mostly acted alone. The Trial Chamber holds that these elements are sufficient to confirm the guilt of the accused on the charge of plunder.”

x) destruction or willful damage to institutions dedicated to religion or education

Blaskić, (Trial Chamber), March 3, 2000, para. 185: To show the destruction or willful damage to institutions dedicated to religion or education, “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. In addition, the institutions must not have been in the immediate vicinity of military objectives.”

But see Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 603-605: “The Chamber respectfully rejects that protected institutions ‘must not have been in the vicinity of military objectives,’” and “does not concur with the view that the mere fact that an institution is in the ‘immediate vicinity of military objective’ justifies its destruction.” “[A] crime under Article 3(d) of the Statute has been committed when: i) the general requirements of Article 3 of the Statute are fulfilled; ii) the destruction regards an institution dedicated to religion; iii) the property was not used for military purposes; iv) the perpetrator acted with the intent to destroy the property.”

xi) unlawful attacks on civilians and civilian objects

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 326-328: “[P]rohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries within the civilian population or extensive damage to civilian objects.”

Blaskić, (Trial Chamber), March 3, 2000, para. 180: “[T]he attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property. Targeting civilians or civilian property is an offence when not justified by military necessity.” “Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.”

xii) unlawful labor

(1) defined

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 250-261: “[T]he offence of unlawful labour against prisoners of war may be defined as an intentional act or omission by which a prisoner of war is forced to perform labour prohibited under Articles 49, 50, 51 or 52 of Geneva Convention III” and which “fall[s] under Article 3 of the Statute.” “[N]ot all labour is prohibited during times of armed conflict. . . . Article 49 of Geneva Convention III establishes a principle of compulsory labour for prisoners of war. The basic principle stated in Paragraph 1 of this provision [Article 49 of Geneva Convention III] ‘is the right of the Detaining Power to require prisoners of war to work.’ Nevertheless, this principle is subject to two fundamental conditions, the first one relating to the prisoner himself, and the second one to the nature of the work required. Thus, prisoners of war may be required to work provided that this is done in their own interest, and those considerations relating to their age and sex, physical aptitude and rank are taken into account. Articles 50 and 52 of Geneva Convention III define which type of labour might be required and which might not. It is emphasised in the Commentary that: ‘[t]he core of the question is still the distinction to be made between activities considered as being connected with war operations and those which are not.’”

(2) mental state (*mens rea*)

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 260: “In order to establish the *mens rea* requirement for the crime of unlawful labour, the Prosecution must prove that the perpetrator had the intent that the victim would be performing prohibited work. The intent can be demonstrated by direct explicit evidence, or, in the absence of such evidence, can be inferred from the circumstances in which the labour was performed.”

For discussion of occupation as relevant to unlawful labor, see Section (I)(e), ICTY Digest.

xiii) slavery

Krnjelac, (Trial Chamber), March 15, 2002, para. 350-351, 356, 359: “Enslavement under Article 5 . . . has been defined by the Tribunal as the exercise of any or all of the powers attaching to the right of ownership over a person. The *actus reus* of enslavement is the exercise of those powers, and the *mens rea* is the intentional exercise of such powers. Although not enumerated under Article 3, slavery may still be punishable under that Article if the four requirements specific to Article 3 . . . are met.” “The Trial Chamber is satisfied that the offence of slavery under Article 3 . . . is the same as the offence of enslavement under Article 5. As such, slavery under Article 3 requires proof of the same elements as constitute enslavement under Article 5.” “[T]he exaction of forced or

compulsory labour or service’ is an ‘indication of enslavement,’ and a ‘factor to be taken into consideration in determining whether enslavement was committed.’”

See also discussion of enslavement under Article 5, Section (IV)(c)(iii), ICTY Digest.

III) GENOCIDE (ARTICLE 4)

a) Statute

ICTY Statute, Article 4:

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

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

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

3. The following acts shall be punishable:

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

b) Defined

Krstic, (Trial Chamber), August 2, 2001, para. 550: “Genocide refers to any criminal enterprise seeking to destroy, in whole or in part, a particular kind of human group, as such, by certain means. Those are two elements of the special intent requirement of genocide: (1) the act or acts must target a national, ethnical, racial or religious group; (2) the act or acts must seek to destroy all or part of that group.”

Krstic, (Trial Chamber), August 2, 2001, para. 580: “[C]ustomary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group.”

Jelusic, (Trial Chamber), December 14, 1999, para. 62: “Genocide is characterised by two legal ingredients according to the terms of Article 4 of the Statute: [1] the material element of the offence, constituted by one or several acts enumerated in paragraph 2 of Article 4; [2] the *mens rea* of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

c) Mental state (*mens rea*): intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

i) generally

Prosecutor v. Jelusic, Case No. IT-95-10 (Appeals Chamber), July 5, 2001, para. 46: “The specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.”

Jelusic, (Appeals Chamber), July 5, 2001, para. 45: “The Statute itself defines the intent required: the intent to accomplish certain specified types of destruction. This intent has been referred to as, for example, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent.”

ii) intent to destroy, in whole or in part

(1) requires an intentional attack against a group, and the intention to participate in or carry out the attack

Jelusic, (Trial Chamber), December 14, 1999, para. 78: “[T]he Trial Chamber will have to verify that there was both an intentional attack against a group and an intention upon the part of the accused to participate in or carry out this attack.”

(2) even if destruction was not original goal, it may become the goal

Krstic, (Trial Chamber), August 2, 2001, para. 572: “It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation.”

(3) destruction “in part”

Krstic, (Trial Chamber), August 2, 2001, para. 584: “[A]ny act committed with the intent to destroy a part of a group, as such, constitutes an act of genocide within the meaning of the [Genocide] Convention.”

Krstic, (Trial Chamber), August 2, 2001, para. 590: “[T]he intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. . . .”

(a) “substantial” part of group required

Krstic, (Trial Chamber), August 2, 2001, para. 634: “[A]n intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”

Jelavic, (Trial Chamber), December 14, 1999, para. 82: “[I]t is widely acknowledged that the intention to destroy must target at least a *substantial* part of the group.”

(b) evidence of destruction of leadership may establish intent to destroy “in part”

Prosecutor v. Sikirica et al., Case No. IT-95-8 (Trial Chamber), September 3, 2001, para. 76-77: “[T]he intention to destroy in part may yet be established if there is evidence that the destruction is related to a significant section of the group, such as its leadership. . . . [T]he requisite intent may be inferred from the ‘desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.’ The important element here is the targeting of a selective number of persons who, by reason of their special qualities of leadership within the group as a whole, are of such importance that their victimization within the terms of Article 4(2) (a), (b) and (c) would impact upon the survival of the group, as such.”

Jelavic, (Trial Chamber), December 14, 1999, para. 82: “Genocidal intent may . . . be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected [*i.e.* leadership of the group] for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group ‘selectively.’”

(c) genocidal intent may be limited to a geographical zone

Jelisić, (Trial Chamber), December 14, 1999, para. 83: “[I]t is accepted that genocide may be perpetrated in a limited geographic zone.” The geographical zone in which an attempt to eliminate the group is made may be “limited to the size of a region or . . . a municipality.”

Krstić, (Trial Chamber), August 2, 2001, para. 590: “[T]he physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue.”

(d) application

Krstić, (Trial Chamber), August 2, 2001, para. 554: “The Chamber concludes that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4.”

(4) no lengthy premeditation required

Krstić, (Trial Chamber), August 2, 2001, para. 572: “Article 4 of the Statute does not require that the genocidal acts be premeditated over a long period.”

(5) distinguish intent from motive

Jelisić, (Appeals Chamber), July 5, 2001, para. 49: The Appeals Chamber noted the “irrelevance” of motives in criminal law and highlighted “the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”

(6) intent may be inferred

Jelisić, (Appeals Chamber), July 5, 2001, para. 47: “As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”

Compare Jelisić, (Trial Chamber), December 14, 1999, para. 78: “[T]he intention necessary for the commission of a crime of genocide may not be presumed even in the case where the existence of a group is at least in part threatened.”

(7) no policy or plan required, but may be important factor

Jelisić, (Appeals Chamber), July 5, 2001, para. 48: “[T]he existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.”

iii) “a national, ethnical, racial or religious group, as such”

(1) “as such”

(a) victims must be targeted by reason of their group membership

Krstić, (Trial Chamber), August 2, 2001, para. 561: “[T]he victims of genocide must be targeted *by reason* of their membership in a group. . . . The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victims’ membership in a distinct group on the part of the perpetrators is not sufficient to establish an intention to destroy the group as such.”

Jelisić, (Trial Chamber), December 14, 1999, para. 67: “The special intent which characterises genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy. Where the goal of the perpetrator or perpetrators of the crime is to destroy all or part of a group, it is the ‘membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide.’”

(b) the group must be targeted, not specific individuals

Sikirica et al., (Trial Chamber), September 3, 2001, para. 89: “The evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase ‘as such’ in the chapeau. Whereas it is the individuals that constitute the victims of most crimes, the ultimate victim of genocide is the group, although its destruction necessarily requires the commission of crimes against its members, that is, against individuals belonging to that group. This is what differentiates genocide from the crime against humanity of persecution. Even though

they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds.”

Krstic, (Trial Chamber), August 2, 2001, para. 551: “[G]enocide must target not only one or several individuals but a group as such.”

Jelavic, (Trial Chamber), December 14, 1999, para. 79: “[T]he intention must be to destroy the group “as such,” meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.’ By killing an individual member of the targeted group, the perpetrator does not thereby only manifest his hatred of the group to which his victim belongs but also knowingly commits this act as part of a wider-ranging intention to destroy the national, ethnical, racial or religious group of which the victim is a member.”

(2) groups protected by Article 4

(a) national, ethnical, racial or religious groups

Krstic, (Trial Chamber), August 2, 2001, para. 554: “[T]he Genocide Convention does not protect all types of human groups. Its application is confined to national, ethnical, racial or religious groups.”

(b) not political groups

Jelavic, (Trial Chamber), December 14, 1999, para. 69: “Article 4 of the Statute . . . excludes members of political groups. The preparatory work of the [Genocide] Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting ‘stable’ groups objectively defined and to which individuals belong regardless of their own desires.”

(c) destroying culture and identity insufficient to show genocide, but can help show intent to destroy the group

Krstic, (Trial Chamber), August 2, 2001, para. 580: “[A]n enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. [W]here there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”

(d) evaluate using subjective criterion: stigmatization by the community

Jelisić, (Trial Chamber), December 14, 1999, para. 70-71: “Although the objective determination of a religious group still remains possible . . . , it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber . . . elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.” “A group may be stigmatised in this manner by way of positive or negative criteria. A ‘positive approach’ would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A ‘negative approach’ would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.”

d) Underlying offenses

i) killing members of the group

ii) causing serious bodily or mental harm to members of the group

Krstić, (Trial Chamber), August 2, 2001, para. 513: “[S]erious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering. [S]erious 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. [I]nhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.”

iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

iv) imposing measures intended to prevent births within the group

v) forcibly transferring children of one group to another group

IV) CRIMES AGAINST HUMANITY (ARTICLE 5)

a) Statute

ICTY Statute, Article 5:

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

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

b) General elements

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 410: In addition to the statutory requirement of an armed conflict, the following sub-elements are necessary: “(i) There must be an attack. (ii) The acts of the perpetrator must be part of the attack. (iii) The attack must be ‘directed against any civilian population.’ (iv) The attack must be ‘widespread or systematic.’ (v) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.”

i) the Statute requires that there must be an armed conflict (element 1)

Tadic, (Appeals Chamber), July 15, 1999, para. 251: “The armed conflict requirement is satisfied by proof that *there was* an armed conflict. . . .”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 23: “Article 5 vests the International Tribunal with the competence to prosecute crimes against humanity ‘when committed in armed conflict, whether international or internal in character.’”

(1) whether there is any linkage required between the acts of the accused and the armed conflict

Tadic, (Appeals Chamber), July 15, 1999, para. 251: “A nexus between the accused’s acts and the armed conflict is *not* required, as is . . . suggested by the [*Tadic* Trial] Judgment. The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that

is all that the Statute requires, and in so doing, it requires more than does customary international law.”

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 83: “[T]he requirement [committed in armed conflict] contained in Article 5 of the Statute is a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 33: “The Appeal Chamber [in *Tadic*] . . . concluded in respect of Article 5 of the Statute that proof of a nexus between the conduct of the accused and the armed conflict is not required. . . .” “Although the acts or omissions must be committed in the course of an armed conflict, the nexus which is required is between the accused’s acts and the attack on the civilian population.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 23: “In the *Tadic* Jurisdiction Decision the Appeals Chamber found that under customary law there is no requirement that crimes against humanity have a connection to an international armed conflict. The Appeals Chamber further held that ‘customary international law may not require a connection between crimes against humanity and any conflict at all.’ Article 5, however, requires nothing more than the existence of an armed conflict at the relevant time and place for the International Tribunal to have jurisdiction.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 233: “[T]he jurisdiction of the Tribunal pursuant to Article 5 of the Statute only comprises such acts of an accused that were committed in ‘armed conflict.’”

ii) there must be an “attack” (element 2)

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 410: To show crimes against humanity, one element is “[t]here must be an attack.”

(1) the “attack” may be, but need not be, part of the “armed conflict”

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 86: “[T]he attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 233: “The attack has been defined as a course of conduct involving the commission of acts of violence. The attack can precede, outlast, or continue during the armed conflict, but need not be a part of the conflict under customary international law.”

(2) “attack” and “armed conflict” are distinct

Vasiljevic, (Trial Chamber), November 29, 2002, para. 30: “The concepts of ‘attack’ and ‘armed conflict’ are distinct and independent.” Quoting the Appeals Chamber in *Tadic*: “The two – the ‘attack on the civilian population’ and the ‘armed conflict’ – must be separate notions, although of course under Article 5 of the Statute the attack on ‘any civilian population’ may be part of an ‘armed conflict.’”

(3) “attack” not limited to use of armed force

Vasiljevic, (Trial Chamber), November 29, 2002, para. 29, 30: “In the context of a crime against humanity, the phrase ‘attack’ is not limited to the use of armed force; it also encompasses any mistreatment of the civilian population.” *See also Kunarac, Kovac and Vokovic*, (Appeals Chamber), June 12, 2002, para. 86 (same).

(4) when establishing the attack, irrelevant that the other side committed atrocities (reciprocity of obligations)

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 87-88: “[W]hen establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent’s civilian population. The existence of an attack from one side against the other side’s civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side’s forces were in fact targeting a civilian population as such. Each attack against the other’s civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity. Evidence of an attack by the other party on the accused’s civilian population may not be introduced unless it tends ‘to prove or disprove any of the allegations made in the indictment,’ notably to refute the Prosecutor’s contention that there was a widespread or systematic attack against a civilian population. A submission that the other side is responsible for starting the hostilities would not, for instance, disprove that there was an attack against a particular civilian population.”

iii) the acts of the accused must form part of the attack (element 3)

Tadic, (Appeals Chamber), July 15, 1999, para. 251: “A nexus with the accused’s acts is required . . . for the attack on ‘any civilian population.’”

Tadic, (Appeals Chamber), July 15, 1999, para. 271: “[T]o convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict). . . .”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 234: “The acts of the accused must not be isolated but form part of the attack. This means that the act, by its nature or consequence, must objectively be a part of the attack.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 33: “[T]he nexus which is required is between the accused’s acts and the attack on the civilian population.”

**iv) the attack must be “directed against any civilian population”
(element 4)**

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 410: To show crimes against humanity, one element is there must be an attack “directed against any civilian population.”

(1) “directed against”

**(a) an attack is “directed against” a civilian population if the
civilian population is the primary object of the attack**

Kunarac, Kovac and Vukovic, (Appeals Chamber), June 12, 2002, para. 90: “[T]he expression ‘directed against’ is an expression which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.’ In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider . . . the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 235: “An attack is ‘directed against’ a civilian population if the civilian population is the primary object of the attack.”

**(b) not entire population, but a “sufficient number” must be
subject to the attack**

Kunarac, Kovac and Vukovic, (Appeals Chamber), June 12, 2002, para. 90: “[T]he use of the word ‘population’ does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population,’ rather than against a limited and randomly selected number of individuals.” *See also Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 235 (same).

(2) civilian population

(a) must be “predominantly” civilian

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 180: “A population may be considered as ‘civilian’ even if certain non-civilians are present – it must simply be ‘predominantly civilian in nature.’”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 235: “[T]he presence of a number of non-civilians cannot refute the predominantly civilian character of a population.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 235: “The population against whom the attack is directed is considered civilian if it is predominantly civilian.”

Jelavic, (Trial Chamber), December 14, 1999, para. 54: “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.”

(b) presence of those involved in conflict does not deprive population of civilian nature

Prosecutor v. Kupreskic et al., Case No. IT-95-16 (Trial Chamber), January 14, 2000, para. 549: “[T]he presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.”

Blaskic, (Trial Chamber), March 3, 2000, para. 214: “[T]he presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.”

(c) civilian includes those who were members of a resistance movement and former combatants but who are no longer taking part in hostilities

Blaskic, (Trial Chamber), March 3, 2000, para. 214: “Crimes against humanity . . . do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore wear uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. [T]he specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.”

Jelisić, (Trial Chamber), December 14, 1999, para. 54: “[T]he notion of civilian population as used in Article 5 of the Statute includes, in addition to civilians in the strict sense, all persons placed *hors de combat* when the crime is perpetrated.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 180: “[I]ndividuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity.”

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 235: “[T]he definition of civilian population includes individuals who may at one time have performed acts of resistance and persons *hors de combat*. . . .”

(d) construe civilian population liberally

Kupreskić et al., (Trial Chamber), January 14, 2000, para. 547-549: “It would seem that a wide definition of ‘civilian’ and ‘population’ is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. The latter are intended to safeguard basic human values by banning atrocities directed against human dignity. [A] broad interpretation should . . . be placed on the word ‘civilians,’ the more so because the limitation [safeguarding civilians and not combatants] in Article 5 constitutes a departure from customary international law.”

Jelisić, (Trial Chamber), December 14, 1999, para. 54: “It follows from the letter and the spirit of Article 5 that the term ‘civilian population’ must be interpreted broadly.”

(e) protects “any” civilian population

Vasiljević, (Trial Chamber), November 29, 2002, para. 33: “The protection of Article 5 extends to ‘any’ civilian population including, if a state takes part in the attack, that state’s own population. It is therefore unnecessary to demonstrate that the victims were linked to any particular side of the conflict.”

v) the attack must be “widespread or systematic” (element 5)

(1) widespread *or* systematic

Naletilić and Martinović, (Trial Chamber), March 31, 2003, para. 236: “The attack must be either widespread or systematic in nature.”

(2) only the attack, not the accused's acts, must be widespread or systematic

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 431: “Only the attack, not the individual acts of the accused, must be ‘widespread or systematic.’”

(3) widespread

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 179: “[A] crime may be widespread or committed on a large scale by the ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.’”

Blaskic, (Trial Chamber), March 3, 2000, para. 206: “The widespread characteristic refers to the scale of the acts perpetrated and to the number of victims.” *See also Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 236 (same).

(4) systematic

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 94: “[P]atterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of [a] systematic occurrence.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 236: “The element ‘systematic’ requires an organised nature of the acts and the improbability of their random occurrence.”

Blaskic, (Trial Chamber), March 3, 2000, para. 203: “The systematic character refers to four elements which . . . may be expressed as follows: [1] the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; [2] the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; [3] the preparation and use of significant public or private resources, whether military or other; [4] the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.”⁵

(5) factors in assessing widespread or systematic

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 95: In assessing what constitutes a “widespread” or “systematic” attack, a Trial Chamber must “first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was

⁵ As to whether there is any requirement of a plan or policy, see discussion, Section (IV)(b)(v)(7), ICTY Digest.

indeed widespread or systematic.” “The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack.”

Jelisić, (Trial Chamber), December 14, 1999, para. 53: “The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.”

(6) single act, if linked to a widespread or systematic attack, can qualify as a crime against humanity

Kupreskić et al., (Trial Chamber), January 14, 2000, para. 550: “[I]n certain circumstances, a single act has comprised a crime against humanity when it occurred within the necessary context. An *isolated* act, however – i.e. an atrocity which did not occur within such a context – cannot.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 178: “[A] single isolated act by a perpetrator, if linked to a widespread or systematic attack, could constitute a crime against humanity.”

(7) whether there is plan or policy requirement

Kunarac, Kovac and Voković, (Appeals Chamber), June 12, 2002, para. 98: “[N]either the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan.’” To prove that the attack was directed against a civilian population and that it was widespread or systematic, which are legal elements of the crime, “it is not necessary to show that they were the result of the existence of a policy or plan.” “[T]he existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.”

