Section 1: Genocide, Crimes against Humanity, and War Crimes

General Commentary

The criminal offenses of genocide, crimes against humanity, and war crimes are requisite parts of domestic legislation where a state wishes to prosecute persons for atrocities committed in the course of a conflict. These offenses have long been recognized as crimes under international law but have often not been incorporated into national legislation. Fortunately, states—including, of course, post-conflict states—are free to adopt legislation providing for prosecution of these crimes committed in the past, despite the general prohibition of retroactive prosecutions. This is because Article 11(2) of the Universal Declaration of Human Rights, and equivalent provisions in all of the major human rights treaties (replicated in Article 3[3] of the MCC), declares that the rule against retroactive prosecution is not infringed if a crime was recognized previously under international law, and this is clearly the case for genocide, crimes against humanity, and war crimes.

Where no legislation on genocide, crimes against humanity, and war crimes is passed, a state will almost invariably be able to prosecute a person for the crimes against the person that underlie the international offenses of genocide, crimes against humanity, or war crimes—offenses such as unlawful killing, rape, and assault. However, even if a post-conflict state takes this latter option, the state should nonetheless include the international offenses in its new criminal legislation. In this way, the offenses apply prospectively from the date of implementation of the legislation. Where a state is a party to the Rome Statute of the International Criminal Court, the state is also expected to implement these offenses into domestic law. The easiest way to implement a state's obligations under the Rome Statute is to take definitions from the statute, as has been done in the MCC.

Because of the highly specialized requirements of the body of law surrounding genocide, crimes against humanity, and war crimes, a state may consider creating a separate court or specialized panel of the regular court system to try these offenses. Reference should be made to Article 3 of the MCCP, which discusses the creation of separate court structures in greater detail. Whether these cases are tried by a separate court, chamber, or panel or within the regular criminal justice system itself, it is

essential that persons involved in the prosecution and defense of such cases are well trained in what is a very complicated area of law. Judges will also need adequate training to adjudicate the case.

Judges, prosecutors, and defense counsel involved in domestic cases involving these criminal offenses in post-conflict Kosovo and East Timor, and consulted in the course of the process of vetting the Model Codes, complained that they had not received such training. Many had little or no previous experience in criminal law, let alone in the complicated areas of international criminal law, international humanitarian law, or international human rights law.

Comprehensive training programs should be adequately resourced and established prior to, or at the time of, the introduction of domestic legislation. It may also be necessary to establish structures to offer research and logistical support to those involved in trying, adjudicating, or defending these cases—defense counsel are particularly likely to be under-resourced. In a post-conflict state, support structures may be established and resourced by the state, an international organization, or a nongovernmental organization. In some states, experts from academic institutions in other states have provided research assistance free of charge to prosecutors, defense counsel, and judges involved in these sorts of cases.

Article 86: Genocide

Article 86.1: Definition of Offense

A person commits the criminal offense of genocide when he or she commits any of the following acts with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

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

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Commentary

The definition in Article 86 copies the one contained within Article II of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, which has subsequently been incorporated unchanged into a number of international instru-

ments, including the Rome Statute of the International Criminal Court, the Statute of the International Criminal Tribunal for Rwanda (ICTR), the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), and, in East Timor, UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses. The jurisprudence of the ICTY and the ICTR has been instrumental in deconstructing the definition of genocide and is referred to at length in the commentary below. The prosecution of the criminal offense of genocide, in addition to articulation of a precise meaning of this criminal offense, is complicated. The following commentary provides an introductory discussion on the definition of genocide. For those involved in the prosecution, defense, or adjudication of persons accused of genocide, further research will be necessary. For a fuller discussion of the meaning and scope of the definition of genocide, including relevant case law, reference should be made to William A. Schabas, *Genocide in International Law*. Human Rights Watch has compiled a basic compendium of case law on genocide entitled *Genocide, War Crimes and Crimes against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia*.

The main feature that distinguishes the criminal offense of genocide from those of crimes against humanity, war crimes, or other offenses such as unlawful killing is the requirement to prove that the perpetrator possessed "the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group." The ICTY and the ICTR have called this requirement genocide's special intent, or *dolus specialis*. According to one ICTY trial chamber, the terms *special intent* and *dolus specialis* can be used interchangeably. In its commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind (page 144), the International Law Commission qualified genocide's specific intent as "the distinguishing characteristic of this particular crime under international law." Proof of this intent may be inferred from the facts, the concrete circumstances, or a pattern of purposeful action. But "[w]here an inference needs to be drawn, it has to be *the only reasonable inference available on the evidence*" (italics in original) (*Prosecutor v. Brđanin*, case no. IT-99-36-T, Judgment, September 1, 2004, paragraph 970; see also *Prosecutor v. Krstić*, case no. IT-98-33-A, Judgment, April 19, 2004, paragraph 41).

The intent of the perpetrator of genocide must be to "destroy" the group. In the *Krstić* case before the ICTY, a trial chamber said that "customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide" (*Prosecutor v. Krstić*, case no. IT-98-33-T, Judgment, August 2, 2001, paragraphs 576, 580).

As to what the perpetrator of genocide must seek to destroy, the definition of genocide contains an exhaustive list, requiring that he or she must intend to destroy "a national, ethnical, racial, or religious group." The ICTY and the ICTR, in interpreting the meaning of the criminal offense of genocide, have moved toward a subjective approach in determining the existence and identity of the group. If the perpetrator or the victim considers the group to exist, this is a compelling indicator for the applica-

tion of the criminal offense of genocide. The tribunals, however, combine this subjective test with an analysis of case-specific objective factors in determining what constitutes a "group." "This is so," wrote an ICTY trial chamber, "because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the *Genocide Convention*, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) must be in fact directed against 'members of the group' " (*Prosecutor v. Brđanin*, case no. IT-99-36-T, Judgment, September 1, 2004, paragraph 684).

