

# INTERNATIONAL CRIMINAL LAW

A DISCUSSION GUIDE FOR THE

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA



WAR CRIMES RESEARCH OFFICE

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## **Acknowledgments**

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## **About the War Crimes Research Office**

The core mandate of the War Crimes Research Office is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor (Special Panels), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). The WCRO has also provided similar assistance to the International Criminal Court (ICC).

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### **COVER PHOTOGRAPHS** (from left)

*The administrative offices of the Extraordinary Chambers in the Courts of Cambodia*

*Fishing village in Cambodia*

*The Extraordinary Chambers court building in Phnom Penh*

All photographs courtesy Susana SáCouto

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COURTS OF CAMBODIA**

**WAR CRIMES RESEARCH OFFICE  
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW**

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## I. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

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

### A. Public International Law

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

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

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

### B. The Evolution of International Criminal Law

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

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

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

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

form of responsibility in international law, i.e., the responsibility of the state, but also that of the individual human beings perpetrating the violation. Such perpetrators could be criminally prosecuted and punished for these violations of international law.

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

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

Nonetheless, the development of international criminal law is a relatively recent phenomenon, and the principle of *nullem crimen sine lege* (no crime without law) takes on particular significance in this context. Further, notwithstanding the fact that these norms directly bind individual human beings, it is essential to bear in mind that these norms were generated in an inter-state legal system. For this reason, certain war crimes will require an inter-state element in order to engage the criminal responsibility of the individual under international law.

### **C. The Establishment & Subject Matter Jurisdiction of the Extraordinary Chambers**

The Law on the Establishment of the Extraordinary Chambers (KRT Law),<sup>5</sup> as amended in 2004, implements the Framework Agreement<sup>6</sup> between the United Nations and the Government of Cambodia.<sup>7</sup> The KRT Law provides that the Extraordinary Chambers

shall be established in the existing court structure, the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and

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<sup>4</sup> International Military Tribunal (Nuremberg), 41 AM. J. INT’L L. 172, 221 (1947).

<sup>5</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/004 (2004), *amending* NS/RKM/0801/12 (2001) [hereinafter KRT Law].

<sup>6</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Kampuchea, *signed* June 6, 2003, *promulgated as* NS/RKM/1004/004 (2004)

<sup>7</sup> *See id.*, art. 2(1) (providing that “[t]he present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended”); Presentation by Deputy Prime Minister Sok An to the National Assembly on Ratification of the Agreement Between Cambodia and the United Nations and Amendments to the 2001 Law concerning the establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, at 5, (Oct. 4-5, 2004), *available at* <http://www.cambodia.gov.kh/krt/pdfs/Sok%20An%20Speech%20to%20NA%20on%20Ratification%20and%20Amendments-En.pdf> (explaining that “[t]he following amendments are solely for the purpose of harmonizing the texts of the Agreement and the Law”).

those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.<sup>8</sup>

The Cambodian government has called the Extraordinary Chambers “a national court with international characteristics[,]” noting that it combines “both international and domestic input in terms of law, judges, prosecutors, lawyers, personnel and funding.”<sup>9</sup> For example, the Extraordinary Chambers has subject matter jurisdiction over three crimes set forth in the 1956 Cambodian Penal Code: homicide, torture, and religious persecution.<sup>10</sup> However, its subject matter jurisdiction also includes crimes derived from international law: genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, grave breaches of the Geneva Conventions of 12 August 1949, destruction of cultural property pursuant to the 1954 Hague Convention for Protection of Cultural Property, and crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations. Moreover, the Law provides for prosecution of crimes against humanity, defined similarly to the language of the Statute of the International Criminal Tribunal for Rwanda. While the Chambers will generally follow Cambodian procedures, “[i]f these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, guidance may be sought in procedural rules established at the international level.”<sup>11</sup> Moreover, the KRT Law provides a role for the United Nations in both nominating international personnel, including at least five of the twelve judges, and in funding the Chambers.

Another factor that lends the Chambers an “internationalized” or “hybrid” character is its specific purpose—seeking justice for crimes that affect the entire international community and thus “transcend[] the interests of any one State.”<sup>12</sup> Cambodian Prime Minister Hun Sen has remarked that:

The crimes were committed not just against the people of Cambodia but against humanity as a whole. It is therefore fitting that both Cambodian and international judges, prosecutors and lawyers will work together in the task of trying those most responsible and, in doing so, helping to build a culture that will prevent the recurrence of such crimes anywhere in the world.<sup>13</sup>

Moreover, a special relationship between the Chambers and the international community may be embodied in the mechanism by which they were established. Although created pursuant to

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<sup>8</sup> KRT Law, art. 2 new.

<sup>9</sup> Presentation by Deputy Prime Minister Sok An to the National Assembly, 8.

<sup>10</sup> The scope of this discussion guide is limited to crimes under international law.

<sup>11</sup> KRT Law, art. 33 (regarding the Extraordinary Chambers obligation to ensure fair trial rights). *See also id.* art. 20 (regarding the co-prosecutors), art. 23 (regarding the co-investigating judges).

<sup>12</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-AR71, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 59 (Appeals Chamber, Oct. 5, 1995) (citing Trial Chamber decision in the same matter, ¶ 42). It should be noted that neither the Appeals Chamber nor the Trial Chamber elaborated on the meaning of “properly constituted.”

<sup>13</sup> Presentation by Deputy Prime Minister Sok An to the National Assembly, 8 (quoting this language).

Cambodian national law to be part of the existing Cambodian judicial system, the Chambers were established in conformity with a framework agreement with the United Nations, by sanction of the General Assembly<sup>14</sup> and with the assistance of the international community. The question arises, therefore, whether the Chambers' foundational relationship provides them with a special relationship to the international community in some ways similar to that of international criminal tribunals.

For example, the Appeals Chamber of the Special Court for Sierra Leone, which was created by an agreement between the U.N. and Sierra Leone pursuant to a Chapter VI Security Council Resolution, has found that the Special Court is an international court created as "an expression of the will of the international community."<sup>15</sup> In so finding, the Chamber noted its creation pursuant to an agreement between *all* members of the United Nations and Sierra Leone" and its establishment "to fulfill an international mandate [as] part of the machinery of international justice."<sup>16</sup> Notably, the language of the U.N. Charter and jurisprudence of the ICTY Appeals Chambers addressing its bases for jurisdiction suggest that a court sanctioned by the General Assembly is in some ways more representative of international consensus—given the broader participation of the world's countries in General Assembly proceedings—than one created under Security Council auspices.<sup>17</sup>

Ultimately, the structure and mandate of the Extraordinary Chambers, the manner in which it was established, and its ongoing relationship to the international community, may suggest that it possesses some characteristics of courts that have been found to have international status. Just how "internationalized" the Chambers determines itself to be could have an impact on a variety of issues that may come before it, including amnesty and immunity questions, as well as the Chambers responsibility for any alleged due process violations suffered by defendants while held under the jurisdiction of regular Cambodian Courts.

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<sup>14</sup> See G.A. Res. 57/228, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/228 (2003) (requesting the Secretary General to resume negotiations and appealing to the international community "to provide personnel and financial and other assistance to permit the early establishment and the sustained operation of the Extraordinary Chambers"); G.A. Res. 56/169, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/169 (2002) (urging "the Government [of Cambodia] and the United Nations to conclude an agreement without delay").

<sup>15</sup> *Prosecutor v. Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 38 (Appeals Chamber, May 31, 2004).

<sup>16</sup> *Id.*, ¶ 39 (finding that the preamble of Resolution 1315 ["the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law"] makes it clear that the Special Court "was established to fulfil an international mandate and is part of the machinery of international justice.").

<sup>17</sup> See *Tadic* Appeals Decision, ¶ 44 (stating in support of the proposition that the ICTY was "established by law" that "[i]n addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the 'representative' organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions.").

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## II. WAR CRIMES GENERALLY

### A. The Regulation of Armed Conflict Under International Law

The traditional function of public international law is to regulate relations between and among states. This function continues even when these relations degenerate into armed conflict, for during such conflicts “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>18</sup>

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

While it shares with international human rights law the purpose of protecting individuals, the two bodies of international law may be distinguished on several grounds. Most significantly, human rights law is primarily concerned with the way a state treats those under its jurisdiction, while “[h]umanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.”<sup>19</sup> Humanitarian law must also be distinguished from the *jus ad bellum*, which regulates the lawfulness of a state’s initial recourse to the use of armed force. Once an armed conflict has begun, the *jus ad bellum* gives way to the *jus in bello*.

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

### B. The Evolution of IHL

The corpus of IHL rests on a set of fundamental principles, which at the same time constitute the earliest antecedents of modern humanitarian law.<sup>20</sup> These include the complementary principles of necessity and humanity, and of distinction and proportionality.

While the principle of humanity was aimed at reducing human suffering, it is tempered by the principle of military necessity, which reflects the interests of the warring parties in avoiding

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<sup>18</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, and annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, art. 22 [hereinafter 1907 Hague Regulations].

<sup>19</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic*, Case No. IT-96-23/1, Judgment, ¶ 470(i) (Trial Chamber II, Feb. 22, 2001). Other distinctions between human rights and humanitarian law include the subjects of obligations, the institutions competent to determine violations, the period of application, the range of rights protected, and the sources of obligations.

<sup>20</sup> These principles are historically rooted in moral philosophy. The doctrine of collateral damage, for example, follows from the Thomist doctrine of “double-effect.”

conferral of a military advantage on the opposing party to the conflict. Thus, traditional weapons were prohibited only if they caused *unnecessary* suffering.

A balance is similarly struck between the principle of distinction and the permissibility of civilian casualties in the form of proportionate collateral damage. The principle of distinction requires that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>21</sup> Civilian casualties may result, however, in the course of an attack against a military objective. The lawfulness of such an attack will be preserved so long as the expected loss of civilian life is not “excessive in relation to the concrete and direct military advantage anticipated.”<sup>22</sup>

As may be gleaned from these principles, many provisions of IHL are premised on a bargaining of sorts. For example, certain protected objects retain their protected status only so long as they are not used for purposes related to the hostilities. Thus, when fighters take shelter in a church, the church becomes a lawful military objective, losing the protection otherwise afforded to it under humanitarian law.<sup>23</sup>

### *The combatants’ privilege*

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

### *The Hague law and Geneva law*

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

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

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<sup>21</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I) art. 48, 8 June 1977, 1125 UNTS 3 [hereinafter Additional Protocol I or API].

<sup>22</sup> *Id.*, art. 57.

<sup>23</sup> Note, however, that if there were civilians in the church as well, the principle of proportionality would still apply. If the number of civilians present in the church vastly outnumbered the number of combatants, it is likely that the principle of proportionality would bar attacking the church in a manner that would result in the deaths of those civilians. See also discussion in Chapter III, *infra*, regarding protection of cultural property.

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

Among the most basic rules of IHL, in addition to the principles noted above, are the following: Persons *hors de combat* (i.e. an individual who has been removed from combat through sickness or detention) and those not taking direct part in hostilities must be protected and treated humanely without adverse discrimination. It is forbidden to kill or injure an enemy who surrenders or is *hors de combat*. The wounded and sick must be collected and cared for by the party that has them in its power. The Red Cross emblem, which is used to protect humanitarian or medical establishments and personnel, must be respected. Captured combatants and civilians under the authority of an adverse party are entitled to have their basic rights respected; in particular they must be protected against violence. All persons are entitled to basic judicial guarantees. Parties to the conflict cannot use weapons or methods of warfare causing unnecessary suffering. In addition, certain acts are specifically prohibited. These include torture, the taking of hostages, the use of human shields, rape, the imposition of collective penalties, pillage,<sup>24</sup> and reprisals<sup>25</sup> against protected<sup>26</sup> persons.

### *The grave breaches*

The Geneva Conventions also establish a special penal regime for certain violations — the so-called “grave breaches.” When a grave breach is committed, all States Parties are obliged to criminalize such conduct under their domestic law, to seek out the perpetrators, and to bring them to justice through prosecution or extradition.<sup>27</sup>

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<sup>24</sup> Pillage is essentially theft of civilian property. It must be distinguished from the lawful act of requisitioning supplies needed by an occupying army.

<sup>25</sup> A reprisal is an otherwise unlawful act committed in response to an unlawful act by the opposing party. Reprisals are employed to induce compliance by the opposing party.

<sup>26</sup> As noted above, the scope of protection afforded by the Geneva Conventions is limited to certain groups of individuals. The bulk of the protection afforded under the Fourth Convention is limited to a particular group of civilians – “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” See Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, art. 4 (1949) [hereinafter Fourth Geneva Convention].

<sup>27</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1st Geneva Convention), 75 U.N.T.S. 31, art. 50 (1949) (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”).

*The continuing relevance of customary law*

Notwithstanding the codification of humanitarian law, such as the grave breaches provisions of the Geneva Conventions, the general principles and customary law of war as developed through the centuries continue to apply in a residual manner, filling any gaps between the express provisions of treaty law. As set forth in the famous Martens clause:<sup>28</sup>

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>29</sup>

*The law of non-international armed conflict*

Because it is embedded in the classical system of international law—a system resting on the sovereign equality of states<sup>30</sup> and the related principle of non-intervention<sup>31</sup>—IHL is predominantly concerned with international (i.e., interstate) armed conflict. Among the four Geneva Conventions, only ‘Common Article 3’ expressly applies to non-international armed conflict. Common Article 3 provides protection from only the most serious abuses.<sup>32</sup> While Protocol II to the 1949 Geneva Conventions also applies to non-international armed conflict, it provides significantly less protection to individuals than does Protocol I, which is applicable only in international armed conflict or occupation. Application of the Hague Conventions is similarly limited to situations of international armed conflict.<sup>33</sup>

While neither the Hague Conventions nor the Geneva Conventions define the phrase “armed conflict,” definitions for both international and non-international armed conflict have been set

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<sup>28</sup> The ‘Martens clause’, as it has come to be known, was included in the preamble of the Hague Conventions at the behest of F. F. de Martens, prominent jurist and Russian delegate to the 1899 Hague Peace Conference. The clause essentially invoked natural law to provide residual protection to victims of inhumane acts that were not expressly prohibited by the Convention. This clause also provided the foundation for the evolution of Crimes Against Humanity as they are understood today. See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78, 79 (2000). The International Court of Justice has found the Clause itself to constitute a rule of customary international law. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257 (July 8, 1996).

<sup>29</sup> Hague Conventions of 1907, pmb1.

<sup>30</sup> UN CHARTER, art. 2(1).

<sup>31</sup> *Id.* art. 2(7).

<sup>32</sup> Common Article 3 prohibits the following acts against persons taking no active part in the hostilities: “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [the] [t]aking of hostages; [o]utrages upon personal dignity, in particular, humiliating and degrading treatment; [and] [t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

<sup>33</sup> Note, however, that the International Criminal Tribunal for the former Yugoslavia has greatly expanded the scope of norms applicable in non-international armed conflict. In the *Tadic* case, the Appeals Chamber found that certain norms of international armed conflict have evolved through customary law and now apply during non-international armed conflict as well. *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 69 (Oct. 2, 1995).



forth in international jurisprudence. According to the jurisprudence of one international criminal tribunal, an armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>34</sup>

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

### **C. Violations of IHL Amounting to War Crimes under International Law**

As noted in the Introduction, it was the establishment of the International Military Tribunals<sup>35</sup> in the aftermath of World War II that spurred the development of international criminal law.<sup>36</sup> Thus, the overwhelming majority of international crimes that were recognized by the international community at that time were those relating to war; i.e. violations of humanitarian law. In addition, the commission of international crimes, by their very nature and scale, will often coincide with times of massive upheaval, such during periods of armed conflict.

“War crimes” are essentially criminal violations of IHL (i.e. violations of those norms of IHL which are deemed to give rise to individual criminal responsibility). Genocide and crimes against humanity are distinct from war crimes in that they need not be committed in times of armed conflict. It must be noted, however, that not all violations of IHL will constitute war crimes. The breach of some norms will give rise only to state responsibility (the traditional form of responsibility in international law), and not the responsibility of the individual perpetrator. The most well-established category of war crimes under international law are the “grave breaches” as set forth in the 1949 Geneva Conventions. As discussed above, such acts are the subject of a mandatory penal regime in the Conventions. Moreover, they give rise to individual criminal responsibility under both treaty and customary international law. Article 6 of the KRT Law explicitly provides the Extraordinary Chambers with the power to try suspects for grave breaches under the 1949 Geneva Conventions.

Grave breaches against prisoners of war include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war

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<sup>34</sup> *Id.*, ¶ 70.

<sup>35</sup> At the close of World War II, the Allies established the International Military Tribunal at Nuremberg as well as the International Military Tribunal for the Far East. While the former was established on the basis of a multilateral treaty, the latter was created on the basis of a unilateral order by the Supreme Commander of the Allied Powers.

<sup>36</sup> As noted above, although international criminal law can refer to various distinct bodies of international law, ranging from extradition treaties to mutual assistance agreements, in this discussion guide it is used to refer to that body of international norms the breach of which gives rise to the criminal responsibility of the individual under international law.

to serve in the forces of the hostile power, or willfully depriving a prisoner of war the rights of a fair and regular trial as provided for in the Third Geneva Convention.<sup>37</sup>

Grave breaches against protected persons, including civilians and armed forces no longer taking an active part in hostilities, include willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, willfully depriving a protected person of the rights of a fair and regular trial as provided for in the Fourth Geneva Convention, taking of hostages, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>38</sup>

To determine what acts, in addition to grave breaches, amount to war crimes under international law, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in its *Tadic* decision developed a framework for analyzing which norms of IHL could be prosecuted before the Tribunal. The primary criteria set forth were the character of the norm itself, the severity of the violation, and the interest of the international community in its repression.<sup>39</sup> Because the KRT Law limits the war crimes jurisdiction of the Extraordinary Chambers to grave breaches (and destruction against cultural property pursuant to the 1954 Hague Convention), it excludes the Chambers from prosecuting other war crimes, including those occurring during internal armed conflicts.

For an act to constitute a war crime, whether or not a grave breach, a nexus must be established between the alleged offence and the armed conflict that gives rise to the applicability of international humanitarian law. The *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) have determined that such a nexus exists where an act is closely related to an armed conflict; i.e., if the act was committed in furtherance of an armed conflict, or under the guise of an armed conflict. They have cited as factors in this determination: the fact that the perpetrator is a combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.

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<sup>37</sup> Geneva Convention III, art. 130.

<sup>38</sup> Geneva Convention IV, art. 147.

<sup>39</sup> *Tadic* Appeal Decision, ¶ 128.

### III. DESTRUCTION OF CULTURAL PROPERTY DURING AN ARMED CONFLICT PURSUANT TO THE 1954 HAGUE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY<sup>40</sup>

Article 7 of the KRT Law provides that:

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict [1954 Hague Convention], and which were committed during the period from 17 April 1975 to 6 January 1979.

The 1954 Hague Convention has no express provision making violations of its terms subject to individual criminal responsibility. However, the Convention does obligate States to respect cultural property by refraining from, preventing, and prosecuting certain acts. The question therefore arises as to which of the acts prohibited by the Convention entailed individual criminal responsibility under either Cambodian or customary international law during the jurisdiction of the Extraordinary Chambers.<sup>41</sup> As this guide does not address questions of Cambodian law, the following discussion will be limited to determining what protection was accorded to cultural property under international law during the period from 1975-1979. Notably, no international criminal court has yet ruled on this question.

#### A. Application

The 1954 Hague Convention applies in both international and non-international armed conflicts. Thus, it applies “in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.”<sup>42</sup> It also applies in all cases of partial or total occupation of the territory of a High Contracting Party.<sup>43</sup>

Article 19(1) of the Convention requires that “[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.” At a minimum, this would include Article 4, setting forth the obligations of States Parties. In *Tadic*, the ICTY Appeals Chamber identified Article 19 as a provision which has “gradually become part of customary law.”<sup>44</sup>

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<sup>40</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

<sup>41</sup> See the discussion of the principle of legality, *infra* § IX.

<sup>42</sup> 1954 Hague Convention, art. 18(1).

<sup>43</sup> See *id.*, art. 18(2). Cambodia became a State Party to the 1954 Hague Convention in 1962.

<sup>44</sup> *Tadic* Appeal Decision, ¶ 98.

## B. Definition of Cultural Property

Article 1 of the 1954 Hague Convention sets forth three categories that, irrespective of origin or ownership, constitute cultural property: (1) movable or immovable property of great importance to the cultural heritage of every people, (2) shelters containing such cultural property, and (3) centers containing a large amount of such cultural property.<sup>45</sup>

Immovable and movable items include, *inter alia*,<sup>46</sup>

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.<sup>47</sup>

Shelters of cultural property include buildings whose “main and effective purpose” is to preserve or exhibit the movable property defined *supra*, such as museums, libraries and archive premises.<sup>48</sup> Centers of cultural property could include important historic cities and archaeological zones.<sup>49</sup>

The definition of cultural property in the 1954 Hague Convention marks a change in approach from prior treaties, which defined cultural property by its use rather than its cultural importance.<sup>50</sup> The First and Second Protocols Additional to the Geneva Conventions of 1949 (API<sup>51</sup> and APII<sup>52</sup>) define cultural property in a similar manner as the 1954 Convention. However, while the 1954 Hague Convention addresses property “of great importance to the cultural heritage of every people,” API and APII address property “which constitutes the cultural or spiritual heritage of peoples.”<sup>53</sup> Commentary to API states that “[d]espite the difference in

<sup>45</sup> See 1954 Hague Convention, art. 1.

<sup>46</sup> During the Conference on the 1954 Hague Convention the parties were divided between those who wanted a general definition that could later be elaborated upon by individual parties in their domestic legislation, or an inclusive and complete enumeration of protected property. The parties adopted an intermediate solution by making a short list of examples of cultural property and indicating only the principal categories. See Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, *Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization and held at the Hague from 21 April to 14 May 1954*, ¶ 172, published by the Government of the Netherlands, The Hague, Staatsdrukkerij en Uitgeverijbedrijf, 1961, [hereinafter Conference Records], available at <http://unesdoc.unesco.org/images/0008/000899/089916mb.pdf> (unofficial translation from French to English).

<sup>47</sup> *Id.*

<sup>48</sup> See 1954 Hague Convention, art. 1.

<sup>49</sup> See *id.*

<sup>50</sup> See, e.g., 1907 Hague Regulations, art. 27 (protecting “buildings dedicated to” certain cultural purposes).

<sup>51</sup> API was acceded to by Cambodia in 1998.

<sup>52</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609, entered into force Dec. 7, 1978 [hereinafter Additional Protocol II or APII]. APII was acceded to by Cambodia in 1998.

<sup>53</sup> Compare 1954 Hague Convention, art. 4(1), with API, art. 53(a) and APII, art. 16. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 130* (2005) (noting that the

terminology, the basic idea is the same.”<sup>54</sup> “[C]ultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.”<sup>55</sup> However, other authorities assert that the difference in terminology is an expression of the intent of the drafters of the Additional Protocols to “to cover only a limited amount of very important cultural property” such that “it will be recognized by everyone, even without being marked.”<sup>56</sup>

### C. Conduct that May Be Subject to Prosecution

The 1954 Hague Convention obligates States to respect cultural property and to prosecute individuals who violate the terms of the Convention. Article 28 states that:

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.<sup>57</sup>

Article 4 of the 1954 Hague Convention contains four categories of prohibited acts: theft, pillage, or misappropriation of or vandalism against cultural property; acts of reprisal against cultural property; acts of hostility directed against such property; and use likely to expose cultural property to destruction or damage.

To help determine whether some or all of these acts entailed criminal responsibility during the jurisdiction of the Extraordinary Chambers, the following section will examine the protections accorded to cultural property by prior and contemporary instruments, such as the Hague Conventions of 1907, the Geneva Conventions of 1949, API and APII. Moreover, the protection provided under subsequent sources will be discussed as evidence of the furthest possible reach of custom during the relevant period. In addition to the heightened protection specifically accorded to cultural property by these instruments, the minimum general protection to which cultural property is entitled as a *prima facie* category of civilian property<sup>58</sup> will also be discussed.

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definition in the Protocols was intended to cover only a limited amount of important cultural property that “will be recognized by everyone, even without being marked”). *But see* ICRC commentary to API, ¶ 2064, available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (stating that “[d]espite the difference in terminology, the basic idea is the same”).

<sup>54</sup> ICRC commentary ¶ 2064. *See also* MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 333 (1982).

<sup>55</sup> ICRC commentary, ¶ 2064.

<sup>56</sup> HENCKAERTS & DOSWALD-BECK, at 130 (citing to “numerous statements at the Diplomatic Conference leading to the adoption of the Additional Protocols”).

<sup>57</sup> 1954 Hague Convention, art. 28. The ICTY referenced this obligation in determining that, at least as of the 1990s, the prohibition against seizing, destroying, or causing willful damage to cultural objects entailed international criminal responsibility. *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment, ¶ 233 (Trial Chamber, Jan. 31, 2005).

<sup>58</sup> *See* HENCKAERTS & DOSWALD-BECK, at 34.

## 1. Theft, Pillage or Misappropriation, and Acts of Vandalism

States Parties to the 1954 Hague Convention “undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”<sup>59</sup> Moreover, States Parties agree to “refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.”<sup>60</sup> The antecedents to these violations, and their possible criminal elements, are discussed below.

### *Defining prohibited appropriations*

The terms “theft” and “misappropriation” are not used in other IHL instruments, although seizures not justified by military necessity have long been prohibited. The right of a party to a conflict to requisition private property under certain circumstances is well recognized, but is likewise limited by the principle of military necessity. Although “pillage” has a long history of prohibition and punishment, IHL instruments have not explicitly defined the term.

International criminal jurisprudence and instruments adopted after the jurisdiction of the Extraordinary Chambers nevertheless provide guidance as to elements of pillage and the relationship of this act to theft and other illegal appropriations. The ICTY has found pillage to be encompassed in the crime of “plunder,” which it defines as an intentional and unlawful appropriation of private or public property.<sup>61</sup> On the other hand, the ICC Elements of Crimes defines pillage more narrowly as an appropriation for private or personal use.<sup>62</sup> The recent ICRC study on customary international law notes that “the prohibition of pillage is a specific application of the general rule prohibiting theft” which “is to be found in national criminal legislation around the world.”<sup>63</sup> These definitions suggest that pillage is likely a form of theft, and misappropriation is likely a broader category encompassing both terms. Thus, while at the broadest, these terms are all forms of “unlawful appropriation,” at the narrowest, they would include appropriations of property for personal use. Both the broader and narrower categories of prohibitions are discussed below.

### *Appropriations and requisitions of property generally*

As far back as the adoption of the Hague Regulations of 1907, the seizure of property of an adversary,<sup>64</sup> including the confiscation of private property in occupied territory,<sup>65</sup> has been

<sup>59</sup> 1954 Hague Convention, art. 4(3).

<sup>60</sup> *Id.*

<sup>61</sup> See *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Judgment, ¶ 84 (Appeals Chamber, Dec. 17, 2004).

<sup>62</sup> See ICC Elements of Crimes, art. 8(2)(b)(xvi), available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf).

<sup>63</sup> HENCKAERTS & DOSWALD-BECK, at 185.

<sup>64</sup> See 1907 Hague Regulations, art. 23(g) (prohibiting the seizure of an enemy’s property “unless such ... seizure be imperatively demanded by the necessities of war”). The protections of the Hague Regulations were found to be declaratory of international law by the International Military Tribunal at Nuremberg (IMT). This prohibition has recently been found to be applicable in both international and non-international armed conflicts. HENCKAERTS & DOSWALD-BECK, at 175-76. The words “seizure” and “appropriation” appear to be used interchangeably in the literature addressing this prohibition.

<sup>65</sup> See 1907 Hague Regulations, art. 46 (“Private property cannot be confiscated.”). The recent ICRC study on customary international law found that the prohibition against the confiscation of private property during

prohibited in the absence of military necessity.<sup>66</sup> For example, private property may be requisitioned “for the needs of the army of occupation” on the authority of the local commander.<sup>67</sup> However, “as far as possible” any requisitioned property should be paid for in cash, or else a receipt provided and the amount due paid as soon as possible.<sup>68</sup> In addition to this general protection, the 1907 Hague Regulations also specifically forbid the seizure of cultural property and require that such seizure be “made the subject of legal proceedings.”<sup>69</sup>

Appropriation of civilian property not justified by military necessity has long been considered a criminal offense. For example, extensive appropriation of civilian property is a grave breach under Geneva Conventions I, II, and IV when “not justified by military necessity and carried out unlawfully and wantonly.”<sup>70</sup> The ICTY and Rome Statutes reiterate this grave breach criteria. The Rome Statute also more broadly criminalizes the seizure of “the property of an adversary unless such . . . seizure be imperatively demanded by the necessities of the conflict” in both international and non-international armed conflicts.<sup>71</sup> Most recently, the ICRC study on customary international law affirmed that appropriations of property not justified by military necessity are war crimes under international law.<sup>72</sup>

Article 4 of the 1954 Hague Convention explicitly provides for a waiver of military necessity with regard to some violations, but not in regard to its prohibition of “theft, pillage, and misappropriation.” Nevertheless, as these acts are all violations of the duty to respect cultural property, it is likely that, while not necessarily synonymous with each other, they are all types of seizure that by definition are not justified by military necessity.<sup>73</sup> As such, all may have been war crimes under international law during the jurisdiction of the Extraordinary Chambers, at least where the unlawful appropriation was “extensive.”

### *Absolute prohibition of pillage and theft*

Pillage is prohibited without qualification twice in the 1907 Hague Regulations: in Article 28, which provides that “[t]he pillage of a town or place, even when taken by assault, is prohibited”; and in Article 47, which provides that “[p]illage is formally forbidden.” Pillage is also absolutely prohibited by Article 33 of Geneva IV<sup>74</sup> and by Article 4 of APII.<sup>75</sup> The ICRC commentary to Geneva IV notes that the prohibition “concerns not only pillage through

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occupation, except where seizure is required by imperative military necessity, is “a long-standing rule of customary international law.” See HENCKAERTS & DOSWALD-BECK, at 178-79.

<sup>66</sup> The concept of military necessity is discussed *infra*, § III.D.

<sup>67</sup> 1907 Hague Regulations, art. 52.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, art. 56 (providing that in cases of occupation by the forces of another State Party, “[a]ll seizure of . . .” religious, charitable, educational, artistic, or scientific institutions; historic monuments; and works of art and science, “is forbidden and should be made the subject of legal proceedings”).

<sup>70</sup> Geneva I, art. 50; Geneva II, art. 51; and Geneva IV, art. 147.

<sup>71</sup> Rome Statute, arts. 8(2)(b)(xiii), (e)(xii).

<sup>72</sup> See HENCKAERTS & DOSWALD-BECK, at 574-75 (finding the “extensive destruction or appropriation of property, not justified by military necessity” to be a war crime under international law).

<sup>73</sup> See, e.g., ICC Elements of Crimes, art. 8(2)(b)(xvi) n.47 (stating that “appropriations justified by military necessity cannot constitute the crime of pillaging”).

<sup>74</sup> Geneva IV, art. 33 (providing that “[p]illage is prohibited”).

<sup>75</sup> APII, art. 4 (providing that pillage is “prohibited at any time and in any place whatsoever”).

individual acts without the consent of the military authorities, but also organized pillage. . . .” Furthermore, “[i]t guarantees all types of property, whether they belong to private persons or to communities of the State.” Although the prohibition of pillage was not included in API, commentators have noted that this omission likely reflects the understanding of the drafters that it was “clearly a part of customary international law” and thus “its reaffirmation did not merit a high priority.”<sup>76</sup>

Pillage was identified as a war crime in the report of the post-World War I Commission on Responsibility.<sup>77</sup> The act was prosecuted as “plunder of public or private property” by the International Military Tribunal at Nuremberg (IMT), and found to be a recognized war crime under international law.<sup>78</sup> Most recently, the ICTY and ICC Statutes have recognized that pillage or plunder is a serious violation of the laws and customs of war in both international and non-international armed conflicts resulting in individual criminal liability.<sup>79</sup> Any illegal appropriation amounting to the act of “pillage” should be considered a crime under international law during the jurisdiction of the Extraordinary Chambers.

### *Vandalism*

The 1954 Hague Convention also prohibits acts of vandalism directed against cultural property. “Vandalism” is not defined in the Convention, nor is this terminology used in previous IHL instruments. It likely should be defined according to its ordinary meaning as “the willful or malicious destruction or defacement of public or private property.” Precedent to this prohibition likely may be found in the Hague Regulations of 1907, which provide that in cases of occupation by the forces of another State Party, “[a]ll . . . destruction or wilful damage done to” religious, charitable, educational, artistic, or scientific institutions; historic monuments; and works of art and science, is forbidden.<sup>80</sup> Another source of the prohibition is likely the prohibition against hostile acts directed at cultural property, discussed *infra* § 3.

## **2. Reprisals**

States Parties to the 1954 Hague Convention are obligated to “refrain from any act directed by way of reprisals against cultural property.”<sup>81</sup> As with the violations discussed above, to determine if this act entailed individual criminal responsibility during the jurisdiction of the Extraordinary Chambers, the following section will examine the status of this prohibition in related IHL instruments.

<sup>76</sup> BOTHE, ET AL., at 327.

<sup>77</sup> See HENCKAERTS & DOSWALD-BECK, at 182.

<sup>78</sup> See *United States v. Herman Goering et al.*, reprinted in 22 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 253 (1948).

<sup>79</sup> See Rome Statute, art. 8(2)(b)(xvi) & (e)(v). See also HENCKAERTS & DOSWALD-BECK, at 134 (finding that the prohibition of pillage is a norm of customary international law applicable in both international and non-international armed conflicts).

<sup>80</sup> 1907 Hague Regulations, art. 56.

<sup>81</sup> 1954 Hague Convention, art. 4(4). The ICRC study on customary international law defines a belligerent reprisal as “an action that would otherwise be unlawful but that in exceptional cases is considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary.” HENCKAERTS & DOSWALD-BECK, at 513.



Article 50 of the 1907 Hague Regulations provides that “[n]o general penalty . . . shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.” Article 33 of Geneva IV is derived from this article,<sup>82</sup> and generally prohibits “[r]eprisals against protected persons and their property” by occupying powers.<sup>83</sup> This would include cultural property, which is a *prima facie* a category of civilian property. The ICRC Commentary to Article 33 notes that the prohibition of reprisals “is absolute and mandatory in character and thus cannot be interpreted as containing tacit reservations with regard to military necessity.”

API extended the prohibition against reprisals to include “enemy civilians [and civilian objects] in territory controlled by the enemy.”<sup>84</sup> Article 52 of API thus generally prohibits reprisals against civilian objects. Moreover, Article 53 of API specifically prohibits reprisals against “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.” The ICRC has recently confirmed that under customary international law, “[r]eprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited.”<sup>85</sup>

Although prohibited under several IHL instruments and under customary law, reprisals against civilian objects have not been explicitly criminalized in any treaty. Notably, however, Article 85(3)(b) of API recognizes as a grave breach the “launching [of] an indiscriminate attack affecting . . . civilian objects in the knowledge that such attack will cause excessive . . . damage to civilian objects [in relation to the concrete and direct military advantage anticipated]”). A reprisal directed at a civilian object that is not a military objective would be by definition indiscriminate,<sup>86</sup> and thus a war crime under API. Moreover, the ICTY Appeals Chamber has recognized that, at least as of the early 1990s, the general prohibition on attacks against civilian objects in Article 52 of API is a customary international law norm the violation of which entails individual criminal responsibility if it results in serious injury to body or health.<sup>87</sup>

As API entered into force in 1977, its provisions may provide evidence of the status of customary international law at the time period relevant to the KRT Law.<sup>88</sup> However, even if the broader protection provided by API was not custom during the temporal jurisdiction of the Extraordinary Chambers, at the least, reprisals against the property of protected persons under occupation would have been prohibited under customary law at that time, and likely criminal in the case of serious violations.

<sup>82</sup> See ICRC Commentary to Geneva IV, art. 33.

<sup>83</sup> The ICRC Commentary to this article defines reprisals as “measures contrary to law, but which, when taken by one State with regard to another State to ensure the cessation of certain acts or to obtain compensation for them, are considered lawful in the particular conditions under which they are carried out.” ICRC Commentary to Geneva IV, art. 33.

<sup>84</sup> BOTHE, ET AL., at 312.

<sup>85</sup> HENCKAERTS & DOSWALD-BECK, at 523.

<sup>86</sup> See API, art. 51(4)(a).

<sup>87</sup> See *Kordic Appeals Judgment*, ¶¶ 56-67.

<sup>88</sup> See, e.g., *id.* ¶ 59 (finding it “well-established that when promulgated, the prohibition in Articles 51 and 52 of Additional Protocol I of attacks on civilians . . . objects reflected the current status of customary international law embodying the customary international law principle of protection of civilians in situations of armed conflict”) (citations omitted).

### 3. Acts of Hostility

State Parties to the 1954 Hague Convention are obligated to respect cultural property “by refraining from any act of hostility *directed* against such property,”<sup>89</sup> except in cases of imperative military necessity.<sup>90</sup> This prohibition does not appear to require that the property sustain any *actual* damage or destruction,<sup>91</sup> however, as discussed *infra* § IX in regard to the principle of legality, the level of severity of damage may be relevant to a determination that the act entails individual criminal responsibility.<sup>92</sup>

One commentator has noted in a related context that

the use of the term “acts of hostility” instead of “attacks” indicates that the prohibition is applicable to [a] Party’s own very important cultural and spiritual objects. Thus, the Article prohibits the destruction of any specially protected object, by any Party to the conflict, either by way of attack or by demolition of objects under its control.<sup>93</sup>

To determine which “acts of hostility” entailed individual criminal responsibility during the jurisdiction of the Extraordinary Chambers, the following section will examine the status of this prohibition in related IHL instruments.

#### *Protection of civilian property generally*

The destruction of the enemy’s property in the absence of military necessity has long been forbidden, and is included in Article 23 of the 1907 Hague Regulations. In the *Hostages Case* after WWII, a U.S. military court found that “the destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law.”<sup>94</sup> Subsequently, civilian property, including cultural property, was recognized to be protected from intentional destruction in Article 53 of Geneva IV. This article generally forbids occupying powers from destroying “real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social cooperative organizations . . . except where such destruction is rendered absolutely necessary by military operations.”

<sup>89</sup> 1954 Hague Convention art. 4(1) (emphasis added).

<sup>90</sup> *See id.* art. 4(2). The meaning of “imperative military necessity” is discussed *infra* § D.

<sup>91</sup> This view is supported by the commentary to API, which notes the similarity of API art. 53(a) to the 1954 Hague Convention art. 4(1) and finds that article 53(a) “prohibits not only a substantial detrimental effect, but all acts ‘directed’ against the protected objects. For a violation of the article to take place it is therefore not necessary for there to be any damage.” ICRC commentary, ¶ 2070. *See also Prosecutor v. Miodrag Jokic*, Case No. IT-01-42/1-S, Sentencing Judgment, ¶ 50 (Trial Chamber I, March 18, 2004) (citing to the ICRC commentary for this proposition).

<sup>92</sup> *See, e.g., Strugar* Trial Judgment, ¶ 231 (recalling that “the offence of attacking civilian objects [meets the third condition listed in the *Tadic* case for determining whether a violation of humanitarian law entails individual criminal responsibility] when it results in severe damage”).

<sup>93</sup> BOTHE ET AL., at 333-34 (discussing API art. 53(a), prohibiting “any acts of hostility directed against” cultural objects “[w]ithout prejudice” to the provisions of the 1954 Hague Convention).

<sup>94</sup> *In re List* (“the Hostages Case”), 11 U.N. WAR CRIMES COMM’N, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 759, 1253-54 (1950).