But see Blaskić, (Trial Chamber), March 3, 2000, para. 204: “This plan [required for determining if an attack is systematic] . . . need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events, *inter alia*: [a] the general historical circumstances and the overall political background against which the criminal acts are set; [b] the establishment and implementation of autonomous political structures at any level of authority in a given territory; [c] the general content of a political programme, as it appears in the writings

and speeches of its authors; [d] media propaganda; [e] the establishment and implementation of autonomous military structures; [f] the mobilisation of armed forces; [g] temporally and geographically repeated and co-ordinated military offensives; [h] links between the military hierarchy and the political structure and its political programme; [i] alterations to the ‘ethnic’ composition of populations; [j] discriminatory measures, whether administrative or other (banking restrictions, laissez-passer,...); [k] the scale of the acts of violence perpetrated – in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites.”

But see Blaskic, (Trial Chamber), March 3, 2000, para. 205: The plan for the attack need not “necessarily be conceived at the highest level of the State machinery.”

vi) mental state (*mens rea*) (element 6)

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 556: “[T]he requisite *mens rea* for crimes against humanity appears to be comprised by (1) the *intent* to commit the underlying offence, combined with (2) *knowledge* of the broader context in which that offence occurs.”

(1) intent

(a) the perpetrator must have intent to commit the underlying offense(s)

Vasiljevic, (Trial Chamber), November 29, 2002, para. 37: “[T]he accused [. . .] must have had the intent to commit the underlying offence or offences with which he is charged. . . .”

(b) motive is irrelevant

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 103: “[T]he motives of the accused for taking part in the attack are irrelevant. . . .” “[T]he accused need not share the purpose or goal behind the attack.”

Tadic, (Appeals Chamber), July 15, 1999, para. 270, 272: “[U]nder customary law, ‘purely personal motives’ do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.” “[I]n the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal’s Statute.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 187: “It is . . . settled that the motives of the accused are not relevant in this context.”

(c) it is irrelevant whether the accused intended his acts to be directed against the targeted population or merely the victim

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 103: “It is . . . irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof.”

(d) discriminatory intent only required for persecution

Tadic, (Appeals Chamber), July 15, 1999, para. 283, 292, 305: “The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely ‘persecutions provided for in Article 5 (h).’” “[C]ustomary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.” “[T]he Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 186: “The Appeals Chamber in *Tadic* clarified another issue in relation to the requisite mens rea for crimes against humanity. It rejected the view that to constitute a crime against humanity all relevant acts or omissions must be undertaken by the perpetrator on discriminatory grounds. [D]iscriminatory intent ‘is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5(h), concerning various types of persecution.’”

Blaskic, (Trial Chamber), March 3, 2000, para. 244: “[T]o be judged guilty of crimes against humanity, except in the case of persecution, [the perpetrator] [need] not have had the intent of targeting civilians because of their race or their religious or political beliefs.”

Blaskic, (Trial Chamber), March 3, 2000, para. 260: “[F]or a widespread or systematic attack and the resultant crimes – murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts with the exception of persecution – to be characterised as crimes against humanity they need not have been perpetrated with the deliberate intent to cause injury to a civilian population on the basis of specific

characteristics. [T]o be found guilty of such an offence, those responsible for the attack need not necessarily have acted with a particular racial, national, religious or political intent in mind.”

Prosecutor v. Todorovic, Case No. IT-95-9/1 (Trial Chamber), July 31, 2001, para. 113: The crime of persecution “is the only crime against humanity which requires that the perpetrator act with a discriminatory intent and, by its nature, it incorporates other crimes.”

See also discussion of mental state (*mens rea*) in underlying offenses, Section (IV)(c)(i)(6) (murder); (IV)(c)(ii)(4) (extermination); (IV)(c)(iii)(1) (enslavement); (IV)(c)(iv) (imprisonment); (IV)(c)(v)(4) (torture); (IV)(c)(vi) (rape); (IV)(c)(vii)(2) (persecution); (IV)(c)(viii)(2)(c) (other inhumane acts), ICTY Digest.

(2) knowledge

(a) the perpetrator must knowingly participate in a widespread or systematic attack, *i.e.*, have knowledge of the attack and the nexus between his acts and that context

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 102: “[T]he accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known ‘that there is an attack on the civilian population and that his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack.’” *See also Krnojelac*, (Trial Chamber), March 15, 2002, para. 59 (same).

Tadic, (Appeals Chamber), July 15, 1999, para. 271: “The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related.”

Blaskic, (Trial Chamber), March 3, 2000, para. 244: “The perpetrator must knowingly participate in a widespread or systematic attack against a civilian population.”

Jelusic, (Trial Chamber), December 14, 1999, para. 56: “The accused must . . . be aware that the underlying crime which he is committing forms part of the widespread and systematic attack.”

Blaskic, (Trial Chamber), March 3, 2000, para. 247: “The accused must first have knowledge of the general context in which his acts occur and then of the nexus between his action and that context.”

Kumarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 410: In addition to the statutory requirement of an armed conflict, the following sub-elements are necessary: “. . . v) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 185: “Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.”⁶

(b) alternatively, the perpetrator must have knowledge of the attack and taken the risk his acts were part of it

Vasiljevic, (Trial Chamber), November 29, 2002, para. 37: The perpetrator “must know ‘that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack.’”

Blaskic, (Trial Chamber), March 3, 2000, para. 257: “It follows that the *mens rea* specific to a crime against humanity does not require that the agent be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan. This specifically means that it must, for example, be proved that: [a] the accused willingly agreed to carry out the functions he was performing; [b] that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes; [c] that he received orders relating to the ideology, policy or plan; and lastly [d] that he contributed to its commission through intentional acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration.”

⁶ See Section (IV)(b)(v)(7), ICTY Digest, as to whether a plan or policy is required.

Krnjelac, (Trial Chamber), March 15, 2002, para. 59: “It is sufficient that, through his acts or the function which he willingly accepted, he [the perpetrator] knowingly took the risk of participating in the implementation of th[e] attack.”

(c) knowledge of the details of the attack not required

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 102: “This requirement [that the accused must have known that there is an attack on the civilian population and that his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack] does not entail knowledge of the details of the attack.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 59: “[T]he accused must know that there is an attack directed against the civilian population and he must know that his acts are part of that attack, or at least take the risk that they are part thereof. This, however, does not entail knowledge of the details of the attack.”

(d) no requirement that the perpetrator must approve of the context

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 185: “There is no apparent requirement in the jurisprudence . . . that the perpetrator must approve of the context in which his acts occur, as well as have knowledge of it.” “[T]he perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act.”

(e) factors from which to infer knowledge of context

Blaskic, (Trial Chamber), March 3, 2000, para. 258-259: “[K]nowledge of the political context in which the offence fits may be surmised from the concurrence of a number of concrete facts” and “these are: [a] the historical and political circumstances in which the acts of violence occurred; [b] the functions of the accused when the crimes were committed; [c] his responsibilities within the political or military hierarchy; [d] the direct and indirect relationship between the political and military hierarchy; [e] the scope and gravity of the acts perpetrated; [f] the nature of the crimes committed and the degree to which they are common knowledge.”

c) Underlying offenses

i) murder

(1) elements

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 560: “The constituent elements of murder under Article 5(a) of the Statute . . . comprise the death of the victim as a result of the acts or omissions of the accused, where the conduct of the accused was a substantial cause of the death of the victim. It can be said that the accused is guilty of murder if he or she engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person.”

Krstic, (Trial Chamber), August 2, 2001, para. 485: “Murder has consistently been defined . . . as the death of the victim resulting from an act or omission of the accused committed with the intention to kill or to cause serious bodily harm which he/she should reasonably have known might lead to death.”

Blaskic, (Trial Chamber), March 3, 2000, para. 217: “[T]he legal and factual elements of the offence” of murder are: “[a] the death of the victim; [b] the death must have resulted from an act of the accused or his subordinate; [c] the accused or his subordinate must have been motivated by the intent to kill the victim or to cause grievous bodily harm in the reasonable knowledge that the attack was likely to result in death.”

Jelusic, (Trial Chamber), December 14, 1999, para. 35: “Murder is defined as homicide committed with the intention to cause death. The legal ingredients of the offence as generally recognised in national law may be characterised as follows: [a] the victim is dead, [b] as a result of an act of the accused, [c] committed with the intention to cause death.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 236: “In order for an accused to be found guilty of murder, the following elements need to be proved: the death of the victim; that the death resulted from an act or omission of the accused or his subordinate; that the accused or his subordinate intended to kill the victim, or to cause grievous bodily harm or inflict serious injury in the reasonable knowledge that the attack was likely to result in death.”

(2) “murder” under Article 5 of the Statute, compared to Articles 2 and 3

Krnjelac, (Trial Chamber), March 15, 2002, para. 323-324: “[T]he elements of the offence of murder are the same under both Article 3 and Article 5 of the Statute.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 236: “[The] elements [of murder under Article 5] are similar to those required in connection to wilful killing under Article 2 and murder under Article 3 of the Statute, with the exception that in order to be characterised as a crime against humanity a ‘murder’ must have been committed as part of a widespread or systematic attack against a civilian population.”

See also discussion of willful killing under Article 2, Section (I)(d)(i), and murder under Article 3, Section (II)(d)(iv), ICTY Digest.

(3) proof of dead body not required

Krnjelac, (Trial Chamber), March 15, 2002, para. 326: “Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. [T]he fact of a victim’s death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.”

(4) suicide as murder

Krnjelac, (Trial Chamber), March 15, 2002, para. 329: “The crucial issues [for determining whether suicide can constitute murder] are causation and intent. The relevant act or omission by the Accused or by those for whose acts or omissions the Accused bears criminal responsibility must have caused the suicide of the victim and the Accused, or those for whom he bears criminal responsibility, must have intended by that act or omission to cause the suicide of the victim, or have known that the suicide of the victim was a likely and foreseeable result of the act or omission. The Accused cannot be held criminally liable unless the acts or omissions for which he bears criminal responsibility induced the victim to take action which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence of the conduct of the Accused, or of those for whom he bears criminal responsibility.”

(5) “murder” not “premeditated murder” is the underlying offense

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 235: “[T]he *Blaskic* Trial Chamber held that ‘it is murder (“meurtre”) and not premeditated murder (“assassinat”) which must be the underlying offence of a crime against humanity.” See also *Blaskic*, (Trial Chamber), March 3, 2000, para. 216 (same).

Jelavic, (Trial Chamber), December 14, 1999, para. 51: “The Trial Chamber notes . . . that the English text of the Statute uses the term ‘murder’ and ‘observes’ that ‘it is appropriate to adopt this as the accepted term in international custom.’”

(6) mental state (*mens rea*)

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 561: “The requisite *mens rea* of murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life. [T]he standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor’s purpose, or the actor is aware that it will occur in the ordinary course of events.”

ii) extermination

(1) generally

Krstic, (Trial Chamber), August 2, 2001, para. 503: “[F]or the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 229: “[T]he elements of the crime of ‘extermination’ are as follows: 1. The material element of extermination consists of any one act or combination of acts which contributes to the killing of a large number of individuals (*actus reus*). 2. The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*).”

(2) number of individuals involved

Krstic, (Trial Chamber), August 2, 2001, para. 502: “[T]he definition should be read as meaning the destruction of a numerically significant part of the population concerned.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 227: The “Trial Chamber concludes . . . that criminal responsibility for ‘extermination’ only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect. Responsibility for one or for a limited number of such killings is insufficient.”

But see Krstic, (Trial Chamber), August 2, 2001, para. 501: “[W]hile extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited.”

(3) extermination must be collective, not directed toward singled out individuals

Vasiljevic, (Trial Chamber), November 29, 2002, para. 227: “The Trial Chamber . . . concludes that the act of extermination must be collective in nature rather than directed towards singled out individuals. . . .”

(4) mental state (*mens rea*)

Vasiljevic, (Trial Chamber), November 29, 2002, para. 228: “[I]t is not sufficient to establish extermination for the offender to have intended to kill a large number of individuals, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death as in the case of murder. He must also have known of the vast scheme of collective murder and have been willing to take part therein.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 229: “The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*).”

(a) discriminatory intent not required

Krstic, (Trial Chamber), August 2, 2001, para. 500: “[E]xtermination may be retained when the crime is directed against an entire group of individuals even though no discriminatory intent nor intention to destroy the group as such on national, ethnical, racial or religious grounds has been demonstrated; or where the targeted population does not share any common national, ethnical, racial or religious characteristics.”

iii) enslavement

(1) *actus reus* and *mens rea*

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 116: “[T]he *actus reus* of the violation [of enslavement] is the exercise of any or all of the powers attaching to the right of ownership over a person,’ and the ‘*mens rea* of the violation consists in the intentional exercise of such powers.”

Krmojelac, (Trial Chamber), March 15, 2002, para. 350: “Enslavement under Article 5 . . . has been defined by the Tribunal as the exercise of any or all of the powers attaching to the right of ownership over a person. The *actus reus* of enslavement is the exercise of those powers, and the *mens rea* is the intentional exercise of such powers.”

(2) indicia of enslavement

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 119: In determining whether enslavement has been established, the indicia of enslavement identified by the Trial Chamber include: “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 359: “[T]he exaction of forced or compulsory labour or service’ is an ‘indication of enslavement,’ and a ‘factor to be taken into consideration in determining whether enslavement was committed.’”

(a) keeping someone in captivity usually not enough

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 542: “Detaining or keeping someone in captivity, without more, [existence of other indications of enslavement] would, depending on the circumstances of a case, usually not constitute enslavement.” “Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.”

(b) duration of enslavement is a factor, but not a required element

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 121, 356: “The duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship.” “[D]uration may be a factor ‘when considering whether someone was enslaved.’ This means that duration is not an element of the crime, but a factor in the proof of the elements of the crime. The longer the period of enslavement, the more serious the offence.”

(3) lack of resistance is not a sign of consent; lack of consent is not an element

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 120: The “lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention” cannot be interpreted as a sign of consent. Lack of consent is not an element of the crime of enslavement.

See also discussion of slavery under Article 3, Section (II)(d)(xiii), ICTY Digest.

iv) imprisonment

Krnjelac, (Trial Chamber), March 15, 2002, para. 115: “To establish the crime of imprisonment as a crime against humanity under Article 5(e) of the Tribunal’s Statute . . . the following elements must be established: i) an individual is deprived of his or her liberty; ii) the deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty; iii) the act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 302-303: “[T]he term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population. In that respect, the Trial Chamber will have to determine the legality of imprisonment as well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, before determining whether or not they occurred as part of a widespread or systematic attack directed against a civilian population.”

v) torture

(1) elements

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 142: The definition [of torture] is based on the following constitutive elements: “(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.”
See also Krnjelac, (Trial Chamber), March 15, 2002, para. 179 (same).

(2) requirement of severe pain and suffering

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 142: The first element for the crime of torture is “[t]he infliction, by act or omission, of severe pain or suffering, whether physical or mental.”

(a) rape necessarily implies severe pain or suffering

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 149-151: “[S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is . . . such an act. . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 145: “[R]ape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.”

See also discussion of rape and other forms of sexual violence constituting the war crime of torture under Article 3, Section (II)(d)(i)(7)(b), ICTY Digest.

(3) requirement of a prohibited purpose

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 142: “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.” *See also Krnojelac*, (Trial Chamber), March 15, 2002, para. 179 (same).

(a) prohibited purpose need not be the predominating or sole purpose

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 155: “[A]cts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.”

Mucic et al., (Trial Chamber), November 16, 1998, para. 470: The prohibited purposes listed in the Torture Convention “do not constitute an exhaustive list, and should be regarded as merely representative.” “Further, 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 predominating or sole purpose.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 153: “[T]he prohibited purpose need be neither the sole nor the main purpose of inflicting the severe pain or suffering.”

(4) mental state (*mens rea*)

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 153: “[E]ven if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”

(5) role of a state official not necessary

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 148: “[T]he public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 139: “[T]he state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.”

See also discussion of torture under Article 3, Section (II)(d)(i), ICTY Digest.

vi) rape

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 127-132: “[T]he *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) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.” “Resistance” is not a requirement. “Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.” “[T]here are ‘factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.’ A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 175, 180: “Rape was succinctly defined in the *Akayesu* Trial Chamber Judgement as ‘a physical invasion of a sexual

nature, committed on a person under circumstances which are coercive.” “[S]exual violence is broader than rape and includes such crimes as sexual slavery or molestation. Moreover, the *Akayesu* Trial Chamber emphasized that sexual violence need not necessarily involve physical contact and cited forced public nudity as an example.”

See also discussion of rape under Article 3, Sections (II)(d)(i)(7)(b) and (II)(d)(ii), ICTY Digest.

vii) persecution

(1) required acts (*actus reus*)

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 634: “The following elements must be proven to establish that persecution as a crime against humanity has been committed: i) the perpetrator commits a discriminatory act or omission; ii) the act or omission denies or infringes upon a fundamental right laid down in international customary or treaty law; iii) the perpetrator carries out the act or omission with the intent to discriminate on racial, religious or political grounds; iv) the general requirements for a crime against humanity pursuant to Article 5 of the Statute are met.”

(a) persecution must be of “same gravity” as other crimes enumerated in Article 5

Kvočka et al., (Trial Chamber), November 2, 2001, para. 185: Persecutory acts separately or combined, must be “of the same gravity or severity as the other enumerated crimes in Article 5.”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 618-619: “[I]n order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be clearly defined limits on the types of acts which qualify as persecution. [A]t a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5.” (*underlining removed*) See also *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 193-195.

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 621: “The Trial Chamber . . . defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.” (*underlining removed*)

Vasiljevic, (Trial Chamber), November 29, 2002, para. 247: “In order to qualify as persecution, the act or omission must reach a level of gravity at least equal to that of other offences listed in the Statute.”

(b) persecutory acts include crimes under other sub-clauses of Article 5, crimes found elsewhere in the Statute and crimes not expressly prohibited under the Statute

Kvočka et al., (Trial Chamber), November 2, 2001, para. 185: “The Tribunal’s caselaw has specified that persecutory acts include those crimes enumerated in other sub-clauses of Article 5, crimes found elsewhere in the Statute, and acts not enumerated in the Statute but which may entail the denial of other fundamental human rights. . . .”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 581, 614-615: “[T]he Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. [N]o such requirement is imposed on it by the Statute of the International Tribunal.” “A narrow definition of persecution is not supported in customary international law.” “[P]ersecution can consist of the deprivation of a wide variety of rights. A persecutory act need not be prohibited explicitly either in Article 5 or elsewhere in the Statute.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 185 (persecution includes “acts not enumerated in the Statute. . . .”)

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 605-606: “[A]cts enumerated in other sub-clauses of Article 5 can . . . constitute persecution. A narrow interpretation of persecution, excluding other sub-headings of Article 5, is . . . not an accurate reflection of the notion of persecution which has emerged from customary international law. [I]f persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a *lacuna* would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent ‘to destroy, in whole or in part, a national, ethnical, racial, or religious group.’”

(c) evaluate persecution in context, looking at cumulative effect

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 622: “In determining whether particular acts constitute persecution . . . acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 247: “When considering whether an act or omission satisfies this threshold [that the act or omission must reach a level of gravity at least equal to that of other offenses listed in the Statute], acts should not be considered in isolation but should be examined in their context and with consideration of their cumulative effect. Although it is not required that each underlying act constitute a violation of international law, the acts must, either separately or in combination, amount to persecution.”

(d) may encompass physical or mental harm or infringements upon individual freedom

Vasiljevic, (Trial Chamber), November 29, 2002, para. 246: “The act or omission constituting the crime of persecution may assume various forms, and there is no comprehensive list of what acts can amount to persecution. It may encompass acts that are listed in the Statute as well as acts that are not listed in the Statute. The persecutory act or omission may encompass physical or mental harm or infringements upon individual freedom.”

(e) single act can constitute persecution if discriminatory intent proven

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 624: “[P]ersecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent.”

(f) examples of persecution

a. destruction of property or means of subsistence

Blaskic, (Trial Chamber), March 3, 2000, para. 234: “In the context of the crime of persecution, the destruction of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily.”

Blaskic, (Trial Chamber), March 3, 2000, para. 227: “[P]ersecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind. [P]ersecution may . . . take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina.”

Blaskic, (Trial Chamber), March 3, 2000, para. 234: In the context of the crime of persecution, “the plunder of property is defined as the unlawful, extensive and wanton appropriation of property belonging to a particular population, whether it be the property of private individuals or of state or ‘quasi-state’ public collectives.”

