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Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland regarding the text prepared by the International Committee of the Red Cross on article 8, paragraph 2 (b), (c) and (e) of the Rome Statute of the International Criminal Court*

Note verbale dated 7 July 1999 from the Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General

The Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa to the United Nations and the Permanent Observer Mission of Switzerland to the United Nations have the honour to attach the text of the papers prepared by the International Committee of the Red Cross (see annexes I–III) in order to assist the Preparatory Commission for the International Criminal Court in elaborating the text on the elements of crimes for the Court.

The material in this paper relates to the crimes listed in article 8, paragraph 2 (b), (c) and (e) of the Statute.

The Permanent Missions of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea and South Africa and the Permanent Observer Mission of Switzerland request the circulation of the present note verbale and its annexes as a document of the Preparatory Commission.

* The annexes to the present document are issued in the language of submission only. Other language versions of the annexes will be made available at a later date.

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Annex I

Paper prepared by the International Committee of the Red Cross on article 8, paragraph 2 (b), (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii) and (xxvi), of the Statute of the International Criminal Court

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INTRODUCTION

It was agreed during the Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998, that a draft text on the elements of the crime of genocide, crimes against humanity and war crimes was to be prepared by the Preparatory Commission. In this respect, Article 9 of the Statute of the International Criminal Court (the "ICC Statute") states that the *"[e]lements of crimes shall assist the Court in the interpretation and application of Articles 6, 7, and 8. They shall be adopted by [...] the members of the Assembly of States Parties"*. This paper is intended to assist the Preparatory Commission in preparing the text on the elements of crime for Article 8 (2) solely by presenting relevant sources and indicating the results that emerge from these sources. It does not reflect any decision taken at a previous session of the Preparatory Commission. Part III deals exclusively with specific war crimes as listed in Article 8 (2) (b) of the ICC Statute.

The review of sources consisted in an exhaustive research and analysis of the relevant case law and international humanitarian law and human rights law instruments. As regards case law, a review of cases from the Leipzig Trials, from post Second World War trials, including the Nuremberg and Tokyo trials as well as national case law, and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda was done. National case law on war crimes was examined when it was available in English, French or German. Decisions from international and regional Human Rights bodies were also analysed for further clarification on certain offences. It is important to note that the various sources referred to in this paper were selected solely in an objective manner and based on their relevance and shall not be seen as a reflection of any particular view or position.

The paper is structured in the following manner. First, the results from the sources are outlined for each offence listed under Article 8 (2) (b) of the Statute. The term "material element" is used to describe the *actus reus* of the offence (the act or omission) and "mental element" to describe the *mens rea* or necessary intent to commit the offence. Second, a commentary containing an analysis of the various sources under review shows the legal basis for the results indicated.

It is important to note that this paper does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) nor questions concerning crimes committed by incitement, attempt, conspiracy or other forms of assistance (Art. 25 ICC Statute).

ABBREVIATIONS

The following abbreviations are used throughout this paper:

ACHPR:	African Charter on Human and Peoples' Rights
A.D.:	Annual Digest and Reports of Public International Law Cases
AP I:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
ICCPR:	International Covenant on Civil and Political Rights
ECHR:	European Court of Human Rights
GAOR:	General Assembly Official Records
GC:	Refers to all four (4) Geneva Conventions
GC I:	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II:	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III:	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV:	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
IACHR:	Inter-American Commission (or Court) on Human Rights
IAYHR	Inter-American Yearbook on Human Rights
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia

ILM:	International Legal Materials
ILR:	International Law Reports
UN Doc.:	United Nations Document
UNGA Res.:	United Nations General Assembly Resolution
WCC:	War Crimes Commission

Article 8 Paragraph 2 (b) ICC Statute
- OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT -

General points common to the offences under Article 8 (2) (b) of the ICC Statute

(1) The conduct is committed in the context of an international armed conflict.

Commentary

War crimes, as defined under Art. 8 (2) (b) of the Statute, concern conduct committed in the context of an international armed conflict.

Definition of an international armed conflict

The term international armed conflict is defined under common Art. 2 GC. The ICTY found that an international armed conflict *"exists whenever there is a resort to armed force between States".*[1]

Time frame and geographical scope of the armed conflict

Concerning the time frame, the ICTY stated that

> *"(i)nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities[*[2]*] until a general conclusion of peace is reached."*[3]

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

> *"the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others,*

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1 ICTY, *The Prosecutor v. Dusko Tadic: Decision on the defence motion for interlocutory appeal on jurisdiction,* 2 October 1995, IT-94-1-AR72, para. 70, p. 37.

2 See for example both GC I (Art. 5) and GC III (Art. 5) are applicable until protected persons who have fallen into the power of the enemy have been released and repatriated.

3 ICTY, *The Prosecutor v. Dusko Tadic: Decision on the defence motion for interlocutory appeal on jurisdiction,* 2 October 1995, IT-94-1-AR72, para. 70, p. 37.

particularly those relating to the protection of prisoners of war and civilians, are not so limited."[4]

Link between the conduct and the armed conflict

The ICTY Prosecution stated that

"a sufficient nexus must, however, be established between the offences that occurred at the Celebici camp and the international armed conflict which gives rise to the applicability of the grave breach provisions"[5].

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

"For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law."[6]

"For an offence to be a violation of international humanitarian law, therefore, this Trial Chamber needs to be satisfied that each of the alleged acts was in fact closely related to the hostilities"[7].

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

Potential Perpetrators

Concerning potential perpetrators of war crimes, the ICTY Prosecution stated, in the *Celebici Case* and on the basis of certain post Second World War Trials, that

"it is not even necessary that the perpetrator be part of the armed forces, or be entitled to combatant status in terms of the Geneva Conventions, to be capable of committing war crimes during international armed conflict".[8]

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4 ICTY, *The Prosecutor v. Dusko Tadic: Decision on the defence motion for interlocutory appeal on jurisdiction,* 2 October 1995, IT-94-1-AR72, para. 68, p. 36.

5 ICTY, *Celebici Case* (Delalic, Mucic, Delic and Landzo), Trial Chamber II, Prosecution's Response to Defendants' Motion for Judgement of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case, 06.03.98., IT-96-21-T, para. 3.34, p. 26.

6 ICTY, *The Prosecutor v. Dusko Tadic: Opinion and Judgement,* 7 May 1997, IT-94-1-T, para. 572, p. 207.

7 *Ibid.*, para. 573, p. 207. See also: In the *Tadic Case*, the Tribunal held: *"The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle"* (ICTY, *The Prosecutor* v. *Dusko Tadic: Decision on the defence motion for interlocutory appeal on jurisdiction,* 2 October 1995, IT-94-1-AR72, para. 69, p. 37). Moreover, *"[i]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict"*, ibid., para. 70, p. 38; ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, paras. 193-194, p. 74.

In an early British trial, the *Essen Lynching Case,* civilians appeared among persons found guilty of killing of three British prisoners of war, or participation therein.[9] In other post Second World War Trials, in addition to military personnel, other categories of persons were found guilty of various war crimes (see Part I of this study).

Comments on specific offences

General remarks relevant to all offences

- With respect to the terms "unlawful" or "lawful", as used in the elements of several offences, it is important to emphasise that they refer to the lawfulness under international law. This was repeatedly stated in various post Second World War Trials (*"contrary to the laws and usages of war"*) as has been shown in Part I of this study.

- The notion "wilful" includes "intent" and "recklessness", but excludes ordinary negligence. The term "knowingly" must be understood in the sense of Art. 30 ICC Statute which defines "knowledge" as meaning awareness that a factual circumstance exists or a consequence will occur in the ordinary course of events (cf. Art. 30 (3)).

Art. 8 (2) (b) (viii) - The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

1. Results from the sources

Material elements

(1) The perpetrator unlawfully
  (a) transferred, directly or indirectly, parts of its own civilian population into the territory it occupies; or
  (b) deported or transferred all or parts of the population of the occupied territory within or outside this territory.

Mental element

(2) The perpetrator acted wilfully and knowingly.

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8 ICTY, Trial Chamber II, Prosecutor's Response to Defendants' Motion for Judgement of Acquittal or in the alternative Motion to Dismiss the Indictment at the Close of the Prosecutor's Case, 06.03.98., IT-96-21-T, para. 3.25, p. 22.

9 UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. I, pp. 88-92.

2. Commentary

a) Treaty reference of the war crime

The crime "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" is directly derived from Art. 85 (4) (a) AP I with two exceptions: the words "directly or indirectly" are inserted and the reference to Art. 49 GC IV is omitted.

b) Legal basis

aa) General remarks

The offence as contained in this part of the ICC Statute deals with two situations:

- the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies

  This part of Art. 8 (2) (b) (viii) ICC Statute criminalizes a violation of Art. 49 (6) GC IV (*"The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."*) and is not included in Art. 8 (2) (a) (vii) ICC Statute.

- the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory on the other hand.

  According to the ICRC Commentary to AP I this particular offence as included in Art. 85 (4) (a) AP I

  > *"is merely a repetition of Article 147 of the Fourth Convention, and Article 49 of that Convention, to which reference is made, continues to apply unchanged."*

  The wording of Art. 49 (1) GC IV (*"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."*) prohibits explicitly the deportation or transfer outside the occupied territory. However, the prohibition seems not to be limited to these situations. With respect to displacements inside the occupied territory the ICRC Commentary states that

  > *"Article 49 of the Fourth Convention prohibits all forcible transfers, as well as deportations of protected persons from occupied territory (paragraph 1)."*[10]

  and

[10] Zimmermann, in: Commentary on the AP, Art. 85, No. 3502, p. 1000.

"by using the word "nevertheless", paragraph 2 [of Art. 49 GC IV] clearly shows that paragraph 1 also prohibits forcible transfers within occupied territory. On the basis of 'Commentary IV', pp. 278-280 and 599 it may be concluded that such a forcible transfer was already a grave breach within the meaning of Article 147; W.A. Solf and E.R. Cummings, op. cit., pp. 232-233, hold this view; E.J. Roucounas, op. cit., p. 116, holds the opposite view."[11]

The formulation chosen in Art. 85 (4) (a) AP I, and thus in Art. 8 (2) (b) (viii) ICC Statute clarifies now explicitly that both deportation or transfer outside the occupied as well as displacements inside the occupied territory constitute a war crime.[12]

Therefore, this part of Art. 8 (2) (b) (viii) ICC Statute may be seen as a mere repetition of Art. 8 (2) (a) (vii) - Unlawful deportation or transfer.

Until now, there are no findings on the elements of this crime by the ad hoc Tribunals.

The question of deportation and forcible transfer is dealt with in Arts. 45 and 49 GC IV. Art. 147 GC IV qualifies the offence "unlawful deportation or transfer of a civilian" as a grave breach. This offence has been reaffirmed and modified in AP I in Art. 85 (4) (a). The conditions set forth in these provisions can be an indication for the elements of this crime.[13]

bb) Remarks concerning the material elements

(1) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies

In comparison to Art. 85 (4) (a) AP I the words "indirectly or directly" are added to the offence as contained in the ICC Statute. The inclusion of "indirect" seems to indicate that the population of the occupying power need not necessarily be physically forced or otherwise compelled. Therefore, acts of inducement or facilitation may fall under this war crime. The fact that the transfer must be done "by the Occupying Power" appears to require government involvement. With respect to individual criminal responsibility this offence seems to presuppose that the conduct of the perpetrator must be imputable to the Occupying Power. Therefore, individuals acting in their private capacity would not be criminally responsible.

The term "parts of the own civilian population" seem to require the transfer of a certain number of individuals is a constituent element of this offence.

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11 Zimmermann, *ibid.*, Fn. 28.

12 ICTY, Prosecutor's pre-trial brief: elements of articles 2, 3, and 5 of the Tribunal Statute, *The Prosecutor v. Milan Kovacevic*, IT-97-24-PT, pp. 15 *et seq.*

13 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 147, p. 599, and Wolfrum, in: Fleck (ed.), Handbook of Humanitarian Law in Armed Conflict, p. 534, state that the war crime contained in Art. 147 GC IV refers to breaches of Arts. 45 and 49 GC IV.

(2) The deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

As has been indicated above, this part of Art. 8 (2) (b) (viii) ICC Statute is a mere repetition of Art. 8 (2) (a) (vii). Thus, the case law quoted and the conclusions stated under the latter section also apply to this offence. In sum, the following points are the main elements:

- The wording of the offence refers only to "population of the occupied territory". Therefore, the nationality of the victims seems to be of no relevance. The terms "parts of the population" appears to require that the deportation or transfer must include more than just one person.

- The displacement of all or parts of the population of the occupied territory is only lawful under the conditions set out in Art. 49 (2) GC IV (*"Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."*)

  Therefore, only the security of the population of the occupied territory or imperative military reasons can justify total or partial evacuation of an occupied area.

  With respect to the security interests of the evacuated population the ICRC Commentary indicates:

  > *"If [...] an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right and, subject to the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge."*[14]

  With respect to evacuations justified on the basis of imperative military reasons the ICRC Commentary refers to situations *"when the presence of protected persons in an area hampers military operations"* and overriding military considerations make the evacuation imperative.[15] Evacuations permitted under these circumstances may only take place within the bounds of the occupied territory, except when for material reasons this is impossible.

- The fact that Art. 49 (2) GC IV requires that protected persons shall be transferred back to their homes as soon as hostilities in the area in question have ceased shows the temporary character of a permitted evacuation.

- An additional element for determining the lawfulness may be found in Art. 49 (3) GC IV. In accordance with that provision

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14 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 147, p. 280.
15 *Ibid.*

"[t]he Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated."[16]

N.B.: A special ruling for children is contained in Art. 78 AP I:

"1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.
2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity."

cc) Remarks concerning the mental element

With respect to the mental element, in several post Second World War Trials dealing with deportation, the accused were found guilty on the basis that they committed the offences *"wilfully and knowingly"*.[17]

The ICTY Prosecution stated that:

"as part of the mens rea *requirement, the accused or a subordinate must have been aware of, or wilfully blind to, the facts that would render the deportation or transfer unlawful."*[18]

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[16] This element was also stressed in the *A. Krupp Case* by the U.S. Military Tribunal which adopted the following statement of Judge Phillips in his concurring opinion in the *Milch Trial* (U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, pp. 45-46, 55-56), which was based on the interpretation of Control Council Law No. 10: *"[D]eportation becomes illegal [...] whenever generally recognized standards of decency and humanity are disregarded."*, *A. Krupp Trial*, U.S. Military Court, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. X, pp. 144 *et seq.* (emphasis added).

[17] *Flick and Five Others Case*, U.S. Military Court, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, p. 3; *I.G. Farben Trial*, *ibid.*, vol. X, pp. 4 *et seq.*; *A. Krupp Case*, *ibid.*, pp. 74 *et seq.*

[18] ICTY, Pre-trial brief: elements of articles 2, 3, and 5 of the Tribunal Statute, *The Prosecutor v. Milan Kovacevic*, IT-97-24-PT, p. 16.

It seems that there are no additional requirements for the mental element besides those mentioned in Art. 30 of the ICC Statute.

Art. 8 (2) (b) (x) - Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons

Physical mutilation

1. Results from the sources

Material elements

(1) The perpetrator physically mutilated or caused physical mutilation upon a person.
(2) The person was in the power of an adverse Party (Party other than the one on which he depends).
(3) The conduct caused death or seriously endangered the [physical or mental] health.
(4) The conduct is unlawful (even with the consent of the victim) if it is not justified by the medical, dental or hospital treatment of the protected person concerned and not carried out in his interest, i.e. 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.

Mental element

(5) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The offence "physical mutilation" is derived in its essence from Art. 11 (2) (a) in connection with Art. 11 (4) AP I.

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

aa) Remarks concerning the material elements

Physical mutilation

The term "physical mutilation" or in some instances "mutilation" is used in several provisions of the GC (Arts. 13 (1) GC III, 32 GC IV, common Art. 3) and since in the AP (Arts. 11 (2) (a), 75 (2) (a) (iv) AP I, 4 (2) (b) AP II). No further definition is given. The ICRC Commentaries on these provisions consider this term as more or less self explanatory.[19]

The verb "to mutilate" is defined in the Cambridge International dictionary of English (1995) as to *"damage severely, esp. by violently removing a part"* (p. 933) and in the Oxford Advanced Learner's Dictionary (1992) as to *"injure, damage or disfigure somebody by breaking, tearing or cutting off a necessary part"* (p. 819). These definitions refer to an act of physical violence. Therefore, the terms "physical mutilation" in Art. 8 (2) (b) (x) and "mutilation" in Art. 8 (2) (c) (i) of the ICC Statute must be understood to have synonymous meanings.

The Commentary to the AP mentions in particular amputations and injury to limbs as examples of physical mutilations.[20] With respect to "justified" mutilation it states:

> *"However, there are some logical exceptions if the procedures are "justified in conformity with the conditions provided for in paragraph 1 [of Art. 11 AP I]", i.e., essentially, as we have seen, if they are conducive to improving the state of health of the person concerned.*
> *In this sense it is clear that some mutilations may be indispensable, such as the amputation of a gangrenous limb."*[21]

N.B.: There are no indications that the term "mutilation" as used for offences committed in an international armed conflict has a different meaning than in the context of a non-international armed conflict, thus in the case of Art. 8 (2) (c) (i) ICC Statute.

Person in the power of an adverse party

The personal field of application of this offence may be determined in accordance with Art. 11 AP I which uses the same terminology. According to the ICRC Commentary the notion "person in the power of an adverse party" encompasses mainly

> *"prisoners of war, civilian internees, persons who have been refused authorization to leave the territory of this adverse Party, and even all persons belonging to a Party to the conflict who simply find themselves in the territory of the adverse Party. The term 'territory of the adverse Party' is used here to mean the territory in which this Party exercises public authority de facto. However, enemy aliens need not necessarily have anything to do directly with the authorities: the simple fact of being in the territory of*

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19 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 32, pp. 233 *et seq.*: *"'Corporal punishment and mutilation'. - These expressions are sufficiently clear not to need lengthy comment. Like torture, they are covered by the general idea of "physical suffering". Mutilation, a particularly reprehensible and heinous form of attack on the human person [...]."*

20 Sandoz, in: Commentary on the AP, Art. 11, No. 478, p. 156.

21 Sandoz, in: Commentary on the AP, Art. 11, Nos. 479 *et seq.*, pp. 156 *et seq.*

the adverse Party, as defined above, implies that one is "in the power" of the latter. In other words, as specified in the commentary on the fourth Convention, the expression "in the power" should not necessarily be taken in the literal sense; it simply signifies that the person is in the territory under control of the Power in question. Finally, the inhabitants of territory occupied by the adverse Party are also in the power of this adverse Party."[22]

Neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest

This wording is directly derived from Art. 13 GC III and differs slightly from the terms of Art. 11 (1) AP I (*"which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty"*).

Up to now there is no case law specifying these notions. However, the following guidelines adopted by the World Medical Assembly[23] may be a tool for clarifying the terms:

"World Medical Association Regulations In Time Of Armed Conflict

1. Medical Ethics in time of armed conflict is identical to medical ethics in time of peace, as established in the International Code of Medical Ethics of the World Medical Association. The primary obligation of the physician is his professional duty; in performing his professional duty, the physician's supreme guide is his conscience.

a) Give advice or perform prophylactic, diagnostic or therapeutic procedures that are not justifiable in the patient's interest.

b) Weaken the physical or mental strength of a human being without therapeutic justification.

c) Employ scientific knowledge to imperil health or destroy life.

3. Human experimentation in time of armed conflict is governed by the same code as in time of peace; it is strictly forbidden on all persons deprived of their liberty, especially civilian and military prisoners and the population of occupied countries. [...]

RULES GOVERNING THE CARE OF SICK AND WOUNDED, PARTICULARLY IN TIME OF CONFLICT

A. 1. Under all circumstances, every person, military or civilian must receive promptly the care he needs without consideration of sex, race, nationality, religion, political affiliation or any other similar criterion.

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22 Sandoz, in: Commentary on the AP, Art. 11, No. 468, p. 153 (Footnote omitted).

23 Adopted by the 10th World Medical Assembly Havana, Cuba, October 1956, Edited by the 11th World Medical Assembly Istanbul, Turkey, October 1957 and Amended by the 35th World Medical Assembly Venice, Italy, October 1983, http://www.wma.net/e/policy/17-50_e.html.

2. Any procedure detrimental to the health, physical or mental integrity of a human being is forbidden unless therapeutically justifiable. [...]"

Cause death to or seriously endanger the health of such person or persons

The act or omission must cause death or seriously endanger the health or integrity" of the persons concerned. Art. 11 (4) AP I is more specific in referring to "physical or mental health" and to the person's integrity.

The wording of the ICC Statute emphasises that the health does not necessarily have to be affected by the act or omission, but it must be endangered.[24] In the absence of any case law, it is difficult to be more specific on this point. To know whether a person's health has or has not been seriously endangered is a matter of judgement and a tribunal should settle this on the basis not only of the act or omission concerned, but also on the foreseeable consequences having regard to the state of health of the person subjected to them.[25]

bb) Remarks concerning the mental element

There appears to be no case law on the mental element of this crime to date. However Art. 11 (4) AP I, which requires a *"wilful act or omission"*, and the Commentary thereof may be helpful to determine the mental element of this offence. Since there must be a wilful act or omission for it to be a grave breach, negligence is excluded. Moreover, the adjective "wilful" also excludes persons with an immature or greatly impaired intellectual capacity or persons acting without knowing what they are doing. On the other hand, the concept of recklessness, that is, the person in question accepts the risk in full knowledge of what he is doing, is included in the concept of wilfulness.[26]

Medical or scientific experiments

1. Results from the sources

Material elements

(1) The offence was committed by act or omission.
(2) The act or omission caused death or seriously endangered the physical or mental health or integrity of a person.
(3) The person was in the power of an adverse Party (Party other than the one on which he depends).
(4) Medical or scientific experiments are unlawful (even with the consent of the victim) if they are not justified by the medical, dental or hospital treatment of the protected person concerned and not carried out in his interest, i.e. 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

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[24] According to Sandoz, in: Commentary on the AP, Art. 11, No. 493, p. 159, the health must be *"clearly and significantly endangered"*.
[25] See also Sandoz, in: Commentary on the AP, Art. 11, No. 493, p. 159.
[26] Sandoz, in: Commentary on the AP, Art. 11, No. 493, p. 159.

circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

Mental element

(5) The act or omission was committed wilfully.

2. Commentary

a) Treaty reference of the war crime

The offence "Subjecting persons who are in the power of an adverse party to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons" is derived directly from Art. 11 (1), (2) and (4) AP I.

Art. 11 (1) and (2) (b) AP I deal with the protection of the *"physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty"* and addresses specifically medical or scientific experiments.

b) Legal basis

aa) Remarks concerning the material element

There is no relevant recent jurisprudence on special elements of this offence to date other than that quoted under the section Art. 8 (2) (a) (ii) specifically dealing with biological experiments.

However, one may refer to the relevant treaty provisions of the GC and AP I which contain the above-mentioned elements of this crime.

Art. 13 GC III states the following:

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

Art. 32 GC IV stipulates that:

> *"[...] This prohibition [of taking any measures of such a character as to cause the physical suffering or extermination of* ***protected persons in the sense of Art. 4 GC IV]*** *applies not only to murder, torture, corporal punishments, mutilation and* ***medical or scientific experiments not necessitated by the medical treatment of a protected person.***" (emphasis added).

Art. 11 AP I states that:

> *"(1) [...] it is prohibited to subject the persons described in this Article* ***[persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 of AP I]*** *to any* ***medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.***
> *2. It is,* ***in particular, prohibited*** *to carry out on such persons,* ***even with their consent:***
> *[...]*
> *(b)* ***medical or scientific experiments;***
> *[...]*
> *except where these acts are justified in conformity with the conditions provided for in paragraph 1.*
> *4. Any* ***wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends*** *and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol."* (emphasis added).

As in the case of biological experiments, the term "medical or scientific experiments of any kind" is not further specified. In one post Second World War Trial, the Tribunal found that the accused performed numerous medical experiments and it mentioned the following groups of experiments: *"castration experiments, sterilization experiments, experiments causing premature termination of pregnancy, experiments on artificial semination, experiments aimed at cancer research, other experiments [i.e. injections of hormones to women]".*[27]

With respect to the other elements "Person in the power of an adverse party", "Neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest" and "Cause death to or seriously endanger the health of such person or persons" see the section above on "Mutilation". In addition to the above cited "World Medical Association Regulations In Time Of Armed Conflict" and the basic moral, ethical and legal principles listed in the *Doctors' Trial*[28] dealing with medical experiments a more recent formulation of medical ethics for the specific problem of biomedical research may be

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27 The *Hoess Trial*, Supreme National Tribunal, Poland, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, pp. 14 *et seq.* See also the *Milch Trial*, U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, pp. 32 *et seq.* Allegations of responsibility for illegal experiments were made also in the *Trial of K. Brandt and Others* (The *Doctor's Trial*), *ibid.*, vol. I, pp. 11 et seq. (high-altitude experiments, freezing experiments, malaria experiments, mustard gas experiments, sulphanilamide experiments, bone, muscle and nerve regeneration and bone transplantation experiments, sea-water experiments, sterilization experiments, spotted fever experiments, poison experiments and in the *Trial of O. Pohl and Others* (U.S. Military Tribunal).