It is necessary to prove only that the perpetrator of genocide intended to destroy the group "in part." The ICTY and the ICTR have interpreted this requirement by adding the adjective *substantial*, which indicates a quantitative dimension, or *significant*, which suggests a qualitative dimension. The ICTR has said "that 'in part' requires the intention to destroy a considerable number of individuals" (*Prosecutor v. Kayishema et al.*, case no. ICTR-95-1-T, Judgment and Sentence, May 21, 1999, paragraph 97). An ICTY and ICTR trial chamber said that genocide must involve the intent to destroy a "substantial" part, although not necessarily a "very important part" (*Prosecutor v. Jelisić*, case no. IT-95-10-T, Judgment, October 19, 1999; *Prosecutor v. Bagilishema*, case no. ICTR-95-1A-T, Judgment, June 7, 2001, paragraphs 56–59). In another judgment, the ICTY referred to a "reasonably substantial" number relative to the group as a whole (*Prosecutor v. Jelisić*, case no. IT-95-10-T, Judgment, October 19, 1999; *Prosecutor v. Bagilishema*, case no. ICTR-95-1A-T, Judgment, June 7, 2001, paragraphs 56–59). The intent requirement that the destruction contemplate the group "in whole or in part" should not be confused with the scale of the participation by an individual perpetrator. The perpetrator may be involved in only one or a few killings or other punishable acts. No single perpetrator, as the principal perpetrator of the physical acts, could plausibly be responsible for destroying a group in whole or in part. Some judgments have held that it is enough to target a "significant" part of the group, such as its religious or political elite. This approach was endorsed by an ICTY trial chamber in the *Jelisić* case, which held that it might be possible to infer the requisite genocidal intent from the "desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such" (*Prosecutor v. Jelisić*, case no. IT-95-10-T, Judgment, December 14, 1999, paragraph 82).

The ICTY and ICTR appeals chambers have held that there is no need to establish a "plan" to commit genocide. This means it is possible to prove the commission of genocide without any evidence of involvement by a state or an organized statelike entity. According to the Appeals Chamber of the ICTY, "the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime" (*Prosecutor v. Jelisić*, case no. IT-95-10-A, Judgment, July 5, 2001, paragraph 48). In another case, the appeals chamber referred to this paragraph in support of its conclusion not to require proof of a "plan or policy" with respect to genocide (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 98, fn. 114).

According to the ICTR Appeals Chamber, "as such" was included in Article II of the 1948 Genocide Convention to resolve an impasse among the negotiators as to

whether or not proof of genocidal *motive* should be added to the requirement of a specific or special intent. The chamber said the expression has the "*effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion." But "as such" does not prohibit a conviction for genocide "in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context" (*Prosecutor v. Niyitegeka*, case no. ICTR-96-14-A, Judgment, July 9, 2004, paragraph 53; see also *Prosecutor v. Ntakirutimana*, case nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, December 13, 2004, paragraph 363).

Article 86 lists five punishable acts of genocide. Each of these acts has its own mental and physical elements, which must be proven in addition to the elements in the chapeau, or introductory paragraph, for there to be a conviction. The list is an exhaustive one and does not permit other acts that might result in the destruction of a protected group.

Paragraph (a): Intentional killing can be prosecuted under the MCC as a war crime (willful killing), a crime against humanity (murder), and genocide (killing). Under Article 86, intentional killing as genocide must be committed with the specific intent to destroy in whole or in part a national, ethnical, racial, or religious group as such.

The act of killing, under genocide, consists of three material elements: the victim is dead, the death resulted from an unlawful act or omission of the perpetrator or a subordinate, and, at the time of the killing, the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased knowing that such bodily harm is likely to cause the victim's death or is reckless about whether the death ensues or not (*Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Judgment, September 2, 1998, paragraph 589). The perpetrator must intend this result or recklessly disregard the likelihood that death will result from such acts or omissions. There is no requirement that the killing be premeditated (*Prosecutor v. Kayishema et al.*, case no. ICTR-95-1-A, Judgment [Reasons], June 1, 2001, paragraph 151), but it must be proven that the death of a person resulted from the actions or omissions of the perpetrator. The actions or omissions need not be the sole cause of death, but they must be "a substantial cause" (*Prosecutor v. Kordić et al.*, case no. IT-95-14/2-T, Judgment, February 26, 2001, paragraphs 236, 229; see also *Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraphs 323–324). To establish the mens rea, or mental element, of the offense, there must be evidence that the perpetrator had the intent to kill. Alternatively, the ICTY has held that it is sufficient to demonstrate that the perpetrator intended to inflict serious bodily injury in reckless disregard of human life (*Prosecutor v. Kordić et al.*, case no. IT-95-14/2-A, Judgment, December 17, 2004, paragraph 36; *Prosecutor v. Delalić et al.*, case no. IT-96-21-A, Judgment, February 20, 2001, paragraph 422). While there must be proof that a person is dead, this fact can be inferred, and it is not necessary to show that the body was recovered. It has been held that causing the suicide of a person may amount to killing where the accused's acts or omissions "induced the victim to take action which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen as a consequence" (*Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 329).