When “extensive,” the destruction of the property has long been considered to be a grave breach if “not justified by military necessity and carried out unlawfully and wantonly.”<sup>95</sup> Thus, it is likely that “an isolated incident would not be enough.”<sup>96</sup> Nevertheless, it is possible that even a single incident could be sufficient if it was committed intentionally.<sup>97</sup> ICTY and Rome Statutes reiterate this grave breach criteria.

The IMT has also found the “wanton destruction of cities, towns, or villages, or devastation not justified by military necessity” to be a war crime, without explicitly requiring “extensive” damage. According to the IMT, by WWII such acts “were already recognized as War Crimes under international law.”<sup>98</sup> The Rome Statute likewise criminalizes “destroying . . . the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” in both international and non-international armed conflicts.<sup>99</sup> The ICRC has recognized this less stringent category to be, at least as of the present time, a war crime under customary international law.<sup>100</sup>

It thus appears that the destruction of the property of an adversary, in the absence of military necessity, was a war crime under international law during the jurisdiction of the Extraordinary Chambers, at least where the such destruction was “extensive.”

#### *Specific protection of cultural property*

The specific prohibition against directing hostile acts against cultural property was codified as early as 1907 in Article 27 of the Hague Regulations, which require that “all necessary steps” be taken to “spare, as far as possible” buildings used for artistic purposes and historic monuments during sieges and bombardments.<sup>101</sup> After World War I, the Commission on Responsibility identified the “wanton destruction of religious, charitable, educational and historic buildings and monuments” as a violation of the laws and customs of war subject to prosecution.<sup>102</sup>

<sup>95</sup> Geneva Convention I, art. 50; Geneva Convention II, art. 51; and Geneva Convention IV, art. 147.

<sup>96</sup> ICRC commentary to Geneva IV, art. 147; ICRC commentary to Geneva I, art. 50.

<sup>97</sup> See ICRC commentary to Geneva IV, art. 147.

<sup>98</sup> *United States v. Herman Goering et al.*, reprinted in 22 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 253 (1948).

<sup>99</sup> Rome Statute, art. 8(2)(b)(xiii), (e)(xii). See HENCKAERTS & DOSWALD-BECK, at 574-75 (finding the “extensive destruction . . . of property, not justified by military necessity” to be a war crime under international law).

<sup>100</sup> See HENCKAERTS & DOSWALD-BECK, at 574-75 (finding the act of “destroying property not required by military necessity” to be a war crime under international law).

<sup>101</sup> 1907 Hague Regulations, art. 27 (providing that “[i]n sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, [and] historic monuments . . . provided they are not being used at the time for military purposes”); Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, art. 5 (providing that “[i]n bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, [and] historic monuments . . . on the understanding that they are not used at the same time for military purposes”).

<sup>102</sup> HENCKAERTS & DOSWALD-BECK, at 128 (noting this finding in a discussion of the customary international law rule prohibiting attacks against cultural property and requiring special care in military operations in order to avoid damage to such property).

API and APII prohibit “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”<sup>103</sup> This is considered a reaffirmation of Article 27 of the 1907 Hague Regulations’ prohibition of attacks against cultural objects “provided that they are not being used at the time for military purposes.”<sup>104</sup> Although the language in the Additional Protocols does not provide a waiver for military necessity, as discussed above,<sup>105</sup> Article 53 of API may protect a more limited category of property than either Article 27 of the 1907 Hague Convention or Article 4 of the 1954 Hague Convention. Moreover, commentators have noted that,

[i]nasmuch . . . [as these provisions are] expressly made ‘without prejudice to the 1954 Hague Conventions and all other relevant instruments’, (including Art. 27 of the Hague Regulations) it must be inferred that loss of the special protection . . . is an appropriate defensive measure which may be taken if the protected property is used to support the military effort . . . .<sup>106</sup>

Notably, API recognizes a grave breach only in regard to attacks that make

clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence [that such objects are being used in the military effort] . . . [or are] located in the immediate proximity of military objectives.<sup>107</sup>

The Commentary to the First Additional Protocol identifies five criteria for an attack to qualify as a grave breach under this provision:

- The attack must have been committed willfully;
- The cultural objects must not have been used in support of the military effort;
- Special protection must have been given to the objects in question by special arrangement;
- The objects must not have been located in the immediate vicinity of military objectives; and
- The attack must have caused extensive destruction of the objects.<sup>108</sup>

<sup>103</sup> API, art. 53(a); APII, art. 16.

<sup>104</sup> BOTHE ET AL., at 329.

<sup>105</sup> See discussion, § A, *supra*.

<sup>106</sup> BOTHE ET AL., at 332-33.

<sup>107</sup> API, art. 85(4)(d) (prohibiting such an attack “when committed willfully and in violation of the [1949] Conventions or the Protocol”). API, art. 85(3)(b) additionally criminalizes indiscriminate attacks against property in violation of the provisions of the Protocol when committed willfully, “in the knowledge that such attack will cause excessive . . . damage to civilian objects,” and “death or serious injury to body or health” results. This prohibition likely applies to a broader range of attacks than those that are “directed against” cultural property and thus may only be tangentially useful in determining the elements of a criminal prohibition under the 1954 Hague Convention.

<sup>108</sup> ICRC commentary to API, art. 85, ¶ 3517.

As API was adopted near to the temporal jurisdiction of the Extraordinary Chambers, it is possible that hostile acts against cultural property not included in a special protection arrangement<sup>109</sup> would not have been explicitly considered a war crime under customary international law at that time. Nevertheless, as discussed above, an act of hostility intentionally directed at the property of an adversary — including cultural property — would likely have been a war crime under customary international law during the temporal jurisdiction of the Chambers, provided the property in question did not qualify as a military objective<sup>110</sup> and the damage thereto was extensive.

#### 4. Use Likely to Expose Property to Destruction or Damage

States Parties' obligation to respect cultural property under the Hague Convention of 1954 requires them to “refrain from any use of the property and its immediate surroundings or of the appliances in use for its protection and purposes which are likely to expose it to destruction or damage in the event of armed conflict”<sup>111</sup> except in cases of imperative military necessity.<sup>112</sup> The Conference Records do not define the word “appliances” and the question was not apparently raised by conference delegates nor discussed in State Parties periodic reports on the implementation of the Convention.<sup>113</sup> It is possible that such appliances concern devices used to protect cultural property, for example, protective boxes, screens or walls, air quality equipment, computers for the maintenance of protective systems, lights, alarm systems or fire prevention systems.<sup>114</sup>

No other IHL instruments apparently prohibit the use of cultural objects until the adoption of the Additional Protocols in 1977. API and APII provide broad protection of a limited class of cultural objects by prohibiting “the use of [historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples] in support of the military effort[,]”<sup>115</sup> with no waiver for military necessity. Commentators have noted that “[t]he absence

<sup>109</sup> Under 1954 Hague Convention art. 8(6), “[s]pecial protection is granted to cultural property by its entry in the ‘‘International Register of Cultural Property under Special Protection.’’ There is evidence that, while on March 31, 1972, the Director-General of UNESCO forwarded an application from the Khmer Republic asking for special protection of Angkor Wat and other cultural properties, the other parties to the Convention objected to the request because they did not respect the Khmer Republic regime as the proper authority to make such a request and therefore the protection was never given. See JIRI TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT*, 108 (1996).

<sup>110</sup> The continuing applicability of this requirement is demonstrated by the recent finding that attacks on religious or cultural objects “provided that they are not military objectives” are war crimes under customary international law in both international and non-international armed conflicts. See HENCKAERTS & DOSWALD-BECK, at 576, 579, 593, 596.

<sup>111</sup> 1954 Hague Convention, art. 4(1).

<sup>112</sup> See *id.*, art. 4(2). Imperative military necessity is discussed *infra*, § D. Article 11 of the 1954 Hague Convention provides that the immunity of cultural property under special protection can only be withdrawn ‘in exceptional cases of unavoidable military necessity.’ This standard is only relevant if Cambodia successfully applied for special protection of the cultural property in question.

<sup>113</sup> Unofficial statement by a member of the UNESCO Secretariat to the WCRO staff (March 2, 2005).

<sup>114</sup> *Id.*

<sup>115</sup> API, art. 53(b); APII, art. 16. ICRC commentary to API states that the “military effort” is a very broad concept, encompassing all military activities connected with the conduct of war.” Thus, “[i]t is prohibited to benefit from protected objects (passive support), as well as to use them (active support), for example, by including them in a defence position. ICRC commentary to art. 53, ¶ 2078.

of any provision authorizing waiver . . . is further indication that only a limited class of very important cultural and spiritual objects are within the scope of [this prohibition in Article 53 of API].”<sup>116</sup>

Notably, Article 53’s use prohibition is not included among the API’s list of grave breaches. Moreover, there is no such prohibition among the enumerated war crimes in the statutes of the *ad hoc* tribunals or the ICC. A prohibition on “[t]he use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage” has, however, recently been recognized as a norm of customary international law applicable in both international and non-international armed conflicts.<sup>117</sup> Moreover, “several military manuals state that the use of a privileged building for improper purposes constitutes a war crime.”<sup>118</sup> Whether such a prohibited use of cultural property was a crime during the jurisdiction of the Extraordinary Chambers may thus be open to question, but an argument could be made that it was a crime if it was serious and led to extensive damage.

#### D. Absence of Military Necessity

Article 4(2) provides that the obligations of States Parties under the 1954 Hague Convention to refrain from acts of hostility directed against cultural property and to refrain from using such property for purposes that are likely to lead to its damage or destruction,<sup>119</sup> may be waived “only in cases where military necessity imperatively requires such a waiver.” The Convention does not similarly qualify the prohibitions on theft, pillage, vandalism, misappropriation,<sup>120</sup> or reprisals. However, as discussed *supra* in § C(1), destruction and appropriation of property would likely not have triggered criminal responsibility during the temporal jurisdiction of the Chambers if found to be required by military necessity. Where destruction and appropriation are also subject to waiver for military necessity, the following discussion may be relevant to these acts as well.

##### 1. Defining Military Necessity

The 1954 Hague Convention does not define “imperative military necessity.”<sup>121</sup> However, this standard was codified as early as the 1907 Hague Regulations, which provided that belligerents were forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be *imperatively demanded by the necessities of war.*”<sup>122</sup> According to this principle, military violence justifies “only those measures[] not forbidden by international law which are relevant

<sup>116</sup> BOTHE, ET AL., at 334.

<sup>117</sup> HENCKAERTS & DOSWALD-BECK, at 131.

<sup>118</sup> *Id.*

<sup>119</sup> See discussion *supra* §§ III.C.3 and 4.

<sup>120</sup> As the Convention refers to “misappropriation,” an assessment of the existence of military necessity may be presumed in the determination that the appropriation was unlawful.

<sup>121</sup> See TOMAN, at 70 (suggesting that parties may have left the term “military necessity” intentionally vague in order to accommodate a wide range of situations). Under the 2005 US Army “The principle of military necessity authorizes that use of force required to accomplish the mission. Military necessity does not authorize acts otherwise prohibited by the law of war. This principle must be applied in conjunction with other law of war principles discussed in this chapter, as well as other, more specific legal constraints set forth in law of war treaties to which the U.S. is a party.” U.S. Army Operational Law Handbook, Ch. 2, § IV.A.1 (2005), *available at* <http://www.nimj.com/Home.asp>.

<sup>122</sup> 1907 Hague Regulations, art. 23(g) (emphasis added).

and proportionate.”<sup>123</sup> The complementary principle of humanity forbids “those measures of violence which are not necessary (i.e., relevant and proportionate) to the achievement of a definite military advantage.”<sup>124</sup>

Both the principle of military necessity and the responsibility of individuals for violation of this principle were confirmed in several war crimes trials held after World War II.<sup>125</sup> For example, in the *Hostage Case*, a U.S. military court found that the destruction of property must be “imperatively demanded by the necessities of war” and that destruction as an end in itself is a violation of international law.<sup>126</sup> For this reason, “[t]here must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.”<sup>127</sup>

In API, the concept of military necessity is integral to the definition of “military objectives.”<sup>128</sup> As discussed *infra*, Protocol II of 1999 to the 1954 Hague Convention [1999 Protocol]<sup>129</sup> builds on the terminology in API in defining “imperative military necessity.”<sup>130</sup> Cambodia is not a party to the 1999 Protocol. However, as the 1999 Protocol was intended to supplement the 1954 Hague Convention, it may provide some insight into the meaning States Parties to the Convention assigned to the term “imperative military necessity.”

#### a. Acts of Hostility

Article 6(a) of the 1999 Protocol to the 1954 Hague Convention provides that:

a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the [1954] Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:

- i. that cultural property has, by its function, been made into a military objective; and

<sup>123</sup> BOTHE, ET AL., at 194 (emphasis omitted).

<sup>124</sup> *Id.*, 195.

<sup>125</sup> See, e.g., *In re von Leeb and Others*, WAR CRIMES REPORT, 12, 93 (1949) (finding that if military necessity were to confer on a belligerent unlimited discretion to do everything to secure the end of the war, it would “eliminate all humanity and decency and all law from the conduct of war”).

<sup>126</sup> *In re List*, 11 U.N. WAR CRIMES COMM’N, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 759, 1253-54 (1950).

<sup>127</sup> *Id.*, 1254.

<sup>128</sup> See API, art. 52(2), discussed *infra*. (defining military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”).

<sup>129</sup> Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 29 (March 26, 1999), available at [http://www.unesco.org/culture/laws/hague/html\\_eng/protocol2.shtml](http://www.unesco.org/culture/laws/hague/html_eng/protocol2.shtml) [hereinafter 1999 Protocol].

<sup>130</sup> See *id.*, pmb. ¶ 4 (“considering that the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law”). The 1999 Protocol supplements the 1954 Convention by establishing “an enhanced system of protection for specifically designated cultural property.” See *id.*, pmb. ¶ 2. Cambodia signed the 1999 Protocol on May 17, 1999, but is not a State Party. See ICRC list of signatory States at <http://www.icrc.org/ihl.nsf/db8c9c8d3ba9d16f41256739003e6371/fec98860daef6aa1412567d100407a67?OpenDocument>.

- ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.

It has been reported that “[d]uring the negotiations of the [1999] Protocol, this interpretation of the waiver in case of imperative military necessity was uncontroversial.”<sup>131</sup>

Article 1(f) of the 1999 Protocol defines “military objects” in an identical manner to Article 52(2) of API.<sup>132</sup> Under both of these Protocols, military objects are “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a *definitive military advantage*.”<sup>133</sup> “In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages.”<sup>134</sup>

API Article 52(3) creates a presumption that places of worship, dwellings, schools, and other objects “normally dedicated to civilian purposes” are not making “an effective contribution to military action.” As cultural objects “normally do not have any significant military use or purpose[,]”<sup>135</sup> they should also be presumed to be civilian objects. This presumption may be overcome in regard to a center containing cultural objects “whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the center.”<sup>136</sup> Because API was adopted close in time to the temporal jurisdiction of the Extraordinary Chambers, its definition of military objective may reflect the relevant standard under customary international law during the period from 1975-1979. Consequently, it is likely that, during relevant time period, the protection of cultural objects would rarely have been subject to waiver for military necessity unless the objects were contained in a center that was being used for military purposes.

In addition to the general protection provided to objects that are presumptively civilian (including cultural property), under the definition of “imperative military necessity” in the 1999 Protocol cultural objects would be entitled to an additional layer of special protection. This standard requires that in any case in which cultural property could be considered a military objective, it nevertheless would only be subject to attack if there was “no feasible alternative available.” It is unclear whether earlier uses of the phrase “imperative military necessity,” such as that in the 1907 Hague Regulations, were defined in this manner, and thus whether during the temporal jurisdiction of the Chambers, cultural property protected by the 1954 Hague Convention would have been protected by this heightened “no feasible alternative” standard. If

<sup>131</sup> HENCKAERTS & DOSWALD-BECK, at 130.

<sup>132</sup> See 1999 Protocol, art. 1(f).

<sup>133</sup> This definition is considered a norm of customary international law applicable in both international and non-international armed conflicts. See HENCKAERTS & DOSWALD-BECK, at 29. The 1954 Hague Convention provides as examples of military objectives “an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication.” 1954 Hague Convention, art. 8(1)(a).

<sup>134</sup> ICRC commentary to API, art. 52, ¶ 2024.

<sup>135</sup> BOTHE ET AL., at 326.

<sup>136</sup> 1954 Hague Convention, art. 8(3).



not, cultural property would still have been protected unless subject to waiver by the less exacting military necessity standard applicable to all types of civilian property.

### **b. Use Likely to Expose Property to Destruction or Damage**

Article 6(b) of 1999 Protocol II to the 1954 Hague Convention provides that:

a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of cultural property and another feasible method for obtaining a similar military advantage.

Commentators have noted that “[a]t the negotiations of the Second Protocol, this interpretation did not give rise to any controversy.”<sup>137</sup> As this act has not been criminalized in any earlier instruments, it is unclear whether this heightened standard of military necessity was applicable during the period from 1975-1979.

## **2. Authority to Invoke Military Necessity**

The 1954 Hague Convention not only requires States Parties to respect cultural property subject to general protection, but also establishes a procedure for placing shelters and centers that are entered in an International Registry under special protection.<sup>138</sup> Article 11(2) of the Convention provides that for cultural property under this special protection regime, military necessity can only be established “by the officer commanding a force the equivalent of a division in size or larger.” In contrast, Article 4 does not stipulate who can invoke military necessity with regard to cultural property only under general protection. The silence in Article 4 may suggest that, as of 1954, there were no customary law restrictions on who could invoke military necessity with regard to general cultural property.

Notably, such a restriction *was* provided for in the Convention’s 1999 Protocol, which provides with regard to cultural property subject to general protection that

the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise.<sup>139</sup>

Nevertheless, there does not appear to be any evidence that this standard, or any other, applied to general property during the period from 1975-1979. Consequently, during the temporal jurisdiction of the Extraordinary Chambers, a determination of military necessity to attack cultural property not under a regime of special protection may not have been restricted to any particular level of the chain of command.

<sup>137</sup> See HENCKAERTS & DOSWALD-BECK, at 130.

<sup>138</sup> 1954 Hague Convention, arts. 8(1), 9.

<sup>139</sup> 1999 Protocol, art. 6(c).

### 3. Obligation to Provide Warning

Article 11(2) of the 1954 Hague Convention, addressing property under the Convention's special protection regime, provides that when a decision has been made to withdraw immunity from property under special protection, "[w]henver circumstances permit, the opposing Party shall be notified, a reasonable time in advance" of the decision. However, the 1954 Convention does not provide a similar obligation to provide warning in regard to cultural property only subject to general protection. Notably, however, by 1999, Article 6(d) of the Convention's 1999 Protocol provides with regard to general cultural property that "in case of attack based on a decision [of imperative military necessity], an effective advance warning shall be given whenever circumstances permit."

Although the failure to include an obligation to warn of an attack against general cultural property in the 1954 Hague Convention may suggest that no such warning was required at that time, a warning may have nevertheless been required with regard to attacks against civilian property generally under customary law. Indeed, Article 26 of the 1907 Hague Regulations provides that "[t]he officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities." API similarly provides that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."<sup>140</sup> This obligation has been found to be a long-standing norm of customary international law,<sup>141</sup> and thus may have been required during the temporal jurisdiction of the Extraordinary Chambers.

#### E. *Mens Rea*

The 1954 Hague Convention does not set forth the required *mens rea* for criminal responsibility to attach to the acts that it prohibits. Such prohibited acts appear to include both acts of an intentional nature, such as directing a hostile act against cultural property,<sup>142</sup> and acts of a reckless nature, such as using an object of cultural property in a manner exposing it to destruction or damage. While the 1999 Protocol to the 1954 Hague Convention sets forth individual criminal responsibility for intentional violations of these prohibited acts, it does not define intentionality.<sup>143</sup> As discussed *supra*, some of the acts prohibited in the 1954 Hague Convention have been criminalized by other instruments or by international criminal tribunals. In the following sections, the *mens rea* standard applied in such cases is noted.

#### *Misappropriation and vandalism*

The Geneva Conventions of 1949 make extensive destruction and appropriation of property a grave breach when carried out "wantonly."<sup>144</sup> ICTY jurisprudence has found that as a matter of

<sup>140</sup> API, art. 57(2)(c).

<sup>141</sup> See *Kupreskic* Trial Judgment, ¶ 524. See also HENCKAERTS & DOSWALD-BECK, at 62.

<sup>142</sup> See *Strugar* Trial Judgment, ¶ 296.

<sup>143</sup> See 1999 Protocol, article 15 ("Serious Violations of this Protocol: 1. Any person commits an offence within the meaning of this Protocol if that person *intentionally* and in violation of the Convention or this Protocol commits any of the following acts . . .").

<sup>144</sup> See Geneva Convention I, art. 50; Geneva Convention II, art. 51; and Geneva Convention IV, art. 147.

customary international law this provision requires that a perpetrator must have “acted with the intent to destroy this property or in reckless disregard of the likelihood of its destruction.”<sup>145</sup>

On the other hand, in the ICC Statute, no mental element has been included for this act.<sup>146</sup> As a consequence, Article 30 should apply.<sup>147</sup> Article 30 provides that,

2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

Additionally, the ICC Elements require the perpetrator to have an awareness of the factual circumstances establishing the property’s protected status.<sup>148</sup> From these sources, it appears that an accused must have acted with knowledge of the character of the property. The ICC intent standard may be stricter than the interpretation by the ICTY of the grave breach under the Geneva Conventions.<sup>149</sup> It is likely, however, that the Geneva Convention standard reflects the state of customary law during the relevant time period, and the ICTY interpretation may be authoritative on this point.

### *Pillage*

In regard to pillage, the ICC Elements of Crimes requires only that “[t]he perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.”<sup>150</sup> This general intent requirement appears to be consistent with the jurisprudence of the IMT and the ad hoc tribunals.<sup>151</sup>

### *Acts of hostility*

Article 85 of the API, which applies to a more limited class of objects than those in the 1954 Hague Convention, provides that making cultural objects the object of attack is a grave breach when it is done “willfully.” The Commentary to this article provides that

<sup>145</sup> *Naletilic et al.* Trial Judgment, ¶ 577.

<sup>146</sup> See Herman von Hebel, *Elements of War Crimes*, in *ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 109, 134, 172.

<sup>147</sup> See Rome Statute, art. 30 (stating that “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge” as defined by Article 30).

<sup>148</sup> See ICC Elements of Crimes, art. 8(2)(a)(iv), (b)(xiii), (e)(xii).

<sup>149</sup> Although a plain reading of Article 30 would appear to include recklessness, at least one commentator has suggested that the concept of recklessness is only included in the Rome Statute in Article 28 regarding superior responsibility. See Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, 189, 206.

<sup>150</sup> ICC Elements of Crimes, art. (8)(2)(b)(xvi), (e)(v).

<sup>151</sup> See, e.g., *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Judgment, ¶¶ 48-49 (Trial Chamber, Dec. 14, 1999).

the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing the (“criminal intent” or “malice aforethought”); this encompasses the concepts of “wrongful intent” or “recklessness”, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered . . . .<sup>152</sup>

ICTY jurisprudence requires that an accused commit the act intentionally, and with knowledge of the character of the property being attacked. For example, in *Kordic*, the ICTY concluded that for liability to attach under its statute for the destruction of “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of arts and sciences,” an accused must commit the destruction or damage willfully and “intend[] by his acts to cause the destruction or damage of institutions dedicated to religion or education and not used for a military purpose.”<sup>153</sup> This view was recently affirmed in the *Strugar* case, in which the ICTY found that “a perpetrator must act with a direct intent to damage or destroy the property in question.”<sup>154</sup> The Trial Chamber questioned whether indirect intent might also be an acceptable form of *mens rea* for this crime, however, it left this question unanswered as the issue was not raised by the circumstances of the case.<sup>155</sup> Like ICTY jurisprudence, the ICC Elements of Crimes provides for individual criminal responsibility for intentionally attacking protected objects when the perpetrator intended to make protected buildings or monuments the object of attack.<sup>156</sup> The perpetrator need not know its legal status, only the factual circumstances that rise to that status.<sup>157</sup>

## F. Conclusion

As both civilian property generally, and cultural property specifically, have been long protected under IHL, it is arguable that all the violations in Article 4 of the 1954 Hague Convention may have been criminalized under customary international law during the temporal jurisdiction of the tribunal. However further research will need to be conducted to clarify the exact state of the law, as well as the potential elements of these crimes during the period in question.

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<sup>152</sup> ICRC commentary to API, ¶ 3474 (describing the meaning of the term “willfulness” in relation to subsection 3).

<sup>153</sup> *Prosecutor v. Kordic et al.*, Case No. IT-95-14/2-T, Judgment, ¶ 361 (Trial Chamber, Feb. 26, 2001); *see also* *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment, ¶ 185 (Trial Chamber, March 3, 2000) (holding that the damage or destruction must have been committed intentionally to institutions that may clearly be identified as dedicated to religion or education); *Naletilic* Trial Judgment, ¶ 605 (requiring that “the perpetrator acted with the intent to destroy the property”).

<sup>154</sup> *Strugar* Trial Judgment, ¶ 311.

<sup>155</sup> *See id.*

<sup>156</sup> *See* ICC Elements of Crimes, arts. 8(2)(b)(ix), (e)(iv).

<sup>157</sup> *See* von Hebel, at 163

#### IV. CRIMES AGAINST HUMANITY

Article 5 of the KRT Law provides the Extraordinary Chambers the authority to bring to trial persons suspected of crimes against humanity. Crimes against humanity were first prosecuted internationally after World War II at the International Military Tribunals at Nuremberg<sup>158</sup> and for the Far East,<sup>159</sup> and in the Control Council Law No. 10 cases.<sup>160</sup>

The language of Article 5 closely tracks the definition in the Statute of the International Criminal Tribunal for Rwanda (ICTR).<sup>161</sup> Thus, while the Framework Agreement provides that the subject matter of the Extraordinary Chambers shall be “crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court,” the definition included in the 2001 KRT law was not amended to reflect this view. For this reason, this section will discuss the contours of crimes against humanity under the KRT Law by examining the jurisprudence of the ICTY and ICTR, and as a subsidiary source, the Rome Statute and its travaux préparatoires.

Broadly speaking, the definition of crimes against humanity can be divided into the *chapeau*, or contextual elements of crimes against humanity, and the enumerated acts.

##### A. Contextual Elements of Crimes of Against Humanity

Article 5 of the KRT Law reads:

Crimes against humanity . . . are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds.

<sup>158</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, art. 6, 82 U.N.T.S. 279, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> [hereinafter London Charter].

<sup>159</sup> Amended Charter of the Tribunal, art. 5(c), available at <http://www.yale.edu/lawweb/avalon/imtfech.htm>.

<sup>160</sup> See Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, reprinted in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS art. I (1951). The Control Council Law No. 10 cases were tried under the auspices of the jointly administered Allied Control Council for Germany, the occupying government of Germany after its unconditional surrender.

<sup>161</sup> See Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, art. 3, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute] (defining crimes against humanity as crimes “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”).

## 1. Widespread or Systematic Attack

### *Definition of attack*

The definition of an attack is fairly nebulous, but may be generally defined as an unlawful act, event, or series of events involving acts of violence.<sup>162</sup> An “attack” does not necessarily require the use of armed force; it could involve other forms of inhumane mistreatment of the civilian population.<sup>163</sup>

### *Widespread or systematic*

The scale and organization criteria of an attack are disjunctive in the KRT Law, allowing jurisdiction over attacks of either massive scale *or* based upon some degree of planning or organization. This has been a requirement for prosecution of crimes against humanity since Nuremberg. While the language of the Nuremberg Charter did not refer to either scale or organization elements, the judgment found that the crimes were “carried out on a vast scale, and in many cases [were] organized and systematic.”<sup>164</sup> Similarly, in the *Einstazgruppen* Case the Control Council 10 tribunal affirmed that “[c]rimes against humanity are acts committed in the course of wholesale and systematic violations of life and liberty.”<sup>165</sup> Like the KRT Law, the ICTR and Rome Statutes specifically provide for a disjunctive test.<sup>166</sup> Although the ICTY Statute does not contain similar language, ICTY jurisprudence requires satisfaction of this disjunctive test.<sup>167</sup>

Under ICTY and ICTR jurisprudence, “widespread” has been interpreted to include both a large number of acts spread across time or geography, as well as a single or limited number of acts committed on a large scale.<sup>168</sup> For the ICTR, “systematic” generally refers to the organized or planned nature of the attack.<sup>169</sup> However, this planning can be done by any organization or group, rather than being limited to the State or military bodies.<sup>170</sup> The ICTY has similarly defined systematicity, and identified relevant factors in determining this element.<sup>171</sup> While the

<sup>162</sup> See *Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60, Judgment, ¶ 543 (Trial Chamber, January 17, 2005).

<sup>163</sup> See *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20, Judgment and Sentence, ¶ 327 (Trial Chamber III, May 15, 2003). See also *Prosecutor v. Milomir Stakic*, Case No. IT-97-24, Judgment, ¶ 623 (Trial Chamber II, July 31, 2003) (clarifying the difference between an attack and armed conflict: “an attack can precede, outlast, or continue during the armed conflict, but it need not be part of it and is not limited to the use of armed force; it encompasses any mistreatment of the civilian population”).

<sup>164</sup> *United States v. Herman Goering et al.*, reprinted in 22 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 498 (1948).

<sup>165</sup> *United States v. Ohlendorf et al.* (Case 9) reprinted in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1952).

<sup>166</sup> *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 626 (Trial Chamber I, May 7, 1997).

<sup>167</sup> E.g. *Prosecutor v. Deronjic*, Case No. IT-02-61, Judgment, ¶ 109 (Appeals Chamber, July 20, 2005).

<sup>168</sup> See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Opinion and Judgment, ¶ 580 (Trial Chamber I, September 2, 1998); *Tadic* Trial Judgment, ¶ 648; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic*, IT- 96-23/1, Judgment, ¶ 94 (Appeals Chamber, June 12, 2002).

<sup>169</sup> See *Akayesu* Trial Judgment, ¶ 173.

<sup>170</sup> *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment, ¶ 78 (Trial Chamber I, June 7, 2001).

<sup>171</sup> *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14, Judgment, ¶ 203 (Trial Chamber I, Mar. 2, 2000). The relevant factors include:

Rome Statute defines neither “widespread” nor “systematic,” ICC negotiators understood “widespread” to mean a “multiplicity of persons” or a “massive attack,”<sup>172</sup> and “systematic” to encompass a developed policy or a high degree of organization and planning of the acts.<sup>173</sup> The ICTY has emphasized that only the attack, and not the accused’s acts, must be widespread or systematic.<sup>174</sup> Similarly under KRT law, *any* act that is part of a widespread or systematic attack, all other criteria being met, may establish criminal liability.<sup>175</sup>

### *No policy likely required*

A Control Council No. 10 tribunal strictly construed its subject matter jurisdiction to include only offenses allowed by the German government, either through action or omission.<sup>176</sup> Although it thus determined that some form of governmental participation was “a material element of the crime against humanity[,]”<sup>177</sup> it did not apparently require the existence of a formal policy. No specific policy by a government or any other type of organization is required under the statutes of the *ad hoc* tribunals, although evidence of a policy or plan may be useful in proving the “widespread” or “systematic” nature of the attack.<sup>178</sup>

The Rome Statute defines an attack as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>179</sup> Thus, uniquely, the Rome Statute explicitly requires a State or organizational policy element.<sup>180</sup> The omission of a similar policy requirement from the KRT Law was likely intentional.<sup>181</sup> For this reason, it is unlikely that the

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

<sup>172</sup> See Preparatory Committee on the Establishment of an International Criminal Court, *Summary of the Proceedings of the Preparatory Committee During the Period 25 March-12 April 1996* at ¶ 45, U.N. Doc. A/AC.249/1 (May 7, 1996) [hereinafter Summary of PrepCom Proceedings 1996].

<sup>173</sup> See *id.* ¶ 45.

<sup>174</sup> *Deronjic Appeals Judgment*, ¶ 109 (“this requirement [of a widespread or systematic attack] only applies to the attack and not to the individual acts of the accused”).

<sup>175</sup> KRT Law, art. 5.

<sup>176</sup> See *Einsatzgruppen Case*, at 498 (observing that international jurisdiction applies to offenses when “the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals”). Similarly, the International Military Tribunal for the Far East found that the Japanese Government and military leaders either secretly ordered or were willfully blind to the occurrence of atrocities amounting to crimes against humanity. See R. JOHN PRITCHARD & SONIA MAGBANUA ZAIDE, 103 THE TOKYO MAJOR WAR CRIMES TRIAL 49,591 (1988).

<sup>177</sup> See *United States v. Alstoetter et al.* (Case 3), reprinted in III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 984 (1951) [hereinafter *Justice Case*].

<sup>178</sup> See *Semanza Trial Judgment*, ¶¶ 326, 329; *Kunarac Appeal Judgment*, ¶¶ 89, 98.

<sup>179</sup> Rome Statute, arts. 7(1), (2)(a).

<sup>180</sup> Rome Statute, art. 7(2)(a).

<sup>181</sup> As discussed above, while the Framework Law provides that crimes against humanity shall be defined in accord with the Rome Statute, article 5 does not reflect this perspective.

existence of a policy would need to be established in order to meet the definition of a “widespread or systematic attack” under the KRT Law.

## 2. Directed Against Any Civilian Population

### *Definition of civilian population*

The KRT Law provides that an attack must be directed against *any* civilian population. The ICTY and ICTR Statutes and jurisprudence also use this terminology, which has been interpreted to mean that the inclusion of non-civilians (military forces or those who have previously borne arms in a conflict) does not necessarily deprive the population of its civilian character.<sup>182</sup> However, the targeted population must remain predominantly civilian in nature.<sup>183</sup> Further, according to ICTR and ICTY jurisprudence, it is the situation of the victim at the time of the attack, and not the victim’s status, that should be the focus of the inquiry.<sup>184</sup> Thus, in the context of crimes against humanity, a non-civilian may nevertheless be considered part of the civilian population if at the time of the attack he or she was not participating in the hostilities.

The population requirement refers to the idea that enough people must be targeted to show that the attack was directed against “a population” as opposed to limited and randomly selected individuals.<sup>185</sup> However, the ICTY has held that “population” need not be the entire population of a state, city, or town.<sup>186</sup>

## 3. *Mens Rea*

The KRT Law does not specify a *mens rea* element, however as it follows the wording of the ICTR Statute, it should likewise be interpreted to require that the defendant be aware of the attack that makes his or her act a crime against humanity. This is because it is the association with a widespread or systematic overarching attack that elevates these offenses to the status of violations against “humanity.”

<sup>182</sup> See *Tadic* Trial Judgment, ¶ 638; *Blaskic* Trial Judgment, ¶ 209; *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, a/k/a “Vlado,”* Case No. IT-95-16, Judgment, ¶ 568 (Trial Chamber II, Jan. 14, 2000); *Akayesu* Trial Judgment, at n. 146.

<sup>183</sup> See *Akayesu* Trial Judgment, ¶ 575 (citing *Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic*, Case No. IT-95-13-R61, Rule 61 Decision of 3 April 1996 (Trial Chamber II, April 3, 1996)). *But see* United State v. von Leeb et al., (Case 12), reprinted in XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 462, 679, 683 (1950) (convicting a defendant of crimes against humanity for his contributions to a successful plan to incite the lynching of Allied airmen and suppress punishment for such lynchings); B.V.A. Roling, *The Tokyo Trial and Beyond 3* (Antonio Cassese, ed. 1993) (suggesting that the omission of the phrase “against any civilian population” from an amended version of the Tokyo Charter may have been intended to broaden the scope of crimes against humanity to ensure punishment for large-scale killings of military personnel).

<sup>184</sup> See *Bagilishema* Trial Judgment, ¶ 79 (citing *Blaskic* Trial Judgment, ¶ 214 [“[t]he specific situation of the victim at the moment of the crimes committed, rather than his status, must be taken into account in determining his standing as a civilian”]).

<sup>185</sup> See *Justice* Case, at 973; *Kordic*, Appeals Judgment, ¶ 95.

<sup>186</sup> *E.g. id.*



In practice, this means that the perpetrator must have knowledge of the attack and some understanding of the relationship between his or her acts and the attack.<sup>187</sup> Under ICTY jurisprudence, knowingly running the risk that an act may be part of a greater attack is sufficient to establish the knowledge requirement.<sup>188</sup> Moreover, the Appeals Chamber in *Kunarac* made clear that the perpetrator need not know the details of the attack.<sup>189</sup> Similarly, the ICC Elements of Crimes<sup>190</sup> states that knowledge of the attack does not necessitate complete knowledge of the detailed character of the attack or the plan or policy behind it.<sup>191</sup>

Both ad hoc tribunals note that motive is entirely separate.<sup>192</sup> Further, the perpetrator need not share a purpose or policy goal behind the attack with any other entity.<sup>193</sup> Similarly, it is irrelevant whether the accused intended the acts to be directed against the targeted population or just the particular victim.<sup>194</sup>

The ICC Elements of Crimes expands upon the Statutes of the ad hoc tribunals by including a provision that specifically provides for “first actors.” “First actors” — initiators of the attack or offenders whose acts take place at the cusp of the attack — attain the requisite *mens rea* if an intent to further the emerging attack is proved.<sup>195</sup>

#### 4. Discrimination Requirement

The KRT Statute, like the ICTR Statute, and unlike the ICTY or Rome Statutes, requires that an attack be based on discriminatory grounds. In the *Akayesu* case, the ICTR Appeals Chamber found that this discrimination element was a jurisdictional requirement specific to the ICTR Statute and was not intended to change the definition of crimes against humanity under customary international law. Similarly, ICTY jurisprudence has affirmed that discrimination is not an element of crimes against humanity, except for the specific crime of persecution.<sup>196</sup> Analyzing the Security Council’s intentions regarding this provision when establishing the ICTR, the *Akayesu* Appeals Chamber concluded:

<sup>187</sup> *Prosecutor v. Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment, ¶¶ 131-32 (Trial Chamber II, May 21, 1999) (“The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act.”). Similarly, under Control Council No. 10 jurisprudence, proof of “conscious participation” in the systematic policy to commit crimes against humanity was required. *See Justice Case*, 982.

<sup>188</sup> *See Kunarac* Appeals Judgment, ¶ 102.

<sup>189</sup> *See id.*

<sup>190</sup> ICC-ASP/1/3 (2002) (containing an enumeration of the elements that must be demonstrated to establish guilt for each of the crimes in the Rome Statute), available at [http://www.icc-cpi.int/library/officialjournal/Elements\\_of\\_Crimes\\_120704EN.pdf](http://www.icc-cpi.int/library/officialjournal/Elements_of_Crimes_120704EN.pdf).

<sup>191</sup> Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, Part II, Finalized draft text of the Elements of Crimes, Addendum, at 9, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter PrepCom Elements of Crimes].

<sup>192</sup> *See Kunarac* Appeal Judgment, ¶ 103; *Kupreskic* Trial Judgment, ¶ 558. At most, evidence that the perpetrator committed the acts for purely personal reasons would be indicative of a rebuttable assumption that the perpetrator was not aware that his or her acts were part of that attack. *See Kunarac* Appeal Judgment, ¶ 103.

<sup>193</sup> *See id.*

<sup>194</sup> *See id.*

<sup>195</sup> ICC Elements of Crimes, at 9 ¶ 2.

<sup>196</sup> *Prosecutor v. Dusko Tadic a/k/a “Dule,”* IT-94-1-A, Judgment, ¶ 249 (Appeals Chamber, July 15, 1999). *See also Kordic*, Trial Judgment, ¶ 211.