28 Cited in: U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, pp. 49-50. For the text see the section Art. 8 (2) (a) (ii) dealing with biological experiments in the first part of this study.

found in the "World Medical Association Recommendations Guiding Physicians In Biomedical Research Involving Human Subjects"[29]:

"[...] The purpose of biomedical research involving human subjects must be to improve diagnostic, therapeutic and prophylactic procedures and the understanding of the aetiology and pathogenesis of disease. [...] Because it is essential that the results of laboratory experiments be applied to human beings to further scientific knowledge and to help suffering humanity, the World Medical Association has prepared the following recommendations as a guide to every physician in biomedical research involving human subjects. They should be kept under review in the future. It must be stressed that the standards as drafted are only a guide to physicians all over the world. Physicians are not relieved from criminal, civil and ethical responsibilities under the laws of their own countries.

I. BASIC PRINCIPLES

1. Biomedical research involving human subjects must conform to generally accepted scientific principles and should be based on adequately performed laboratory and animal experimentation and on a thorough knowledge of the scientific literature.
2. The design and performance of each experimental procedure involving human subjects should be clearly formulated in an experimental protocol which should be transmitted for consideration, comment and guidance to a specially appointed committee independent of the investigator and the sponsor [...].
3. Biomedical research involving human subjects should be conducted only by scientifically qualified persons and under the supervision of a clinically competent medical person. The responsibility for the human subject must always rest with a medically qualified person and never rest on the subject of the research, even though the subject has given his or her consent.
4. Biomedical research involving human subjects cannot legitimately be carried out unless the importance of the objective is in proportion to the inherent risk to the subject.
5. Every biomedical research project involving human subjects should be preceded by careful assessment of predictable risks in comparison with foreseeable benefits to the subject or to others. Concern for the interests of the subject must always prevail over the interests of science and society.
6. The right of the research subject to safeguard his or her integrity must always be respected. Every precaution should be taken to respect the privacy of the subject and to minimize the impact of the study on the subject's physical and mental integrity and on the personality of the subject.
7. Physicians should abstain from engaging in research projects involving human subjects unless they are satisfied that the hazards involved are believed to be predictable. Physicians should cease any investigation if the hazards are found to outweigh the potential benefits.

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[29] Adopted by the 18th World Medical Assembly Helsinki, Finland, June 1964 and amended by the 29th World Medical Assembly, Tokyo, Japan, October 1975; 35th World Medical Assembly, Venice, Italy, October 1983; 41st World Medical Assembly, Hong Kong, September 1989; and the 48th General Assembly, Somerset West, Republic of South Africa, October 1996, http://www.wma.net/e/policy/17-c_e.html See also "International Ethical Guidelines for Biomedical Research Involving Human Subjects" prepared by the Council for International Organizations of Medical Sciences in collaboration with the World Health Organization, 1993.

8. [publication of the results of the research]
9. In any research on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort it may entail. He or she should be informed that he or she is at liberty to abstain from participation in the study and that he or she is free to withdraw his or her consent to participation at any time. The physician should then obtain the subject's freely-given informed consent, preferably in writing.
10. When obtaining informed consent for the research project the physician should be particularly cautious if the subject is in a dependent relationship to him or her or may consent under duress. In that case the informed consent should be obtained by a physician who is not engaged in the investigation and who is completely independent of this official relationship.
11. In case of legal incompetence, informed consent should be obtained from the legal guardian in accordance with national legislation. Where physical or mental incapacity makes it impossible to obtain informed consent, or when the subject is a minor, permission from the responsible relative replaces that of the subject in accordance with national legislation.
Whenever the minor child is in fact able to give a consent, the minor's consent must be obtained in addition to the consent of the minor's legal guardian.
12. The research protocol should always contain a statement of the ethical considerations involved and should indicate that the principles enunciated in the present Declaration are complied with.

II. MEDICAL RESEARCH COMBINED WITH PROFESSIONAL CARE (Clinical Research)

1. In the treatment of the sick person, the physician must be free to use a new diagnostic and therapeutic measure, if in his or her judgement it offers hope of saving life, re-establishing health or alleviating suffering.
2. The potential benefits, hazards and discomfort of a new method should be weighed against the advantages of the best current diagnostic and therapeutic methods.
3. In any medical study, every patient - including those of a control group, if any - should be assured of the best proven diagnostic and therapeutic method. This does not exclude the use of inert placebo in studies where no proven diagnostic or therapeutic method exists.
4. The refusal of the patient to participate in a study must never interfere with the physician-patient relationship.
5. If the physician considers it essential not to obtain informed consent, the specific reasons for this proposal should be stated in the experimental protocol for transmission to the independent committee (I, 2).
6. The physician can combine medical research with professional care, the objective being the acquisition of new medical knowledge, only to the extent that medical research is justified by its potential diagnostic or therapeutic value for the patient.
[...]"

bb) Remarks concerning the mental element

In the *K. Brandt Case* (1947) the indictment used the terms *"unlawfully, wilfully, and knowingly committed war crimes [...] involving medical experiments"*[30]. There appears to be no judgement which clearly specifies the required mental element, however Art. 11 (4) AP I, which requires a *"wilful act or omission"*, and the Commentary thereof may be helpful to determine the mental element of this offence. Since there must be a wilful act or omission for it to be a grave breach, negligence is excluded. Moreover, the adjective "wilful" also excludes persons with an immature or greatly impaired intellectual capacity or persons acting without knowing what they are doing. On the other hand, the concept of recklessness, that is, the person in question accepts the risk in full knowledge of what he is doing, is included in the concept of wilfulness.[31]

Art. 8 (2) (b) (xiii) - Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war

1. Results from the sources

Material elements

(1) The perpetrator committed an unlawful act causing destruction or seizure of property of the adverse Part.
(2) The destruction or seizure is not imperatively demanded by the necessities of war.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The wording of this offence is directly derived from Art. 23 (g) Hague Regulations. The Hague Regulations contain an extensive and detailed law for the protection of enemy property. Since Art. 154 GC IV stipulates:

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30 U.S. Military Tribunal, in: Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, vol. I, pp. 11 *et seq.*; the same formula was used in the indictment in the *Milch Trial*, U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, p. 28. In this case Judge Musmanno, said in a concurring opinion with respect to medical experiments: *"In order to find Milch guilty on this count of the indictment, it must be established that - 1. Milch had knowledge of the experiments; 2. That, having knowledge, he knew they were criminal in scope and execution; 3. That he had this knowledge in time to act to prevent the experiments; 4. That he had the power to prevent them."*, U.S. Military Tribunal, 1947, in: Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, vol. II, p. 856. These statements were made as to the responsibilities of a high commander.

31 Sandoz, in: Commentary on the AP, Art. 11, No. 493, p. 159.

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

both the Hague Regulations and the relevant provisions of the 1949 Geneva Conventions must be taken into account for the interpretation of this offence, mainly the determination of what constitutes a conduct which is unlawful under international law. This war crime concerns all kinds of enemy property.

While the destruction of property during the conduct of hostilities is more specifically dealt with under other provisions of Art. 8 (2) (b) of the ICC Statute, there is a certain overlapping of this offence with Art. 8 (2) (a) (iv) - Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, especially concerning destruction of property. While the notion of "appropriation" seems to be quite well defined, this is not the case with the term "seizure". Considering the various definitions given to the notion of "seizure", the terms "seizure" and "appropriation" seem to have different meanings. With respect to "destruction", there are no indications that the term must be interpreted in a different way for these two offences. However, the offence under Art. 8 (2) (b) (xiii) seems to have a more general scope than Art. 8 (2) (a) (iv) by covering also the law on the conduct of hostilities as contained in AP I and reflected in other crimes under this Statute. Besides, the threshold for constituting a war crime is slightly different: in the case of Art. 8 (2) (a) (iv) the destruction/appropriation must be "extensive" and "not justified by military necessity and carried out unlawfully and wantonly" while Art. 8 (b) (xiii) criminalises destruction/seizure not imperatively demanded by the necessities of war[32].

b) Legal basis

aa) Remarks concerning the material element of this offence

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

- Destruction of property can be committed by a large range of actions. The following acts may constitute "destruction": *inter alia* to set fire to property, to destroy, pull down, mutilate or damage (cf. post Second World War Trials).

- Property that cannot lawfully be seized obviously cannot lawfully be destroyed.

- Both private and public property are protected by specific provisions (Art. 53 GC IV, post Second World War Trials, Hague Regulations).

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[32] With respect to Art. 23 (g) the Court in the *F. Holstein and twenty-three others case* stated that its *"careful phraseology is usually interpreted to mean that 'imperative demands of the necessities of war' may occur only in the course of active military operations."*, Permanent Military Tribunal at Dijon, France, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, p. 30.

- In general, the lawfulness of destruction and seizure is dependent of the necessities of war (ICC Statute, Arts. 34, 50 GC I, Art. 51 GC II, Arts. 53, 57, 147 GC IV, Arts. 23 (g), 52 Hague Regulations, post Second World War Trials, the ICTY Prosecution with various formulations). However, many other rules contained especially in the GC and AP I regulating the conduct of hostilities define a specific threshold determining the lawfulness of destruction/seizure. Therefore, it is difficult to formulate material elements as a general rule which would apply to all possible cases of destruction or seizure which would be prohibited.

(1) Destruction

Until now, there have been no findings by the ad hoc Tribunals on this offence.

The ICTY Prosecution in the case of *The Prosecutor v. Milan Kovacevic*[33] considered that the following constituted the material elements of "extensive destruction and/or appropriation of property, not justified by military necessity carried out unlawfully and wantonly" (see Art. 8 (2) (a) (iv) ICC Statute):

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

In the case of *The Prosecutor v. Dario Kordic and Mario Cerkez* it defined the specific elements in the following terms:

- The occurrence of extensive destruction of property;
- The destruction was not justified by military necessity;
- The property destroyed was protected property pursuant the Geneva Conventions.[34]

In the same case it defined the following as the specific elements of the offence "wanton destruction or devastation" under Art. 3 of the ICTY Statute:

- The occurrence of destruction or devastation of property;
- The destruction or devastation of property was not justified by military necessity.[35]

Under this offence the ICTY Prosecution in the above cited case of *The Prosecutor v. Milan Kovacevic* dealing with wanton destruction or devastation of cities, towns, or villages addressed specifically Art. 23 (g) of the 1907 Hague Regulations. It stated that

> *"[a]ny destruction or devastation of cities, towns or villages that occurred during active military operations must be required by military necessity in that this*

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33 ICTY, Prosecutor's pre-trial brief: elements of articles 2, 3, and 5 of the Tribunal Statute, IT-97-24-PT, p. 16.

34 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 46.

35 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 49.

destruction or devastation is closely connected with the overcoming of the enemy forces. The U.S. Army's 1956 Law of Land Warfare, *interpreting Article 23 (g) of the 1907 Hague Regulations, stipulates that '[d]evastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army.' (United States Army, Law of Land Warfare (GPO: 1956), para. 56).'*[36]

As has been pointed out above, there are no indications that the term "destruction" has a different meaning under Art. 8 (2) (b) (xiii) than under Art. 8 (2) (a) (iv). Thus, the case law of several post Second World War Trials as well as the provisions of the GC and Hague Regulations already mentioned under the latter section and the conditions set forth in these provisions must be considered in order to determine the elements of this crime. In addition to the cases already cited, the following trial addresses more specifically the problem of 'scorched earth' policy under this offence:

In the *W. List and others case*, one accused was specifically charged with *"the wanton destruction of cities, towns and villages, [...] and the commission of other acts of devastation not warranted by military necessity, in the occupied territories".*[37] The acts were committed in his retreat from Finland to Western Norway. The accused understood that the hostile army was right behind him, and he ordered complete devastation so that there would be nothing to assist the hostile army in its pursuit of him. He was wrong. The enemy army was not in immediate pursuit of him, it was several days behind him and there was plenty of time for him to escape with his troops. Nevertheless, he carried out the 'scorched earth' policy which provided the basis for this charge of the indictment. The Tribunal found with respect to the facts the following:

"Villages were destroyed. Isolated habitations met a similar fate. Bridges highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication and transport facilities was had. [...] The destruction was as complete as an efficient army could do it. [...] While the Russians did not follow up the retreat to the extent anticipated, there are physical evidences that they were expected to do so. [...] there are mute evidences that an attack was anticipated."[38]

As to the legal problems the Tribunal held:

"There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the

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36 ICTY, Prosecutor's pre-trial brief: elements of articles 2, 3, and 5 of the Tribunal Statute, *The Prosecutor* v. *Milan Kovacevic*, IT-97-24-PT, p. 20. For the specific elements of "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity", see p. 19.

37 U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, pp. 35 *et seq.*

38 *Ibid.*, p. 68.

subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist."[39]

More specifically addressing Art. 23 (g) of the 1907 Hague Regulations the Tribunal held:

"The Hague Regulations prohibited 'The destruction or seizure of enemy property except in case where this destruction or seizure is urgently required by the necessities of war.' Article 23 (g). The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exceptions contained in Article 23 (g). We are not called upon to determine whether urgent military for the devastation and destruction [...] actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. [...]"[40]

N.B.: This finding of the post Second World War Tribunal must be read nowadays specifically in the context of Art. 54 (5) AP I, which reads as follows

"In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity."

As has been indicated in the *List and others case*, 'scorched earth' policies exercised by an Occupying Power withdrawing from occupied territory were judged legitimate if required by imperative military necessity. Art. 54 AP I changes that situation as regards objects indispensable to the survival of the civilian population: In the case of imperative military necessity a belligerent Power may in an extreme case even destroy these objects in that part of its own territory which is under its control. On the other hand, it may not carry out such destruction in the part of its territory which is under enemy control. In other words, an occupation army which is withdrawing may, if military operations render it absolutely necessary, carry out destructions (bridges, railways, roads, airports, ports etc.) with a view to preventing or slowing down the advance of enemy troops, but may not destroy indispensable objects such as supplies of foodstuffs, crops ripe for harvesting, drinking water reservoirs and water distribution systems or remove livestock. Any "scorched earth" policy carried out by an Occupying Power, even when withdrawing from such territory, must not affect such objects.

Besides, as has been pointed out above, the interpretation of this offence in Art. 8 (2) (b) (xiii) has to take into account the crimes relating to destruction of property as listed in other parts of Art. 8 (b) of the Statute, which set up specific conditions for the lawfulness of destructions.

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39 *Ibid.*, pp. 68 *et seq.*
40 *Ibid.*, p. 69.

2) Seizure

There are no provisions in the treaties of international humanitarian law which specifically clarify the notion of "seizure of property".

The ICRC Commentary states in this regard:

> *"There is a distinction in law between seizure and requisition. Seizure applies primarily to State property which is war booty; requisition only affects private property. There are, however, certain cases mentioned in Article 53, paragraph 2, of the Hague Convention in which private property can also be seized; but such seizure is only sequestration, to be followed by restitution and indemnity, whereas requisition implies a transfer of ownership."*[41]

However, it has to be indicated that this choice of terminology is not necessarily shared in the literature. A review of leading international writers shows that there is no single meaning of the terms "seizure" and "requisition" and not always a clear distinction between these terms in the laws of armed conflict.[42] According to its legal context (e.g. occupation/military operations/sea prizes), the meaning and legal effect vary.

Particularly, the following rules contained in various instruments of international humanitarian law deal with specific acts of seizure/requisition and set up special conditions for their lawfulness or unlawfulness. As it follows from Art. 154 GC IV cited-above, the provisions of GC IV supplement Sections II and III of the Hague Regulations. Therefore, specific norms of the Hague Regulations - containing further restrictions - are also relevant for the determination of the lawfulness or unlawfulness of seizure.

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41 Pictet (ed.), Commentary I Geneva Convention, Geneva 1958, Art. 34, p. 296 (Fn. 2).

42 With respect to terminology the following different views may be found in the literature:

- seizure and requisition must be distinguished on the basis of the nature of the goods appropriated: articles susceptible of a direct military use are seized; articles not susceptible of a direct military use bit useful for the needs of the occupying or progressing army are requisitioned. As the interference with private rights is stronger in the second case, the legal conditions to effect a requisition are stricter (*e.g.* Greenspan, The Modern Law of Land Warfare, 1959, pp. 293 *et seq.*, 296, 300 *et seq.;* Von der Heydte, Voelkerrecht, vol. II, 1960, pp. 324 *et seq.*);
- the notion of seizure is confined to the war at sea, requisition to the war on land (*e.g.* Oppenheim/Lauterpacht, International Law, vol. II, 7th ed, 1952, pp. 407 *et seq.*, 474-476);
- seizure is linked to public property, requisition to private property (*e.g.* Fauchille, Traité de droit international public, vol. II, 1921, pp. 254 *et seq.*, 281 *et seq.*);
- requisition covers all acts of appropriation of articles for the needs of the army, seizure covers movable property taken as war booty (*e.g.* Woolsey, American Journal of International Law, 1943, p. 285);
- the difference between requisition and seizure is *ratione personae* and eventually *ratione materiae*: "Ratione personae, *seizure extends to the property of the State and that of private persons. Requisition, however, is limited to the property of private persons and local authorities in occupied territories.* Ratione materiae, *the emphasis in seizure and requisition is on movables but, in the case of requisition, the wording of Article 52 [Hague Regulations] is sufficiently wide to include immovables"* (*e.g.* Schwarzenberger, International Law - As Applied by International Courts and Tribunals, vol. II, The Law of Armed Conflict, 1968, p. 269, see also pp. 291 *et seq.*);
- requisition seems to be a technical term involving a legal regime, seizure being the concrete act of taking.

Public Movable Property

- Art. 53 Hague Regulations:
  "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
  All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

- Art. 56 Hague Regulations:
  "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
  All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

- Art. 4 (3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[43]

  "The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall, refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party."

- Art. 14 (1) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

  "Immunity from seizure, placing in prize, or capture shall be granted to:
  (a) cultural property enjoying the protection provided for in Article 12 [Transport under Special Protection] or that provided for in Article 13 [Transport in Urgent Cases];
  (b) the means of transport exclusively engaged in the transfer of such cultural property."

With respect to the protection of State archives and public records see Von Glahn, The Occupation of Enemy Territory ... A Commentary on the Law and Practice of Belligerent Occupation, 1957, pp. 183 *et seq.*

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[43] See also the recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999): esp. Arts. 9, 15.

Public Immovable Property

- Art. 55 Hague Regulations:
  "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. [...]"

Private Property

- Art. 46 Hague Regulations states that *"[...] private property [...] must be respected. Private property cannot be confiscated."*

- Art. 53 (2) Hague Regulations:
  "All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

- Protection of objects of personal use:
  Art 18 GC III (prisoners of war):
  "All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment. [...]
  Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.
  Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given [...].
  The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; [...]."

  Art. 97 GC IV (Internees):
  "Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. [...]
  Articles which have above all a personal or sentimental value may not be taken away. [...]
  On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt being given. [...]"

Property of aid societies, hospitals

- Art. 34 GC I rules on the requisition of real and personal property of aid societies and states:
  "The right of requisition recognized for belligerents by the laws and customs of war shall not be exercised except in case of urgent necessity, and only after the welfare of the wounded and sick has been ensured."

- Art. 57 GC IV:
  "The Occupying Power may requisition civilian hospitals only temporarily and only in cases of urgent necessity for the care of military wounded and sick, and then on condition that suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation.
  The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population."

In the *A. Krupp Trial* the Tribunal addressed one aspect of the legality of seizure under the Hague Regulations quoting from Garner, International Law and The World War, Vol. 2, footnote on p. 126:

"The authorities are all in agreement that the right of requisition as recognised by the Hague Convention is understood to embrace only such territory occupied and does not include the spoliation of the country and the transportation to the occupant's own country of raw materials and machinery for use in his home industries. [...] The Germans contended that the spoliation of Belgian and French industrial establishments and the transportation of their machinery to Germany was a lawful act of war under 23 (g) of the Hague Convention which allows a military occupant to appropriate enemy private property whenever it is 'imperatively demanded by the necessities of war". In consequence of the Anglo-French blockade which threatened the very existence of Germany it was a military necessity that she should draw in part on the supply of raw materials and machinery available in occupied territory. But ***it is quite clear from the language and context of Art. 23 (g) as well as the discussions on it in the Conference, that it was never intended to authorise a military occupant to despoil on an extensive scale the industrial establishments of occupied territory or to transfer their machinery to his own country for use in his home industries. What was intended merely was to authorise the seizure or destruction of private property only in exceptional cases when it was an imperative necessity for the conduct of military operations in the territory under occupation.*** *This view is further strengthened by Art. 46 which requires belligerents to respect enemy private property and which forbids confiscation, and by Art. 47 which prohibits pillage."*[44]

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[44] U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. X, pp. 136 *et seq.*

The Tribunal also rejected the Defence's contention that *"the laws and customs of war do not prohibit the seizure and exploitation of property in belligerently occupied territory, so long as no definite transfer of title was accomplished. [...] if, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and deprives him from lawfully exercising his prerogative as owner, it cannot be said that his property 'is respected' under Article 46 as it must be."*[45]

bb) Remarks concerning the mental element

In the case of *The Prosecutor v. Milan Kovacevic*[46] the Prosecution of the ICTY considered the following to constitute the mental element of "extensive destruction and/or appropriation of property, not justified by military necessity carried out unlawfully and wantonly" (see Art. 8 (2) (a) (iv) ICC Statute):

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

However, it seems questionable whether this special intent requirement applies also to the offence of "Destroying or seizing the enemy's property".

In the *Kordic and Cerkez Case*[47] the ICTY Prosecution defined the mental element of the offences "extensive destruction and/or appropriation of property, not justified by military necessity carried out unlawfully and wantonly" and "wanton destruction or devastation" in the following way:

- The destruction [or devastation] was committed wilfully.[48]

The *mens rea* required in the above-cited post Second World War cases is that the offence must be committed *"wilfully and knowingly"* , as was decided in the case of *Flick and Five others* (at p. 3 and ff.), the *I.G. Farben Trial* and the *A. Krupp Trial.*

With respect to the question of knowledge of facts and mistake of facts concerning military necessity see the above cited parts from the *W. List and others case* under the subsection "destruction".

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45 Ibid., p. 137.

46 ICTY, Prosecutor's pre-trial brief: elements of articles 2, 3, and 5 of the Tribunal Statute, IT-97-24-PT, p. 16.

47 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 46, 49.

48 In the *Simic and others case* the ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 35.

Art. 8 (2) (b) (xiv) - Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party

1. Results from the sources

Material elements

(1) The perpetrator declared abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the adverse party.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party" are directly derived from Art. 23 (h) Hague Regulations.

b) Legal basis

It appears that there is no case law defining the elements of this crime.

aa) Remarks concerning the material elements

The rule in Art. 23 (h) Hague Regulation was added in 1907 at the suggestion of two German delegates. The purpose of the provision according to one of its initiators was not limited to protecting corporeal property from confiscation but it had in view *"the whole domain of obligations, by prohibiting all legislative measures which in time of war, would place the subject of an enemy state in a position of being unable to enforce the execution of a contract by resort to the courts of the adverse party."*[49]

In other words, its object was to prohibit belligerents from depriving enemy subjects by legislation or otherwise of the means of enforcing their legal rights through resort to courts.

English and American authorities[50] have, however, placed a different interpretation on the meaning of Art. 23 (h) of the 1907 Hague Regulations and the matter has been the subject of much controversy.

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[49] Quoted in: Garner, American Journal of International Law 1919, p. 24.

[50] See also in this context, F.A. Campbell, in: Politis, Revue générale de droit international public 1911, pp. 253 *et seq.* Additional references to the Anglo-American interpretation may be found in Garner, American Journal of International Law 1919, p. 25, Fn. 10.