Blaskic, (Trial Chamber), March 3, 2000, para. 233: “[T]he crime of ‘persecution’ encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long

as the victimised persons were specially selected on grounds linked to their belonging to a particular community.”

b. unlawful detention of civilians

Blaskic, (Trial Chamber), March 3, 2000, para. 234: “The unlawful detention of civilians, as a form of the crime of persecution, means unlawfully depriving a group of discriminated civilians of their freedom.”

c. deportation or forcible transfer of civilians

Blaskic, (Trial Chamber), March 3, 2000, para. 234: “The deportation or forcible transfer of civilians [as a form of the crime of persecution] means ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’”

d. harassment, humiliation and psychological abuse

Kvočka et al., (Trial Chamber), November 2, 2001, para. 190: “In order to constitute persecution, harassment, humiliation, and psychological abuse must occupy the same level of seriousness as other listed or recognized crimes against humanity, or together with other crimes cognizable under Article 5, they must form part of a course of conduct which satisfies the criteria for persecution.” “[H]umiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution.”

e. murder, extermination, torture

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 600, 615: “In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.”

f. political, social, economic rights violations generally

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 615: “Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights.”

g. violations of the right to life, liberty and the security of person; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; and the right not to be subjected to arbitrary arrest, detention or exile

Blaskic, (Trial Chamber), March 3, 2000, para. 220: “[I]nfringements of the elementary and inalienable rights of man, which are ‘the right to life, liberty and the security of

person,’ the right not to be ‘held in slavery or servitude,’ the right not to ‘be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and the right not to be ‘subjected to arbitrary arrest, detention or exile’ as affirmed in Articles 3, 4, 5 and 9 of the Universal Declaration of Human Rights, by their very essence may constitute persecution when committed on discriminatory grounds.”

h. additional examples

Kvočka et al., (Trial Chamber), November 2, 2001, para. 186: “[T]he ICTY have found that the following acts may constitute persecution when committed with the requisite discriminatory intent: imprisonment, unlawful detention of civilians or infringement upon individual freedom, murder, deportation or forcible transfer, ‘seizure, collection, segregation and forced transfer of civilians to camps,’ comprehensive destruction of homes and property, the destruction of towns, villages and other public or private property and the plunder of property, attacks upon cities, towns and villages, trench-digging and the use of hostages and human shields, the destruction and damage of religious or educational institutions, and sexual violence.”

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 202-207: “[T]hese acts may constitute the crime of persecution provided they are performed with the requisite discriminatory intent:”

- attacking cities, towns and villages;
- trench-digging and use of hostages and human shields;
- the “wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock” may constitute the crime of persecution when the cumulative effect of such property destruction is the removal of civilians from their homes on discriminatory grounds;
- destruction and damage of religious or educational institutions.

i. acts that do not rise to the level of persecution

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 208-210: The following acts do not constitute persecution as a crime against humanity because they do not rise to the same level of gravity as the other crimes against humanity enumerated in Article 5:

- encouraging and promoting hatred on political grounds;
- dismissing and removing Bosnian Muslims from government.

(2) mental state (*mens rea*)

(a) discriminatory intent required for persecution

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 212: “[A] particular intent is required, in addition to the specific intent (to commit the act and produce its consequences) and the general intent (objective knowledge of the context in which the accused acted). This intent – the discriminatory intent – is what sets the crime of persecution apart from other Article 5 crimes against humanity. This discriminatory intent requirement for the crime of persecution is thus different from the more general level of intent required for the other crimes against humanity under Article 5, when mere ‘knowledge of the context’ of a widespread or systematic attack against a civilian population is sufficient.” (*underlining removed*)

Blaskic, (Trial Chamber), March 3, 2000, para. 235: Persecution “must be committed for specific reasons whether these be linked to political views, racial background or religious convictions. It is the specific intent to cause injury to a human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on it its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example, attacks on property.”

(b) mental state (*mens rea*) requirement for persecution higher than for other crimes against humanity, but lower than for genocide

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 636: “[T]he *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. [P]ersecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. [F]rom the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.”

(c) intent to target group, not individuals

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 636: “A discriminatory basis exists where a person is targeted on the basis of religious, political or racial considerations, i.e. for his or her membership in a certain victim group that is targeted by the perpetrator group. . . . [T]he targeted group does not only comprise persons who *personally* carry the (religious, racial or political) criteria of the group. The targeted group must be interpreted broadly, and may, in particular, include such persons who are *defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies for the victim group*. . . . [T]his interpretation is consistent with the underlying *ratio* of the provision prohibiting persecution, as it is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status. The Chamber finds that in such cases, a factual discrimination is given as the victims are *discriminated in fact* for who or what they are on the basis of the perception of the perpetrator.”

Blaskic, (Trial Chamber), March 3, 2000, para. 235: The “perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial, religious or political group.”

(d) discriminatory intent can be shown by positive or negative criteria

Kvočka et al., (Trial Chamber), November 2, 2001, para. 195: “[T]he discriminatory act could result from the application of positive or negative criteria.” For example, “an attack ‘conducted against only the non-Serb portion of the population because they were non-Serbs’ was indicative of the necessary discriminatory intent.”

(e) discriminatory intent can be inferred from knowingly participating in a system or enterprise that discriminates on political, racial or religious grounds

Kvočka et al., (Trial Chamber), November 2, 2001, para. 201: “[D]iscriminatory intent of a perpetrator can be inferred from knowingly participating in a system or enterprise that discriminates on political, racial or religious grounds.”

(f) no requirement of discriminatory policy

Krnjelac, (Trial Chamber), March 15, 2002, para. 435: “There is no requirement under persecution that a discriminatory policy exist or that, in the event that such a policy is shown to have existed, the accused has taken part in the formulation of such discriminatory policy or practice by a governmental authority.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 248: “The requirement that an accused consciously intends to discriminate does not require the existence of a discriminatory policy or, where such a policy is shown to exist, participation by the accused in the formulation of that discriminatory policy or practice by an authority.”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 625: “Although acts of persecution are often part of a discriminatory policy, the Trial Chamber finds that it is not necessary to demonstrate that an accused has taken part in the formulation of a discriminatory policy or practice by a governmental authority.”

But see Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 220: “[I]n order to possess the necessary heightened *mens rea* for the crime of persecution, the accused must have shared the aim of the discriminatory policy: ‘the removal of those persons from the society in which they live alongside the perpetrators, or eventually from humanity itself.’”

(g) knowledge that one is acting in a way that is discriminatory is insufficient; must intend to discriminate

Vasiljevic, (Trial Chamber), November 29, 2002, para. 248: “The accused must consciously intend to discriminate for persecution to be established. It is not sufficient that the accused was merely aware that he is in fact acting in a discriminatory way.”

Krmojelac, (Trial Chamber), March 15, 2002, para. 435: “The crime of persecution also derives its unique character from the requirement of a specific discriminatory intent. It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.”

(h) intent to discriminate need not be the primary intent, but must be a significant one

Krmojelac, (Trial Chamber), March 15, 2002, para. 435: “While the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one.”

(i) discriminatory intent must relate to the act charged as persecution, not the attack

Krmojelac, (Trial Chamber), March 15, 2002, para. 436: “The discriminatory intent must relate to the specific act charged as persecution rather than the attack in general, even though the latter may also in practice have a discriminatory aspect. This is clear from the definition of persecution which requires an act or omission that is in fact persecutory. There is no requirement, either under the crime of persecution or under the general requirements for crimes against humanity, that the attack in general be discriminatory. [T]he law has . . . been applied by this Tribunal on the basis that an

attack on discriminatory grounds is a sufficient basis from which to infer the necessary discriminatory intent for persecution. While such an approach would probably reach the correct conclusion for most acts occurring within the context of a discriminatory attack, there may be certain acts committed within the context of the attack either on discriminatory grounds not listed in the Statute, or for purely personal reasons. Therefore, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 249: “[T]he discriminatory intent must relate to the specific act charged as persecution. It is not sufficient that the act merely occurs within an attack which has a discriminatory aspect. Occasionally, the law has been applied by this Tribunal on the basis that a discriminatory attack is a sufficient basis from which to infer the discriminatory intent of acts carried out within that attack. This approach may lead to the correct conclusion with respect to most of the acts carried out within the context of an discriminatory attack, but there may be acts committed within the context that were committed either on discriminatory grounds not listed in the Statute, or for purely personal reasons. . . . [T]his approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts that occur within that context.”

(j) discriminatory consequences required

Vasiljevic, (Trial Chamber), November 29, 2002, para. 245: “[T]he act or omission must in fact have discriminatory consequences rather than merely be done with discriminatory intention. Discriminatory intent by itself is not sufficient. Without this requirement an accused could be convicted of persecution without anyone having actually been persecuted. . . .”

Krnjelac, (Trial Chamber), March 15, 2002, para. 432: “Previous Tribunal jurisprudence... has required a discriminatory element as part of the *actus reus*, that is, the act or omission must in fact have discriminatory consequences rather than merely be done with discriminatory intention. Discriminatory intent by itself is not sufficient. A different approach was recently taken in the *Kvočka* Trial Judgment, rejecting the need for discriminatory consequences. [T]his Trial Chamber does not find that judgment persuasive. [L]ogic argues in favour of a requirement that the act be discriminatory in fact. Without such a requirement, an accused could be convicted of persecution without anyone actually having been persecuted. In addition, the distinction between the crime of persecution and other crimes would be rendered virtually meaningless by depriving the crime of persecution of the qualities that distinguish it from other prohibited acts, such as murder and torture, which have as their object the protection of individuals irrespective of any group association.”

viii) other inhumane acts

(1) generally

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 247: “Article 5(i) of the Statute (other inhumane acts) is a residual clause, which applies to acts that do not fall within any of other sub-clause of Article 5 of the Statute but are sufficiently similar in gravity to the other enumerated crimes. Inhumane acts are ‘[...] acts or omissions intended to cause deliberate mental or physical suffering to the individual.’ As constituting crimes against humanity, these acts must also be widespread or systematic.”

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 563: “The phrase ‘other inhumane acts’ was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”

(2) elements

Vasiljevic, (Trial Chamber), November 29, 2002, para. 234: “The elements to be proved [for other inhumane acts] are: (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 271-272: “Within the context of the discussion of ‘other inhumane acts,’ the *Blaskic* Trial Chamber defined the elements of serious bodily or mental harm thus: the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances; the suffering must be the result of an act of the accused or his subordinate; when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.”

(a) seriousness/severity of the act

Vasiljevic, (Trial Chamber), November 29, 2002, para. 235: “To assess the seriousness of an act, consideration must be given to all the factual circumstances” and these “may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. [T]he fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.” *See also Blaskic*, (Trial Chamber), March 3, 2000, para. 243.

(b) serious bodily or mental harm

Krnjelac, (Trial Chamber), March 15, 2002, para. 131: “The suffering inflicted by the act upon the victim does not need to be lasting so long as it real and serious.”

(c) mental state (*mens rea*)

Krnjelac, (Trial Chamber), March 15, 2002, para. 132: “The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.”
See also Vasiljevic, (Trial Chamber), November 29, 2002, para. 236.

(3) equivalent to “cruel treatment” under Article 3

Jelavic, (Trial Chamber), December 14, 1999, para. 52: “The sub-characterisation ‘other inhumane acts’ specified under Article 5(i) of the Statute is a generic charge which encompasses a series of crimes. [T]he notion of cruel treatment set out in Article 3 of the Statute ‘carries an equivalent meaning [. . .] as inhuman treatment does in relation to grave breaches of the Geneva Conventions.’ Likewise . . . the notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute have the same legal meaning.”

See discussion of inhuman treatment under Article 2, Section (I)(d)(ii)(2)(c), and cruel treatment under Article 3, Section (II)(d)(iii), ICTY Digest.

(4) application

Krstic, (Trial Chamber), August 2, 2001, para. 523: “[F]orcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 208: “Mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance are listed in the jurisprudence of the Tribunal as falling under this category [other inhumane acts].”

Blaskic, (Trial Chamber), March 3, 2000, para. 239: “[S]erious physical and mental injury – excluding murder – is without doubt an ‘inhumane act’ within the meaning of Article 5 of the Statute.”

V) INDIVIDUAL RESPONSIBILITY (ARTICLE 7(1))

a) Statute

ICTY Statute, Article 7(1):

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

b) Generally

i) criminal responsibility of superiors under Article 7(1)

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 367: “Article 7(1) is concerned with persons directly responsible for planning, instigating, ordering, committing, or aiding and abetting in the planning, preparation or execution of a crime. Thus, both the individual who himself carries out the unlawful conduct and his superior who is involved in the conduct not by physical participation, but for example by ordering or instigating it, are covered by Article 7(1). For instance, a superior who orders the killing of a civilian may be held responsible under Article 7(1), as might a political leader who plans that certain civilians or groups of civilians should be executed, and passes these instructions on to a military commander. The criminal responsibility of such superiors, either military or civilian, in these circumstances is personal or direct, as a result of their direct link to the physical commission of the crime. The criminal responsibility of a superior for such positive acts, except where the superior orders the crime in which case he may be more appropriately referred to as primarily responsible for its commission, may be regarded as ‘follow(ing) from general principles of accomplice liability.’”

ii) overlap of Articles 7(1) and 7(3)

Krstic, (Trial Chamber), August 2, 2001, para. 605: “[T]he Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by ‘planning,’ ‘instigating’ or ‘ordering’ the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.”

But see Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 79, 81: “The *Krnjelac* Trial Chamber stated that as it is inappropriate to convict [persons] under both [Articles 7(1) and 7(3)] for the same conduct, [; therefore] the Trial Chamber has the discretion to choose which is the most appropriate one.” “The Chamber follows the

finding of the *Krnjelac* Trial Chamber by choosing between Article 7(1) and Article 7(3) of the Statute the most appropriate form of responsibility.”

Compare Blaskic, (Trial Chamber), March 3, 2000, para. 337: “[T]he failure to punish past crimes, which entails the commander’s responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further crimes*.”

See also “proving responsibility under both Article 7(1) and Article 7(3)” as impacting on sentencing, Section (X)(b)(iii)(3)(k), ICTY Digest.

c) Planning, instigating, ordering, committing

i) mental state (*mens rea*) generally

Blaskic, (Trial Chamber), March 3, 2000, para. 278: “[P]roof is required that whoever planned, instigated or ordered the commission of a crime possessed the criminal intent, that is, that he directly or indirectly intended that the crime in question be committed. [I]n general, a person other than the person who planned, instigated or ordered is the one who perpetrated the *actus reus* of the offence.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 386: “[A]n accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed.”

ii) planning

Blaskic, (Trial Chamber), March 3, 2000, para. 279: “[P]lanning implies that ‘one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.’”

Krstic, (Trial Chamber), August 2, 2001, para. 601: “‘Planning’ means that one or more persons design the commission of a crime at both the preparatory and execution phases.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 386: “[P]lanning constitutes a discrete form of responsibility under Article 7(1) of the Statute, and . . . an accused may be held criminally responsible for planning alone.”

(1) person who committed crime cannot also be held responsible for planning it

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 386: “[A] person found to have committed a crime will not be found responsible for planning the same crime.”

(2) circumstantial evidence may prove plan

Blaskic, (Trial Chamber), March 3, 2000, para. 279: “[C]ircumstantial evidence may provide sufficient proof of the existence of a plan.”

iii) instigating

(1) generally

Krstic, (Trial Chamber), August 2, 2001, para. 601: “‘Instigating’ means prompting another to commit an offence.” *See also Blaskic*, (Trial Chamber), March 3, 2000, para. 280 (same).

(2) the act (*actus reus*)

(a) requires a clear contribution to the conduct of the other person, but unnecessary to show that the crime would not have occurred without the accused’s involvement

Kvočka et al., (Trial Chamber), November 2, 2001, para. 252: “The *actus reus* required for ‘instigating’ a crime is any conduct by the accused prompting another person to act in a particular way. This element is satisfied if it is shown that the conduct of the accused was a clear contributing factor to the conduct of the other person(s). It is not necessary to demonstrate that the crime would not have occurred without the accused’s involvement.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 60: “The *actus reus* requires a clear contribution to the act of the other person, but it needs not to be shown that the offence would not have been perpetrated without the participation of the accused.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 387: “Although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (*i.e.*, that the contribution of the accused in fact had an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused’s involvement.”

Blaskic, (Trial Chamber), March 3, 2000, para. 278, 280: “In the case of instigating . . . proof is required of a causal connection between the instigation and the fulfilment of the

actus reus of the crime.” “The ordinary meaning of instigating, namely, ‘bring about’ the commission of an act by someone, corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.”

**(b) both positive acts and omissions may constitute instigating,
as well as express and implied conduct**

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 387: “Both positive acts and omissions may constitute instigation. . . .”

Blaskic, (Trial Chamber), March 3, 2000, para. 280: “The wording [instigating] is sufficiently broad to allow for the inference that both acts and omissions may constitute instigating and that this notion covers both express and implied conduct.”

(3) mental state (*mens rea*)

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 60: “The requisite *mens rea* [for instigating] is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 252 (same).

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 387: “[I]t must be proved that the accused directly intended to provoke the commission of the crime.”

iv) ordering

(1) generally

Krstic, (Trial Chamber), August 2, 2001, para. 601: “‘Ordering’ entails a person in a position of authority using that position to convince another to commit an offence.”

**(2) order may be explicit or implicit, and proven through
circumstantial evidence**

Blaskic, (Trial Chamber), March 3, 2000, para. 281: “It is not necessary that an order be given in writing or in any particular form. It can be explicit or implicit. The fact that an order was given can be proved through circumstantial evidence.”

**(3) order need not be given directly to person who performs the
offense**

Blaskic, (Trial Chamber), March 3, 2000, para. 282: “[A]n order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the

offence. [W]hat is important is the commander's *mens rea*, not that of the subordinate executing the order."

(4) no formal superior-subordinate relationship required

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 388: "[N]o formal superior-subordinate relationship is required for a finding of 'ordering' so long as it is demonstrated that the accused possessed the authority to order."

(5) irrelevant whether the illegality of the order was apparent on its face

Blaskic, (Trial Chamber), March 3, 2000, para. 282: "[I]t is irrelevant whether the illegality of the order was apparent on its face."

v) committing

(1) generally

Krstic, (Trial Chamber), August 2, 2001, para. 601: "'Committing' covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law."

(2) the act (*actus reus*)

(a) involves direct personal or physical participation

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 376: "[A]ny finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the International Tribunal's Statute with the requisite knowledge."

Kvočka et al., (Trial Chamber), November 2, 2001, para. 251: "The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute. . . ."

Vasiljevic, (Trial Chamber), November 29, 2002, para. 62: "The Accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where it is proved that he personally physically perpetrated the criminal act in question or personally omitted to do something in violation of international humanitarian law."

(b) alternatively, can involve a culpable omission

Kumarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 390: "An individual can be said to have 'committed' a crime when he or she physically perpetrates the

relevant criminal act or engenders a culpable omission in violation of a rule of criminal law.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 251: Committing can be through “through positive acts or omissions. . . .”

(c) there can be several perpetrators of the same crime

Kumarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 390: “There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfills the requisite elements of the definition of the substantive offence.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 251: Committing may be done “individually or jointly with others.”

(3) mental state (*mens rea*)

Kvočka et al., (Trial Chamber), November 2, 2001, para. 251: “The requisite *mens rea* [for committing a crime] is that, as in other forms of criminal participation under Article 7(1), the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.”

d) Aiding and abetting

i) generally

Kumarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 391: “As opposed to the ‘commission’ of a crime, aiding and abetting is a form of accessory liability.”

ii) based on customary international law

Prosecutor v. Tadić, Case No. IT-94-1 (Trial Chamber), May 7, 1997, para. 666: “The concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act . . . has a basis in customary international law.”

iii) defined

Krstić, (Trial Chamber), August 2, 2001, para. 601: “‘Aiding and abetting’ means rendering a substantial contribution to the commission of a crime.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 254: “[A]iding and abetting, ‘which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto.’”

Tadic, (Trial Chamber), May 7, 1997, para. 689: “[A]iding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present.”

iv) the act (*actus reus*)

(1) requires practical assistance, encouragement or moral support

Furundzija, (Trial Chamber), December 10, 1998, para. 235, 249: “[T]he *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 70: “An accused will incur individual criminal responsibility for aiding and abetting a crime under Article 7(1) where it is demonstrated that the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender of the crime.”

(2) may occur through an omission

Blaskic, (Trial Chamber), March 3, 2000, para. 284: “[T]he *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 70: “The act of assistance may be either an act or omission. . . .”

(3) must have a substantial effect on the commission of the crime

Vasiljevic, (Trial Chamber), November 29, 2002, para. 70: “The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.”

Furundzija, (Trial Chamber), December 10, 1998, para. 234: “The position under customary international law seems . . . to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime.”