Paragraph (b): The ICTR has held "serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment or persecution" (*Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Judgment, September 2, 1998, paragraph 504). Another trial chamber of the ICTR defined serious bodily or mental harm as "harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses" (*Prosecutor v. Kayishema et al.*, case no. ICTR-95-1-T, Judgment and Sentence, May 21, 1999, paragraph 109). A trial chamber of the ICTY has likewise considered torture and inhuman or degrading treatment to fall within the provision's scope (*Prosecutor v. Karadžić et al.*, case nos. IT-95-5-R61 and IT-95-18-R6 and Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, July 11, 1996, paragraph 93). It has been held that "inhuman treatment … and deportation are among the acts which may cause serious bodily or mental injury" (*Prosecutor v. Krstić*, case no. IT-98-33-T, Judgment, August 2, 2001, paragraph 513). Rape and sexual violence may constitute "serious bodily or mental harm" on both a physical and a mental level (*Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Judgment, September 2, 1998, paragraphs 731–733). Causing serious bodily or mental harm to members of the group does not necessarily mean the harm is permanent and irremediable, but it needs to be serious (*Prosecutor v. Kayishema et al.*, case no. ICTR-95-1-T, Judgment and Sentence, May 21, 1999, paragraph 108; *Prosecutor v. Rutaganda*, case no. ICTR-96-3-T, Judgment and Sentence, December 6, 1999, paragraph 51).

Paragraph (c): This act of genocide refers to methods of destruction apart from direct killings, such as subjecting the group to a subsistence diet, systematic expulsion from homes, and denial of the right to medical services (*Prosecutor v. Stakić*, case no. IT-97-24-PT, Second Amended Indictment, October 5, 2001, paragraph 20; *Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Judgment, September 2, 1998, paragraphs 505–506). It also includes circumstances that would lead to a slow death, such as lack of proper housing, clothing, and hygiene or excessive work or physical exertion (*Prosecutor v. Stakić*, case no. IT-97-24-T, Judgment, July 31, 2003, paragraph 517; *Prosecutor v. Kayishema et al.*, case no. ICTR-95-1-T, Judgment and Sentence, May 21, 1999, paragraphs 115–116).

Paragraphs (d) and (e): The last two punishable acts, set out in Paragraphs (d) and (e), are rarely encountered in practice.

Article 86.2: Penalty

1. The applicable penalty range for the criminal offense of genocide is ten to thirty years' imprisonment.
2. In exceptional circumstances, and in accordance with Article 49, the court may impose a penalty of life imprisonment for the criminal offense of genocide.

Article 87: Crimes against Humanity

Article 87.1: Definition of Offense

1. A person commits the criminal offense of crimes against humanity when he or she commits any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

   (a) murder;

   (b) extermination;

   (c) enslavement;

   (d) deportation or forcible transfer of population;

   (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

   (f) torture;

   (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

   (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this article or in Section 1 of the Special Part of the MCC;

   (i) enforced disappearance of persons;

   (j) the crime of apartheid; or

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

2. For the purposes of Article 87:

   (a) *attack directed against any civilian population* means a course of conduct involving the multiple commission of acts referred to in Paragraph 1 of Article 87 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack;

   (b) *extermination* includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) *enslavement* means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) *deportation or forcible transfer of population* means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) *torture* means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody and under the control of the accused; except that torture does not include pain or suffering arising from, inherent in, or incidental to, lawful sanctions;

(f) *forced pregnancy* means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;

(g) *persecution* means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) *the crime of apartheid* means inhumane acts of a character similar to those referred to in Paragraph 1 of Article 87, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; and

(i) *enforced disappearance of persons* means the arrest, detention, or abduction of persons by, or with the authorization, support, or acquiescence of, a state or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons with the intention of removing them from the protection of the law for a prolonged period of time.

Commentary

Paragraph 1: The definition of crimes against humanity in the MCC is taken verbatim from Article 7 of the Rome Statute of the International Criminal Court. The concept of crimes against humanity was first developed in the Trial of the Major War Criminals, held in Nuremberg in 1945–46. The definition has evolved over the years, adding specific punishable acts that were not in the original provisions and eliminating the so-called nexus requirement, which meant that crimes against humanity could be committed only in the context of international armed conflict. It is now generally recognized that crimes against humanity may also be committed in peacetime, a fact that

is acknowledged through the omission of the nexus requirement in the definition of crimes against humanity in Article 7 of the Rome Statute of the International Criminal Court and in the above provision.

The precise meaning and scope of crimes against humanity have been the subject of much jurisprudence at the ICTY and the ICTR. Much of the following commentary discusses specific cases of the international tribunals to provide a general description of the meaning and scope of crimes against humanity. The following commentary provides an introductory discussion to the definition of crimes against humanity. For those involved in the prosecution, defense, or adjudication of an accused person, further research will be necessary. For a complete discussion of the meaning and scope of the definition of crimes against humanity, including relevant case law, reference should be made to M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*. Reference may also be made of Human Rights Watch's *Genocide, War Crimes and Crimes against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia*, a compendium of relevant case law from the international tribunals.

For a crime against humanity to be committed, a civilian population must be the object of a "widespread or systematic attack." The words are disjunctive rather than conjunctive. Thus, to prove a crime against humanity, it is sufficient to prove the existence of either a "widespread" *or* a "systematic" attack. The "widespread characteristic refers to the scale of the acts perpetrated and the number of victims" (*Prosecutor v. Blaškić*, case no. IT-95-14-T, Judgment, March 3, 2000, paragraph 206; see also *Prosecutor v. Kordić et al.*, case no. IT-95-14/2-A, Judgment, December 17, 2004, paragraph 94). In *Akayesu*, an ICTR trial chamber said that "[t]he concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" (*Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Judgment, September 2, 1998, paragraph 580). A "widespread" criminal offense may involve the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude" (*Prosecutor v. Kordić et al.*, case no. IT-95-14/2-T, Judgment, 26 February 2001, paragraph 179. See also *Prosecutor v. Kordić et al.*, case no. IT-95-14/2-A, Judgment, December 17, 2004, paragraph 94). The "systematic" character of a crime against humanity refers to the organized nature of the pattern—that is, the nonaccidental repetition of similar criminal conduct and the improbability of its random occurrence (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 94). A court will obviously consider the number of victims and the nature of the acts (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 95; *Prosecutor v. Jelisić*, case no. IT-95-10-T, Judgment, December 14, 1999, paragraph 53). It will also take into account the existence of a political objective and an acknowledged policy or plan pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, that contemplates the destruction, persecution, or weakening of a community; the preparation and use of significant public or private resources; and the participation of high-level political or military authorities (*Prosecutor v. Blaškić*, case no. IT-95-14-T, Judgment, March 3, 2000, paragraph 203; *Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 95; *Prosecutor v. Jelisić*, case no. IT-95-10-T,