One commentator describes this controversy as follows:

> *"A serious academic controversy has centered for several decades around the provisions of Articles 23-h of the 1907 Hague Regulations [...]. This sentence has been interpreted to mean that enemy aliens could not be forbidden access to the courts of the belligerent nation in which they resided, while others have asserted that the provision is simply an instruction to the commanders of occupying forces in enemy territory. The present writer's opinion coincides with the prevailing Anglo-American interpretation which regards the sentence as a mere prohibition laid down specifically for the commander of a force of occupation against the exclusion of the inhabitants of an occupied area from the courts of the territory concerned. The governing case for this point of view is Porter v. Freudenberg (Great Britain, Court of Appeal, 1915) in which it was held that Article 23-h*
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> > ... is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights ... [quoted in Garner, Law, I, 120 ...]
>
> *Continental writers on international law have disagreed strongly with this 'narrow' view and have maintained that the provision also refers to the standing of enemy aliens in the courts of a belligerent country. Regardless of the merits of these opposing attitudes, it can be stated definitely that the indigenous courts cannot be used by the inhabitants of an occupied territory to sue the occupant, even in the case of contracts entered into between such inhabitants and the occupation authorities. Owing to his military supremacy and his alien character, an occupant is not subject to the laws or to the courts of the occupied enemy state, nor have native courts jurisdiction over members of the occupying forces."*[51]

A further indication of what constitutes the material elements may be found in Oppenheim's treatise on international law:

> *"[...] the British and American interpretation of Article 23 (h) of the Hague Regulations is that is prohibits an occupant of enemy territory from declaring extinguished, suspended, or unenforceable in a court of law the rights and the rights of action of the inhabitants; and Article 43[*[52]*] provides that the occupant must respect, unless absolutely prevented, the laws in force in the country. But an occupant may, where necessary set up military courts instead of the ordinary courts; and in case, and in so far as, he permits the administration of justice by the ordinary courts, he may nevertheless, so far as it is necessary for military purposes, or for the maintenance of public order and safety, temporally alter the laws, especially the Criminal Law, on the basis of which justice is administered as well as the laws regarding procedure. Moreover, in the exceptional cases in which the law of the*

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51 Von Glahn, The Occupation of Enemy Territory ... A Commentary on the Law and Practice of Belligerent Occupation, 1957, p. 108 (footnotes omitted). With respect to the question of the power, or lack of power, of indigenous courts to enforce lawful orders of an occupant and the problem of whether such courts have the right to review legislative acts of the occupant with respect to their validity under the Hague Regulations, see *ibid.*, pp. 109 *et seq.*

52 *"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."*

occupied State is such as to flout and shock elementary conceptions of justice and of the rule of law, the occupying State must be deemed entitled to disregard it. [...] There is no doubt that an occupant may suspend the judges as well as other officials. However, if he does suspend them, he must temporarily appoint others in their place. If they are willing to serve under him, he must respect their independence according to the laws of the country. He has, however, no right to constrain the courts to pronounce their verdicts in his name, although he need not allow them to pronounce verdicts in the name of the legitimate Government."[53]

Continental writers almost without exception have expressed themselves or assumed that the German interpretation referred to above is the correct one. As an example, Sieveking, discussing the force of Art. 23 (h) before the International Law Association at its meeting in 1913, may be quoted:

"[...] there can be no doubt whatever as to the meaning of this Article: an alien enemy shall henceforth have a persona in judicio standi in the courts of the other belligerent for all his claims, whether they originated before or during the war; his claim shall henceforth no longer be dismissed or suspended on account of his being an alien enemy; he shall be entitled to a judgment on the merits of the case, and this judgment shall be immediately enforceable. It has been argued that this article merely conveys instructions to officers commanding in the field and in no way touches the dealings of the Home Government and the law at home. If this were so it would mean that the German delegates proposed an article devoid of any meaning."[54]

With respect to criminal laws and courts handling criminal cases Art. 64 GC IV gives further guidance:

"*The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.*

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53 Oppenheim, International Law. A Treatise, Vol. II, 7th ed., 1952 (edited by Lauterpacht), pp. 445 *et seq.* He describes the development of the *Persona standi in judicio* on Enemy Territory in the following terms:

"Formerly the rule prevailed everywhere that an enemy subject had no persona standi in judicio, *and was, therefore* ipso facto *by the outbreak of war, prevented from either taking of defending proceedings in the courts. This rule dated from the time when war was considered such a condition between belligerents as justified hostilities by all the subjects of one belligerent against all the subjects of the other [...]. Since the rule that enemy subjects are entirely ex lege had everywhere vanished, the rule that they might not take or defend proceedings in the courts had in many countries [...] likewise vanished before the First World War.",*

ibid., p. 309.

54 Quoted in: Garner, American Journal of International Law 1919, p. 24. Other writers supporting the continental interpretation are *inter alia*: Bonfils, Ullmann (Völkerrecht, 2nd ed., 1908, p. 474), Wehberg, de Visscher, Politis (Revue générale de droit international public 1911, pp. 256 *et seq.*), Despagnet, Kohler, Strupp, Noldeke, and Théry, for the references see Garner, American Journal of International Law 1919, p. 25, Fn. 10.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

However, the controversial question of civil and commercial courts has not been mentioned in the GC[55] or any other more recent instrument of international humanitarian law.

With respect to Art. 64 (1) 2nd sentence the ICRC Commentary points out:

"A. 'The rule'. - Owing to the fact that the country's courts of law continue to function, protected persons will be tried by their normal judges, and will not have to face a lack of understanding or prejudice on the part of people of foreign mentality, traditions or doctrines.
The continued functioning of the courts of law also means that the judges must be able to arrive at their decisions with complete independence. The occupation authorities cannot therefore, subject to what is stated below, interfere with the administration of penal justice or take any action against judges who are conscientiously applying the law of their country.
B. 'Reservations'. - There are nevertheless two cases - but only two - in which the Occupying Power may depart from this rule and intervene in the administration of justice.
1. [...] the occupation authorities have the right to suspend or abrogate any penal provisions contrary to the Convention, and in the same way they can abolish courts or tribunals which have been instructed to apply inhumane or discriminatory laws.
2. The second reservation is a consequence of 'the necessity for ensuring the effective administration of justice', especially to meet the case of the judges resigning, as Article 56 gives them the right to do for reasons of conscience. The Occupying Power, being the temporary holder of legal power, would then itself assume responsibility for penal jurisdiction.
For this purpose it may call upon inhabitants of the occupied territory, or on former judges, or it may set up courts composed of judges of its own nationality; but in any case the laws which must be applied are the penal laws in force in the territory."[56]

bb) Remarks concerning the mental element

It seems that there are no specific requirements for the mental element besides those already contained in Art. 30 of the ICC Statute.

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55 See in this respect Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 64, pp. 335 *et seq.*
56 *Ibid.*, p. 336 (footnote omitted).

Art. 8 (2) (b) (xv) - Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war

1. Results from the sources

Material elements

(1) The perpetrator compelled by pressure or coercion a national of an adverse party to take part in the operations of war directed against their own country.
(2) The compelled acts were not permissible as prisoner of war or civilian labour, as defined under international humanitarian law.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The terms "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" are directly derived from Art. 23 2nd sentence Hague Regulations.

b) Legal basis

Neither the ICTY nor the ICTR has rendered any decision on this war crime to date. However, certain other sources may be helpful in interpreting various elements of this offence. Since this war crime is closely linked to the war crime of Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power in Art. 8 (2) (a) (v), the case law cited under that section must be taken into account.

aa) Remarks concerning the material element

As concerns the notion of "compelling", in the *Weizäcker and Others Case,* the U.S. Military Tribunal found in 1949 that:

> *"it is not illegal to recruit prisoners of war who volunteer to fight against their own country, but pressure or coercion to compel such persons to enter into the armed services obviously violates international law."*[57]

In the following post Second World War Trials the accused were found guilty for war crimes:

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[57] A.D., vol. 16, 1949, p. 357.

- In the *Wagner case* the Court ruled on "incitement" to enrol in the German Forces. It based itself on French law, i.e. Art. 75 (4) of the French Penal Code: *"Any Frenchman who, in time of war, incites soldiers or sailors to pass into the service of a foreign power, facilitates such an act, or carries out enrolments for the benefit of a power at war with France"* is guilty of treason.[58]

- In the *Milch case*, the accused was found guilty for the participation in *"plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations [...]."* These acts were considered contrary to the 1907 Hague Regulations and the 1929 Geneva Convention relative to the Treatment of Prisoners of War.[59]

- In the *T. Koschiro case*, prisoners of war were employed on prohibited work in that they built ammunition dumps or depots, that being contrary to Art. 6 of the 1907 Hague Regulations and Art. 31 of the 1929 Geneva Convention relative to the Treatment of Prisoners of War.[60]

- Dealing with forced labour of civilians, the tribunal stated in the *v. Leeb and others case*:

  > *"Under the articles above quoted [Arts. 43, 46, 47, 49, 50, 53 of the 1907 Hague Regulations], it is apparent that the compulsory labour of the civilian population for the purpose of carrying out military operations against their own country was illegal."*[61]

  It added:

  > *"Under the same articles the compulsory recruitment from the population of an occupied country for labour in the Reich was illegal."*[62]

  With respect to labour of prisoners of war, in the same case, the tribunal found that (compulsory) employment of prisoners of war in the armament industry was illegal - but that not all of the accused knew that it was going to take place when they ordered those prisoners to be transferred to Germany.[63]

N.B.: Arts. 49-57 GC III, in particular Art. 50 and 52 deal with specifically with permitted and prohibited labour for prisoners of war. In this respect Art. 52 GC III prohibits labour which is unhealthy or dangerous in nature. For example, the removal of mines or similar devices is considered as dangerous labour under this provision. Art. 51 GC IV sets forth conditions for permitted labour of civilians.

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58 Permanent Military Tribunal at Strasbourg, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. III, pp. 23 *et seq.* (40, 41, 50 *et seq.*).

59 U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, p. 28.

60 Netherlands Temporary Court-Martial, Macassar, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XI, p. 2.

61 U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XII, p. 93.

62 *Ibid.*

63 *Ibid.*, p. 89.

bb) Remarks concerning the mental element

In the *Milch Case* the accused was charged with *"unlawfully, wilfully, and knowingly"* participating in *"plans and enterprises involving the use of prisoners of war in war operations and work having a direct relation with war operations"*. He was found guilty in this respect.[64]

It seems that there are no additional requirements for the mental element besides those already contained in Art. 30 of the ICC Statute.

Art. 8 (2) (b) (xvi) - Pillaging a town or place, even when taken by assault

1. Results from the sources

Material elements

(1) The perpetrator appropriated or obtained against the owner's will [by force] [either through taking advantage of the circumstances of armed conflict or through abuse of military strength] private or public property in a town or a place.
(2) The conduct was not permissible as lawful acts of, in particular, seizure, levying contributions, requisitions or taking war booty.

Mental element

(2) The act is committed wilfully with the specific intention [of unjustified gain] [to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner].

2. Commentary

a) Treaty reference of the war crime

The term "Pillaging a town or place, even when taken by assault" is derived directly from Art. 28 of the 1907 Hague Regulations.

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[64] U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, pp. 27 *et seq.*

b) Legal basis

aa) Remarks concerning the material element of this offence

"Pillage" and the terms "plundering", "looting" and "sacking" are very often used synonymously. None has been defined adequately for the purposes of international law.

The ICTY Prosecution in the *Delalic case* considered that the following constituted the material elements of the offence "plunder of public or private property" as listed under Art. 3 (e) of the ICTY Statute:

- The accused must be linked to one side of the conflict.
- The accused unlawfully destroyed, took, or obtained any public or private property belonging to institutions or persons linked to the other side of the armed conflict.[65]

Later on in the *Kordic and Cerkez Case,* the ICTY Prosecution defined the elements in a different manner and mentioned only one specific material element:

- Public or private property was unlawfully or violently acquired.[66]

In the *Delalic case* in its judgement the ICTY specifically dealt with the war crime of plunder. It described in general terms the rules aimed at protecting property rights in times of armed conflict, without naming explicitly the elements of these offences. Nevertheless, these findings may give some guidance in the determination of the elements of the crime "Pillaging a town or place, even when taken by assault" as contained in the ICC Statute.

> *"[i]nternational law today imposes* ***strict limitations on the measures which a party to an armed conflict may lawfully take in relation to private and public property of an opposing party****. The* ***basic norms*** *in this respect, which form part of customary international law, are contained* ***in the Hague Regulations, articles 46 to 56*** *which are broadly aimed at preserving the inviolability of public and private property during military occupation. In relation to private property, the fundamental principle is contained in article 46, which provides that private property must be respected and cannot be confiscated. While subject to a number of well-defined restrictions, such as the right of an occupying power to levy contributions and make requisitions, this rule is reinforced by article 47, which unequivocally establishes that '[p]illage is forbidden'. Similarly, article 28 of the Regulations provides that '[t]he pillage of a town or place, even when taken by assault, is prohibited'."*[67]

> *"The principle of respect for private property is further reflected in the four Geneva Conventions of 1949. [Reference is made to Arts. 15 GC I, 18 GC II, 18 GC III] Likewise, article 33 of Convention IV categorically affirms that '[p]illage is prohibited'. It will be noted that this prohibition is of general application, extending*

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65 ICTY, Closing Statement of the Prosecution, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, A1-11.

66 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 50.

67 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, para. 587, p. 207 (emphasis added, footnotes omitted).

to the entire territories of the parties to a conflict, and is thus not limited to acts committed in occupied territories."[68]

In the following, the ICTY addressed the terminological question of whether the acts alleged in the Indictment [plunder of money, watches and other valuable property belonging to persons at the Celebici camp], if at all criminal under international law, constitute the specific offence of "plunder". It held:

"In this connection, it is to be observed that ***the prohibition against the unjustified appropriation of public and private enemy property*** *is general in scope, and* ***extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.*** *Contrary to the submissions of the Defence, the fact that it was acts of the latter category which were made the subject of prosecutions before the International Military Tribunal at Nürnberg and in the subsequent proceedings before the Nürnberg Military Tribunals* ***does not demonstrate the absence of individual criminal liability under international law for individual acts of pillage committed by perpetrators motivated by personal greed.*** *In contrast, when seen in a historical perspective, it is clear that the prohibition against pillage was directed precisely against violations of the latter kind. Consistent with this view, isolated instances of theft of personal property of modest value were treated as war crimes in a number of trials before French Military Tribunals following the Second World War. Commenting upon this fact, the United Nations War Crimes Commission correctly described such offences as "war crimes of the more traditional type.*

While the Trial Chamber, therefore, must reject any contention made by the Defence that the offences against private property alleged in the Indictment, if proven, could not entail individual criminal responsibility under international law, it must also consider the more specific assertion that the acts thus alleged do not amount to the crime of 'plunder'. In this context, it must be observed that the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'. Thus, whereas article 47 of the Hague Regulations and article 33 of Geneva Convention IV by their terms prohibit the act of 'pillage', the Nürnberg Charter, Control Council Law No. 10 and the Statute of the International Tribunal all make reference to the war crime of 'plunder of public and private property'. ***While it may be noted that the concept of pillage in the traditional sense implied an element of violence not necessarily present in the offence of plunder, it is for the present purposes not necessary to determine whether, under current international law, these terms are entirely synonymous. The Trial Chamber reaches this conclusion on the basis of its view that the latter term, as incorporated in the Statute of the International Tribunal, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for***

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[68] ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, para. 588, pp. 207 *et seq.* (footnotes omitted).

which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'."[69]

In sum the ICTY found the following:

- the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory; in both cases it entails individual criminal responsibility;
- the protection of property is subject to a number of well-defined restrictions, such as the right of an occupying power to levy contributions and make requisitions;
- the concept of pillage in the traditional sense implied an element of violence;
- the term plunder, as incorporated in the ICTY Statute, should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'.

As it follows from Art. 154 GC IV cited-above, the provisions of GC IV supplement Sections II and III of the Hague Regulations. Therefore, both the Hague Regulations and the relevant provisions of the 1949 Geneva Conventions must be taken into account for the interpretation of this offence, mainly the determination of what constitutes a conduct which is unlawful under international law.

The 1907 Hague Regulations postulate the principle of respect for private property and expressly prohibit any act of pillage (Arts. 28 and 47). Art. 28 of the 1907 Hague Regulations formally prohibits pillage of a town or place, even when taken by assault, whereas Art. 47 stipulates that *"[p]illage is formally forbidden."* The latter provision applies to all occupied enemy territory. A specific protection is given to cultural property in Art. 4 (3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

"The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall, refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party."[70]

According to Arts. 15 (1) GC I, 18 (1) GC II, 16 (2), 33 (2) GC IV protected persons, in particular sick or dead persons, shall be protected against pillage. The prohibition of pillage in Art. 33 GC IV more specifically applies to the entire territories of the parties involved in the conflict and to any person, without restriction. The ICRC Commentary to that provision states:

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69 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, paras. 590 *et seq.*, pp. 208 *et seq.* (emphasis added, footnotes omitted).

70 See also the recently adopted Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 March 1999): esp. Arts. 9, 15.

"This prohibition is general in scope. It concerns not only pillage through individual acts without the consent of the military authorities, but also organized pillage, the effects of which are recounted in the histories of former wars, when the booty allocated to each soldier was considered as part of his pay. Paragraph 2 of Article 33 is extremely concise and clear; it leaves no loophole. The High Contracting Parties prohibit the ordering as well as the authorization of pillage. They pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage. Consequently, they must take all the necessary legislative steps. The prohibition of pillage is applicable to the territory of a Party to the conflict as well as to occupied territories. It guarantees all types of property, whether they belong to private persons or to communities or the State. On the other hand, it leaves intact the right of requisition or seizure."[71]

Besides the right of requisition or seizure, weapons and military equipment of the enemy found on the battlefield may be lawfully taken as war booty.[72]

In an attempt to clarify the term pillage by examining historical examples, linguistic usage and military regulations, a commentator elaborated the following definition:

"(a) in a narrow sense, the unauthorized appropriation or obtaining by force of property [...] in order to confer possession of it on oneself or a third party;
(b) in a wider sense, the unauthorized imposition of measures for contributions or sequestrations, or an abuse of the permissible levy of requisitions (e.g. for private purposes), each done either through taking advantage of the circumstances of war or through abuse of military strength. In the traditional sense, pillage implied an element of violence. The notion of appropriation or obtaining against the owner's will (presumed or expressed), with the intention of unjustified gain, is inherent in the idea of pillage so that it is also perceived as a form of theft through exploitation of the circumstances and fortunes of war."[73]

The following cases from post Second World War Trials specifically refer to the above-cited rules of the 1907 Hague Regulations for the description of the material elements of plunder, pillage, spoliation, and exploitation. Although the elements of Art. 28 of the Hague Regulations are not specifically elaborated, the findings of the Tribunals may have an indicative value. With respect to terminology, the Tribunal in the *I.G. Farben Case* found that:

"the Hague Regulations do not specifically employ the term "spoliation", but we do not consider this matter to be one of legal significance. As employed in the indictment, the term is used interchangeably with the words "plunder" and "exploitation". [...] the term 'spoliation' [...] applies to the widespread and systematized acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or controlled of Nazi Germany during World War II. We consider that 'spoliation' is

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71 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 33, pp. 226 *et seq.*

72 See for example Oppenheim, International Law. A Treatise, Vol. II, 7th ed., 1952 (edited by Lauterpacht), pp. 401 *et seq.*

73 Steinkamm, Pillage, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 3 (1997), p. 1029.

synonymous with the word 'plunder' as employed in Control Council Law 10, and that it embraces offences against property in violation of the laws and customs of war [...]"[74]

Hence, it appears that the terms plunder, pillage, spoliation, exploitation were used interchangeably with the term appropriation.[75]

Therefore, the case law cited under the section Art. 8 (2) (a) (iv) - Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly describing the term "appropriation" may be a further indication of what constitutes pillage.

The following other cases from post Second World War Trials deal explicitly with pillage without giving further clarification:

In the *F. Holstein and others Case*[76] the accused were found guilty under Art. 221 of the French Code of Military Justice ("pillage committed in gangs by military personnel with arms or open force").

In the *P. Rust* Case[77], the accused was found guilty of abusive and illegal requisitioning of French property, a case of pillage in time of war, under Art. 221 of the French Penal Code of Military Justice and Art. 2 (8) of the Ordinance of 1944 for the prosecution of war criminals. These provisions give effect to Art. 52 of the Hague Regulations of 1907.

In the *H. Szabados Case*, the accused was found guilty of pillage (i.e. the looting of personal belongings and other property of the civilian evicted from their homes prior to their destruction) under Art. 440 of the French Penal Code.[78]

Art. 28 of the 1907 Hague Regulations was quoted for the actus reus in the *T. Sakai Case*.[79]

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74 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, vol. VIII, 1952, p. 1133.

75 See also Digest of Laws and Cases, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XIV, p. 126; Verri, Dictionary of the International Law of Armed Conflict, p. 85.

76 Permanent Military Tribunal at Dijon, France, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VIII, p. 31.

77 Permanent Military Tribunal at Metz, France, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, pp. 71 *et seq.*

78 Permanent Military Tribunal at Clermont-Ferrand, France, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. IX, pp. 60 *et seq.*

79 Chinese War Crimes Military Tribunal, Nanking, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XIV, p. 7.

bb) Remarks concerning the mental element of this offence

The ICTY Prosecution in the *Delalic case* considered that the following constituted the mental elements of the offence "plunder of public or private property" under Art. 3 (e) of the ICTY Statute:

- The destruction, taking, or obtaining by the accused of such property was committed with the intent to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner.

Later on in the *Kordic and Cerkez Case*[80] the ICTY Prosecution defined the mental element in a different manner:

- The property was acquired wilfully[81]

In the *H. Rauter* Case[82], the accused was found guilty of *"intentionally"* taking the necessary measures to carry out the systematic pillage of the Netherlands population.

Art. 8 (2) (b) (xxi) - Committing outrages upon personal dignity, in particular humiliating and degrading treatment

1. Results from the sources

Material elements of humiliating and degrading treatment

(1) The conduct of the perpetrator constituted an attack on human dignity and caused - either in the eyes of others or in the eyes of the victim - humiliation or debasement attaining a minimum level of severity.

Mental element of humiliating and degrading treatment

(2) The perpetrator acted wilfully.

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80 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 50.

81 In the *Simic and others case* the ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 35.

82 Netherlands Special Court, The Hague, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XIV, pp. 89 *et seq.*

2. Commentary

a) Treaty reference of the war crime

The term "outrages upon personal dignity, in particular humiliating and degrading treatment" is derived from Art. 75 (2) (b) AP I. Art. 85 (4) (c) AP I defines "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination" as grave breaches.

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR on the elements of this offence.

The wording of this crime suggests that humiliating and degrading treatment are simply examples of committing outrages upon personal dignity. The list is of course illustrative, as shown by the words "in particular".[83] The treatment in question must constitute an assault on the main purpose mentioned in this offence, namely a person's dignity. In this regard the ICTY Prosecution pointed out:

> *"The safeguarding of personal dignity was intended to be flexible enough to encompass any act or omission that degrades, humiliates, or attacks the integrity of the victim, including sexual integrity."*[84]

The provisions in the GC (common Art. 3 GC, Art. 95 GC IV) and AP (Arts. 75 (2) (b), 85 (4) (c) AP I, 4 (2) (e) AP II) which use this terminology do not give further clarifications. The ICTY Prosecution in the *Aleksovski Case*[85] referring to the ICRC Commentary on Art. 75 AP I described the essence of "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault" in the following way:

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83 The ICTY mentioned as another example any serious sexual assault falling short of actual penetration. It found that the prohibition *"embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity."*, ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 186, p. 73. Following these findings, the ICTY Prosecution considered as elements of sexual assault as a form of humiliating and degrading treatment:

1. Serious abuse of a sexual nature was inflicted upon the physical and moral integrity of the victim, by means of coercion, threat of force or intimidation, in a manner that is degrading and humiliating for the victim's dignity;
2. The acts or omissions were committed wilfully.

ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 53. The ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, *ibid.*, pp. 35, 56. See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor v. Miroslav Kvocka, Mlado Radic, Milojica Kos, Zoran Zigic*, IT-98-30-PT, pp. 45 *et seq.*

84 ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor v. Dragoljub Kunarac*, IT-96-23-PT, pp. 28 *et seq.*

85 ICTY, The Prosecutor's Closing Brief, *The Prosecutor v. Zlatko Aleksovski*, IT-95-14/I-PT, para. 56, p. 23.

"This refers to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts.
Such provisions are contained in the Conventions (common Article 3; Articles 14[86] and 52[87], Third Convention; Article 27[88], Fourth Convention)."[89]

The term "outrage" is defined in the Cambridge International Dictionary of English (1995) as a *"shocking, morally unacceptable and usually violent action"* (p. 1003).

aa) Remarks concerning the material element

It appears that there are no legal sources elaborating specifically on elements of committing outrages upon personal dignity up to now. However, it has to be emphasised that this offence is drafted in the same way as for non-international armed conflicts in Art. 8 (2) (c) (ii) ICC Statute. There are no indications that in the context of an international armed conflict different forms of conduct are criminalised than in the context of an internal armed conflict. Therefore, the case law of human rights bodies quoted under the section Art. 8 (2) (c) (ii) ICC is of relevance in this context, too.

However, there is some specific case law from the post Second World War trials which may be added:

- In the *K. Maelzer case* the accused was charged and convicted for exposing prisoners of war in his custody to acts of violence, insults and public curiosity in breach of Art. 2 (2) GC 1929.

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[86] Art. 14 GC III:
"Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.
Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires."

[87] Art. 52 (2) GC III:
"No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces."
See also in this respect Art. 95 (1) GC IV:
"The Detaining Power shall not employ internees as workers, unless they so desire. [...] [E]mployment on work which is of a degrading or humiliating character are in any case prohibited."

[88] Art. 27 GC IV:
"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."

[89] Pilloud/Pictet, in: Commentary on the AP, Art. 75, Nos. 3047 *et seq.*, p. 873.

Those prisoners were forced to march through the streets of Rome in a parade emulating the tradition of ancient triumphal marches.[90]

- In the *T. Chuichi and others case* the accused added, to ordinary acts of ill-treatment, the cutting off of hair and beard and forced a prisoner of war to smoke a cigarette. The prisoners of war were Indians of Sikh religion, which forbids them to have their hair or beard removed or to handle tobacco (Arts. 2, 3, 16, 46 (3), 54 GC 1929 + Art. 18 Hague Regulations 1907).[91]

- In the *M. Schmid Trial* the accused was convicted for having wilfully, deliberately and wrongfully participated in the maltreatment of a dead prisoner of war. His body was mutilated and a honourable burial was refused.[92]

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (b) (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

1. Treaty reference of the war crime

There is no single treaty reference containing all the different acts described in this war crime. The constituent parts of the crime may be found in a number of legal instruments. As the ICTY pointed out in the *Delalic case*:

> *"There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4 (2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4 (1) which states that all persons are entitled to respect for their person and honour. Moreover, article 76 (1) of Additional Protocol I expressly requires that women be protected from rape, forced prostitution and any other form of indecent assault. An implicit prohibition on rape and sexual assault can also be found in article 46 of the 1907 Hague Convention (IV) that provides for the protection of family honour and rights. Finally, rape is prohibited as*

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90 U.S. Military Commission, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XI, pp. 53 *et seq.*

91 Australian Military Court, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XI, pp. 62 *et seq.*

92 U.S. General Military Government Court, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XIII, pp. 151 *et seq.* See also the *J. Kikuchi, M. Mahuchi, T. Yochio, T. Takehiko* and *T. Tisato cases*, quoted *ibid.*, p. 152.

a crime against humanity under article 6 (c) of the Nürnberg Charter and expressed as such in Article 5 of the Statute.
There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape."[93]

The most relevant provisions of the GC and AP read as follows:

- Art. 27 (2) GC IV:
  "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

- Art. 75 (2) (b) AP I[94]:
  "outrages upon personal dignity, in particular [...] enforced prostitution [...]"