Tadic, (Trial Chamber), May 7, 1997, para. 691: “[T]he acts of the accused must be direct and substantial.”

Blaskic, (Trial Chamber), March 3, 2000, para. 285: “Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required.”

(4) presence at scene

(a) is not conclusive, unless it demonstrates a significant encouraging effect or a direct and substantial effect

Vasiljevic, (Trial Chamber), November 29, 2002, para. 70: “Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.”

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 393: “Presence alone at the scene of the crime is not conclusive of aiding or abetting, unless it is shown to have a significant legitimising or encouraging effect on the principal.”

Tadic, (Trial Chamber), May 7, 1997, para. 689: “[P]resence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.”

Aleksovskij, (Trial Chamber), June 25, 1999, para. 64: “Mere presence constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*.”

(b) example

Tadic, (Trial Chamber), May 7, 1997, para. 690: “[W]hen an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.”

(c) position of authority and presence may, in some circumstances, be interpreted as approval of the conduct

Blaskic, (Trial Chamber), March 3, 2000, para. 284: “[I]f the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime.”

Aleksovskij, (Trial Chamber), June 25, 1999, para. 65: “[A]n individual’s position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime.”

[T]he presence of an individual with uncontested authority over the perpetrators of the unlawful act may, in some circumstances, be interpreted as approval of that conduct. . . . An individual's authority must therefore be considered to be an important indicium as establishing that his mere presence constitutes an act of intentional participation under Article 7(1). Nonetheless, responsibility is not automatic and merits consideration against the background of the factual circumstances.”

(d) actual physical presence not required

Tadic, (Trial Chamber), May 7, 1997, para. 691: “[A]ctual physical presence when the crime is committed is not necessary . . . an accused can be considered to have participated in the commission of a crime . . . if he is found to be ‘concerned with the killing.’”

(5) assistance may occur before, during or after the act is committed

Vasiljevic, (Trial Chamber), November 29, 2002, para. 70: The act of assistance “may occur before or during the act of the principal offender.”

Blaskic, (Trial Chamber), March 3, 2000, para. 285: “[P]articipation may occur before, during or after the act is committed and be geographically separated therefrom.”

Aleksovski, (Trial Chamber), June 25, 1999, para. 62: “Participation may occur before, during or after the act is committed. It can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed, that is, behaviour which may in fact clearly constitute instigation or abetment of the perpetrators of the crime.”

(6) the aider and abettor will be responsible for all that naturally results from his act

Tadic, (Trial Chamber), May 7, 1997, para. 692: The aider and abettor “will . . . be responsible for all that naturally results from the commission of the act in question.”

v) mental state (*mens rea*): intent and knowledge

(1) aider and abettor needs to have intended to assist or facilitate, or accepted that assistance would be a possible and foreseeable consequence

Blaskic, (Trial Chamber), March 3, 2000, para. 286: “[T]he aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 255 (same).

(2) need not know precise crime intended or committed

Furundzija, (Trial Chamber), December 10, 1998, para. 246: “[I]t is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.” *See also Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 255 (same).

(3) need not share principal’s intent, but must be aware of essential elements of the crime, including the principal’s mental state

Aleksovski, (Appeals Chamber), March 24, 2000, para. 162: “[I]t is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal. It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.”

Furundzija, (Trial Chamber), December 10, 1998, para. 245: “[I]t is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 71: “The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender’s state of mind. However, the aider and abettor need not share the intent of the principal offender. The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability from that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender.”

(4) must have knowledge that actions will assist commission of the crime

Vasiljevic, (Trial Chamber), November 29, 2002, para. 71: “To establish the *mens rea* of aiding and abetting, it must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.”

Blaskic, (Trial Chamber), March 3, 2000, para. 286: It is necessary to show “knowledge that [the] acts [at issue] assist the commission of the crime. . . .”

Furundzija, (Trial Chamber), December 10, 1998, para. 245, 249: “[T]he clear requirement in the vast majority of the cases is for the accomplice to have knowledge

that his actions will assist the perpetrator in the commission of the crime.” “The *mens rea* required is the knowledge that these acts assist the commission of the offence.”

(5) mental state (*mens rea*) may be deduced from circumstances, such as position of authority and presence

Aleksovski, (Trial Chamber), June 25, 1999, para. 65: “The *mens rea* may be deduced from the circumstances, and the position of authority constitutes one of the circumstances which can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrator of the wrongful act as a sign of support or encouragement.”

(6) mental state (*mens rea*) for aider and abettor of persecution

Kvočka et al., (Trial Chamber), November 2, 2001, para. 262: “The aider or abettor of persecution, as a ‘special intent’ crime, must not only have knowledge of the crime he is assisting or facilitating. He must also be aware that the crimes being assisted or supported are committed with a discriminatory intent. The aider or abettor of persecution does not need to share the discriminatory intent, but must be aware of the broader discriminatory context and know that his acts of assistance or encouragement have a significant effect on the commission of the crimes. Each and every act of discrimination need not be known or intended by the aider or abettor. The aider or abettor of persecution will thus be held responsible for discriminatory acts committed by others that were a reasonably foreseeable consequence of their assistance or encouragement.”

vi) difference between “aiding and abetting,” and “participation in a joint criminal enterprise” (*i.e.*, acting pursuant to a common design or purpose)

(1) generally

Blaskić, (Trial Chamber), March 3, 2000, para. 288: “[A] distinction is to be made between aiding and abetting and participation in pursuance of a purpose or common design to commit a crime.”⁷

Furundžija, (Trial Chamber), December 10, 1998, para. 249: The “notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.”

⁷ Participation in a joint criminal enterprise, *i.e.*, acting pursuant to a common design or purpose, is discussed in Section (V)(e), ICTY Digest.

(2) elements distinguished

Tadic, (Appeals Chamber), July 15, 1999, para. 229: The Appeals Chamber distinguished “between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.” “(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal. (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution. (iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose. (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (*i.e.*, either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed). . . .”

(3) mental state (*mens rea*) distinguished

Tadic, (Appeals Chamber), July 15, 1999, para. 229: “In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (*i.e.*, either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed). . . .”

Krnjelac, (Trial Chamber), March 15, 2002, para. 75: “The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender. That is because a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a joint criminal enterprise with the principal offender must share that intent.”

(4) application: torture

Furundzija, (Appeals Chamber), July 21, 2000, para. 118: “[T]wo types of liability for criminal participation ‘appear to have crystallised in international law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors,

on the other.’ [T]o distinguish a co-perpetrator from an aider or abettor, ‘it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person).’ [T]o be convicted as a co-perpetrator, the accused ‘must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.’”

Furundzija, (Trial Chamber), December 10, 1998, para. 257: “(i) [T]o be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person. (ii) [T]o be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.”

e) Joint criminal enterprise/ the common purpose doctrine

i) generally

Tadic, (Appeals Chamber), July 15, 1999, para. 190: “[T]he Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.”

Krstic, (Trial Chamber), August 2, 2001, para. 601: “‘Joint criminal enterprise’ liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in Article 7(1) of the Statute. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 307: “A joint criminal enterprise can exist whenever two or more people participate in a common criminal endeavor.” “Within a joint criminal enterprise there may be other subsidiary criminal enterprises.”

ii) three categories of common purpose doctrine

Tadic, (Appeals Chamber), July 15, 1999, para. 195-196, 202-204: “[T]he notion of common purpose encompasses three distinct categories of collective criminality.” “The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design. . . .”

“The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called ‘concentration camp’ cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; *i.e.*, by groups of persons acting pursuant to a concerted plan.”

“The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.”

For further details regarding these three categories, see *Tadic*, (Appeals Chamber), July 15, 1999, para. 220.

iii) elements

Tadic, (Appeals Chamber), July 15, 1999, para. 227: “[T]he objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows: i. *A plurality of persons*. They need not be organised in a military, political or administrative structure . . . ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute* . . . iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 67: “A person participates in a joint criminal enterprise by personally committing the agreed crime as a principal offender, or by assisting the principal offender in committing the agreed crime as a co-perpetrator (by undertaking acts that facilitate the commission of the offence by the principal offender), or by acting in furtherance of a particular system in which the crime is committed by reason of the accused’s position of authority or function, and with knowledge of the nature of that system and intent to further that system. If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such

as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 312: For joint criminal enterprise liability, “an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise.”

(1) need to establish existence of an arrangement or understanding

Tadić, (Appeals Chamber), July 15, 1999, para. 227: One of the required elements is: “[t]he existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.”

Vasiljević, (Trial Chamber), November 29, 2002, para. 66: “The Prosecution must establish the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed.”

(a) arrangement need not be express/can be unspoken

Vasiljević, (Trial Chamber), November 29, 2002, para. 66: “The arrangement or understanding need not be express, and it may be inferred from all the circumstances. The fact that two or more persons are participating together in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act.”

(b) common plan or purpose may materialize extemporaneously

Tadić, (Appeals Chamber), July 15, 1999, para. 227: “There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. . . .”

(2) level of participation in joint criminal enterprise must be significant

Kvočka et al., (Trial Chamber), November 2, 2001, para. 309: “The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; *e.g.*, a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. [P]articipation would need to be assessed on a case by case

basis, especially for low or mid level actors who do not physically perpetrate crimes. It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity. In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any 'body' could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 311: “The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealotry or gratuitous cruelty exhibited in performing the actor’s function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavor, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of a crime. Perhaps the most important factor to examine is the role the accused played vis-à-vis the seriousness and scope of the crimes committed.”

(a) level of participation for aider and abettor: must have a substantial effect

Kvočka et al., (Trial Chamber), November 2, 2001, para. 289: “The assistance or facilitation provided by the aider or abettor must of course have a substantial effect on the crime committed by a co-perpetrator. The precise threshold of participation in joint criminal enterprise has not been settled, but the participation must be ‘in some way . . . directed to the furthering of the common plan or purpose.’”

(3) responsibility for crimes outside the common purpose occurs if it was foreseeable that such a crime might be perpetrated and the accused willingly took that risk

Tadić, (Appeals Chamber), July 15, 1999, para. 228: “[R]esponsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.”

(4) whether participation in a joint criminal enterprise is more akin to direct perpetration or accomplice liability

Krstic, (Trial Chamber), August 2, 2001, para. 642-643: “In the *Tadic* Appeal Judgement, the Appeals Chamber referred to ‘the notion of common design as a form of accomplice liability,’ a phrase upon which Trial Chamber II subsequently relied to distinguish ‘committing’ from ‘common purpose liability’ under Article 7(1). [T]his Trial Chamber views the comment in the *Tadic* Appeal Judgement as not part of the *ratio decidendi* of that Judgement and does not believe that *Tadic* characterisation means that any involvement in a joint criminal enterprise automatically relegates the liability of an accused to that of ‘complicity in genocide’ in Article 4(3)(e). . . . [This] Trial Chamber sees no basis for refusing to accord the status of a co-perpetrator to a member of a joint genocidal enterprise whose participation is of an extremely significant nature and at the leadership level.” “It seems clear that ‘accomplice liability’ denotes a secondary form of participation which stands in contrast to the responsibility of the direct or principal perpetrators. The Trial Chamber is of the view that this distinction coincides with that between ‘genocide’ and ‘complicity in genocide’ in Article 4(3). The question comes down to whether . . . a participant in the criminal enterprise may be most accurately characterised as a direct or principal perpetrator or as a secondary figure in the traditional role of an accomplice.”

But see Krnojelac, (Trial Chamber), March 15, 2002, para. 77: “This Trial Chamber . . . does not . . . accept the validity of the distinction which Trial Chamber I [*Krstic*] has sought to draw between a co-perpetrator and an accomplice. This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadic*, that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice.”

iv) mental state (*mens rea*)

(1) if the crime fell within the joint criminal enterprise

(a) must prove common state of mind for co-perpetrator

Krstic, (Trial Chamber), August 2, 2001, para. 613: “If the crime charged fell within the object of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 68-69: For *mens rea* as to joint criminal enterprise, “[t]he Prosecution must . . . establish that the person charged shared a common state of mind with the person who personally perpetrated the crime charged (the ‘principal offender’) that the crime charged should be carried out, the state of mind required for that crime. Where the Prosecution relies upon proof of state of mind by

inference, that inference must be the only reasonable inference available on the evidence. If the Trial Chamber is not satisfied that the Prosecution has proved that the Accused shared the state of mind required for the commission of any of the crimes in which he is alleged to have participated pursuant to a joint criminal enterprise, it may then consider whether it has nevertheless been proved that the Accused incurred criminal responsibility for any of those crimes as an aider and abettor to their commission.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 284, 271: “[A] co-perpetrator of a joint criminal enterprise shares the intent to carry out the joint criminal enterprise and performs an act or omission in furtherance of the enterprise.” “The shared intent may, and often will, be inferred from knowledge of the plan and participation in its advancement. Acting with such intent – express or inferred – is usually referred to as acting in pursuance of the common criminal design.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 284: “In the case of a continuing crime . . . the shared intent of an accused participating in a criminal enterprise may be inferred from knowledge of the criminal enterprise and continued participation, if the participation is significant in position or effect.”

See also *Tadić*, (Appeals Chamber), July 15, 1999, para. 204, for discussion of *mens rea* required for three categories of common design discussed in Section (V)(e)(ii).

(b) must prove knowing assistance for an aider or abettor

Kvočka et al., (Trial Chamber), November 2, 2001, para. 271: “[L]iability on the basis of a joint criminal enterprise requires a knowing assistance or encouragement for an aider or abettor. . . .”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 284: “[A]n aider or abettor of the joint criminal enterprise need only be aware that his or her contribution is assisting or facilitating a crime committed by the joint criminal enterprise.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 284: “An aider or abettor need not necessarily share the intent of the co-perpetrators.”

(2) if the crime went beyond the enterprise, need to prove that the accused was aware that the further crime was a possible consequence and that, with that awareness, he participated in that enterprise

Krstić, (Trial Chamber), August 2, 2001, para. 613: “If the crime charged went beyond the object of the joint criminal enterprise, the prosecution needs to establish only that the

accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise.”

See also *Tadic*, (Appeals Chamber), July 15, 1999, para. 228, for discussion of *mens rea* required for the third category of common design discussed in Section (V)(e)(ii).

(3) where crime requires special intent, must prove such intent

Kvočka et al., (Trial Chamber), November 2, 2001, para. 288: “Where the crime requires special intent, such as the crime of persecution . . . the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-perpetrator.”

v) difference between participating in a joint criminal enterprise, and aiding and abetting a joint criminal enterprise

(1) generally

Kvočka et al., (Trial Chamber), November 2, 2001, para. 285, 287: “Depending on the level and nature of participation, the accused is either an aider and abettor or a co-perpetrator of the criminal enterprise.” “The level of participation necessary to render someone a participant in a joint criminal enterprise is less than the level of participation necessary to graduate an aider or abettor to a co-perpetrator of that enterprise.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 312: “The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.”

(2) mental state (*mens rea*) compared

See Sections (V)(e)(iv)(1)(a) and (b), ICTY Digest.

(3) when an aider or abettor becomes a co-perpetrator

Kvočka et al., (Trial Chamber), November 2, 2001, para. 284-285: “Eventually, an aider or abettor, one who assists or facilitates the criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes, if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise. By sharing the intent of the joint criminal enterprise, the aider or abettor becomes a co-perpetrator. When . . . an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator.” “Once the evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becomes a co-perpetrator.”

(4) application: participation in operation of a detention facility

Kvočka et al., (Trial Chamber), November 2, 2001, para. 306: “[W]hen a detention facility is operated in a manner which makes the discriminatory and persecutory intent of the operation patently clear, anyone who knowingly participates in any significant way in the operation of the facility or assists or facilitates its activity, incurs individual criminal responsibility for participation in the criminal enterprise, either as a co-perpetrator or an aider and abettor, depending upon his position in the organizational hierarchy and the degree of his participation.”

VI) COMMAND RESPONSIBILITY (ARTICLE 7(3))

a) Statute

ICTY Statute, Article 7(3):

“The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

b) Elements

Kordić and Cerkez, (Trial Chamber), February 26, 2001, para. 401: “[T]hree elements must be proved before a person may incur superior responsibility for the crimes committed by subordinates: (1) the existence of a relationship of superiority and subordination between the accused and the perpetrator of the underlying offence; (2) the mental element, or knowledge of the superior that his subordinate had committed or was about to commit the crime; (3) the failure of the superior to prevent the commission of the crime or to punish the perpetrators.”

Blaskić, (Trial Chamber), March 3, 2000, para. 294: “[F]or a conviction under Article 7(3) of the Statute in the present case, proof is required that: (1) there existed a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime; (2) the accused knew or had reason to know that the crime was about to be or had been committed; and (3) the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.” *See also Mucić et al.*, (Trial Chamber), November 16, 1998, para. 346.

Aleksovski, (Appeals Chamber), March 24, 2000, para. 76: “Article 7(3) provides the legal criteria for command responsibility, thus giving the word ‘commander’ a juridical

meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.”

i) the existence of a superior-subordinate relationship (element 1)

(1) the superior-subordinate relationship

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 396: “A superior-subordinate relationship must exist for the recognition of [command responsibility].”

(a) relationship to subordinate may be direct or indirect, including command of informal structures

Mucic et al., (Appeals Chamber), February 20, 2001, para. 248-268: “[T]he superior-subordinate relationship is based on the notion of control within a hierarchy and that this control can be exercised in a direct or indirect manner, with the result that the superior-subordinate relationship itself may be both direct and indirect.” “The Appeals Chamber regards the Trial Chamber as having recognised the possibility of both indirect as well as direct relationships subordination and agrees that this may be the case, with the proviso that effective control must always be established.” “The requirement of the existence of a “superior-subordinate relationship” which, in the words of the Commentary to Additional Protocol I, should be seen “in terms of a hierarchy encompassing the concept of control,” is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined. It is the Trial Chamber’s conclusion . . . that persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so.”

Mucic et al., (Appeals Chamber), February 20, 2001, para. 193: “Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment.”

Blaskic, (Trial Chamber), March 3, 2000, para. 301: “[A] commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them.”

For discussion of “effective control,” see Section (VI)(b)(i)(1)(e), ICTY Digest.

(b) relationship between commander and his subordinates need not be formalized

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 397: “The relationship between the commander and his subordinates need not have been formalized; a tacit or implicit understanding between them as to their positioning *vis-à-vis* one another is sufficient.”

(c) analyze reality of the authority/actual tasks performed

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 419-424: “A starting point will be the official position held by the accused. Actual authority however will not be determined by looking at formal positions only. Whether *de jure* or *de facto*, military or civilian, the existence of a position of authority will have to be based upon an assessment of the reality of the authority of the accused.” “A formal position of authority may be determined by reference to official appointment or formal grant of authority.” “The capacity to sign orders will be indicative of some authority. The authority to issue orders, however, may be assumed *de facto*.” “A superior status, when not clearly spelled out in an appointment order, may be deduced through an analysis of the actual tasks performed by the accused in question.”

(d) the giving of orders or exercise of powers generally attached to a military command are strong indications an individual is a commander, but are not the sole relevant factors

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 397: “The giving of orders or the exercise of powers generally attached to a military command are strong indications that an individual is indeed a commander. But these are not the sole relevant factors.”

(e) effective control required: the ability to prevent and punish the crimes

Mucic et al., (Appeals Chamber), February 20, 2001, para. 256: “The concept of effective control over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.”

Blaskic, (Trial Chamber), March 3, 2000, para. 335: A “superior” is “a person exercising ‘effective control’ over his subordinates.”

Blaskic, (Trial Chamber), March 3, 2000, para. 300-302: “[I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.” “[A] commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them. Although . . . ‘actual ability’ of a commander is a relevant criterion, the commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 416: “[O]nly those superiors, either *de jure* or *de facto*, military or civilian, who are clearly part of a chain of command, either directly or indirectly, with the actual power to control or punish the acts of subordinates may incur criminal responsibility.”

(f) temporary nature of military unit or ad hoc command do not exclude relationship

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 399: “Both those permanently under an individual’s command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, *at the time when the acts charged in the Indictment were committed*, these persons were under the effective control of that particular individual.”

(g) may be *de jure* or *de facto* power to control

Mucic et al., (Appeals Chamber), February 20, 2001, para. 192-194: “Under Article 7(3), a commander or superior is . . . the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate’s crime or to punish the perpetrators of the crime after the crime is committed.” “The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of

accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment.” “[W]hereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.”

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 396: “[A] relationship cannot be determined by reference to formal status alone. Accordingly, formal designation as a commander is not necessary for establishing command responsibility, as such responsibility may be recognised by virtue of a person’s *de facto*, as well as *de jure*, position as a commander.”