Judgment, December 14, 1999, paragraph 53). It is the attack itself that must be "widespread or systematic" and not the specific acts with which the accused is charged (*Prosecutor v. Kordić et al.*, case no. IT-95-14/2-A, Judgment, December 17, 2004, paragraph 94; *Prosecutor v. Blaškić*, case no. IT-95-14-A, Judgment, July 29, 2004, paragraph 101, referring to *Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 96).

Although the term *attack* may appear to connote the existence of an armed conflict, as mentioned above, the existence of armed conflict is not a requirement, and the two concepts are distinct and independent: "The attack has been defined as a course of conduct involving the commission of acts of violence. The attack can precede, outlast, or continue during the armed conflict, but need not be a part of the conflict under customary international law" (*Prosecutor v Naletilic and Martinovic*, case no. IT-98-34 Judgment, March 31, 2003, paragraph 233). It is not limited to an armed attack and may involve any mistreatment of the civilian population and even nonviolent attacks, such as establishment of a system of apartheid (*Prosecutor v. Vasiljević*, case no. IT-98-32-T, Judgment, November 29, 2002, paragraphs 29, 30; *Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 86).

There must be some connection or nexus between the acts of the perpetrator and the attack itself, but the specific acts with which the accused is charged need not be shown to be widespread and systematic (*Prosecutor v. Kunarac et al.*, case nos. IT-96-23-T and IT-96-23/1-T, Judgment, February 22, 2001, paragraph 431). Under certain circumstances, even a single act can constitute a crime against humanity when committed within the appropriate context, but an isolated act cannot (*Prosecutor v. Kupreškić et al.*, case no. IT-95-16-T, Judgment, January 14, 2000, paragraph 550).

In addition to the nexus between the act of the perpetrator and the attack itself, the perpetrator must have some knowledge that the attack is widespread or systematic (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 102; *Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 59; *Prosecutor v. Tadić*, case no. IT-94-1-A, Judgment, July 15, 1999, paragraph 271). A perpetrator who lacks such knowledge cannot be found criminally responsible for crimes against humanity, although he or she may still be liable for prosecution by national courts for underlying criminal behavior, such as murder (*Prosecutor v. Tadić*, case no. IT-94-1-A, Judgment, July 15, 1999, paragraph 271).

The ICTY has held that the civilian population must be the "primary object of the attack" (*Prosecutor v. Naletilić et al.*, case no. IT-98-34-T, Judgment, March 31, 2003, paragraph 235). There is no need to show that the entire population of a geographic entity was targeted by the attack, as long as the attack was not directed against "a limited and randomly selected number of individuals" (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 90). Another judgment says the "civilian population" requirement is "intended to imply crimes of a collective nature and thus excludes single or isolated acts" (*Prosecutor v. Bagilishema*, case no. ICTR-95-1A-T, Judgment, June 7, 2001, paragraph 80). The population must be "predominantly civilian in nature," although noncivilians may be present (*Prosecutor v. Kordić et al.*, case no. IT-95-14/2-T, Judgment, February 26, 2001, paragraph 180). Crimes against humanity can also be perpetrated against members of a resistance movement and

former combatants, regardless of whether they have worn uniforms, to the extent that they were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms, or ultimately had been placed hors de combat (out of combat), in particular due to wounds or being detained (*Prosecutor v. Blaškić*, case no. IT-95-14-T, Judgment, March 3, 2000, paragraph 214). This wide definition "includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force" (*Prosecutor v. Kayishema et al.*, case no. ICTR-95-1-T, Judgment and Sentence, May 21, 1999, paragraphs 127–129). Generally, the concept of a civilian population should be construed liberally, in order to promote the principles underlying the prohibition of crimes against humanity, which are to safeguard human values and protect human dignity (*Prosecutor v. Kupreškić et al.*, case no. IT-95-16-T, Judgment, January 14, 2000, paragraphs 547–549; *Prosecutor v. Jelisić*, case no. IT-95-10-T, Judgment, December 14, 1999, paragraph 54).

The definition of crimes against humanity consists of a chapeau, or introductory paragraph, followed by a list of punishable acts. The list is exhaustive and does not explicitly invite courts to add new categories, although the final act of crimes against humanity, "other inhumane acts," gives a court some scope to consider acts beyond those defined in the list of punishable acts.

Paragraph 1(a): The ICTY and the ICTR have held that the term *murder* has an identical meaning to the act of genocide of killing, the war crime of willful killing under the grave breaches provision of Article 88, and the war crime of murder (*Prosecutor v. Krstić*, case no. IT-98-33-T, Judgment, August 2, 2001, paragraph 499; *Prosecutor v. Rutaganda*, case no. ICTR-96-3-T, Judgment and Sentence, December 6, 1999, paragraphs 83–84; *Prosecutor v. Musema*, case no. ICTR-96-13-T, Judgment and Sentence, January 27, 2000, paragraph 218; *Prosecutor v. Ntakirutimana et al.*, case nos. ICTR-96-10 and ICTR-96-17-T, Judgment, February 21, 2003, paragraph 813). In the context of the MCC, murder is equated with unlawful killing. Reference should be made to Article 89 on unlawful killing and its accompanying commentary.