- Art. 76 (1) AP I[95]:
  "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."

2. Criminalised forms of conduct

a) Rape

aa) Results from the sources

Material elements

(1) The perpetrator committed an act of 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;
(2) by coercion or force or threat of force against the victim or a third person.

Mental elements

(3) The perpetrator acted wilfully.

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93 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, paras. 476 *et seq.*, pp. 172 *et seq. See also* ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, paras. 165 *et seq.*, pp. 65 *et seq.*

94 Describing the personal field of application, the ICRC Commentary points out that this provision *"applies to everybody covered by the article, regardless of sex"*, Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3049, p. 874.

95 Describing the personal field of application, the ICRC Commentary states: *"The rule applies quite generally and therefore covers all women who are in the territory of Parties involved in the conflict, following the example of Part II of the fourth Convention. In fact, the provision is not subject to any further specification, unlike most of the rules contained in Section III. Thus it applies both to women affected by the armed conflict, and to others; to women protected by the fourth Convention and to those who are not."*, Pilloud/Pictet, in: Commentary on the AP, Art. 76, No. 3151, p. 892.

bb) Commentary

(1) Remarks concerning the material elements

The material elements of rape as mentioned above are taken from the most recent decision of the ICTY in the *Furundzija Case*.[96] Analysing the national criminal legislation of a number of countries,[97] the Tribunal developed in this judgement the criteria set out by the ICTR in the *Akayesu Case*[98] and confirmed by the ICTY in the *Delalic Case*.[99]

In the *Delalic Case* the ICTY had defined the term rape in the following terms:

> *"The Trial Chamber draws guidance on this question from the discussion in the recent judgement of the ICTR, in the case of the Prosecutor v. Jean-Paul Akayesu (hereafter 'Akayesu Judgement') which has considered the definition of rape in the context of crimes against humanity. The Trial Chamber deciding this case found that there was no commonly accepted definition of the term in international law and acknowledged that, while 'rape has been defined in certain national jurisdictions as non-consensual intercourse', there are differing definitions of the variations of such an act. It concluded,*
>
> > that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. [...] The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed under circumstances which are coercive. [...]
>
> *This Trial Chamber agrees with the above reasoning, and sees no reason to depart from the conclusion of the ICTR in the Akayesu Judgement on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive."*[100]

The notion of "coercive" was addressed in the *Akayesu* Judgement in further detail:

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96 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 185, p. 73. See also the definition by the ICTY Prosecution quoted in that judgement (para. 174, p. 68): *"rape is a forcible act: this means that the act is 'accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression". This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.'"* (Footnote omitted).

97 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, paras. 180 *et seq.*, pp. *70 et seq.*

98 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, paras. 597 *et seq.*

99 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, paras. 176 *et seq.*, pp. 69 *et seq.*

100 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, paras. 478 *et seq.*, p. 173 (footnotes omitted).

"[C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence [...]."[101]

In the *Furundzija Case* the Trial Chamber noted the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act: this means that the act is

"accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression".[102]

The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict defined "rape" in the following way:

"'Rape' should be understood to be the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape.[103]"

In § 25, the report adds that

"[l]ack of consent or the lack of capacity to consent due, for example, to coercive circumstances or the victim's age, can distinguish lawful sexual activity from unlawful sexual activity under municipal law. The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime. In addition, consent is not an issue as a legal or factual matter when considering the command responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations. The issue of consent may, however, be raised as an affirmative defense as provided for in the general rules and practices established by the International Criminal Tribunal for the Former Yugoslavia".

(2) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

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101 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

102 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 174, p. 68.

103 Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22.06.98, § 24.

b) Sexual slavery

aa) Results from the sources

Material elements

(1) The perpetrator treated a person as chattel by exercising any or all of the powers attaching to the right of ownership, including sexual access through rape or other forms of sexual violence.

Mental elements

(2) The perpetrator acted wilfully.

bb) Commentary

(1) Remarks concerning the material elements

Adapting the first comprehensive and now the most widely recognised definition of slavery contained in the 1926 Slavery Convention, the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict defined "Sexual slavery" in the following way:

> *"[Sexual slavery] should be understood to be the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence.*
> *The crime of slavery does not require government involvement or State action, and constitutes an international crime whether committed by State actors or private individuals. Further, while slavery requires the treatment of a person as chattel, the fact that a person was not bought, sold or traded does not in any way defeat a claim of slavery."*[104]

The Special Rapporteur mentions the following examples:

> *"The 'comfort stations' that were maintained by the Japanese military during the Second World War [...], the 'rape camps' [...] [For example, see ICTY, Indictment of Gagovic and Others, IT-96-23-I (26 June 1996)], [...] situations where women and girls are forced into 'marriage', domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors."*[105]

(2) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

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[104] Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22.06.98, paras. 27 *et seq.*

[105] *Ibid.*, para. 30.

c) Enforced prostitution

aa) Results from the sources

Material elements

(1) The perpetrator imposed conditions of control over a person and coerced that person to engage in sexual activity.

Mental elements

(2) The perpetrator acted wilfully.

bb) Commentary

(1) Remarks concerning the material elements

There are only few legal sources clarifying the elements of "enforced prostitution". However, the following may be an indication.

- The ICRC Commentary on Art. 27 (2) GC IV describes the term "enforced prostitution" as *"i.e. the forcing of a woman into immorality by violence or threats".*[106]

- In one post Second World War Trial a Japanese accused who ran a club restaurant was charged with enforced prostitution and found guilty.[107] The actus reus was defined in Art. 1 (7) of the Statute Book Decree No. 44 of 1946 on War Crimes: *"Abduction of girls and women for the purpose of enforced prostitution."* The term "enforced" was specified as follows: *"[The women] had to take up residence in a part of the club shut off for that purpose and from which they were not free to move".* If they wished to quit they *"were threatened with Kempei (Japanese Military Police), which threats [...] were rightly considered as being synonymous with ill-treatment, loss of liberty and worse."* The threats were so serious that they were *"forced through them to give themselves to the Japanese visitors [...] against their will."*[108]

- The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict defined "enforced prostitution" in the following way:

  "Sexual slavery [...] encompasses most, if not all forms of forced prostitution. The terms 'forced prostitution' or 'enforced prostitution' [...] generally [refer] to conditions of control over a person who is coerced by another to engage in sexual activity."[109]

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106 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 27, p. 206.

107 *W. Awochi Case*, Netherlands Temporary Court-Martial at Batavia, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. XIII, p. 123.

108 *Ibid.*, p. 124.

109 Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22.06.98, para. 31.

She adds:

"As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery."[110]

(2) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

d) Forced pregnancy, as defined in article 7, paragraph 2 (f)

According to Art. 7 (2) (f) of the ICC Statute,

"'Forced pregnancy' means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."

Up to now, there is no specific case law on this crime as defined in the Statute.

e) Enforced sterilization

In some post Second World War Trials defendants were charged for acts of enforced sterilization in the context of medical experiments.[111] There are no further indications of the material elements in existing case law.

f) Any other form of sexual violence also constituting a grave breach of the Geneva Conventions

aa) Results from the sources

Material elements

(1) The perpetrator committed an physical or psychological act of a sexual nature upon a person under circumstances which are coercive.

Mental elements

(2) The perpetrator acted wilfully.

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[110] *Ibid.*, para. 33.

[111] The *Hoess Trial*, Supreme National Tribunal, Poland, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, p. 15. See also the *Trial of K. Brandt and Others* (The *Doctor's Trial*).

bb) Commentary

(1) Remarks concerning the material elements

The ICTR defined sexual violence in the context of crimes against humanity in the following terms:

> *"Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."*[112] and
> *"Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. [...] The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence [...]."*[113]

The UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict defined "Sexual violence" as:

> *"any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts."*[114]

(2) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

N.B.: The ICTR stressed that

> *"[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity."*[115]

The ICTY in the *Delalic case* followed this approach and pointed out

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112 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 598.

113 *Ibid.*, para. 688.

114 Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22.06.98, para. 21. It should be indicated that the last two forms of conduct may also fall under the crime of mutilation as contained in Art. 8 (2) (b) (x) of the Statute.

115 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, paras. 597 *et seq.*

"whenever rape and other forms of sexual violence meet the [...] criteria [of torture as described under Art. 8 (2) (a) (ii) - Torture or inhuman treatment, including biological experiments], then they shall constitute torture, in the same manner as any other acts that meet this criteria."[116]

The ICTR also held:

"Sexual violence falls within the scope of [...] "outrages upon personal dignity," set forth in Article 4 (e) of the [ICTR] Statute, and "serious bodily or mental harm," set forth in Article 2 (2) (b) of the [ICTR] Statute."[117]

The ICTY addressed in the *Furundzija Case* also the question of other serious sexual assault as also amounting to humiliating and degrading treatment. It held in this regard:

"As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing."[118]

Following these findings, the ICTY Prosecution considered sexual assault as amounting to humiliating and degrading treatment, if it has the following elements:

1. Serious abuse of a sexual nature was inflicted upon the physical and moral integrity of the victim, by means of coercion, threat of force or intimidation, in a manner that is degrading and humiliating for the victim's dignity;
2. The acts or omissions were committed wilfully.[119]

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116 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, para. 496, p. 179.

117 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 688.

118 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 186, p. 73.

119 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 53. The ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, *ibid.*, pp. 35, 56. See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor v. Miroslav Kvocka, Mlado Radic, Milojica Kos, Zoran Zigic*, IT-98-30-PT, pp. 45 *et seq.*

Art. 8 (2) (b) (xxvi) - Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities

1. Results from the sources

Material elements

(1) The perpetrator caused
  (a) the conscription or enlistment of a child into the national armed forces, or
  (b) used them to participate actively in hostilities.
(2) The child was under the age of fifteen years.

Mental elements

(3) The perpetrator acted wilfully.
(4) The perpetrator
  (a) knew or was aware that the child was under the age of fifteen years, or
  (b) was wilfully blind to the fact that the child was under the age of fifteen years.

2. Commentary

a) Treaty reference of the war crime

This offence is derived from Art. 77 (2) AP I which reads as follows:

> *"The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces."*

Similar wording is found under Art. 38 (2) and (3) of the 1989 UN Convention on the Right of the Child:

> *"States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.*
> States Parties *shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."*

b) Legal basis of the elements of crime

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

aa) Remarks concerning the material elements

Conscripting or enlisting

While Art. 77 (2) AP I contains the notion "recruiting", Art. 8 (2) (b) (xxvi) of the ICC Statute uses the terms "conscripting or enlisting". The notions are not further defined. The plain and ordinary meaning to be given to the terms suggest the following:

According to *The Oxford English Dictionary* "to recruit" means "to enlist new soldiers; to get or seek for fresh supplies of men for the army"[120]; "to enlist" is defined as "to enrol on the 'list' of a military body; to engage a soldier"[121]; and "to conscript" means "to compel to military service by conscription; to enlist compulsorily"; the term "conscription" is defined as "enrolment or enlistment (of soldiers)"[122].

Based on these explanations of the ordinary meaning of the terms, one may conclude that the notion of "to enlist" comprises both the act of recruiting and the act of conscripting. The terms used seem to encompass every act - formal or de facto - of including persons into the armed forces. As it has been pointed out in the ICRC Commentary on the corresponding provision for non-international armed conflicts

> *"[t]he principle of non-recruitment also prohibits accepting voluntary enlistment."*[123]

National armed forces

In the GC the term "armed forces" is not specifically defined. However, as the ICRC Commentary points out the expression "members of the armed forces" refers to all military personnel, whether they belong to the land, sea or air forces.[124]

In Art. 43 AP I the armed forces are defined in the following terms:

> *"1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.*

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120 The Oxford English Dictionary", Oxford, first published 1933, reprint 1978, vol. VIII, p. 277. According to the Cambridge International dictionary of English, 1995, the notion means "to persuade someone to become a new member of an organization, esp. the army", p. 1188, and according to The Concise Oxford Dictionary, 1994, it means "enlist (a person) as a recruit", p. 1004.

121 The Oxford English Dictionary", Oxford, first published 1933, reprint 1978, vol. III, p. 191. According to the Cambridge International dictionary of English, 1995, the notion means "to (cause to) join something, esp. the armed forces", p. 459, and according to The Concise Oxford Dictionary, 1994, it means "enrol (= enter one's name on a list, esp. as a commitment to membership) in the armed services", p. 389.

122 The Oxford English Dictionary", Oxford, first published 1933, reprint 1978, vol. II, p. 848. According to the Cambridge International dictionary of English, 1995, the notion means "to force someone by law to serve in one of the armed forces", p. 289, and according to The Concise Oxford Dictionary, 1994, it means "enlist by conscription" and "conscription" means "compulsory enlistment for State service, esp. military service", p. 243.

123 Junod, in: Commentary on the AP, Art. 4, No. 4557, p. 1380.

124 Pictet (ed.), Commentary III Geneva Convention, Geneva 1958, Art. 4, p. 51.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict."

Participate actively in hostilities

In contrast to the wording in Art. 77 (2) AP I "direct part in hostility" Art. 8 (2) (b) (xxvi) ICC Statute uses the terms "participate actively in hostilities". In the context of common Art. 3 GC and the respective provisions of AP II the ICTR found that **the term "direct part in hostilities" has evolved from the notion "active part in the hostilities"** of common Art. 3. The Tribunal concluded in this respect:

*"**These phrases** are so similar that, for the Chamber's purposes, they **may be treated as synonymous**."*[125]

In the ICRC Commentary the *travaux préparatoires* of Art. 77 (2) AP I are described as follows:

"The text refers to taking a 'direct' part in hostilities. The ICRC proposal did not include this word. Can this lead to the conclusion that indirect acts of participation are not covered? Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such."[126]

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date. Therefore, the mental element may be defined in accordance with Art. 30 of the ICC Statute.

With respect to the age of 15 a specific problem arises. It must be determined what level of knowledge the accused must have with regard to the age of the child. Must he/she know that the child is under 15 years old? Could he/she remain unpunished if he/she doesn't inquire the age?

In the case *Regina v. Finta*, the Court held in general that

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125 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 629 (emphasis added).
126 Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3187, p. 901.

"for war crimes, the Crown would have ***to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime.*** *That is to say the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right thinking people.*
Alternatively, *the* mens rea *requirement of [...] war crimes would be met* ***if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.*** *"*[127]

N.B.: Although touching a different context, a further indication may be derived from national case law on indecent assault on children or similar offences where the actus reus encompasses a certain age limit.

- UK: In *Regina v. Prince*[128], the jury found that the accused believed the victim's statement that she was eighteen and his belief was reasonable, for she looked very much older than sixteen. In fact, she was under sixteen and the accused therefore brought about the *actus reus* of the crime. He was not even negligent, let alone reckless or intentional as to the girl's age. In spite of his blameless inadvertence as to this important circumstance in the *actus reus*, the accused was convicted. Therefore, the reasonable belief that the victim is over a certain age limit is not a defence if he or she is in fact under it.[129]

- CH: with respect to offences requiring *dolus directus* or *dolus eventualis* the reasonable belief that the victim is over a certain age limit excludes the mental element;[130] with regard to Art. 187 (4) of the "Code pénal" which explicitly criminalises negligent conduct: *"L'auteur doit faire preuve d'une prudence accrue lorsque la victime présente un âge apparent proche de l'âge limite de protection: ce n'est que si des faits précis lui ont fait admettre que la personne avait plus de 16 ans qu'il ne sera pas punissable."*[131]

- France: with respect to an error of the actual age of the victim the accused must be acquitted if he proves the error and the error appears to be *"suffisamment plausible"*[132].

- U.S.: Loewy points out: *"'Statutory rape' is generally a strict liability offence [...] Thus, even an honest and reasonable mistake as to age (or mental capacity) will not serve to exculpate the defendant. E.g. S v. Superior Court of Pima County, 104 Ariz. 440, 454 P.2d 982 (1969). There is, however, some authority to the contrary."*[133]
  With respect to the crime of statutory rape, in LaFave/Scott[134] it is stated that the majority of states *"impose[s] strict liability for sexual acts with underage complainants."* (*Garnett v. State*, 332 Maryland. 571, 632 A.2d 797 (1993)). Under such a provision, a conviction may be obtained *"even when the defendant's judgment as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age."* (*Garnett v. State*, ibid.).

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127 ILR vol. 104, p. 363.
128 Law Reports 2 Crown Cases Reserved 154 (1875).
129 See Smith & Hogan, Criminal Law, 7th ed. 1995, pp. 72, 471.
130 Stratenwerth, Schweizerisches Strafrecht, BT I, 4th ed., 1993, p. 144.
131 Favre/Pellet/Stoudmann, Code pénal annoté, 1997, p. 383; Stratenwerth, *ibid.*
132 Pradel/Danti-Juan, Droit pénal spécial, 1995, p. 472. See also Merle/Vitu, Traité de droit criminel, Droit pénal spécial, 1982, p. 1514; Rassat, Droit pénal spécial, 1977, p. 474.
133 Loewy, Criminal Law, 2nd ed., 1987, pp. 63 *et seq.*
134 Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law, 1995, Pocket Part, p. 29.

- Germany: At least *dolus eventualis* is required. The accused is criminally responsible, if he did not know the age, but did not care about it. However, he/she must not have excluded the possibility that the victim was under the age limit. If he did not think at all about the age of the victim, there is no *dolus eventualis*. He/she must be acquitted.[135]

In sum, the picture of these examples is not uniform. Some countries accept a strict liability. Others require that the accused at least realised the possibility that the victim was under the age limit. However, the latter may be seen as the bottom line.

[135] Schoenke/Schroeder, Strafgesetzbuch, 25th ed., 1997, § 176, p. 1290.

Annex II

Paper prepared by the International Committee of the Red Cross on article 8, paragraph 2 (c), of the Statute of the International Criminal Court

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INTRODUCTION

It was agreed during the Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998, that a draft text on the elements of the crime of genocide, crimes against humanity and war crimes was to be prepared by the Preparatory Commission. In this respect, Article 9 of the Statute of the International Criminal Court (the "ICC Statute") states that the *"[e]lements of crimes shall assist the Court in the interpretation and application of Articles 6, 7, and 8. They shall be adopted by [...] the members of the Assembly of States Parties"*. This paper is intended to assist the Preparatory Commission in preparing the text on the elements of crime for Article 8 (2) solely by presenting relevant sources and indicating the results that emerge from these sources. It does not reflect any decision taken at a previous session of the Preparatory Commission. Part II deals exclusively with war crimes as listed in Article 8 (2) (c) of the ICC Statute.

The review of sources consisted in an exhaustive research and analysis of the relevant case law and international humanitarian law and human rights law instruments. As regards case law, a review of cases from the Leipzig Trials, from post Second World War trials, including the Nuremberg and Tokyo trials as well as national case law, and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda was done. National case law on war crimes was examined when it was available in English, French or German. Decisions from international and regional Human Rights bodies were also analysed for further clarification on certain offences. It is important to note that the various sources referred to in this paper were selected solely in an objective manner and based on their relevance and shall not be seen as a reflection of any particular view or position.

The paper is structured in the following manner. First, the results from the sources are outlined for each offence listed under Article 8 (2) (c) of the Statute. The term "material element" is used to describe the *actus reus* of the offence (the act or omission) and "mental element" to describe the *mens rea* or necessary intent to commit the offence. Second, a commentary containing an analysis of the various sources under review shows the legal basis for the results indicated.

It is important to note that this paper does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) nor questions concerning crimes committed by incitement, attempt, conspiracy or other forms of assistance (Art. 25 ICC Statute).

ABBREVIATIONS

The following abbreviations are used throughout this paper:

ACHPR:	African Charter on Human and Peoples' Rights
A.D.:	Annual Digest and Reports of Public International Law Cases
AP I:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
ICCPR:	International Covenant on Civil and Political Rights
ECHR:	European Court of Human Rights
GAOR:	General Assembly Official Records
GC:	Refers to all four (4) Geneva Conventions
GC I:	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II:	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III:	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV:	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
IACHR:	Inter-American Commission (or Court) on Human Rights
IAYHR	Inter-American Yearbook on Human Rights
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
ILM:	International Legal Materials

ILR:	International Law Reports
UN Doc.:	United Nations Document
UNGA Res.:	United Nations General Assembly Resolution
WCC:	War Crimes Commission

Article 8 Paragraph 2 (c) ICC Statute
- VIOLATIONS OF COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS -

General points common to the offences under Article 8 (2) (c) of the ICC Statute

(1) The acts or omissions are committed in the context of an armed conflict not of an international character.
(2) The acts or omissions are 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.

Commentary

(1) The acts or omissions are committed in the context of a non-international armed conflict

War crimes, as defined under Art. 8 (2) (c) of the Statute, concern conduct committed in the context of an armed conflict not of an international character against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.

Definition of an armed conflict not of an international character

The term "armed conflict not of an international character" is derived from common Art. 3 GC. The ICTY found that a non-international armed conflict *"exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".*[1]

Concerning the definition of internal conflicts covered by common Art. 3 GC the ICTR held the following:

> *"Common Article 3 applies to "armed conflicts not of an international character" [...]*
> *It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, [...] Common Article 3 [...] will apply once it has been established*

[1] ICTY, *The Prosecutor* v. *Dusko Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction,* IT-94-1-AR72, para. 70, p. 37. This finding is also cited in ICTR, *The Prosecutor v. Jean Paul Akayesu,* ICTR-96-4-T, para. 619.

there exists an internal armed conflict which fulfils [its] respective pre-determined criteria [...]".[2]

The bottom line of what constitutes a non-international conflict is defined in Art. 8 (2) (d) of the Statute, which stipulates:

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

With respect to the distinction of genuine armed conflicts from mere acts of banditry or unorganized and short-lived rebellions, the ICTR referred to the following non-cumulative and therefore alternative reference criteria enunciated in the ICRC Commentary on common Art. 3 GC which resulted from the various amendments discussed, but not adopted during the Diplomatic Conference of Geneva, 1949, *inter alia*:

"1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
3. (a) That the de jure Government has recognized the insurgents as belligerents; or
(b) That it has claimed for itself the rights of a belligerent; or
(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression."[3]

As the ICRC Commentary and the ICTR point out, the above criteria are useful as a means of distinguishing armed conflicts from other forms of violence, but it does not mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions (which are not obligatory and are only mentioned as an indication).[4]

The foregoing led the Tribunal to conclude that:

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2 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, paras. 602-603.

3 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 619. The ICRC Commentary adds:
"4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.
(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.",
Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 3, p. 36.

4 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 3, p. 36.

"[t]he term, 'armed conflict' in itself suggests the existence of ***hostilities between armed forces organized to a greater or lesser extent****. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict [...], it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict."*[5]

> *"[u]ntil [a peaceful settlement is achieved], international humanitarian law continues to apply [...] in the whole territory under the control of a party, whether or not actual combat takes place there."*[10]

This view is shared by the ICTR.

- In the *Akayesu* Judgement, the ICTR added the restriction that

> *"the crimes must not be committed by the perpetrator for purely personal motives."*[11]

Therefore, there has to be a certain link between the conduct and the armed conflict, or in the terms of the ICTY the offences charged must be *"committed within the context of that armed conflict"*.[12]

Potential Perpetrators

The ICTR found that war crimes can be committed in non-international armed conflicts by civilians as well as by the military. This conclusion was based on the following reasoning:

> *"The four Geneva Conventions - as well as the two Additional Protocols - as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.*
> *Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts. The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols.*
> *[...]*
> *It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking [...]. Other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they*

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10 ICTY, *The Prosecutor* v. *Dusko Tadic, Decision on the defence motion for interlocutory appeal on jurisdiction,* IT-94-1-AR72, para. 70, p. 37.

11 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 636.

12 See ICTY, *The Prosecutor* v. *Dusko Tadic, Opinion and Judgement,* IT-94-1-T, paras. 572, 617, pp. 207, 231.

have a link or connection with a Party to the conflict.[13] *The principle of holding civilians liable for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities.*
Thus it is clear from the above that the laws of war must apply equally to civilians as to combatants in the conventional sense."[14]

(2) The acts or omissions are committed against persons taking no active part in the hostilities

The term *"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"* is directly derived from common Art. 3 GC.[15]

The formulation was introduced in order to demonstrate that only those persons who are not taking an active part in the hostilities are protected. The part beginning with "including" was chosen in order to emphasise that even members of the armed forces are entitled to certain protection if they fulfil the conditions mentioned therein.[16]

With respect to the protection of the civilian population this elementary point is more clearly expressed in Arts. 4 and 13 (3) AP II. The provisions define the personal field of application with respect to the beneficiaries of the fundamental guarantees and for the provisions on the conduct of hostilities: civilians lose their right to protection if they take a direct part in hostilities, and throughout the duration of such participation. **The term *"direct part in hostilities"* has evolved from the notion *"active part in the hostilities"* of common Art. 3.** The ICTR concludes in this respect:

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13 See *The Hadamar Trial*, Law Reports of Trials of War Criminals ("LRTWC"), Vol. I, pp. 53-54: *"The accused were not members of the German armed forces, but personnel of a civilian institution. The decision of the Military Commission is, therefore, an application of the rule that the provisions of the laws or customs of war are addressed not only to combatants but also to civilians, and that civilians, by committing illegal acts against nationals of the opponent, may become guilty of war crimes"*; *The Essen Lynching Case*, LRTWC, Vol. I, p. 88, in which, *inter alia*, three civilians were found guilty of the killing of unarmed prisoners of war; and *the Zyklon B Case*, LRTWC, Vol. I, p. 103: *"The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation. [...] The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal"*.