It is within this context, and in light of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack) that the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds. This is to say that the Security Council intended thereby that the Tribunal should not prosecute perpetrators of other possible crimes against humanity.<sup>197</sup>

Thus, the limitation imposed by the *chapeau* language in the KRT, like that in the ICTR Statute, should most likely be viewed as an attempt to limit the jurisdiction of the Extraordinary Chambers to certain acts rather than to “change the legal ingredients required [under customary law] . . . with respect to crimes against humanity.”<sup>198</sup> For this reason, it should be read as a characterization of the nature of the “attack” rather than of the individual intent of the perpetrator.<sup>199</sup> Accordingly, an act committed for purely personal motives, not of a discriminatory origin, is not necessarily excluded from being a crime against humanity as long as the underlying offence was committed as part of a broader attack that was based on national, political, ethnical, racial or religious grounds. Moreover, the ICTR has found that a victim of a discriminatory attack need not be a member of a group that is specifically being discriminated against.<sup>200</sup>

## 5. Nexus between the Act and the Attack

Both the ICTR and ICTY have interpreted their own Statutes to require a nexus between the act and an attack.<sup>201</sup> Thus, crimes against humanity consist of individual “acts” that will fall under, be connected with, or exist during a larger “attack.”<sup>202</sup> ICTR jurisprudence has determined that the act does not need to be committed at the same time or place as the attack, or share the same features, but it must, on some essential level, form part of the attack.<sup>203</sup> For example, it must share some relation, temporal or geographical, with the attack. To meet this requirement, the act does not necessarily have to be committed against the same population as the broader attack of which it is a part.<sup>204</sup>

<sup>197</sup> *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Judgment, ¶ 464 (Appeals Chamber, June 1, 2001).

<sup>198</sup> *Akayesu* Appeals Chamber, ¶ 465.

<sup>199</sup> *Bagilishema* Trial Chamber, ¶ 81. This conclusion is supported by the repetition of discriminatory factors in regard to the act of persecution, which would be rendered redundant if all crimes against humanity required a discriminatory intent.

<sup>200</sup> *See Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Judgment and Sentence, ¶ 209 (Trial Chamber I, Jan. 27, 2000).

<sup>201</sup> *See Semanza* Trial Judgment, ¶ 330; *Tadic* Appeal Judgment, ¶ 251.

<sup>202</sup> Each act within Article 3(a)-(i) has its own requirements, but each must be part of the greater attack required by the *chapeau*. The enumerated acts which may rise to the level of crimes against humanity are the same in the ICTR and ICTY statutes. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 3217th mtg., art. 5, U.N. Doc. S/RES/827 (1993); ICTR Statute, art. 3.

<sup>203</sup> *Semanza* Trial Judgment, ¶ 329 (“Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.”). *Cf. Tadic* Appeal Judgment, ¶ 251.

<sup>204</sup> *See Semanza* Trial Judgment, ¶ 330. Although the act does not have to be committed against the same population, if it is committed against the same population, that characteristic may be used to demonstrate the nexus between the act and the attack.

## 6. No Armed Conflict Requirement

The nexus between an act and an attack must be distinguished from the question of whether the act must be “committed in armed conflict.” The IMT Charter defined crimes against humanity to require a nexus with one of the other crimes within the jurisdiction of the tribunal, namely the crime of aggression or war crimes. While the Statute of the ICTY also included an armed conflict nexus requirement as a jurisdictional element, the ICTY stated unequivocally that no such element was required under customary international law.<sup>205</sup>

Although the KRT Law does not contain an armed conflict requirement, arguably permitting the prosecution of acts perpetrated during peacetime as well as during either internal or international armed conflicts, some commentators have raised the question of whether the absence of this requirement was customary during the period of the temporal jurisdiction of the Extraordinary Chambers.<sup>206</sup> While the IMT was itself vague as to whether the nexus was required under international law and a number of other international law instruments had dropped the requirement by 1968,<sup>207</sup> the question as to whether a nexus to armed conflict was required under customary international law during the time period over which it has jurisdiction will ultimately have to be determined by the Extraordinary Chambers.

### B. Enumerated Acts

The KRT Law describes nine enumerated acts amounting to crimes against humanity if the contextual evidence satisfies the *chapeau* elements. These acts are: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, and other inhumane acts. Notably, this is not an exclusive list.<sup>208</sup> Although many of these acts have been recognized as crimes under customary international law, the principle of legality, examined *infra* in Chapter IX, requires that each enumerated act be examined to determine whether it gave rise to international criminal responsibility at the time it was committed. The crimes of enslavement, torture, rape, and other inhumane acts are discussed *infra* in Chapter VII in relation to their potential to encompass acts of sexual violence.

<sup>205</sup> See *Tadic* Appeal Decision, ¶ 141 (stating that “[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict”). Although the ICTY Statute retains an armed conflict requirement for crimes against humanity, the *Tadic* Appeals Chamber suggested that “the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.” *Id.* In accordance with this, the Rome Statute also excludes this requirement from the *chapeau* of crimes against humanity.

<sup>206</sup> See, e.g., STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 288 (2<sup>nd</sup> ed. 2001) (stating that “the most difficult issue to determine is whether the nexus to armed conflict was still required [as of 1975]”).

<sup>207</sup> See *id.* at 50-52 (noting that while [t]he IMT itself skirted the question whether the Charter represented a complete or incomplete codification of international law,” Control Council Law No. 10 did not include the nexus and the cases prosecuted under this law adopted divergent views on whether or not it was required). While the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted the IMT definition, it also accepted that they could be committed “in time of war or peace.” See art. I(b). Moreover, the International Law Commission dropped the nexus requirement in its 1954 draft code of offenses, and at least as of the early 1980s its members apparently agreed that it was not required under customary international law. See RATNER, at 56.

<sup>208</sup> See KRT Law, art. 5 (providing that crimes against humanity shall include acts “such as” those enumerated).

## V. GENOCIDE<sup>209</sup>

### A. Introduction to Genocide

The term “genocide” was coined by the Polish-American jurist Raphael Lemkin in the early 1940s to describe the intentional destruction of certain groups. Writing in the midst of the Holocaust, Lemkin’s work was informed in large part by the events of World War II.<sup>210</sup>

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

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

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

This definition is used verbatim in all relevant international legal instruments, including the KRT Law.<sup>211</sup> Broadly speaking, the definition can be divided into a mental element (the necessary intent to destroy the group as such) and a physical element (the commission of at least one of the enumerated acts).

### B. Distinctive Features of the Definition

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

Second, killing is not expressly required. The perpetrator need only commit one of the enumerated acts with the required intent. However, the *travaux préparatoires* make clear that the definition of genocide set forth in the Convention was not intended to encompass “cultural genocide;” nor was it intended to provide protection for political groups.<sup>212</sup>

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<sup>209</sup> This section is based largely upon J. Cerone, *Recent Developments in the Law of Genocide in ETHNIC CLEANSING IN 20TH-CENTURY EUROPE* (S. Vardy & T. Tooley eds., 2003).

<sup>210</sup> See Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AMER. J. INT’L L. 145 (1947).

<sup>211</sup> See KRT Law, art. 4.

<sup>212</sup> See Josef L. Kunz, *The UN Convention on Genocide*, 43 AMER. J. INT’L L. 4 (1949).

Third, unlike war crimes, the crime of genocide need not occur in the context of an armed conflict. Additionally, although both genocide and crimes against humanity can be committed in times of peace, these two crimes should also be distinguished from one another. As the ICTY Trial Chamber noted in the case of *Prosecutor v. Kupreskic*, genocide is an extreme and most inhumane form of the crime against humanity of persecution; its *mens rea* requires proof of the intent not only to discriminate, but also to destroy, in whole or in part, the group to which the victims of the genocide belong.<sup>213</sup>

Finally, the prohibition of genocide has entered the corpus of customary international law. Thus, the obligation to prevent and punish genocide exists independently of a state's treaty obligations (i.e. even states not parties to the Convention are bound by this obligation).<sup>214</sup> Further, this norm has acquired the status of *jus cogens*, meaning that it is a higher-order norm overriding conflicting obligations and voiding conflicting treaties.<sup>215</sup>

### C. Enumerated Acts

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

#### 1. Killing Members of the Group

##### *Killing*

With regard to the first enumerated act, killing members of the group, the ICTR has employed a somewhat narrow interpretation by requiring that the killing amount to murder (a specific intent crime).<sup>216</sup> However, there is nothing particularly new in this holding as killing with the intent to destroy the group will generally mean that the perpetrator intended to kill the victim in any case.

##### *Protected groups*

The ICTR has examined the nature of the groups listed in the definition and extracted what it deemed a common criterion — “that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.”<sup>217</sup> It determined that any permanent, stable group should be protected.

<sup>213</sup> *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic*, also known as “Vlado,” IT-95-16, Judgment ¶ 636, (Trial Chamber II, January 14, 2000).

<sup>214</sup> *See Reservations to the Convention on Genocide* (Advisory Opinion), ICJ Reports 1951.

<sup>215</sup> Human Rights Committee, General Comment 6, 30 July 1982. *See also Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (separate opinion of Judge Lauterpacht), 1993 I.C.J. 325; *Blagojevic and Jokic*, Trial Judgment, ¶ 639. It should be noted, however, that the doctrine of *jus cogens* is not universally accepted.

<sup>216</sup> *Akayesu*, Trial Chamber, at ¶ 501. Similarly, the ICTY has defined “killing” as an “intentional but not necessarily premeditated act[.]” *Stakic*, Trial Chamber at ¶ 515.

<sup>217</sup> *See Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Opinion and Judgment, ¶ 511 (Trial Chamber I, Sept. 2, 1998).

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

to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community.<sup>218</sup>

The Tribunal stated further that a positive or negative approach could be used in making this determination.<sup>219</sup> A positive approach, as defined by the Tribunal, would involve distinguishing a group by characteristics that perpetrators deem particular to that group. A negative approach would be the case where perpetrators distinguish themselves as an ethnic, racial, religious, or national group distinct from the other group or groups. The negative approach was, however, recently rejected by the ICTY Appeals Chamber in the *Stakić* case. The Appeals Chamber emphasized the requirement that a protected group be targeted “as such,” and held that this language “shows that the offence requires intent to destroy a collection of people who have a particular group identity.”<sup>220</sup> Because, in its view, “negatively defined groups lack specific characteristics, defining groups by reference to a negative would run counter to the intent of the Genocide Convention’s drafters.”<sup>221</sup>

## 2. Causing Serious Bodily or Mental Harm to Members of the Group

Regarding the second enumerated act, the ICTR stated in the *Akayesu* case that “[c]ausing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.”<sup>222</sup> In doing so, it cited the *Eichmann* case for the proposition that “serious bodily or mental harm of members of the group can be caused ‘by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture’.”<sup>223</sup> Ultimately, the Tribunal took serious bodily or mental harm, “without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.”<sup>224</sup> It expressly found that sexual violence fell into this category, and ultimately pointed to acts of rape in this case as genocidal acts.

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<sup>218</sup> *Jelisić* Trial Judgment, ¶ 70.

<sup>219</sup> *Id.*, ¶ 71.

<sup>220</sup> *Prosecutor v. Milomir Stakić*, Case No. IT-97-24A, Judgment, ¶ 20 (Appeals Chamber, 22 Mar. 2006).

<sup>221</sup> *Id.* ¶ 22.

<sup>222</sup> *Akayesu* Trial Chamber, ¶ 502.

<sup>223</sup> *Id.* ¶ 503.

<sup>224</sup> *Id.* ¶ 504.

### 3. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About its Physical Destruction in Whole or in Part

The ICTR held that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, “include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”<sup>225</sup>

### 4. Imposing Measures Intended to Prevent Births Within the Group

Within this category of measures, the ICTR included sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.<sup>226</sup> In addition, it held that in a culture where membership in the group is determined by the identity of the father, deliberate impregnation during rape by a man not of the group<sup>227</sup> could also constitute such a measure. The Tribunal further determined that such measures could be mental in nature. It stated, “For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”<sup>228</sup>

### 5. Forcibly Transferring Children of the Group to Another Group

In line with its expansive interpretation of the first four enumerated acts, the *Akayesu* Trial Chamber opined that the objective of the fifth enumerated act “is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.”<sup>229</sup>

## D. The Specific Intent Requirement

In addition to the *mens rea* of the underlying crime, genocide requires proof of a *dolus specialis*; that is, a specific intent to commit genocide. For that reason, genocide is not easy to prove. Recognizing that the special intent inherent in the crime of genocide is a mental factor which is difficult, even impossible, to determine, the *Akayesu* Trial Chamber noted that “in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact.”<sup>230</sup>

In the *Akayesu* case, the ICTR considered that it was possible to deduce the genocidal intent of a particular act from: (1) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same

<sup>225</sup> *Id.* ¶ 506.

<sup>226</sup> *Id.* ¶ 507.

<sup>227</sup> *Id.* (“In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.”).

<sup>228</sup> *Id.* ¶ 508.

<sup>229</sup> *Id.* ¶ 509.

<sup>230</sup> *Id.* ¶ 523.

offender or by others; (2) the scale of atrocities committed, their general nature, in a region or a country; and (3) the deliberate and systematic targeting of victims on account of their membership of a particular group, while excluding the members of other groups.<sup>231</sup>

The ICTY has held that the requisite intent may be inferred from “the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.”<sup>232</sup> In that case, the ICTY found that “this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.”<sup>233</sup>

The ICTR has provided additional examples of factors that can be used to infer genocidal intent. In the *Ruzindana* case, the Tribunal referred to a “pattern of purposeful action”, which might include: (1) the physical targeting of the group or their property; (2) the use of derogatory language toward members of the targeted group; (3) the weapons employed and the extent of bodily injury; and (4) the methodical way of planning, the systematic manner of killing.<sup>234</sup>

### 1. “In Whole or in Part”

With respect to the “in whole or in part” aspect of the intended destruction, the ICTY affirmed the position of the International Law Commission that complete annihilation of a group from every corner of the globe is not required.<sup>235</sup> In particular, the *Jelusic* Tribunal held that the intent may extend only to a limited geographical area.<sup>236</sup> Although there is no numeric threshold of victims necessary to establish genocide, the ICTY held that “in part” means in *substantial* part.<sup>237</sup> It further stated that a substantial part might include a large number or a representative faction. If the latter, that representative faction must be destroyed in such a way so as to threaten the survival of the group as a whole.<sup>238</sup>

### 2. Role of the Individual Perpetrator

In *Jelusic*, the ICTY also dealt with the issue of the role of the individual perpetrator in the commission of genocide. Generally, the tribunals have first determined whether genocide

<sup>231</sup> *Id.* ¶ 523.

<sup>232</sup> *Id.* ¶ 524.

<sup>233</sup> *Id.*

<sup>234</sup> Prosecutor v. Clement Kayishema & Obed Ruzindana, Case Nos. ICTR-95-1; 2: ICTR-96-10, Judgment, ¶ 93 (Trial Chamber, May 21, 1999).

<sup>235</sup> *Jelusic* Trial Judgment, ¶ 80 (citing Stefan Glaser, *Droit International Penal Conventionnel*, Bruylant, Brussels, 1970, p. 107).

<sup>236</sup> *Accord Prosecutor v. Krstic*, Case No. IT-98-33, Judgment, ¶ 590 (Trial Chamber I, Aug. 2, 2001) (noting that although the killing of all members of a part of a group in a particular geographic area may result in less killings than a campaign spread over a broad geographical area, it would “qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographic area”).

<sup>237</sup> *Prosecutor v. Krstic*, Case No. IT-98-33, Judgment, ¶ 8 (Appeals Chamber, April 19, 2004).

<sup>238</sup> *See Id.*, ¶¶ 8-9; *Jelusic* Trial Chamber, ¶ 83 (Trial Chamber I, Dec. 14, 1999). *See also* 18 USC 1093 (2000) (“‘Substantial part’ means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.”).



occurred in an area, and then proceeded to determine whether an individual has shared the genocidal intent. In *Jelusic*, the ICTY indicated that an individual could be deemed responsible for genocide where he was one of many executing an over-all, higher level planned genocide, or where he individually committed genocide.<sup>239</sup> Thus the Tribunal indicated that an individual alone could be guilty of committing genocide; nevertheless, it is still very difficult to prove if the acts were not widespread and not backed by an organization or system.

### 3. Genocide v. Forced Expulsion

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

The primary purpose of the massacre was to expel the Muslims from the village, by killing many of them, by burning their houses, slaughtering their livestock, and by illegally detaining and deporting the survivors to another area. The ultimate goal of these acts was to spread terror among the population so as to deter the members of that particular ethnic group from ever returning to their homes.<sup>240</sup>

The Tribunal thus held that this was a case of the crime against humanity of persecution, and that it was not a case of genocide.<sup>241</sup> Comparatively, the *Krstić* Appeals Chamber found that where one-fifth of the population had been massacred, including all men of military age, the forcible transfer of women, children, and elderly could be “an additional means by which to ensure the physical destruction” of a community, eliminating any possibility that it could reconstitute itself.<sup>242</sup>

### 4. Modes of Participation

Unlike the Genocide Convention and the statutes of the ICTY and ICTR, which list five separate modes of participation for the crime of genocide, KRT Law specifies five modes of participation for all crimes within the jurisdiction of the Extraordinary Chambers and separately enumerates only three additional mode for genocide: attempts to commit acts of genocide, conspiracy to commit acts of genocide, and participation in genocide. A discussion of these forms of criminal responsibility, is included in the chapter on Individual Criminal Responsibility.

<sup>239</sup> *Jelusic* Trial Chamber, ¶ 78.

<sup>240</sup> *Kupreskic* Trial Chamber, ¶ 749.

<sup>241</sup> *Id.* ¶ 751 (But note that the Prosecutor agreed with the Tribunal in that case. Genocide was not charged). *Accord Stakic* Appeals Judgment, ¶ 519 (“A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.”).

<sup>242</sup> *Prosecutor v. Krstić*, Case No. IT-98-22-A, Judgment, ¶ 31 (Appeals Chamber, April 19, 2004).

## **5. Comparison with the Rome Statute**

Although the definition of genocide within KRT Law is identical to the one provided in the Rome Statute, the Elements of Crimes adopted by the ICC for each of the enumerated acts of genocide include a common element not explicitly required in prior Statutes or in the jurisprudence of the ICTY or ICTR, namely that the conduct must have taken place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”

## **VI. CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS PURSUANT TO THE VIENNA CONVENTION OF 1961 ON DIPLOMATIC RELATIONS**

Article 8 of the KRT Law provides that:

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations [1961 Vienna Convention<sup>243</sup>], and which were committed during the period from 17 April 1975 to 6 January 1979.

The report of the UN group of experts on Cambodia found evidence that “the Khmer Rouge leaders and cadre appear to have committed . . . crimes against internationally protected persons[,]” noting that “[i]n April 1965, the regime detained personnel in the French embassy and then removed and murdered Cambodian husbands of foreign diplomatic personnel.”<sup>244</sup> It thus appears likely that Article 8 was intended to address these acts. The following section will analyze whether such persons were afforded protection under the 1961 Vienna Convention and which acts against internationally protected persons were criminal during the period from 1975-1979 under either the 1961 Vienna Convention or customary international law.

### **A. Relationship of the 1961 Vienna Convention to the 1973 Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons**

The 1961 Vienna Convention is largely a codification of the customary international law of “Diplomatic Intercourse and Immunities.”<sup>245</sup> Cambodia acceded to it in 1965. The Convention creates obligations between “sending” and “receiving” States, but does not criminalize violations of these obligations. Nor does it require States Parties to criminalize or prosecute such violations domestically.

<sup>243</sup> Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, *adopted* Apr. 18, 1961, *entered into force*, June 24, 1964 [hereinafter 1961 Vienna Convention].

<sup>244</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, U.N. Doc. A/53/850, ¶ 79 (Mar. 16, 1999).

<sup>245</sup> In 1952 the General Assembly, through resolution 685 (VII) of 5 December, requested that the ILC undertake the codification on “the law of diplomatic intercourse and immunities.” *See* Official Records of the General Assembly, U.N. GAOR, 9th Sess., Supp. No. 9, U.N. Doc. A/2693. *See also* ARTHUR WATTS, 1 INTERNATIONAL LAW COMMISSION 1949-1998 at 165 (1999) (noting that the rules of conduct of diplomatic relations “had to a very considerable extent already acquired the status of rules of customary international law”).

The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons [hereinafter 1973 Convention]<sup>246</sup> was drafted to promote “international cooperation for the prevention and punishment of crimes committed against [internationally protected] persons.”<sup>247</sup> It requires States Parties to make attacks against internationally protected persons and premises “punishable by appropriate penalties which take into account their grave nature.”<sup>248</sup> Moreover, it obligates States Parties to either prosecute or extradite alleged offenders.<sup>249</sup> Because Cambodia is not a party to the 1973 Convention, the Cambodian government decided not to include it as a basis for criminal jurisdiction in the KRT law, explaining that this decision was necessary in order to

avoid a challenge to the validity of the applicable law forming the competence of the Extraordinary Chambers. Inclusion of the 1961 Vienna Convention on Diplomatic Relations, to which Cambodia is a signatory, would appear to give scope for prosecution since prima facie it would seem that the Khmer Rouge did violate this Convention.<sup>250</sup>

Notably, however, the 1973 Convention provides that the acts for which it requires prosecution or extradition were considered crimes “of grave concern to the international community” by the time it was adopted in 1973.<sup>251</sup> The ILC drafters also appeared to agree that the Convention would not create a new offense, but would instead encourage cooperation in the prosecution of previously recognized domestic crimes.<sup>252</sup> For this reason, it may provide useful guidance as to which acts against internationally protected persons prohibited by the Vienna Convention entailed international criminal responsibility during the period from 1975-1979.

## **B. Definition of Internationally Protected Persons**

The 1961 Vienna Convention provides broad privileges and immunities to diplomatic agents, defined in Article 30 as the head of mission and members of its diplomatic staff. Article 38 clarifies that unless greater protection has been granted by a receiving state, “a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from

<sup>246</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1035 U.N.T.S. 167, 13 I.L.M. 41, *adopted* Dec. 14, 1973, *entered into force* Feb. 20, 1977 [hereinafter 1973 Convention], art. 2(2).

<sup>247</sup> Yearbook of the ILC 1972, *Report of the ILC on the work of its twenty-fourth session*, 2 May-7 July 1972, Ch. 3, Supp. No. 10, at 312 ¶ 67, U.N. Doc. A/8710/Rev.1 [hereinafter ILC Report on 1973 draft convention].

<sup>248</sup> 1973 Convention, art. 2(2).

<sup>249</sup> *See id.*, art. 6(1) (requiring “the State Party in whose territory the alleged offender is present . . . [to] take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition”); *id.* art. 7 (requiring that “[t]he State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution”).

<sup>250</sup> Letter from Sok An, Senior Minister in Charge of the Office of the Council of Ministers, to Hans Corell, U.N. Under Secretary-General for Legal Affairs (Jan. 22, 2002), *available at* <http://www.cambodia.gov.kh/krt/pdfs/Sok%20An%202002-01-22%20to%20HC%20on%2011%20points.pdf>.

<sup>251</sup> 1973 Convention, pmb. ¶ 3.

<sup>252</sup> *See, e.g.*, ILC Report on 1973 draft convention, at 312, ¶ 67 (“Basing itself on existing legal obligations that are intended to contribute effectively to the inviolability and protection of the persons in question, these draft articles seek to achieve this purpose through the promotion of international cooperation for the prevention and punishment of crimes committed against those persons.”).

jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.” Article 37 additionally protects “[t]he members of the family of a diplomatic agent forming part of his household . . . , if they are not nationals of the receiving State,” who shall “enjoy the privileges and immunities specified [for diplomatic agents] in Articles 29 to 36 [of the Convention].” Conversely, it appears that family members who are nationals of a receiving state would not enjoy these immunities. Thus, in Cambodia, Cambodian spouses of French diplomats would likely not be protected under the Convention.

Members of the administrative and technical staff of the mission and their family members enjoy almost all the same protections as diplomatic agents and their families under the Convention “if they are not nationals of or permanently resident in the receiving State . . . .”<sup>253</sup> Diplomatic couriers are entitled to more limited protection to enable them to perform their official functions.<sup>254</sup>

The 1973 Convention more broadly defines “internationally protected persons” to include visiting heads of state and other high officials and their accompanying family members, as well as:

any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.<sup>255</sup>

Notably, this wording includes family members “forming part of [the protected person’s] household.”<sup>256</sup> Thus, on its face, the 1973 Convention would seem to provide broader coverage to family members than the 1961 Vienna Convention, perhaps encompassing spouses who are nationals of a receiving state. However, as the 1973 Convention was drafted for the purpose of promoting international cooperation in the prosecution of crimes against internationally protected persons,<sup>257</sup> it is not clear that this definition was intended to do more than to recognize the categories of persons already entitled to special protection under international law.<sup>258</sup> This view

<sup>253</sup> 1961 Vienna Convention, art. 37(2) (providing that they shall “enjoy the privileges and immunities specified in Articles 29 to 35” of the Convention”).

<sup>254</sup> *See id.*, art. 27(5) (providing that the diplomatic courier “shall enjoy personal inviolability and shall not be liable to any form of arrest or detention”).

<sup>255</sup> 1973 Convention, art. 1.

<sup>256</sup> *Id.*

<sup>257</sup> *See id.*, pmb. ¶ 4 (“Convinced that there is an urgent need to adopt appropriate and effective measures for the prevention and punishment of . . . crimes [against diplomatic agents and other internationally protected persons]. *See also* 1972 Yearbook vol. 1 at 193-94, 1183rd mtg. ¶ 31 (reporting the view of one ILC member that “the draft was solely intended to consolidate, to the greatest possible extent and on the basis of reciprocity, respect of a well-established principle of international law”).

<sup>258</sup> *See* 1973 Convention, art. 1 (defining the term “internationally protected persons” “for the purposes of this Convention”). *See also* ILC Report on 1973 draft convention, at 313, ¶ 5 (stating that the ILC “decided in favor of the general formulation [of internationally protected persons] over an enumeration of the classes specified in particular conventions as being the best means of effectuating the stated desire of the General Assembly for the broadest possible coverage”). Notably, the Commission rejected extending the existing protections to diplomatic

is supported by the consensus among the 1973 Convention's drafters that entitlement to special protection does not arise from the terms of the Convention itself, but "must exist pursuant to general international law or an international agreement and . . . be applicable where and when the offence is committed."<sup>259</sup> The language of the ILC draft was more explicit in saying that protected family members were limited to those "who are . . . entitled to special protection."<sup>260</sup> It is not clear why the language was eliminated by the General Assembly, however, it remains likely that family members who are nationals of a receiving state would only be covered by the 1973 Convention if they are already protected by either the 1961 Convention or some other legal basis. For this reason, by itself, the language the 1973 Convention does not appear to extend special protection to Cambodian spouses of diplomatic agents received by Cambodia.

### C. Conduct that May Be Subject to Prosecution

#### 1. Violating the Inviolability of Internationally Protected Persons

Article 29 of the 1961 Vienna Convention provides that:

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity.

The ICJ has found that the State obligations under this article are "obligations under general international law."<sup>261</sup> In addition to diplomatic agents, Article 29 applies to members of the administrative and technical staff of the mission and to non-national family members of these protected groups.<sup>262</sup> Under Article 27(5), diplomatic couriers also "enjoy personal inviolability and shall not be liable to any form of arrest or detention" in the performance of their functions.<sup>263</sup>

A protected person "shall enjoy [these privileges and immunities] from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified . . ." to the receiving State.<sup>264</sup> These

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agents on vacation outside of the receiving state, considering that an "extension of special protection to, for example diplomatic agents on leave in a third State, that might well be unaware of their presence, could not be justified under the international conventions currently in force or the applicable rules of international law." *Id.*, at 422, ¶ 6. *See also* 1972 ILC Yearbook, vol. 1 at 194-95, ¶ 37 (reporting the ILC members' discussion on this question).

<sup>259</sup> ILC Report on 1973 draft convention, at 314, ¶ 11. *See also id.* at 311, ¶ 66.

<sup>260</sup> The ILC draft language defined internationally protect persons as including:

Any official of either a State or an international organization who is entitled, pursuant to general international law or an international agreement, to special protection *for or because of* the performance of functions on behalf of his State or international organization, as well as members of his family *who are likewise entitled to special protection.*

ILC Report on 1973 draft convention, at 312 (emphasis added).

<sup>261</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24), at ¶ 62 ("In the view of the Court, the obligations of the Iranian Government [under the 1961 Vienna Convention] are not merely contractual obligations . . . , but also obligations under general international law.").

<sup>262</sup> 1961 Vienna Convention, art. 37(1), (2).

<sup>263</sup> *See id.*, art. 27(5).

<sup>264</sup> *Id.*, art. 39(1).

protections “shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict.”<sup>265</sup>

As indicated above, violations of these protections were not criminalized by the terms of the 1961 Vienna Convention. Consequently, it may be useful to look to the 1973 Convention, which asks states parties to criminalize “the intentional commission of: (a) “murder, kidnapping or other attack upon the person or liberty of an internationally protected person[.]”<sup>266</sup> The ILC draft of this article even more broadly required punishment of “[a] violent attack upon the person or liberty of an internationally protected person,”<sup>267</sup> but was likewise understood to include at a minimum the crimes of murder and kidnapping.<sup>268</sup> Notably, the ILC drafters believed that “[t]he acts covered [in its draft] have normally been regarded as crimes in domestic legislation, which is why they are so labeled in article 2.”<sup>269</sup> Although it is not clear why the General Assembly chose to specifically include specific examples of “attacks” in the final text, both the draft and final versions are open-ended, potentially covering a broad range of offenses. Some ILC members would have likewise preferred “listing the individual crimes to be covered by the draft articles. . . [so that] “articles dealing with criminal matters should be as specific as possible because interpretation of the defined crimes would be on a restrictive basis.”<sup>270</sup> Nevertheless, the ILC ultimately decided

to use the general expression ‘violent attack’, in order both to provide substantial coverage of serious offenses and at the same time to avoid the difficulties which arise in connexion with a listing of specific crimes in a convention intended for adoption by a great many states. . . . Consequently, it was decided to leave it open to each individual State party the ability to utilize the various definitions which exist in its internal law for the specific crimes which are comprised within the concept of violent attack upon the person or liberty. . . .<sup>271</sup>

Each violent attack against an internationally protected person would need to be individually analyzed to determine whether it was a crime under either Cambodian or international law during the temporal jurisdiction of the Extraordinary Chambers. Nevertheless, as the drafters of the 1973 Convention highlighted murder and kidnapping in particular as crimes that were “perfectly well known to national law,”<sup>272</sup> it is likely that, at the least, these acts entailed individual criminal responsibility during the jurisdiction of the Chambers.<sup>273</sup>

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<sup>265</sup> *Id.*, art. 39(2).

<sup>266</sup> 1973 Convention, art. 2(1)(a).

<sup>267</sup> See ILC Report on 1973 draft convention, at 315.

<sup>268</sup> See *id.* ¶ 5 (stating that this language applies to crimes such as “the murder, wounding or kidnapping of [an internationally protected person]”).

<sup>269</sup> ILC Report on 1973 draft convention, at 316; 1972 Yearbook vol. 1 p. 197, 1184<sup>th</sup> mtg. ¶ 11 (stating that “[a]ttacks on diplomats had always been offences punishable under municipal law”); see also *id.* at 203, 1185<sup>th</sup> mtg. ¶ 40 (noting “there was nothing in the language of [draft] article 2 to suggest that a new crime was being created, since in almost all countries the offences listed were already punishable by law”).

<sup>270</sup> ILC Report on 1973 draft convention, at 315, ¶ 3.

<sup>271</sup> *Id.*, at 315, ¶ 4.

<sup>272</sup> See, e.g., 1972 Yearbook vol. 1 p. 199, 1184<sup>th</sup> mtg. ¶ 40 (stating the view of the French Government that “no attempt should be made to define a new offense . . . [as] [k]idnapping, murder and illegal restraint are . . . perfectly

## 2. Violating the Inviolability of the Premises of the Mission and the Private Residence of a Diplomatic Agent

Article 22 of the 1961 Vienna Convention provides that:

- (1) The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.
- (2) The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
- (3) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

The drafters appeared to agree “that the principle of the inviolability of the mission premises was one of the most ancient in international law.”<sup>274</sup> Article 1(i) defines the “premises of the mission” as “the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of mission.” Moreover, Article 29(1) provides that, “[t]he private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.” The ICJ has found that the State obligations under these articles are “obligations under general international law.”<sup>275</sup>

As indicated above, violations of these protections were not criminalized by the terms of the 1961 Vienna Convention. Consequently, it may be useful to look to the 1973 Convention, which asks States Parties to criminalize “the intentional commission of: (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty[.]”<sup>276</sup> As with attacks on protected persons, the ILC decided

to use the general expression ‘violent attack’, in order both to provide substantial coverage of serious offenses and at the same time to avoid the difficulties which arise in connexion with a listing of specific crimes in a convention intended for adoption by a great many states. . . . Consequently, it was decided to leave it open to each individual State party the ability to utilize the various definitions which

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well known to national law, and States might be reluctant to accept a text which created special categories for such crimes according to the status of the victim”).

<sup>273</sup> See discussion of the principle of legality, § IX, *infra*.

<sup>274</sup> *Summary Records of the 22nd Meeting*, [1961] UN Conference on Diplomatic Intercourse and Immunities, Committee of the Whole, ¶ 12, U.N. Doc. A.CONF.20/14. See generally, *id.* ¶¶ 1-68 (arguing generally against the inclusion of any exception to the principle).

<sup>275</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (Judgment of May 24), ¶ 62 (“In the view of the Court, the obligations of the Iranian Government [under the 1961 Vienna Convention] are not merely contractual obligations . . . , but also obligations under general international law.”).

<sup>276</sup> See 1973 Convention, art. 2(1)(b).



exist in its internal law for the specific crimes which are comprised within the concept of violent attack . . . upon official premises or accommodation . . . .<sup>277</sup>

Examples of such crimes were considered to include “bombing an embassy, forcible entry into the premises of a diplomatic mission or discharging firearms at the residence of an ambassador,” and not “minor intrusions into the protected premises.”<sup>278</sup> Each violent act against a particular targeted location would need to be individually analyzed to determine whether it amounted to a crime under Cambodian or international law during the temporal jurisdiction of the Extraordinary Chambers. However, it is notable that the ILC drafters generally considered that “[t]he acts covered . . . have normally been regarded as crimes in domestic legislation. . . .”<sup>279</sup>

#### D. *Mens Rea*

As the 1961 Vienna Convention does not explicitly criminalize attacks against protected persons and premises, it does not discuss the required *mens rea* for criminal liability to attach for these acts. Article 2 of the 1973 Convention, on the other hand, requires prosecution for the “intentional commission” of such acts. The phrasing was agreed upon due to the desire of the drafters to “make it . . . clear that the criminal must be aware of the victim’s status as a diplomat or other protected person”<sup>280</sup> as well as to preclude the article from applying, “for example, to a manslaughter charge resulting from an automobile accident.”<sup>281</sup> For this reason, both intent to commit an attack and knowledge of the status of the victim or targeted premises are required *mens rea* elements under the 1973 Convention. They thus may also need to be demonstrated to establish individual criminal responsibility for similar acts under the 1961 Vienna Convention. It is unclear whether reckless conduct could also suffice.

<sup>277</sup> ILC Report on 1973 draft convention, at 315, ¶ 4.

<sup>278</sup> *Id.* ¶ 5.

<sup>279</sup> *Id.*, at 316. *See also* 1972 Yearbook vol. 1 p. 202, 1185th mtg., at 203, ¶ 40 (noting “there was nothing in the language of [draft] article 2 to suggest that a new crime was being created, since in almost all countries the offences listed were already punishable by law”). *See* discussion of the principle of legality, § IX, *infra*.

<sup>280</sup> 1972 Yearbook vol. 1 p. 202, 1185th mtg. ¶ 2. *See also id.* ¶ 30 (discussing the need to “convey the idea that the act must be an attack committed against a protected person in that person’s [official] capacity. . .”); *id.* at 203 ¶ 34 (suggesting that the words “regardless of motive” be replaced with “knowingly” “in order to bring out the idea of intent and to make it clear that the offender must have been fully aware of the victim’s status . . .”).

<sup>281</sup> 1972 ILC Yearbook, 24<sup>th</sup> Sess. 1191st mtg., ¶ 28, pg. 237. *See also* ILC Report on 1973 draft convention, at 315.

## VII. CRIMES OF SEXUAL VIOLENCE

### A. Sexual Violence As a Grave Breach of the Geneva Conventions

#### 1. Grave Breaches Violations

Article 6 of the KRT Law authorizes the trial of persons responsible for grave breaches of the Geneva Conventions.<sup>282</sup> Unlike the ICTY, ICTR, and ICC Statutes, the KRT Law does not also explicitly provide for prosecution of violations of the laws and customs of war that do not amount to grave breaches.<sup>283</sup> Therefore, any violations of international humanitarian law arising from sexual violence must be prosecuted before the Extraordinary Chambers as grave breaches. In order to avoid a violation of the principle of *nullum crimen sine lege*, a critical question for the Extraordinary Chambers will be whether customary international law recognized that acts of sexual violence could be prosecuted as grave breaches during the period from 1975-1979.

Sexual violence during armed conflict has been prohibited since as early as the fifteenth century when 27 judges of the Holy Roman Empire judged and condemned Peter van Hagenbach in Germany because he allowed his troops to rape and kill civilians.<sup>284</sup> The eminent publicist Hugo Grotius reaffirmed the prohibition on rape during wartime in the mid-seventeenth century.<sup>285</sup> The norm was incorporated into many domestic manuals, including the influential 1863 U.S. Lieber Code that was issued to govern the conduct of Union troops during the American Civil War.<sup>286</sup> Moreover, Article 46 of the Hague Regulations of 1907<sup>287</sup> was read, in conjunction with

<sup>282</sup> KRT Law, art. 6 provides in part that:

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979: . . . torture or inhumane treatment; wilfully causing great suffering or serious injury to body or health . . .

<sup>283</sup> Compare KRT Law, art. 6 (providing only for the prosecution of those individuals “who committed or ordered grave breaches of the Geneva Conventions of 12 August 1949”) with ICTY Statute, at art. 3 (providing for prosecutions of violations of the laws and customs of war) and ICTR Statute, at art 4 (providing for prosecutions of violations of Common Article 3 to the Geneva conventions and of Additional Protocol II to the Geneva Conventions).

<sup>284</sup> M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L COMP. L. REV. 1, 1 (1991), cited in Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 9 n.31 (Kelly D. Askin et al. eds., 2000).

<sup>285</sup> HUGO GROTIUS, 3 THE RIGHTS OF WAR AND PEACE 1300-01 (Richard Tuck ed., 2005).

<sup>286</sup> The Lieber Code — the first domestic codification of regulations of the laws of war and widely considered the precursor to the 1949 Geneva Conventions — expressly prohibited rape as a war crime serious enough to warrant the death penalty. *Lieber Code: Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863*, arts. 44, 47, reprinted in THE LAWS OF ARMED CONFLICTS 10 (D. Schindler & J. Toman eds., 1981).