Paragraph 1(b) and Paragraph 2(b): Extermination, the second punishable act of crimes against humanity, refers to "acts committed with the intention of bringing about the death of a large number of victims either directly, such as by killing the victim with a firearm, or less directly, by creating conditions provoking the victim's death" (*Prosecutor v. Krstić*, case no. IT-98-33-T, Judgment, August 2, 2001, paragraph 499). The ICTR Appeals Chamber has said: "Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offenses is the requirement of the offense of extermination that the killings occur on a mass scale" (*Prosecutor v. Ntakirutimana et al.*, case nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, December 13, 2004).

"There must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population" (*Prosecutor v. Krstić*, case no. IT-98-33-T, Judgment, August 2, 2001, paragraph 503). An ICTR

trial chamber said that extermination could be distinguished from murder in that it was directed against a population rather than individuals (*Prosecutor v. Semanza*, case no. ICTR-97-20-T, Judgment and Sentence, May 15, 2003, paragraph 340). However, "[t]he scale of the killing required for extermination must be substantial. Responsibility for a single or a limited number of killings is insufficient" (*Prosecutor v. Semanza*, case no. ICTR-97-20-T, Judgment and Sentence, May 15, 2003, paragraph 340). There is no requirement that a precise list of victims be furnished to the court to establish commission of the criminal offense (*Prosecutor v. Ntakirutimana et al.*, case nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, December 13, 2004, paragraphs 518, 521). Moreover, "any attempt to set a minimum number of victims in the abstract will ultimately prove unhelpful; the element of massive scale must be assessed on a case-by-case basis in light of the proven criminal conduct and all relevant factors" (*Prosecutor v. Blagojević*, case no. IT-02-60-T, Judgment, January 17, 2005, paragraph 573).

Paragraph 1(c) and Paragraph 2(c): Slavery has been defined as "the exercise of any or all of the powers attaching to the right of ownership over a person" (*Prosecutor v. Kunarac et al.*, case nos. IT-96-23-T and IT-96-23/1-T, Judgment, February 22, 2001, paragraph 539). The traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as chattel slavery (or slavery over "things"), has evolved to encompass various contemporary forms of slavery that are also based on the exercise of any or all of the powers attaching to the right of ownership. According to the ICTY Appeals Chamber, "[i]n the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery,' but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree. The Appeals Chamber considers that at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law" (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 117).

International humanitarian law does not prohibit all labor by protected persons in armed conflicts. For example, Article 51 of the fourth Geneva Convention seeks to regulate the practice of forced labor, declaring that an occupying power may not compel protected persons to work unless they are over eighteen years of age, and then they may perform only work that is necessary for the needs of the army of occupation; for public utility services; or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied country. Article 5 of Additional Protocol II to the four Geneva Conventions also contemplates forms of forced labor: "In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained. . . . [T]hey shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population." In peacetime, however, the prohibition of slavery or enslavement would appear to be an absolute one, consistent with nonderogable norms in international human rights treaties. The case law of the ICTY has established that "the exaction of forced or compulsory labour or service" is an "indication of enslavement" and a factor

"to be taken into consideration in determining whether enslavement was committed" (*Prosecutor v. Kunarac et al.*, case nos. IT-96-23-T and IT-96-23/1-T, Judgment, February 22, 2001, paragraphs 542–543). Often forced or compulsory labor or service is without remuneration, and frequently, though not necessarily, it involves physical hardship, sex, prostitution, and human trafficking, and these too are factors to be assessed (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 542). Evidence that a person was kept in captivity in the absence of other indications would not be enough to establish the crime of enslavement. Duration is a factor in determining enslavement, but it is not an element. Lack of consent or resistance is not an element of the crime of enslavement (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 120).

In addition to the crime against humanity of slavery, the MCC also contains the criminal offense of "establishing slavery, slavery-like conditions, and forced labor." Reference should be made to Article 103 and its accompanying commentary.

Paragraph 1(d) and Paragraph 2(d): Deportation implies forcible transfer beyond a state's borders, whereas forcible transfer refers to internal displacement. The terms *forcible transfer* and *forcible displacement* are treated as synonyms (*Prosecutor v. Blagojević*, case no. IT-02-60-T, Judgment, January 17, 2005, paragraph 595, fn. 1962). According to an ICTY trial chamber, evacuation is distinct from forcible transfer or forcible displacement: "Evacuation is by definition a temporary and provisional measure and the law requires that individuals who have been evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased" (*Prosecutor v. Blagojević*, case no. IT-02-60-T, Judgment, January 17, 2005, paragraph 597). The trial chamber further noted that international humanitarian law had long recognized not only the right but also the duty of military commanders to evacuate civilians when they are in danger as a result of military operations. It concluded that humanitarian reasons are also a justification for evacuation of a civilian population (paragraphs 597–600).

Paragraph 1(e): The crime against humanity of imprisonment consists of an act or omission that results in arbitrary deprivation of physical liberty or that is reasonably likely to effect that result. Arbitrary deprivation of liberty occurs when there is no legal justification for the detention (*Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 115; *Prosecutor v. Kordić et al.*, case no. IT-95-14/2-T, Judgment, February 26, 2001, paragraphs 302–303). According to the ICTY Appeals Chamber, imprisonment "should be understood as contemplating arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population" (*Prosecutor v. Kordić et al.*, case no. IT-95-14/2-T, Judgment, February 26, 2001, paragraph 302).