14 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 630-634.

15 The term "a person placed *hors de combat*" is nowadays indicated in Art. 41 (2) AP I in the following way:
"A person is hors de combat if:
(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
provided that in any of these cases he abstains from any hostile act and does not attempt to escape."
For other persons *hors de combat* see also Art. 3 (2) GC II (shipwrecked) and Art. 42 AP I (persons parachuting from an aircraft in distress).

16 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 3, p. 40.

> *"**These phrases** are so similar that, for the Chamber's purposes, they **may be treated as synonymous.**"*[17]

According to the ICTY

> *"[t]he protection embraces, at least, all of those protected persons by the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces in the field and wounded and shipwrecked members of the armed forces at sea. Whereas the concept of 'protected person' under the Geneva Conventions is defined positively, the class of persons protected by the operation of Common Article 3 is defined negatively. For that reason, the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed."*[18]

Thus, if the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in common Art. 3 which forms the legal basis of Art. 8 (2) (c) ICC.

For the ICTY

> *"it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time."*[19]

In that specific case the victims were captured or detained at time the incriminated acts happened. The Tribunal found:

> *"Whatever their involvement in hostilities prior to that time, each of these classes of persons cannot be said to have been taking an active part in the hostilities. Even if they were members of the armed forces [...] or otherwise engaging in hostile acts prior to capture, such persons would be considered 'placed* hors de combat *by detention'."*[20]

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17 ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 629 (emphasis added).

18 ICTY, *The Prosecutor* v. *Dusko Tadic, Opinion and Judgement,* IT-94-1-T, para. 615, p. 231.

19 ICTY, *The Prosecutor* v. *Dusko Tadic, Opinion and Judgement,* IT-94-1-T, para. 616, p. 231.

20 *Ibid.*

Comments on specific offences

General remarks relevant to all offences

- When the term "person" is used in the elements of crime of several offences, it refers to persons taking no active part in the hostilities as defined in the paragraph "General elements common to the offences under Article 8 (2) (c) of the ICC Statute".

- With respect to the terms "unlawful" or "lawful", as used in the elements of several offences, it is important to emphasise that they refer to the lawfulness under international law.

- The notion "wilful" in the following sections includes "intent" and "recklessness", but excludes ordinary negligence. The term "knowingly" must be understood in the sense of Art. 30 ICC Statute which defines "knowledge" as meaning awareness that a factual circumstance exists or a consequence will occur in the ordinary course of events (cf. Art. 30 (3)).

Art. 8 (2) (c) (i) - Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture

This war crime gives a number of examples of acts detrimental to life, health or physical or mental well-being.[21] The list is of course non-exhaustive, as shown by the words "in particular".

Murder of all kinds

1. Results from the sources

Material elements

(1) The term "murder" covers all cases in which a person is killed or the death of such a person was caused.

(2) The death results from an unlawful conduct committed by the perpetrator.

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21 The ICTY Prosecution defined the specific elements in the following manner:
"1. The occurrence of acts or omissions causing death or serious mental or physical suffering or injury;
2. The acts or omissions were committed wilfully; [...]",
see ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 43-44 and 46-47.

Mental element

(3) At the time of the killing the perpetrator had the intent to kill or inflict grievous harm upon the victim having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensues or not.

2. Commentary

a) Treaty reference of the war crime

The term "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" is derived from common Art. 3 (1) (a) GC.

b) Legal basis

As the ICTY concluded - with regard to any difference between the notions of "wilful killing" in the context of an international armed conflict (Art. 8 (2) (a) ICC Statute) on the one hand, and "murder" in the context of a non-international armed conflict (Art. 8 (2) (c) ICC Statute)

2. Commentary

a) Treaty reference of the war crime

The term "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" is derived from common Art. 3 (1) (a) GC.

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

aa) Remarks concerning the material element

Apart from common Art. 3 the term "mutilation" or in some instances "physical mutilation" is used in several provisions of the GC (Arts. 13 (1) GC III, 32 GC IV) and since in the AP (Arts. 11 (2) (a), 75 (2) (a) (iv) AP I, 4 (2) (b) AP II). No further definition is given. The ICRC Commentaries on these provisions consider this term as more or less self explanatory.

In the Commentary on Art. 32 GC IV it is stated:

> *"'Corporal punishment and mutilation'. - These expressions are sufficiently clear not to need lengthy comment. Like torture, they are covered by the general idea of "physical suffering". Mutilation, a particularly reprehensible and heinous form of attack on the human person [...]."*[24]

The Commentary to the AP mentions in particular amputations and injury to limbs as examples of physical mutilations.[25] With respect to "justified" mutilation it states:

> *"However, there are some logical exceptions if the procedures are "justified in conformity with the conditions provided for in paragraph 1 [of Art. 11 AP I]", i.e., essentially, as we have seen, if they are conducive to improving the state of health of the person concerned.*
> *In this sense it is clear that some mutilations may be indispensable, such as the amputation of a gangrenous limb."*[26]

The verb "to mutilate" is defined in the Cambridge International dictionary of English (1995) as to *"damage severely, esp. by violently removing a part"* (p. 933) and in the Oxford Advanced Learner's Dictionary (1992) as to *"injure, damage or disfigure somebody by breaking, tearing or cutting off a necessary part"* (p. 819). These definitions refer to an act of physical violence. Therefore, the terms "mutilation" in Art. 8 (2) (c) (i) and "physical mutilation" in Art. 8 (2) (b) (x) of the ICC Statute must be understood to have synonymous meanings.

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24 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 32, pp. 233 *et seq.*

25 Sandoz, in: Commentary on the AP, Art. 11, No. 478, p. 156.

26 Sandoz, in: Commentary on the AP, Art. 11, Nos. 479 *et seq.*, pp. 156 *et seq.*

bb) Remarks concerning the mental element

There appears to be no case law on the mental element of this crime to date. Therefore, the mental element may be defined in accordance with Art. 30 of the ICC Statute.

Cruel treatment

1. Results from the sources

Material elements

(1) The act or omission [conduct] of the perpetrator caused serious physical or mental suffering or injury upon the person or constituted a serious attack on human dignity.

Mental element

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The term "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" is derived from common Art. 3 (1) (a) GC.

b) Legal basis

aa) Remarks concerning the material elements

Viewed in the context of common Art. 3 GC and Art. 4 (2) AP II, the various human rights instruments mentioned above, and the plain and ordinary meaning of the words used, the Tribunal concluded in the *Delalic Case* that

> *"cruel treatment is treatment which causes serious mental or physical suffering or serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions."*[27]

Therefore, according to the Tribunal,

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[27] ICTY, Judgement, *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also knows as "Zenga"*, IT-96-21-T, para. 551, pp. 195 *et seq.* See also ibid., para. 443, p. 162:
"(...) for the purpose of common article 3, all torture is encapsulated in the offence of cruel treatment. However, this latter offence extends to all acts or omission which cause serious mental or physical suffering or injury or constitute a serious attack on human dignity".
See also ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 44 and 47.

> *"cruel treatment constitutes an **intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity**. As such, it carries an **equivalent meaning** and therefore the same residual function for the purpose of common article 3 of the Statute, **as inhuman treatment does in relation to grave breaches of the Geneva Conventions**. Accordingly, the **offence of torture under common article 3 of the Geneva Convention is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment.**"*[28]

Consequently, the case law presented under paragraph Art. 8 (2) (a) (ii) - Torture or inhuman treatment, including biological experiments, sub-paragraph Inhuman treatment can also be helpful to determine certain behaviours constituting cruel treatment.

With respect to the reasoning of the ICTY the following may be added:

In the *Tadic Case*[29] the Tribunal analysed the term "cruel treatment" first of all in the context of the two introductory phrases of common Art. 3 GC (*"Persons taking no active part in the hostilities [...] shall in all circumstances be treated humanely, without any adverse distinction [...]. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [...]"*) and found that

> *"[a]ccording to this Article the prohibition against cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in hostilities shall in all circumstances be treated humanely."*[30]

In addition to the prohibition in common Art. 3 GC, cruel treatment or cruelty is proscribed by Art. 4 (2) AP II, which stipulates:

> *"[...] the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:*
> *(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment"*

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28 ICTY, Judgement, *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also knows as "Zenga"*, IT-96-21-T, para. 552, p. 196 (emphasis added). For the view of the ICTY Prosecution: ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Slavko Dokmanovic*, IT-95-13a-PT, p. 24; ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Vlatko Kupreskic and others*, IT-95-16-PT, p. 17; ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 47. See also art. 1 (2) Annex of GA Declaration of 1975 (A/Res 3452 (XXX) of the 9 December 1975) providing that: *"2. Torture constitutes an aggravated and deliberated form of cruel, inhuman or degrading treatment or punishment."*

29 In this judgement *"[...] beatings of great severity and other grievous acts of violence [...] "* were qualified as cruel treatment, ICTY, *The Prosecutor* v. *Dusko Tadic*: *Opinion and Judgement*, IT-94-1-T, para. 726, p. 287.

30 ICTY, Judgement, *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also knows as "Zenga"*, IT-96-21-T, para. 552, p. 196.

This provision served as a guidance for the ICTY in the *Tadic* and *Delalic* Cases. In the *Tadic* judgement the Tribunal concluded that

> *"[t]hese instances of cruel treatment [mentioned in Art. 4], and the inclusion of "any form of corporal punishment" demonstrate that no narrow or special meaning is here being given to the phrase 'cruel treatment'."*[31]

A review of the human rights treaties and decisions of human rights bodies gives no further clarification in that respect. As with the offence of inhuman treatment no international instrument defines this offence,[32] although it is specifically prohibited by Art. 5 of the Universal Declaration of Human Rights, Art. 7 of the ICCPR, Art. 5 (2) of the Inter-American Convention of Human Rights and Art. 5 of the African Charter of Human and Peoples' Rights. However, it is noteworthy that in Art. 7 ICCPR cruel treatment is very closely related to inhuman treatment.[33] In Art. 5 Inter-American Convention of Human Rights, containing an almost identical provision, cruel treatment is dealt with under the heading "Right to humane treatment". Up to 1998, the UN Human Rights Committee has not defined the terms "torture", "cruel, inhuman or degrading treatment or punishment" used in Art. 7 ICCPR nor delineated the boundaries between these terms.[34] Neither the Inter-American Commission nor the Inter-American Court on Human Rights has attempted to differentiate precisely the terms 'torture' and 'inhuman treatment' under the meaning of Art. 5 of the American Convention on Human Rights.[35] The Inter-American Court, like the UN Human Rights Committee, applied these concepts in a number of cases directly to the facts, limiting itself to conclude whether there had been or not a violation of the right to humane treatment.

bb) Remarks concerning the mental elements

The ICTY held that:

> *"cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental".*[36]

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31 ICTY, *The Prosecutor v. Dusko Tadic, Opinion and Judgement,* IT-94-1-T, para. 725, p. 287.

32 See J.H. Burger/H. Danelius, The United Nation Convention Against Torture, p. 122, according to whom *"it has been found impossible to find any satisfactory definition of this general concept [cruel treatment], whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation"*, cited in: ICTY, *The Prosecutor* v. *Dusko Tadic, Opinion and Judgement,* IT-94-1-T, para. 724, p. 287. Nowak, ICCPR Commentary, 1993, p. 131, states without further distinguishing that inhuman and cruel treatment *"include all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements. They also cover those practices imposing suffering that does not reach the necessary intensity."*

33 Art. 7 ICCPR, Art. 5 of the American convention on Human Rights cited in ICTY, *The Prosecutor* v. *Dusko Tadic, Opinion and Judgement,* IT-94-1-T, para. 723, p. 287.

34 See McGoldrick, The Human Rights Committee, 1991, pp. 364, 371; Nowak, ICCPR Commentary, 1993, pp. 129, 134 *et seq.*

35 Davidson, in: Harris/Livingstone (eds.), The Inter-American System of Human Rights, 1998, p. 230.

36 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, para. 552, p. 196. For the view of the ICTY Prosecution see ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Slavko Dokmanovic*, IT-95-13a-PT, p. 24.

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

"Recklessness would constitute a sufficient form of intention."[37]

Torture

1. Results from the sources

Material elements

(1) The perpetrator inflicted, by act or omission, severe physical or mental pain or suffering upon the victim.
(2) At least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.

Mental element

(3) The perpetrator caused the pain or suffering intentionally and for such purposes as:
   a) obtaining information or a confession from the victim or a third person;
   b) punishing the victim for an act the victim or a third person has committed or was suspected of having committed;
   c) intimidating, humiliating or coercing the victim or the third person; or
   d) for any reason based on discrimination of any kind.

2. Commentary

a) Treaty reference of the war crime

The term "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" is derived from common Art. 3 (1) (a) GC.

b) Legal basis

Concerning any difference between the notion of "torture" in the context of an international armed conflict (Art. 8 (2) (a) ICC Statute) on the one hand, and in the context of a non-international armed conflict (Art. 8 (2) (c) ICC Statute) on the other hand, the ICTY concluded that *"[t]he characteristics of the offence of torture under common article 3 and under the 'grave breaches' provisions of the Geneva Conventions, do not differ".*[38] Therefore, the various judgements of the ICTY and the ICTR analysed above in the section on Article 8 Paragraph 2 (a) ICC Statute - GRAVE BREACHES OF THE 1949 GENEVA CONVENTIONS may serve as guidance for the interpretation of the elements of this offence

[37] ICTY, Closing Statement of the Prosecution, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, Annex 1, pp. A1 - 6 and 11.

[38] ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, paras. 443, p. 162.

whether the acts were committed during an international or non-international armed conflict. Thus, the results from the sources are to a great extent the same and the material and mental elements are formulated basically in the same way.

In its last judgement up to now, the ICTY spelled out some specific elements that pertain to torture as "considered from the specific viewpoint of international criminal law relating to armed conflicts". Thus, the Trial Chamber considers that the elements of torture in an armed conflict require that torture:

> *"(i) consists of the infliction by act or omission of severe pain or suffering, whether physical or mental; in addition*
> *(ii) this act or omission must be intentional;*
> *(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person; or at discriminating, on any ground, against the victim or a third person;*
> *(iv) it must be linked to an armed conflict;*
> *(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity."*[39]

With respect to the addition of the purpose "humiliating" under (iii) the ICTY held in the above mentioned judgement that it is

> *"warranted by the general spirit of international humanitarian law; the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from "outrages upon personal dignity". The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture."*[40]

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

> *"Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities."*[41]

In the context of non-international armed conflicts, it thus also includes acts emanating from non-State actors involved in the armed conflict. Soldiers must be seen as having an official function.

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39 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 162, pp. 63 *et seq.*

40 ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 163, p. 64.

41 ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, para. 473, p. 172.

Art. 8 (2) (c) (ii) - Committing outrages upon personal dignity, in particular humiliating and degrading treatment

1. Results from the sources

Material elements of humiliating and degrading treatment

(1) The act or omission [conduct] of the perpetrator constituted an attack on human dignity and caused - either in the eyes of others or in the eyes of the victim - humiliation or debasement attaining a minimum level of severity.

Mental element of humiliating and degrading treatment

(2) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The term "outrages upon personal dignity, in particular humiliating and degrading treatment" is derived from common Art. 3 (1) (a) GC.

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR on the general elements of this offence. The wording of this crime suggests that humiliating and degrading treatment are simply examples of committing outrages upon personal dignity. The list is of course non-exhaustive, as shown by the words "in particular".[42] The treatment in question must constitute an assault on the main purpose mentioned in this offence, namely a person's dignity. In this regard the ICTY Prosecution pointed out:

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[42] The ICTY mentioned as an example any serious sexual assault falling short of actual penetration. It found that the prohibition *"embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity."*, ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, para. 186, p. 73. Following these findings, the ICTY Prosecution considered as elements of sexual assault:

1. Serious abuse of a sexual nature was inflicted upon the physical and moral integrity of the victim, by means of coercion, threat of force or intimidation, in a manner that is degrading and humiliating for the victim's dignity;
2. The acts or omissions were committed wilfully.

ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 53. The ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, *ibid.*, pp. 35, 56. See also ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor v. Miroslav Kvocka, Mlado Radic, Milojica Kos, Zoran Zigic*, IT-98-30-PT, pp. 45 *et seq.*

"The safeguarding of personal dignity was intended to be flexible enough to encompass any act or omission that degrades, humiliates, or attacks the integrity of the victim, including sexual integrity."[43]

The provisions in the GC (Art. 95 GC IV) and AP (Arts. 75 (2) (b), 85 (4) (c) AP I, 4 (2) (e) AP II) which use this terminology do not give further clarification. The ICTY Prosecution referred in the *Aleksovski Case*[44] to the ICRC Commentary on Art. 75 AP I which states with respect to "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault" the following:

"This refers to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts.
Such provisions are contained in the Conventions (common Article 3; Articles 14[45] and 52[46], Third Convention; Article 27[47], Fourth Convention)."[48]

The term "outrage" is defined in the Cambridge International Dictionary of English (1995) as a *"shocking, morally unacceptable and usually violent action"* (p. 1003).

aa) Remarks concerning the material elements of humiliating and degrading treatment

It appears that there are no legal sources elaborating specifically on elements of committing outrages upon personal dignity up to now. Following the approach in the *Delalic* and *Furundzija* Cases (both cited previously) which used human rights law to define "torture" as

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43 ICTY, Prosecutor's Pre-trial Brief, *The Prosecutor v. Dragoljub Kunarac*, IT-96-23-PT, pp. 28 *et seq.*

44 ICTY, The Prosecutor's Closing Brief, *The Prosecutor v. Zlatko Aleksovski*, IT-95-14/I-PT, para. 56, p. 23.

45 Art. 14 GC III:
"Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.
Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires."

46 Art. 52 (2) GC III:
"No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces."
See also in this respect Art. 95 (1) GC IV:
"The Detaining Power shall not employ internees as workers, unless they so desire. [...] [E]mployment on work which is of a degrading or humiliating character are in any case prohibited."

47 Art. 27 GC IV:
"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."

48 Pilloud/Pictet, in: Commentary on the AP, Art. 75, Nos. 3047 *et seq.*, p. 873.

a war crime the following human rights cases could be helpful to determine the elements of "degrading treatment":

- European Court of Human Rights

- With respect to different forms of ill-treatment as mentioned in Art. 3 European Convention on Human Rights, i.e. torture, inhuman or degrading treatment or punishment, the ECHR found in general terms that

> *"ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [European Convention on Human Rights]. The assessment of this minimum is, in the nature of things relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."*[49]

- More specifically, under the European Convention on Human Rights, the term "degrading treatment" was first defined in the *Greek Case* as:

> *"Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."*[50]

Later, in the *Case of Ireland v. The United Kingdom,* the ECHR considered five interrogation techniques as degrading

> *"since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."*[51]

With respect to degrading punishment the ECHR mentioned in another case the following elements

- the victim was treated as an object in the power of the authorities;
- the treatment constituted an assault on precisely that which is one of the main purposes of Art. 3 European Convention of Human Rights, namely a person's dignity and physical integrity;
- the punishment had adverse psychological effects;
- the victim was subjected to mental anguish.[52]

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49 ECHR, *Case of Ireland v. The United Kingdom*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 25, 1978, p. 65; ECHR, *Tyrer Case*, *ibid.*, vol. 26, 1978, p. 14; ECHR, *Case of Campbell and Cosans*, *ibid.*, vol. 48, 1982, p. 13; ECHR, *Case of Selçuk and Asker v. Turkey*, Reports of Judgments and Decisions, 1998-II, p. 910.

50 ECHR, *The Greek Case*, Yearbook of the Convention on Human Rights vol. 12, 1972, p. 186. See also ECHR, *Case of Ireland v. The United Kingdom*, *ibid.*, vol. 19, 1977, p. 748.

51 ECHR, *Case of Ireland v. The United Kingdom*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 25, 1978, p. 66. See also ECHR, *Soering Case*, *ibid.*, vol. 161, 1989, para. 100, p. 39; ECHR, *Case of Campbell and Cosans*, *ibid.*, vol. 48, 1982, p. 13, stating that a treatment *"will not be 'degrading', unless the person concerned has undergone - either in the eyes of others or in his own eyes - humiliation or debasement attaining a minimum level of severity. This level has to be assessed with regard to the circumstances."*

52 ECHR, *Tyrer Case*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 26, 1978, pp. 16 *et seq*.

- According to the ECHR *"as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading".*[53]

- Considering the case law with respect to the different forms of ill-treatment in the European Convention on Human Rights the following has to be noted: The same treatment may be both degrading and inhuman, as in the case of resort to the five interrogation techniques in *Ireland v. The United Kingdom* and physical assault in *Tomasi v. France*[54]. In the *Greek Case*, the Commission supposed that *"all torture must be inhuman and degrading treatment, and inhuman treatment also degrading"*[55]. However, all degrading treatment or punishment is not necessarily inhuman nor amount to torture.[56]

- Human Rights Committee and Inter-American System

A review of the decisions of these human rights bodies gives no further clarification in that respect. Up to 1998, the UN Human Rights Committee has not defined the terms 'torture', 'cruel, inhuman treatment or degrading treatment or punishment' used in Art. 7 ICCPR nor delineated the boundaries between these terms.[57] Neither the Inter-American Commission nor the Inter-American Court on Human Rights has attempted to differentiate precisely the terms 'torture', 'inhuman treatment' and 'degrading treatment' under the meaning of Art. 5 of the American Convention on Human Rights.[58] The Inter-American Court, like the UN Human Rights Committee, applied these concepts in a number of cases directly to the facts, limiting itself to conclude whether there had been or not a violation of the right to humane treatment.

Considering these sources one may conclude that there is no real difference between degrading and humiliating treatment since the element of humiliation seems to be constituent element of a degrading treatment in human rights law.

The following non exhaustive list of examples found in human rights case law indicate which conduct may constitute humiliating and degrading treatment:

- forms of racial discrimination (differential treatment of a group of persons on the basis of race),[59]

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53 ECHR, *Case of Herczegfalvy v. Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 244, 1993, p. 26 (The case concerned a person who was incapable of taking decisions.).

54 ECHR, *Case of Ireland v. The United Kingdom*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 25, 1978, paras. 162 *et seq.*, pp. 66 *et seq.*; ECHR, *Tomasi v. France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 241-A, 1992, paras. 107 *et seq.*, pp. 40 *et seq.*

55 ECHR, *The Greek Case*, Yearbook of the Convention on Human Rights vol. 12, 1972, p. 186.

56 ECHR, *Tyrer Case*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 26, 1978, para. 29, p. 14.

57 See McGoldrick, The Human Rights Committee, 1991, pp. 364, 370; Nowak, ICCPR Commentary, 1993, pp. 134 *et seq.* This commentator considers degrading treatment as being the weakest level of a violation of Art. 7 ICCPR. Referring to the case law of the ECHR he concludes that the severity of the suffering imposed is of less importance here than the humiliation of the victim, regardless of whether this is in the eyes of others or those of the victim himself or herself.

58 Davidson, in: Harris/Livingstone (eds.), The Inter-American System of Human Rights, 1998, p. 230.

59 ECHR, East African Asians Cases, 3 E.H.R.R. 1973, Com Rep, p. 76; CM DH (77) 2. See also Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights, 1995, pp. 81 *et seq.*, for a detailed analysis.

- specific psychological interrogation techniques being at the same time inhuman treatment (wall standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink),[60]
- in the *Hurtado v. Switzerland case*, the applicant had defecated in his trousers because of the shock caused by a stun grenade used in his arrest; the Commission concluded that there had been degrading treatment when he was not able to change his clothing until the next day and after he had been transported between buildings and questioned,[61]
- specific forms of corporal punishment,[62]
- arbitrary prison practices aimed at humiliating prisoners and making them feel insecure (repeated solitary confinement, subjection to cold, persistent relocation to different cell),[63]
- women prisoners were subjected to specific humiliation in the form of hanging naked from handcuffs or being forced to maintain a certain position for long periods of time.[64]

bb) Remarks concerning the mental element of humiliating and degrading treatment

There seems to be no case law on the mental element of this crime to date.

Art. 8 (2) (c) (iii) - Taking of hostages

1. Results from the sources

(1) The perpetrator seized or detained or otherwise unlawfully held hostage a person.
(2) The perpetrator threatened to kill or injure or continue to detain such person.
(3) The perpetrator performed these acts with the intent to compel a third party, including a State, an international organisation, a natural person or judicial person, or group of persons to act or refrain from acting as an explicit or implicit condition for the release of the hostage.

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60 ECHR, *Case of Ireland v. The United Kingdom*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 25, 1978, para. 96.

