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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: DEFINING THE OFFENSES

WALTER GARY SHARP, SR.*

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge. . . .

The Universal Declaration of Human Rights¹

I. INTRODUCTION

The Universal Declaration of Human Rights is one of the greatest documents impacting human rights since the Magna Carta.² It was born

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1. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Part I, U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR].

2. The Magna Carta was a charter granted by King John of England to the English barons on June 15, 1215, and since considered the basis of English constitutional liberties. . . . The Magna Carta contained the first detailed definition of the relationship between the king and the barons, guaranteed feudal rights, and regularized the judicial system. . . . The Courts of Common Pleas were set permanently in Westminster, the conduct of trials was simplified according to strict rules of procedure, and the penalties for felonies were standardized. No one was to be condemned on rumor or suspicion, but only on the evidence of credible witnesses. The historical basis for English civil liberties is contained in the statement: "No freeman shall be taken and imprisoned or disseised or exiled or in any way destroyed, nor shall we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land." In other words, life, lib-

out of the barbarity of two world wars and a reaffirmation of fundamental international human rights³ that recognized the "dignity and worth of the human person and . . . the equal rights of men and women."⁴ Sadly, however, we celebrate the fiftieth anniversary of this historic document on December 10, 1998⁵ in the absence of a standing international criminal court that can prosecute even the most egregious violations of international human rights law.

Any international tribunal convened to prosecute persons suspected of violations of international human rights law must comply with certain minimum standards accepted by the international community.⁶ As discussed in Part II of this article, the sporadic international prosecutions before World War I provide no acceptable standards, and the trials following World War I were unsuccessful. In contrast, the prosecutions that followed World War II were generally successful, yet their fairness have been questioned.⁷ The "international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" since 1991⁸ is the only contemporary tribunal that provides a model for

erty, and property were not to be taken from anyone without judgment of the person's peers and only by process of the law of the land. . . . Although the Magna Carta may be refuted by Parliament at any time and is therefore not legally inviolable, the rights established under the charter have been given the force of law for seven centuries and have secured a habitual recognition of validity. *Magna Carta*, MICROSOFT ENCARTA '95 (CD-ROM Multimedia Encyclopedia, 1994).

3. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 776-93 (Bruno Simma ed., 1994). This text provides an excellent, concise history of the Universal Declaration of Human Rights. The UDHR is an implementation of the obligations of Member States found in art. 55c of the Charter of the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* at 782. For a more detailed historical account and commentary, see THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Asbjorn Eide et al. eds., 1992).

4. UDHR, *supra* note 1, pmb1.

5. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY, *supra* note 3, at 1.

6. The Charter of the United Nations and the Universal Declaration of Human Rights make no exceptions for international tribunals which prosecute violations of human rights law.

7. See, e.g., LAWRENCE TAYLOR, A TRIAL OF GENERALS (1981).

8. See U.N.S.C. Res. 827 (May 25, 1993). The official abbreviated title for this tribunal is "The International Criminal Tribunal for the former Yugoslavia." 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, at xvii n.2 (1995).

internationally accepted standards for prosecuting persons suspected of violating international human rights law.

The Universal Declaration of Human Rights does, however, set forth minimum guidelines for the rights of individuals during trial by national courts and international tribunals. Articles 5 and 9 through 11 provide that

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . .

Article 9. No one shall be subjected to *arbitrary arrest*, detention or exile.

Article 10. Everyone is entitled in full equality to a FAIR and public *hearing* by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. 1. Everyone charged with a penal offence has the right to be presumed innocent until *proved guilty according to law* in a public trial at which he has had all the *guarantees necessary for his defence*. 2. **No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.** Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.⁹

I have emphasized certain phrases in these articles to highlight the principle *nullem crimen sine lege* (there can be no crime without a law) and to make the point that the Universal Declaration of Human Rights requires that crimes must be defined in detail. There is no protection against arbitrary arrest, no guarantee of a fair hearing, no standard against which to prove one guilty according to law, no standard against which to defend oneself, and no certainty as to the nature of a crime at any given time if the elements of the offenses are not detailed in the jurisdictional documents of an international tribunal.

A standing international criminal court is vital to the enforcement of international human rights. Part II of this article will briefly survey the evolution of international criminal enforcement mechanisms for violations of international human rights law – from the fifteenth century to the International Criminal Tribunal for the former Yugoslavia established in 1993. Part III will then discuss in detail the proposed Definition of Of-

9. UDHR, *supra* note 1, arts. 5, 9-11 [emphasis added].

fenses that I prepared for the International Criminal Tribunal for the former Yugoslavia. The final part briefly discusses the ongoing initiative for a standing international criminal court, and concludes that the proposed Definition of Offenses attached should be used as a guide for drafting elements of crimes for the standing international criminal court.

II. ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS

Existing enforcement of human rights violations occurs primarily at three levels: by the national courts of the state concerned, formal and informal diplomatic pressure by states upon each other, and civil remedies applied by international organizations against states.¹⁰ Criminal sanctions for violations of international human rights law, however, first began as war crimes prosecutions.¹¹ The first recorded international war crimes prosecution was the trial of Peter von Hagenbach in 1474 by a tribunal of twenty-eight judges from the allied States of the Holy Roman Empire.¹²

Prior to World War I, war crimes trials reflected the international community's competence to prosecute those suspected of violating the laws and customs of war, but such prosecutions were sporadic and failed to form a body of precedent.¹³ The discretion to prosecute suspected war criminals was left to the individual States involved in a conflict, and prosecution depended upon national legislation.¹⁴ The trials following World War I were the first major international effort to punish war crimes.¹⁵ These trials are referred to as the Leipzig trials, and were generally unsuccessful.¹⁶

10. NATIONAL SECURITY LAW 719-21 (John Norton Moore et al. eds., 1990).

11. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 147-51 (1992).