Paragraph 1(f) and Paragraph 2(e): The international criminal offense of torture has been defined as involving "the infliction, by act or omission, of severe pain or suffering, whether physical or mental," for the purpose of "obtaining information or a confession, or . . . punishing, intimidating or coercing the victim or a third person, or . . .

discriminating, on any ground, against the victim or a third person" (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraph 142). To qualify as the crime against humanity of torture, the act or omission must be carried out with a prohibited purpose or goal: "The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person" (*Prosecutor v. Kunarac et al.*, case no. IT-96-23/1-A, Judgment, June 12, 2002, paragraphs 142, 155). The list of prohibited purposes is drawn from Article 1 of the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, but it has been taken as a representative and not an exhaustive enumeration (*Prosecutor v. Delalić et al.*, case no. IT-96-21-T, Judgment, November 16, 1998, paragraph 470; *Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraph 140). For example, "humiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law" (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraph 140). It has been noted that torture is not a gratuitous act of violence but seeks to attain a certain result or purpose. In the absence of such purpose or goal, even infliction of very severe pain would not qualify as torture (*Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 180). But while there must be evidence of the prohibited purpose, it need not be the sole or even the predominant purpose for inflicting the severe pain or suffering (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraph 153; *Prosecutor v. Kunarac et al.*, case nos. IT-96-23-T and IT-96-23/1-T, Judgment, February 22, 2001, paragraph 486). The list of prohibited purposes in the definition of torture has been held not to be exhaustive but merely representative. Torture for purely private purposes, however, falls outside the scope of the definition.

There is no requirement that one of the perpetrators of torture be a public official or someone not acting in a private capacity. An ICTY trial chamber explained that "the state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law" (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraph 139).

It is the severity of the pain or suffering inflicted in the case of torture that sets it apart from similar offenses. In assessing the seriousness of such mistreatment, it has been held that the objective severity of the harm inflicted must first be assessed. Then a court should consider subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraphs 142–143). According to one ICTY trial chamber, "When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. The extent that an individual has been mistreated over a prolonged period of time will also be relevant" (*Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 182). Although torture often causes

permanent damage to the health of its victims, permanent injury is not a requirement (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraph 148). The mental suffering of an individual forced to watch severe mistreatment of a relative could reach the level of gravity required for the crime of torture. An ICTY trial chamber wrote: "[B]eing forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped" (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraph 149). The tribunal has noted that "[t]he psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting" (*Prosecutor v. Delalić et al.*, case no. IT-96-21-T, Judgment, November 16, 1998, paragraph 495).

In addition to the crime against humanity of torture, under Article 101, the MCC also contains the offense of torture committed outside the context of crimes against humanity. Reference should be made to Article 101 and its accompanying commentary.

Paragraph 1(g) and Paragraph 2(f): The term *rape* is widely used in national justice systems, but its definition varies considerably. The definition has also evolved considerably over the years, reflecting changing attitudes toward the nature and gravity of sexual violence. Article 7 of the Rome Statute of the International Criminal Court does not define *rape*. It is, however, defined in Article 7(1)(g)-1 of the Elements of Crimes of the Rome Statute of the International Criminal Court. This same definition is used in Article 94 of the MCC. Reference should be made to Article 94 on "rape" and its accompanying commentary. The Elements of Crimes of the Rome Statute of the International Criminal Court also provide definitions of *sexual slavery, enforced prostitution, enforced sterilization*, and *other forms of sexual violence of comparable gravity*. Reference should be made to Article 7(1)(g)-2 (on the crime against humanity of sexual slavery), Article 7(1)(g)-3 (on the crime against humanity of enforced prostitution), Article 7(1)(g)-5 (on the crime against humanity of enforced sterilization), and Article 7(1)(g)-6 (on the crime against humanity of other forms of sexual violence). The term *forced pregnancy* is defined in Paragraph 2(f).

Paragraph 1(h) and Paragraph 2(g): An ICTY trial chamber has said that persecution refers to "a discriminatory act or omission" that "denies or infringes upon a fundamental right laid down in international customary or treaty law" and that is perpetrated with "an intent to discriminate on racial, religious, or political grounds" (*Prosecutor v. Naletilić et al.*, case no. IT-98-34-T, Judgment, March 31, 2003, paragraph 634). The ICTY Appeals Chamber has defined persecution as "an act or omission which: 1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)" (*Prosecutor v. Kordić et al.*, case no. IT-95-14/2-A, Judgment, December 17, 2004, paragraph 101).

Like the criminal offense of genocide, with which it has important similarities, the crime against humanity of persecution is a crime of "specific intent" (*Prosecutor v.*

Kvočka et al., case no. IT-98-30/1-A, Judgment, February 28, 2005, paragraph 460). The discriminatory intent can be demonstrated by omission as well as by act. Discriminatory intent can be inferred from knowingly participating in a system or enterprise that discriminates on political, racial, or religious grounds. But "[t]he requirement that an accused consciously intends to discriminate does not require the existence of a discriminatory policy or, where such a policy is shown to exist, participation by the accused in the formulation of that discriminatory policy or practice by an authority" (*Prosecutor v. Vasiljević*, case no. IT-98-32-T, Judgment, November 29, 2002, paragraph 248). The law does not require that a discriminatory policy exist or that there be proof that the accused took part in formulating a discriminatory policy or practice by an authority (*Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 435). "The accused must consciously intend to discriminate" (*Prosecutor v. Vasiljević*, case no. IT-98-32-T, Judgment, November 29, 2002, paragraph 248), and "[w]hile the intent to discriminate need not be the primary intent with respect to the act, it must be a significant one" (*Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 435). This discriminatory intent must be established with respect to the specific act that is charged rather than the attack in general. But in addition to the intent itself, it must be established that there were discriminatory consequences; in other words, it is not enough to show that the perpetrator conducted an act with the intent to discriminate. It must be shown that a victim was actually persecuted (*Prosecutor v. Vasiljević*, case no. IT-98-32-T, Judgment, November 29, 2002, paragraph 245).