61 ECHR, *Hurtado v. Switzerland,* Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 280-A, 1984, para. 68, p. 14.

62 For a detailed analysis see Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights, 1995, pp. 81 *et seq., with references to the case law, esp.* ECHR, *Tyrer Case*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 26, 1978 (the applicant had been sentenced to three strokes of the birch in accordance with the penal legislation of the Isle of Man), pp. 16 *et seq.;* ECHR, *Costello-Roberts v. UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 247-C, 1993, paras. 29-32, pp. 59-60; *Warwick v UK*, No 9471/81, Decisions and Reports vol. 60, 1986, Com Rep, paras. 79-89, pp. 16-17 (canings); ECHR, *Y v. UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 247-A, 1993, Com Rep, paras. 37-46, pp. 12-14 (canings).

63 *H. Conteris v. Uruguay*, Communication No. 139/1983, Report of the Human Rights Committee, UN GAOR Doc. A/40/40, paras. 9.2-10, pp. 201-202.

64 *L. Arzuaga Gilboa v. Uruguay*, Communication No. 147/1983, Report of the Human Rights Committee, UN GAOR Doc. A/41/40, paras. 4.3 and 14, pp. 130 and 133 (also cruel treatment); *E. Soriano de Bouton v. Uruguay*, Communication No. 37/1978, Report of the Human Rights Committee, UN GAOR Doc. A/36/40, paras. 2.5 and 13, pp. 144 and 146.

2. Commentary

a) Treaty reference of the war crime

The prohibition to take hostages is provided for under common Art. 3 of the GC and reiterated in Art. 4 (2) (c) AP II.

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence. However, the ICTY Prosecution indicated in the case against *Kordic and Cerkez* the specific elements of this offence as follows:

"1. The occurrence of acts or omissions causing person/s to be seized, detained, or otherwise unlawfully held as hostages;
2. The acts or omissions involved a threat to injure, kill, or continue to detain such person/s in order to compel a State, military force, international organization, natural person or group of persons to act or refrain from acting, as an explicit or implicit condition for the safe release of the hostage/s;
3. The acts or omissions were committed wilfully[65]; [...]."[66]

Besides, the conclusions stated under the section dealing with the offence of taking of hostages (Art. 8 (2) (a) (viii) of the Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. There are no indications in the ICC Statute or the GC that this offence has different constituent elements in an international or non-international armed conflict. The ICTY Prosecution defined the specific elements for both situations in the same manner.[67]

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65 In the *Simic and others others case* the ICTY Prosecution defined the notion of "wilful" as *"a form of intent which includes recklessness but excludes ordinary negligence. 'Wilful' means a positive intent to do something, which can be inferred if the consequences were foreseeable, while 'recklessness' means wilful neglect that reaches the level of gross criminal negligence."*, ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric*, IT-95-9-PT, p. 35.

66 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, p. 48.

67 ICTY, The Prosecutor's Pre-trial Brief, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-PT, pp. 45-46 and 48.

Art. 8 (2) (c) (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

1. Results from the sources

Material elements

(1) The act or omission [conduct] by the perpetrator caused the passing of a sentence and/or carrying out of executions.
(2) No previous judgement has been pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

The crime of passing sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as being indispensable is derived from common Art. 3 (1) (d) GC, with the sole exception of the suppression of the reference to "civilized people" and the addition of "generally" instead.

b) Legal basis

Until now, there are no findings on the elements of this offence by the ad hoc Tribunals. Common Art. 3 GC itself does not give any clarification for the interpretation of this offence.

aa) Remarks concerning the material element

The following conclusions may be drawn from the various sources examined below. The expression "a regular court affording all judicial guarantees which are generally recognized as being indispensable" includes, but is not limited to, the following:

- The right to a fair [and public] hearing by an independent and impartial tribunal established by law, including the right of access to a court (see Arts. 6 (2) AP II, 14 (1) ICCPR, 6 (1) ECHR, 8 (1) ACHR)

- The right to be informed of the charges against him/her without delay (see Arts. 6 (2) (a) AP II, 14 (3) (a) ICCPR, 6 (3) (a) ECHR, 8 (2) (b) ACHR.

- The right to be afforded before and during the trial all necessary rights and means of defence (Art. 6 (2) (a) AP II in general, see also Arts. 14 (3) ICCPR, 6 (3) ECHR, 8 (2) ACHR), which includes the following pre-trial and trial minimum guarantees:

  - *The right to be brought promptly before a judge or other officer authorized by law to exercise judicial power (Arts. 9 (3) ICCPR, 5 (3) ECHR, 7 (5) ACHR)*

  - *The right to be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release (Arts. 9 (4) ICCPR, 5 (4) ECHR, 7 (6) ACHR)*

  - The right to have adequate time and facilities for the preparation of his defence [and to communicate with counsel of his own choosing;] (Art. 14 (3) (b) ICCPR, Art. 6 (3) (b) ECHR, Art. 8 (2) (c), (d) ACHR)

  - The right to defend himself/herself in person or through legal assistance (Arts. 14 (3) (d) ICCPR, 6 (3) (c) ECHR, 8 (2) (d), (e) ACHR, 7 (1) (c) ACHPR)

  - The right to be tried without undue delay (Arts. 14 (3) (c) ICCPR, 6 (1) ECHR 8 (1) ACHR and 7 (1) (d) (*"within a reasonable time"*))

  - The right to defend himself/herself in person or through legal assistance (Arts. 14 (3) (d) ICCPR, 6 (3) (c) ECHR, 8 (2) (d), (e) ACHR, 7 (1) (c) ACHPR)

  - The right to present and examine witnesses (Arts. 14 (3) (e) ICCPR, 6 (3) (d) ECHR, 8 (2) (f) ACHR, see also Art. 75 (4) (g) AP I)

  - The right to an interpreter (Arts. 14 (3) (f) ICCPR, 6 (e) ECHR (almost literally), 8 (2) (a) ACHR ("*without charge*"))

- No one shall be convicted of an offence except on the basis of individual penal responsibility (Art. 6 (2) (b) AP II)

- The principle of *nullum crimen, nulla poena sine lege* and the prohibition of a heavier penalty (Arts. 6 (2) (c) AP II, 15 ICCPR, 7 ECHR, 9 ACHR, 7 (2) ACHPR)

- The right to be presumed innocent (Arts. 6 (2) (d) AP II, 14 (2) ICCPR, 6 (2) ECHR, 8 (2) ACHR, 7 (1) (b) ACHPR)

- The right to be tried in his presence (Arts. 6 (2) (e) AP II, 14 (3) (d) ICCPR, 8 (2) (g) ACHR)

- The right not to be compelled to testify against himself or to confess guilt (Arts. 6 (2) (f) AP II, 14 (3) (g) ICCPR, 8 (2) (g), 8 (3) ACHR)

- The right to be advised of his judicial and other remedies and of the time-limits within which they may be exercised (Art. 6 (3) AP II)

- The right of the accused to have the judgement pronounced publicly (Arts. 75 (4) (i) AP I, 14 (1) ICCPR, 6 (1) ECHR, 8 (5) ACHR);

- The principle of *ne bis in idem* (Arts. 86 GC III, 117 (3) GC IV, 75 (4) (h) AP I and Arts. 14 (7) ICCPR, Art. 4 of the 7th AP to the ECHR, Art. 8 (4) ACHR).

(1) General remarks

Neither Art. 8 (2) (c) (iv) ICC Statute nor common Art. 3 GC give much guidance of what is meant by the notions "regularly constituted Court" and "judicial guarantees which are generally recognized as indispensable". However, it should be noted that the wording of the chapeau of Art. 6 (2) AP II is in its essence identical to common Art. 3, and thus also to Art. 8 (2) (c) (iv) of the Statute. The relevance of Art. 6 (2) AP II for the interpretation of common Art. 3 (1) (1) GC is underlined in the ICRC Commentary on Art. 75 AP I:

> *"[Common] Article 3 relies on the "judicial guarantees which are recognized as indispensable by civilized peoples", while Article 75 rightly spells out these guarantees. Thus this article, and to an even greater extent,* ***Article 6 of Protocol II '(Penal prosecutions),' gives valuable indications to help explain the terms of Article 3 on guarantees.***"[68]

and on Art. 6 AP II:

> *"Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect. It supplements and develops* ***common Article 3, paragraph 1, sub-paragraph (1) (d)****, which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". This very general rule* ***required clarification to strengthen the prohibition of summary justice and of convictions without trial****, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions, and for the rest is largely based on the International Covenant on Civil and Political Rights, particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation.*"[69]

From these sources it may be concluded that Art. 6 (2) AP II rather explains common Art. 3 (1) (d) GC than extends it. Therefore, the material elements of Art. 6 (2) AP II may be an indication for the respective elements of Art. 8 (2) (c) (iv) ICC Statute. Especially, it may be argued that the non exhaustive minimum list of essential guarantees contained in Art. 6 (2) AP II also applies to this crime. Following the approach in the *Delalic* (cited previously) and *Furundzija* cases (cited previously) where human rights law was used to define "torture" as a war crime, the relevant case law of the respective human rights bodies may be a further

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68 Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3083, p. 878 (emphasis added).

69 Junod, in: Commentary on the AP, Art. 6, No. 4597, p. 1396 (emphasis added).

indication for the interpretation of common Art. 3 GC, and thus Art. 8 (2) (c) (iv) ICC Statute. This approach is even more justified with respect to this offence because - as pointed out in the ICRC Commentary - Art. 6 (2) AP II largely reiterates principles based on the ICCPR.

(2) Meaning of "Regularly constituted Court"

Given the fact that the Statute has *verbatim* retained the language of common Art. 3 GC, also dissident armed groups are bound to set up "a regularly constituted court" before a sentencing might take place. Thus, special courts set up on an *ad hoc* basis by rebel groups are prohibited.

However, the problem of courts set up by rebel groups led to a change of wording in the drafting of Art. 6 (2) AP II which was thought to clarify the general rule of common Art. 3 GC. In the ICRC Commentary to the AP II the *travaux préparatoires* are described as follows:

> *"[Art. 6 (2) AP II] repeats paragraph 1, sub-paragraph (1) (d) of common Article 3, with a slight modification. The term "regularly constituted court" is replaced by "a court offering the essential guarantees of independence and impartiality". In fact, some experts argued that it was unlikely that a court could be "regularly constituted" under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, which was accepted without opposition.*
> *This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgment is given by "a court offering the essential guarantees of independence and impartiality". Sub-paragraphs (a)-(f) provide a list of such essential guarantees; as indicated by the expression "in particular" at the head of the list, it is illustrative, only enumerating universally recognized standards."*[70]

From this source one may conclude that independence and impartiality are the main features of a "regularly constituted court". International and regional human rights treaties mention the same guarantees (Arts. 14 (1) ICCPR, 6 (1) ECHR, 8 (1) ACHR). As indicated above, the relevant case law of the respective human rights bodies may be a further indication for the interpretation of common Art. 3 GC, and thus Art. 8 (2) (c) (iv) ICC Statute:

Human Rights Committee

- Art. 14 (1) ICCPR: *"everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"*

  Impartiality: The Human Rights Committee described this term in the following way:

  > *"'Impartiality' of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that*

[70] Junod, in: Commentary on the AP, Art. 6, Nos. 4600 *et seq.*, p. 1398.

promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14."[71]

- The Committee considers *"that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal [...]."*[72]

- A conviction by a special tribunal under anti-terrorist legislation composed of judges with covered faces (faceless judges) is incompatible with Art. 14. Such a tribunal cannot be seen to be impartial and independent: *"In a system of trial by 'faceless judges', neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces."*[73]

According to the Human Rights Committee another element of Art. 14 (1) ICCPR is the accused's general right of access to a court.[74]

European Court of Human Rights

- Art. 6 (1) ECHR: *"everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*

(i) Independent (from the executive, legislative or parties): see for example the *Findlay v. UK* case[75], *Ringeisen* case[76]; *Benthem* case[77]; *Campbell and Fell* case[78]:

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71 *A.O. Karttunen v. Finland*, 1992, Communication No. 387/1989, Report of the Human Rights Committee, UN GAOR Doc. A/48/40, para. 7.2, p. 120.

72 *Angel N. Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, Report of the Human Rights Committee, UN GAOR Doc. A/49/40 (1994), para. 9.4, p. 187.

73 *R. Espinoza de Polay v. Peru*, 1997, Communication No. 577/1994, Report of the Human Rights Committee, UN GAOR Doc. A/53/40, p. 43.

74 *Angel N. Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, Report of the Human Rights Committee, UN GAOR Doc. A/49/40 (1994), para. 9.4, p. 187.

75 ECHR, 1997, Reports of Judgments and Decisions, 1997-I, No. 30, para. 73, p. 281, with further references (A convening officer played a significant role in the pre-trail proceedings, appointed the members of the Court martial. All the judges were military subordinates of the convening officer, who had also an important role during the proceedings, e.g. he procured attendance of the witnesses at trial and his agreement was necessary for some procedural steps to be taken. More over he could vary the sentence imposed, which in any way was not effective until ratified by him, pp. 281 et seq.); followed in: ECHR, *Coyne v. UK*, ibid., 1997-V, No. 49, pp. 1854 *et seq.*

76 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 13, para. 95, p. 39 (in this case no violation was found).

77 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 97, paras. 41-43, p. 18 (The judicial body was not independent because it was an administrative body acting under the authority of the minister; there was no further appeal to an independent court).

78 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 80, para. 78, pp. 39-40 (No violation. The board members were appointed by the home secretary (executive)

"In determining whether a body can be considered to be independent (...), the Court has regard to the manner of appointment of its members and the duration of their term of office (...), the existence of guarantees against outside pressures (...) and the question whether the body presents an appearance of independence".

(ii) Impartial: the judges have to stand above the parties, to decide without personal influence and objectively, only according to their best knowledge and conscience. Impartiality means also lack of prejudice or bias. See e.g. the *Piersack* case[79], *De Cubber* case[80], *Findlay v. UK* case[81]:

"there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect".

As to the impartiality of a jury, see the *Holm* case[82].

(iii) A definition of a court of law ("tribunal") can be found in the *Belilos* case[83]:

"[A] 'tribunal' is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (...). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' term of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 (1) itself".

(iv) According to the European Court another element of Art. 6 (1) ECHR is the accused's general right of access to a court.[84]

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but they were not subject to any instruction; they were elected for 3 years; they were irremovable at least in fact, even if the statute under which they were acting did not formally contain any such guarantee.).

79 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 53, paras. 28 *et seq.*, pp. 13-16 (No objective impartiality: A judge on the bench had been a former judicial officer in the public prosecutor's department; he had already had to deal with the case at hand.).

80 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 86, paras. 24 *et seq.*, pp. 13-16 (No objective impartiality: A judge of the bench had been a former investigating judge on that case.).

81 ECHR, 1997, Reports of Judgments and Decisions, 1997-I, No. 30, p. 281 (No impartiality because of the role and influence of the convening officer, p. 282, for the facts see footnote 75 above.); see also ECHR, *Hauschildt* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 154, para. 46, p. 21.

82 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 279-A, paras. 27 *et seq.*, pp. 13-16.

83 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 132, para. 64, p. 29.

84 ECHR, *Deweer* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 35, para. 49, p. 25.

Inter-American System

- Art. 8 (1) ACHR: *"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law"*

(i) The Commission elaborated in a report entitled "Measures necessary for rendering the autonomy, independence and integrity of the members of the Judicial Branch more effective" the criteria which member States should implement to satisfy the requirements of judicial independence and impartiality. The list included the following:

> *"a) guaranteeing the judiciary freedom from interference by the executive and legislative branches;*
> *b) providing the judiciary with the necessary political support for performing its functions;*
> *c) giving judges security of tenure;*
> *d) preserving the rule of law and declaring states of emergency only when necessary and in strict conformity with the requirements of the American Convention;*
> *e) returning to the judiciary responsibility for the disposition and supervision of detained persons."*[85]

(ii) As to the meaning of impartiality, the Commission said:

> *"Impartiality presumes that the court or judge do not have preconceived opinions about the case* sub judice *and, in particular, do not presume the accused to be guilty. For the European Court, the impartiality of the judge is made up of subjective and objective elements. His subjective impartiality in the specific case is presumed as long as there is no evidence to the contrary. Objective impartiality, on the other hand, requires that the tribunal or judge offer sufficient guarantees to remove any doubt as to their impartiality in the case."*[86]

(iii) In the Case 11.006 (Peru) the Commission, following the judgement of the European Court on Human Rights in *Campbell and Fell*, held a determination of whether a court is independent of the executive depends on the *"manner of appointment of its members, the duration of their terms [and] the existence of guarantees against outside pressures [...]"*[87] Furthermore, the Commission stated that *"the irremovability of judges [...] must [...] be considered a necessary corollary of their independence."*[88]

In several cases the Commission stated that a Special Military Court is not an independent and impartial tribunal inasmuch as it is subordinate to the Ministry of Defence, thus to the executive.[89]

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85 IACHR Annual Report 1992-3, p. 207.

86 ACHR, Report 5/96, Case No. 10.970, Peru, IAYHR 1996, vol. 1, pp. 1120 *et seq.*

87 ACHR, Report 1/95, IAYHR 1995, pp. 278 *et seq.*

88 *Ibid.*

89 ACHR, Report 27/94, Case No. 11.084, Peru, IAYHR 1994, vol. 1, p. 518.

(iv) According to the Commission another element of Art. 8 (1) ACHR is the accused's general right of access to a court.[90]

(v) The Court emphasised in a report entitled "Judicial Guarantees in States of Emergency" that *"[r]eading Article 8 together with Articles 7 (6), 25, and 27 (2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of human rights that are not subject to derogation".*[91]

The Court stressed also that the *"concept of due process"* in Art. 8 *"should be understood as applicable, in the main, to all judicial guarantees referred to in the American Convention"*, even where there have been legitimate derogations from certain rights under Art. 27 ACHR.[92]

(3) Meaning of "judicial guarantees which are generally recognized as indispensable"

The judicial guarantees to be afforded according to common Art. 3 GC are only described by the formulation *"which are recognized as indispensable by civilized peoples"* which has been replaced in the Statute by *"which are generally recognized as being indispensable"*.

The Commentary on common Art. 3 states in only very general terms that:

> *"Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses - though that has yet to be proved - but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. [...] [I]t is only summary justice which is intended to be prohibited. No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law."*

As pointed out above, in order to determine the generally recognized necessary judicial guarantees, the particular judicial guarantees under Art. 6 AP II may serve as a basis for interpretation. As indicated by the expression "in particular" at the head of the list, it is illustrative, *"only enumerating universally recognized standards"*[93]. The provision mentions the following essential judicial guarantees.

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90 ACHR, Report 28/92, Cases Nos. 10.147; 10.181; 10.240; 10.262; 10.309 and 10.311, Argentina, (1992); IAYHR, 1992, vol. 1, pp. 740 *et seq.*

91 ACHR, Advisory Opinion No. 9, Series A, no. 9 (1987), IAYHR 1988, para. 30, pp. 904 *et seq.*

92 ACHR, Advisory Opinion No. 9, I/A Court H.R. Series A No. 9 (1987), para. 29, 9 HRLJ p. 209.

93 Junod, in: Commentary on the AP, Art. 6, No. 4601, p. 1398.

"(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt."

Most of the guarantees listed in Art. 6 (2) sub-paragraphs (a)-(f) are contained in international and regional human rights instruments (ICCPR, ECHR, ACHR). However, in each of these human rights treaties, there is a clause permitting derogations from the articles in question in times of emergency, but only to the degree indispensable and provided that they are not inconsistent with other international law requirements. **Common Art. 3 GC and Art. 6 AP II are not subject to any possibility of derogation or suspension** and consequently, it is these provisions which will play a decisive role in the case of armed conflict.

As the provisions in all these instruments are more or less equivalent,[94] the judicial guarantees in human rights instruments and their interpretation may serve as an additional tool for the interpretation of common Art. 3 GC. Human Rights case law will be presented if it contains findings of general nature describing the substance of the rights.

(a) Indispensable judicial guarantees listed in Art. 6 AP II

(i) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence (Art. 6 (2) (a) AP II)

On the one hand, this rule underlines that the accused must be informed as quickly as possible of the particulars of the offence alleged against him, and of his rights. Arts. 14 (3) (a) ICCPR, 6 (3) (a) ECHR, 8 (2) (b) ACHR[95] lay down the same principle.[96] On the

94 Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3092, pp. 880 *et seq.*

95 Essentially the same right is guaranteed at the pre-trial stage, see:
Art. 9 (2) ICCPR:
"Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."
Art. 5 (2) ECHR:
"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."
Art. 7 (4) ACHR:
"Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him."
These pre-trial guarantees overlap to a certain extent with the trial guarantees.

other hand, he must be in a position to exercise them and be afforded the rights and means of defence *"before and during his trial"*, **i.e., at every stage of the procedure.**[97] With regard to the latter, human rights law may serve as an indication of what constitutes essential judicial guarantees before the trial on the merits and *"necessary rights and means of defence"*.

Specific judicial guarantees before the trial on the merits

Arts. 9 ICCPR, 5 ECHR and 7 ACHR contain specific essential pre-trial judicial guarantees. The most important in the context of a non-international armed conflict are the following:

- *The right to be brought promptly before a judge or other officer authorized by law to exercise judicial power*

  This guarantee is stated in Arts. 9 (3) ICCPR[98], 5 (3) ECHR[99], 7 (5) ACHR[100].

  Relevant case law of Human Rights bodies:

  Human Rights Committee:

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96 According to a Commentator to the ICCPR, the right to be informed *"promptly"* implies that information must be provided with the lodging of the charge or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person, Nowak, ICCPR Commentary, 1993, p. 255, see also *P. Kelly v. Jamaica*, 1991, Communication No. 253/1987, Report of the Human Rights Committee, UN GAOR Doc. A/46/40, p. 247. Human rights instruments add the element that the person concerned must be informed *"in a language which he understands"* (see for example: ECHR, *X v. Austria*, case E 6185/73 (COM), Decisions and Reports vol. 2, pp. 70 *et seq.*: The information must take place in understandable language; this can require a translation of the documents testifying of the opening of the procedure, but not of the whole dossier. See also *B.S. Harward v. Norway*, 1993, Communication No. 451/1991, Report of the Human Rights Committee, UN GAOR Doc. A/49/40, p. 154; Nowak, *ibid.*, pp. 255 *et seq.*).

97 In the ICRC Commentary the following examples are mentioned: *"The right to be heard, and, if necessary, the right to call on the services of an interpreter, the right to call witnesses for the defence and produce evidence; these constitute the essential rights and means of defence."*, Junod, in: Commentary on the AP, Art. 6, No. 4602, p. 1398.

98 ***"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power*** *and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."* (emphasis added). The right to a trial within a reasonable time or to release are addressed in another section below.

99 ***"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power*** *and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."* (emphasis added). The right to a trial within a reasonable time or to release are addressed in another section below.

100 ***"Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power*** *and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."* (emphasis added). The right to a trial within a reasonable time or to release are addressed in another section below.

- According to the Human Rights Committee, the delay in bringing the arrested person before a judge under Art. 9 (3) must not exceed a few days.[101]
- In case No. 373/1989 a delay of 8 days was deemed to be incompatible with this guarantee;[102] in case No. 597/1994 more than 7 days.[103]

European Court of Human Rights:

- The Commission tends to a 4-days limit, the Court to a 3-days limit.[104]
- The accused must be brought to a judge or other officer authorised to exercise judicial power, i.e. who is independent from the executive and from the parties.[105]
- The function of the judicial officer must be that of *"reviewing the circumstances militating for and against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons"*[106].

• *The right to be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release*

This guarantee is stated in Arts. 9 (4) ICCPR[107], 5 (4) ECHR[108], 7 (6) ACHR[109] and Principle 11 of UN General Assembly Resolution 43/173 of 9 December 1988 (Annex).

Relevant case law of Human Rights bodies:

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101 Human Rights Committee, General Comment 8, article 9, A/37/40, Annexe V, para. 2, p. 95.

102 *Stephens v. Jamaica*, Communication No. 373/1989, Report of the Human Rights Committee, UN GAOR Doc. A/51/40, p. 9.

103 *P. Grant v. Jamaica*, Communication No. 597/1994, Report of the Human Rights Committee, UN GAOR Doc. A/51/40, p. 212.

104 See Frowein/Peukert, Europäische MenschenRechtsKonvention, pp. 123-124; for specific case law e.g. ECHR, *Brogan* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 145-B, paras. 58 *et seq.*, pp. 32 *et seq.* [4 days and 6 hours to 6 days and 16 hours]; ECHR, *De Jong* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 77, paras. 57 *et seq.*, pp. 25 *et seq.* [6, 7 and 11 days] – both were held to violate the Convention. See also ECHR, *Branigan and McBride v. United Kingdom*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 258-B, 1992, paras. 36 *et seq.*, pp. 47 *et seq.* [6 days and 14 hours 30 minutes, 4 days and 6 hours 25 minutes], with respect to permissible suspensions and corresponding safeguards.

105 ECHR, *Schiesser* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 34, para. 31, pp. 13 *et seq.;* ECHR, *De Jong* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 77, paras. 47 *et seq.*

106 ECHR, *Schiesser* case, *ibid.*, para. 31, p. 14.

107 *"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. [...]".*

108 *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[...]".*

109 ***"Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.*** *In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. [...]."* (emphasis added).