<sup>287</sup> 1907 Hague Regulations, art. 46 (“Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected”).

the Martens Clause,<sup>288</sup> to implicitly prohibit rape and sexual assault in armed conflict. By the middle of the twentieth century, many national courts had confirmed that rape constitutes not only a violation of the laws and customs of war, but also one that gives rise to individual criminal responsibility.<sup>289</sup>

Although the drafters of the Geneva Conventions did not list rape as a grave breach, commentators believe that such conduct could at least amount to the grave breaches of “inhuman treatment” or “wilfully causing great suffering or serious injury to body or health.”<sup>290</sup> Notably, while the drafters of the Rome Statute chose not to explicitly list rape as a grave breach, they too believed it was already possible to prosecute this act under the existing grave breaches provisions. In fact, in the provision listing specific acts of sexual violence amounting to “other serious violations of the laws and customs applicable in international armed conflict,” the Rome Statute drafters added the phrase “or any other form of sexual violence *also constituting a grave breach* of the Geneva Conventions.”<sup>291</sup> This language clearly reflects the drafters’ view that sexual violence could also be prosecuted as a grave breach.<sup>292</sup> Thus, it seems uncontroversial that acts of sexual violence may be prosecuted as grave breaches under the Rome Statute. Such an interpretation is consistent with the jurisprudence of the ICTY.<sup>293</sup> It is likely that acts of sexual violence could also have been prosecuted as grave breaches during the jurisdiction of the Extraordinary Chambers. However, to avoid violating the principle of legality, the Extraordinary Chambers will need to examine whether by this period of time the grave breaches of torture, inhuman treatment, or wilfully causing great suffering or serious injury to body or health encompassed acts of sexual violence.

<sup>288</sup> See n. 28 and accompanying text, *supra*.

<sup>289</sup> See, e.g., HENCKAERTS & DOSWALD-BECK, at 324-25 (citing the *Takashi Sakai* case before the War Crimes Military Tribunal of the Chinese Ministry of National Defense (1946) and the *John Schultz* case before the U.S. Court of military Appeals (1952) as evidence that rape was a “crime universally recognized as a properly punishable under the law of war”).

<sup>290</sup> See HENCKAERTS & DOSWALD-BECK, at 585 (arguing that “it would have to be considered a grave breach” on this basis); Kelly D. Askin, *Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 310 (2003) (stating that “[t]he grave breaches language is intentionally expansive to provide as much protection as possible to persons protected by the Conventions, and there is general consensus that the provisions should be interpreted liberally.”)

<sup>291</sup> Rome Statute, art. 8(2)(b)(xxii) (“War crimes” means . . . [o]ther serious violations of the laws and customs applicable in armed conflict . . . [including] . . . rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”).

<sup>292</sup> See Hebel & Robinson, at 109 n.96, 117 n.11 (stating that “[t]he language in Article 8(2)(b)(xxii) is intended to confirm the understanding that sexual violence can also be charged under the relevant grave breaches provisions of the Geneva Conventions”); Christopher Keith Hall, *The Fifth Session of the U.N. Preparatory Committee on the Establishment of an International Criminal Court*, 92 A.J.I.L. 331, 334 (1998) (“[t]he drafters intended that the wording of the prohibition of rape and other sexual abuse would make it clear that the prosecutor could also charge persons for these acts separately as grave breaches of the Geneva Conventions, such as torture, inhuman treatment or wilfully causing great suffering, or serious injury to body or health, although this intent is not readily apparent from the wording finally adopted”).

<sup>293</sup> *Prosecutor v. Furundzija*, Case No. IT-97-17 1, Judgment ¶ 172 (Trial Chamber, December 10, 1998).

## 2. Sexual Violence As the Grave Breach of Torture

Under Article 6 of the KRT Law, “torture” is punishable as a grave breach of the Geneva Conventions.

### a. Elements of Torture

Adopted unanimously by the U.N. General Assembly, the 1975 Declaration on the Protection from Torture (Torture Declaration)<sup>294</sup> is perhaps the best expression of the status of the customary international law prohibition on torture during the Extraordinary Chambers’ temporal jurisdiction. Indeed, the ICTY has noted that “all the members of the United Nations concurred in and supported that definition.”<sup>295</sup> The Torture Declaration requires states to prohibit and punish the crime of torture, which it defines as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. . . . Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading punishment.<sup>296</sup>

In the *Celebici* case, the ICTY Trial Chamber referred to the Torture Declaration’s definition, along with the definitions contained in the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Torture Convention)<sup>297</sup> and the 1985 Inter-American Convention to Prevent and Punish Torture,<sup>298</sup> as evidence of the definition of torture as a war crime under customary international law.<sup>299</sup> The ICTY Appeals Chamber identified this crime to contain the following elements under customary international law:

- (i) [t]here must be an act or omission that causes severe pain or suffering, whether physical or mental,
- (ii) which is inflicted intentionally, and

<sup>294</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, Annex arts. 7, 10, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975) [hereinafter Torture Declaration].

<sup>295</sup> *Furundzija* Trial Judgment, ¶ 160.

<sup>296</sup> Torture Declaration, art. 1.

<sup>297</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 114, art 1(1) *entered into force* June 26, 1987 [hereinafter Torture Convention] (providing in part that “torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”).

<sup>298</sup> Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, *entered into force* Feb. 28, 1987, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992).

<sup>299</sup> *Celebici* Trial Judgment, ¶ 459.

- (iii) for a prohibited purpose, such as obtaining information or a confession from the victim or a third person, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any grounds, against the victim or a third person.<sup>300</sup>

### *Severe pain or suffering*

In determining whether conduct gives rise to severe pain or suffering, the ICTY has found that, in addition to considering the objective severity of harm, it may take into account subjective criteria “such as the physical or mental effect of the treatment on the particular victim, and in some cases, factors such as the victim’s age, sex, or state of health.”<sup>301</sup> The ICTY has recognized that “[s]ome acts, like rape, appear by definition to meet the severity threshold.”<sup>302</sup> Thus severe pain or suffering, as required by the definition of the crime of torture, “can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”<sup>303</sup>

### *Prohibited purpose element*

The Torture Declaration prohibits torture “*for such purposes as* obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.”<sup>304</sup> The Torture Convention includes nearly identical language.<sup>305</sup> In *Celebici*, the ICTY Trial Chamber found, in relation to the Torture Convention, that the phrase “for such purposes” indicates that the list is not exhaustive.<sup>306</sup> Thus, the use of this phrase in the Torture Declaration should also be read to include prohibited purposes other than those explicitly enumerated.

### *State action not required*

Notably, although state action is an element of torture in both the Torture Declaration and Torture Convention,<sup>307</sup> the ICTY has not found it to be a required element of the war crime of

<sup>300</sup> See *Prosecutor v. Kvočka, et al.*, Case No. IT-98-30/1-A, Judgment, ¶ 289 (Appeals Chamber, February 28, 2005); *Prosecutor v. Kunarac, Kovac, and Vokovic*, Case No. IT-96-23, Judgment, ¶ 142 (Appeals Chamber, June 12, 2002). Unlike the Torture Convention, the customary international law definition of torture as a war crime or as a crime against humanity does not require that such conduct be committed by an individual acting under color of law. See *infra* notes 307-310.

<sup>301</sup> *Kvočka* Trial Judgment, ¶ 143. See also *Celebici* Trial Judgment, ¶¶ 462-69 (examining human rights jurisprudence addressing what type of conduct constitutes torture).

<sup>302</sup> *Prosecutor v. Brdjanin*, Case No. IT-99-36, Judgment, ¶ 485 (Trial Chamber, September 1, 2004).

<sup>303</sup> *Id.*

<sup>304</sup> Torture Declaration, art. 1.

<sup>305</sup> *Id.* (expanding on this definition by including as a prohibited purpose “any reason based on discrimination of any kind”).

<sup>306</sup> *Celebici* Trial Judgment, ¶ 470. For example, in its *Furundzija* judgment, the Trial Chamber found that “humiliation” should be considered a prohibited purpose. *Furundzija* Trial Judgment, ¶ 162 (noting that “[t]he notion of humiliation is . . . close to the notion of intimidation, which is explicitly referred to in the Torture Convention’s definition of torture”).

<sup>307</sup> See *Kunarac* Appeals Judgment, ¶ 148; *Kunarac* Trial Judgment, ¶ 496 (finding that “the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law”).

torture. As explained by the ICTY Appeals Chamber in *Kunarac*, although the Torture Convention's definition reflects the customary international law responsibility of States, this does not mean that "this definition wholly reflects customary international law regarding the meaning of the crime of torture generally."<sup>308</sup> Supporting this view, the Torture Convention explicitly states that its definition is to be used "for the purposes of th[e] Convention."<sup>309</sup> Thus, "the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention."<sup>310</sup> As the Torture Declaration was similarly adopted to regulate the conduct of States, its "public official" requirement should likewise not be viewed as a necessary element of its definition for the purpose of determining individual responsibility.

### **b. Sexual Violence As Torture**

The ICTY was the first international criminal tribunal to recognize that rape can be prosecuted as torture when it meets the required elements. The Tribunal has found that "[s]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture."<sup>311</sup> In *Celebici*, the ICTY Trial Chamber stated:

[t]he Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. . . . Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by the social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.<sup>312</sup>

Moreover, the ICTY has found that being forced to witness rape<sup>313</sup> or having one's own rape witnessed<sup>314</sup> are types of harm that can constitute torture because of the profound psychological and social consequences.

Because rape has been found to meet the elements of torture under international law, the Extraordinary Chambers likely has the authority to prosecute rape as the grave breach of torture. Nevertheless, the question remains as to which sexual acts constituted rape under international law during the temporal jurisdiction of the Chambers. This issue is discussed *infra*, § B.1. Moreover, there is a question as to whether state action was a required element of the crime of

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<sup>308</sup> *Kunarac* Appeals Judgment, ¶ 147.

<sup>309</sup> Torture Convention, art. 1(1).

<sup>310</sup> *Kunarac* Appeals Judgment, ¶ 148.

<sup>311</sup> *Id.* ¶ 150; see also *Celebici* Trial Judgment, ¶¶ 480-93, *Furundzija* Trial Judgment, ¶¶ 163, 171.

<sup>312</sup> *Celebici* Trial Judgment, ¶¶ 495-96 (providing that "whenever rape and other forms of sexual violence meet the [following] criteria, then they shall constitute torture").

<sup>313</sup> *Furundzija* Trial Judgment, ¶ 267.

<sup>314</sup> *Kvočka* Trial Judgment, ¶ 149 ("[t]he presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped").

torture during this period of time. Based on the reasoning of the ICTY, a strong argument can be made that, while state action was an element of the human rights violation of torture, it was not relevant to questions of individual criminal responsibility, and thus was not an element of the crime of torture. Whether other acts of sexual violence, in addition to rape, could also have amounted to the grave breach of torture during the jurisdiction of the Chambers would depend on whether they also meet the required elements of this crime.

### 3. Sexual Violence As the Grave Breach of Inhuman Treatment

Under Article 6 of the KRT Law, “inhumane treatment” is punishable as a grave breach of the Geneva Conventions.

#### a. Elements of Inhuman Treatment

The Torture Declaration distinguishes torture from other forms of ill treatment by describing torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”<sup>315</sup> Similarly, in 1978 the European Court of Human Rights found that the difference between inhuman treatment and torture relates to the level of severity and depends on the circumstances of the case.<sup>316</sup> The Human Rights Committee noted in 1982 that “it may not be necessary to draw sharp distinctions between the various prohibited forms of treatment and punishment. These distinctions depend on the kind, purpose, and severity of the particular treatment.”<sup>317</sup>

Although the idea of inhuman treatment is thus “difficult to define,” the Commentary to the Fourth Geneva Convention argues that it is not limited to “treatment constituting an attack on physical integrity or health” but also includes measures causing “grave injury to . . . human dignity.”<sup>318</sup> The ICTY has likewise found “inhumane treatment” to include conduct that “causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,”<sup>319</sup> similar to the constituent crime of “other inhumane acts” under crimes against humanity.<sup>320</sup>

A potentially broad category of ill treatment could fall within this definition. Indeed, the Commentary to the Geneva Conventions suggests that its drafters deliberately refrained from enumerating all prohibited acts of “inhumanity”:

[h]owever much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future

<sup>315</sup> Torture Declaration, art(1)(2).

<sup>316</sup> *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B), ¶ 162 (1976) (“ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”).

<sup>317</sup> Human Rights Committee, General Comment 7(16), U.N. Doc. A/37/40 (July 30, 1982).

<sup>318</sup> ICRC Commentary to Geneva IV, art. 147; ICRC Commentary to Geneva III, art. 150.

<sup>319</sup> *Celebici* Trial Judgment, ¶ 543.

<sup>320</sup> “Other inhumane acts” include those acts that “severely damage the physical or mental integrity of the victim, or his health or human dignity.” *Celebici* Trial Judgment, ¶ 533.

torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.<sup>321</sup>

Likewise, international tribunals have not attempted to restrict the type of conduct potentially falling under this heading, but have instead undertaken a fact-based analysis of the severity of the conduct in each case. For example, post-World War II military tribunals convicted individuals for inhuman treatment in connection with overwork, poor conditions, cruelty,<sup>322</sup> and involuntary medical experimentation.<sup>323</sup>

## b. Sexual Violence As Inhuman Treatment

The non-exhaustive list of acts constituting inhuman treatment likely makes it possible to prosecute sexual violence as a form of inhuman treatment before the Extraordinary Chambers. Indeed, the commentary to the Fourth Geneva Convention has highlighted that “the sort of treatment covered by [article 27—including ‘rape, enforced prostitution, or any other form of indecent assault’] would be one which ceased to be humane.”<sup>324</sup>

Although the Nuremberg Charter omitted an explicit reference to sexual violence in its list of war crimes, commentators have argued that rape could have been prosecuted as “ill treatment.”<sup>325</sup> This view is supported by the fact that the International Military Tribunal for the Far East (IMTFE) prosecuted individuals for rape of civilian women and medical personnel, which it characterized as a form of “inhumane treatment.”<sup>326</sup> It is thus likely that under customary international law rape could be prosecuted as the grave breach of inhuman treatment during the temporal jurisdiction of the Extraordinary Chambers. Whether or not acts of sexual

<sup>321</sup> ICRC Commentary to Geneva I, art. 3 (referencing common article 3’s prohibition of inhumane conduct amounting to either “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” or “(c) outrages upon personal dignity, in particular humiliating and degrading treatment”).

<sup>322</sup> See, e.g., *U.S. v. Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS 1373 (finding that the treatment of civilian workers and prisoners of war in German slave labor camps amounted to “inhumane treatment” as a crime against humanity and “ill-treatment” constituting a war crime. Such acts included overwork, malnutrition, and lack of proper medical attention”).

<sup>323</sup> *U.S. v. Brant et al.* (U.S. Military Tribunal I, Aug. 19, 1947), reprinted in 1 CONTROL COUNCIL NO. 10 CASES, at 16 (indictment), 2 CONTROL COUNCIL LAW NO. 10 CASES, at 198, 207, 217, 222, 235, 241, 248 (verdicts).

<sup>324</sup> ICRC Commentary to Geneva IV, art. 147.

<sup>325</sup> See KELLY D. ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 138 (1997) (arguing that sexual assault “certainly” could have been prosecuted as the war crime of “ill-treatment” at Nuremberg); Nuremberg Charter, art. 6(b) (including as a war crime subject to prosecution “ill treatment,” but not “torture” or “inhumane treatment.”)

<sup>326</sup> Michael Cottier, *Rape and Other Forms of Sexual Violence*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 249 (Otto Triffterer ed., 1999), citing 1 TOKYO JUDGMENT 385 (B.V.A. Roling & C.F. Ruter eds.) (providing that “[t]he evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal establishes that . . . rape, and other cruelties of the most inhumane and barbarous character were freely practiced . . .”). See also 2 TOKYO JUDGMENT 967 (Pal, J., dissenting on other grounds) (citing the appendix to the indictment, which lists rape as a breach of the laws and customs of war falling under the category of “inhumane treatment”); Theodor Meron, *Rape as a War Crime under International Humanitarian Law*, 87 AM. J. INT’L. L. 426, n.14 (1993). Notably, in 1976, the European Commission of Human Rights found that rape was a violation of States’ obligation in the European Convention to not subject individuals to inhumane treatment. *Cyprus v. Turkey*, Eur. Comm’n. H.R., 482 Eur. H.R. Rep. ¶ 374 (1976); European Convention on Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, art. 3, entered into force Sept. 3, 1953 (declaring that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”).



violence other than rape could likewise be prosecuted under this heading will require an analysis in each case as to whether the conduct would have met the required elements during the jurisdiction of the Extraordinary Chambers.

#### 4. Sexual Violence As the Grave Breach of Willfully Causing Great Suffering, or Serious Injury to Body or Health

Under Article 6 of the KRT Law, “the crime of willfully causing great suffering or serious injury to body or health” is punishable as a grave breach of the Geneva Conventions. The commentary to the Fourth Geneva Convention states that, “[t]his refers to suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, perhaps out of pure sadism.”<sup>327</sup> Moreover, “[s]ince the Conventions do not specify that only physical suffering is meant, it can quite legitimately be held to cover moral suffering also.”<sup>328</sup>

In the ICTY Statute, this grave breach is defined as “an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health, committed against a protected person.”<sup>329</sup> The ICTY Trial Chamber found that this crime “covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could fall within the ambit of this offence.”<sup>330</sup> In addition, it determined the criterion for seriousness is “harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”<sup>331</sup> as opposed to “acts where the resultant harm relates solely to an individual’s human dignity,”<sup>332</sup> which could comprise the war crime of inhuman treatment.

In 1992, the International Committee of the Red Cross declared that the grave breach of “willfully causing great suffering . . .” covers rape.<sup>333</sup> Moreover, although proposals by New Zealand and Switzerland at the Rome Conference to add the phrase “in particular rape” to this grave breach were rejected, it is notable that this occurred because the drafters believed rape was already covered by the general language of the provision.<sup>334</sup> Due to the broad consensus on this issue, it is likely that rape could have been prosecuted as the grave breach of “willfully causing great suffering . . .” during the jurisdiction of the Extraordinary Chambers. Whether or not other acts of sexual violence could also be prosecuted under this heading would require an analysis in each case to determine if the conduct met the required elements of this crime.

<sup>327</sup> ICRC Commentary to Geneva IV, art. 147.

<sup>328</sup> *Id.* See also *Celebici* Trial Judgment, ¶¶ 508-09 (finding that this crime could include “moral suffering”).

<sup>329</sup> ICTY Statute, art. 2(c). The Rome Statute’s definition of this crime reflects the ICTY’s definition. See ICC Elements of Crimes, art. 8(2)(a)(iii).

<sup>330</sup> *Celebici* Trial Judgment, ¶ 511.

<sup>331</sup> *Naletilic* Trial Judgment, ¶ 343 (“serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment, or humiliation”).

<sup>332</sup> *Kordic* Trial Judgment, ¶ 245.

<sup>333</sup> International Committee for the Red Cross (ICRC), Aide-Mémoire (Dec. 3, 1992), cited in Meron, at 426.

<sup>334</sup> Hebel & Robinson, at 108-09. The drafters also wished to avoid any controversy that could be spurred by adding new crimes to the list of grave breaches, whose status under customary international law was undisputed. *Id.*

## B. Sexual Violence As a Crime Against Humanity

Article 5 of the KRT Law gives the Extraordinary Chambers the authority to prosecute crimes against humanity, defined as “any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts.”

Notably, this article does not explicitly include the more expansive list of sexual crimes found in the Rome Statute, including “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”<sup>335</sup> The drafters of the KRT Law may have purposefully excluded these sexual violence crimes. However, it could also be argued that the KRT Law should be interpreted to allow prosecution of these acts. First, the KRT Law was intended to implement the Framework Agreement between the United Nations and the Government of Cambodia, and Article 9 of this agreement calls for the adoption the definition for crimes against humanity as set forth in the Rome Statute.<sup>336</sup> Second, as a party to the Rome Statute, the Government of Cambodia has already signaled its approval of the expanded list. Finally, the inclusion of the phrase “such as” preceding the enumerated list of crimes in Article 5 suggests an intent not to restrict the Extraordinary Chambers’ jurisdiction to these specified acts.<sup>337</sup> While the co-prosecutors of the Extraordinary Chambers may thus find it appropriate to consider the Rome Statute’s more comprehensive definition of sexual violence in framing indictments, they must first determine whether these acts could have been prosecuted as crimes against humanity during the temporal jurisdiction of the Chambers.

Under Article 5, sexual violence as a crime against humanity would most likely to be prosecuted as an act of rape, enslavement, torture, persecution, or other inhumane acts.

### 1. Rape

As noted above, rape is an enumerated act under the crimes against humanity provision of the KRT Law. The customary international law definition of crimes against humanity has included rape since at least the end of World War II when Control Council Law No. 10 explicitly listed rape under this category of crimes.<sup>338</sup> The Statutes for the ICTY, ICTR, ICC, and Special Court

<sup>335</sup> ICC Elements of Crimes, art. 7(1)(g).

<sup>336</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Kampuchea, art. 9, *signed* June 6, 2003, *promulgated as* NS/RKM/1004/004 (2004) (providing that “[t]he subject-matter jurisdiction of the Extraordinary Chambers shall be . . . crimes against humanity as defined in the 1998 Rome Statute. . .”).

<sup>337</sup> KRT Law, art. 5 (“[c]rimes against humanity . . . are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, *such as* murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts” (emphasis added)).

<sup>338</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(1)(c) (Dec. 20, 1945), 3 Official Gazette Control Council for Germany 50 (1946).

for Sierra Leone (SCSL) also include rape as a constituent act of crimes against humanity.<sup>339</sup>

Although no clear definition of rape under international law existed during the Extraordinary Chambers' temporal jurisdiction, the *ad hoc* tribunals have since developed a comprehensive definition of this crime. The ICTR Trial Chamber held in *Akayesu* that a definition of rape is similar to the definition of torture in that it is more properly premised on "the conceptual framework of State sanctioned violence" than on "a mechanical description of objects or body parts."<sup>340</sup> It then went on to define rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."<sup>341</sup> In *Kunarac*, the ICTY adopted *Akayesu*'s conceptual framework, then set out the precise elements of the crime of rape. In the Appeal Chamber's view, the elements of rape are:

the sexual penetration, however slight:

- (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
- (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.

Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual perpetration, and the knowledge that it occurs without the consent of the victim.<sup>342</sup>

Significantly, evidence of non-consent may be shown by the inherently coercive circumstances of rape in armed conflict.<sup>343</sup>

It is not clear that this definition was part of customary law during the temporal jurisdiction of the Extraordinary Chambers. As noted by the ICTY in the *Furundzija* case, there has been substantial movement in recent years in the way domestic jurisdictions define rape:

a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a

<sup>339</sup> ICTY Statute, art. 5; ICTR Statute, art. 3; ICC Statute, art. 7(1)(g); *Statute of the Special Court for Sierra Leone*, in Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, Annex Enclosure, art. 2(g), U.N. Doc. S/2000/915 (2000) [hereinafter SCSL Statute].

<sup>340</sup> *Akayesu* Trial Judgment, ¶ 597.

<sup>341</sup> *Id.* ¶¶ 598, 688. As a result of this definition, the Trial Chamber recognized that rape was not limited to "non-consensual sexual intercourse" or "physical invasion of the human body" and "may include acts which do not involve penetration or even physical contact." *Akayesu* Trial Judgment, ¶¶ 686, 688.

<sup>342</sup> *Kunarac* Trial Judgment, ¶ 460, 437, approved in *Kunarac* Appeals Judgment, ¶ 128.

<sup>343</sup> *Id.* ¶ 129. See also the ICTY Trial Chamber's finding in *Furundzija* that "any form of captivity vitiates consent." *Furundzija* Trial Chamber, ¶ 271. See accord *Prosecutor v. Muhimana*, ICTR-95-IB-T, Judgment, ¶ 546 (Trial Chamber, Apr. 28, 2005) ("the Chamber is persuaded by the [ICTY] Appellate Chamber's analysis that coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape. Further, this Chamber concurs with the opinion that the circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.").

stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.<sup>344</sup>

Hence, while the current customary international law definition of rape encompasses not just non-consensual penetration but also acts such as forced oral sex,<sup>345</sup> it is unclear whether this was equally true during the period from 1975-1979. Indeed, the definition of rape under the 1956 Cambodian penal code is significantly narrower, providing that: “[a]nyone who penetrates or attempts to penetrate forcefully his penis into the vagina of a girl without her consent is guilty of rape.”<sup>346</sup> Nevertheless, it is clear that perpetrators of rape during the Khmer Rouge-era in Cambodia would have had notice that at least this more narrowly defined act was criminalized.

Moreover, it is possible that the definition under customary international law during the temporal jurisdiction of the Extraordinary Chambers was less mechanical than the one provided in the 1956 penal code. Indeed, many jurisdictions applied a broader definition during this period, suggesting that some shift in the customary law definition may have occurred already by that time. For example, by the late 1970s, forty-one U.S. states had changed the name of the crime from “rape” to “sexual assault,” rewritten rape statutes to be gender-neutral, and expanded the definition of rape to include vaginal, oral, and anal penetration by objects in addition to a penis.<sup>347</sup> Nevertheless, a more comprehensive state survey would be needed to determine the customary international law definition of this crime between 1975-1975.

## 2. Enslavement and Sexual Slavery

Like the statutes of every international criminal tribunal beginning with the Nuremburg and IMTFE Charters, Article 5 of the KRT Law lists enslavement as a constituent act of crimes against humanity.<sup>348</sup> The crime of enslavement derives from the prohibition of slavery in the 1926 Slavery Convention,<sup>349</sup> which had been accepted as customary international law by 1937.<sup>350</sup> Under the Slavery Convention, enslavement is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>351</sup> The

<sup>344</sup> *Furundzija* Trial Judgment, ¶ 179.

<sup>345</sup> In the view of the ICTY, such acts “constitute[] a most humiliating and degrading attack upon human dignity,” and ought to be classified as rape. *Furundzija* Trial Judgment, ¶ 183.

<sup>346</sup> Penal Code of Cambodia, art. 443 (1956). Rape of a woman under thirteen years old was punishable by imprisonment with heavy work load, whereas rape of a girl over age thirteen was punishable by a one to five year prison term. *Id.* arts. 21, 443. However, rape of a girl under thirteen could be reduced to a lower sentence based on consent, as long as the consent was obtained “without coercion, without violence, or without deception.” *Id.* art. 444. Punishment for rape was more severe if the victim was a virgin, married, closely related to the perpetrator, under custodial care of the perpetrator, gang raped, drugged by the perpetrator, sleeping at the time of the rape, or if the perpetrator involved others as accomplices. *Id.* arts. 445–46.

<sup>347</sup> See, e.g., FLA. STAT. ANN. § 794.011 (West 1976) (“sexual battery”); N.M. STAT. ANN. § 30-9-11 (Supp. 1982) (“criminal sexual penetration”).

<sup>348</sup> See Nuremburg Charter, art. 6; IMTFE Charter, art. 5(c); ICTY Statute, art. 5(c); ICTR Statute, art. 3(c); Rome Statute, art. 7(1)(c); SCSL Statute, art. 2(c).

<sup>349</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 60 L.N.T.S. 253, entered into force March 9, 1927 [hereinafter Slavery Convention].

<sup>350</sup> See, e.g., M. Cherif Bassiouni, *Enslavement*, in 1 INTERNATIONAL CRIMINAL LAW 663-704 (M. Cherif Bassiouni ed., 1999).

<sup>351</sup> Slavery Convention, art. 1.

ICTY adopted this definition in *Kunarac*.<sup>352</sup> Moreover, the *Kunarac* Appeals Chamber found that the determination of whether someone has been enslaved “turns on the quality of the relationship between the accused and the victim.”<sup>353</sup> Relevant factors 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 labor.<sup>354</sup>

Both the Rome Statute and the Statute of the Special Court for Sierra Leone include “sexual slavery” as an enumerated act constituting a crime against humanity, when committed as part of a widespread or systematic attack against any civilian population.<sup>355</sup> While no charges of sexual slavery have yet been brought by the ICC, the Prosecutor of the SCSL charged three members of the Armed Forces Revolutionary Council (AFRC) on four different counts of sexual violence, including rape, sexual slavery, and other inhumane acts in the form of “forced marriage” as crimes against humanity, as well as outrages upon personal dignity as a war crime.<sup>356</sup> The Trial Chamber of the Special Court convicted each of the three accused on one count of rape as a crime against humanity and one count of outrages upon personal dignity as a war crime, which “encompasses rape and/or other types of sexual violence as well as enslavement.”<sup>357</sup> However, the Trial Chamber dismissed the charges of sexual slavery and other inhumane acts (forced marriage) as crimes against humanity on the ground that these charges were duplicative of the charges for the crime against humanity of rape and the war crime of outrages upon personal dignity.<sup>358</sup>

While neither of the *ad hocs* includes a specific reference to the act of sexual slavery in its statute, its component parts have been prosecuted at the ICTY as rape committed during the course of enslavement.<sup>359</sup> Because sexual slavery is not explicitly listed in the KRT Law, the co-prosecutors at the Extraordinary Chambers may choose to adopt a similar strategy. Moreover, this approach could also be used to prosecute related crimes such as “forced marriage.”<sup>360</sup>

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<sup>352</sup> *Kunarac* Trial Judgment, ¶ 539 (defining enslavement as “a crime against humanity in customary international law consist[ing] of the exercise of any or all of the powers attaching to the right of ownership over a person”), affirmed in *Kunarac* Appeals Judgment, ¶ 117 (“the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery” has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all the powers attaching to the right of ownership.”) In turn, the *Kunarac* definition formed the basis for the definition of enslavement in the Rome Statute. See Rome Statute, art. 7(2)(c) (“the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”).

<sup>353</sup> *Kunarac* Appeals Judgment, ¶ 121.

<sup>354</sup> *Id.* ¶ 119. Notably, commercial activity and mistreatment were not considered by the ICTY to be indicia of enslavement.

<sup>355</sup> See ICC Elements of Crimes, art. 7(1)(g)-2 (providing the elements of the crime against humanity of sexual slavery); SCSL Statute, art. 2(g).

<sup>356</sup> See *Prosecutor v. Brima, Kamara and Kanu*, Judgment, SCSL-2004-16-PT, ¶ 691 (Trial Chamber, June 20, 2007).

<sup>357</sup> *Id.* ¶ 719.

<sup>358</sup> *Id.* ¶¶ 95, 714.

<sup>359</sup> See *Kunarac* Trial Judgment, ¶ 515.

<sup>360</sup> In the list of elements for sexual slavery, the ICC Elements of Crimes references the Supplementary Convention on the Abolition of Slavery, the Slavery Trade, and Institutions and Practices Similar to Slavery, 266 U.N.T.S. 3

It is important to distinguish enslavement, sexual slavery and “forced marriage” from the crime of enforced prostitution, which is prohibited in both the Geneva Conventions<sup>361</sup> and their Protocols.<sup>362</sup> The Rome Statute includes both the crimes of enforced prostitution and sexual slavery.<sup>363</sup> The ICC Elements of Crimes explains that the crucial difference between these two acts is that enforced prostitution requires that “the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.”<sup>364</sup>

### 3. Torture

Rape as a crime against humanity may also be prosecuted as torture before the Extraordinary Chambers under Article 6 of the KRT Law. The definition of torture under customary international law is discussed in section A.2.a. in the context of war crimes.

### 4. Persecution

Persecution has been defined as the deprivation of a fundamental right on discriminatory grounds.<sup>365</sup> It is the only underlying offence constituting a crime against humanity that must be committed in a discriminatory manner. The ICTY has elaborated:

[Persecution] is defined as an act or omission which: 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).<sup>366</sup>

The ICTY has affirmed that rape is an act of sufficient gravity that it can, under certain circumstances, constitute persecution.<sup>367</sup> Similarly, “[a]ny sexual assault falling short of rape

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(1957) [hereinafter Supplementary Slavery Convention], which prohibits “practices similar to slavery,” including the practice of forced marriage. See ICC Elements of Crimes, art. 7(1)(g)-2. Forced marriage is defined in the Supplementary Slavery Convention as:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of consideration in money or in kind to her parents, guardian, family or any other person or group;
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.

Supplementary Slavery Convention, art. 1(c). Notably, this text addresses the traditional practice of forced arranged marriage and not the practice of abducting women and forcing them to “marry” in the context of mass violence. Nevertheless, this convention provides evidence that during the jurisdiction of the Extraordinary Chambers “forced marriage” was a prohibited form of enslavement under international law.

<sup>361</sup> Geneva Convention IV, art. 72.

<sup>362</sup> Additional Protocol I, arts. 75(2)(b), 76(1); Additional Protocol II, art. 4(2)(e).

<sup>363</sup> Rome Statute, art. 7(1)(g).

<sup>364</sup> ICC Elements of Crimes, art. 7(1)(g)-3(2).

<sup>365</sup> See *Semanza* Trial Judgment, ¶ 347 (drawing from the Rome Statute of the ICC as well as ICTY jurisprudence).

<sup>366</sup> *Deronjic*, Appeals Judgment, ¶ 109 (internal citations omitted),

<sup>367</sup> *Brdjanin*, Trial Judgment, ¶¶1008-1009.

may be punishable as persecution under international criminal law, provided that it reaches the same level of gravity as the other crimes against humanity enumerated [in the] Statute.”<sup>368</sup> Thus, the ICTY has found that such acts can constitute the crime against humanity of persecution where it is shown that they were “discriminatory in fact.”<sup>369</sup>

## 5. Other Inhumane Acts

“Other inhumane acts,” may also be prosecuted as a crime against humanity under the KRT Law. This residual category has been included in the statutes of all international criminal tribunals.<sup>370</sup> The ICTR has found that it encompasses “those crimes against humanity that are not otherwise specified [as a crime against humanity in the Statute], but are of comparable seriousness.”<sup>371</sup> Such crimes are defined as “acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.”<sup>372</sup> The ICTY has determined that an “other inhumane act” must cause “serious” harm, the severity of which is assessed “on a case-by-case basis with due regard for the individual circumstances. . . .”<sup>373</sup> Relevant factors may include “the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim including age, sex and health.”<sup>374</sup>

This category was first used to prosecute sexual violence crimes when the IMFTE prosecuted twenty-eight Japanese Axis defendants for rape of civilian women and medical personnel under the categories of “inhumane treatment,” “mistreatment,” and “ill-treatment.”<sup>375</sup> With rape now independently listed as a crime against humanity in their Statutes, modern international criminal tribunals have found that other forms of sexual violence — defined by the ICTR as “any act of a sexual nature which is committed on a person under circumstances which are coercive”<sup>376</sup> — can

<sup>368</sup> *Id.* at ¶ 1012.

<sup>369</sup> *Id.* at ¶¶ 1010-1011 (Trial Chamber, September 1, 2004) (explaining that the rape of Bosnian Muslim and Bosnian Croat women by Bosnian Serb soldiers or policemen left “no doubt that these rapes were discriminatory in fact”, and that the requisite *mens rea* was evidenced by the perpetrators’ “abundant use of pejorative language” showing discriminatory intent).

<sup>370</sup> IMT Charter, art. 6(c); IMFTE Charter, art. 5(c); ICTY Statute, art. 5(i); ICTR Statute, art. 3(i); Rome Statute, art. 7(k); SCSL Statute, art. 2(i).

<sup>371</sup> *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgment, ¶ 150 (Trial Chamber I, May 21, 1999).

<sup>372</sup> *Id.*, ¶ 151. The ICC has similarly defined “other inhumane acts” as those that are “similar in character [to other crimes against humanity] intentionally causing great suffering, or serious injury to body or to mental or physical health.” ICC Elements of Crimes, art. 7(i)(k).

<sup>373</sup> *Kordic Appeals Judgment*, ¶ 117 (citing *Kordic Trial Judgment*, ¶ 271).

<sup>374</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25, Judgment, ¶ 131 (March 15, 2003, Trial Chamber). *See also Vasiljevic Trial Judgment*, ¶ 235.

<sup>375</sup> Askin, *Prosecuting Wartime Rape*, at 302, citing THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 31, 111-17 (R. Pritchard & S. Zaide eds., 1981). Rape was not listed as a crime against humanity in the Tokyo Charter, nor is it clear from the judgment that rape was prosecuted as a crime against humanity as well as a war crime; however, the indictment characterized rape as a “inhumane act.” *See* 2 TOKYO JUDGMENT 967 (Pal, J., dissenting on other grounds) (citing the appendix to the indictment, which lists rape under the category of “inhumane treatment”).

<sup>376</sup> *Akayesu Trial Judgment*, ¶ 688. *See also Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Comm’n on H.R., 50th Sess., Agenda Item 6, ¶ 41, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) (determining that “[s]exual violence, including rape, falls within the general prohibition of ‘inhumane acts’ in the traditional formulation of crimes against humanity” (citation omitted)).

fall within the scope of “other inhumane acts.” For example, the ICTR has found that acts such as forced undressing, public marching while nude,<sup>377</sup> and the insertion of wooden objects into a woman’s genitalia<sup>378</sup> constitute “other inhumane acts.” The ICTY has suggested that “other inhumane acts” could include enforced prostitution, which is not an enumerated act in its Statute,<sup>379</sup> as well as “[c]ertain measures . . . which might cut the civilian internees off completely from the outside world and in particular from their families . . . .”<sup>380</sup> Most recently, the SCSL indicted several accused for “forced marriage” under this category.<sup>381</sup>

As discussed *supra* with respect to the war crime of “inhuman treatment,” whether particular acts of sexual violence would have been considered serious enough to fall under this category during the jurisdiction of the Extraordinary Chambers will depend on the facts in each particular case.

### C. Sexual Violence As Genocide

Article 4 of the KRT Law prohibits genocide, which is defined as:

any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group such as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children from one group to another group.<sup>382</sup>

The landmark prosecution of Akayesu for genocide before the ICTR was based on the rapes and sexual humiliation he witnessed, ordered, and encouraged in the course of a genocidal campaign while acting as a commune leader.<sup>383</sup> The Trial Chamber found that rape and sexual violence constituted serious bodily and mental harm against Tutsi women, and were “an integral part of the process of destruction.”<sup>384</sup> The Elements of Crimes of the Rome Statute follows *Akayesu* in highlighting that acts “causing serious bodily or mental harm” may include *inter alia* “rape, sexual violence or inhuman or degrading treatment.”<sup>385</sup>

<sup>377</sup> *Akayesu* Trial Judgment, ¶¶ 692, 697.

<sup>378</sup> *Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, Judgment & Sentence, ¶ 316 (Trial Chamber, May 16, 2003).

<sup>379</sup> *Kupreskic* Trial Judgment, ¶ 566.

<sup>380</sup> *Celebici* Trial Judgment, ¶ 521 (citing Commentary to the Fourth Geneva Convention art. 147). The ICTY has determined that determined that “cruel treatment, inhuman treatment and inhumane acts basically require proof of the same elements.” *Krnjelac* Trial Judgment, ¶ 130.

<sup>381</sup> See *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, Case No. SCSL-2004-15-PT-108, Amended Consolidated Indictment (Special Court for Sierra Leone, May 13, 2004) (counts 6-8); *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, Case No. SCSL-2004-16-PT-070, Amended Consolidated Indictment (Special Court for Sierra Leone, May 13, 2004) (counts 6-8).

<sup>382</sup> KRT Law, art 4.

<sup>383</sup> *Akayesu* Trial Judgment, ¶¶ 706-07.

<sup>384</sup> *Id.* ¶¶ 731-34.

<sup>385</sup> ICC Elements of Crimes, art. 6(b).



While the *ad hoc* tribunals have thus found that rape and sexual violence can constitute genocide when the acts are committed with the requisite specific intent,<sup>386</sup> and most agree that such is now settled customary law,<sup>387</sup> it is unclear whether the law had moved this far during the temporal jurisdiction of the Extraordinary Chambers.

#### D. Leadership Responsibility for Sexual Violence Crimes

There is some evidence suggesting that the Khmer Rouge leadership promulgated a policy prohibiting sexual violence, contained within a more general prohibition on sexual relations of any kind outside marriage. Violations of this policy were known as “moral offences” and carried severe penalties.<sup>388</sup> If such a policy is shown to have existed, the co-prosecutors of the Extraordinary Chambers will likely face evidentiary challenges in prosecuting sexual violence crimes for the following reasons. First, because the personal jurisdiction of the Extraordinary Chambers extends only to “senior leaders and those most responsible,” the Chambers are less likely to prosecute direct perpetrators of sexual violence. Second, where leaders are responsible for sexual violence committed by others, they will likely be prosecuted under the superior responsibility theory of liability, which requires proof that they knew of or should have known of sexual violence committed by subordinates within their effective control.<sup>389</sup> Thus, the existence of a policy prohibiting sexual violence might present a challenge because if lower-level officers knew they would be punished for committing sexual violence, they would have been more likely to commit such acts without the knowledge of their superiors.