Aleksovski, (Trial Chamber), June 25, 1999, para. 76: “Superior responsibility is thus not reserved for official authorities. Any person acting *de facto* as a superior may be held responsible under Article 7(3). The decisive criterion in determining who is a superior according to customary international law is not only the accused’s formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control. ‘[T]he factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. [F]ormal designation as a commander should not be considered to be a necessary prerequisite for superior responsibility to attach, as such responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure*, position as a commander.”

Blaskic, (Trial Chamber), March 3, 2000, para. 300: “[I]n order for Article 7(3) of the Statute to apply, the accused must be in a position of command. This principle is not limited to individuals formally designated commander but also encompasses both *de facto* and *de jure* command.”

(h) degree of *de facto* authority must be equivalent to *de jure* authority

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 416: “The Appeals Chamber [in *Mucic et al.*] found that the degree of *de facto* authority or powers of control required under the doctrine of superior responsibility is equivalent to that required based upon *de jure* authority: Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts.”

(2) two or more superiors may be held responsible

Krnjelac, (Trial Chamber), March 15, 2002, para. 93: “Two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.”

Blaskic, (Trial Chamber), March 3, 2000, para. 303: “[T]he test of effective control exercised by the commander implies that more than one person may be held responsible for the same crime committed by a subordinate.”

(3) application to civilian leaders: test of effective control

Mucic et al., (Trial Chamber), November 16, 1998, para. 377-378: “[I]t is . . . the Trial Chamber’s conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority. . . .” “[I]n order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character . . . the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 415-416: “While civilians occupying positions of authority in relation to a portion of a territory may be held responsible under the principle of superior responsibility, they will incur criminal responsibility only if they are found to possess the necessary powers of control over the actual perpetrators.” “[A] government official will only be held liable under the doctrine of command responsibility if he was part of a superior-subordinate relationship, even if that relationship is an indirect one. Even though arguably effective control may be achieved through substantial influence, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective control over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes. A showing that the official merely was generally an influential person will not be sufficient.”

Compare Aleksovski, (Trial Chamber), June 25, 1999, para. 78: “[A] civilian must be characterised as a superior pursuant to Article 7(3) if he has the ability *de jure* or *de facto* to issue orders to prevent an offence and to sanction the perpetrators thereof.” “A civilian’s sanctioning power must however be interpreted broadly.” “It cannot be

expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position.” “[T]he superior’s ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.”

ii) mental state (*mens rea*) (element 2)

Blaskic, (Trial Chamber), March 3, 2000, para. 294: The second element is that “the accused knew or had reason to know that the crime was about to be or had been committed. . . .”

(1) actual knowledge

(a) knowledge may be proven through direct or circumstantial evidence

Blaskic, (Trial Chamber), March 3, 2000, para. 307: “Knowledge may not be presumed. However, ‘knowledge’ may be proved through either direct or circumstantial evidence.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 427: “Actual knowledge, which may be defined as the awareness that the relevant crimes were committed or were about to be committed, may be established through direct or circumstantial evidence. Circumstantial evidence will allow for an inference that the superior ‘must have known’ of subordinates’ criminal acts.”

(b) evidence required to demonstrate actual knowledge may differ based on position of authority

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 428: “Depending on the position of authority held by a superior, whether military or civilian, *de jure* or *de facto*, and his level of responsibility in the chain of command, the evidence required to demonstrate actual knowledge may be different. [T]he actual knowledge of a military commander may be easier to prove considering the fact that he will presumably be part of an organised structure with established reporting and monitoring systems. In the case of *de facto* commanders of more informal military structures, or of civilian leaders holding *de facto* positions of authority, the standard of proof will be higher.”

Blaskic, (Trial Chamber), March 3, 2000, para. 308: “[A]n individual’s command position *per se* is a significant indicium that he knew about the crimes committed by his subordinates.”

(c) the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 72: “Considering geographical and temporal circumstances . . . the more physically distant the superior was from the commission of the crimes, the more additional indicia are necessary to prove that he knew of the crimes. On the other hand, if the crimes were committed next to the superior’s duty-station this suffices as an important indicium that the superior had knowledge of the crimes, even more if the crimes were repeatedly committed.”

(d) other indicia of knowledge

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 427: “[T]he indicia [for determining when circumstantial evidence will allow for an inference that the superior ‘must have known’ of the subordinates’ criminal acts] listed by the United Nations Commission of Experts may be used when making such a determination: the number, type, and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; their widespread occurrence; the tactical tempo of operations; the modus operandi of similar illegal acts; the officers and staff involved and the location of the commander at that time.”

(2) reason to know

(a) analyze whether superior had information which would put him on notice

Mucic et al., (Appeals Chamber), February 20, 2001, para. 222-241: “A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he ‘had reason to know.’ As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. Finally, the relevant information only needs to have been provided or available to the superior, or . . . ‘in the possession of.’ It is not required that he actually acquainted himself with the information. [A]n assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.” “[A] superior will be criminally responsible through the principles of superior responsibility

only if information was available to him which would have put him on notice of offences committed by subordinates.”

(b) commander who exercises due diligence distinguished from situation where the absence of knowledge results from negligence

Blaskic, (Trial Chamber), March 3, 2000, para. 332: “[I]f a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties. . . .”

iii) the failure of the superior to take the necessary and reasonable measures to prevent or punish (element 3)

Blaskic, (Trial Chamber), March 3, 2000, para. 294: The third element is that “the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.”

(1) measures required are limited to what is feasible, but commander must use every means in his power

Krnjelac, (Trial Chamber), March 15, 2002, para. 95: “The measures required of the superior are limited to those which are feasible in all the circumstances and are ‘within his power.’ A superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 441, 445: “Article 7(3) of the Statute establishes a duty to prevent a crime that a subordinate was about to commit or to punish such a crime after it is committed, by taking ‘necessary and reasonable measures.’” “[A] superior has discharged his duty to prevent or punish if he uses every means in his powers to do so. Such a determination will be based on the circumstances of each case.”

(2) degree of effective control will determine what is required

Blaskic, (Trial Chamber), March 3, 2000, para. 335: “[I]t is a commander’s degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator. [T]his implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.”

(3) cannot make up for failure to prevent crime by punishing subordinates afterwards

Blaskic, (Trial Chamber), March 3, 2000, para. 336: “[T]he obligation to ‘prevent or punish’ does not provide the accused with two alternative and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.”

(4) when duties arise

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 445-446: “The duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinate crimes.” “The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 317: “Action is required on the part of the superior from the point at which he ‘knew or had reason to know’ of the crimes committed or about to be committed by subordinates.”

(5) what the duty to punish entails

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 446: “This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.”

(6) superior need not be the person who dispenses punishment, but must take important step in disciplinary process

Kvočka et al., (Trial Chamber), November 2, 2001, para. 316: “The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process.”

(7) civilian superiors are under similar obligations

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 446: “Civilian superiors would be under similar obligations [as military superiors regarding the duty to prevent or punish], depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action.”

c) Superior responsibility is not a form of strict liability

Mucic et al., (Appeals Chamber), February 20, 2001, para. 197, 239: “The doctrine of command responsibility is ultimately predicated upon the power of the superior to

control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine.” “[C]ommand responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he ‘knew or had reason to know’ about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 369: “Liability under Article 7(3) is based on an omission as opposed to positive conduct. It should be emphasised that the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he ‘knew or had reason to know’ of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability.”

VII) AFFIRMATIVE DEFENSES

a) Duress does not afford a complete defense

Prosecutor v. Erdemovic, Case No. IT-96-22 (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 55, 66, 72, 75, 88: The justices held that “no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings.” In the absence of a customary rule, the justices examined “the general principles of law recognized by civilised nations” and held that there is “a general principle of law recognised by civilised nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress,” with the term “duress” meaning “imminent threats to the life of an accused if he refuses to commit a crime.” However, the justices held that “[i]t is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons.” The justices expressed concern that “in relation to the most heinous crimes known to humankind, the principles of law to which we [the ICTY] give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations,” and concluded that “international law . . . cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale.” The justices held that “duress cannot afford a complete defence to a soldier charged with

crimes against humanity or war crimes in international law involving the taking of innocent lives. We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined.” (Judge Li, in a Separate and Dissenting Opinion, concurred with Judges McDonald and Vohrah regarding the issue of duress.)

See also discussion of duress and sentencing, Section (X)(b)(iii)(4)(d), ICTY Digest.

b) *Tu quoque* principle rejected: the argument that the adversary committed similar crimes is not a valid defense

Kupreskic et al., (Trial Chamber), January 14, 2000, para. 51, 515-520: The argument at issue “amount[s] to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent.” However, “the *tu quoque* defence has no place in contemporary international humanitarian law.” The Trial Chamber rejected the *tu quoque* principle as it is “fallacious and inapplicable” in international humanitarian law. It has been “universally rejected” and “flawed in principle” since “[i]t envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations.” Rather, “the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity.”

c) Involvement in defensive operation is not a defense

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 448-452: “[T]he involvement of a person in a ‘defensive operation’ does not ‘in itself’ constitute a ground for excluding criminal responsibility.”

d) Diminished mental responsibility is not a defense

Vasiljevic, (Trial Chamber), November 29, 2002, para. 282: “[T]he issue of diminished mental responsibility is relevant only to the sentence to be imposed. It is not a defence that if established would lead to the acquittal of the Accused.”

Mucic et al., (Appeals Chamber), February 20, 2001, para. 590: “The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant’s diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense.”

See also discussion of diminished mental responsibility and sentencing, Section (X)(b)(iii)(4)(f), ICTY Digest.

VIII) JURISDICTION

a) Generally

Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 2, 36, 40, 47, 64, 145-146: Dusko Tadic challenged the jurisdiction and the lawfulness of the existence of the ICTY on three different grounds: (1) illegal foundation of the ICTY; (2) wrongful primacy of the ICTY over national courts; and (3) lack of subject-matter jurisdiction. The Appeals Chamber found that the ability of a judicial or arbitral tribunal “to determine its own jurisdiction” is “a major part, of [its] incidental or inherent jurisdiction.” The Appeals Chamber held that the establishment of the ICTY fell squarely within the powers of the Security Council under Article 41 of the United Nations Charter, that the ICTY had been lawfully established as a measure under Chapter VII of the Charter and that the ICTY had been “established by law.” The Appeals Chamber determined that there had been a threat to the peace in the former Yugoslavia justifying the Security Council's invocation of Chapter VII of the Charter and, further, that Article 41 of Chapter VII served as an appropriate legal basis for establishing an international criminal tribunal. The Appeals Chamber dismissed the second ground of Tadic's appeal as ill-founded and held that the tribunal had subject-matter jurisdiction over the case at hand.

IX) ETHICS

a) Contempt proceedings

i) Tribunal possesses “inherent jurisdiction” to deal with contempt

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), January 31, 2000, para. 13, 14, 26: Contempt proceedings were brought against Milan Vujin, former counsel for Dusko Tadic. In resolving the issue, the Appeals Chamber discussed where the ICTY finds its authority to deal with contempt proceedings and to punish those individuals it finds guilty of contempt. The Appeals Chamber held that although “[t]here is no mention in the Tribunal's Statute of its power to deal with contempt” it does “however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.” This “inherent jurisdiction” “is adequately encompassed by the wording . . . in Rule 77.”

ii) contempt imposed for putting forward a case known to be false in material respects and manipulating witnesses

Tadic, (Appeals Chamber), January 31, 2000, para. 134, 160, 166, 167, 174: In finding Milan Vujin, Dusko Tadic's former counsel, in contempt, the Appeals Chamber held that Vujin "put forward a case . . . that he knew to be false in material respects" and that he "manipulated Witnesses A and B by seeking to avoid any identification by them in statements of their evidence of persons who may have been responsible for the crimes for which Tadic had been convicted." The Appeals Chamber held the contempt to be "serious" because Vujin's "conduct ha[d] been against the interests of his client," which "strikes at the very heart of the criminal justice system." The Appeals Chamber ordered Vujin "to pay a fine of Dfl 15,000 to the Registry of the Tribunal" and directed the Registrar "to consider striking" his name "off the list of assigned counsel" and report "his conduct . . . to the professional body to which he belongs." Vujin appealed this judgment and on February 27, 2001, the Appeals Chamber dismissed his appeal and affirmed the Appeals Chamber's judgment in first instance. On June 8, 2001, the Registrar ordered Vujin's name to be withdrawn from the list of assigned counsel.

b) Impartiality of judges

i) two-pronged test for judicial bias

Furundzija, (Appeals Chamber), July 21, 2000, para. 189-190: "[T]here is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. [T]he Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute: A. A Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if: i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." "In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the 'reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.'"

ii) high threshold required to rebut the presumption of impartiality

Furundzija, (Appeals Chamber), July 21, 2000, para. 197: "[I]n the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal 'can

disabuse their minds of any irrelevant personal beliefs or predispositions.’ It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the judge] was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality. ‘[D]isqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be firmly established.’”

iii) qualifications that play an integral role in satisfying eligibility requirements do not, in the absence of the clearest contrary evidence, show bias or impartiality

Furundzija, (Appeals Chamber), July 21, 2000, para. 205: “The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements.” “Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.”

iv) application

(1) Judge Mumba’s acting as a representative on the United Nations Commission on the Status of Women not grounds for disqualification

Furundzija, (Appeals Chamber), July 21, 2000, para. 200-202: In evaluating whether Judge Mumba’s acting as a representative of her country on the United Nations Commission on the Status of Women (UNCSW) was grounds for disqualification regarding a case involving rape, the Appeals Chamber stated: “even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW . . . in promoting and protecting the human rights of women, that inclination . . . is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women. [E]ven if Judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations, and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal.” “Concern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape.’ To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.”

**(2) Judge Benito’s membership on the Board of Trustees of the
United Nations Voluntary Fund for the Relief of Victims of
Torture not grounds for disqualification**

Mucic et al., (Appeals Chamber), February 20, 2001, para. 697-699, 707: In dismissing the defendants’ appeal that Trial Judge Odio Benito should be disqualified because of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture, the Appeals Chamber stated: “[t]he relevant question to be determined . . . is . . . whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case. The apprehension of bias must be a reasonable one. Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold in the solemn declaration made when assuming office, that he or she will perform the duties and exercise the powers of such an office ‘honourably, faithfully, impartially and conscientiously.’ [B]y accepting a position on the Board of Trustees, Judge Odio Benito undertook in her personal capacity to further the mandate of the Victims of Torture Fund. . . . As noted in the *Furundzija* Appeal Judgement, personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality. The Appeals Chamber has already emphasised that, as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the reasonable apprehension of bias must be ‘firmly established.’ The reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.”

**v) Judges not disqualified from hearing two or more trials arising out of
the same series of events**

Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2 (Bureau Decision), May 4, 1998, & (Trial Chamber), May 21, 1998: “[I]t is a fundamental right of all persons facing criminal charges to be tried before an independent and impartial tribunal. [T]he Tribunal is guided by the principle that the requirement of impartiality prohibits not only actual bias or prejudice, but also the appearance of partiality. Thus, where the circumstances create a reasonable or legitimate suspicion of prejudice, there may be a basis for disqualification though in fact no actual bias or prejudice exists. However . . . it does not follow that a judge is disqualified from hearing two or more criminal trials arising out [of] the same series of events, where he is exposed to evidence relating to these events in both cases. A judge is presumed to be impartial. The nature of the Tribunal’s jurisdiction is such that the cases before it inevitably overlap. On the one hand, the same issues and the

same evidence are often involved. On the other hand, the Tribunal possesses a finite number of judges.”

X) CHARGING, CONVICTIONS AND SENTENCING

a) Cumulative charging and convictions

i) cumulative charging permitted

Mucic et al., (Appeals Chamber), February 20, 2001, para. 400: “Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 718: “Cumulative charging is permissible according to the practice of the Tribunal, as a Trial Chamber is in a position to evaluate the charges to be retained only after the presentation of the evidence.”

ii) cumulative convictions based on same conduct permitted only where crimes involve materially distinct element

Mucic et al., (Appeals Chamber), February 20, 2001, para. 405, 412: The Appeals Chamber noted that “multiple convictions based on the same acts have sometimes been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase,” but held that “reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.”

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 173: The Appeals Chamber “will be guided by the considerations of justice for the accused: the Appeals Chamber will permit multiple convictions only in cases where the same act or transaction clearly violates two distinct provisions of the Statute and where each statutory provision requires proof of an additional fact which the other does not.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 718: “Multiple convictions for the same conduct are permissible if each offence involved contains materially distinct elements, which requires proof of a fact not required by another offence. . . . In determining whether a provision contains a materially distinct element, all the elements of the offence are to be taken into account, including the chapeau requirements.”

iii) where crimes not materially distinct, convict under the more specific provision

Mucic et al., (Appeals Chamber), February 20, 2001, para. 413: “Where this test [for allowing multiple convictions] is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 718: “In the event that th[e] test [for allowing multiple convictions] is not satisfied, the Chamber must uphold a conviction under the more specific provision.”

iv) application

Jelusic, (Appeals Chamber), July 5, 2001, para. 82: “Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Articles 3 and 5 are permissible.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 503: “Convictions for the crimes enumerated under Articles 3 and 5 based on the same conduct are permissible as each contains a materially distinct element. The materially distinct element required by Article 3 offences is the requirement that there be a close link between the acts of the accused and the armed conflict. That required by Article 5 offences is that the offence be committed within the context of a widespread and systematic attack directed against a civilian population. [C]onvictions for the cruel treatment and persecution charges (pursuant to Articles 3 and 5 respectively) based on the same conduct are permissible and are therefore entered.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 503: “[I]t is clear that neither the crime of imprisonment nor that of inhumane acts [both pursuant to Article 5] contains an element which is materially distinct from the crime of persecution. As persecution requires the materially distinct elements of a discriminatory act and discriminatory intent,

it is the more specific provision. A conviction is therefore entered for persecution, but not for imprisonment and inhumane acts.”

v) cumulative convictions of themselves involve additional punishment

Prosecutor v. Mucic et al., Case No. IT-96-21 (Appeals Chamber), April 8, 2003, para. 25: “It may be accepted that the cumulative convictions of themselves involve an additional punishment – not only by reason of the social stigmatisation inherent in being convicted of that additional crime, but also the risk that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend to some extent upon the number or nature of the convictions entered. The quashing of the cumulative convictions undoubtedly removed the punishment involved in the additional convictions themselves.”

b) Sentencing/penalties

i) instruments governing penalties

(1) ICTY Statute, Article 24: Penalties

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

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

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

(2) Rule 101 of the Rules of Procedure and Evidence, ICTY

“(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

- (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
- (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
- (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.”

ii) generally

(1) sentencing factors

Prosecutor v. Simic, Case No. IT-95-9/2-S (Trial Chamber), October 17, 2002, para. 32: “The factors to be taken into account in determining the sentence for an individual accused are expressed in Article 24 of the Statute and in Rule 101 (B) of the Rules. These include the gravity of the crime, any aggravating or mitigating circumstances as well as the general practice regarding prison sentences in the courts of the former Yugoslavia.”

(2) sentence to reflect gravity of the crime

Mucic et al., (Appeals Chamber), February 20, 2001, para. 731: “The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. [T]he gravity of the offence is the primary consideration in imposing [the] sentence.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 718: “[A] consideration in the imposition of sentence is the gravity of the offence. The Appeal Chamber has held that it is a factor of primary importance. A ‘consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime’ is required in determining the gravity of the crime.”

(3) “totality principle”/discretion to impose global, concurrent, consecutive, or a mixture of concurrent and consecutive sentences

Mucic et al., (Appeals Chamber), February 20, 2001, para. 428-430: “If . . . a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider

the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently. It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive. In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle), or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate. [T]he overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber."

Mucic et al., (Appeals Chamber), April 8, 2003, para. 46: "[S]entencing in relation to more than one offence involves more than just an assessment of the appropriate period of imprisonment for each offence and the addition of all such periods so assessed as a simple mathematical exercise. The total single sentence, or the effective total sentence where several sentences are imposed, must reflect the totality of the offender's criminal conduct but it must not exceed that totality. Where several sentences are imposed, the result is that the individual sentences must either be less than they would have been had they stood alone or they must be ordered to be served either concurrently or partly concurrently."

(a) application

Blaskic, (Trial Chamber), March 3, 2000, para. 805-807: "[T]he provisions of Rule 101 of the Rules do not preclude the passing of a single sentence for several crimes." "Here, the crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span, the very length of which served to ground their characterisation as a crime against humanity, without its being possible to distinguish criminal intent from motive. [C]rimes other than the crime of persecution brought against the accused rest fully on the same facts as those specified under the other crimes for which the accused is being prosecuted. [T]he Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty."