Human Rights Committee:

- In communication No. 330/1988 (*Albert Berry v. Jamaica*) the Committee found that the period of two and a half month, throughout which the detained had no opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention, was in violation of Art. 9 (4) ICCPR.[110]

European Court of Human Rights:

- In the *De Jong* case, it was held that periods of 6, 7 and 11 days are incompatible with Art. 5 (4) ECHR which requires that *"the lawfulness of his detention shall be decided speedily"*.[111]
- The accused must be able to challenge all the formal and material conditions of imprisonment.[112]
- To be of judicial character a body must be independent both of the executive and the parties to the case.[113]
- The Court must have the power to decide the release of the person.[114]
- The Court must function in accordance with procedural guarantees[115], such as:
  (a) Oral hearing[116]
  (b) Legal assistance[117]
  (c) Adversarial proceedings[118]
  (d) Time and facilities to prepare application[119]:

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110 Communication No. 283/1988, Report of the Human Rights Committee, UN GAOR Doc. A/49/40, para. 11.1, pp. 26-27.

111 ECHR, *De Jong* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 77, para. 58, p. 27.

112 See Frowein/Peukert, Europäische MenschenRechtsKonvention, p. 141.

113 ECHR, *De Wilde and others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 12, p. 41, para. 77.

114 ECHR, *X. v. UK* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 46, paras. 58 *et seq.*, pp. 25 *et seq.;* ECHR, *Van Droogenbroeck* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 50, para. 49, pp. 26 *et seq.*

115 See ECHR, *De Wilde and others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 12, paras. 76 *et seq.*, pp. 41 *et seq.;* see also ECHR, *Ireland v. United Kingdom,* Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 25, 1978, paras. 84 and 200, pp. 41 and 76-77 (in particular, the detained person *"had no right in law to appear or be legally represented before [the committee], to test the ground for internment, to examine witnesses against him or to call his own witnesses"*).

116 ECHR, *Sanchez-Reisse* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 107, para. 51, p. 19 [Exceptions possible]; ECHR, *Hussain v. UK* case, Reports of Judgments and Decisions, 1996-I, no. 4, paras. 59 *et seq.*, p. 271; ECHR, *Singh v. UK* case, Reports of Judgments and Decisions, 1996-I, no. 4, pp. 296 *et seq.*

117 ECHR, *Mondefo* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 141-B, (COM), paras. 85 *et seq.*, pp. 41 *et seq.*; ECHR, *Bonamar* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 129, para. 60, p. 24 [juvenile]; ECHR, *Megyeri v. Germany* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 237-A, para. 23, p. 12 [mentally insane person].

118 ECHR, *Toth* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 224, para. 84, p. 23; ECHR, *Lamy* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 151, para. 29, p. 17; ECHR, *Hussain v. UK* case, Reports of Judgments and Decisions, 1996-I, no. 4, paras. 59 *et seq.*, p. 271; ECHR, *Singh v. UK* case, Reports of Judgments and Decisions, 1996-I, no. 4, pp. 296 *et seq.*

119 ECHR, *K v. Austria* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 255-B (COM), para. 64, p. 41; ECHR, *Farmakopoulos* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 235-A, (COM), para. 53, p. 15.

- The delay in which the control must be exercised - the notion of "speedily"[120]: Consideration must be given to the diligence of the national authorities and any delays bought about by the conduct of the detained person as well as other factors causing delay, not in the power of the State organs.[121]

Inter-American System:
The Court has expressed the opinion in its advisory opinion on Habeas Corpus in Emergency Situations that the essential remedies for challenging the legality of detention (habeas corpus and amparo), may not be suspended in times of emergency so as to prevent their use to protect a non-derogable right.[122] It concluded that

> *"[...] habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment".*[123]

Necessary Rights and means of defence

Art. 14 (3) ICCPR, 6 (3) ECHR and 8 (2) ACHR name certain minimum guarantees which are not explicitly mentioned in Art. 6 (2) AP II, but which clearly form a part of this requirement:

- *"To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;",* Art. 14 (3) (b) ICCPR, Art. 6 (3) (b) ECHR (this provision does not lay down the right to communicate with a counsel of his own choosing), Art. 8 (2) (c) (d) ACHR

  Relevant case law of Human Rights bodies:

  Human Rights Committee:
  - The right applies not only to accused persons but also to their defence attorney, and it relates to all stages of the trial.[124] What adequate time means depends on the circumstances and complexity of the case.[125] The word "facilities" means that the accused or his defence council is granted access to the documents, records, etc. necessary for the preparation of the defence.

120 [illegible]

However, this does not give right to be furnished with copies of all relevant documents.[126]

- The accused's right to communicate with a counsel of his own choosing serves solely the preparation of the defence and is particularly relevant when the individual concerned is being held in pre-trial detention. Typical violations of this right stem from cases of incommunicado detention[127] or when an ex-officio defence attorney has been appointed for the accused against his will.[128]

European Court of Human Rights:

- The **adequacy of time**[129] will depend upon the complexity of the case[130], the defence lawyer's workload[131], the stage of proceedings[132] or the accused's decision to conduct his defence alone[133].
- The accused's right to **adequate facilities** was explained in *Can v. Austria*[134] as requiring that he has *"the opportunity to organize his defence in an appropriate way and without restrictions as to the possibility to put all relevant defence arguments before the trial court"*. It includes the accused's right to communicate with his lawyers during the pre-trial period, as well as later, to the extent necessary to prepare his defence.[135] The accused must be able to consult orally and by writing his solicitor and they must be able to pursue the defence in the way they see as appropriate, subject to the procedural rules.[136] A prisoner must be allowed to receive a visit from his

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126 *O.F. v. Norway*, Communication No. 158/1983, Report of the Human Rights Committee, UN GAOR Doc. A/40/40, para. 5.5, p. 211.

127 *Wight v. Madagascar*, Communication No. 115/1982, Report of the Human Rights Committee, UN GAOR Doc. A/40/40, para. 17, p. 178; *Pietroroia v. Uruguay*, Communication No. 44/1979, Report of the Human Rights Committee, UN GAOR Doc. A/36/40, para. 17, p. 159; *Drescher Caldas v. Uruguay*, Communication No. 43/1979, Report of the Human Rights Committee, UN GAOR Doc. A/38/40, para. 14, p. 196; *Lafuente Penarrieta v. Bolivia*, Communication No. 176/1984 Report of the Human Rights Committee, UN GAOR Doc. A/43/40, para. 16, p. 207.

128 *S. Ruben Lopez Burgos v. Uruguay*, Communication No. 52/1979, Report of the Human Rights Committee, UN GAOR Doc. A/36/40, para. 13, p. 183; *L. Celiberti de Casariego v. Uruguay*, Communication 56/1979, Report of the Human Rights Committee, UN GAOR Doc. A/36/40, para. 11, p. 188; *M.A. Estrella v. Uruguay*, Communication No. 74/1980, Report of the Human Rights Committee, UN GAOR Doc. A/38/40, para. 10, p. 159.

129 Under the European Convention on Human Rights the ECHR held that the guarantee begins to run from the moment that a person is subject to a criminal charge. This will be from the moment that he is arrested or *"otherwise substantially affected"*, ECHR, *Corigliano v. Italy*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 57, 1982, para. 34, p. 13.

130 ECHR, *Albert and Le Compte* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 58, para. 41, pp. 20-21.

131 ECHR, *X and Y v. Austria,* case no. 7904/77 (COM), Decisions and Reports vol. 15, p. 163.

132 ECHR, *Huber* case, case no. 5523/72 (COM), Collection of Decisions of the European Commission of Human Rights vol. 46, p. 99.

133 ECHR, *X v. Austria*, case no. 2370/64 (COM), Collection of Decisions of the European Commission of Human Rights vol. 22, p. 96.

134 Publications of the European Court of Human Rights, Series A vol. 96, 1985, Com Rep, para. 53, p. 17.

135 ECHR, *Campbell and Fell v. UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 80, 1984, paras. 111-113, p. 49; *Goddi v. Italy*, *ibid.*, vol. 76, 1984, paras. 27-32, pp. 11-13.

136 ECHR, *Can v. Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 96, 1985, para. 53, p. 17.

lawyer out of the hearing of prison officers or other officials in order to convey instructions or to pass or receive confidential information relating to the preparation of his defence (restrictions upon visits by lawyers may be imposed if they can be justified in the public interest).[137] At least the solicitor must be able to consult the documents constituting the dossier, subject to certain exceptions (secret, security, etc.).[138]

Inter-American System:

- **Adequacy of time**: In case 10.198 (Nicaragua) the Commission inferred from the shortness of the time during which the accused had been detained, tried and sentenced that he had not been accorded the time and means for the preparation of his defence.[139]

- *"[...] to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it"*, Art. 14 (3) (d) ICCPR, Art. 6 (3) (c) ECHR[140], Art. 8 (2) (d), (e) ACHR[141], Art. 7 (1) (c) ACHPR[142]

This guarantee may be divided into a list of individual rights:
- to defend oneself in person,
- to choose one's own counsel,
- to be informed of the right to counsel, and
- to receive free legal assistance if needed.

Relevant case law of Human Rights bodies:

European Court of Human Rights:

- According to the European Court this guarantee applies at the pre-trial stage as well as during the trial.[143] The purpose of this guarantee is to ensure that

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137 ECHR, *Can v. Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 96, 1985, paras. 51-52, pp. 16 *et seq.* (Opinion of the Court); ECHR, *Campbell and Fell v. UK*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 80, 1984, para. 113, p. 49.

138 ECHR, *Kamasinski* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 168, paras. 87 *et seq.*, pp. 39 *et seq.* As to exceptions, see *e.g.* ECHR, *Haase* case, B 7412/76 (COM), Decisions and Reports vol. 11, pp. 91-92.

139 Inter-American Yearbook on Human Rights 1989, p. 348 (6 weeks).

140 *"to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".*

141 *"d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;*
e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law".

142 *"the right to defence, including the right to be defended by a counsel of his choice".*

143 ECHR, *Imbrioscia v. Switzerland*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 275, para. 36, p. 13; *Quaranta v. Switzerland, ibid.*, vol. 205, 1991, para. 67, pp. 25 *et seq.* (Commission); Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights, 1995, p. 256.

proceedings against an accused *"will not take place without an adequate representation of the case for the defence"*.[144] In terms of equality of arms, it is *"primarily to place the accused in a position to put his case in such a way that he is not at a disadvantage vis-à-vis the prosecution"*.[145] The right of the accused to defend himself in person has not been interpreted as allowing the accused a completely free choice.[146]

Inter-American System:

- Some indications on the scope of Art. 8 (2) (d) (e) ACHR may be found in the "Exceptions to the Exhaustion of Domestic Remedies Advisory Opinion" (1990).[147] In this advisory opinion it is *inter alia* stated that *"[s]ub-paragraphs (d) and (e) of Article 8 (2) indicate that the accused has a right to defend himself personally or to be assisted by legal counsel of his own choosing and that, if he should choose not to do so, he has the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides [...]"*

◆ *"To be tried without undue delay"*, Art. 14 (3) (c) ICCPR, Arts. 6 (1) ECHR, 8 (1) ACHR and 7 (1) (d) ACHPR (*"within a reasonable time"*)

Relevant case law of Human Rights bodies:

Human Rights Committee:

- Reviewing the case law of the Human Rights Committee, one can only conclude that it depends on the circumstances and complexity of the case as to what a reasonable time (or undue delay) is. The Committee's general comment on Art. 14 explains that *"this guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all states must take place 'without undue delay'."*[148]

European Court of Human Rights:

- The Court and the Commission have said that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to its complexity, the conduct of the parties, and the authorities dealing with the case.[149] *"Article 6 commands that judicial*

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144 ECHR, *Pakelli v. FRG*, Publications of the European Court of Human Rights, Series B: Judgments and Decisions vol. 53, 1983, Com Rep, para. 84, p. 26.

145 ECHR, *X v. FRG* No. 10098/82, 8 E.H.R.R. 1984, p. 225.

146 See Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights, 1995, p. 258, with references.

147 Inter-American Court of Human Rights, Series A: Judgments and Opinions, no. 11, 1992, paras. 25 *et seq.*, p. 28.

148 Quoted in: De Zayas, in: Weissbrodt/Wolfrum (eds.), The Right to a Fair Trial, 1998, p. 684. According to a commentator, the time limit begins to run when the suspect is informed that the authorities are taking specific steps to prosecute him. It ends on the date of the definitive decision, i.e., final and conclusive judgement or dismissal of the proceedings, Nowak, ICCPR Commentary, 1993, p. 257.

149 ECHR, *Scopelletti v. Italy*, 17 E.H.R.R. 1993, p. 453; *Olson v. Sweden* (No. 2), 17 E.H.R.R. 1992, p. 134; *König v. Federal Republic of Germany*, 2 E.H.R.R. 1978, p. 170; *App. No. 9604/81 v. Germany*, 5 E.H.R.R. 1983, p. 587.

proceedings be expeditious, but it also lays down the more general principle of the proper administration of justice."[150]

Inter-American System:

- With respect to the right to a hearing within a reasonable time, the Commission simply noted that a series of factors might determine the length of a trial. The factors included *"the complexity of the case, the behaviour of the accused, and the diligence of the competent authorities in their conduct of the proceedings".*[151]

N.B.: Besides the right of a detained person to be brought promptly before a judge or other officer authorized by law to exercise judicial power, the above mentioned Arts. 9 (3) ICCPR[152], 5 (3) ECHR[153], 7 (5) ACHR[154] contain also the right of a person detained on remand to a trial within a reasonable time or to release from detention if no trial can be held within reasonable time.

The ECHR found that:

- The reasonable time of pre-trial detention depends on the circumstances of the case and especially on the difficulty of the investigations, the behaviour of the accused and the handling of the case by the national authorities.[155]

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150 ECHR, *Boddaert v. Belgium*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 235-D, 1992, para. 39, pp. 82 *et seq.*

151 ACHR, Report 12/96, Case 11.245, Argentina, IAYHR 1996, vol. 1, paras. 111 *et seq.*, p. 278.

152 *"Anyone arrested or detained on a criminal charge [...] shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."*

153 *"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."*

154 *"Any person detained [...] shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."*

155 Cf. ECHR, *Wernhoff* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 7, para. 17, p. 26 [complexity of the case]; ECHR, *Matzenetter* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 10, para. 12, pp. 34 *et seq.* [exceptional complexity of the case]; ECHR, *Stögmüller* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 9, para. 16, p. 44 [excessive length because of slowness of proceedings without good reason]; *Tomasi v. France* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 241-A, paras. 102 *et seq.*, p. 39. If no trial can be held in a reasonable time, the accused has a right to be released (bail). Such bail can be refused for specific reasons:

(a) Danger of flight (ECHR, *Stögmüller* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 9, p. 44),

(b) Interference with the course of justice (ECHR, *Wernhoff* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 7, p. 25),

(c) Prevention of crime (ECHR, *Matzenetter* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 10, p. 33),

(d) Preservation of public order (ECHR, *Letellier* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 207, para. 51, p. 21; ECHR, *Kemmache* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 218, para. 52, p. 25 [reaction of society to a particular grave crime]).

In the Inter-American System the Commission confirmed the ECHR jurisprudence.[156] The Human Rights Committee has interpreted Art. 9 (3) ICCPR as meaning that pre-trial detention should be as short as possible.[157]

- *"To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"*, Art. 14 (3) (e) ICCPR, Art. 6 (3) (d) ECHR (almost literally), Art. 8 (2) (f) ACHR[158], see also Art. 75 (4) (g) AP I

This guarantee may be divided into two individual rights:
- the right to examine, or have examined, the witnesses against him,
- the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

As the ICRC Commentary to Art. 75 AP I points it out: *"It is clear that the possibility of examining witnesses is an essential prerequisite for an effective defence."*[159]

According to commentators to the human rights instruments: *"The right to call, obtain the attendance of and examine witnesses under the same conditions as the prosecutor is an essential element of 'equality of arms' and thus of a fair trial."*[160]

Relevant case law of Human Rights bodies:

European Court of Human Rights:
- According to the Court *"that right means in principle the opportunity for the parties to a criminal [...] trial to have knowledge of and comment on all evidence addressed or observations filed [...] with a view to influencing the court's decision."*[161]
- The right applies to the trial. It does not apply generally at the pre-trial stage.[162] Neither the accused's right to cross-examine witnesses nor his right to call defence witnesses is absolute.[163] However, such limits as are set or occur must be consistent with the principle of equality of arms.[164]

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156 See ACHR, Resolution 17/89, Case 10.037, Argentina, IAYHR 1989, p. 94; ACHR, Report 12/96, Case 11.245, Argentina, IAYHR 1996 vol. 1, pp. 258, 264 *et seq.* The Commission stated *inter alia* that preventive detention is an exceptional measure. Only strict reasons can justify it: such are the danger of absconding, the seriousness of the crime, the potential severity of the sentence, the impediment of the preliminary investigations, e.g. by destroying evidence, or the risk of repetition of offences.

157 See Grothe, in: Weissbrodt/Wolfrum (eds.), The Right to a Fair Trial, 1998, p. 709, with reference.

158 *"the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts".*

159 Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3115, p. 884.

160 Nowak, ICCPR Commentary, 1993, p. 261 with further references.

161 ECHR, *J.J. v. The Netherlands*, 1998, Reports of Judgments and Decisions, 1998-II, No. 68, para. 43, p. 613.

162 ECHR, *Can v. Austria*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 96, 1985, Com Rep, para. 47; ECHR, *Adolf v. Austria*, Publications of the European Court of Human Rights, Series B: Judgments and Decisions vol. 43, 1980, Com Rep, para. 64, p. 29.

163 ECHR, *Engel v. Netherlands*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 22, 1976, para. 91, pp. 38 *et seq.*

164 *Ibid.* The obligation is to achieve equality in fact as well as in law: ECHR, *Austria v. Italy*, Yearbook of the Convention on Human Rights vol. 6, 1963, p. 772 (Commission).

- *"To have the free assistance of an interpreter if he cannot understand or speak the language used in court [...]"*, Art. 14 (3) (f) ICCPR, Art. 6 (e) ECHR (almost literally), Art. 8 (2) (a) ACHR ("*without charge*")

  Relevant case law of Human Rights bodies:

  Human Rights Committee:

  - The Committee explained the range of this right as follows:

    "The provision for the use of one official court language by States parties to the Covenant does not [...] violate article 14. Nor does the requirement of a fair hearing obligate State parties to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding or expressing themselves in the court language is it obligatory that the services of an interpreter be made available."[165]

  European Court of Human Rights:

  - The guarantee protects persons once they are charged with a criminal offence.[166] It covers all criminal proceedings and includes the translation of documents or oral evidence which are essential to be understood by the accused in order to secure a fair trial.[167] This does not involve translation of all the documents of the dossier.[168]The assistance is free in all cases, i.e. also in case of conviction.[169] It does not depend on the accused's means. The right can be waived by the accused.[170]

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165 *Y. Cadoret and H. Le Bihan v. France*, 1991, Communication Nos. 221/1987 and 323/1988, Report of the Human Rights Committee, UN GAOR Doc. A/46/40, p. 224; *D. Guesdon v. France*, 1990, Communication No. 219/1986, Report of the Human Rights Committee, UN GAOR Doc. A/45/40, p. 67; *Barzhig v. France*, Communication No. 327/1988, Report of the Human Rights Committee, UN GAOR Doc. A/46/40, para. 5.5, p. 256; *C.L.D. v. France*, Communication No. 439/1990, Report of the Human Rights Committee, UN GAOR Doc. A/47/40, para. 4.2, p. 433; *Z.P. v. Canada*, Communication No. 341/1988, Report of the Human Rights Committee, UN GAOR Doc. A/46/40, para. 5.3; *C.E.A. v. Finland*, Communication No. 316/1988, Report of the Human Rights Committee, UN GAOR Doc. A/46/40, para. 6.2, p. 296.

166 Harris/O'Boyle/Warbrick, Law of the European Convention on Human Rights, 1995, pp. 269 *et seq.*

167 ECHR, *Luedicke and others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 29, para. 48, p. 20.

168 ECHR, *Kamasinski* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 168, para. 74, p. 35.

169 ECHR, *Luedicke and others* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 29, paras. 38 *et seq.*, pp. 16 *et seq.*; para. 46, p. 19.

170 ECHR, *Kamasinski* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 168, para. 80, p. 37.

(ii) no one shall be convicted of an offence except on the basis of individual penal responsibility (Art. 6 (2) (b) AP II)

With respect to this judicial guarantee, also laid down in Art. 75 (4) (b) AP I the ICRC Commentary explains:

> *"This sub-paragraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. This principle is contained in every national legislation. It is already expressed in Article 33 of the fourth Convention, where it is more elegantly worded as follows: "No protected person may be punished for an offence he or she has not personally committed". [...] The wording was modified to meet the requirement of uniformity between the texts in the different languages and, in this particular case, with the English terminology ("individual penal responsibility"). Article 75, paragraph 4 (b), of Protocol I, lays down the same principle."*[171]

Of course, this does not exclude cases of complicity or incitement, which are punishable offences in themselves and may lead to a conviction.

(iii) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby (Art. 6 (2) (c) AP II)

In addition to the prohibition of a heavier penalty than the one that was applicable at the time the offence was committed, this rule sets out two aspects of the principle that criminal law should not be retroactively applied: *'nullum crimen sine lege'* and *'nulla poena sine lege'*. AP II retained the wording of the Covenant. This solution was adopted out of a concern to establish in Protocol II fundamental guarantees for the protection of human beings, which would be equivalent to those granted by the Covenant in the provisions from which no derogation may be made, even in time of public emergency threatening the life of the nation. Art. 15 of the Covenant is one of those articles.[172] These principles are also laid down in Arts. 7 ECHR, 9 ACHR and 7 (2) ACHPR. The ECHR and ACHR qualify them as being non-derogable.

Relevant case law of Human Rights bodies:

European Court of Human Rights:
- In the *Kokkinakis v. Greece Case*,

> *"[t]he Court points out that Article 7 § 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law*

171 Junod, in: Commentary on the AP, Art. 6, No. 4603, pp. 1398 *et seq.*

172 Junod, in: Commentary on the AP, Art. 6, No. 4604, p. 1399.

can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable."[173]

(iv) anyone charged with an offence is presumed innocent until proved guilty according to law (Art. 6 (2) (d) AP II)

The presumption of innocence, which is implicitly contained in Art. 67 GC IV and laid down in Art. 75 (4) (d) AP I, is also contained in Arts. 14 (2) ICCPR, 6 (2) ECHR, 8 (2) ACHR, Art. 7 (1) (b) ACHPR. It is a widely recognized legal principle that it is not the responsibility of the accused to prove he is innocent, but of the prosecution to prove he is guilty.[174] In cases of doubt, the accused must be found not guilty in accordance with the ancient principle *in dubio pro reo*.[175]

Relevant case law of Human Rights bodies:

Inter-American System:

- The Commission stated in case 10.970 (Peru): *"The essential thing is therefore that the judge who hears the case is free of any prejudice concerning the accused's guilt and affords him the benefit of the doubt, i.e. does not condemn him until he is certain or convinced of his criminal liability, so that all reasonable doubt that the accused might be innocent is removed."*[176] An excessive period of pre-trial detention can be in violation of the presumption of innocence: *"The prolonged imprisonment [in casu: over 4 years] without conviction, with its natural consequence of undefined and continuos suspicion of an individual, constitutes a violation of the principle of presumed innocence [...] The substantiation of guilt calls for the formulation of a judgement establishing blame in a final sentence. If the use of that procedure fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment."*[177]

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173 ECHR, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 260-A, 1993, para. 52, p. 22.

174 Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3108, p. 882; Nowak, ICCPR Commentary, 1993, p. 254.

175 Nowak, *ibid.*

176 ACHR, Report 5/96, IAYHR 1996, vol. 1, p. 1196. See also ACHR, Report 27/94, Case 11.084, Peru, IAYHR 1994, vol. 1, pp. 510 *et seq.*

177 ACHR, Report 12/96, Case No. 11.245, Argentina, IAYHR 1996, vol. 1, paras. 113 *et seq.*, pp. 278 *et seq.*

(v) anyone charged with an offence shall have the right to be tried in his presence (Art. 6 (2) (e) AP II)[178]

With respect to the drafting of Art. 75 (4) (e) AP I, which is formulated in the same way as Art. 6 (2) (e) AP II, the Rapporteur of Committee III noted that it was understood that persistent misconduct by a defendant could justify his removal from the courtroom.[179]

According to the commentators in the ICRC Commentary to the AP:

> *"This sub-paragraph does not exclude sentencing a defendant in his absence if the law of the State permits judgement in absentia.*
> *In some countries the discussions of the judges of the court are public and take place before the defendant; in other countries the discussion is held in camera, and only the verdict is made public. Finally, there are countries where the court's decision is communicated to the defendant by the clerk of the court in the absence of the judges. This sub-paragraph does not prohibit any such practices: the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections."*[180]

The rule reiterates the principle laid down in Art. 14 (3) (d) ICCPR. Art. 8 (2) (g) ACHR contains the same judicial guarantee.

Relevant case law of Human Rights bodies:

European Court of Human Rights:

- A criminal trial without the presence of the accused is incompatible with Art. 6 and in case of *in absentia* trial there must be an opportunity for the convicted to reopen the trial.[181]
- Hearing *in absentia* is permitted if the State has acted diligently, but unsuccessfully, to give the accused effective notice of the hearing.[182] But the accused must be able to obtain a re-opening of the case: see above. It is doubtful if such a re-hearing is possible where there had been a waiver[183] or where the accused has absconded (various criminal procedures of European States do not grant such a right).

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178 This wording is the result of a proposal in the Working Group which recommended *"everyone charged with an offence shall have the right to be tried in his presence"*. The proposal was not adopted in this form because a number of delegations argued that sentences in absentia are allowed. The right of the accused to be present at his trial, which is established here, should be understood as a right which the accused is free to exercise or not, see Junod, in: Commentary on the AP, Art. 6, No. 4609, p. 1400.