Nevertheless, even if a policy prohibiting sexual violence can be shown to have existed, persons responsible for acts of sexual violence could nevertheless be prosecuted for either war crimes or crimes against humanity.<sup>390</sup> Indeed, where leaders cannot be shown to have “known or should have known” that their subordinates were committing acts of sexual violence, it may be possible to prosecute them under a joint criminal enterprise (JCE) theory of liability if it can be shown that sexual violence was a foreseeable consequence of the larger criminal plan or policy.<sup>391</sup> As discussed in Chapter VIII(B) *infra*, under this third “category” of joint criminal enterprise – the “extended” form – one of the perpetrators commits an act which, while outside the common design, was nevertheless *a natural and foreseeable consequence* of effecting that common purpose.<sup>392</sup> While prosecutions under a JCE theory of liability have often proved successful in the *ad hoc* tribunals over the past ten years, the Trial Chamber of the Special Court for Sierra

<sup>386</sup> *Id.* ¶ 731; *Krstic* Trial Judgment, ¶ 513.

<sup>387</sup> *See, e.g.*, QUÉNIVET, at 161.

<sup>388</sup> *See* Documentation Center of Cambodia, *Sexual Abuse Cases Under the Democratic Kampuchea (the Khmer Rouge) Regime* 11 (Tieng Sopheak Vichea, trans., May 1999).

<sup>389</sup> *See* Chapter VIII(B), *infra*.

<sup>390</sup> *See Kupreskic* Trial Judgment, ¶ 555 n.816 (quoting 1 *Entscheidungen* 203, 206-07 (the German Supreme Court in the British occupied zone, of Dec. 21, 1948) for the proposition that an act qualifies as part of an attack if it is “put at the service . . . of . . . [the] criminal goals and plans” of a leadership, even where that act is done on private initiative and later rebuked by an officer of that leadership); *Kunarac* Trial Judgment, ¶ 419 (“[i]t is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity”).

<sup>391</sup> *See, e.g.*, *Krstic* Trial Judgment, ¶¶ 617-18. *See also* discussion of JCE responsibility in Chapter VIII(B), *infra*.

<sup>392</sup> *Tadic* Appeals Decision, ¶ 228.

Leone has thus far been unwilling to enter a conviction on the basis of JCE liability.<sup>393</sup> Thus, relying on JCE as a mode of criminal liability is not without its challenges.

### **E. Protecting Victims of Sexual Violence Appearing Before the Extraordinary Chambers**

Rules of procedure and evidence in international criminal trials can play an important role in protecting victims and witnesses of sexual violence. The KRT Law generally calls for the protection of victims and witnesses, but specifies only one procedure to accomplish this goal — holding private, in camera, proceedings for judges to review sensitive evidence.<sup>394</sup> However, the Law allows judges to consult international law, including the rules of procedure and evidence of the *ad hoc* tribunals and the ICC, where necessary to fill in the gaps between domestic Cambodian law and international standards.<sup>395</sup>

The ICTY and ICTR have protected victims and witnesses by rejecting a requirement of corroboration of a rape victim's testimony,<sup>396</sup> making evidence of a victim's prior sexual conduct inadmissible,<sup>397</sup> and preventing the use of consent as a defense to rape when coercive conditions are present.<sup>398</sup> In addition, the *ad hoc* tribunals have challenged prevailing stereotypes about victims of rape and sexual assault. For example, in *Furundzija*, the ICTY Trial Chamber admitted the testimony of a rape victim, dismissing the argument that a victim suffering from post-traumatic stress disorder would not be able to provide credible testimony.<sup>399</sup>

The ICC Rules offer the most protective standards for victims and witnesses of sexual violence. A Victims and Witnesses Unit was established to provide special care for victims of sexual violence, including measures to protect their security and confidentiality, as well as take gender-sensitive measures to facilitate the testimony of victims.<sup>400</sup> Evidentiary rules ensure that no corroboration is required to prove any crime of sexual violence,<sup>401</sup> severely restrict the circumstances in which consent can be inferred,<sup>402</sup> prohibit the introduction of evidence of a victims' prior sexual conduct,<sup>403</sup> and provide for *in camera* procedures to review sensitive evidence.<sup>404</sup> Nothing in the KRT Law would preclude the adoption of such measures in order to ensure the highest level of protection and care for victims.

<sup>393</sup> See, e.g., *Prosecutor v. Brima, Kamara & Kanu*, Judgment, ¶¶ 77-85 (refusing to consider JCE as a mode of liability due to the Prosecutor's failure to properly plead either the first or the third categories of JCE); *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgment, SCSL 04-14-T (Trial Chamber, August 2, 2007), ¶¶ 732, 744, 771, 804, 815, 851 (finding the Prosecutor failed to lead sufficient evidence to support allegations of liability under both the first and third categories of JCE).

<sup>394</sup> KRT Law art. 33; U.N. Agreement, art. 23.

<sup>395</sup> See U.N. Agreement, art. 12.

<sup>396</sup> ICTY Rules, R. 96(i);

<sup>397</sup> *Id.* R. 96(iv).

<sup>398</sup> *Id.* R. 96(ii).

<sup>399</sup> *Furundzija* Trial Judgment, ¶ 109.

<sup>400</sup> ICC Rules of Procedure and Evidence, R. 16-17.

<sup>401</sup> *Id.* R. 64.

<sup>402</sup> *Id.* R. 70.

<sup>403</sup> *Id.* R. 71.

<sup>404</sup> *Id.* R. 72.

## VIII. INDIVIDUAL CRIMINAL RESPONSIBILITY

Article 29 of the KRT Law provides for individual criminal responsibility of any “[s]uspect who planned, instigated, ordered, aided and abetted, or committed” any of the crimes punishable by the Extraordinary Chambers. Moreover, this article provides that superiors may be responsible for the acts of subordinates under certain circumstances. Article 4 provides three additional modes of responsibility solely in relation to the crime of genocide. These include participation, attempts to commit, and conspiracy to commit acts of genocide.

The following chapter discusses the definition of each of these forms of criminal responsibility, as defined in the jurisprudence of the ICTY and ICTR and in the *travaux préparatoires* of the Rome Statute.

As an initial matter, it is worth noting that ICTY jurisprudence makes clear that a Trial Chamber may determine the level of criminal responsibility of the accused if the prosecution does not specify it.<sup>405</sup>

### A. Modes of Responsibility Applicable to All KRT Law Crimes

The five generally applicable modes of individual responsibility in the KRT Law are identical to those in the ICTR and ICTY Statutes<sup>406</sup>: commission, planning, instigating, ordering, and aiding an abetting. The responsibility of superiors is also similar under all three instruments.

#### 1. Committing, Planning, Ordering, Instigating

The ICTY Trial Chamber has found that to be found responsible for committing, planning, ordering, or instigating a crime, an accused must be found to have “directly or indirectly intended that the crime in question be committed.”<sup>407</sup>

##### a. Commission Generally

“Committing” can generally be considered to be the perpetration of a crime in a way that meets the required elements of the KRT Law. The definition of “committing” is well-established in international jurisprudence as “physically perpetrating a crime or engendering a culpable omission in violation of criminal law.”<sup>408</sup> Commission does not require “direct personal or

<sup>405</sup> *Krstic* Trial Judgment, ¶ 602 (stating that “[s]ince the Prosecution has not charged any specific head of criminal responsibility under Article 7(1) of the Statute, it is within the discretion of the Trial Chamber to convict the Accused under the appropriate head within the limits of the Indictment and fair notice of the charges and insofar as the evidence permits”).

<sup>406</sup> ICTY Statute., art. 7(1); ICTR Statute, art. 6(1).

<sup>407</sup> *Blaskic* Trial Chamber, ¶ 278.

<sup>408</sup> *Prosecutor v. Fofana & Kondewa*, SCSL-04-14-T, Judgment, ¶ 205 (Trial Chamber, August 2, 2007). *See also* *Krstic* Trial Judgment, ¶ 601.

physical participation. . . .”<sup>409</sup> In other words, there is no requirement of a direct *act*; thus, an omission can qualify as “committing.”<sup>410</sup>

Additionally, “to hold an individual criminally responsible for his participation in the commission of a crime other than through direct commission, it should be demonstrated that he intended to participate in the commission of the crime and that his deliberate acts contributed directly and substantially to the commission of the crime.”<sup>411</sup> Further, “[t]here can be several perpetrators regarding the same crime as long as each of them fulfils the requisite elements of the crime.”<sup>412</sup>

## b. Commission Through a Joint Criminal Enterprise<sup>413</sup>

Both *ad hoc* tribunals and the Special Court for Sierra Leone have found that the modes of responsibility listed in their Statutes implicitly include “participation in a joint criminal enterprise as a form of ‘commission’ . . .”<sup>414</sup> and that “its elements are based on customary law.”<sup>415</sup> According to the Appeals Chamber in *Tadic*, for joint criminal enterprise liability, three specific elements must be proved.

- i. *A plurality of persons*. They need not be organized in a military, political or administrative structure
- ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or

<sup>409</sup> *Kordic*, Trial Judgment, ¶ 376 (referencing *Prosecutor v. Dusko Tadic a/k/a “Dule,”* IT-94-1-A, Judgment, ¶ 188 (Appeals Chamber, July 15, 1999), which determined that individual criminal responsibility “covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law”); see also *Prosecutor v. Galic*, Case No. IT-98-29, Judgment, ¶ 168 (Trial Chamber, December 5, 2003).

<sup>410</sup> Indeed, an accused may commit a crime by participating in certain conduct “directly or indirectly.” *Prosecutor v. Stakic*, Case No. IT-97-24, Judgment, ¶ 439 (Trial Chamber, July 31, 2003).

<sup>411</sup> *Kordic* Trial Judgment, ¶ 385. See also *Prosecutor v. Dusko Tadic a/k/a “Dule,”* IT-94-1-T, Opinion and Judgment, ¶ 692 (Trial Chamber II, May 7, 1997) (“In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.”).

<sup>412</sup> *Prosecutor v. Mladen Naletilic a/k/a “Tuta” & Vinko Martinovic, a/k/a “Stela,”* IT-98-34, Judgment, ¶ 61 (Trial Chamber I, March 31, 2003).

<sup>413</sup> Judge Shahabudden of the ICTY has noted that the terms “common enterprise,” “joint enterprise,” “common plan,” and “common purpose,” among others, are often used with great flexibility. *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 4 (Appeals Chamber, May 21, 2003) (separate opinion of J. Shahabuddeen).

<sup>414</sup> See *Prosecutor v. Elizaphan Ntakirutimana & Gerard Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR 96-17-A, Judgment, ¶ 462 (Appeals Chamber, Dec. 13, 2004); *Milutinović et al.*, Appeal Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 20; *Krstic* Trial Judgment, ¶ 480; *Fofana* Trial Judgment, ¶ 208 (“‘committing’ [as used in the Statute] is sufficiently protean in nature as to include participation in a joint criminal enterprise to commit the crime”).

<sup>415</sup> *Milutinović et al.*, Appeal Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 21.

purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.<sup>416</sup>

The requisite *mens rea* differs depending on which of three categories of joint criminal enterprise is under consideration:

The first category is a “basic” form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.

The second category is a “systemic” form of joint criminal enterprise. It is a variant of the basic form, characterized by the existence of an organized system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.

The third category is an “extended” form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.<sup>417</sup>

For the first category, where the crime is one that was an intended outcome of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime.<sup>418</sup> For the second category, which involves a system of ill-treatment, it must be shown that the accused had personal knowledge of the system and an intent to further the criminal purpose of the system; this personal knowledge may be proven by direct evidence or by reasonable inference from the accused’s position of

<sup>416</sup> *Tadic* Appeal Judgment, ¶ 227; *Fofana* Trial Judgment, ¶¶ 213-215.

<sup>417</sup> *Fofana* Trial Judgment, ¶ 210 (citing *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶¶ 97-99 (Appeals Chamber, February 25, 2004)). See also *Tadic* Appeal Judgment, ¶¶ 196, 202, 204.

<sup>418</sup> See *Tadic* Appeal Judgment, ¶ 196.

authority.<sup>419</sup> In the third category, where a crime occurs that was not part of the original plan, responsibility for one or many other additional crimes may still be possible if the following two elements are met:

- (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*.<sup>420</sup>

Thus, the ICTY Appeals Chamber<sup>421</sup> has found that in this later case an accused:

need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed. Rather, it is sufficient that that accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed.<sup>422</sup>

An individual can even be held responsible for genocide under this theory if the prosecution can “establish that it was reasonably foreseeable to the accused that an act [of genocide] would be committed and that it would be committed with genocidal intent.”<sup>423</sup>

### c. Planning

Planning “implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases.”<sup>424</sup> “The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.”<sup>425</sup> The existence of a plan may be proved by circumstantial evidence.<sup>426</sup>

### d. Instigating

“‘Instigating’ means prompting another to commit an offence.”<sup>427</sup> The *actus reus* may be an act or omission which is shown to substantially contribute to the conduct of another person committing the crime.<sup>428</sup> 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

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<sup>419</sup> *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgment, ¶ 65 (Appeals Chamber, March 22, 2006).

<sup>420</sup> *Id.* (emphasis in original); *Tadic* Appeal Judgment, ¶ 228.

<sup>421</sup> *See Prosecutor v. Radoslav Brjdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal (Appeals Chamber, Mar. 19, 2004).

<sup>422</sup> *See id.* ¶ 5.

<sup>423</sup> *See id.* ¶ 6.

<sup>424</sup> *Fofana* Trial Judgment, ¶ 221 (citing *Prosecutor v. Limaj et al.*, Case No. IT-03-66, Judgment, ¶ 513 (Trial Chamber, November 30, 2005)).

<sup>425</sup> *Semanza* Trial Chamber, ¶ 380; *see also Kordic*, Appeals Judgment, ¶ 26.

<sup>426</sup> *Blaskic* Trial Chamber, ¶ 279.

<sup>427</sup> *Kordic*, Appeals Judgment, ¶ 27; *see also Fofana* Trial Judgment, ¶ 223.

<sup>428</sup> *Fofana* Trial Judgment, ¶ 223 (citing *Kordic and Cerkez* Appeal Judgment, ¶ 27).

necessary to prove that the crime would not have been perpetrated without the accused's involvement.<sup>429</sup>

### e. Ordering

“‘Ordering’ means that a person in a position of authority instructs another to commit an offence.”<sup>430</sup> Both ICTY and ICTR jurisprudence agree that there is no need for a *de jure* superior-subordinate relationship; however the “accused [must have] possessed the authority to order.”<sup>431</sup> Evidence of the existence of an order can be inferred from circumstantial evidence.<sup>432</sup>

*Ad hoc* tribunal jurisprudence has determined that the order need not be written, discovered, or given directly to the actual perpetrator.<sup>433</sup> Additionally, the ICTY has stated that the “order does not need to be given in any particular form and can be explicit or implicit.”<sup>434</sup>

## 2. Aiding and Abetting

“‘Aiding and abetting’ means rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime.”<sup>435</sup> The *Tadic* Appeals Chamber clearly laid out the main elements of aiding and abetting as well as the differences of this level of responsibility from “acting in pursuance of a common purpose or design to commit a crime.”

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

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

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

<sup>429</sup> See *Id.*; see also *Kordic* Trial Judgment, ¶ 387.

<sup>430</sup> *Kordic* Appeals Judgment, ¶ 28.

<sup>431</sup> *Id.*; see also *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14, Judgment, ¶ 281 (Trial Chamber I, March 2, 2000) (citing *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Opinion and Judgment ¶ 483 (Trial Chamber I, Sept. 2, 1998)).

<sup>432</sup> *Limaj* Trial Judgment, ¶ 513.

<sup>433</sup> *Id.*

<sup>434</sup> *Naletilic* Trial Judgment, ¶ 61.

<sup>435</sup> *Fofana* Trial Judgment, ¶ 228; see also *Krstic* Trial Judgment, ¶ 601.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.<sup>436</sup>

In addition to these elements, aiding and abetting may be committed 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*.<sup>437</sup>

For the *mens rea* element to be satisfied, the aider or abettor must know he is assisting in the crime;<sup>438</sup> however, he “need not have known the precise crime being committed as long as he was aware that one of a number of crimes would be committed, including the one actually perpetrated.”<sup>439</sup> However, the ICTY Appeals Chamber has found that “an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime.”<sup>440</sup> Thus,

the aider and abettor in persecution, . . . , must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.<sup>441</sup>

Likewise, the aider and abettor to genocide must know about the perpetrator’s genocidal intent.<sup>442</sup>

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

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

<sup>436</sup> *Tadic* Appeal Judgment, ¶ 229.

<sup>437</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment, ¶ 47 (Appeals Chamber, July 29, 2004) (internal citations omitted).

<sup>438</sup> *Blaskic*, Trial Judgment, ¶ 45.

<sup>439</sup> *Naletilic* Trial Judgment, ¶ 63.

<sup>440</sup> *Krstić* Appeal Judgment, ¶ 140.

<sup>441</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25 “Foca,” Judgment, ¶ 52 (Appeals Chamber, Sept. 17, 2003).

<sup>442</sup> *Krstić* Appeal Judgment, ¶ 140.



presence must be considered against the background of the factual circumstances.<sup>443</sup>

### 3. Responsibility of Superiors

The principle of superior responsibility is “anchored firmly” in customary and conventional international law.<sup>444</sup> KRT Law provides for enforcement of this principle under Article 29:

The fact that any of the [crimes triable by the Extraordinary Chambers] were committed by a subordinate does not relieve the superior of personal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior 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 necessary and reasonable measures to prevent such acts or to punish the perpetrators.<sup>445</sup>

The purpose behind superior responsibility is to ensure compliance with the law. Indeed, the ICTY has noted how the related concept of command responsibility is designed to ensure compliance with the protections that are at the heart of international humanitarian law:

Ensuring this protection requires, in the first place, preventative measures which commanders are in a position to take, by virtue of the effective control which they have over their subordinates, thereby ensuring the enforcement of international humanitarian law in armed conflict. A commander who possesses effective control over the actions of his subordinates is duty bound to ensure that they act within the dictates of international humanitarian law and that the laws and customs of war are therefore respected.<sup>446</sup>

Article 29 of the KRT Law appears to closely follow ICTY and ICTR jurisprudence, which holds that whether the superior knew or should have known of the acts informs whether he or she is responsible for not preventing or punishing the perpetration of the crimes. It is this omission or negative action that elevates the responsibility of a superior to this level. Superior responsibility is therefore not a form of strict liability, but a type of imputed responsibility.<sup>447</sup> As the *Kordic* Trial Chamber explains, superior responsibility

may be described as “indirect” as it does not stem from a “direct” involvement by the superior in the commission of a crime but rather from his omission to prevent or punish such offence, *i.e.*, of his failure to act in spite of knowledge. This responsibility arises only where the superior is under a legal obligation to act.<sup>448</sup>

<sup>443</sup> *Prosecutor v. Semanza*, ICTR-97-20, Judgment and Sentence, ¶ 386 (Trial Chamber III, May 15, 2003).

<sup>444</sup> *Fofana* Trial Judgment, ¶ 233; *Celibici* Appeal Judgement, ¶ 195.

<sup>445</sup> KRT Law, art. 29.

<sup>446</sup> *Prosecutor v. Halilovic*, Case No. IT-01-48, Judgment, ¶ 39 (Trial Chamber, November 16, 2005).

<sup>447</sup> *See Kordic* Trial Judgment, ¶ 365.

<sup>448</sup> *Id.*

This element of responsibility arises from treaty law and customary international law, including Additional Protocol I to the Geneva Conventions establishing an affirmative duty for commanders to prevent and punish violations of international humanitarian law.<sup>449</sup> However, “only feasible measures in the power of a superior are required.”<sup>450</sup>

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

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>451</sup>

The ICTY has emphasized the importance of effective control in determining the existence of a superior-subordinate relationship sufficient to invoke superior responsibility.<sup>452</sup> This requirement has been explicitly added to the KRT law.<sup>453</sup> Effective control is identified in the *ad hocs* and the Special Court for Sierra Leone using the “effective control test”, under which “the superior must possess the material ability to prevent or punish criminal conduct.”<sup>454</sup>

For a superior to “have reason to know,” ICTY jurisprudence dictates that:

It must be proved either that (i) the superior had actual knowledge that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or that (ii) he had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes had been or were about to be committed by his subordinates.<sup>455</sup>

Moreover, although actual knowledge cannot be presumed, the fact that an individual was a commanding officer may be used to show that he or she had knowledge of the acts of his or her subordinates.<sup>456</sup> In the absence of direct evidence, actual knowledge may be established by circumstantial evidence.<sup>457</sup>

<sup>449</sup> See *Celebici*, Appeals Judgment ¶ 195.

<sup>450</sup> *Naletilic* Trial Judgment, ¶ 77.

<sup>451</sup> *Prosecutor v. Mucic*, IT-96-21, Judgment, ¶ 346 (Trial Chamber II, November 16, 1998). This language has been affirmed by several more recent Appeals Chamber decisions as well as the Special Court for Sierra Leone. See *Fofana* Trial Judgment, ¶ 235, note 311.

<sup>452</sup> See *Kordic*, Appeals Judgment, ¶ 840; *Limaj*, Trial Judgment, ¶ 521; *Naletilic* Trial Judgment, ¶ 66.

<sup>453</sup> KRT Law, art. 29.

<sup>454</sup> *Fofana* Trial Judgment, ¶ 238 (citing *Celebici* Appeals Judgment, ¶ 256).

<sup>455</sup> *Prosecutor v. Halilovic*, Case No. IT-01-48, Judgment, ¶ 65 (Trial Chamber, November 16, 2005).

<sup>456</sup> See *Naletilic* Trial Judgment, ¶ 71.

<sup>457</sup> *Fofana* Trial Judgment, ¶ 243 (citation omitted).

With respect to necessary and reasonable measures, the Special Court has indicated that this standard is connected to the degree of effective control possessed by the superior.<sup>458</sup> Thus, a superior will be liable if he failed to take those measures that were within his material ability. “[T]he question of whether the superior had the explicit legal capacity to do so is irrelevant if it is proven that he had the material ability to act.”<sup>459</sup>

There has been a movement in the jurisprudence of *ad hoc* tribunals against concurrent convictions for both individual and superior responsibility in relation to the same count based on the same facts. Instead, the Tribunals have determined that these are alternative modes of responsibility, and that an accused should be convicted only for the mode that most appropriately expresses his or her culpability.<sup>460</sup>

## **B. Modes of Responsibility Applicable only to the Crime of Genocide**

### **1. Participation in Genocide**

Participation in genocide includes all the modes of responsibility discussed above: committing, planning, ordering or instigating one or more of the enumerated acts constituting genocide with the requisite intent.<sup>461</sup> Participation also includes aiding and abetting in the crime of genocide. As discussed *supra*, the jurisprudence of the *ad hoc* tribunals has determined that an aider and abetter to genocide must know about, but need not share, the perpetrator’s genocidal intent.<sup>462</sup>

### **2. Conspiracy to Commit Acts of Genocide**

Conspiracy to commit acts of genocide is defined as “an agreement between two or more persons to commit the crime of genocide”<sup>463</sup> with the intent to commit genocide.<sup>464</sup> The act of conspiring is punishable even if no acts of genocide have occurred.<sup>465</sup>

### **3. Attempts to Commit Acts of Genocide**

Jurisprudence regarding this issue is scarce.

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<sup>458</sup> *Id.*, ¶ 246.

<sup>459</sup> *Id.* (citing *Celebici* Trial Judgment, ¶ 395).

<sup>460</sup> See, e.g., *Kordic Cerkez* Appeal Judgment, ¶¶ 34-35; *Blaskic* Appeal Judgment ¶¶ 91-92. See also *Juvenal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, ¶ 81 (Appeals Chamber, May 23, 2005); *Fofana* Trial Judgment, ¶ 251.

<sup>461</sup> See discussion *supra* § IV.D, E regarding enumerated acts of genocide and its specific intent requirement.

<sup>462</sup> *Krstić* Appeal Judgment, ¶ 140.

<sup>463</sup> *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 939 (Trial Chamber I, Jan. 27, 2000).

<sup>464</sup> *Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶ 423 (Trial Chamber I, May 16, 2003).

<sup>465</sup> See *id.*

#### 4. No Incitement to Commit Genocide

Although incitement to genocide is a mode of responsibility in the Genocide Convention and the Statutes of the *ad hoc* tribunals, it has not been included in Article 4 of the KRT Law.

#### 5. No Complicity in Genocide

The KRT Law does not include the mode of responsibility of complicity in genocide. However, it is notable that the *ad hoc* tribunals have found that aiding and abetting, which is provided for in the KRT Law, is a form of complicity.<sup>466</sup> In *obiter dictum*, the ICTY has suggested that where conduct amounting to complicity in genocide prohibits conduct broader than aiding and abetting, it might be necessary to demonstrate that an accomplice acted with genocidal intent.<sup>467</sup>

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<sup>466</sup> See *Krstic* Appeal Judgment, ¶¶ 138-39; *Ntakirutimana* Appeal Judgment, ¶ 371.

<sup>467</sup> See *Krstic* Appeal Judgment, ¶ 142.

## IX. THE PRINCIPLE OF LEGALITY

### A. *Nullum Crimen Sine Lege*

The principle *nullum crimen sine lege*, no crime without law, has developed as a rule prohibiting retroactive application of criminal laws. It is counted among the so-called “principles of legality,”<sup>468</sup> and may be found in various international legal instruments, including international human rights and humanitarian law treaties.<sup>469</sup> This principle is included in the KRT Law by reference. Article 33 states:

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [ICCPR].

Article 15 of the ICCPR provides in part that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed . . . .
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Thus, to be prosecuted by the Extraordinary Chambers, an act must have either been criminalized under the domestic law applicable in Cambodia or under international law at the time it was committed. The jurisprudence of the *ad hoc* criminal tribunals for the ICTY and ICTR as well as that of the European Court of Human Rights indicates that it would not be sufficient for the act to be merely prohibited by international law.<sup>470</sup> International law must have recognized that the act entailed criminal liability during the period from 1975-1979. For this reason, acts that have long been recognized as giving rise to international criminal responsibility under customary

<sup>468</sup> M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in 1 INTERNATIONAL CRIMINAL LAW at 33 (M. Cherif Bassiouni 2d.ed., 1999).

<sup>469</sup> See, e.g., Article 11(2) of the Universal Declaration of Human Rights; Article 15(1) of the International Covenant on Civil and Political Rights; Article 7(1) of the European Convention on Human Rights and Fundamental Freedoms; Article 9 of the American Convention on Human Rights; Article 7(2) of the African Charter on Human and Peoples’ Rights; Article 67 of the Fourth Geneva Convention; and Article 13 of the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind.

<sup>470</sup> See *Case of Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001 (Applications nos. 34044/96, 35532/97 and 44801/98); *Tadic* Appeal Decision; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3, Judgment and Sentence, ¶ 86 (Dec. 6, 1999).

international law, such as those enumerated in the International Military Tribunal's Charter, would satisfy the *nullum crimen* principle. On the other hand, acts recognized as criminal only in the more recent Statutes of the ICTY, ICTR, and ICC may or may not have been crimes during the time period applicable to the Extraordinary Chambers.

Drawing from the IMT Judgment at Nuremberg, the ICTY Appeals Chamber has noted that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.<sup>471</sup> Individual criminal responsibility may also attach to violations of customary law. Indeed, the ICTY has looked to the following factors to determine whether particular conduct triggers criminal responsibility under customary law at a given time:

The clear and unequivocal recognition of [a rule] in international law and State practice indicating 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.<sup>472</sup>

Where these conditions are met, prohibited conduct triggers individual criminal responsibility at the international level.

Application of the *nullum crimen* principle raises the question of whether the conduct must have been proscribed as a crime in the specific terms in which it is being prosecuted. Although nothing in the text of KRT Law or the ICCPR speaks directly to this question, the jurisprudence of the European Court of Human Rights and the ICTY suggests that conduct can be prosecuted in terms that vary from the manner in which such conduct was proscribed as long as 1) the *essence* of the conduct being prosecuted is the same as that which was proscribed at the time of its commission and 2) individuals could reasonably have foreseen from existing law what acts or omissions could entail criminal responsibility.<sup>473</sup>

## **B. Limitation on Use of Analogy**

A related issue is the extent to which the Extraordinary Chamber may use analogy in defining the contours of the crimes proscribed by the KRT Law without running afoul of the *nullum crimen* principle. The KRT Law does not explicitly address this question.

Crimes may not be extended by analogy to create new crimes; however, a certain level of judicial interpretation seems permissible, particularly in the process of clarifying the contours of crimes already proscribed. Indeed, a limited use of analogy is permissible as long as the resultant interpretation or clarification is consistent with the essence of the offense and individuals could reasonably have foreseen

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<sup>471</sup> *Tadic*, Appeals Judgment, ¶ 128.

<sup>472</sup> *Id.* (citing *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, Part 22, at 445-47, 467).

<sup>473</sup> See *Case of Streletz, Kessler and Krentz*, ¶ 105; *Prosecutor v. Hadzahasanovic*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 165 (Nov. 12, 2002) (“the principle of *nullum crimen sine lege* is satisfied if the underlying criminal conduct as such was punishable, regardless of how the concrete charges in a specific law would have been formulated”).

from the law what acts or omissions could entail criminal responsibility.<sup>474</sup> Notably, despite the Rome Statute's explicit prohibition on extending the definition of a crime by analogy, its drafting history suggests that customary international law can be used as one of the possible sources in interpreting the contours of the crimes within the jurisdiction of the ICC. The same possibility should be available to the KRT.

### C. *Nulla Poena Sine Lege*

A related aspect of the principle of legality addresses whether the penalty must also be prescribed. Known as the principle of *nulla poena sine lege*, it is incorporated in the KRT Law through its reference in article 33 to the ICCPR. ICCPR article 15 provides that no "heavier penalty [shall] be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

In general, international criminal tribunals have had recourse to national legal standards in determining the applicable legal penalty.<sup>475</sup> Nevertheless, the Chambers are likely not bound by Cambodia's penalty provisions during the years 1975-1979. In the ICTY's *Celebici* case, for instance, the Trial Chamber held that the ICTY could apply sentences longer than 20 years despite the fact that the SFRY Penal Code limited imprisonment as a form of punishment to a term of 15 years. It noted that "[t]here is no jurisprudential or juridical basis for the assertion that the International Tribunal is bound by decisions of the courts of the former Yugoslavia."<sup>476</sup>

Moreover, there appears to be more flexibility in using analogy in the context of the application of penalties than with respect to the definitions of crimes. Thus, one influential commentator has noted that the "minimum standard of legality . . . permits the application of penalties by analogy to similar crimes and penalties in the national criminal laws of the prosecuting state having proper jurisdiction."<sup>477</sup>

<sup>474</sup> See *S.W. v. the United Kingdom* (Application No. 20166/92) and *C.R. v. the United Kingdom*, Judgments (Application No. 20190/92) of 22 November 1995 (Series A nos. 335-B and 335-C, pp. 41-42, ¶ 34-36, and p. 68 and 69, ¶ 32-34, respectively), available at <http://echr.coe.int> ("However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. . . . Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.").

<sup>475</sup> See ICTY Statute, art. 24 (providing that "[i]n 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"); ICTR Statute, art. 23 (providing that "[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda"); SCSL Statute, art. 19 (providing that "[i]n determining the terms of imprisonment, the Trial Chamber shall have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone"). Unlike these courts, the ICC Statute contains only a general *nulla poena sine lege* provision, which does not direct the ICC to consider national legal standards as guidance. See Rome Statute, art. 23 (providing that "[a] person convicted by the Court may be punished only in accordance with this Statute").

<sup>476</sup> *Celebici* Trial Judgment, ¶¶ 1209-12. The ICTR has similarly concluded that its statute's reference to the sentencing practice in Rwanda was not mandatory, but rather intended to provide the Tribunal with guidance. See *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 23 (Trial Chamber, Sept. 4, 1998).

<sup>477</sup> M. Cherif Bassiouni, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 144 (2<sup>nd</sup> ed. 1999).

## **X. THE *NON BIS IN IDEM* PRINCIPLE**

The KRT Law does not explicitly address the *non bis in idem* principle; however it is referenced through the requirement of article 33 that the Extraordinary Chambers “exercise their jurisdiction in accordance with the international standards of justice, fairness and due process of law” as set out in ICCPR art. 14. Article 14(7) provides that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

### **A. International Standards Governing Prosecutions in Two or More States**

A review of *non bis in idem* provisions in international instruments, including the ICCPR, supports the propositions that the *ne bis in idem* principle applies primarily to prosecutions instituted within the same state and that individuals prosecuted in one state may be prosecuted in another state under certain limited circumstances. However, many extradition treaties contain a transnational analogue to these provisions. Bilateral extradition treaties frequently contain such provisions.<sup>478</sup> In addition, some multilateral treaties on matters of transnational criminal procedure include a *non bis in idem* rule.

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

### **B. Approaches of the International Criminal Tribunals**

The approach to the *non bis in idem* principle taken in each of the statutes of the ICTY and ICTR support a similar proposition, namely, that individuals tried in national jurisdictions may, under certain limited circumstances, also be tried before the *ad hoc* tribunals. However, the *ad hoc* tribunals differ with respect to how they characterize the “idem” for which a second trial is generally barred. Article 10(2) of the ICTY Statute provides in part:

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
  - (a) The act for which he or she was tried was characterized as an ordinary

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<sup>478</sup>See I.A. Shearer, EXTRADITION IN INTERNATIONAL LAW 13 (1971).



crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Virtually identical provisions appear in Article 9(1) and (2) of the ICTR Statute.<sup>479</sup>

Several decisions of an ICTR trial chamber have apparently interpreted the phrase “acts constituting serious violations of international humanitarian law” in Article 9(2) of the ICTR Statute to encompass all charges entailing serious violations of international humanitarian law that relate to the same act.<sup>480</sup> If, however, a national court prosecuted a defendant under charges that amount to an “ordinary crime,” the ICTY and ICTR would not be barred from prosecuting the same defendant for the same act.<sup>481</sup> It should also be noted that the *non bis in idem* provisions of both statutes direct the relevant tribunal to “take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.”<sup>482</sup>

Article 20(3) of the Rome Statute provides:

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

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Had Article 20(3) used the term “offense” or “crime” instead of “conduct,” it would have been more plausible to interpret the Rome Statute to allow the ICC to try someone on a charge such as genocide who had already been prosecuted for the same underlying conduct on a charge such as murder. As written, the actual phrasing of Article 20(3) of the Rome Statute seems to preclude a second trial for the same underlying conduct.<sup>483</sup> This conclusion is reinforced by the fact that, in

<sup>479</sup>The only difference in the text of the ICTR Statute is the addition of the words “for Rwanda” following “the International Tribunal” in paragraphs 1 and 2.

<sup>480</sup>See *In the Matter of Alfred Musema*, ICTR-96-5-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral, ¶12 (March 12, 1996). See also *In the Matter of Radio Television Libre des Mille Collines SARL*, ICTR-96-6-D, Decision of the Trial Chamber on the Application of the Prosecutor for a Formal Request for Deferral, ¶11 (March 13, 1996); and *In the Matter of Théoneste Bagosora*, ICTR-96-7-D, Decision of the Trial Chamber on the Application by the Prosecutor for a formal Request for Deferral, ¶1 (May 17, 1996).

<sup>481</sup>See ICTY Statute, art. 10(2)(a), quoted above, and ICTR Statute, art. 9(2)(a).

<sup>482</sup>ICTY Statute, art. 10(3); ICTR Statute, art. 9(3).

<sup>483</sup>According to one writer, however, the phrase “with respect to the same conduct” was added to the chapeau of Article 20(3) “to clarify that the Court could try someone even if that person had been tried in a national court provided that different conduct was the subject of prosecution.” John T. Holmes, “The Principle of Complementarity,” in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES,*

contrast to the *non bis in idem* provisions in the statutes of the ad hoc tribunals, the Rome Statute does not provide an exception to its *non bis in idem* rule when the conduct in question was characterized as an “ordinary crime” in previous national proceedings.

## X. VICTIMS' PARTICIPATION IN ECCC PROCEEDINGS

Pursuant to the ECCC Internal Rules, victims of the crimes within the Chambers' jurisdiction may participate in ECCC proceedings either by filing complaints with the Co-Prosecutors, or by applying to be joined as a civil party in the prosecution of a case.<sup>484</sup> A "victim" is defined as "a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC."<sup>485</sup> The Internal Rules also authorize individuals to participate in ECCC proceedings through membership in a "Victims' Association," defined as "an association made up solely of victims of crimes coming within the jurisdiction of the ECCC, which is validly registered in the country in which it is carrying on activities at the time of its intervention before the ECCC, and has been validly authorized to take action on behalf of its members."<sup>486</sup> However, the Victims' Associations "are not themselves civil parties to the proceedings;" they "simply represent their members who are civil parties."<sup>487</sup>

### A. Filing Complaints

Rule 49 of the Internal Rules authorizes "Victims and Victims' Associations" to lodge "complaints or information alleging commission of crimes within the jurisdiction of the ECCC" with the Office of the Co-Prosecutors.<sup>488</sup> While the Co-Prosecutors are required to "receive and consider"<sup>489</sup> all such written complaints or information, the filing of a complaint will not automatically initiate criminal prosecution. Rather, the Co-Prosecutors "shall decide, at their discretion, whether to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation or forward the complaint directly to the Co-Investigating Judges."<sup>490</sup> Thus, victims have a potential right of "intervention" in ECCC

<sup>484</sup> Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, R. 23(1), June 12, 2007, <http://www.unakrt-online.org/Docs/Court%20Documents/2007-06-18%20IRs%20English.pdf>. The KRT Law makes mention of victims' participation before the ECCC, stating that "[t]he Extraordinary Chamber of the Supreme Court shall decide appeals made by . . . the victims . . . against the decision of the Extraordinary Chamber of the trial court." KRT Law, art. 36 (new). However, the KRT Law provides no further details on the scope of victims' participation in the context of the ECCC, other than requiring that the Chambers' trials be conducted in accordance with Cambodia's existing criminal procedures, which provide an opportunity for victims to participate in court proceedings. KRT Law, art. 33 (new) (providing in part that trials be "conducted in accordance with existing procedures in force"). The UN Framework Agreement is silent on the issue of victims' participation.

<sup>485</sup> Internal Rules, Glossary, p. 71.

<sup>486</sup> *Id.*

<sup>487</sup> ECCC, Practice Direction on Victim Participation, 02/2007, art. 5.1, October 5, 2007, available at [http://www.eccc.gov.kh/english/cabinet/files/pd/PD\\_on\\_victim\\_participation\\_eng.pdf](http://www.eccc.gov.kh/english/cabinet/files/pd/PD_on_victim_participation_eng.pdf).

<sup>488</sup> Internal Rules, R. 49(2), R. 49(3).

<sup>489</sup> *Id.* R. 49(2).