(4) goal of penalties

(a) goals are deterrence and retribution

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 739: “Deterrence and retribution are the underlying principles in relation to the sentencing of an individual by the Tribunal. While retribution entails a proportionate punishment for the offence committed, deterrence ensures that the penalty imposed will dissuade others from commission of such crimes.”

Furundzija, (Trial Chamber), December 10, 1998, para. 288: “The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.”

Simic, (Trial Chamber), October 17, 2002, para. 33: “[T]he jurisprudence of the Tribunal, . . . supports deterrence and retribution as the main general sentencing factors. The Trial Chamber understands this to mean that first, the penalty imposed must be proportionate to the gravity of the crime and the degree of responsibility of the offender, and second, such penalty must have sufficient deterrent value to ensure that those who would consider committing like crimes will be dissuaded from so doing, and consequently contributing to respect of the rule of law and promoting an acknowledgement of the harm done to the victims.”

(b) deterrence must not be accorded undue prominence

Aleksovski, (Appeals Chamber), March 24, 2000, para. 185: The Appeals Chamber accepted the “general importance of deterrence as a consideration in sentencing for international crimes,” but stated that “this factor [deterrence] must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal. An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.”

Mucic et al., (Appeals Chamber), February 20, 2001, para. 801: “[O]ne of the purposes of the Tribunal, in ‘bringing to justice’ individuals responsible for serious violations of international humanitarian law, is to deter future violations. With regard to the impact of deterrence on punishment, the Appeals Chamber has already accepted ‘the general importance of deterrence as a consideration in sentencing for international crimes.’ Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.”

Prosecutor v. Tadic, Case No. IT-94-1 (Appeals Chamber), January 26, 2000, para. 48: “The Appeals Chamber accepts that this [the principle of deterrence] is a consideration that

may legitimately be considered in sentencing. Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.”

(c) rehabilitation is a relevant factor, but cannot play a predominant role

Mucic et al., (Appeals Chamber), February 20, 2001, para. 806: “Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a predominant role in the decision-making process of a Trial Chamber of the Tribunal. On the contrary, the Appeals Chamber (and Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution. Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight.”

(d) public reprobation and stigmatization

Blaskic, (Trial Chamber), March 3, 2000, para. 761-764: “[T]he International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.’ [S]uch reasoning is not applicable only to crimes against humanity but also to war crimes and other serious violations of international humanitarian law.”

(5) consistency of sentences; yet individualized sentencing

(a) consistency of sentences

Mucic et al., (Appeals Chamber), February 20, 2001, para. 756-757: “One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice.” “This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increase, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar. When such a range or pattern has appeared, a Trial Chamber would be obliged to consider that range or pattern of sentences, without being bound by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal’s administration of criminal justice.” “At the present time, therefore, in order to avoid any unjustified disparity, it is possible for the

Tribunal to have regard only to those sentences which have been imposed by it in generally similar circumstances as to both the offences and the offenders. It nevertheless must do so with considerable caution. [C]omparisons with sentences imposed in other cases will be of little assistance unless the circumstances of the cases are substantially similar. However, in cases involving similar factual circumstances and similar convictions, particularly where the sentences imposed in those other cases have been the subject of consideration in the Appeals Chamber, there should be no substantial disparity in sentence unless justified by the circumstances of particular accused.”

(b) a sentence should not be capricious or excessive

Jelisić, (Appeals Chamber), July 5, 2001, para. 96: “Whether the practice [of sentencing] of the Tribunal is far enough advanced to disclose a pattern is not clear. [A] sentence should not be capricious or excessive. . . .” “[I]n principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which [the] sentence should be assessed, as prescribed by the Statute and set out in the Rules. But it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case.”

(c) sentence must be individualized

Jelisić, (Appeals Chamber), July 5, 2001, para. 101: “[T]he sentence imposed by the Trial Chamber must be individualised and it is generally not useful to compare one case to another unless the cases relate to the same offence committed in substantially similar circumstances.”

(d) no established “penal regime” regarding sentencing

Furundžija, (Appeals Chamber), July 21, 2000, para. 237: “It is . . . premature to speak of an emerging ‘penal regime,’ and the coherence in sentencing practice that this denotes. It is true that certain issues relating to sentencing have now been dealt with in some depth; however, still others have not yet been addressed. [A]t this stage, it is not possible to identify an established ‘penal regime.’ Instead, due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case.”

(e) factors for why different sentences might be imposed for same type of crime

Furundzija, (Appeals Chamber), July 21, 2000, para. 249-250: “In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness. While acts of cruelty that fall within the meaning of Article 3 of the Statute will, by definition, be serious, some will be more serious than others. ‘[T]he sentence imposed must reflect the inherent gravity of the accused’s criminal conduct.’” “The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules.”

(6) taking account of sentencing practices in the former Yugoslavia: should be considered, but not controlling

Mucic et al., (Appeals Chamber), February 20, 2001, para. 813, 816: “Article 24(1) of the Statute provides that, in determining sentence[s], ‘Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.’ The question of whether or not this ‘recourse’ should be of a binding nature has been consistently and uniformly interpreted by the Tribunal. It is now settled practice that, although a Trial Chamber should ‘have recourse to’ and should ‘take into account’ this general practice regarding prison sentences in the courts of the former Yugoslavia, this ‘does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.’ Trial Chambers are not bound by the practice of courts in the former Yugoslavia in reaching their determination of the appropriate sentence for a convicted person. This principle applies to offences committed both before and after the Tribunal’s establishment.”

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 377: “[A] Trial Chamber must consider, but is not bound by, the sentencing practice in the former Yugoslavia. It is only where that sentencing practice is silent or inadequate in light of international law that a Trial Chamber may consider an approach of its own.”

Jelisić, (Appeals Chamber), July 5, 2001, para. 116-117: “[T]he Tribunal may be informed in an appropriate case by the sentencing practices of the courts of one or more of the constituent republics of the former Yugoslavia where it has reason to believe that such specific consideration would aid it in appreciating ‘the general practice [. . .] in the courts of the former Yugoslavia.’ The latter phrase is obviously to be taken as a whole; individual divergences from the norm in particular republics do not show the ‘general practice.’” “[G]eneral practice’ provides general guidance and does not bind a Trial

Chamber to act exactly as a court of the former Yugoslavia would. For example, even if the general practice were otherwise, this would not prohibit the imposition of a sentence of life imprisonment; *a fortiori*, it would not stand in the way of a sentence of 40 years' imprisonment."

Tadic, (Appeals Chamber), January 26, 2000, para. 21: "The jurisprudence of this Tribunal has consistently held that, while the law and practice of the former Yugoslavia shall be taken into account by the Trial Chambers for the purposes of sentencing, the wording of Sub-rule 101(A) of the Rules, which grants the power to imprison for the remainder of a convicted person's life, itself shows that a Trial Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system."

Blaskic, (Trial Chamber), March 3, 2000, para. 759-760: "[T]he Trial Chamber has recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia. Reference to the practice is only indicative and not binding. Whenever possible, the Tribunal examines the texts and relevant judicial practice of the former Yugoslavia. However, it could not be legally bound by them in determining the sentences and sanctions it imposes for crimes falling under its jurisdiction. [T]he Trial Chamber is not limited by the practice of the courts of the former Yugoslavia and it may draw upon other legal sources in order to determine the appropriate sentence."

(a) domestic sentencing practices, other than those of the courts of the former Yugoslavia, are of little assistance

Mucic et al., (Appeals Chamber), February 20, 2001, para. 758: "The offences which the Tribunal tries are of such a nature that there is little assistance to be gained from sentencing patterns in relation to often fundamentally different offences in domestic jurisdictions, beyond that which the Tribunal gains from the courts of the former Yugoslavia in accordance with Article 24 of the Tribunal's Statute."

(7) ranking of crimes

(a) whether genocide is the most serious crime

Krstic, (Trial Chamber), August 2, 2001, para. 700: "It can . . . be argued . . . [that] genocide is the most serious crime because of its requirement of the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. In this sense, even though the criminal acts themselves involved in a genocide may not vary from those in a crime against humanity or a crime against the laws and customs of war, the convicted person is, because of his specific intent, deemed to be more blameworthy. However, this does not rule out the Trial Chamber's duty to decide on the appropriate punishment according to the facts of each case."

Compare Blaskic, (Trial Chamber), March 3, 2000, para. 800-802: “The ICTR has . . . supposedly established a genuine hierarchy of crimes” with genocide being the “crime of crimes,” but “[t]he ICTY has not yet transposed this hierarchy of crimes to the sentencing phase. [I]t appears that the case-law of the [ICTY] is not fixed.”

**(b) whether there is a distinction between the seriousness of a
crime against humanity and a war crime**

Furundzija, (Appeals Chamber), July 21, 2000, para. 247: “[T]here is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter. It follows that the length of sentences imposed for crimes against humanity does not necessarily limit the length of sentences imposed for war crimes.”

Tadic, (Appeals Chamber), January 26, 2000, para. 69: “[T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.”

But see Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 20-21: “[A] punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime.” “It is in their very nature that crimes against humanity differ in principle from war crimes. Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator’s conduct not only towards the immediate victim but also towards the whole of humankind.” “Crimes against humanity are particularly odious forms of misbehaviour and in addition form part of a widespread and systematic practice or policy. Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location.” “This aspect of crimes against humanity as injuring a broader interest than that of the immediate victim and therefore as being of a more serious nature than war crimes is shown by the intrinsic elements of the offence of a crime against humanity.”

(c) no rule that crimes resulting in loss of life should be punished more severely than those not leading to loss of life

Furundzija, (Appeals Chamber), July 21, 2000, para. 246: The Appeals Chamber considers “the view that crimes resulting in loss of life are to be punished more severely than those not leading to the loss of life” “to be too rigid and mechanistic.”

But see Mucic et al., (Appeals Chamber), February 20, 2001, para. 732: Regarding command responsibility, “[a] failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.”

(8) sentence can be lengthened if discernible error

Aleksovski, (Appeals Chamber), March 24, 2000, para. 187: The Appeals Chamber “should not intervene in the exercise of the Trial Chamber’s discretion with regard to sentence unless there is a ‘discernible error.’” The Appeals Chamber held that “there was a discernible error in the Trial Chamber’s exercise of discretion in imposing sentence” and “[t]hat error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1).”

(9) must give credit for time in detention pending trial

Tadic, (Appeals Chamber), January 26, 2000, para. 38, 75: “Under Sub-rule 101(D) the Appellant is entitled to credit for the time spent in custody in the Federal Republic of Germany only for the period pending his surrender to the International Tribunal. However, the Appeals Chamber recognises that the criminal proceedings against the Appellant in the Federal Republic of Germany emanated from substantially the same criminal conduct as that for which he now stands convicted at the International Tribunal. Hence, fairness requires that account be taken of the period the Appellant spent in custody in the Federal Republic of Germany prior to the issuance of the Tribunal’s formal request for deferral.”

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 850: “[A] Trial Chamber must give credit to an accused for the period during which he or she was detained in custody pending trial. . . .”

(10) must order sentence to run from date of judgment

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 850: A trial chamber “must order any sentence to run from the date of Judgement. . . .”

(11) may recommend a minimum sentence to be served before any commutation or sentence reduction

Kordic and Cerkez, (Trial Chamber), February 26, 2001, para. 850: A trial chamber “may recommend a minimum sentence to be served by an accused before any commutation or reduction of sentence is considered.”

(12) factors for assessing gravity of offenses

(a) generally

Prosecutor v. Plavsic, Case No. IT-00-39&40/1 (Trial Chamber), February 27, 2003, para. 52: “The gravity [of offences] is illustrated by: the massive scope and extent of the persecutions; the numbers killed, deported and forcibly expelled; the grossly inhumane treatment of detainees; and the scope of the wanton destruction of property and religious buildings.”

Krnjelac, (Trial Chamber), March 15, 2002, para. 512: “The Trial Chamber considers that [the effects of the crime on relatives of the immediate victims] are irrelevant to the culpability of the offender, and that it would be unfair to consider such effects in determining a sentence. Consideration of the consequences of a crime upon the victim who is directly injured by it is, however, always relevant to the sentencing of the offender. Where such consequences are part of the definition of the offence, they may not be considered as an aggravating circumstance in imposing sentence, but the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences.”

Krstic, (Trial Chamber), August 2, 2001, para. 702: “[T]he Trial Chamber agrees with the Prosecutor that the number of victims and their suffering are relevant factors in determining the sentence and that the mistreatment of women or children is especially significant.”

Krstic, (Trial Chamber), August 2, 2001, para. 703: “[T]he circumstance that the victim detainees were completely at the mercy of their captors, the physical and psychological suffering inflicted upon witnesses to the crime, the ‘indiscriminate, disproportionate, terrifying’ or ‘heinous’ means and methods used to commit the crimes are all relevant in assessing the gravity of the crimes. . . . Appropriate consideration of those circumstances gives ‘a voice’ to the suffering of the victims.”

Kvočka et al., (Trial Chamber), November 2, 2001, para. 702: “[T]he following should be taken into consideration: . . . the repetitious and continuing nature of most of the crimes, . . . the very real fears of witnesses that they would be next, . . . the sexual violence

inflicted upon the women, and the discriminatory nature of the crimes. All are relevant factors in assessing the gravity of the crimes.”

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 352: The Trial Chamber can consider “the factor of the vulnerability of the victims in terms of the gravity of the offences.” “Whether or not the vulnerability of the victim is an element of the crime of rape does not affect its being evidence of the gravity of the crime, which can duly be considered in the course of sentencing.”

(b) regarding offenses committed under Article 7(3)

Mucic et al., (Appeals Chamber), February 20, 2001, para. 732: “The Prosecution first submitted that there are two aspects to an assessment of the gravity of offences committed under Article 7(3) of the Statute: (1) the gravity of the underlying crime committed by the convicted person’s subordinate; and (2) the gravity of the convicted person’s own conduct in failing to prevent or punish the underlying crimes. The Appeals Chamber agrees that these two matters must be taken into account. As a practical matter, the seriousness of a superior’s conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.”

(c) participant in a joint criminal enterprise compared to principal offender

Krnjelac, (Trial Chamber), March 15, 2002, para. 77: “This Trial Chamber does not hold the same view as Trial Chamber I [*Krstic* and *Kvočka et al.*] as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing. There are, for example, circumstances in which a participant in a joint criminal enterprise will deserve greater punishment than the principal offender deserves. The participant who plans a mass destruction of life, and who orders others to carry out that plan, could well receive a greater sentence than the many functionaries who between them carry out the actual killing.”

(13) sentence should reflect the relative significance of the role of the defendant

Tadic, (Appeals Chamber), January 26, 2000, para. 55: “[T]he Trial Chamber’s decision, when considered against the background of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda, fails to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 744: “[T]he sentence imposed should reflect the relative significance of the role of the accused in the context of the conflict in the former Yugoslavia. However, this has been interpreted to mean that even if the position of an accused in the overall hierarchy in the conflict in the former Yugoslavia was low, it does not follow that a low sentence is to be automatically imposed. The requirement that the inherent gravity of the crime be reflected in the sentence was again reiterated in this context.”

(14) double jeopardy impacting on sentence

Aleksovskij, (Appeals Chamber), March 24, 2000, para. 190: In imposing a revised sentence, the Appeals Chamber considered the element of double jeopardy “in that the accused has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress, and also that he has been detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer.”

(15) discretion to impose life imprisonment

Jelusic, (Appeals Chamber), July 5, 2001, para. 100: “[I]t falls within the Trial Chamber’s discretion to impose life imprisonment. The Trial Chamber has a broad discretion as to which factors it may consider in sentencing and the weight to attribute to them.”

iii) aggravating and mitigating factors

(1) generally

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 742: “[T]he Chamber shall take into account the individual circumstances of the convicted person as well as aggravating and mitigating factors. The Appeals Chamber has stated that since the factors to be taken into account for aggravation or mitigation of a sentence have not been defined exhaustively by the Statute and the Rules, a Trial Chamber has a considerable amount of discretion in deciding these factors. The Chamber is obliged to take into account mitigating circumstances when determining the sentence, but the weight to be attached thereto is discretionary.”

(2) burden of proof

Mucic et al., (Appeals Chamber), February 20, 2001, para. 763: “[O]nly those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused’s sentence or taken into account in aggravation of that sentence.”

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 847: “[F]airness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt,

and that the Defence needs to prove mitigating circumstances only on the balance of probabilities.”

Simic, (Trial Chamber), October 17, 2002, para. 40: “Mitigating circumstances need only be proven on the balance of probabilities and not beyond a reasonable doubt.”

(3) aggravating factors

(a) position of the accused

Tadic, (Appeals Chamber), January 26, 2000, para. 55-56: The Appeals Chamber held that, when sentencing, the Trial Chamber needs “to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.” “Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.”

Plavsic, (Trial Chamber), February 27, 2003, para. 57: “The Trial Chamber accepts that the superior position of the accused is an aggravating factor in the case. The accused was not in the very first rank of the leadership: others occupied that position. She did not conceive the plan which led to this crime and had a lesser role in its execution than others. Nonetheless, Mrs. Plavsic was in the Presidency, the highest civilian body, during the campaign and encouraged and supported it by her participation in the Presidency and her pronouncements.”

Simic, (Trial Chamber), October 17, 2002, para. 67: “[W]hile [Milan Simic] was not charged as a superior per se, his position of authority is nonetheless relevant, as an aggravating factor. Considering his position, Milan Simic’s participation in the torture of the detainees . . . must have left the impression on those present with him in the primary school at the time that this type of conduct was permissible, or even, encouraged.”

Prosecutor v. Sikirica et al., Case No. IT-95-8 (Trial Chamber), November 13, 2001, para. 138-139: “Dusko Sikirica has admitted to being ‘Commander of Security’ at the Keraterm camp and, as such, that there was a ‘technical duty upon him to prevent the entry of persons from outside the camp.’” “Dusko Sikirica’s failure in his duty to prevent outsiders from coming into the camp to mistreat the detainees is an aggravating factor.”

Sikirica et al., (Trial Chamber), November 13, 2001, para. 172: “Damir Dosen’s position as shift leader is an aggravating factor in relation to this crime. He was in a position of trust which he abused: he permitted the persecution of, and condoned violence towards, the very people he should have been protecting.”

Krstic, (Trial Chamber), August 2, 2001, para. 709: “A high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own. The consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes.”

Kumarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 863: “[T]he criminal culpability of those leading others is higher than those who follow.”

Blaskic, (Trial Chamber), March 3, 2000, para. 788: “[T]here can be no doubt that command position may justify a harsher sentence.” A “command position” is classified “as an aggravating circumstance.” “Command position must . . . systematically increase the sentence or at least lead the Trial Chamber to give less weight to the mitigating circumstances, independently of the issue of the form of participation in the crime.”

(b) active and direct criminal participation

Krstic, (Trial Chamber), August 2, 2001, para. 708: “Direct criminal participation under Article 7(1), if linked to a high-rank position of command, may be invoked as an aggravating factor. [B]oth Tribunals have mentioned the three most direct forms of participation, ‘planning, ordering, instigating,’ as possible aggravating circumstances. So it is in the case of genocide. Because an accused can commit genocide without the aid and co-operation of others, provided he has the requisite intent, a one-man genocidal agent could be viewed differently from the commander of an army or the president of a State, who has enlisted the resources of an army or a nation to carry out his genocidal effort.”

Blaskic, (Trial Chamber), March 3, 2000, para. 790-791: “Active and direct participation in the crime means that the accused committed by his own hand all or some of the crimes with which he is charged. Direct participation in the crime is accordingly an aggravating circumstance which will more often than not be held against the actual perpetrators rather than against the commanders.” “[C]ommand position is more of an aggravating circumstance than direct participation.”

(c) role as fellow perpetrator

Furundzija, (Trial Chamber), December 10, 1998, para. 281: “[T]he accused's role in the tortures was that of fellow perpetrator. His function was to interrogate Witness A in the large room and later in the pantry where he also interrogated Witness D, while both were being tortured by Accused B. In such situations, the fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering.”

(d) discriminatory state of mind

Vasiljevic, (Trial Chamber), November 29, 2002, para. 277-278: “[A] discriminatory state of mind goes to the seriousness of the offence, but it may not additionally aggravate that offence. A discriminatory state of mind may however be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element. . . . [T]he existence of such a state of mind is relevant to the sentence to be imposed either as an ingredient of that crime or as a matter of aggravation where it is not such an ingredient.”

Todorovic, (Trial Chamber), July 31, 2001, para. 57: “[T]he crime of persecution, on account of its distinctive features, is a particularly serious crime. . . . Since a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorovic’s criminal conduct is already encompassed in a consideration of the offence. [I]t should not be treated separately as an aggravating factor.”