In considering whether or not acts fall under the heading of persecution, the ICTY has stated that they should not be evaluated in isolation but rather in their contexts, taking particular account of their cumulative effects. Individual acts might not amount to persecution, but their combined effect would (*Prosecutor v. Kupreškić et al.*, case no. IT-95-16-T, Judgment, January 14, 2000, paragraph 622; *Prosecutor v. Vasiljević*, case no. IT-98-32-T, Judgment, November 29, 2002, paragraph 247), although this does not mean that a single act might not also constitute a crime of persecution (*Prosecutor v. Kupreškić et al.*, case no. IT-95-16-T, Judgment, January 14, 2000, paragraph 624).

Persecutions may involve the infliction of physical or mental harm, or infringements upon individual freedom, such as the unlawful detention, deportation, or forcible transfer of civilians (*Prosecutor v. Vasiljević*, case no. IT-98-32-T, Judgment, November 29, 2002, paragraph 246; *Prosecutor v. Blaškić*, case no. IT-95-14-T, Judgment, March 3, 2000, paragraph 220). Persecutions can even involve attacks on political, social, and economic rights. An ICTY trial chamber has referred in particular to "acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind" (*Prosecutor v. Blaškić*, case no. IT-95-14-T, Judgment, March 3, 2000, paragraph 227). Acts of "harassment, humiliation and psychological abuse" may also amount to persecution (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-A, Judgment, February 28, 2005, paragraphs 324–325). Persecution can include crimes that target property, which appear on the surface to be less serious, but where the victimization involves discrimination (*Prosecutor v. Blaškić*, case no. IT-95-14-T, Judgment, March 3, 2000, paragraph 233).

Paragraph 1(i) and Paragraph 2(i): The MCC contains the criminal offense of enforced disappearance in Article 104. The wording of Article 104 differs slightly from that of Article 87(2)(i). Reference should be made to Article 104 and its accompanying commentary.

Paragraph 1(k): "The phrase 'Other inhumane acts' was deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition" (*Prosecutor v. Kupreškić et al.*, case no. IT-95-16-T, Judgment, January 14, 2000, paragraph 563).

Serious physical and mental injury, falling short of murder, can be prosecuted as "other inhumane acts" (*Prosecutor v. Blaškić*, case no. IT-95-14-T, Judgment, March 3, 2000, paragraph 239). Criminal behavior deemed in judgments of the ICTY and the ICTR to fall within "other inhumane acts" has included mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, inhumane and degrading treatment, forced prostitution, and forced disappearance (*Prosecutor v. Kvočka et al.*, case no. IT-98-30/1-T, Judgment, November 2, 2001, paragraph 208). An ICTR trial chamber found that acts of sexual violence that were not subsumed within other paragraphs of the crimes against humanity provision, such as forced nudity, could be prosecuted as other inhumane acts (*Prosecutor v. Akayesu*, case no. ICTR-96-4-T, Judgment, September 2, 1998, paragraphs 688, 697).

Article 87.2: Penalty

1. The applicable penalty range for the criminal offense of crimes against humanity is ten to thirty years' imprisonment.
2. In exceptional circumstances, and in accordance with Article 49, the court may impose a penalty of life imprisonment for the criminal offense of crimes against humanity.

Article 88: War Crimes

Article 88.1: Definition of Offense

1. A person commits the criminal offense of war crimes when he or she commits:
   (a) grave breaches of the Geneva Conventions of August 12, 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) willful killing;

(ii) torture or inhuman treatment, including biological experiments;

(iii) willfully causing great suffering or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile power;

(vi) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer or unlawful confinement;

(viii) taking of hostages.

(b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against civilian objects, that is, objects that are not military objectives;

(iii) intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects, or widespread, long-term, and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) attacking or bombarding, by whatever means, towns, villages, dwellings, or buildings that are undefended and are not military objectives;

(vi) killing or wounding a combatant who, having laid down his or her arms or having no longer means of defense, has surrendered at discretion;

(vii) making improper use of a flag of truce or of the flag or the military insignia and uniform of the enemy or of the United Nations, as well

as the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives;

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

(xi) killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) declaring that no quarter will be given;

(xiii) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) pillaging a town or place, even when taken by assault;

(xvii) employing poison or poisoned weapons;

(xviii) employing asphyxiating, poisonous, or other gases and all analogous liquids, materials, or devices;

(xix) employing bullets that expand or flatten easily in the human body, such as a bullet with a hard envelope that does not entirely cover the core or is pierced with incisions;

(xx) employing weapons, projectiles, and material and methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering or that are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons,

projectiles, and material and methods of warfare are the subject of a comprehensive prohibition;

(xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;

(xxiv) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of August 12, 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause:

(i) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment, and torture;

(ii) committing outrages upon personal dignity, in particular, humiliating and degrading treatment;

(iii) taking of hostages;

(iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all judicial guarantees that are generally recognized as indispensable.

(d) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) pillaging a town or place, even when taken by assault;

(vi) committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

(vii) conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) killing or wounding treacherously a combatant adversary;

(x) declaring that no quarter will be given;

(xi) subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental, or hospital treatment of the person or persons concerned nor carried out in his or her or their interest, and that cause death to or seriously endanger the health of such person or persons;

(xii) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

2. Paragraph 1(c) applies to armed conflicts not of an international character and 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.
3. Paragraph 1(d) applies to armed conflicts not of an international character and does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
4. Nothing in Paragraphs 1(c) and 1(d) shall affect the responsibility of a government to maintain or reestablish law and order in the state or to defend the unity and territorial integrity of the state by all legitimate means.

Commentary

The text of Article 88 is taken almost verbatim from Article 8 of the Rome Statute of the International Criminal Court, dealing with war crimes. The requirement in Article 8(1) that war crimes can be prosecuted only "as part of a plan or policy or as part of a large-scale commission of such crimes" has not, however, been duplicated in the MCC. The purpose of this wording is to ensure that the International Criminal Court focuses on war crimes that are "the most serious crimes of concern to the international community" (Rome Statute of the International Criminal Court, preamble, paragraph 4), while all other war crimes not of this character will be prosecuted before national courts under what is known as the complementarity regime.