<sup>490</sup> *Id.* R. 49(4).

proceedings, but they do not have a right of “initiation.”<sup>491</sup>

The ECCC Practice Direction on Victim Participation, issued on October 5, 2007, specifies that submissions to the Co-Prosecutors under Article 49 must be made on the “Victim Information Form” attached to the Practice Direction, and must include the following information: the identity of the complainant; the subject of the complaint; and a summary of the alleged crimes coming within the jurisdiction of the ECCC.<sup>492</sup> In addition, the complaint shall include: any details of potential witnesses; any piece of evidence in the complainant’s possession; and an indication as to whether the complainant wishes to be joined as a Civil Party should the case lead to the initiation of an investigation.<sup>493</sup>

The Co-Prosecutors must inform the complainant of their decided course of action on a complaint “as soon as possible and in any case not more than 60 days after registration of the complaint.”<sup>494</sup> A decision not to pursue a complaint will not have the effect of *res judicata*,<sup>495</sup> thus the Co-Prosecutors may change their decision “at any time, in which case the complainant shall be so informed as soon as possible and in any case not more than 30 days from the decision.”<sup>496</sup>

## **B. Joining an Action as a Civil Party**

According to Rule 23, the “purpose of Civil Party action” before the Extraordinary Chambers is to:

- a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
- b) Allow Victims to seek collective and moral reparations, as provided in this Rule.<sup>497</sup>

The right to take civil action “may be exercised by Victims of a crime coming within the jurisdiction of the ECCC, without any distinction based on criteria such as current residence or nationality.”<sup>498</sup>

In order for a civil action to be admissible, a victim must demonstrate injury that is: (a) physical, material or psychological; *and* (b) the direct consequence of the offence, personal and have

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<sup>491</sup> See, e.g., Richard S. Frase, *France*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 143, 177-78 (Craig M. Bradley ed., 1999) (explaining that a right of initiation enables victims themselves to start a public action by constituting themselves as a substitute prosecutor and filing a complaint directly with an investigating judge).

<sup>492</sup> Practice Direction on Victim Participation, arts. 2.3 & 2.4.

<sup>493</sup> *Id.*

<sup>494</sup> Internal Rules, R. 49(4).

<sup>495</sup> *Id.* 49(5).

<sup>496</sup> *Id.*

<sup>497</sup> *Id.* R. 23(1).

<sup>498</sup> *Id.* 23(2). A group of victims may also choose to “organise their Civil Party action by becoming members of a Victims’ Association,” in which case they will “be represented by the association’s lawyers, and summonses and notifications concerning its members shall be served via the association.” *Id.* 23(9)(c). Note that the “fact that certain Victims choose to take action through a Victims’ Association shall not affect the right of other Victims to be joined as Civil Parties in the same case.” *Id.* R. 23(9)(d).

actually come into being.<sup>499</sup> According to the Practice Direction on Victim Participation, “psychological loss” may include “the death of kin who were the victim” of crimes within the jurisdiction of the Chambers.<sup>500</sup>

Victims may only apply to be joined as civil parties to a case which “is under investigation by the Co-Investigating Judges or which has been sent before the Trial Chamber.”<sup>501</sup> An application may be filed at any time during a judicial investigation, in which case the application will be reviewed by the Co-Investigating Judges.<sup>502</sup> In the event that the Co-Investigating Judges determine that an application is inadmissible,<sup>503</sup> the victim may appeal to the Pre-Trial Chamber.<sup>504</sup> Victims may also apply to participate as civil parties after a judicial investigation is closed by filing an application with the Trial Chamber prior to the “opening of proceedings” before that Chamber.<sup>505</sup> A Victim who has filed a civil party application during the investigation is not required to renew the application before the Chambers.<sup>506</sup> An adverse ruling on a civil party application by the Trial Chamber is appealable to the Supreme Court Chamber.<sup>507</sup>

In the event that an application is approved, the victim “becomes a party to the criminal proceedings.”<sup>508</sup> Accordingly, the victim “can no longer be questioned as a simple witness in the same case and,” with limited exception, “may only be interviewed under the same conditions as a Charged Person or Accused.”<sup>509</sup> The Trial Chamber is required to make a decision on any Civil Party claims in the judgment, including the admissibility and the substance of such claims against the Accused.<sup>510</sup> Where appropriate, “the Chamber may adjourn its decision on Civil Party claims to a new hearing.”<sup>511</sup> In any event, the Chamber is prohibited from handing down “judgment on a civil party action that is in contradiction with their judgment on public prosecution of the same case.”<sup>512</sup>

The right of victims to appeal is set forth in the Establishment Law, which provides that “[t]he Extraordinary Chamber of the Supreme Court shall decide appeals made by the . . . victims . . .

<sup>499</sup> *Id.* 23(2).

<sup>500</sup> Practice Direction on Victim Participation, art. 3.2(c).

<sup>501</sup> *Id.* art. 3.3. *See also* Internal Rules, R. 23(3), R. 23(4). Rule 23(5) sets forth the requirements of an application: “All Civil Party applications must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator. With a view to service and notifications, the domicile of the Victim, the registered office of the Victims’ Association of which he or she is a member, or the address of the lawyer, as appropriate, must also be stated. Where this address is outside of Cambodia, an address in Cambodia shall be provided.” *Id.* R. 23(5).

<sup>502</sup> *Id.* R. 23(3).

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* R. 74(4), R. 75 (1) (appeals must be submitted within 30 days from the day that the decision in question was received).

<sup>505</sup> *Id.* R. 23(4).

<sup>506</sup> *Id.* R. 23(4).

<sup>507</sup> Practice Direction, art. 3.9.

<sup>508</sup> Internal Rules, R. 23(6)(a).

<sup>509</sup> *Id.* (“When joined as a Civil Party, the Victim becomes a party to the criminal proceedings. The Civil Party can no longer be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused”).

<sup>510</sup> *Id.* R. 100.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* R. 23(6)(b).

against the decision of the Extraordinary Chamber of the trial court.”<sup>513</sup> However, the Internal Rules specify that civil parties may only appeal “in respect of their civil interests,”<sup>514</sup> and “only where the Co-Prosecutors have appealed” in the same case.<sup>515</sup> Furthermore, civil parties “may not introduce new claims that were not already submitted to the Trial Chamber.”<sup>516</sup>

### C. Victims Unit

Rule 12 of the Internal Rules provides for the creation of a Victims Unit, a body that is to be established by the Office of Administration and directed by the Head of the Victims Unit. The envisioned activities of the ECCC Victims Unit include the following:

- c) Under the supervision of the Co-Prosecutors, assist Victims in lodging complaints;
- d) Under the supervision of the Co-Investigating Judges or the Trial Chamber, as appropriate, assist Victims in submitting Civil Party Applications; [and]
- g) Facilitate the participation of Victims and the common representation of Civil Parties.<sup>517</sup>

In addition, the Victims Unit serves to provide the victims with relevant information about legal representation, as well as administering the applications for admission to the list of Victims Associations.<sup>518</sup>

At the time of this writing, the Victims Unit has yet to be established and, because the Unit was not provided for in the original court budget, it remains to be seen when this important organ of the Chambers will become operational.<sup>519</sup> As a “transitional measure” until that time, “complaints and civil party applications shall be filed directly with the Greffier of the Office of the Co-Prosecutors or the Office of the Co-Investigating Judges, as the case may be.”<sup>520</sup>

### D. Protective Measures

Rule 29 requires that the ECCC “ensure the protection of Victims who participate in the proceedings, whether as complainants or Civil Parties.”<sup>521</sup> Thus, when the “Co-Investigating Judges or the Chambers issue an order or when other offices within the ECCC fulfill their duties,

<sup>513</sup> KRT Law, art. 37.

<sup>514</sup> Internal Rules, R. 105(1)(c). This is consistent with the practice of the International Criminal Court, which limits participating victims’ right of appeal to challenges to a reparation order. *See* Rome Statute, art. 82(4) (providing that “[a] legal representative of the victims . . . may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence”).

<sup>515</sup> Internal Rules, R. 105(1)(c).

<sup>516</sup> *Id.* R. 110(5).

<sup>517</sup> *Id.* R. 12.

<sup>518</sup> *Id.*

<sup>519</sup> *See* Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, p. 9, September 2007, available at [http://www.justiceinitiative.org/db/resource2?res\\_id=103892](http://www.justiceinitiative.org/db/resource2?res_id=103892) (“The delay in setting up the Victims Unit comes in part because the unit was not foreseen in the original 2004 staffing or budget plans for the court. The unit was created by the internal rules adopted in June 2007.”).

<sup>520</sup> Practice Direction, art. 1.3.

<sup>521</sup> Internal Rules, R. 29(1).

they shall take account of the needs of victims and witnesses.”<sup>522</sup> In particular, “whenever such offices must communicate with victims, witnesses, complainants or Civil Parties, they may communicate with their lawyers or Victims’ Association, as appropriate, where direct communication could place the life or well being of that person in danger.”<sup>523</sup> Furthermore, the Co-Investigating Judges and the Chambers “may, on their own motion or at the request of one of the parties or their lawyers, and after having consulted with the Victims Unit or the Witnesses/Experts Support Unit, order appropriate measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger.”<sup>524</sup>

## E. Reparations

Rule 23(11) states that, “[s]ubject to Article 39 of the ECCC Law, the Chambers may award only collective and moral reparations to Civil Parties.”<sup>525</sup> These awards “shall be awarded against, and be borne by convicted persons.”<sup>526</sup> Pursuant to Rule 23(12), reparations awarded by the ECCC may take the following forms:

- a) An order to publish the judgment in any appropriate news or other media at the convicted person’s expense;
- b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or
- c) Other appropriate and comparable forms of reparation.

<sup>522</sup> *Id.* R. 29(2).

<sup>523</sup> *Id.*

<sup>524</sup> *Id.* R. 23(3).

<sup>525</sup> *Id.* R. 23(11). Article 39 of the ECCC Law provides: “In addition to imprisonment, the Extraordinary Chamber of the Trial Court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct. The confiscated property shall be returned to the State.” KRT Law, art. 39. The International Centre for Transitional Justice, a non-profit organization that has written extensively on reparations issues, made the following observations on the scope of the ECCC’s discretion under the Draft Internal Rules, which permitted the Chamber to award “collective or symbolic” – as opposed to “collective and moral” – reparations:

- a) The prudent exercise of this option might be important, given that there will be victims of Khmer Rouge crimes who will not be “civil parties” because (i) the perpetrators who victimized them are dead or not charged, (ii) they are not able to join in the civil aspect, *e.g.* because they have no access to information on reparations or to the ECCC itself—no radio, no means of transportation, illiteracy. Symbolic reparations might include them, specially those that are “collective” in the sense of embracing either victims of the same perpetrator or victims of the same kind of violation (even carried out by different perpetrators) or “collective” in that the victims have a distinct and shared pre-violation identity that was significant in their victimization, for example Buddhists or Cham Muslims.
- b) On the other hand, any “collective reparations” that might be awarded to the civil parties should not preclude reparations for victims who are unable to join as “civil parties.” In other words, it might be important to preserve victims’ right to reparations given that the “civil party”-victims association-based reparations remedy in the draft rules might be seen as similar to the “opt-out” mechanisms often used in class-action suits in certain jurisdictions.

*See* Int’l Centre for Transitional Justice, Comments on Draft Internal Rules for the Extraordinary Chambers in the Courts of Cambodia, November 2006, at 8-9.

<sup>526</sup> Internal Rules, R. 23(11).

**F. Challenge Posed by Number of Potential Victims Seeking to Participate and Seek Reparations Before the ECCC**

A major challenge facing the ECCC victim participation scheme will be the Chambers' ability to manage the participation of, and award of reparations to, a potentially enormous number of individuals victimized by the Khmer Rouge regime. Notably, the only other international criminal body that currently permits victims some level of participation in its proceedings – the ICC – is already struggling to efficiently process victims' applications for participation and to determine how victims might meaningfully intervene in the Court's operations without threatening the fair trial rights of the accused and the expeditious conduct of proceedings. While the ECCC Internal Rules seem to envision participation by victims akin to victim participation in domestic criminal proceedings, the Chambers will likely face difficulties similar to those experienced by the ICC in accommodating a high volume of applicants and, ultimately, participants in its proceedings. As such, the ECCC might find useful guidance in measures developed by the ICC to improve meaningful participation of victims in its proceedings.



## **APPENDIX A**

### **Relevant Excerpts from:**

**The Charter of the International Military Tribunal (IMT), the United Nations Secretary-General's Report on the International Criminal Tribunal for the former Yugoslavia (ICTY), and the statutes of the ICTY, the International Criminal tribunal for Rwanda (ICTR), and the International Criminal Court**

## 1. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

### II. JURISDICTION AND GENERAL PRINCIPLES

#### Article 6.

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

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

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

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

**(c) CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

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

#### Article 7.

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

#### Article 8.

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

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

**II. COMPETENCE OF THE INTERNATIONAL TRIBUNAL**

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

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

**Article 1  
Competence of the International Tribunal**

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

*A. Competence ratione materiae (subject-matter jurisdiction)*

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

34. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims<sup>3</sup>; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907<sup>4</sup>; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948<sup>5</sup>; and the Charter of the International Military Tribunal of 8 August 1945<sup>6</sup>.

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

### **Grave breaches of the 1949 Geneva Conventions**

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.

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

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

40. The corresponding article of the statute would read:

#### **Article 2 Grave breaches of the Geneva Conventions of 1949**

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

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

### **Violations of the laws or customs of war**

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

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

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

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

#### **Article 3**

### **Violations of the laws or customs of war**

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

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

### **Genocide**

45. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951<sup>7</sup>.

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

**Article 4  
Genocide**

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

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

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

3. The following acts shall be punishable:

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

**Crimes against humanity**

47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany<sup>8</sup>. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character<sup>9</sup>.

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

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

## Article 5 Crimes against humanity

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

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

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

...

### Individual criminal responsibility

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

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

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

56. A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or

had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

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

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

59. The corresponding article of the statute would read:

**Article 7**  
**Individual criminal responsibility**

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



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

#### **Article 1 Competence of the International Tribunal**

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

#### **Article 2 Grave breaches of the Geneva Conventions of 1949**

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

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

#### **Article 3 Violations of the laws or customs of war**

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

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

#### **Article 4 Genocide**

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

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

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

3. The following acts shall be punishable:

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

#### **Article 5 Crimes against humanity**

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

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

**Article 7**  
**Individual criminal responsibility**

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

**Article 24**  
**Penalties**

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

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

##### **Article 1: Competence of the International Tribunal for Rwanda**

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

##### **Article 2: Genocide**

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
  - (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) Genocide;
  - (b) Conspiracy to commit genocide;
  - (c) Direct and public incitement to commit genocide;
  - (d) Attempt to commit genocide;
  - (e) Complicity in genocide.

##### **Article 3: Crimes against Humanity**

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;

- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

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

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

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- (h) Threats to commit any of the foregoing acts.

#### **Article 6: Individual Criminal Responsibility**

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

**Article 23: Penalties**

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

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

### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

#### Article 5

#### Crimes within the jurisdiction of the Court

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

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

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

#### Article 6

#### Genocide

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

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

**Article 7**  
**Crimes against humanity**

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

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

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;



- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

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

## **Article 8**

### **War crimes**

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
  - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of

the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
  - (ii) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  - (vii) Unlawful deportation or transfer or unlawful confinement;
  - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
  - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

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- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
  - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
  - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
  - (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
  - (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
  - (xii) Declaring that no quarter will be given;
  - (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
  - (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
  - (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
  - (xvi) Pillaging a town or place, even when taken by assault;
  - (xvii) Employing poison or poisoned weapons;
  - (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
  - (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
  - (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
  - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
  - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
  - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (iii) Taking of hostages;

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- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
  - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (v) Pillaging a town or place, even when taken by assault;
  - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
  - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
  - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - (ix) Killing or wounding treacherously a combatant adversary;

- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

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

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

### **Article 9 Elements of Crimes**

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

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

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

### **Article 20 Ne bis in idem**

1. Except as provided in this Statute, no person shall be tried before the Court with respect

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to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

### **Article 21** **Applicable law**

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

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

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

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

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

### **PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW**

#### **Article 22**

#### **Nullum crimen sine lege**

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

#### **Article 23**

#### **Nulla poena sine lege**

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

#### **Article 25**

#### **Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:



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- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

#### **Article 27** **Irrelevance of official capacity**

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

#### **Article 28** **Responsibility of commanders and other superiors**

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

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

**Article 30**  
**Mental element**

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

**APPENDIX B**  
**ICC Elements of Crimes**

## ICC/ASP/1/3

**Elements of Crimes \***

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

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## Elements of crimes

### General introduction

1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes.
2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.
3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.
4. With respect to mental elements associated with elements involving value judgement, such as those using the terms “inhumane” or “severe”, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.
5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime.<sup>527</sup>
6. The requirement of “unlawfulness” found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.
7. The elements of crimes are generally structured in accordance with the following principles:
  - As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;

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<sup>527</sup> This paragraph is without prejudice to the obligation of the Prosecutor under article 54, paragraph 1, of the Statute.



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- When required, a particular mental element is listed after the affected conduct, consequence or circumstance;
  - Contextual circumstances are listed last.
8. As used in the Elements of Crimes, the term “perpetrator” is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply *mutatis mutandis* to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.
  9. A particular conduct may constitute one or more crimes.
  10. The use of short titles for the crimes has no legal effect.

## **Article 6**

### **Genocide**

#### **Introduction**

With respect to the last element listed for each crime:

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

#### **Article 6 (a)**

### **Genocide by killing**

#### **Elements**

1. The perpetrator killed<sup>528</sup> one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

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<sup>528</sup> The term “killed” is interchangeable with the term “caused death”.

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

**Elements**

1. The perpetrator caused serious bodily or mental harm to one or more persons.<sup>529</sup>
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

**Article 6 (c)**  
**Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction**

**Elements**

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.<sup>530</sup>
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

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<sup>529</sup> This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.

<sup>530</sup> The term “conditions of life” may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

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**Article 6 (d)**  
**Genocide by imposing measures intended to prevent births**

**Elements**

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

**Article 6 (e)**  
**Genocide by forcibly transferring children**

**Elements**

1. The perpetrator forcibly transferred one or more persons.<sup>531</sup>
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

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<sup>531</sup> The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.

## **Article 7**

### **Crimes against humanity**

#### **Introduction**

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

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

3. “Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.<sup>532</sup>

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<sup>532</sup> A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

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**Article 7 (1) (a)**  
**Crime against humanity of murder**

**Elements**

1. The perpetrator killed<sup>533</sup> one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

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

**Elements**

1. The perpetrator killed<sup>534</sup> one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.<sup>535</sup>
2. The conduct constituted, or took place as part of,<sup>536</sup> a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

**Article 7 (1) (c)**  
**Crime against humanity of enslavement**

**Elements**

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by

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<sup>533</sup> The term “killed” is interchangeable with the term “caused death”. This footnote applies to all elements which use either of these concepts.

<sup>534</sup> The conduct could be committed by different methods of killing, either directly or indirectly.

<sup>535</sup> The infliction of such conditions could include the deprivation of access to food and medicine.

<sup>536</sup> The term “as part of” would include the initial conduct in a mass killing.

purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>537</sup>

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

#### **Article 7 (1) (d)**

#### **Crime against humanity of deportation or forcible transfer of population**

##### **Elements**

1. The perpetrator deported or forcibly<sup>538</sup> transferred,<sup>539</sup> without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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<sup>537</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

<sup>538</sup> The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.

<sup>539</sup> “Deported or forcibly transferred” is interchangeable with “forcibly displaced”.

**Article 7 (1) (e)****Crime against humanity of imprisonment or other severe deprivation of physical liberty****Elements**

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

**Article 7 (1) (f)****Crime against humanity of torture<sup>540</sup>****Elements**

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

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<sup>540</sup> It is understood that no specific purpose need be proved for this crime.

**Article 7 (1) (g)-1**  
**Crime against humanity of rape**

**Elements**

1. The perpetrator invaded<sup>541</sup> the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>542</sup>
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

**Article 7 (1) (g)-2**  
**Crime against humanity of sexual slavery<sup>543</sup>**

**Elements**

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>544</sup>
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

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<sup>541</sup> The concept of “invasion” is intended to be broad enough to be gender-neutral.

<sup>542</sup> It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

<sup>543</sup> Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

<sup>544</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.



3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### **Article 7 (1) (g)-3**

#### **Crime against humanity of enforced prostitution**

##### **Elements**

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### **Article 7 (1) (g)-4**

#### **Crime against humanity of forced pregnancy**

##### **Elements**

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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

**Elements**

1. The perpetrator deprived one or more persons of biological reproductive capacity.<sup>545</sup>
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.<sup>546</sup>
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

**Article 7 (1) (g)-6**  
**Crime against humanity of sexual violence**

**Elements**

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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<sup>545</sup> The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

<sup>546</sup> It is understood that "genuine consent" does not include consent obtained through deception.

**Article 7 (1) (h)**  
**Crime against humanity of persecution**

**Elements**

1. The perpetrator severely deprived, contrary to international law,<sup>547</sup> one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.<sup>548</sup>
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

**Article 7 (1) (i)**  
**Crime against humanity of enforced disappearance of persons**<sup>549 550</sup>

**Elements**

1. The perpetrator:
  - (a) Arrested, detained<sup>551 552</sup> or abducted one or more persons; or

<sup>547</sup> This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

<sup>548</sup> It is understood that no additional mental element is necessary for this element other than that inherent in element 6.

<sup>549</sup> Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.

<sup>550</sup> This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute.

<sup>551</sup> The word “detained” would include a perpetrator who maintained an existing detention.

<sup>552</sup> It is understood that under certain circumstances an arrest or detention may have been lawful.

(b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

3. The perpetrator was aware that.<sup>553</sup>

(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons;<sup>554</sup> or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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<sup>553</sup> This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.

<sup>554</sup> It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.

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

**Elements**

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.<sup>555</sup>
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
7. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

**Article 7 (1) (k)**  
**Crime against humanity of other inhumane acts**

**Elements**

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.<sup>556</sup>
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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<sup>555</sup> It is understood that “character” refers to the nature and gravity of the act.

<sup>556</sup> It is understood that “character” refers to the nature and gravity of the act.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

## **Article 8**

### **War crimes**

#### **Introduction**

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

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

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

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

#### **Article 8 (2) (a)**

##### **Article 8 (2) (a) (i)**

##### **War crime of wilful killing**

#### **Elements**

1. The perpetrator killed one or more persons.<sup>557</sup>
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

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<sup>557</sup> The term “killed” is interchangeable with the term “caused death”. This footnote applies to all elements which use either of these concepts.

3. The perpetrator was aware of the factual circumstances that established that protected status.<sup>558 559</sup>
4. The conduct took place in the context of and was associated with an international armed conflict.<sup>560</sup>
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements<sup>561</sup>**

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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<sup>558</sup> This mental element recognizes the interplay between articles 30 and 32. This footnote also applies to the corresponding element in each crime under article 8 (2) (a), and to the element in other crimes in article 8 (2) concerning the awareness of factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict.

<sup>559</sup> With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).

<sup>560</sup> The term “international armed conflict” includes military occupation. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).

<sup>561</sup> As element 3 requires that all victims must be “protected persons” under one or more of the Geneva Conventions of 1949, these elements do not include the custody or control requirement found in the elements of article 7 (1) (e).

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

**Elements**

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

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

**Elements**

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



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

**Elements**

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

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

**Elements**

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (a) (v)****War crime of compelling service in hostile forces****Elements**

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

**Article 8 (2) (a) (vi)****War crime of denying a fair trial****Elements**

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

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**Article 8 (2) (a) (vii)-1**  
**War crime of unlawful deportation and transfer**

**Elements**

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

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

**Elements**

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

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

**Elements**

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.

3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### **Article 8 (2) (b)**

##### **Article 8 (2) (b) (i)**

##### **War crime of attacking civilians**

##### **Elements**

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

##### **Article 8 (2) (b) (ii)**

##### **War crime of attacking civilian objects**

##### **Elements**

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

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

**Article 8 (2) (b) (iii)**

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

**Elements**

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

**Article 8 (2) (b) (iv)**

**War crime of excessive incidental death, injury, or damage**

**Elements**

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be

clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>562</sup>

3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>563</sup>

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

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

### **Article 8 (2) (b) (v)**

#### **War crime of attacking undefended places<sup>564</sup>**

##### **Elements**

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.

2. Such towns, villages, dwellings or buildings were open for unresisted occupation.

3. Such towns, villages, dwellings or buildings did not constitute military objectives.

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

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

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<sup>562</sup> The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

<sup>563</sup> As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.

<sup>564</sup> The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

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

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

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

1. The perpetrator used a flag of truce.
2. The perpetrator made such use in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.
3. The perpetrator knew or should have known of the prohibited nature of such use.<sup>565</sup>
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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<sup>565</sup> This mental element recognizes the interplay between article 30 and article 32. The term “prohibited nature” denotes illegality.

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

**Elements**

1. The perpetrator used a flag, insignia or uniform of the hostile party.
2. The perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.
3. The perpetrator knew or should have known of the prohibited nature of such use.<sup>566</sup>
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator used a flag, insignia or uniform of the United Nations.
2. The perpetrator made such use in a manner prohibited under the international law of armed conflict.
3. The perpetrator knew of the prohibited nature of such use.<sup>567</sup>
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.

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<sup>566</sup> This mental element recognizes the interplay between article 30 and article 32. The term “prohibited nature” denotes illegality.

<sup>567</sup> This mental element recognizes the interplay between article 30 and article 32. The “should have known” test required in the other offences found in article 8 (2) (b) (vii) is not applicable here because of the variable and regulatory nature of the relevant prohibitions.



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

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

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

**Elements**

1. The perpetrator used the distinctive emblems of the Geneva Conventions.
2. The perpetrator made such use for combatant purposes<sup>568</sup> in a manner prohibited under the international law of armed conflict.
3. The perpetrator knew or should have known of the prohibited nature of such use.<sup>569</sup>
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (b) (viii)**

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

**Elements**

1. The perpetrator:
  - (a) Transferred,<sup>570</sup> directly or indirectly, parts of its own population into the territory it occupies; or

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<sup>568</sup> “Combatant purposes” in these circumstances means purposes directly related to hostilities and not including medical, religious or similar activities.

<sup>569</sup> This mental element recognizes the interplay between article 30 and article 32. The term “prohibited nature” denotes illegality.

(b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.

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

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

#### **Article 8 (2) (b) (ix)**

#### **War crime of attacking protected objects<sup>571</sup>**

##### **Elements**

1. The perpetrator directed an attack.

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

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

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

#### **Article 8 (2) (b) (x)-1**

#### **War crime of mutilation**

##### **Elements**

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

2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.

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<sup>570</sup> The term “transfer” needs to be interpreted in accordance with the relevant provisions of international humanitarian law.

<sup>571</sup> The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.<sup>572</sup>
4. Such person or persons were in the power of an adverse party.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### **Article 8 (2) (b) (x)-2**

#### **War crime of medical or scientific experiments**

##### **Elements**

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

#### **Article 8 (2) (b) (xi)**

#### **War crime of treacherously killing or wounding**

##### **Elements**

1. The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord,

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<sup>572</sup> Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. This footnote also applies to the same element for article 8 (2) (b) (x)-2.

protection under rules of international law applicable in armed conflict.

2. The perpetrator intended to betray that confidence or belief.
3. The perpetrator killed or injured such person or persons.
4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
5. Such person or persons belonged to an adverse party.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (b) (xii)**

**War crime of denying quarter**

**Elements**

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

**Article 8 (2) (b) (xiii)**

**War crime of destroying or seizing the enemy's property**

**Elements**

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

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

**Article 8 (2) (b) (xiv)**

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

**Elements**

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

**Article 8 (2) (b) (xv)**

**War crime of compelling participation in military operations**

**Elements**

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

**Article 8 (2) (b) (xvi)**  
**War crime of pillaging**

**Elements**

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.<sup>573</sup>
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (b) (xvii)**  
**War crime of employing poison or poisoned weapons**

**Elements**

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

**Article 8 (2) (b) (xviii)**  
**War crime of employing prohibited gases, liquids, materials or devices**

**Elements**

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

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<sup>573</sup> As indicated by the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging.

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.<sup>574</sup>
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### **Article 8 (2) (b) (xix)**

#### **War crime of employing prohibited bullets**

##### **Elements**

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

#### **Article 8 (2) (b) (xx)**

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

##### **Elements**

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

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<sup>574</sup> Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to development, production, stockpiling and use of chemical weapons.

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

**Elements**

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.<sup>575</sup>
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator invaded<sup>576</sup> the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>577</sup>
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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<sup>575</sup> For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

<sup>576</sup> The concept of “invasion” is intended to be broad enough to be gender-neutral.

<sup>577</sup> It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 8 (2) (b) (xxii)-3, 5 and 6.



**Article 8 (2) (b) (xxii)-2**  
**War crime of sexual slavery<sup>578</sup>**

**Elements**

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>579</sup>
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

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

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<sup>578</sup> Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

<sup>579</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

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

**Elements**

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

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

**Elements**

1. The perpetrator deprived one or more persons of biological reproductive capacity.<sup>580</sup>
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.<sup>581</sup>
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against

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<sup>580</sup> The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

<sup>581</sup> It is understood that “genuine consent” does not include consent obtained through deception.

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

2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

#### **Article 8 (2) (b) (xxiii)**

#### **War crime of using protected persons as shields**

##### **Elements**

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

#### **Article 8 (2) (b) (xxiv)**

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

##### **Elements**

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.

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

**Article 8 (2) (b) (xxv)**

**War crime of starvation as a method of warfare**

**Elements**

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

**Article 8 (2) (b) (xxvi)**

**War crime of using, conscripting or enlisting children**

**Elements**

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

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

1. The perpetrator killed one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel<sup>582</sup> taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

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

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<sup>582</sup> The term "religious personnel" includes those non-confessional non-combatant military personnel carrying out a similar function.

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

**Elements**

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

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

**Elements**

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

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

**Elements**

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.<sup>583</sup>
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
5. The perpetrator was aware of the factual circumstances that established this status.

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<sup>583</sup> For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (c) (iv)**

**War crime of sentencing or execution without due process**

**Elements**

1. The perpetrator passed sentence or executed one or more persons.<sup>584</sup>
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. There was no previous judgement pronounced by a court, or the court that rendered judgement was not “regularly constituted”, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.<sup>585</sup>
5. The perpetrator was aware of the absence of a previous judgement or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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<sup>584</sup> The elements laid down in these documents do not address the different forms of individual criminal responsibility, as enunciated in articles 25 and 28 of the Statute.

<sup>585</sup> With respect to elements 4 and 5, the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial.



**Article 8 (2) (e)****Article 8 (2) (e) (i)****War crime of attacking civilians****Elements**

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

**Article 8 (2) (e) (ii)****War crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions****Elements**

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

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

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

**Article 8 (2) (e) (iv)****War crime of attacking protected objects<sup>586</sup>****Elements**

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

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<sup>586</sup> The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.<sup>587</sup>
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator invaded<sup>588</sup> the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>589</sup>
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

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<sup>587</sup> As indicated by the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging.

<sup>588</sup> The concept of “invasion” is intended to be broad enough to be gender-neutral.

<sup>589</sup> It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements in article 8 (2) (e) (vi)-3, 5 and 6.

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

**Article 8 (2) (e) (vi)-2**  
**War crime of sexual slavery<sup>590</sup>**

**Elements**

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>591</sup>
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

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<sup>590</sup> Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

<sup>591</sup> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

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

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

**Elements**

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

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

**Elements**

1. The perpetrator deprived one or more persons of biological reproductive capacity.<sup>592</sup>
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.<sup>593</sup>
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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

**Elements**

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage

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<sup>592</sup> The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

<sup>593</sup> It is understood that “genuine consent” does not include consent obtained through deception.

in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (e) (vii)**

**War crime of using, conscripting and enlisting children**

**Elements**

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

**Article 8 (2) (e) (viii)**

**War crime of displacing civilians**

**Elements**

1. The perpetrator ordered a displacement of a civilian population.
2. Such order was not justified by the security of the civilians involved or by military necessity.

3. The perpetrator was in a position to effect such displacement by giving such order.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (e) (ix)**

**War crime of treacherously killing or wounding**

**Elements**

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

**Article 8 (2) (e) (x)**

**War crime of denying quarter**

**Elements**

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

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

**Article 8 (2) (e) (xi)-1**  
**War crime of mutilation**

**Elements**

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.<sup>594</sup>
4. Such person or persons were in the power of another party to the conflict.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (e) (xi)-2**  
**War crime of medical or scientific experiments**

**Elements**

1. The perpetrator subjected one or more persons to a medical or scientific experiment.
2. The experiment caused the death or seriously endangered the physical or mental health or integrity of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.

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<sup>594</sup> Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. This footnote also applies to the similar element in article 8 (2) (e) (xi)-2.



4. Such person or persons were in the power of another party to the conflict.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**Article 8 (2) (e) (xii)**

**War crime of destroying or seizing the enemy's property**

**Elements**

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

**Documents Relating to the Extraordinary Chambers**

**1. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).<sup>595</sup>**

**LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA**

**CHAPTER I  
GENERAL PROVISIONS**

**Article 1**

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

**CHAPTER II  
COMPETENCE**

**Article 2 new**

Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as “Suspects”.

**Article 3 new**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)
- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

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<sup>595</sup> *Unofficial translation by the Council of Jurists and the Secretariat of the Task Force. Revised 23 Nov 2004.*

The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

#### **Article 4**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group such as:

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

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of acts of genocide.

#### **Article 5**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts.

**Article 6**

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- wilful killing;
- torture or inhumane treatment;
- wilfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.

**Article 7**

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

**Article 8**

The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979.

### **CHAPTER III COMPOSITION OF THE EXTRAORDINARY CHAMBERS**

**Article 9 new**

The Trial Chamber shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges with one as president, and two foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The Supreme Court Chamber, which shall serve as both appellate chamber and final instance, shall be an Extraordinary Chamber composed of seven judges, of whom four are Cambodian judges with one as president, and three foreign judges; and before which the Co-Prosecutors

shall present their cases. The president shall appoint one or more clerks of the court to participate.

## **CHAPTER IV APPOINTMENT OF JUDGES**

### **Article 10 new**

The judges of the Extraordinary Chambers shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

### **Article 11 new**

The Supreme Council of the Magistracy shall appoint at least seven Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least five individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary -General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint five sitting judges and at least two reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of each Chamber may, on a case-by-case basis, designate one or more reserve foreign judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

### **Article 12**

All judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each judge under this law shall be appointed for the period of these proceedings.

**Article 13**

Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary and, with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

**CHAPTER V  
DECISIONS OF THE EXTRAORDINARY CHAMBERS**

**Article 14 new**

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

- a. a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
- b. a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the opinions of the majority and the minority.

**Article 15**

The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

**CHAPTER VI  
CO-PROSECUTORS**

**Article 16**

All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers.

**Article 17 new**

The Co-Prosecutors in the Trial Chamber shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

**Article 18 new**

The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the appointed prosecutors in case of their absence. These reserve prosecutors may continue to perform their regular duties in their respective courts.

One foreign prosecutor with the competence to appear in both Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary -General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

**Article 19**

The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

**Article 20 new**

The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.



The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary -General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre -Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

#### **Article 21 new**

The Co-Prosecutors under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each Co-Prosecutor shall be appointed for the period of these proceedings. In the event of the absence of the foreign Co-Prosecutor, he or she shall be replaced by the reserve foreign Co-Prosecutor.

#### **Article 22 new**

Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the foreign Co-Prosecutor from a list provided by the Secretary- General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed in their offices. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian prosecutors and foreign prosecutors.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

## CHAPTER VII INVESTIGATIONS

### **Article 23 new**

All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration. The difference shall be settled forthwith by the Pre -Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre -Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations.

The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co -Prosecutors also to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

**Article 24 new**

During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand.

**Article 25**

The Co-Investigating Judges shall be appointed from among the currently practicing judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

**Article 26**

The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence. The reserve Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co –Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge.

**Article 27 new**

All Investigating Judges under this law shall enjoy equal status and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation.

In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge.

**Article 28**

The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants, the Co-Investigating Judges shall comply with the spirit of the provisions set forth in Article 13 of this law.

## **CHAPTER VIII INDIVIDUAL RESPONSIBILITY**

### **Article 29**

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior 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.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

## **CHAPTER IX OFFICE OF ADMINISTRATION**

### **Article 30**

The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

This Office shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

### **Article 31 new**

The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two-year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

The Director of the Office of Administration shall be appointed from among those with significant experience in court administration and fluency in one of the foreign languages used in the Extraordinary Chambers, and shall be a person of high moral character and integrity.

The foreign Deputy Director shall be appointed by the Secretary -General of the United Nations and assigned by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all international staff, as required by the foreign components of the Extraordinary Chambers, the Co -Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources provided through the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and international staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

### **Article 32**

All staff assigned to the judges, Co-Investigating Judges, Co -Prosecutors, and Office of Administration shall enjoy the same working conditions according to each level of the Extraordinary Chambers.

## **CHAPTER X TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS**

### **Article 33 new**

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

Suspects who have been indicted and arrested shall be brought to the Trial Chamber according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear before the court, and is responsible for taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement

elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

#### **Article 34 new**

Trials shall be public and open the representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international nongovernment organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.

#### **Article 35 new**

The accused shall be presumed innocent as long as the court has not given its definitive judgment.

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

- a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
- b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
- c. to be tried without delay;
- d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it ;
- e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;
- f. to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;
- g. not to be compelled to testify against themselves or to confess guilt.

#### **Article 36 new**

The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial

court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

#### **Article 37 new**

The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.

### **CHAPTER XI PENALTIES**

#### **Article 38**

All penalties shall be limited to imprisonment.

#### **Article 39**

Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

### **CHAPTER XII AMNESTY AND PARDONS**

#### **Article 40 new**

The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.

### **CHAPTER XIII STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES**

#### **Article 41**

The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic

Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

**Article 42 new**

1. Cambodian judges, the Co -Investigating Judge, the Co-Prosecutor, the Director of the Office of Administration and personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Extraordinary Chambers, the Pre -Trial Chamber and the Office of Administration.

2. International personnel shall be accorded in addition:

- a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;
- b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;
- c. immunity from immigration restriction;
- d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:

- a. immunity from personal arrest or detention and from seizure of personal baggage relating to his or her functions in the proceedings;
- b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
- c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of their function as counsel of a suspect or accused.

4. The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre -Trial Chamber and the Office of Administration and in general all documents and materials made available to, belonging to, or used by it them, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.



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**CHAPTER XIV  
LOCATION OF THE EXTRAORDINARY CHAMBERS**

**Article 43 new**

The Extraordinary Chambers established in the trial court and the Supreme Court Chamber shall be located in Phnom Penh.

**CHAPTER XV  
EXPENSES**

**Article 44 new**

The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;
2. The expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary- General of the United Nations shall be borne by the United Nations;
3. The defence counsel may receive fees for mounting the defence;
4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.

**CHAPTER XVI  
WORKING LANGUAGES**

**Article 45 new**

The official working languages of the Extraordinary Chambers shall be Khmer, English and French.

**CHAPTER XVII  
ABSENCE OF FOREIGN JUDGES, INVESTIGATING JUDGES OR  
PROSECUTORS**

**Article 46 new**

In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, and the Secretary-General of the United Nations does not supplement the lists with new candidates,

or in the event that the United Nations withdraws its support from the Extraordinary Chambers, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

## **CHAPTER XVIII EXISTENCE OF THE COURT**

### **Article 47**

The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.

## **CHAPTER XIX AGREEMENT BETWEEN THE UNITED NATIONS AND CAMBODIA**

### **Article 47 bis new**

Following its ratification in accordance with the relevant provisions of the law of Kingdom of Cambodia regarding competence to conclude treaties, the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crime Committed during the period of Democratic Kampuchea, done at Phnom Penh on 6 June 2003, shall apply as law within the Kingdom of Cambodia.

## **FINAL PROVISION**

### **Article 48**

This law shall be proclaimed as urgent.