(e) informed, voluntary, willing or enthusiastic participation in crime

Blaskic, (Trial Chamber), March 3, 2000, para. 792: “Informed and voluntary participation means that the accused participated in the crimes fully aware of the facts. The importance of this factor varies in case-law depending on the degree of enthusiasm with which the accused participated. Informed participation is consequently a less aggravating circumstance than willing participation. Not only does the accused’s awareness of the criminality of his acts and their consequences and of the criminal behaviour of his subordinates count but also his willingness and intent to commit them. Once such intent is established, it is likely to justify an additional aggravation of the sentence.”

Prosecutor v. Tadic, Case No. IT-94-1 (Trial Chamber), November 11, 1999, para. 20: “Consideration must also be given to the willingness of Dusko Tadic to commit the crimes and to participate in the attack. . . .”

(f) premeditation and motive

Krstic, (Trial Chamber), August 2, 2001, para. 711: “Premeditation may ‘constitute an aggravating circumstance when it is particularly flagrant’ and motive ‘to some extent [is] a necessary factor in the determination of sentence after guilt has been established.’ When a genocide or a war crime, neither of which requires the element of premeditation, are in fact planned in advance, premeditation may constitute an aggravating circumstance. Premeditated or enthusiastic participation in a criminal act necessarily reveals a higher level of criminality on the part of the participant. In determining the appropriate sentence, a distinction is to be made between the individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who

initiated or aggravated it and thereby more substantially contributed to the overall harm.”

Blaskic, (Trial Chamber), March 3, 2000, para. 785: “The motive of the crime may also constitute an aggravating circumstance when it is particularly flagrant. Case-law has borne in mind the following motives: ethnic and religious persecution, desire for revenge and sadism. Here, the Trial Chamber takes note of the ethnic and religious discrimination which the victims suffered. In consequence, the violations are to be analysed as persecution which, in itself, justifies a more severe penalty.”

Blaskic, (Trial Chamber), March 3, 2000, para. 793: “The premeditation of an accused in a crime tends to aggravate his degree of responsibility in its perpetration and subsequently increases his sentence.”

(g) egregious nature of how crime was committed

Blaskic, (Trial Chamber), March 3, 2000, para. 783: “The fact that the crime was as egregious as it was is a qualitative criterion which can be gleaned from its particularly cruel or humiliating nature.” “The cruelty of the attack is clearly a significant consideration when determining the proper sentence. In this case, the heinousness of the crimes is established by the sheer scale and planning of the crimes committed which resulted in suffering being intentionally inflicted upon the . . . victims regardless of age, sex or status.”

(h) sexual, violent and humiliating nature of the acts, and vulnerability of victims

Simic, (Trial Chamber), October 17, 2002, para. 63: “Although the mistreatment inflicted by Milan Simic upon his victims did not happen over a prolonged period of time, the manner and methods used render them despicable. The sexual, violent, and humiliating, nature of the acts are therefore considered in aggravation, as it would certainly have increased the mental suffering and feeling of degradation experienced by the victims.”

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 867: “[I]hat these offences were committed against particularly vulnerable and defenceless women and girls is also considered in aggravation.”

Furundzija, (Trial Chamber), December 10, 1998, para. 282, 283: “The circumstances of these attacks [rapes and serious sexual assaults] were particularly horrifying. A woman was brought into detention, kept naked and helpless before her interrogators and treated with the utmost cruelty and barbarity. [I]his case presents particularly vicious instances of torture and rape.”

(i) status of the victims and effect of the crimes on them

Blaskic, (Trial Chamber), March 3, 2000, para. 786: “The status of the victims may be taken into account as an aggravating circumstance. [I]n this case many crimes targeted the general civilian population and within that population the women and children” and “[t]hese acts constitute an aggravating circumstance.”

Blaskic, (Trial Chamber), March 3, 2000, para. 787: “The physical and mental effects of the bodily harm meted out to the victims were also seen as aggravating circumstances.” “[V]ictims’ suffering is one factor to be taken into account when determining the sentence. The Trial Chamber here points not only to the suffering inflicted upon the victims while the crimes were being committed through the use of indiscriminate, disproportionate and terrifying combat means and methods, such as ‘baby bombs,’ flame-throwers, grenades and a booby-trapped lorry, but also the manifest physical and mental suffering endured by the survivors of these brutal events. [A]long with the physical or emotional scars borne by the victims, their suffering at the loss of loved ones and the fact that most of them are still unable to return to their homes” are also relevant.

(j) active participation of superior in criminal acts of subordinate

Mucic et al., (Appeals Chamber), February 20, 2001, para. 736-737: “[P]roof of active participation by a superior in the criminal acts of subordinates adds to the gravity of the superior’s failure to prevent or punish those acts and may therefore aggravate the sentence. [A]ctive abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority: The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance or in mitigation of his guilt. There is no doubt that abuse of positions of authority or trust will be regarded as aggravating. [A]bsence of such active participation is not a mitigating circumstance. Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability.”

(k) proving responsibility under both Article 7(1) and Article 7(3)

Mucic et al., (Appeals Chamber), February 20, 2001, para. 745: “Where criminal responsibility for an offence is alleged under one count pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in

the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility . . . or the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1). The *Aleksovski* Appeal Judgement has recognised both such matters as being factors which should result in an increased or aggravated sentence.”

Naletilic and Martinovic, (Trial Chamber), March 31, 2003, para. 81: “As held by the *Celebici* and *Aleksovski* Appeal Judgements the form of responsibility, which was not chosen, must be considered as aggravating circumstance, because the final sentence should reflect the totality of the culpable conduct.”

(l) youthful age of victims, number of victims and recurrence of crimes

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 864, 866: “The youthful age of certain of the victims of the offences committed by Dragoljub Kunarac is considered as an aggravating factor.” “The involvement of more than one victim in his offences is also considered in aggravation.”

Blaskic, (Trial Chamber), March 3, 2000, para. 784: “The number of victims has been raised on several occasions as an aggravating circumstance and reflects the scale of the crime committed. By noting that the crimes were committed systematically, the Trial Chambers also took into account as aggravating circumstances the recurrence of the crimes. The number of victims must also be considered in relation to the length of time over which the crimes were perpetrated.”

(m) extended time period during which offenses committed

Kunarac, Kovac and Vukovic, (Trial Chamber), February 22, 2001, para. 865: Another aggravating factor is that the defendant “committed these offences over an extended period of time in relation to certain of his victims.”

(n) magnitude of the crime and the scale of the accused's role

Prosecutor v. Erdemovic, Case No. IT-96-22 (Trial Chamber), March 5, 1998, para. 15: “[T]he magnitude of the crime [hundreds of Bosnian Muslim civilian men murdered by an execution squad] and the scale of the accused's role [using an automatic rifle to kill up to one hundred people himself] in it are aggravating circumstances to be taken into account.”

(o) civilian detainee

Furundzija, (Trial Chamber), December 10, 1998, para. 283: “[T]he fact that Witness A was a civilian detainee [at the headquarters of the ‘Jokers,’ a special unit of the military

police of the Croatian Defence Council (HVO)] and at the complete mercy of her captors [was found] to be a further aggravating circumstance.”

(p) character of the accused

Mucic et al., (Appeals Chamber), February 20, 2001, para. 788: “The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber notes that factors such as conduct during trial proceedings, ascertained primarily through the Trial Judges’ perception of an accused, have also been considered in both mitigation and aggravation of sentence. This behaviour is relevant to a Trial Chamber’s determination of, for example, remorse for the acts committed or, on the contrary, total lack of compassion.”

(q) circumstances of offenses generally

Tadic, (Trial Chamber), November 11, 1999, para. 19: “Each of the offences was committed in circumstances that could not but aggravate the crimes and the suffering of its victims. The horrific conditions at the camps established by Bosnian Serb authorities in [O]pstina Prijedor and the inhuman treatment of the detainees in the camps, of which Dusko Tadic was well aware, were discussed in detail . . . Dusko Tadic’s willing participation in the brutal treatment exacerbated these conditions and serves only to increase the harm which he inflicted on his victims and accordingly to aggravate the crimes of which he has been found guilty.”

(r) accused not testifying is not an aggravating factor

Mucic et al., (Appeals Chamber), February 20, 2001, para. 783: “Neither the Statute nor the Rules of this Tribunal expressly provide that an inference can be drawn from the failure of an accused to give evidence. At the same time, neither do they state that silence should not ‘be a consideration in the determination of guilt or innocence.’ Should it have been intended that such adverse consequences could result, . . . an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore . . . an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules. . . . Similarly, this absolute prohibition must extend to an inference being drawn in the determination of sentence. [T]he Trial Chamber would have committed an error should it be shown that it relied on Mucic’s failure to give oral testimony as an aggravating factor in determining his sentence.”

Plavsic, (Trial Chamber), February 27, 2003, para. 64: “[T]he accused’s unwillingness to give evidence is not a factor to be taken into account in determining sentence.”

(4) mitigating factors

(a) generally

Plavsic, (Trial Chamber), February 27, 2003, para. 65: “A Trial Chamber has the discretion to consider any other factors which it considers to be of a mitigating nature. These factors will vary with the circumstances of each case. In addition to substantial co-operation with the Prosecutor, Chambers of the International Tribunal have found the following factors relevant to this case to be mitigating: voluntary surrender; a guilty plea; expression of remorse; good character with no prior criminal conviction; and the post-conflict conduct of the accused.”

(b) co-operation of the accused

Jelavic, (Appeals Chamber), July 5, 2001, para. 126: “[T]he determination of whether the cooperation should be considered as substantial and therefore whether it constitutes a mitigating factor is for the Trial Chamber to determine.”

Blaskic, (Trial Chamber), March 3, 2000, para. 774: “The earnestness and degree of co-operation with the Prosecutor decides whether there is reason to reduce the sentence on this ground. Therefore, the evaluation of the accused’s co-operation depends both on the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation which must be lent without asking for something in return. Providing that the co-operation lent respects the aforesaid requirements, the Trial Chamber classes such co-operation as a ‘significant mitigating factor.’”

Plavsic, (Trial Chamber), February 27, 2003, para. 63: “[T]his Trial Chamber holds that the determination as to whether an accused’s co-operation has been substantial depends on the extent and quality of the information he or she provides. . . . [C]o-operation with the Prosecutor is a mitigating circumstance, but it does not follow that failure to do so is an aggravating circumstance.”

Simic, (Trial Chamber), October 17, 2002, para. 112: “The Trial Chamber finds Milan Simic’s comportment in the Detention Unit and his general co-operation with the Trial Chamber and the Prosecution during the proceedings against him to be a mitigating factor.”

Todorovic, (Trial Chamber), July 31, 2001, para. 86: “[T]he fact that an accused has gained or may gain something pursuant to an agreement with the Prosecution does not preclude the Trial Chamber from considering his substantial cooperation as a mitigating circumstance in sentencing.”

Erdemovic, (Trial Chamber), March 5, 1998, para. 16: The Trial Chamber held that “the accused cooperated without asking for anything in return and that the extent and value of his cooperation has been such as to justify considerable mitigation.”

Erdemovic, (Trial Chamber), March 5, 1998, para. 21: “It is in the interests of international criminal justice and the purposes of the International Tribunal to give appropriate weight to the cooperative attitude of the accused. [Erdemovic] truthfully confessed his involvement in the massacre at a time when no authority was seeking to prosecute him in connection therewith, knowing that he would most probably face prosecution as a result. Understanding of the situation of those who surrender to the jurisdiction of the International Tribunal and who confess their guilt is important for encouraging other suspects or unknown perpetrators to come forward.”

(c) guilty plea including remorse and reconciliation

Plavsic, (Trial Chamber), February 27, 2003, para. 66-81: “The Trial Chamber accepts [Plavsic’s expression of remorse at the Sentencing Hearing], together with expressions in her earlier statement in support of the motion to change her plea, as an expression of remorse to be considered as part of the mitigating circumstances connected with a guilty plea. This, together with the substantial saving of international time and resources as a result of a plea of guilty before trial, entitle the accused to a discount in the sentence which would otherwise have been appropriate. . . . The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. [T]he Trial Chamber concludes that the guilty plea of Mrs. Plavsic and her acknowledgement of responsibility, particularly in the light of her former position as President of Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole. The Trial Chamber will . . . give significant weight to the plea of guilty by the accused, as well as her accompanying expressed remorse and positive impact on the reconciliatory process, as a mitigating factor.”

Simic, (Trial Chamber), October 17, 2002, para. 84-85: “[A] guilty plea should, in principle, give rise to a reduction in the sentence a convicted person would otherwise have received. A guilty plea is recognised as greatly contributing to the work of the Tribunal in so far that it avoids a possible lengthy trial. . . . [A] plea of guilt will only contribute to public advantage if it is pleaded before the commencement of the trial. Such public advantage includes the saving of resources for investigation, counsel fees and the general cost of trial.”

Sikirica et al., (Trial Chamber), November 13, 2001, para. 150: “[W]hile an accused who pleads guilty to the charges against him prior to the commencement of his trial will

usually receive full credit for that plea, one who enters a plea of guilt any time thereafter will still stand to receive some credit, though not as much as he would have, had the plea been made prior to the commencement of the trial.”

Simic, (Trial Chamber), October 17, 2002, para. 92: “In order to accept remorse as a mitigating factor, a Trial Chamber must be satisfied that the expressed remorse is sincere.”

Todorovic, (Trial Chamber), July 31, 2001, para. 81: “A guilty plea is always important for the purpose of establishing the truth in relation to a crime.”

Erdemovic, (Trial Chamber), March 5, 1998, para. 16: “An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which has saved the International Tribunal the time and effort of a lengthy investigation and trial is to be commended.”

Blaskic, (Trial Chamber), March 3, 2000, para. 777: “A guilty plea, where entered, may in itself constitute a factor substantially mitigating the sentence.”

Blaskic, (Trial Chamber), March 3, 2000, para. 774: “[T]he feeling of remorse must be analysed in the light of not only the accused’s statements but also of his behaviour (voluntary surrender, guilty plea).”

(d) duress

Erdemovic, (Trial Chamber), March 5, 1998, para. 17: Duress “may be taken into account only by way of mitigation.” The Trial Chamber held that there was duress in this case and found “that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.”

(e) indirect or forced participation

Krstic, (Trial Chamber), August 2, 2001, para. 714: “Indirect participation is one circumstance that may go to mitigating a sentence. An act of assistance to a crime is a form of participation in a crime often considered less serious than personal participation or commission as a principal and may, depending on the circumstances, warrant a lighter sentence than that imposed for direct commission. Similarly, in some cases, forced participation in a crime can be a mitigating circumstance.”

(f) diminished mental responsibility

Mucic et al., (Appeals Chamber), February 20, 2001, para. 590: “[T]he relevant general principle of law . . . is that the defendant’s diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. . . . Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.”

Vasiljevic, (Trial Chamber), November 29, 2002, para. 282-283: “[T]he issue of diminished mental responsibility is relevant only to the sentence to be imposed. It is not a defence that if established would lead to the acquittal of the Accused. . . . [A]n accused suffers from a diminished mental responsibility where there is an impairment to his capacity to appreciate the unlawfulness of or the nature of his conduct or to control his conduct so as to conform to the requirements of the law.”

(g) voluntary surrender

Plavsic, (Trial Chamber), February 27, 2003, para. 84: “The Trial Chamber accepts that the voluntary surrender of the accused is a mitigating circumstance for the purpose of sentence.”

Blaskic, (Trial Chamber), March 3, 2000, para. 776: “Voluntary surrender is deemed a significant mitigating circumstance in determining the sentence.”

(h) post-conflict conduct

Plavsic, (Trial Chamber), February 27, 2003, para. 94: “The Trial Chamber is satisfied that Mrs. Plavsic was instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska. As such, she made a considerable contribution to peace in the region and is entitled to pray it in aid in mitigation of sentence. The Trial Chamber gives it significant weight.”

(i) age

Plavsic, (Trial Chamber), February 27, 2003, para. 95-106: “[T]he Trial Chamber considers that it should take account of the [advanced] age of the accused and does so for two reasons: First, physical deterioration associated with advanced years makes serving the same sentence harder for an older than a younger accused. Second, . . . an offender of advanced years may have little worthwhile life left upon release. [T]he Trial Chamber considers as a mitigating factor the advanced age of the accused.”

Erdemovic, (Trial Chamber), March 5, 1998, para. 16: The Trial Chamber held that the combination of [Erdemovic's] young age [26 years old], evidence that he is “not a dangerous person for his environment,” and “his circumstances and character indicate that he is reformable and should be given a second chance to start his life afresh upon release, whilst still young enough to do so.”

Blaskic, (Trial Chamber), March 3, 2000, para. 778: “The case-law of the two *ad hoc* criminal Tribunals on rehabilitation takes the young age of the accused into account as a mitigating circumstance. The assessment of youth varies – whilst the ICTY considers accused aged between 19 and 23 at the time of the facts as being young, the ICTR selects ages from 32 to 37.”

(j) personal circumstances/family concerns

Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 362: “Family concerns should in principle be a mitigating factor” such as being the father of three young children.

Vasiljevic, (Trial Chamber), November 29, 2002, para. 300: “The personal circumstances of the Accused, . . . the fact that he is married and has two children, have also been taken into account by the Trial Chamber as a mitigating factor.”

Blaskic, (Trial Chamber), March 3, 2000, para. 779: “[I]t [is] appropriate to review the accused’s personal history - socially, professionally and within his family” because these factors “may bring to light the reasons for the accused’s criminal conduct.”

(k) character of the accused

Mucic et al., (Appeals Chamber), February 20, 2001, para. 788: “The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber notes that factors such as conduct during trial proceedings, ascertained primarily through the Trial Judges’ perception of an accused, have also been considered in both mitigation and aggravation of sentence. This behaviour is relevant to a Trial Chamber’s determination of, for example, remorse for the acts committed or, on the contrary, total lack of compassion.”

Blaskic, (Trial Chamber), March 3, 2000, para. 780: “The character traits are not so much examined in order to understand the reasons for the crime but more to assess the possibility of rehabilitating the accused. High moral standards are also indicative of the accused’s character.”

(l) poor health: only in exceptional or rare cases

Simic, (Trial Chamber), October 17, 2002, para. 98: “[I]ssues concerning the ill health of a convicted person should normally be a matter for consideration in the execution of the sentence to be meted out. Hence, it is only in exceptional circumstances or ‘rare’ cases where ill health should be considered in mitigation.”

(m) assistance to detainees or victims

Sikirica et al., (Trial Chamber), November 13, 2001, para. 195: “The Chamber has also taken into account the evidence that Dosen, as shift leader, often acted to ameliorate the terrible conditions that prevailed in the Keraterm camp, in relation to particular detainees. The Chamber considers that Damir Dosen’s acts in this regard constitute a mitigating factor for purposes of sentencing.”

Sikirica et al., (Trial Chamber), November 13, 2001, para. 229: “The Chamber has heard ample evidence of Dragan Kolundzija’s efforts to ease the harsh conditions in the Keraterm camp for many of the detainees. . . . [O]n the basis of the testimony as to his benevolent attitude towards the detainees, Dragan Kolundzija should receive a significant reduction in his sentence.”

Blaskic, (Trial Chamber), March 3, 2000, para. 781: “Another indication that the accused’s character is reformable is evident in his lending assistance to some of the victims.”

(n) lack of strength of character not a mitigating factor

Krnjelac, (Trial Chamber), March 15, 2002, para. 516: “The Trial Chamber does not . . . consider it appropriate . . . to mitigate the sentence of the Accused on the basis that he is the type of person who did not have the strength of character to challenge what he knew to be criminal behaviour by those over whom he had authority in the KP Dom. The Accused voluntarily accepted this position of authority, and the fact that he may have had difficulties in exercising the authority which that position gave him did not, in the circumstances, mitigate his responsibility.”

XI) MISCELLANEOUS

a) Weight to give prior decisions

i) the Appeals Chamber should follow its previous decisions, absent a cogent reason in the interests of justice

Aleksovski, (Appeals Chamber), March 24, 2000, para. 104-110: “The right of appeal is a component of the fair trial requirement” and “an aspect of the fair trial requirement is the right of an accused to have like cases treated alike.” “[I]n the interests of certainty and predictability, the Appeals Chambers should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.” The “legal principle,” or *ratio decidendi*, should be followed. However, “the obligation to follow that principle only applies in similar cases, or substantially similar cases,” *i.e.*, where “the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision.”