179 O.R. XV, p. 462, CDDH/407/Rev.1, para. 48.

180 Pilloud/Pictet, in: Commentary on the AP, Art. 75, Nos. 3109 *et seq.*, p. 883.

181 ECHR, *Colozza* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 89, para. 29, p. 15.

182 ECHR, *Colozza* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 89, para. 28, pp. 14 *et seq. F.C.B. v. Italy* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 208-B, p. 21, para. 33.

183 ECHR, Poitrimol case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 277-A, para. 31, p. 13.

- The accused may waive this right by unequivocal statements provided that there are minimum standards of safeguard in that context.[184]

(vi) no one shall be compelled to testify against himself or to confess guilt (Art. 6 (2) (f) AP II)

This rule repeats Art. 14 (3) (g) ICCPR. The Human Rights Committee explained that this provision must be understood *"in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt."*[185] The guarantee is also contained in Art. 8 (3) ACHR, which reads as follows: *"A confession of guilt by the accused shall be valid only if it is made without coercion of any kind."* It must be read together with Art. 8 (2) (g) ("the right not to be compelled to be a witness against himself or to plead guilty"). Under the ECHR this judicial guarantee has been seen as one element of the right to a fair trial.[186]

(vii) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised (Art. 6 (3) AP II)

In the ICRC Commentary the rationale of this provision is explained in the following terms:

> *"It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right of appeal against sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft. However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies."*[187]

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184 ECHR, *Poitrimol* case, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 277-A, para. 31, pp. 13 *et seq.*

185 *E. Johnson v. Jamaica*, 1996, Communication No. 88/1994, Report of the Human Rights Committee, UN GAOR Doc. A/51/40, p. 180; *A. Berry v. Jamaica*, 1994, Communication No. 330/1988, Report of the Human Rights Committee, UN GAOR Doc. A/49/40, p. 28; *P. Kelly v. Jamaica*, 1991, Communication No. 253/1987, Report of the Human Rights Committee, UN GAOR Doc. A/46/40, p. 246; *S. Ruben Lopez Burgos*, Communication No. 52/1979, Report of the Human Rights Committee, UN GAOR Doc. A/36/40, paras. 11.5, 13., pp. 181 et seq.; *M.A. Teti Izquierdo v. Uruguay*, Communication No. 73/1980, Report of the Human Rights Committee, UN GAOR Doc. A/37/40, para. 9, p. 186; *M.A. Estrella v. Uruguay*, Communication No. 74/1980, Report of the Human Rights Committee, UN GAOR Doc. A/38/40, para. 10, p. 159; *H. Conteris v. Uruguay*, Communication No. 139/1983, Report of the Human Rights Committee, UN GAOR Doc. A/40/40, para. 10, p. 202; *R. Cariboni v. Uruguay*, Communication No. 159/1983, Report of the Human Rights Committee, UN GAOR Doc. A/43/40, para. 10, p. 190.

186 For example: ECHR, *Funke v. France*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions vol. 256-A, 1993, para. 44, p. 22: *"the right of anyone 'charged with a criminal offence' [...] to remain silent and not to contribute to incriminating himself"*; ECHR, *Serves v. France*, Reports of Judgments and Decisions, 1997-VI, No. 53, para. 47, p. 2174.

187 Junod, in: Commentary on the AP, Art. 6, No. 4611, pp. 1400 *et seq.*

N.B.: Art. 14 (5)[188], Art. 8 (2) (h)[189] Art. 2 of the 7th AP to the ECHR[190] and Art. 7 (1) (a) ACHPR[191] contain the right to appeal.

(b) Indispensable judicial guarantees derived from other sources

As Art. 6 (2) AP II does not contain an exhaustive list, the provisions of the GC and AP I mentioned under the section Art. 8 (2) (a) (vi) - Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial may be a further indication of indispensable guarantees.

The following guarantees - also derived from human rights instruments - are not explicitly mentioned in Art. 6 AP II:

(i) the right of the accused to have the judgement pronounced publicly (Art.75 (4) (i) AP I)

According to the ICRC Commentary to the AP:

> *"It is an essential element of fair justice that judgments should be pronounced publicly. Of course, a clear distinction should be made between proceedings and judgment. It may be necessary because of the circumstances and the nature of the case to hold the proceedings in camera, but the judgment itself must be made in public, unless, as the Rapporteur pointed out, this is prejudicial to the defendant himself; this could be the case for a juvenile offender."*[192]

As regards holding oral proceedings in camera, Art. 14 (1) ICCPR gives some clear indications:

> *"The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".*[193]

According to the ICCPR, the right to a public judgement is subject to overriding interests of juvenile persons.[194]

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188 ICCPR *"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."*

189 ACHR *"[T]he right to appeal the judgment to a higher court."*

190 *"Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law"*, certain exceptions are permitted, see Art. 2 (2).

191 *"[T]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force".*

192 Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3118, p. 884. See also Nowak, ICCPR Commentary, 1993, pp. 248 et seq.

193 See also Art. 6 (1) ECHR

194 Art. 6 (1) ECHR stipulates in this regard:
"Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances

(ii) the principle of *ne bis in idem* (i.e. no punishment more than once for the same act)

This principle is mentioned in Arts. 86 GC III, Art. 117 (3) GC IV, Art.75 (4) (h) AP I and human rights instruments (Art. 14 (7) ICCPR[195]; Art. 4 of the 7th AP to the ECHR[196], which is non derogable, Art 4 (3); and Art. 8 (4) ACHR[197]). Considering the status of *res judicata* in international law, the ICTY Prosecution[198] followed Bin Cheng who concluded in his standard-setting work on general principles of international law: *"There seems little, if indeed any question as to res judicata being a general principle of law or as to its applicability in international judicial proceedings."*[199] The ICRC Commentary to the AP points out that *"[r]espect for 'res judicata' is one of the basic principles of penal procedure, and it is important to uphold this principle."*[200]

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where publicity would prejudice the interests of justice.

Art. 8 (5) ACHR reads as follows:

"Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

195 *"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.". In A.P. v. Italy*, the Human Rights Committee interpreted the principle of "ne bis in idem" as having no effect whatsoever on proceedings in other States, Communication No. 204/1986, Report of the Human Rights Committee, UN GAOR Doc. A/43/40, para. 7.3, p. 244.

196 *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.".* In Art. 4 (2) of the 7th AP to the ECHR it is stipulated that under certain extraordinary circumstances a new criminal trial is permissible, even to the detriment of an acquitted or already convicted person

197 *"An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."*

The Commission analysed the meaning of the principle under the ACHR in Case 11.006, Peru. It named the following elements:

"1. the accused must have been acquitted;
2. the acquittal must be a final judgment; and
3. the new trial must be based on the same cause that prompted the original trial."

The notion 'accused person acquitted' implies

"that someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he had been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it has been determined that the acts of which he is accused are not defined as crimes."

In the context of 'nonappealable judgment' the expression 'judgment'

"should be interpreted as any procedural act that is fundamentally jurisdictional in nature, and 'non-appealable judgment' as expressing the exercise of jurisdiction that acquires the immutability and incontestability of res judicata.", Report 1/95, IAYHR 1995, p. 300.

198 ICTY, Prosecutor's Response to the Trial Chamber's Request for a Brief on the Use of Cumulative Criminal Charges in Relation to a Proposed "Substantive" *Non Bis in Idem* Principle in International Criminal Law, *The Prosecutor v. Slavko Dokmanovic*, IT-95-13a-T, p. 18. In this response the ICTY Prosecution distinguished the traditional procedural or formal principle of *non bis in idem* from a "substantive" *non bis in idem* principle, which would apply to a case before the question of guilt has been finally adjudicated by a court, in particular at the time of the first trial. According to the Prosecution the latter does not exist as a general principle of international law.

199 Bin Cheng, General Principles of Law as Applied By International Courts and Tribunals, 1953, p. 336.

200 Pilloud/Pictet, in: Commentary on the AP, Art. 75, No. 3117, p. 884.

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

Annex III

Paper prepared by the International Committee of the Red Cross on article 8, paragraph 2 (e) (v), (vi), (vii), (viii), (xi) and (xii), of the Statute of the International Criminal Court

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INTRODUCTION

It was agreed during the Diplomatic Conference on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998, that a draft text on the elements of the crime of genocide, crimes against humanity and war crimes was to be prepared by the Preparatory Commission. In this respect, Article 9 of the Statute of the International Criminal Court (the "ICC Statute") states that the *"[e]lements of crimes shall assist the Court in the interpretation and application of Articles 6, 7, and 8. They shall be adopted by [...] the members of the Assembly of States Parties"*. This paper is intended to assist the Preparatory Commission in preparing the text on the elements of crime for Article 8 (2) solely by presenting relevant sources and indicating the results that emerge from these sources. It does not reflect any decision taken at a previous session of the Preparatory Commission. Part IV deals exclusively with specific war crimes as listed in Article 8 (2) (e) of the ICC Statute.

The review of sources consisted in an exhaustive research and analysis of the relevant case law and international humanitarian law and human rights law instruments. As regards case law, a review of cases from the Leipzig Trials, from post Second World War trials, including the Nuremberg and Tokyo trials as well as national case law, and decisions from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda was done. National case law on war crimes was examined when it was available in English, French or German. Decisions from international and regional Human Rights bodies were also analysed for further clarification on certain offences. It is important to note that the various sources referred to in this paper were selected solely in an objective manner and based on their relevance and shall not be seen as a reflection of any particular view or position.

The paper is structured in the following manner. First, the results from the sources are outlined for each offence listed under Article 8 (2) (e) of the Statute. The term "material element" is used to describe the *actus reus* of the offence (the act or omission) and "mental element" to describe the *mens rea* or necessary intent to commit the offence. Second, a commentary containing an analysis of the various sources under review shows the legal basis for the results indicated.

It is important to note that this paper does not deal with the responsibilities of commanders, superiors and subordinates (Art. 28 ICC Statute) nor questions concerning crimes committed by incitement, attempt, conspiracy or other forms of assistance (Art. 25 ICC Statute).

ABBREVIATIONS

The following abbreviations are used throughout this paper:

ACHPR:	African Charter on Human and Peoples' Rights
A.D.:	Annual Digest and Reports of Public International Law Cases
AP I:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
AP II:	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977
ICCPR:	International Covenant on Civil and Political Rights
ECHR:	European Court of Human Rights
GAOR:	General Assembly Official Records
GC:	Refers to all four (4) Geneva Conventions
GC I:	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC II:	Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949
GC III:	Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949
GC IV:	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
IACHR:	Inter-American Commission (or Court) on Human Rights
IAYHR	Inter-American Yearbook on Human Rights
ICC:	International Criminal Court
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
ILM:	International Legal Materials

ILR:	International Law Reports
UN Doc.:	United Nations Document
UNGA Res.:	United Nations General Assembly Resolution
WCC:	War Crimes Commission

Article 8 Paragraph 2 (e) ICC Statute

- OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICTS NOT OF AN INTERNATIONAL CHARACTER -

General points common to the offences under Article 8 (2) (e) of the ICC Statute

(1) The acts or omissions are committed in the context of an armed conflict not of an international character.

Commentary

(1) The acts or omissions are committed in the context of a non-international armed conflict

War crimes, as defined under Art. 8 (2) (e) of the Statute, concern conduct committed in the context of an armed conflict not of an international character.

Definition of an armed conflict not of an international character

The term "armed conflict not of an international character" is derived from common Art. 3 GC. The ICTY found that a non-international armed conflict *"exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State"*.[1] This qualification has been included into Art. 8 (2) (f) ICC Statute with one modification: the term "protracted armed violence" has been replaced by "protracted armed conflict". The addition of the word "protracted" to armed conflict seems to be redundant since protracted violence is a constituent element of an armed conflict not of an international character. See also below the sources concerning the lower threshold of an internal armed conflict.

With regard to the definition of internal conflicts, the elements described under section Article 8 Paragraph 2 (c) ICC Statute -VIOLATIONS OF COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS - must be considered. In sum, the most important points are the following:

- the ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria;

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[1] ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction, IT-94-1-AR72, para. 70, p. 37. This finding is also cited in ICTR, *The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, para. 619.

- the term 'armed conflict' presupposes the existence of hostilities between armed forces organized to a greater or lesser extent;
- there must be the opposition of armed forces and a certain intensity of the fighting

The latter criteria, which are closely related, are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, which are not subject to international humanitarian law.

Concerning the description of the geographical scope of the armed conflict and the Potential Perpetrators see section Article 8 Paragraph 2 (c) ICC Statute -VIOLATIONS OF COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS.

Comments on specific offences

General remarks relevant to all offences

- With respect to the terms "unlawful" or "lawful", as used in the elements of several offences, it is important to emphasise that they refer to the lawfulness under international law.

- The notion "wilful" in the following sections includes "intent" and "recklessness", but excludes ordinary negligence. The term "knowingly" must be understood in the sense of Art. 30 ICC Statute which defines "knowledge" as meaning awareness that a factual circumstance exists or a consequence will occur in the ordinary course of events (cf. Art. 30 (3)).

Art. 8 (2) (e) (v) - Pillaging a town or place, even when taken by assault

1. Results from the sources

Material elements

(1) The perpetrator appropriated or obtained against the owner's will [by force] [either through taking advantage of the circumstances of armed conflict or through abuse of military strength] private or public property in a town or a place.

Mental element

(2) The act is committed wilfully with the specific intention [of unjustified gain] [to deprive the owner or any other person of the use or benefit of the property, or to appropriate the property for the use of any person other than the owner].

2. Commentary

a) Treaty reference of the war crime

The instruments of international humanitarian applicable to non-international armed conflicts prohibit explicitly only the pillaging of *"persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted"* (Art. 4 (2) (g) AP II).

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

The conclusions stated under the section dealing with the offence of Pillaging a town or place, even when taken by assault (Art. 8 (2) (b) (xvi) of the Statute) in the context of international armed conflicts also apply to a large extent to this offence when committed in the context of a non-international armed conflict. Since both offences are formulated in exactly the same manner, there are no indications in the ICC Statute that this offence has different special constituent elements in an international or non-international armed conflict. However, it must be emphasised that there are no specific rules of international humanitarian law allowing requisitions, contributions, seizure or taking of war booty in a non-international armed conflict.

Art. 8 (2) (e) (vi) - Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions

1. Treaty reference of the war crime

There is no single treaty reference containing all the different acts described in this war crime. The constituent parts of the crime may be found in a number of legal instruments. As the ICTY pointed out in the *Delalic case*:

> *"There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4 (2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4 (1) which states that all persons are entitled to respect for their person and honour. [...]*

There is on the basis of these provisions alone, a clear prohibition on rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape."[2]

The most relevant provision of AP II reads as follows:

Art. 4 (2) (e) AP II:
"outrages upon personal dignity, in particular [...] rape, enforced prostitution and any form of indecent assault".

According to Art. 4 (1) AP II persons protected against these acts are all those *"who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted".* However, this reference is not included in the ICC Statute.

2. Criminalised forms of conduct

a) Results from the sources

aa) Rape

Material elements

(1) The perpetrator committed an act of 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;
(2) by coercion or force or threat of force against the victim or a third person.

Mental elements

(3) The perpetrator acted wilfully.

bb) Sexual slavery

Material elements

(1) The perpetrator treated a person as chattel by exercising any or all of the powers attaching to the right of ownership, including sexual access through rape or other forms of sexual violence.

Mental elements

(2) The perpetrator acted wilfully.

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[2] ICTY, Judgement, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, IT-96-21-T, paras. 476 *et seq.*, pp. 172 *et seq.* See also ICTY, Judgement, *The Prosecutor v. Furundzija*, IT-95-17/1-T, paras. 165 *et seq.*, pp. 65 *et seq.*

cc) Enforced prostitution

Material elements

(1) The perpetrator imposed conditions of control over a person and coerced that person to engage in sexual activity.

Mental elements

(2) The perpetrator acted wilfully.

dd) Forced pregnancy, as defined in article 7, paragraph 2 (f)

According to Art. 7 (2) (f) of the ICC Statute,

> *"'Forced pregnancy' means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."*

ee) Enforced sterilization

There is no solid basis in the case law indicating the elements of this offence.

ff) Any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions

Material elements

(1) The perpetrator committed an physical or psychological act of a sexual nature upon a person under circumstances which are coercive.

Mental elements

(2) The perpetrator acted wilfully.

b) Commentary

The conclusions stated under the section dealing with the offence of Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (Art. 8 (2) (b) (xxii) of the Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Although the wording of the crime in a non-international armed conflict is slightly different, in particular by using the term "also constituting a serious violation of article 3 common to the four Geneva Conventions" instead of "also constituting a grave breach of the four Geneva Conventions", there are no indications in the ICC Statute or

other sources that this offence has different special constituent elements in an international or non-international armed conflict.

Art. 8 (2) (e) (vii) - Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities

1. Results from the sources

Material elements

(1) The perpetrator caused
  (a) the conscription or enlistment of a child into armed forces or groups, or
  (b) used them to participate actively in hostilities.
(2) The child was under the age of fifteen years.

Mental elements

(3) The perpetrator acted wilfully.
(4) The perpetrator
  (a) knew or was aware that the child was under the age of fifteen years, or
  (b) was wilfully blind to the fact that the child was under the age of fifteen years.

2. Commentary

a) Treaty reference of the war crime

This offence is derived from Art. 4 (3) (c) AP II, providing that:

> *"children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."*

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

In contrast to the corresponding offence in an international armed conflict the terms "armed forces or groups"[3] are used instead of "national armed forces", clearly indicating that the

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[3] Describing the *travaux préparatoires* the ICRC Commentary points out that the term "armed forces" of the High Contracting Party in Art. 1 AP II
> *"should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, "regular armed forces", in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force).",*
Junod, in: Commentary on the AP, Art. 1, No. 4462, p. 1352.

conscription or enlistment into rebel forces as well the active participation of children in hostilities on the rebel side constitute a war crime as well.

The conclusions stated under the section dealing with the offence of Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities (Art. 8 (2) (b) (xxvi) of the Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Besides the different wording and the corresponding consequences indicated above, there are no indications in the ICC Statute or the AP II that this offence has different constituent elements in an international or non-international armed conflict.

Art. 8 (2) (e) (viii) - Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand

1. Results from the sources

Material elements

(1) The perpetrator ordered the displacement of civilians or a group of civilians for reasons related to the conflict.
(2) The displacement was not demanded by the security of the civilians involved or imperative military reasons.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

a) Treaty reference of the war crime

This offence is derived from Art. 17 (1) 1st sentence AP II which reads as follows:

> *"The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand."*

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence. From one decision of the ICTY under rule 61 one may conclude that the Tribunal considers "ethnic cleansing" as an example of unlawful displacement.[4] However, in this decision, the Tribunal did not specifically point out the elements of this crime.

aa) Remarks concerning the material elements

The ICRC Commentary to Art. 17 AP II points out that

> *"[p]aragraph 1 covers displacements of the civilian population as individuals or in groups within the territory of a Contracting Party where a conflict [...] is taking place."*

This offence prohibits the forced displacement of the civilian population, except in exceptional circumstances of two kinds:

- The security of the civilian population
- Imperative military reasons.

Art. 49 (2) GC IV applicable to evacuations in international armed conflicts refer to the same circumstances. The indications given under Art. 8 (2) (a) (vii) - Unlawful deportation or transfer or unlawful confinement and Art. 8 (2) (b) (viii) - The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory may be useful as well for this offence.

In sum, the following indications were made under these sections:

- With respect to the security interests:

  "If [...] an area is in danger as a result of military operations or is liable to be subjected to intense bombing," it may or must be evacuated *"partially or wholly, by placing the inhabitants in places of refuge."*[5]

- With respect to evacuations justified on the basis of imperative military reasons the ICRC Commentary refers to situations *"when the presence of protected persons in an area hampers military operations"* and overriding military considerations make the evacuation imperative.[6]

  In general terms, military necessity as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances. In this case, military necessity is qualified by referring to "imperative military reasons". The situation should

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4 ICTY, *The Prosecutor v. Karadzic and Mladic*, IT-95-5-R61 and IT-95-18-R61, ILR 108, paras. 60 *et seq.*, pp. 115 *et seq.*

5 Pictet (ed.), Commentary IV Geneva Convention, Geneva 1958, Art. 147, p. 280.

6 *Ibid.*

be scrutinized most carefully as the adjective "imperative" reduces to a minimum cases in which displacement may be ordered.[7]

Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group.[8]

This offence prohibits only forced movements "for reasons related to the conflict". In fact, displacement may prove to be necessary in certain cases of epidemics or natural disasters such as floods or earthquakes. Such circumstances are not covered by Art. 17 AP II, and thus in Art. 8 (2) (e) (viii) of the ICC Statute.

An additional element for determining the lawfulness may be found in Art. 17 (1) 2nd sentence AP II. In accordance with that provision

"[...] all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition."

This element was also stressed in the context of an international armed conflict in the *A. Krupp Case* by the U.S. Military Tribunal which adopted the following statement of Judge Phillips in his concurring opinion in the *Milch Trial*[9], which was based on the interpretation of Control Council Law No. 10:

"[D]eportation becomes illegal [...] whenever generally recognized standards of decency and humanity are disregarded."[10]

N.B.: A special ruling for children is contained in Art. 4 (3) (e) AP II:

"measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being."

bb) Remarks concerning the mental element

There seems to be no case law on the mental element of this crime to date.

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7 Junod, in: Commentary on the AP, Art. 17, No. 4853, pp. 1472 *et seq.*

8 Junod, in: Commentary on the AP, Art. 17, No. 4854, p. 1473.

9 *Milch Trial,* U.S. Military Tribunal, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. VII, pp. 45-46, 55-56.

10 *A. Krupp Trial*, U.S. Military Court, in: UN War Crimes Commission, Law Reports of Trials of War Criminals, vol. X, pp. 144 *et seq.* (emphasis added).

Art. 8 (2) (e) (xi) - Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons

1. Results from the sources

a) Physical mutilation

Material elements

(1) The perpetrator physically mutilated or caused physical mutilation upon a person.
(2) The person was in the power of another party to the conflict.
(3) The conduct caused death or seriously endangered the [physical or mental] health.
(4) The conduct is unlawful (even with the consent of the victim) if it is not justified by the medical, dental or hospital treatment of the protected person concerned and not carried out in his interest, i.e. 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 belong to the party conducting the procedure and who are in no way deprived of liberty.

Mental element

(5) The perpetrator acted wilfully.

b) Medical or scientific experiments

Material elements

(1) The offence was committed by act or omission.
(2) The act or omission caused death or seriously endangered the [physical or mental] health of a person.
(3) The person was in the power of another party to the conflict.
(4) Medical or scientific experiments are unlawful (even with the consent of the victim) if they are not justified by the medical, dental or hospital treatment of the protected person concerned and not carried out in his interest, i.e. 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 belong to the party conducting the procedure and who are in no way deprived of liberty.

Mental element

(5) The act or omission was committed wilfully.

a) Treaty reference of the war crime

According to Art. 4 (2) (a) AP II mutilation of *"[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted"* is prohibited. Art. 5 (2) (e) AP II obliges

> *"those who are responsible for the internment or detention of the persons referred to in paragraph 1 [persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained] [...], within the limits of their capabilities, [to] respect the following provisions relating to such persons: [...]*
> *(e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances."*

As it has been pointed out in the ICRC Commentary

> *"[t]he aim of this [last] sentence is to prohibit medical experiments. The term 'medical procedure' means 'any procedure which has the purpose of influencing the state of health of the person undergoing it'."*[11]

b) Legal basis

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

The conclusions stated under the section dealing with the offence of "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" (Art. 8 (2) (b) (x) of the Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Although the wording of the crime in a non-international armed conflict is slightly different,

- the words "power of another party to the conflict" instead of "power of an adverse party",

there are no indications in the ICC Statute or other sources that this offence has different special constituent elements in an international or non-international armed conflict.

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[11] Junod, in: Commentary on the AP, Art. 5, No. 4593, p. 1392. The whole provision reiterates Art. 11 (1) AP I. The interpretation of these two purely humanitarian provisions is identical and consequently reference can also be made to the commentary on Art. 11 AP I as contained in the section on Art. 8 (2) (b) (x), *ibid.*, No. 4588, p. 1391.

Art. 8 (2) (e) (xii) - Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict

1. Results from the sources

Material elements

(1) The perpetrator committed an unlawful act causing destruction or seizure of property of the adverse party.
(2) The destruction or seizure is not imperatively demanded by the necessities of the conflict.

Mental element

(3) The perpetrator acted wilfully.

2. Commentary

It appears that there are no decisions from the ICTY or the ICTR concerning this offence.

The conclusions stated under the section dealing with the offence of Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the war (Art. 8 (2) (b) (xiii) of the Statute) in the context of international armed conflicts also apply to this offence when committed in the context of a non-international armed conflict. Although the wording of the crime in a non-international armed conflict is slightly different,

- the term "property of an adversary" instead of "enemy's property";
- the words "necessities of the conflict" instead of "necessities of war",

there are no indications in the ICC Statute or other sources that this offence has different constituent elements in an international or non-international armed conflict. However, in order to determine the lawfulness of destruction/seizure, the specific provisions applicable in non-international armed conflicts, in particular regulating the conduct of hostilities as reflected in other crimes under this Statute or as contained in AP II as well as customary international law, must be considered.