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## **2. AGREEMENT BETWEEN THE UNITED NATIONS AND THE ROYAL GOVERNMENT OF CAMBODIA CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA**

**WHEREAS** the General Assembly of the United Nations, in its resolution 57/228 of 18 December 2002, recalled that the serious violations of Cambodian and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole;

**WHEREAS** in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security;

**WHEREAS** the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979;

**WHEREAS** prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations (hereinafter, “the Secretary-General”) and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea;

**WHEREAS** by its resolution 57/228, the General Assembly welcomed the promulgation of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea and requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations on the establishment of the Extraordinary Chambers consistent with the provisions of the said resolution, so that the Extraordinary Chambers may begin to function promptly;

**WHEREAS** the Secretary-General and the Royal Government of Cambodia have held negotiations on the establishment of the Extraordinary Chambers;

**NOW THEREFORE** the United Nations and the Royal Government of Cambodia have agreed as follows:

### **Article 1 Purpose**

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of

Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

**Article 2**  
**The Law on the Establishment of Extraordinary Chambers**

1. The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in “the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea” (hereinafter: “the Law on the Establishment of the Extraordinary Chambers”), as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.
2. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.
3. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.

**Article 3**  
**Judges**

1. Cambodian judges, on the one hand, and judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations (hereinafter: “international judges”), on the other hand, shall serve in each of the two Extraordinary Chambers.
2. The composition of the Chambers shall be as follows:
  - a. The Trial Chamber: three Cambodian judges and two international judges;
  - b. The Supreme Court Chamber, which shall serve as both appellate chamber and final instance: four Cambodian judges and three international judges.
3. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. In the overall composition of the Chambers due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.
5. The Secretary-General of the United Nations undertakes to forward a list of not less than seven nominees for international judges from which the Supreme Council of the Magistracy shall appoint five to serve as judges in the two Chambers. Appointment of international judges by the Supreme Council of the Magistracy shall be made only from the list submitted by the Secretary-General.
6. In the event of a vacancy of an international judge, the Supreme Council of the Magistracy shall appoint another international judge from the same list.
7. The judges shall be appointed for the duration of the proceedings.
8. In addition to the international judges sitting in the Chambers and present at every stage of the proceedings, the President of a Chamber may, on a case-by-case basis, designate from the list of nominees submitted by the Secretary-General, one or more alternate judges to be present at each stage of the proceedings, and to replace an international judge if that judge is unable to continue sitting.

#### **Article 4 Decision-making**

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:
  - a. A decision by the Trial Chamber shall require the affirmative vote of at least four judges;
  - b. A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges.
2. When there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority.

#### **Article 5 Investigating judges**

1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.
2. The co-investigating judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to such a judicial office.

3. The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.
4. The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article.
5. In addition to the list of nominees provided for in Article 3, paragraph 5, the Secretary-General shall submit a list of two nominees from which the Supreme Council of the Magistracy shall appoint one to serve as an international co-investigating judge, and one as a reserve international co-investigating judge.
6. In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post must be the reserve international co-investigating judge.
7. The co-investigating judges shall be appointed for the duration of the proceedings.

## **Article 6** **Prosecutors**

1. There shall be one Cambodian prosecutor and one international prosecutor competent to appear in both Chambers, serving as co-prosecutors. They shall be responsible for the conduct of the prosecutions.
2. The co-prosecutors shall be of high moral character, and possess a high level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases.
3. The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.
4. The co-prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. The Secretary-General undertakes to forward a list of two nominees from which the Supreme Council of the Magistracy shall select one international co-prosecutor and one reserve international co-prosecutor.
6. In case there is a vacancy or a need to fill the post of the international co-prosecutor, the person appointed to fill this post must be the reserve international co-prosecutor.
7. The co-prosecutors shall be appointed for the duration of the proceedings.
8. Each co-prosecutor shall have one or more deputy prosecutors to assist him or her with prosecutions before the Chambers. Deputy international prosecutors shall be appointed by the international co-prosecutor from a list provided by the Secretary-General.

#### **Article 7**

##### **Settlement of differences between the co-investigating judges or the co-prosecutors**

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.
2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General. Article 3, paragraph 3, shall apply to the judges.
3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.
4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.

#### **Article 8**

##### **Office of Administration**

1. There shall be an Office of Administration to service the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office.
2. There shall be a Cambodian Director of this Office, who shall be appointed by the Royal Government of Cambodia. The Director shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

3. There shall be an international Deputy Director of the Office of Administration, who shall be appointed by the Secretary-General. The Deputy Director shall be responsible for the recruitment of all international staff and all administration of the international components of the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges, the Prosecutors' Office and the Office of Administration. The United Nations and the Royal Government of Cambodia agree that, when an international Deputy Director has been appointed by the Secretary-General, the assignment of that person to that position by the Royal Government of Cambodia shall take place forthwith.

4. The Director and the Deputy Director shall cooperate in order to ensure an effective and efficient functioning of the administration.

#### **Article 9**

#### **Crimes falling within the jurisdiction of the Extraordinary Chambers**

The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

#### **Article 10**

#### **Penalties**

The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment.

#### **Article 11**

#### **Amnesty**

1. The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.

2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.

#### **Article 12**

#### **Procedure**

1. The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the



consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.

### **Article 13** **Rights of the accused**

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.

2. The United Nations and the Royal Government of Cambodia agree that the provisions on the right to defence counsel in the Law on the Establishment of Extraordinary Chambers mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights.

### **Article 14** **Premises**

The Royal Government of Cambodia shall provide at its expense the premises for the co-investigating judges, the Prosecutors' Office, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration. It shall also provide for such utilities, facilities and other services necessary for their operation that may be mutually agreed upon by separate agreement between the United Nations and the Government.

### **Article 15** **Cambodian personnel**

Salaries and emoluments of Cambodian judges and other Cambodian personnel shall be defrayed by the Royal Government of Cambodia.

**Article 16****International personnel**

Salaries and emoluments of international judges, the international co-investigating judge, the international co-prosecutor and other personnel recruited by the United Nations shall be defrayed by the United Nations.

**Article 17****Financial and other assistance of the United Nations**

The United Nations shall be responsible for the following:

- a. remuneration of the international judges, the international co-investigating judge, the international co-prosecutor, the Deputy Director of the Office of Administration and other international personnel;
- b. costs for utilities and services as agreed separately between the United Nations and the Royal Government of Cambodia;
- c. remuneration of defence counsel;
- d. witnesses' travel from within Cambodia and from abroad;
- e. safety and security arrangements as agreed separately between the United Nations and the Government;
- f. such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers.

**Article 18****Inviolability of archives and documents**

The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration, and in general all documents and materials made available, belonging to or used by them, wherever located in Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

**Article 19****Privileges and immunities of international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration**

1. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

- a. personal inviolability, including immunity from arrest or detention;
- b. immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;
- c. inviolability for all papers and documents;
- d. exemption from immigration restrictions and alien registration;
- e. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.

2. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

#### **Article 20**

#### **Privileges and immunities of Cambodian and international personnel**

1. Cambodian judges, the Cambodian co-investigating judge, the Cambodian co-prosecutor and other Cambodian personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

2. International personnel shall be accorded:

- a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;
- b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;
- c. immunity from immigration restrictions;
- d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The United Nations and the Royal Government of Cambodia agree that the immunity granted by the Law on the Establishment of the Extraordinary Chambers in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement will

apply also after the persons have left the service of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

### **Article 21 Counsel**

1. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Royal Government of Cambodia to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.
2. In particular, the counsel shall be accorded:
  - a. immunity from personal arrest or detention and from seizure of personal baggage;
  - b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
  - c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed by them in their official capacity as counsel. Such immunity shall continue to be accorded to them after termination of their functions as a counsel of a suspect or accused.
3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession.

### **Article 22 Witnesses and experts**

Witnesses and experts appearing on a summons or a request of the judges, the coinvestigating judges, or the co-prosecutors shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions.

### **Article 23 Protection of victims and witnesses**

The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the identity of a victim or witness.

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**Article 24**  
**Security, safety and protection**  
**of persons referred to in the present Agreement**

The Royal Government of Cambodia shall take all effective and adequate actions which may be required to ensure the security, safety and protection of persons referred to in the present Agreement. The United Nations and the Government agree that the Government is responsible for the security of all accused, irrespective of whether they appear voluntarily before the Extraordinary Chambers or whether they are under arrest.

**Article 25**  
**Obligation to assist the co-investigating judges, the co-prosecutors and**  
**the Extraordinary Chambers**

The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to:

- a. identification and location of persons;
- b. service of documents;
- c. arrest or detention of persons;
- d. transfer of an indictee to the Extraordinary Chambers.

**Article 26**  
**Languages**

1. The official language of the Extraordinary Chambers and the Pre-Trial Chamber is Khmer.
2. The official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French.
3. Translations of public documents and interpretation at public hearings into Russian may be provided by the Royal Government of Cambodia at its discretion and expense on condition that such services do not hinder the proceedings before the Extraordinary Chambers.

**Article 27**  
**Practical arrangements**

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Extraordinary Chambers, a phased-in approach shall be adopted for their establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Extraordinary Chambers, the judges, the co investigating judges and the co-prosecutors will be appointed along with investigative and prosecutorial staff, and the process of investigations and prosecutions shall be initiated.
3. The trial process of those already in custody shall proceed simultaneously with the investigation of other persons responsible for crimes falling within the jurisdiction of the Extraordinary Chambers.
4. With the completion of the investigation of persons suspected of having committed the crimes falling within the jurisdiction of the Extraordinary Chambers, arrest warrants shall be issued and submitted to the Royal Government of Cambodia to effectuate the arrest.
5. With the arrest by the Royal Government of Cambodia of indicted persons situated in its territory, the Extraordinary Chambers shall be fully operational, provided that the judges of the Supreme Court Chamber shall serve when seized with a matter. The judges of the Pre-Trial Chamber shall serve only if and when their services are needed.

**Article 28**  
**Withdrawal of cooperation**

Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.

**Article 29**  
**Settlement of disputes**

Any dispute between the Parties concerning the interpretation or application of the present Agreement shall be settled by negotiation, or by any other mutually agreed upon mode of settlement.

**Article 30**  
**Approval**

To be binding on the parties, the present Agreement must be approved by the General Assembly of the United Nations and ratified by Cambodia. The Royal Government of Cambodia will make its best endeavours to obtain this ratification by the earliest possible date.

**Article 31**  
**Application within Cambodia**

The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification in accordance with the relevant provisions of the internal law of the Kingdom of Cambodia regarding competence to conclude treaties.

**Article 32**  
**Entry into force**

The present Agreement shall enter into force on the day after both parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Done at Phnom Penh on 6 June 2003 in two copies in the English language.

For the United Nations

For the Royal Government of Cambodia

[Signature omitted]

[Signature omitted]

Sok An

Hans Corell

Senior Minister

Under-Secretary-General for Legal Affairs

in Charge of the Council of Ministers

The Legal Counsel

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**  
**INTERNAL RULES**  
12 June 2007

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\* Explanatory note: This annex includes excerpts from the Internal Rules, but does not reproduce the Rules in their entirety. The Table of Contents is therefore included here for purposes of communicating the full scope of the Internal Rules. The page numbers included in this Table of Contents refer to the pages in the English version of the Internal Rules, available at [http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC\\_IRs\\_English\\_2007\\_06\\_12.pdf](http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC_IRs_English_2007_06_12.pdf).



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## **I – PROVISIONS RELATING TO THESE INTERNAL RULES (“IRs”)**

### **Rule 2. Procedure Applicable in Case of *lacunae* in these IRs**

Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement and Articles 20 new, 23 new, 33 new or 37 new of the ECCC Law as applicable, having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs shall be submitted to the Rules and Procedure Committee as soon as possible.

### **Rule 3. Amendments**

1. Requests for amendment of these IRs may be made to the Rules and Procedure Committee by a Judge, a Co-Investigating Judge, a Co-Prosecutor, the Head of the Defence Support Section, the Head of the Victims Unit and the Director or Deputy Director of the Office of Administration.
2. Proposals for amendment received from the Rules and Procedure Committee shall be submitted to the Plenary Session for adoption in accordance with the procedure for adopting these IRs.

## **II – ORGANISATION OF THE COURT**

### **A – General Provisions**

#### **Rule 4. Administrative Regulations**

After these IRs come into force, the Office of the Co-Prosecutors, the Office of Co-Investigating judges, the Chambers, the Office of Administration, the Defence Support Section and Victims Unit shall develop their own respective administrative regulations, which shall comply with these IRs. The Rules and Procedure Committee, on its own motion or at the request of any of the abovementioned bodies, may review the administrative regulations of any other body where there is doubt concerning their consistency with these IRs.

#### **Rule 11. The Defence Support Section**

1. The Office of Administration shall establish a Defence Support Section, which shall only be autonomous with regard to the substantive defence matters set out in this Rule. The Defence Support Section shall be directed by the Head of the Defence Support Section, with a national and an international Deputy, and such other staff as necessary.

2. The Defence Support Section shall:

- a) After consultations between the Defence Support Section and the BAKC, adopt administrative regulations, in accordance with Rule 4 of these IRs, which shall include:
  - i) the criteria and procedures for the inclusion of lawyers and other personnel in the lists referred to in paragraphs d) and i) below, in accordance with sub-rule 4;
  - ii) the procedure for assignment of defence lawyers; and
  - iii) the criteria for determining indigence and the remuneration of defence lawyers.
- b) Receive, verify and translate applications by foreign lawyers to defend persons before the ECCC, and forward completed applications to the BAKC for registration in accordance with the procedure determined by the BAKC after consultation with the Defence Support Section.
- c) Maintain a list of:
  - i) national lawyers registered by the BAKC; and
  - ii) foreign lawyers admitted to the bar in a United Nations Member State who have been registered by the BAKC for the purposes of defending persons before the ECCC, as set out in paragraph (b) above.
- d) After consultations between the Defence Support Section and the BAKC, compile and maintain a sub-list of:
  - i) national lawyers registered by the BAKC who meet Defence Support Section criteria, as set out in its administrative regulations, for defending indigent persons before the ECCC; and
  - ii) foreign lawyers admitted to the bar in a United Nations Member State who have been registered by the BAKC and who meet Defence Support Section criteria, as set out in its administrative regulations, for defending indigent persons before the ECCC.
- e) Under the supervision of the Co-Prosecutors, Co-Investigating Judges or the Chambers, as appropriate, present the lists of lawyers as provided in sub-rules 2(c) and 2(d) to persons entitled to a defence lawyer under these IRs;
- f) Upon request for supplementary information, provide persons entitled to a defence lawyer under these IRs with information on lawyers as referred to in sub-rules 2(c) and 2(d);
- g) Enter into contracts with defence lawyers for any indigent Suspects, Charged Persons,

Accused or other persons entitled to a defence lawyer under these IRs;

h) Monitor and assess the fulfilment of all contracts referred to in paragraph (g) above, and authorize corresponding remuneration in accordance with Defence Support Section administrative regulations;

i) Provide lawyers with a list of national and foreign personnel eligible to assist defence teams for indigent persons;

j) Provide basic legal assistance and support including legal research and document research and retrieval for defence lawyers appearing before the ECCC; and

k) Organize training for defence lawyers in consultation and cooperation with the BAKC.

3. The procedure for registration of foreign lawyers with the BAKC for the purpose of defending persons before the ECCC shall be fair, transparent and expeditious.

4. The criteria for inclusion in the Defence Support Section list for defending indigent persons before the ECCC, referred to in sub-rule 2(d) above, shall comply with the following principles:

a) The procedure for inclusion in such lists shall be fair, transparent and expeditious;

b) An applicant shall not have been convicted of a serious criminal or disciplinary offence considered by their professional association to be incompatible with acting as a defence lawyer;

c) A foreign applicant shall only be required to:

i) be a current member in good standing of a recognised association of lawyers in a United Nations Member State;

ii) have a degree in law or an equivalent legal or professional qualification;

iii) have at least 10 (ten) years working experience in criminal proceedings, as a lawyer, judge or prosecutor, or in some other capacity;

iv) have established competence in criminal law and procedure at the international or national level; and

v) be fluent in Khmer, French or English.

d) A national applicant shall only be required to:

i) be a member of the BAKC; and

ii) have established competence in criminal law and procedure at the national or international level.

5. Any lawyer or assistant whose request to be placed on the lists of lawyers for indigent persons

referred to in sub-rules 2(d) and 2(i) above is refused or has not been examined within 30 (thirty) days of receipt by the Defence Support Section, or who is excluded from the list, may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the Head of the Defence Support Section or the end of the 30 (thirty) day period, as appropriate. The decision of the Pre-Trial Chamber shall not be subject to appeal. If the required majority is not attained, the default decision of the Pre-Trial Chamber shall be that the decision of the Head of the Defence Support Section shall stand. However, in cases where the application was not examined within the 30 (thirty) day time period, the default decision shall be that inclusion in the list shall be deemed to have been granted.

6. Any foreign lawyer whose application for registration with the BAKC for the purposes of defending persons before the ECCC is refused, or has not been examined within 30 (thirty) days of receipt by the BAKC from the Defence Support Section, may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the BAKC, or the end of the 30 (thirty) day period, as appropriate. The decision of the Pre-Trial Chamber shall not be subject to appeal. If the required majority is not attained, the default decision of the Pre-Trial Chamber shall be that the decision of the BAKC shall stand. However, in cases where the application was not examined within the 30 (thirty) day time period, the default decision shall be that registration is deemed to have been granted.

7. The Head of the Defence Support Section shall make determinations on indigence and the assignment of lawyers to indigent persons based on the criteria set out in the Defence Support Section administrative regulations, subject to appeal to the Co-Investigating Judges or the Chamber before which the person is appearing at the time, within 15 (fifteen) days of receiving notification of the decision. No further appeal shall be allowed.

## **Rule 12. The Victims Unit**

1. The Office of Administration shall establish a Victims Unit, which shall be directed by the Head of the Victims Unit, together with such staff as necessary.

2. The Victims Unit shall:

- a) Maintain a list of foreign and national lawyers registered with the BAKC in accordance with Rule 11, who wish to represent Victims or Victims Associations before the ECCC;
- b) Administer applications for admission to the list of Victims' Associations approved to act on behalf of Civil Parties before the ECCC, pursuant to the criteria set out in Rule 23, and maintain a list of Victims' Associations so approved;
- c) Under the supervision of the Co-Prosecutors, assist Victims in lodging complaints;
- d) Under the supervision of the Co-Investigating Judges or the Trial Chamber, as appropriate, assist Victims in submitting Civil Party applications;
- e) Under the supervision of the Co-Investigating Judges or the Chambers, as appropriate, present the above mentioned lists of lawyers and Victims Associations to Victims or

Civil Parties;

- f) Upon request for supplementary information, provide Victims and Civil Parties with information on such lawyers and Victims Associations, or any other information necessary to facilitate effective participation;
- g) Facilitate the participation of Victims and the common representation of Civil Parties;
- h) Assist the Public Affairs Section in outreach activities related to victims; and
- i) Adopt such administrative regulations as required to give effect to this Rule.

### **C – The Office of the Co-Prosecutors**

#### **Rule 13. Operation of the Office of the Co-Prosecutors**

1. The Office of the Co-Prosecutors shall operate as an independent office within the ECCC. It shall be comprised of the Co-Prosecutors and such other staff as necessary, including at least one Greffier. For the purposes of Article 22 new of the ECCC Law, the Co-Prosecutors may choose deputy prosecutors from amongst their Deputy Co-Prosecutors and Assistant Co-Prosecutors. The Greffier shall keep a record of the investigation and undertake such other activities as required by the Co-Prosecutors under these IRs. The Greffier shall liaise with the Office of Administration to ensure that copies of all case files are made and kept by the Office of Administration. The Greffier shall certify that copied records are the same as the original. All original case files shall be kept in the Greffier's office, in a Co-Prosecutor's office, or in any room of the ECCC with sufficient security conditions.
2. In preparing or amending the administrative regulations of their office, the Co-Prosecutors shall consult with the Chambers, the Co-Investigating Judges and the Director and Deputy Director of the Office of Administration on any matters that may affect their respective Chambers or Offices. These administrative regulations shall be approved by the Co-Prosecutors.
3. Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Prosecutors may delegate power to one of them, by a joint written decision, to accomplish such action individually.
4. Except for actions that must be performed personally under the ECCC Law and these IRs, the Co-Prosecutors may delegate the exercise of their functions verbally or in writing, as follows:
  - a) During the preliminary investigation: to any of their Investigators, except where coercive measures are required, or to the Judicial Police;
  - b) At all times: to their deputy prosecutors: and
  - c) In case of a verbal delegation of their functions, the Co-Prosecutors shall provide a written confirmation within 48 (forty-eight) hours after the initial delegation.
5. In the event of disagreement between the Co-Prosecutors, the procedure in Rule 71 shall

apply.

## **D – The Office of the Co-Investigating Judges**

### **Rule 14. Operation of the Office of the Co-Investigating Judges**

1. The Office of the Co-Investigating Judges shall be established as an independent office within the ECCC. It shall be comprised of the Co-Investigating Judges and such other staff as necessary.
2. Each Co-Investigating Judge shall have a Greffier. The Greffiers shall keep a record of the investigation and undertake such other activities as required by the Co-Investigating Judges under these IRs. The Greffiers shall liaise with the Office of Administration to ensure that copies of all case files are made and kept by the Office of Administration. The Greffiers shall certify that copied records are the same as the original. All original case files shall be kept in the Greffiers' office, in an Investigating Judge's office, or in any room of the ECCC with sufficient security conditions.
3. In preparing or amending their administrative regulations, the Co-Investigating Judges shall consult with the Chambers, the Co-Prosecutors and the Director and Deputy Director of the Office of Administration on any matters that may affect the operation of their Chambers or Offices. These administrative regulations shall be approved by the Co-Investigating Judges.
4. Except for action that must be taken jointly under the ECCC Law and these IRs, the Co-Investigating Judges may delegate power to one of them, by a joint written decision, to accomplish such action individually.
5. Except for actions that must be performed personally under the ECCC Law and these IRs, the Co-Investigating Judges may delegate the exercise of their functions by Rogatory Letter to their Investigators, except where coercive measures are required, or to the Judicial Police.
6. In the absence of a Co-Investigating Judge, actions that must be performed personally under these IRs may be accomplished by remote means.
7. In the event of disagreement between the Co-Investigating Judges, the procedure in Rule 72 shall apply.

## **E – Judicial Police and Investigators**

### **Rule 15. The Judicial Police**

1. The Judicial Police are auxiliary officers of the ECCC. They carry out inquiries under the sole instructions of the Co-Prosecutors and Co-Investigating Judges, and where appropriate, the Chambers, throughout the territory of Cambodia, as set out in these IRs. The Judicial Police shall neither seek nor take orders from any other person in carrying out their functions.
2. The Co-Prosecutors shall direct and coordinate the action of the Judicial Police until a judicial investigation has been initiated. Once such a judicial investigation has been initiated, the Judicial



Police shall carry out their duties as instructed by the Co-Investigating Judges.

3. During any supplementary investigation ordered by the Chambers, the Judicial Police shall perform their duties as instructed by the Chambers.

4. The Co-Prosecutors shall have the authority to forward cases of Judicial Police misconduct to the competent Cambodian authorities.

### **Rule 16. Investigators**

In order to exercise their functions within the ECCC as provided in these IRs, ECCC officers who have been designated by the Office of the Co-Prosecutors or the Office of the Co-Investigating Judges as Investigators shall be accredited by the Ministry of Justice. To that end, the Office of the Administration shall immediately forward the list of Investigators to the Ministry of Justice for accreditation. Duly accredited Investigators shall swear an oath before the Pre-Trial Chamber of the ECCC.

## **F – The Chambers**

### **Rule 17. General Provisions**

1. The Chambers shall be established as independent bodies within the ECCC. They shall be composed of their respective sitting Judges, reserve Judges, Greffiers and such other staff as necessary.

2. If a Judge is unable to continue during a pre-trial hearing, trial or appeal, the provisions in Rules 77, 79 and 108 shall apply, as appropriate.

3. The Chambers shall be assisted by Greffiers, who shall keep a record of the proceedings and undertake such other activities as directed by the Chambers under these IRs. The Greffiers shall liaise with the Office of Administration to ensure that copies of all records of proceedings are made and kept by the Office of Administration. The Greffiers shall certify that copied records are the same as the original.

4. In preparing or amending their administrative regulations, the Chambers shall consult with the Co-Prosecutors, the Co-Investigating Judges and the Director and Deputy Director of the Office of Administration on any matters that may affect the operation of their Offices. These administrative regulations shall be approved by super majority of the judges in their respective Chamber.

## **III – PROCEDURE**

### **A – General Provisions**

#### **Rule 21. Fundamental Principles**

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged

Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:

- a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;
  - b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules;
  - c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and
  - d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.
2. Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.
3. No form of inducement, physical coercion or threats thereof, whether directed against the interviewee or others, may be used in any interview. If such inducements, coercion or threats are used, the statements recorded shall not be admissible as evidence before the Chambers, and the person responsible shall be appropriately disciplined in accordance with Rules 35 to 38.
4. Proceedings before the ECCC shall be brought to a conclusion within a reasonable time.

### **Rule 23. Civil Party Action by Victims**

1. The purpose of Civil Party action before the ECCC is to:
  - a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and
  - b) Allow Victims to seek collective and moral reparations, as provided in this Rule.
2. The right to take civil action may be exercised by Victims of a crime coming within the jurisdiction of the ECCC, without any distinction based on criteria such as current residence or nationality. In order for Civil Party action to be admissible, the injury must be:
  - a) physical, material or psychological; and
  - b) the direct consequence of the offence, personal and have actually come into being.

3. At any time during the judicial investigation, a Victim may apply to the Co-Investigating Judges in writing to be joined as a Civil Party. Subject to the provisions in these IRs relating to the protection of Victims, the Co-Investigating Judges must notify the Co-Prosecutors and the Charged Person. The Co-Investigating Judges may decide by reasoned order that the Civil Party application is inadmissible. Such order shall be open to appeal by the Victim.

4. A Victim may submit a Civil Party application up until the opening of proceedings before the Trial Chamber. Such application shall be in writing and filed with the Greffier of the Trial Chamber and shall be placed on the record of proceedings. A Victim who has filed a Civil Party application during the investigation shall not be required to renew the application before the Chambers.

5. All Civil Party applications must contain sufficient information to allow verification of their compliance with these IRs. In particular, the application must provide details of the status as a Victim, specify the alleged crime and attach any evidence of the injury suffered, or tending to show the guilt of the alleged perpetrator. With a view to service and notifications, the domicile of the Victim, the registered office of the Victims' Association of which he or she is a member, or the address of the lawyer, as appropriate, must also be stated. Where this address is outside of Cambodia, an address in Cambodia shall be provided.

6. Being joined as a Civil Party shall have the following effects:

- a) When joined as a Civil Party, the Victim becomes a party to the criminal proceedings. The Civil Party can no longer be questioned as a simple witness in the same case and, subject to Rule 62 relating to Rogatory Letters, may only be interviewed under the same conditions as a Charged Person or Accused;
- b) The Chambers shall not hand down judgment on a Civil Party action that is in contradiction with their judgment on public prosecution of the same case; and
- c) The Co-Investigating Judges and the Chambers may afford to Civil Parties the protection measures set out in Rule 29.

7. Any Victim participating in proceedings before the ECCC as a Civil Party has the right to be represented by a national lawyer, or a foreign lawyer in collaboration with a national lawyer, as follows:

- a) Victims shall have the right freely to choose from amongst national lawyers and foreign lawyers who are registered with the BAKC. In order to facilitate this choice, such persons shall be provided with the list of lawyers referred to in Rule 12(2)(a);
- b) A foreign lawyer listed with the Victims Unit shall work in conjunction with a national lawyer before the ECCC;
- c) Inclusion of a lawyer in such list does not authorise a foreign lawyer to undertake any other legal professional activities in Cambodia;
- d) Where a person wishes to retain a lawyer who is not on the list of lawyers referred

to in Rule 12(2)(a), that lawyer must first complete the formalities for appearing before the ECCC as provided in Rule 12(2);

e) During proceedings before the ECCC, the following provisions shall apply:

i) The national lawyer shall request recognition of any foreign lawyer, the first time such lawyer appears before each judicial body of the ECCC. Once recognized, such foreign lawyer shall enjoy the same rights and privileges before the ECCC as a national lawyer;

ii) However, at all stages of the proceedings, the national lawyer has the right to speak first;

f) In the performance of their duties, lawyers shall be subject to the relevant provisions of the Agreement, the ECCC Law, these IRs, ECCC Practice Directions and administrative regulations, as well as the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession;

g) Any foreign lawyer whose application for registration with the BAKC for the purposes of representing Victims or Victims' Associations before the ECCC is refused, or has not been examined within 30 (thirty) days of receipt by the BAKC from the Victims Unit, may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the BAKC, or the end of the 30 (thirty) day period, as appropriate. The decision of the Pre-Trial Chamber shall not be subject to appeal. If the required majority is not attained, the default decision of the Pre-Trial Chamber shall be that the decision of the BAKC shall stand. However, in cases where the application was not examined within the 30 (thirty) day time period, the default decision shall be that registration is deemed to have been granted; and

h) National and foreign lawyers for Victims and Victims Associations have the right to recruit legal teams to assist in their work.

8. A group of Civil Parties may choose to be represented by a common lawyer drawn from the list held by the Victims Unit. In addition, the Co-Investigating Judges or the Chambers may organize such common representation, as follows:

a) The Co-Investigating Judges or the Chambers, may request a group of Civil Parties to choose a common lawyer within a set time limit;

b) Where a group of Civil Parties is unable to choose a common lawyer within such time limit, the Civil Parties may request the Victims Unit to choose one or more common lawyers for them. In that case the Unit shall take into account the wishes of the Civil Parties concerned and the particular circumstances of the case, and any conflicting interests within the group, as well as the need to respect local traditions and to assist vulnerable groups;

c) Where the interests of Justice so require, the Co-Investigating Judges or the Chambers may, after consulting the Victims Unit, designate a common lawyer for

such a group of Civil Parties;

d) The Co-Investigating judges or the Chambers and the Victims Unit shall take all reasonable steps to ensure that in the selection of common lawyers, the distinct interests of each of the Civil Parties are represented and that any conflict of interest is avoided;

e) At any time, the Civil Parties may request the Co-Investigating judges or the Chambers to reconsider the Victims Unit's choice of common lawyers, or their designation by the Co-Investigating judges or the Chambers; and

f) Civil parties who lack the necessary means to pay for a common lawyer designated by the Co-Investigating Judges or the Chambers may seek assistance from the Victims Unit.

9. A group of Victims may also choose to organise their Civil Party action by becoming members of a Victims' Association, as follows:

a) In order to facilitate such collective organisation of Civil Party action, the Victims Unit may provide Victims with a list of approved Victims' Associations drawn up under the supervision of the Co-Investigating Judges and the Trial Chamber;

b) In order to be included in the list, such Victims' Association shall provide the Victims Unit with documentation showing that it is validly registered or established in the country in which it is carrying on its activities, and that it is authorised to act on behalf of its members as provided in the relevant Practice Direction. The fact that a Victims' Association represents foreign resident Victims before the ECCC shall not be construed as carrying on activities in Cambodia for approval under this sub-rule;

c) Civil parties who are members of a Victims' Association shall be represented by the association's lawyers, and summonses and notifications concerning its members shall be served via the association;

d) The fact that certain Victims choose to take action through a Victims' Association shall not affect the right of other Victims to be joined as Civil Parties in the same case; and

e) Any Victims' Association whose application for admission to the above list is refused or has not been examined within 30 (thirty) days of receipt by the Victims Unit, or which is excluded from the list, may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the Head of the Victims Unit or the end of the 30 (thirty) day period, as appropriate. The decision of the Pre-Trial Chamber shall not be subject to appeal. If the required majority is not attained, the default decision of the Pre-Trial Chamber shall be that the decision of the Head of the Victims Unit shall stand. However, in cases where the application was not examined within the 30 (thirty) day time period, the default decision shall be that inclusion in the list shall be deemed to have been granted.

10. A Civil Party may, at any time, waive the right to request reparation or abandon a Civil Party action. The waiver of the right or abandonment of the action shall not stop or suspend the criminal prosecution.

11. Subject to Article 39 of the ECCC Law, the Chambers may award only collective and moral reparations to Civil Parties. These shall be awarded against, and be borne by convicted persons.

12. Such awards may take the following forms:

- a) An order to publish the judgment in any appropriate news or other media at the convicted person's expense;
- b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or
- c) Other appropriate and comparable forms of reparation.

#### **Rule 24. Witnesses**

1. Before being interviewed by the Co-Investigating Judges or testifying before the Chambers, witnesses shall take an oath or affirmation in accordance with their religion or beliefs to state the truth.

2. The following witness may make a statement without having taken an oath:

- a) The father, mother and ascendants of the Charged Person, Accused or Civil Party;
- b) The sons, daughters and descendants of the Charged Person, Accused or Civil Party;
- c) The brothers and sisters of the Charged Person, Accused or Civil Party;
- d) The brother-in-laws and sister-in-laws of the Charged Person, Accused or Civil Party;
- e) The husband or wife of the Charged Person, Accused or Civil Party, even if they have been divorced; and
- f) Any child who is less than 14 (fourteen) years old.

3. The Co-Investigating Judges or the President of the Trial Chamber shall question every witness in order to establish whether he or she is in a relationship with the Charged Person or Accused or a Civil Party, as provided in sub-rule 2 above.

4. The Co-Investigating Judges and the Chambers shall not call as a witness any person against whom there is evidence of criminal responsibility, except as provided in Rule 28.

#### **Rule 28. Right Against Self-Incrimination of Witnesses**

1. A witness may object to making any statement that might tend to incriminate him or her. The right against self-incrimination applies to all stages of the proceedings, including preliminary

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investigations by the Co-Prosecutor, investigations by the Co-Investigating Judges, and proceedings before the Chambers.

2. If a witness has not been notified of his or her right against self-incrimination, the Co-Prosecutors, the Co-Investigating Judges, or the Chambers shall notify a witness of this right before his or her interview or testimony.

3. Where the Co-Investigating Judges or the Chambers determine that a witness should be required to answer a question or questions, they may assure such witness, if possible in advance, that the evidence provided in response to the questions:

a) will be kept confidential and will not be disclosed to the public; and/or

b) will not be used either directly or indirectly against that person in any subsequent prosecution by the ECCC.

4. Before giving such an assurance, the Co-Investigating Judges or the Chambers shall seek the views of the Co-Prosecutors to determine whether the assurance should be given to this particular witness.

5. In determining whether to require the witness to answer, the Co-Investigating Judges or the Chambers shall consider:

a) The importance of the anticipated evidence;

b) Whether the witness would be providing unique evidence;

c) The nature of the possible incrimination, if known, of the person in question; and

d) The sufficiency of any protection available for the witness, in the particular circumstances.

6. If the Co-Investigating Judges or the Chambers determine that it would not be appropriate to provide an assurance to the witness, they shall not require the witness to answer the question but may still continue the questioning of the witness on other matters.

7. In order to give effect to the assurance, the Co-Investigating Judges or the Chambers may, as appropriate:

a) Order that the evidence of the witness be given *in camera*;

b) Order that the identity of the witness and the content of the evidence given shall not be disclosed, in any manner, and provide that the breach of any such order will be subject to sanctions under Rules 35 to 38;

c) Specifically advise the parties present and their legal representative of the consequences of a breach of an order under this Rule;

d) Order the sealing of any record of the proceedings; and

e) Use protective measures, as foreseen in Rule 29 to ensure that the identity of the witness and the content of the evidence given are not disclosed.

8. Where a party is aware that the testimony of any witness may raise issues with respect to self-incrimination, or where the witness him or herself raises the matter, he or she shall request an *in camera* hearing and advise the Co-Investigating Judges or the Chambers of this, in advance of the testimony of the witness. The Co-Investigating Judges or the Chambers may impose the measures outlined in sub-rule 7 for all or a part of the testimony of that witness.

9. If an issue of self-incrimination arises in the course of the proceedings, the Co-Investigating Judges or the Chambers shall, unless the witness waives that right, suspend the taking of the testimony and provide the witness with a lawyer. Such waiver shall be recorded in accordance with Rule 25.

### **Rule 29. Protective Measures**

1. The ECCC shall ensure the protection of Victims who participate in the proceedings, whether as complainants or Civil Parties, and witnesses, as provided in the supplementary agreement on security and safety and the relevant Practice Directions.

2. When the Co-Investigating Judges or the Chambers issue an order or when other offices within the ECCC fulfil their duties, they shall take account of the needs of victims and witnesses. In particular, whenever such offices must communicate with victims, witnesses, complainants or Civil Parties, they may communicate with their lawyers or Victims' Association, as appropriate, where direct communication could place the life or well being of that person in danger.

3. The Co-Investigating Judges and the Chambers may, on their own motion or at the request of one of the parties or their lawyers, and after having consulted with the Victims Unit or the Witnesses/Experts Support Unit, order appropriate measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger.

4. In this respect, the Co-Investigating Judges and the Chambers may make a reasoned order adopting measures to protect the identity of such persons, including:

a) declaring their contact address to be that of their lawyers or their Victims' Association, as appropriate, or of the ECCC;

b) using a pseudonym when referring to the protected person;

c) authorising recording of the person's statements without his or her identity appearing in the case file. Such decisions shall only be subject to appeal, within 15 (fifteen) days of notice of the order, where knowledge of the person's identity is essential to the case for the defence;

d) where a Charged Person or Accused requests to be confronted with such a person, technical means may be used that allow remote participation or distortion of the person's voice and or physical features;



e) as an exception to the principle of public hearings, that the Chambers may conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means.

5. In such cases, the person's request and identity shall be recorded in a classified register separate from the case file. Disclosure of the identity or the address of a person who has benefited from the provisions of this Rule may be punished in accordance with Cambodian Law.

6. No conviction may be pronounced against the Accused on the sole basis of statements taken under the conditions set out in this Rule.

7. Where necessary, the Co-Investigating Judges and the Chambers may order appropriate judicial guarantees and/or the physical protection of a Victim or witness in safe residence in Cambodia or abroad.

#### **Rule 41. Summonses**

1. A summons is an order to any person to appear before the ECCC. It may be issued to a Suspect, Charged Person or Accused, Civil Party or witness and shall set out the capacity in which the person is being summoned.

2. Unless otherwise provided in these IRs, the minimum period between service of the summons and the date of the appearance before the ECCC shall be 5 (five) days. However, where the summons concerns a detained person, such period shall not apply.

3. All summonses shall be served at the last known address by the Greffier, the Judicial Police or any other authorised officer of the ECCC, by any appropriate means. A person in detention shall be summoned through the head of the detention facility. Service of a summons shall be recorded in a written report of service setting out the means used, time, date and place of service, as well as any other relevant circumstances, which shall be signed by the officer and placed on the case file.

4. Any persons requested to serve a summons shall comply with the request and use their best endeavours to obtain acknowledgement of receipt. Such acknowledgement shall be appended to the report of service.

#### **Rule 42. Arrest Warrants**

An Arrest Warrant may be issued against a Suspect, Charged Person or Accused, whether he or she is within or outside the territory of the Kingdom of Cambodia. If necessary, the Arrest Warrant may be issued internationally with the support of any effective mechanism.

#### **Rule 43. Detention Orders**

The Co-Investigating Judges or the Chambers may only issue a Detention Order to the head of the ECCC detention facility where a provisional Detention Order has been issued relating to the same person.

**Rule 44. Arrest and Detention Orders**

1. An Arrest and Detention Order may be issued against a Charged Person or Accused who flees, resides in an unknown place or is outside the territory of the Kingdom of Cambodia. If necessary, the order may be issued internationally with the support of any effective mechanism. The Co-Prosecutors shall ensure dissemination of the Arrest and Detention Order.
2. Before issuing an Arrest and Detention Order, the Co-Investigating Judges or the Chambers shall seek the opinion of the Co-Prosecutors. Such order shall be reasoned.