Mucic et al., (Appeals Chamber), February 20, 2001, para. 26: “Applying the principle enunciated in the *Aleksovski* Appeal Judgement, this Appeals Chamber is unable to conclude that the decision in [*sic*] *Tadic* was arrived at on the basis of the application of a wrong legal principle, or arrived at per incuriam. . . . [T]his Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadic* Appeal Judgement.”

ii) decisions of the Appeals Chamber are binding on Trial Chambers

Aleksovski, (Appeals Chamber), March 24, 2000, para. 112-113: The Appeals Chambers held that the “*ratio decidendi* of its decisions is binding on Trial Chambers.”

iii) decisions of Trial Chambers have no binding force on each other

Aleksovski, (Appeals Chamber), March 24, 2000, para. 1114: “[D]ecisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.”

b) Unreasonableness is test for appellate review of Trial Chamber’s factual findings

Tadic, (Appeals Chamber), July 15, 1999, para. 64: “[T]he standard to be used when determining whether the Trial Chamber’s factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin

of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.”

c) “Equality of arms” principle

Tadic, (Appeals Chamber), July 15, 1999, para. 43, 44, 48, 52: Article 20(1) of the Statute provides that “[t]he Trial Chambers shall ensure that a trial is fair and expeditious . . .” and “equality of arms means that each party must have a reasonable opportunity to defend its interests ‘under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent.’” The Appeals Chamber held that “the principle of equality of arms falls within the fair trial guarantee under the Statute.” “[U]nder the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.”

**d) Lawyer-client privilege does not cover prior defense witness statements:
Trial Chamber may order their disclosure**

Tadic, (Appeals Chamber), July 15, 1999, para. 325-326: The Appeals Chamber held that lawyer-client privilege “does not cover prior Defence witness statements” and “a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.”

e) Test for accepting guilty pleas

i) whether there is a sufficient factual basis for the crime and the accused's participation in it, and whether the elements presented establish the crime acknowledged

Jelisić, (Trial Chamber), December 14, 1999, para. 25: "A guilty plea is not in itself a sufficient basis for the conviction of an accused. Although the Trial Chamber notes that the parties managed to agree on the crime charged, it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime."

Jelisić, (Trial Chamber), December 14, 1999, para. 26, 28: The Trial Chamber outlined the three pre-conditions that must be satisfied before a plea of guilty can be entered, and stated that the judges must also verify that "there is sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case." The Trial Chamber also held that it "must also verify whether the elements presented in the guilty plea are sufficient to establish the crimes acknowledged."

Todorović, (Trial Chamber), July 31, 2001, para. 23-26: "[U]nder [Rule 62 *bis*], a guilty plea cannot form the sole basis for the conviction of an accused; the Trial Chamber must also be satisfied that 'there is a sufficient factual basis for the crime and the accused's participation in it.' [T]he Trial Chamber may rely on either independent indicia or on the lack of 'any material disagreement between the parties about the facts of the case.'"

ii) plea must be voluntary, informed and unequivocal

Erdemović, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 8: "[C]ertain pre-conditions must be satisfied before a plea of guilty can be entered. [T]he minimum pre-conditions are as follows:

(a) The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises.

(b) The guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty;

(c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility."

(1) voluntary

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 10: “[A] guilty plea [must] be made voluntarily. Voluntariness involves two elements. Firstly, an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty. Secondly, the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence.”

(2) informed

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 14: “[A]ll common law jurisdictions insist that an accused who pleads guilty must understand the nature and consequences of his plea and to what precisely he is pleading guilty.” In the case at hand, “an informed plea would require that the Appellant understand (a) the nature of the charges against him and the consequences of pleading guilty generally; and (b) the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other.”

(3) unequivocal

Erdemovic, (Appeals Chamber), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, para. 31: “Whether a plea of guilty is equivocal must depend on a consideration, *in limine*, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law.”

ALPHABETICAL INDEX

A

Accused not testifying, not aggravating factor, sentencing.....	256
Active and direct criminal participation, aggravating factor, sentencing.....	251
Acts of the accused form part of the attack, crimes against humanity	170
Actual knowledge, mental state, command responsibility	225
Affirmative defenses	229
Affirmative defenses, diminished mental responsibility not a defense	230
Affirmative defenses, duress does not afford a complete defense	229
Affirmative defenses, involvement in defensive operation not a defense.....	230
Affirmative defenses, <i>tu quoque</i> principle rejected	230
Age, mitigating factor, sentencing	260
Aggravating factors, sentencing	250
Aiding and abetting, defined.....	205
Aiding and abetting, difference between “aiding and abetting” and “participation in a joint criminal enterprise”	210
Aiding and abetting, generally	205
Aiding and abetting, mental state.....	208
Aiding and abetting, the act (<i>actus reus</i>), individual responsibility.....	206
Armed conflict, crimes against humanity	168
Armed conflict, war crimes, Article 2	122
Armed conflict, war crimes, Article 3	143
Attack must be “directed against any civilian population,” crimes against humanity.....	171
Attack must be “widespread or systematic,” crimes against humanity.....	173
Attack must have occurred, crimes against humanity	169
Assistance to detainees, mitigating factor, sentencing.....	262

B

C

Causing serious bodily or mental harm to members of the group, genocide	167
Character of accused, aggravating factor, sentencing.....	256
Character of accused, mitigating factor, sentencing.....	261
Charging, convictions and sentencing.....	235
Circumstances of offenses, aggravating factor, sentencing	256
Civilian detainee, aggravating factor, sentencing.....	255
“Civilian population,” crimes against humanity	172
Command responsibility, Article 7(3)	219

Command responsibility, elements.....	219
Command responsibility, failure of superior to take measures to prevent or punish	227
Command responsibility, mental state.....	225
Command responsibility, statute.....	219
Command responsibility, superior-subordinate relationship.....	220
Command responsibility, superior responsibility is not a form of strict liability.....	228
Committing, generally.....	204
Committing, individual responsibility for.....	204
Committing, mental state (<i>mens rea</i>).....	205
Committing, the act (<i>actus reus</i>).....	204
Common purpose doctrine/joint criminal enterprise, difference between participating in a joint criminal enterprise and aiding and abetting a joint criminal enterprise	218
Common purpose doctrine/joint criminal enterprise, elements	213
Common purpose doctrine/joint criminal enterprise, generally.....	212
Common purpose doctrine/joint criminal enterprise, individual responsibility for	212
Common purpose doctrine/joint criminal enterprise, mental state.....	216
Consistency of sentences yet individualized sentencing.....	241
Contempt proceedings, ethics	231
Cooperation of accused, mitigating factor, sentencing	257
Credit given for time in detention pending trial, sentencing.....	246
Crimes against humanity, acts of the accused must form part of the attack.....	170
Crimes against humanity, armed conflict required.....	168
Crimes against humanity, Article 5.....	168
Crimes against humanity, attack must be “directed against any civilian population”	171
Crimes against humanity, attack must be “widespread or systematic”	173
Crimes against humanity, attack required.....	169
Crimes against humanity, elements	168
Crimes against humanity, enslavement.....	184
Crimes against humanity, extermination.....	183
Crimes against humanity, imprisonment	186
Crimes against humanity, mental state.....	176
Crimes against humanity, murder	181
Crimes against humanity, other inhumane acts	198
Crimes against humanity, persecution.....	189
Crimes against humanity, rape	188
Crimes against humanity, statute	168

Crimes against humanity, torture.....	186
Crimes against humanity, underlying offenses.....	181
Cruel and inhuman treatment, generally, war crimes, Article 2	130
Cruel treatment, war crimes, Article 2	131
Cruel treatment, war crimes, Article 3	151
Cumulative charging and convictions	235

D

Date of judgment, sentence to run from, sentencing.....	246
Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, genocide.....	167
Destruction or willful damage to institutions dedicated to religion or education, war crimes, Article 3.....	159
Diminished mental responsibility, mitigating factor, sentencing	260
Diminished mental responsibility, not a defense.....	230
“Directed against” any civilian population, crimes against humanity	171
Discretion to impose life imprisonment, sentencing.....	249
Discriminatory state of mind, aggravating factor, sentencing.....	252
Double jeopardy, sentencing.....	249
Duress does not afford a complete defense.....	229
Duress, mitigating factor, sentencing.....	259

E

Egregious nature of how crime was committed, aggravating factor, sentencing.....	253
Enslavement, crimes against humanity	184
Equality of arms principle.....	264
Ethics	231
Ethics, contempt proceedings.....	231
Ethics, impartiality of judges	232
Examples of persecution, crimes against humanity	191
Existence of an armed conflict, war crimes, Article 2.....	122
Extensive destruction of property not justified by military necessity, war crimes, Article 2.....	133
Extermination, crimes against humanity	183

F

Factors for assessing gravity of crimes, sentencing.....	247
Failure of superior to take measures to prevent or punish, command responsibility.....	227
Forcibly transferring children of one group to another group, genocide.....	167

G

Genocide, Article 4	161
Genocide, causing serious bodily or mental harm to members of the group.....	167
Genocide, definition	161
Genocide, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.....	167
Genocide, forcibly transferring children of one group to another group	167
Genocide, imposing measures intended to prevent births within the group.....	167
Genocide, killing members of the group.....	167
Genocide, mental state	162
Genocide, statute.....	161
Genocide, underlying offenses.....	167
Goal of penalties, sentencing.....	240
Guilty plea including remorse and reconciliation, mitigating factor, sentencing.....	258
Guilty plea, test for accepting plea	265

H

I

Impartiality of judges.....	232
Imposing measures intended to prevent births within the group, genocide.....	167
Imprisonment, crimes against humanity.....	186
Indirect or forced participation, mitigating factor, sentencing.....	259
Individual responsibility, aiding and abetting.....	205
Individual responsibility, Article 7(1)	200
Individual responsibility, committing.....	204
Individual responsibility, difference between “aiding and abetting” and “participation in a joint criminal enterprise”	210
Individual responsibility, generally	200
Individual responsibility, instigating.....	202
Individual responsibility, joint criminal enterprise/the common purpose doctrine.....	212
Individual responsibility, ordering.....	203
Individual responsibility, planning.....	201
Individual responsibility, statute	200
Informed, guilty plea must be	266
Inherent jurisdiction of tribunal to deal with contempt, contempt proceedings, ethics.....	231
Inhuman treatment, war crimes, Article 2.....	131
Instigating, generally, individual responsibility	202

Instruments governing penalties, sentencing/penalties	237
Involvement in defensive operation, not a defense	230

J

Joint criminal enterprise/the common purpose doctrine, individual responsibility	212
Judicial bias test, impartiality of judges, ethics	232
Jurisdiction	231

K

Killing members of the group, genocide	167
--	-----

L

Lack of strength of character, not a mitigating factor, sentencing	262
Lawyer-client privilege, does not cover defense witness statements	264

M

Magnitude of crime and scale of accused's role, aggravating factor, sentencing	255
Mental state (<i>mens rea</i>), "a national, ethnical, racial or religious group, as such," genocide	165
Mental state (<i>mens rea</i>), actual knowledge, command responsibility	225
Mental state (<i>mens rea</i>), aiding and abetting	208
Mental state (<i>mens rea</i>), committing	205
Mental state (<i>mens rea</i>), extermination, crimes against humanity	184
Mental state (<i>mens rea</i>), for command responsibility, Article 7(3)	225
Mental state (<i>mens rea</i>), for crimes against humanity, Article 5	176
Mental state (<i>mens rea</i>), for genocide, Article 4	162
Mental state (<i>mens rea</i>), for planning, instigating, ordering, committing, generally	201
Mental state (<i>mens rea</i>), for war crimes, Article 2	129
Mental state (<i>mens rea</i>), for war crimes, Article 3	145
Mental state (<i>mens rea</i>), instigating	203
Mental state (<i>mens rea</i>), intent, crimes against humanity	176
Mental state (<i>mens rea</i>), intent to destroy in whole or in part, genocide	162
Mental state (<i>mens rea</i>), knowledge, crimes against humanity	178
Mental state (<i>mens rea</i>), murder, crimes against humanity	183
Mental state (<i>mens rea</i>), other inhumane acts, crimes against humanity	199
Mental state (<i>mens rea</i>), outrages upon personal dignity, war crimes, Article 3	155
Mental state (<i>mens rea</i>), persecution, crimes against humanity	194

Mental state (<i>mens rea</i>), reason to know, command responsibility	226
Mental state (<i>mens rea</i>), torture, crimes against humanity	188
Mental state (<i>mens rea</i>), torture, war crimes, Article 3	147
Mental state (<i>mens rea</i>), unlawful labor, war crimes, Article 3	160
Minimum sentence, sentencing.....	247
Mitigating factors, sentencing.....	257
Murder, crimes against humanity.....	181
Murder, war crimes, Article 3.....	152

N

Nexus between armed conflict and alleged offense, war crimes, Article 3	143
Nexus between conflict and crimes alleged, war crimes, Article 2.....	123

O

Occupation.....	136
Occupation, guidelines for determining	137
Occupation, where relevant.....	136
Ordering, individual responsibility for.....	203
Other inhumane acts, crimes against humanity.....	198
Outrages upon personal dignity, war crimes, Article 3	154
Overall control test, war crimes, Article 2.....	125

P

Participation of superior in criminal acts of subordinate, aggravating factor, sentencing.....	254
Penalties	237
Penalties, governing instruments	237
Persecution, crimes against humanity	189
Person or property at issue must be protected, war crimes, Article 2	127
Personal circumstances or family concerns, mitigating factor, sentencing	261
Planning, individual responsibility for.....	201
Plunder, war crimes, Article 3	157
Poor health, mitigating factor in rare cases, sentencing	262
Position of the accused, aggravating factor, sentencing.....	250
Post-conflict conduct, mitigating factor, sentencing	260
Premeditation and motive, aggravating factor, sentencing.....	252
Prior decisions, weight to give	263
Proving responsibility under both Articles 7(1) and 7(3), aggravating factor, sentencing.....	254

Q

R

Ranking of crimes, sentencing.....	244
Rape, crimes against humanity.....	188
Rape, war crimes, Article 2.....	132
Rape, war crimes, Article 3.....	150
Rape and other forms of sexual violence as torture, war crimes, Article 3.....	149
Reason to know, mental state, command responsibility.....	226
Reflect gravity of crime, sentencing.....	238
Reflect significance of role of defendant, sentencing.....	248
Required acts, persecution, crimes against humanity.....	189
Role as fellow perpetrator, aggravating factor, sentencing.....	251
Role of a state official not necessary, torture, crimes against humanity.....	188

S

Sentencing.....	237
Sentencing, aggravating factors.....	250
Sentencing, aggravating and mitigating factors.....	249
Sentencing, aggravating and mitigating factors, burden of proof.....	249
Sentencing, consistency of sentences yet still individualized.....	241
Sentencing, credit given for time in detention pending trial.....	246
Sentencing, discretion to impose life imprisonment.....	249
Sentencing, double jeopardy impacting on sentence.....	249
Sentencing, factors.....	238
Sentencing, factors for assessing gravity of offenses.....	247
Sentencing, generally.....	238
Sentencing, goal of penalties.....	240
Sentencing, governing instruments.....	237
Sentencing, minimum sentence.....	247
Sentencing, mitigating factors.....	257
Sentencing, ranking of crimes.....	244
Sentencing, reflective of gravity of crime.....	238
Sentencing, sentence can be lengthened if discernible error.....	246
Sentencing, sentence should reflect significance of the role of the defendant.....	248
Sentencing, sentence to run from date of judgment.....	246
Sentencing, totality principle.....	238
Sentencing factors, sentencing.....	238
Sentencing practices in former Yugoslavia.....	243

Sexual nature of crime and vulnerability of victims, aggravating factor, sentencing.....	253
Slavery, war crime, Article 3	160
Status of victims and effect of crimes on them, aggravating factor, sentencing.....	254
Statute, command responsibility	219
Statute, crimes against humanity, Article 5.....	168
Statute, genocide, Article 4	161
Statute, individual responsibility	200
Statute, war crimes, Article 2.....	122
Statute, war crimes, Article 3.....	138
Superior-subordinate relationship, command responsibility	220
Systematic attack, crimes against humanity.....	174

T

Taking civilians as hostages, war crimes, Article 2.....	135
Taking of hostages, war crimes, Article 3.....	156
Test for accepting guilty pleas	265
Test for appellate review of Trial Chamber's factual findings	263
Time period during which offenses committed, aggravating factor, sentencing.....	255
Torture, crimes against humanity	186
Torture, war crimes, Article 2.....	130
Torture, war crimes, Article 3.....	145
Torture or cruel and inhuman treatment, war crimes, Article 2	130
Torture, rape and other forms of sexual violence as torture, war crimes, Article 3	149
Totality principle, sentencing.....	238
<i>Tu quoque</i> principle, argument that the adversary committed similar crimes is not a valid defense	230
Type of participation in crime, aggravating factor, sentencing	251

U

Underlying offenses, crimes against humanity.....	181
Underlying offenses, genocide	167
Underlying offenses, war crimes, Article 2.....	130
Underlying offenses, war crimes, Article 3.....	145
Unequivocal, guilty plea must be	266
Unlawful attacks on civilians and civilian objects, war crimes, Article 3.....	159
Unlawful confinement of civilians and imprisonment, war crimes, Article 2	134

Unlawful labor, war crimes, Article 3.....	160
Unlawful transfer, war crimes, Article 2	135

V

Violence to life and person, war crimes, Article 3	153
Voluntary, guilty plea must be.....	266
Voluntary surrender, mitigating factor, sentencing.....	260

W

Wanton destruction not justified by military necessity, war crimes, Article 3	156
War crimes, armed conflict must be international, Article 2.....	123
War crimes, armed conflict must be international, overall control test, Article 2	124
War crimes, armed conflict must exist, Article 2.....	122
War crimes, armed conflict whether internal or international must exist, Article 3	143
War crimes, Article 3 covers acts committed in both internal and international armed conflict, Article 3	139
War crimes, Article 3 functions as a residual clause, Article 3	138
War crimes, Article 3, generally.....	138
War crimes, conditions for determining which violations fall within Article 3	139
War crimes, cruel and inhuman treatment, Article 2.....	130
War crimes, cruel treatment, Article 3	151
War crimes, destruction or willful damage to institutions dedicated to religion or education, Article 3.....	159
War crimes, elements, Article 2.....	122
War crimes, elements, Article 3.....	142
War crimes, existence of an armed conflict, Article 2.....	122
War crimes, extensive destruction of property not justified by military necessity, Article 2	133
War crimes, for Common Article 3 crimes must be committed against civilians or civilian property, Article 3	144
War crimes, grave breaches of the Geneva Conventions of 1949, Article 2	122
War crimes, inhuman treatment, Article 2	131
War crimes, mental state, Article 2.....	129
War crimes, mental state, Article 3.....	145
War crimes, murder, Article 3	152

War crimes, nexus between the armed conflict and alleged offense, Article 3	143
War crimes, nexus between the conflict and crimes alleged, Article 2	123
War crimes, outrages upon personal dignity, Article 3.....	154
War crimes, overall control test, Article 2.....	125
War crimes, person or property at issue must be protected, Article 2.....	127
War crimes, plunder, Article 3.....	157
War crimes, rape, Article 2.....	132
War crimes, rape, Article 3.....	150
War crimes, rationale for why Common Article 3 violations are covered, Article 3	140
War crimes, slavery, Article 3	160
War crimes, statute, Article 2.....	122
War crimes, statute, Article 3.....	138
War crimes, taking civilians as hostages, Article 2	135
War crimes, taking of hostages, Article 3	156
War crimes, torture, Article 2.....	130
War crimes, torture, Article 3	145
War crimes, torture or cruel and inhuman treatment, Article 2.....	130
War crimes, underlying offenses, Article 2.....	130
War crimes, underlying offenses, Article 3.....	145
War crimes, unlawful attacks on civilians and civilian objects, Article 3.....	159
War crimes, unlawful confinement of civilians and imprisonment, Article 2	134
War crimes, unlawful labor, Article 3.....	160
War crimes, unlawful transfer, Article 2	135
War crimes, violations of international humanitarian law that are covered, Article 3	140
War crimes, violence to life and person, Article 3	153
War crimes, wanton destruction not justified by military necessity, Article 3	156
War crimes, willful killing, Article 2	130
War crimes, willfully causing great suffering or serious injury to body or health, Article 2	132
Weight to give prior decisions.....	263
Weight to give prior decisions, Appeals Chamber to follow its previous decisions	263
Weight to give prior decisions, Appeals Chamber decisions binding on Trial Chambers.....	263
Weight to give prior decisions, Trial Chamber decisions not binding on other Trial Chambers	263

Widespread attack, crimes against humanity.....	174
Willfully causing great suffering or serious injury to body or health, war crimes, Article 2.....	132
Willful killing, war crimes, Article 2	130

X

Y

Youthful age of victims and number of victims, aggravating factor, sentencing.....	255
--	-----

Z