War crimes are violations of a body of law known as international humanitarian law or the law of armed conflict. International humanitarian law began its life as the "laws of war," customary rules that governed the conduct of warfare between states. Eventually, these rules became codified in international treaties. At the same time, certain rules that are not codified can be recognized under public international law if they are deemed to be norms of customary international law. Reference should be made to the commentary to Article 3(3), which discusses the meaning of *customary international law*. Not all violations of international humanitarian law, whether treaty-based or part of customary international law, incur individual criminal responsibility. A small number of international prosecutions of war crimes after World War I and also after World War II served as a preliminary clarification of the sorts of war crimes for which a person could be held criminally responsible and consequently could be forced to stand trial. However, it was the jurisprudence of the ICTY and the ICTR that paved the way for the drafting of Article 8 of the Rome Statute of the International Criminal Court, which sets out a full list of violations of international humanitarian law that should be subject to both international criminal law and domestic criminal law. In interpreting Articles 2 and 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 4 of the Statute of the International Criminal Tribunal for Rwanda, respectively, the ICTY and the ICTR, with great judicial innova-

tion, considerably expanded the preexisting corpus of war crimes subject to individual criminal responsibility.

Article 8 of the Statute of the International Criminal Court, from which Article 88 of the MCC is derived, is a long and complicated provision. It is divided into four parts. The first and second parts of the article are concerned with violations of international humanitarian law during international armed conflict, while the third and fourth parts are concerned with violations that occur during internal armed conflict. Article 88 of the MCC also contains these four elements. Article 88.1(1)(a) covers "grave breaches" of the four Geneva Conventions of 1949. The Geneva Conventions are part of treaty-law-based international humanitarian law. Under the provisions of the Geneva Conventions, states parties are required to ensure that grave breaches are subject to individual criminal responsibility at a domestic level. The second part of the article, Article 88.1(b), covers "other serious violations of the laws and customs applicable in international armed conflict." This provision consists of a detailed and exhaustive list of twenty-six such violations. These violations are sourced from treaties dealing with international humanitarian law (including the Geneva Conventions, Additional Protocol I to the four Geneva Conventions, and the Hague Conventions) and from customary international law. The third part of the provision, Article 88.1(1)(c), reproduces Common Article 3 of the Geneva Conventions. Common Article 3, as the name suggests, is contained in all four Geneva Conventions. Common Article 3 was included to cover situations "of armed conflict not of an international character," in contrast to the rest of the conventions, which focus only on matters relating to the conduct of international armed conflict. The final category of war crimes, Article 88.1(1)(d), relates to "other serious violations of the laws and customs applicable in armed conflict not of an international character." Many of these provisions are taken from Additional Protocol II to the four Geneva Conventions, which governs the conduct of noninternational armed conflict and expands upon the laconic text of Common Article 3 to the Convention. In addition to the provisions of Article 8 of the Statute of the International Criminal Court, the *Elements of Crimes* provides a further elaboration on the legal elements of war crimes. To interpret Article 88 of the MCC, reference should be made to this document.

A detailed discussion of the nature and origins of international humanitarian law, the criminalization of aspects of international humanitarian law, and the precise meaning of each individual war crime covered in Article 88 of the MCC is beyond the scope of this commentary. For a fuller discussion on the meaning of war crimes in the Statute of the International Criminal Court, reference should be made to Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Reference may also be made of Human Rights Watch, *Genocide, War Crimes and Crimes against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia*, which is a compendium of relevant case law from the international criminal tribunals. As mentioned in the general commentary to Section 1 of the Special Part, those involved in prosecuting, defending, or adjudicating on persons accused of war crimes will need extensive training to do so. This will include training on international humanitarian law and international criminal law.

Paragraph 1: The wording of this paragraph comes from Articles 8(2)(a), 8(2)(b), 8(2)(c), and 8(2)(e) of the Rome Statute of the International Criminal Court.

Paragraph 1(b)(xx): The wording of Paragraph 1(b)(xx) comes from Article 8(2)(b)(xx) of the Rome Statute of the International Criminal Court. Article 8(2)(b)(xx) further provides, after the words "are the subject of a comprehensive prohibition" (contained in the MCC provision also) that the weapons, projectiles, materials, and methods of warfare subject to the comprehensive prohibition should also be "included in an annex to this Statute [the Rome Statute of the International Criminal Court] by an amendment in accordance with the relevant provisions set forth in articles 121 and 123." This wording is particular to the Rome Statute of the International Criminal Court and therefore has not been replicated in the MCC. In interpreting the meaning of Paragraph 1(b)(xx) of the MCC, and what weapons, projectiles, and material and methods of warfare are "inherently indiscriminate in violation of the international law of armed conflict" and that are also "the subject of a comprehensive prohibition," reference may be made to Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, which contains a prohibition on chemical weapons, biological weapons, nondetectable fragments, blinding laser weapons, and booby traps. There is also a strong case to be made that antipersonnel landmines and nuclear weapons would also fall within the ambit of Paragraph 1(b)(xx).

Paragraph 2: The wording of this paragraph comes from Article 8(2)(d) of the Rome Statute of the International Criminal Court.

Paragraph 3: The wording of this paragraph comes from Article 8(2)(f) of the Rome Statute of the International Criminal Court.

Paragraph 4: The wording of this paragraph comes from Article 8(3) of the Rome Statute of the International Criminal Court.

Article 88.2: Penalty

The applicable penalty range for the criminal offense of war crimes is ten to thirty years' imprisonment.