**B – Prosecution****Rule 49. Exercising Public Action**

1. Prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint.
2. The Co-Prosecutors shall receive and consider all written complaints or information alleging commission of crimes within the jurisdiction of the ECCC. Such complaints or information may be lodged with the Co-Prosecutors by any person, organisation or other source who witnessed or was a victim of such alleged crimes, or who has knowledge of such alleged crimes.
3. A complaint referred to in this Rule may also be prepared and/or lodged on behalf of a Victim by a lawyer or Victims' Association. Copies of all such written complaints shall be kept with the Office of Administration and may be translated into the working languages of the ECCC, as needed.
4. Such complaints shall not automatically initiate criminal prosecution, and the Co-Prosecutors shall decide, at their discretion, whether to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation or forward the complaint directly to the Co-Investigating Judges. The Co-Prosecutors shall inform the complainant of the decision as soon as possible and in any case not more than 60 (sixty) days after registration of the complaint.
5. A decision not to pursue a complaint shall not have the effect of *res judicata*. The Co-Prosecutors may change their decision at any time in which case the complainant shall be so informed as soon as possible and in any case not more than 30 (thirty) days from the decision.

**Rule 50. Preliminary Investigations**

1. The Co-Prosecutors may conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses.
2. Preliminary investigations may be carried out by Judicial Police officers or by Investigators of the ECCC only at the request of the Co-Prosecutors. The Judicial Police and Investigators may search for and gather relevant evidence including documents only between 6 (six) o'clock in the morning and 6 (six) o'clock in the evening, and after obtaining a written order from the Co-

Prosecutors and approval from the owner or occupier of the premises. Such approval shall be hand-written, or if the owner or occupier cannot write, a Judicial Police officer or Investigator shall record this fact in his or her report.

3. Should the owner or occupant of the premises be absent, or refuse access, the Co-Prosecutors may apply to the President of the Pre-Trial Chamber for authorization to conduct the search. The President's reasoned decision shall be in writing and placed in the case file. In case of emergency and the absolute impossibility to immediately provide a written authorization, the latter may be given verbally and confirmed in writing within 48 (forty-eight) hours. The search shall be conducted in the presence of the owner or occupant of the premises or, if this is not possible, in the presence of two witnesses selected by the Co-Prosecutors. The witnesses shall not be Investigators or Judicial Police officers involved in the search.

4. At the Co-Prosecutors' request, Judicial Police officers or Investigators may summon and interview any person who may provide relevant information on the case under investigation.

5. The Co-Prosecutors shall draw up an inventory of all items seized during the preliminary investigation, including documents, books, papers, and other objects, and shall provide one copy of such inventory to the person from whom such items were seized. Items that are of no evidentiary value shall be returned without delay at the end of the preliminary investigation.

#### **Rule 51. Police Custody**

1. For the needs of the inquiry, the Co-Prosecutors may order the Judicial Police to take into police custody a person suspected of having participated in a crime within the jurisdiction of the ECCC as a perpetrator or accomplice. Such a person shall be informed of the reasons for the custody and of his or her rights under Rule 21(1)(d). Wherever possible, the person shall be held in the premises of the detention unit of the ECCC.

2. An order for police custody shall be made in writing, signed by the Co-Prosecutors and served on the Suspect, whenever possible. If due to the urgency of the situation, this is not possible, the order may be issued verbally by the Co-Prosecutors, but shall be put in writing as soon as possible thereafter.

3. Police custody may be ordered by the Co-Prosecutors for a period not exceeding 48 (forty-eight) hours from the time of the arrest of the Suspect. At the end of this period, the Co-Prosecutors may order an extension for an additional period of 24 (twenty-four) hours, setting out the reasons in writing.

4. The Suspect shall be brought before the Co-Prosecutors as soon as possible. Where transportation difficulties or the distance between the place of arrest and the ECCC make this impracticable, the Co-Prosecutors may provide an additional time period to transport the Suspect. The cause of the delay shall be recorded in the final report.

5. The Suspect may request to see a lawyer of his or her choice, who shall be informed of the request immediately, by all means available. The Suspect may meet with such lawyer or, if this is not possible, a lawyer provided by the Defence Support Section, for a maximum of 30 (thirty) minutes before the Suspect is presented to the Co-Prosecutors. Such lawyer shall have the right

to be present during the period of police custody, subject to the administrative requirements of the detention facility.

6. The Co-Prosecutors may ask a doctor to examine a Suspect at any time. The doctor shall verify whether the Suspect has any health conditions that make him or her unsuitable for further custody, and shall certify any such findings.

7. At the end of the period of police custody, the Suspect shall be either released or brought before the Co-Investigating Judges in accordance with Rule 57.

8. The Co-Prosecutors shall make a final report for every arrest, which shall include the following information:

- a) The full name and position of the Judicial Police officer who executed the order for police custody;
- b) The identity of the Suspect;
- c) The reason for the police custody;
- d) The date and time of the commencement of the police custody;
- e) The full name of the doctor who examined the Suspect, if applicable;
- f) The identity of any lawyer who visited the Suspect;
- g) The duration of any interview and the duration of any breaks between interview periods;
- h) The date and time of the termination of police custody;
- i) Any incidents that occurred during the period of police custody; and
- j) The decision made by the Co-Prosecutors at the expiry of the police custody period.

9. The final report of police custody shall be attached to the case file, and a register of the Police Custody shall be maintained by the Office of Administration.

### **Rule 53. Introductory Submissions**

1. If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons. The submission shall contain the following information:

- a) a summary of the facts;
- b) the type of offence(s) alleged;

- c) the relevant provisions of the law that defines and punishes the crimes;
  - d) the name of any person to be investigated, if applicable; and
  - e) the date and signature of both Co-Prosecutors.
2. The submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory.
  3. The absence of any of the formalities provided in sub rule 1 shall render the submission void.
  4. The Co-Prosecutors shall, as soon as practicable, disclose to the Co-Investigating Judges any material that in the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the Suspect or the Charged Person or affect the credibility of the prosecution evidence.
  5. The Office of Administration shall organize and index a copy of this information using a computerized case file management system.
  6. Where it is decided not to pursue a complaint at the end of a preliminary investigation, all associated complainants shall be notified of the decision within 30 (thirty) days thereof.

#### **Rule 54. Public Information by the Co-Prosecutors**

Introductory, Supplementary and Final Submissions filed by the Co-Prosecutors shall be confidential documents. However, mindful of the need to ensure that the public is duly informed of ongoing ECCC proceedings, the Co-Prosecutors may provide the public with an objective summary of the information contained in such submissions, taking into account the rights of the defence and the interests of Victims, witnesses and any other persons mentioned therein, and the requirements of the investigation. In addition, the Co-Prosecutors may jointly, either personally or through the Public Affairs Section, correct any false or misleading information, provided that the case is still under preliminary investigation.

### **C – Judicial Investigations**

#### **Rule 55. General Provisions Concerning Investigations**

1. A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.
2. The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.
3. If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.

4. The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission. They may also charge any other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co-Prosecutors before charging such persons.

5. In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory. To that end, the Co-Investigating Judges may:

- a) Summon and question Suspects and Charged Persons, interview Victims and witnesses and record their statements, seize physical evidence, seek expert opinions and conduct on-site investigations;
- b) Take any appropriate measures to provide for the safety and support of potential witnesses and other sources;
- c) Seek information and assistance from any State, the United Nations or any other intergovernmental or non-governmental organization, or other sources that they deem appropriate; and
- d) Issue such orders as may be necessary to conduct the investigation, including summonses, Arrest Warrants, Detention Orders and Arrest and Detention Orders.

6. The Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC.

7. A written record shall be made of every interview. Each page of the written record shall be signed or fingerprinted after the interviewee reads it. If necessary, the Greffier of the Co-Investigating Judges, with the assistance of the interpreter, shall read the record back. If the interviewee refuses to sign or fingerprint the record, the Greffier of the Co-Investigating Judges shall note this on the record.

8. The Co-Investigating Judges may make on-site visits to conduct any investigation they consider useful. They shall be accompanied by their Greffiers, who shall make a written record for the case file. The Co-Investigating Judges may inform the parties of such visits, where their presence may be necessary. In such cases, the parties may request the Co-Investigating Judges to allow them to attend.

9. The Co-Investigating Judges may issue Rogatory Letters requesting the Judicial Police or ECCC Investigators to undertake such action as necessary for the conduct of their investigations, as provided in these IRs.

10. At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation. If the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.

11. The Co-Prosecutors and the lawyers for the other parties shall have the right to consult the original case file, subject to reasonable limitations to ensure the continuity of the proceedings.

### **Rule 56. Public Information by the Co-Investigating Judges**

1. In order to preserve the rights and interests of the parties, judicial investigations shall not be conducted in public. All persons participating in the judicial investigation shall maintain confidentiality.

2. However, the Co-Investigating Judges, may:

a) jointly through the Public Affairs Section, issue such information regarding a case under judicial investigation as they deem essential to keep the public informed of the proceedings, or to rectify any false or misleading information; and

b) jointly grant limited access to the judicial investigation to the media or other non-parties in exceptional circumstances, under their strict control and after seeking observations from the parties to the proceedings. The non-respect of any conditions that the Co-Investigating Judges may impose shall be dealt with in accordance with Rules 35 to 38.

3. Disagreements between the Co-Investigating Judges regarding matters referred to in sub-rule 2 above shall not be submitted to the procedure for settlement of disagreements set out in Rule 72.

### **Rule 63. Provisional Detention**

1. The Co-Investigating Judges may order the Provisional Detention of a Charged Person after an adversarial hearing. If the Charged Person does not yet have the assistance of a lawyer, he or she shall be advised of the right to a lawyer as provided by Rule 21(1)(d). The Charged Person has the right to a reasonable period in order to prepare his or her defence. During the hearing, the Co-Investigating Judges shall hear the Co-Prosecutors, the Charged Person and his or her lawyer. At the end of the hearing the Co-Investigating Judges shall decide on Provisional Detention. If Provisional Detention is not ordered, the Charged Person shall be released. If the Co-Investigating Judges decide to order Provisional Detention they shall issue a Detention Order.

2. An order for Provisional Detention shall:

a) set out the legal grounds and factual basis for detention, based on sub-rule 3 below;  
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b) specify the maximum initial period of provisional detention possible; and

c) when served on the Charged Person, shall be accompanied by a statement of his or her rights.

3. The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and

b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:

i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;

ii) preserve evidence or prevent the destruction of any evidence;

iii) ensure the presence of the Charged Person during the proceedings;

iv) protect the security of the Charged Person; or

v) preserve public order.

4. The Charged Person may appeal against an order for Provisional Detention to the Pre-Trial Chamber.

5. The Greffier of the Co-Investigating Judges shall immediately serve copies of an order for Provisional Detention on the Charged Person and his or her lawyer, and to the Co-Prosecutors and the Office of Administration.

6. Provisional Detention may be ordered as follows:

a) for genocide, war crimes and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the Provisional Detention for further 1 (one) year periods; and

b) for all other crimes coming within ECCC jurisdiction, for a period not exceeding 6 (six) months. However, the Co-Investigating Judges may extend the Provisional Detention for further 6 (six) month periods.

7. Any decision by the Co-Investigating Judges concerning extension of Provisional Detention shall be in writing and shall set out the reasons for such extension. An extension shall be made only after the Co-Investigating Judges notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the Co-Investigating Judges. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal.

8. In all cases, a Charged Person in Provisional Detention shall be personally brought before the



Co-Investigating Judges at least every 4 (four) months The Co-Investigating Judges shall offer the Suspect an opportunity to discuss his or her treatment and conditions during Provisional Detention. Where any action is required, the Co-Investigating Judges may issue appropriate orders. A written record of the interview shall be placed on the case file.

#### **Rule 64. Release of a Charged Person**

1. At any time during a Charged Person's detention, either on their own motion or at the request of the Co-Prosecutors, the Co-Investigating Judges shall order a Charged Person's release where the requirements of Provisional Detention set out in Rule 63 above are no longer satisfied. Where the Co-Investigating Judges are considering the matter on their own motion, they shall seek the Co-Prosecutors opinion before making the order. Any such order is subject to appeal.
2. At any moment during the period of the Provisional Detention, the Charged Person or his or her lawyer may submit an application for release to the Co-Investigating Judges. As soon as possible after receiving the application, the Co-Investigating Judges shall forward it to the Co-Prosecutors, who shall provide their opinion within 5 (five) days. Subject to the provisions of Rule 72(2), the Co-Investigating Judges shall issue a reasoned decision within 5 (five) days from receipt of the Co-Prosecutors' opinion. All such orders are open to appeal.
3. If his or her circumstances have changed since his or her last application, the Charged Person may file a further application not less than 3 (three) months after the final determination of the previous application for release.
4. The Co-Prosecutors and the Charged Person shall be notified immediately of an order to release a Charged Person from detention. The Co-Prosecutors and the Charged Person shall also be notified immediately of an order not to release the Charged Person from detention. The Office of Administration and the head of the detention facility shall be notified as soon as an order to release from detention becomes enforceable.

#### **Rule 65. Bail Orders**

1. On their own motion, or at the request of the Co-Prosecutors, the Co-Investigating Judges may order that a Charged Person remain at liberty or be released from detention. The order by the Co-Investigating Judges shall specify whether a bail bond is payable, and impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others. Any such order is subject to appeal.
2. A Charged Person shall receive a receipt from the Greffier of the Co-Investigating Judges in return for any property or monies handed over.
3. The Charged Person and the Co-Prosecutors shall be immediately notified of a bail order.
4. At any time, on their own motion or at the request of the Co-Prosecutors, the Co-Investigating Judges may change, suspend, add new conditions to or terminate the bail order. The Charged Person and the Co-Prosecutors shall be immediately notified of any such orders, which shall be open to appeal.

5. A Charged Person may, at any time, file an application to change or suspend any conditions of the bail order, or to terminate it. The Co-Investigating Judges shall immediately send that request to the Co-Prosecutors for their opinion, who shall provide it within 5 (five) days. Subject to the provisions of Rule 72(2), the Co-Investigating Judges shall issue an order within 10 (ten) days from the date of receipt of the Co-Prosecutors' opinion. The Charged Person and the Co-Prosecutors shall be immediately notified of the order.

6. If the Charged Person violates any of the bail conditions in such an order, the Co-Investigating Judges may issue a warning or issue a Provisional Detention Order in respect of the Charged Person. Any such order is subject to appeal.

## **D – Pre-Trial Chamber Proceedings**

### **Rule 71. Settlement of Disagreements between the Co-Prosecutors**

1. In the event of disagreement between the Co-Prosecutors, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Prosecutors.

2. Within 30 (thirty) days, either Co-Prosecutor may bring the disagreement before the Pre-Trial Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Pre-Trial Chamber and communicate the statements to its judges, with a copy to the other Co-Prosecutor. In such cases, the other Co-Prosecutor may submit a response within 10 (ten) days. The written statement of the facts and reasons for the disagreement shall not be placed on the case file. The Greffier of the Co-Prosecutors shall forward a copy of the case file to the Pre-Trial Chamber immediately.

3. Throughout this dispute settlement period, the Co-Prosecutors shall continue to seek consensus. However, the action or decision the subject of the disagreement shall be executed except for disagreements concerns:

- a) an Introductory Submission;
- b) a Supplementary Submission relating to new crimes;
- c) a Final Submission; or
- d) a decision relating to an appeal,

in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Pre-Trial Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.

4. The Pre-Trial Chamber shall settle the disagreement forthwith, as follows:

- a) The hearing shall be held and the judgment handed down *in camera*. Remote participation may be organized, as necessary.

b) The Pre-Trial Chamber may order the personal appearance of the Co-Prosecutors at its discretion, as well as the production of exhibits.

c) A decision of the Pre-Trial Chamber requires the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Pre-Trial Chamber, in accordance with Article 20 new of the ECCC Law, the default decision shall be that the action or decision done by one Co-Prosecutor shall stand, or that the action or decision proposed to be done by one Co-Prosecutor shall be executed.

d) All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. The Greffier of the Pre-Trial Chamber shall forward such decisions to the Director of the Office of Administration, who shall notify the Co-Prosecutors. The Co-Prosecutors shall immediately proceed in accordance with the decision of the Pre-Trial Chamber.

## **Rule 72. Settlement of Disagreements between the Co-Investigating Judges**

1. In the event of disagreement between the Co-Investigating Judges, either or both of them may record the exact nature of their disagreement in a signed, dated document which shall be placed in a register of disagreements kept by the Greffier of the Co-Investigating Judges.

2. Within 30 (thirty) days, either Co-Investigating Judge may bring the disagreement before the Pre-Trial Chamber by submitting a written statement of the facts and reasons for the disagreement to the Office of Administration, which shall immediately convene the Pre-Trial Chamber and communicate the statements to its judges, with a copy to the other Co-Investigating Judge. If the disagreement relates to the Provisional Detention of a Charged Person, this period shall be reduced to 5 (five) days. The other Co-Investigating Judge may submit a response within 10 (ten) days. The written statement of the facts and reasons for the disagreement shall not be placed on the case file, except in cases referred to in sub-rule 4(b) below. The Greffier of the Co-Investigating Judges shall forward a copy of the case file to the Pre-Trial Chamber immediately.

3. Throughout this dispute settlement period, the Co-Investigating Judges shall continue to seek consensus. However the action or decision the subject of the disagreement shall be executed, except for disagreements concerning:

a) any decision that would be open to appeal by the Charged Person or a Civil Party under these IRs;

b) notification of charges; or

c) an Arrest and Detention Order,

in which case, no action shall be taken with respect to the subject of the disagreement until either consensus is achieved, the 30 (thirty) day period has ended, or the Pre-Trial Chamber has been seised and the dispute settlement procedure has been completed, as appropriate.

4. The Pre-Trial Chamber shall settle the disagreement forthwith, as follows:

- a) The hearing shall be held and the judgment handed down *in camera*.
- b) Where the disagreement relates to a decision against which a party to the proceedings would have the right to appeal to the Pre-Trial Chamber under these IRs:
  - i) The Greffier of the Pre-Trial Chamber shall immediately inform the parties in question and their lawyers of the date of the hearing;
  - ii) The Co-Prosecutors and the lawyers for the other parties involved may consult the case file up until the date of the hearing;
  - iii) The Co-Prosecutors and the lawyers for the other parties involved may file pleadings as provided in the Practice Direction on filing of documents. Such pleadings shall immediately be placed on the case file by the Greffier of the Pre-Trial Chambers;
  - iv) The Pre-Trial Chamber may, on the motion of any judge or party, decide that all or part of a hearing be held in public, in particular where the case may be brought to an end by its decision, including appeals or requests concerning jurisdiction or bars to jurisdiction, if the Pre-Trial Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court;
  - v) During the hearing, the Co-Prosecutors and the lawyers of the other parties involved may present brief observations.
- c) In all cases, the Chamber may, at its discretion, order the personal appearance of any parties or experts, as well as the production of any exhibits.
- d) A decision of the Pre-Trial Chamber shall require the affirmative vote of at least four judges. This decision is not subject to appeal. If the required majority is not achieved before the Pre-Trial Chamber, in accordance with Article 23 new of the ECCC Law, the default decision shall be that the order or investigative act done by one Co-Investigating Judge shall stand, or that the order or investigative act proposed to be done by one Co-Investigating Judge shall be executed. However, where the disagreement concerns provisional detention, there shall be a presumption of freedom.
- e) All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors. The Greffier of the Pre-Trial Chamber shall forward such decisions to the Director of the Office of Administration, who shall notify the Co-Investigating Judges. In addition, decisions concerning matters referred to in sub-rule 4(b) shall be notified to the parties. The Co-Investigating Judges shall place the decision of the Pre-Trial Chamber on the case file and immediately proceed in accordance with such decision.

#### **Rule 74. Grounds for Pre-Trial Appeals**

1. No appeal shall lie against decisions of the Co-Investigating Judges where the matter has already been heard by the Pre-Trial Chamber pursuant to the dispute settlement provisions in

Rule 72.

2. The Co-Prosecutors may appeal against all orders by the Co-Investigating Judges.
3. The Charged Person may appeal against the following orders of the Co-Investigating Judges:
  - a) confirming the jurisdiction of the ECCC;
  - b) refusing requests for investigative action allowed under these IRs;
  - c) refusing requests for the restitution of seized items;
  - d) refusing requests for expert reports allowed under these IRs;
  - e) refusing requests for additional expert investigation allowed under these IRs;
  - f) relating to provisional detention or bail; or
  - g) refusing an application to seize the Pre-Trial Chamber for annulment of investigative action.
4. Civil Parties may appeal against the following orders by the Co-Investigating Judges:
  - a) refusing requests for investigative action allowed under these Rules;
  - b) declaring the Civil Party application inadmissible;
  - c) refusing requests for the restitution of seized property;
  - d) refusing requests for expert reports allowed under these IRs;
  - e) refusing requests for further expert investigation allowed under these IRs;
  - f) a Dismissal Order where the Co-Prosecutors have appealed; or
  - g) refusing an application to seize the Pre-Trial Chamber for annulment of investigative action.
5. Any non-party to the investigation proceedings who has requested the return of seized items shall be entitled to appeal against any order of the Co-Investigating Judges denying such request.

#### **Rule 78. Publication of Pre-Trial Chamber Decisions**

All decisions and default decisions of the Pre-Trial Chamber, including any dissenting opinions, shall be published in full, except where the Pre-Trial Chamber decides that it would be contrary to the integrity of the Preliminary Investigation or to the Judicial Investigation.

## **E – Proceedings Before the Trial Chamber**

### **Rule 79. General Provisions**

1. The Trial Chamber shall be seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber.
2. The date of the trial shall be determined by the President of the Trial Chamber, taking into account the time limits for notification and summons set out in these IRs.
3. The parties shall be notified in writing of the trial date by the Greffier of the Trial Chamber, as soon as possible. Such notification shall be deemed valid summons.
4. The Co-Prosecutors shall submit to the Greffier of the Trial Chamber a list of the witnesses and experts they intend to summons. The Greffier shall place the list on the case file and forward a copy of the list to the other parties.
5. Where the Accused and/or any Civil Party wishes to summon any witnesses who are not on the list provided by the Co-Prosecutors, they shall submit an additional list to the Greffier of the Trial Chamber, who shall place such list on the case file and forward a copy of the list to the other parties.
6. When the Trial Chamber is seised of a number of related Indictments, it may issue an order consolidating all such Indictments.
7. Reserve Judges of the Trial Chamber shall be present at all stages of proceedings. Such Reserve Judges shall not have the right to express any opinion or to make any decision unless and until appointed to replace a sitting judge.
8. In case of absence of a sitting Judge, the President of the Trial Chamber may, after consultation with the remaining judges, decide to adjourn the proceedings or designate a Reserve Judge to sit in place of the absent Judge for the remainder of the proceedings in question. Where, however, the replaced sitting Judge is able to return, the Trial Chamber may, after taking into consideration all factors relevant to the case and being satisfied that the returning Judge has been fully informed of the evolution of the case during his/her absence, decide to replace the Reserve Judge by that sitting Judge.
9. In case of absence of the President of the Trial Chamber, and in a situation where the proceedings are otherwise able to continue, the oldest national judge shall automatically preside over the trial. In such case, a national Reserve Judge shall fill the vacant position until the end of the trial in question, subject to replacement under sub-rule 8 above.

### **Rule 84. Public Nature of the Hearing and Judgment**

1. Hearings of the Trial Chamber shall be conducted in public.
2. The Office of Administration shall ensure a public broadcast of the trial hearings, subject to any protective measures adopted under these IRs.

3. Where the Chamber considers that a public hearing would be prejudicial to public order, or to give effect to protective measures ordered under these IRs, it may, by reasoned decision, order that all or part of the hearing be held *in camera*. This decision is not open to appeal.

4. In any case, the Trial Chamber shall announce its judgments at a public hearing.

### **Rule 87. Rules of Evidence**

1. Unless provided otherwise in these IRs, all evidence is admissible. The Trial judges shall weigh all such evidence independently in deciding whether guilt has been proven beyond a reasonable doubt.

2. Any decision of the Trial Chamber shall be based only on the evidence in the case file, or that has been put before the Chamber and subjected to examination. The Chamber may reject a request for evidence where it finds that it is:

- a) irrelevant or repetitious;
- b) impossible to obtain within a reasonable time;
- c) unsuitable to prove the facts it purports to prove; or
- d) not allowed under the law.

3. The Chamber shall give the same consideration to confessions as to other forms of evidence.

4. Any communications between the Accused and their lawyers are privileged and shall not be admissible as evidence.

5. The President of the Chamber may order that physical evidence be brought before the Chambers.

### **Rule 89. Interlocutory Applications**

1. The Trial Chamber has jurisdiction to hear any interlocutory applications filed by Parties concerning matters arising after the Closing Order.

2. An interlocutory application shall be raised before the Accused is called for questioning, failing which it shall be inadmissible.

3. The Chamber shall afford the other parties the opportunity to respond to the application.

4. The Chamber shall, as appropriate, issue its reasoned decision either immediately or at the same time as the judgment on the merits. In the latter case, the proceedings shall continue.

### **Rule 90. Questioning of the Accused**

1. The President of the Chamber shall inform the Accused of his or her rights under Rule 21(1)(d) and shall conduct the hearing. All the judges may ask any questions which they consider

to be conducive to ascertaining the truth. In this respect, they have a duty to raise all pertinent questions, whether these would tend to prove or disprove the guilt of the Accused.

2. After questioning by the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused. All questions shall be asked with the permission of the President. Except for questions asked by the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber.

### **Rule 91. Hearing of other Parties and Witnesses**

1. The Trial Chamber shall hear the Civil Parties, witnesses and experts in the order it considers useful.

2. The Co-Prosecutors and all the other parties and their lawyers shall be allowed to ask questions with the permission of the President. Except for questions asked by the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber.

3. The Co-Prosecutors and all the other parties and their lawyers may object to the continued hearing of the testimony of any witnesses, if they consider that such testimony is not conducive to ascertaining the truth. In such cases, the President shall decide whether to take the testimony.

4. After being questioned, each witness shall remain at the disposal of the Chamber until the Chamber decides that his or her presence is no longer needed.

### **Rule 98. The Judgment**

1. Where the judgment is not pronounced during the final hearing, the President of the Chamber shall notify the parties of the date for pronouncement of the judgment, which shall not be later than 30 (thirty) days unless exceptional circumstances justify a greater period.

2. The judgment shall be limited to the facts set out in the Indictment. The Chamber may, however, change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced. The Chamber shall only pass judgment on the Accused. If another person, appearing as a witness during the trial is suspected of committing a crime or conspiring with someone to commit a crime, the Chamber shall only try such person after he or she has been charged and indicted in accordance with these IRs.

3. The Chamber shall examine whether the acts amount to a crime falling within the jurisdiction of the ECCC, and whether the Accused has committed those acts.

4. Pursuant to the ECCC Law, the Chamber shall attempt to achieve unanimity. If this is not possible, a conviction shall require the affirmative vote of at least 4 (four) judges. If the required majority is not attained, the default decision shall be that the Accused is acquitted.

5. If the Accused is found guilty, the Chamber shall sentence him or her in accordance with the Agreement, the ECCC Law and these IRs.

6. Where the Chamber considers that the acts set out in the Indictment have not been proved, or



that the Accused is not guilty of those acts, he or she shall be acquitted.

7. Where the Chamber considers that the crimes set out in the Indictment do not fall within the jurisdiction of the ECCC, it shall decide that it does not have jurisdiction in the case.

### **Rule 99. Effect of the Judgment**

1. In case of acquittal, or where a sentence handed down is less than, or equal to, that of any Provisional Detention already served, the Accused shall be immediately released, unless he or she is in detention in relation to other charges.

2. Where the detained Accused is found guilty, the Chamber shall decide on continued detention. Where the Accused is present at judgment but not detained, the Chamber may issue a reasoned Detention Order. Where the Accused is absent, it may issue an Arrest and Detention Order. These orders shall have immediate effect.

3. When the judgment is pronounced, any bail order shall come to an end. The Chamber shall decide on the return of any seized items.

### **Rule 100. Judgment on Civil Party Claims**

1. The Chamber shall make a decision on any Civil Party claims in the judgment. It shall rule on the admissibility and the substance of such claims against the Accused. Where appropriate, the Chamber may adjourn its decision on Civil Party claims to a new hearing.

2. Where a Civil Party has claimed reparation before the start of the trial but he or she does not appear personally or is not validly represented at any time during the trial, and where the Accused was found guilty, the Trial Chamber shall make its decision concerning reparation based on the case file.

## **F – Appeals from the Trial Chamber**

### **Rule 104. Jurisdiction of the Supreme Court Chamber**

1. The Supreme Court Chamber shall decide appeals, on any issues of fact and law, against decisions of the Trial Chamber.

2. The Supreme Court Chamber may either confirm, annul or amend in whole or in part, as provided in Rule 110.

3. Decisions of the Supreme Court Chamber are final, and shall not be sent back to the Trial Chamber.

### **Rule 105. Admissibility**

1. An appeal may be filed by:

- a) The Co-Prosecutors;

b) The Accused; and

c) The Civil Parties in respect of their civil interests, only where the Co-Prosecutors have appealed.

2. Notice of appeal shall be filed with the Greffier of the Trial Chamber, and shall be noted in the appeal register of the Trial Chamber.

3. The Accused and the Civil Parties may be represented by their lawyers, who shall have a written authorization from their clients to file an appeal.

4. The notice of appeal shall be signed by the appellant or appellant's lawyers, and initialled by the Greffier of the Trial Chamber. The written authorization shall be attached to the appeal.

5. Where the Accused is in detention, he or she shall file the notice of appeal with the head of the ECCC detention facility, who shall immediately submit the appeal to the Greffier of the Trial Chamber. The Greffier shall note it on the appeal register.

6. In order for an appeal to be admissible, the appellant shall submit a brief containing the reasons of fact and law upon which the appeal is based, during the period set out in Rule 107 and as provided in the Practice Direction on filing of documents.

### **Rule 111. The Appeal Judgment**

1. The rules relating to the form and signature of the judgments of the Trial Chamber shall also apply to the judgments of the Supreme Court Chamber.

2. Where the Supreme Court Chamber finds that an appeal was filed late, or was otherwise procedurally defective, it may declare the appeal inadmissible.

3. Subject to Rule 110(4), where the Supreme Court Chamber finds that the trial judgment is void for procedural defects, it may hear the case as if it were the Trial Chamber and decide it on the merits.

4. In case of acquittal on appeal, the Accused shall be immediately released, unless he or she is in detention in relation to other charges.

5. Where, on appeal, a detained Accused either has a prison sentence confirmed, or is sentenced to prison, the Supreme Court Chamber shall rule on detention matters. Where the Accused is present at judgment but not detained, the Chamber may issue a reasoned Detention Order. Where the Accused is absent, it may issue an Arrest and Detention Order. These orders shall have immediate effect.

6. Pursuant to the ECCC Law, the Chamber shall attempt to achieve unanimity. If this is not possible, a decision shall require the affirmative vote of at least five judges. Where an appeal is rejected, the trial judgment shall become final and no further appeal against such decision shall be allowed.

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**Rule 112. Revision of Final Judgment**

1. The convicted person or, after his or her death, the spouse, children, parents, or any person alive at the time of the person's death who has been given express written instructions from the convicted person to bring such a claim, or the Co-Prosecutors on the person's behalf, may apply to the Supreme Court Chamber to revise the final judgment on the grounds that:

a) new evidence has been discovered that:

i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application; and

ii) is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

b) it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; or

c) one or more of the judges who participated in a judicial investigation or a conviction, committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under these IRs.

2. The applicant shall submit the request for revision to the Greffier of the Supreme Court Chamber, clearly setting out the factual and legal basis for such request. Thereafter, the procedure for appeals before the Supreme Court Chamber as set out in these IRs will apply.

3. Pursuant to the ECCC Law, the Chamber shall attempt to achieve unanimity. If this is not possible, a revision decision shall require the affirmative vote of at least five judges. The Supreme Court Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it shall retain jurisdiction over the matter, with a view to, after following the procedure set out for appeals from the Trial Chamber in these IRs, arriving at a determination on whether the judgment should be revised.

## **APPENDIX D**

### **Useful Websites for Internet Research**

**African Commission on Human & People's Rights**

<http://www.achpr.org/>

State Reports, African Charter on Human and Peoples' Rights, Protocol to the Charter, rules of procedure for the Commission, publications.

**American Society for International Law Guide to Electronic Resources for International Law**

<http://www.asil.org/resource/crim1.htm>

Provides information on the major electronic sources for researching international and transnational crime, as well as current issues common to both categories, such as efforts to codify international crimes, activities aimed at crime prevention, cooperation in law enforcement, jurisdictional questions, international judicial cooperation, and the effects of bilateral and multilateral treaties

**Avalon Project: The International Military Tribunal for Germany, Yale University**

<http://www.yale.edu/lawweb/avalon/imt/imt.htm>

Collection of trial documents, motions, conventions, rules of procedure, indictments, and all other memoranda and documents associated with the Nuremberg Trials.

**Canada and the International Criminal Court**

[http://www.dfait-maeci.gc.ca/foreign\\_policy/icc/history-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/icc/history-en.asp)

Canada's Department of Foreign Affairs and International Trade website on the International Criminal Court.

**Council of Europe Treaty Office**

<http://conventions.coe.int/>

Database of European treaties.

**European Court of Human Rights**

<http://www.echr.coe.int/>

General information, pending cases, judgments and decisions, basic texts, press releases.

**European Union—Court of Justice**

<http://curia.eu.int/en/index.htm>

Homepage with links to case law, press and information, research and documentation, library, and texts relating to the organization.

**Inter-American Court of Human Rights**

<http://www.corteidh.or.cr/>

**International Court of Justice (ICJ)**

<http://www.icj-cij.org/>

Homepage with docket, decisions, news, publications, and general information on the ICJ.

**International Criminal Court (ICC)**

<http://www.icc-cpi.int/index.php>

Office site of the ICC with information on the organization and its work, recent news, legal documents. Legal tools database of international criminal law located at [http://www.icc-cpi.int/Legaltools\\_home.html](http://www.icc-cpi.int/Legaltools_home.html).

**International Criminal Tribunal for Rwanda (ICTR)**

<http://www.icttr.org/>

Court homepage with information on the organization and its work, recent news, legal texts.

**International Criminal Tribunal for the Former Yugoslavia (ICTY)**

<http://www.un.org/icty/>

Overview of the tribunal, latest developments, indictments and proceedings, publications.

**International Humanitarian Law Database, ICRC**

<http://www.icrc.org/ihl>

91 treaties and texts, commentaries on the four Geneva Conventions and their Additional Protocols, an up-to-date list of signatures, ratifications relating to IHL treaties and full text of reservations.

**International War Crimes Project, New England School of Law**

[http://www.nesl.edu/center/WAR\\_CRIMES.htm](http://www.nesl.edu/center/WAR_CRIMES.htm)

Links to resources on trials of war criminals. The site has full texts of war crimes charters, statutes, trial transcripts, amicus curiae briefs, decisions, etc.

**Judicial System Monitoring Programme**

<http://www.jsmp.minihub.org/>

NGO established in East Timor for trial monitoring, legal analysis, and reports on the justice system. News, resources, and trial information.

**Khmer Rouge Trials Task Force**

[http://www.ocm.gov.kh/krt\\_main.htm](http://www.ocm.gov.kh/krt_main.htm)

Links to legal documents, indictments, statements, letters, and legislation related to the trials.

**Law of Armed Conflict Treaty Links, University of Minnesota**

<http://www1.umn.edu/humanrts/instreet/auoy.htm>

Database of treaties, conventions, and other documents relating to armed conflict.

**National Archives of Cambodia**

<http://www.camnet.com.kh/archives.cambodia/>

Preserves documents created by the government of Cambodia, including records of the French colonial administration and post-independence Cambodian governments.

**National Implementation Database, ICRC**

<http://www.icrc.org/ihl-nat>

Provides documentation and commentaries concerning the implementation of international humanitarian law at national level.

**NEPAD Organizations**

**<http://www.avmedia.at/nepad/indexgb.html>**

Links to the homepages, charters, declarations, resolutions, and protocols of various African inter-governmental organizations like the African Union, the African Economic Community, and the various African economic communities.

**No Peace Without Justice Sierra Leone Special Court Page**

**<http://www.specialcourt.org/>**

Special Court news releases, briefing papers, Special Court documents, and other information.

**Organization of American States Documents Page**

**[http://www.oas.org/XXXIIGA/english/documents\\_eng.htm](http://www.oas.org/XXXIIGA/english/documents_eng.htm)**

**Special Court for Sierra Leone**

**<http://www.sc-sl.org/scsl.htm>**

Official website of the Special Court for Sierra Leone.

**UN Documentation Centre**

**<http://www.un.org/documents/>**

Database of General Assembly, Security Council, Economic and Social Council, and Secretariat press releases, resolutions, documents, decisions, reports, archives, etc. Links to these bodies' homepages.

**UNAMSIL Documents**

**<http://www.un.org/Depts/dpko/missions/unamsil/docs.html>**

Resolutions, reports, statements, documents.

**UNTAET Documents**

**<http://www.un.org/peace/etimor/docs/UntaetD.htm>**

Resolutions, reports, letters, and other official documents on the UN mission in East Timor.

**War Crimes, Crimes Against Humanity Treaty Links, University of Minnesota**

**<http://www1.umn.edu/humanrts/instree/auox.htm>**

Database of conventions and other documents relating to war crimes, crimes against humanity, genocide and terrorism, including rules of procedure and evidence for various international courts and tribunals.

**War Crimes Research Office, American University Washington College of Law**

**[https://www.wcl.american.edu/warcrimes/wcro\\_docs/](https://www.wcl.american.edu/warcrimes/wcro_docs/)**

Offers a regularly updated, searchable database of jurisprudence and key documents relating to international/ized criminal courts and tribunals.

**War Crimes Studies Center, UC Berkeley**

**<http://socrates.berkeley.edu/~warcrime/>**

Center houses an archive of World War II war crimes trials and others materials relating to subsequent international and national war crimes tribunals.

**Web Genocide Documentation Centre, University of the West of England****<http://www.ess.uwe.ac.uk/genocide.htm>**

Resources on genocide, war crimes, and mass killing.

**Yale University Genocide Studies Program****<http://www.yale.edu/gsp/>**

Links to Yale's East Timor, Cambodia, and Rwanda genocide projects.

- **Cambodia Genocide Program and Database, Yale University**  
**<http://www.yale.edu/cgp/>**  
Cambodian genocide databases containing primary and secondary documents, articles and books; databases on military, political leaders, and victims of the Khmer Rouge regime; a large photographic database; and a geographic database of interactive maps, as well as maps showing locations of mass graves, prisons, and memorials.
- **East Timor Genocide Project, Yale University**  
**[http://www.yale.edu/gsp/east\\_timor/index.html](http://www.yale.edu/gsp/east_timor/index.html)**
- **Rwandan Genocide Project, Yale University**  
**<http://www.yale.edu/gsp/rwanda/index.html>**



# International Criminal Law: A Discussion Guide for the Extraordinary Chambers in the Courts of Cambodia

## ORDERING INFORMATION

Inquiries about obtaining print copies of this Discussion Guide (in English or Khmer) may be sent to:

War Crimes Research Office  
Washington College of Law  
4801 Massachusetts Avenue, NW  
Washington, DC 20016

Tel.: 202 274-4067

Fax: 202 274-4458

E-mail: [warcimes@wcl.american.edu](mailto:warcimes@wcl.american.edu)

Website: [www.wcl.american.edu/warcimes](http://www.wcl.american.edu/warcimes)



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