12. M. Cherif Bassiouni, *The Prosecution of International Crimes and the Establishment of an International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 3, 3 (M. Cherif Bassiouni ed., 1987). During his trial in Breisach, Germany, Peter von Hagenbach was found guilty of murder, rape, perjury, and other crimes "against the law of God and man" in the execution of a military occupation, was stripped of his knighthood, and put to death. *Id.*

13. COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 583 (Jean S. Pictet ed., 1958) [hereinafter 1949 Geneva Convention No. IV COMMENTARY]; BASSIOUNI, *supra* note 11, at 151.

14. 1949 Geneva Convention No. IV COMMENTARY, *supra* note 13, at 584.

15. DOCUMENTS ON THE LAWS OF WAR 11 (Adam Roberts & Richard Guelff eds., 2d ed. 1989) [hereinafter LAWS OF WAR].

16. DEP'T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW, VOLUME II, at 222 (1962) [hereinafter DA PAM. 27-161-2]. The 1919 Versailles "Treaty of Peace Between the Allied and Associated Powers and Germany" obligated Germany to turn over suspected war

In 1942, the Allies signed, in London, a declaration that the punishment of war crimes was a principal goal of the Allies.¹⁷ To specifically avoid a repeat of the Leipzig trials, the Allies signed the Moscow Declaration of October 30, 1943, that stated suspected war criminals would be tried "by the people and at the spot where the crime was committed."¹⁸ The Moscow Declaration also stated that crimes with no specific geographic setting would be the subject of a later joint decision.¹⁹ On August 8, 1945, an agreement²⁰ was signed by the Allies establishing an International Military Tribunal to try Germans whose alleged crimes had no situs.²¹ The only international prosecutions in the Far East were based on the Potsdam Declaration of July 26, 1945, issued by the United States, United Kingdom, and China.²²

Individual criminal responsibility for violations of the laws and customs of war is an undisputed part of contemporary customary international law.²³ Criminal responsibility can extend to individual combatants, government officials, and Heads of State.²⁴ Furthermore, it is a recog-

criminals to the Allies for trial. Germany, however, refused the Allied extradition request for 896 suspected German war criminals, and instead, chose forty-five accused to be tried by the Criminal Senate of the Imperial Court of Justice of Germany. Of these forty-five, only twelve were tried – six of these twelve were acquitted, and the other six received light sentences. *Id.* at 221-22.

17. LAWS OF WAR, *supra* note 15, at 11.

18. DA PAM. 27-161-2, *supra* note 16, at 222.

19. *Id.*

20. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter 1945 London Agreement], *reprinted in* THE LAWS OF ARMED CONFLICTS 911 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter LAWS OF ARMED CONFLICTS].

21. DA PAM. 27-161-2, *supra* note 16, at 223-4. Annexed to the 1945 London Agreement was the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1545, 82 U.N.T.S. 280 [hereinafter 1945 Charter of the IMT], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 20, at 913. The International Military Tribunal at Nuremberg conducted one trial of twenty-four German defendants. Of these twenty-four defendants, nineteen were convicted of at least one of the four counts alleged, three were found not guilty, one defendant committed suicide before trial, and one was not tried because of old age. DA PAM. 27-161-2, *supra* note 16, at 224-26.

22. DA PAM. 27-161-2, *supra* note 16, at 233. On April 3, 1946, the Allied Far Eastern Advisory Committee issued a policy decision upon which twenty-five defendants were tried and convicted. *Id.* at 234.

23. *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, princ. I, [1950] 2 Y.B. Int'l L. Comm'n 374 [hereinafter 1950 Nuremberg Principles], *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 20, at 923; LAWS OF WAR, *supra* note 15, at 12.

24. 1950 Nuremberg Principles, *supra* note 23, princs. III-IV, *reprinted in* LAWS OF ARMED CONFLICTS, *supra* note 20, at 924.

nized principle of international law that “[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [crimes against peace, war crimes, and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.”²⁵ Since war crimes are universal crimes, suspected war criminals may be prosecuted by any State or by an international tribunal.²⁶ States have, however, avoided war crimes trials of enemy personnel for conflicts since World War II²⁷ despite the serious war crimes that were committed during a number of international armed conflicts such as Korea, Vietnam, Palestine, Pakistan-Bangladesh-India, Cyprus, Lebanon, and the Persian Gulf.²⁸

The war in the former Yugoslavia began in March of 1992.²⁹ In October of 1992, alarmed at the continuing reports of widespread violations of international humanitarian law, mass killings, and ethnical cleansing, the Security Council requested the United Nations Secretary-General to establish a Commission of Experts to report on the “evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.”³⁰ After an interim report of the Commission of Experts in February of 1993 that recommended the creation of an *ad hoc* international tribunal, the Security Council decided that an international tribunal shall be established and requested the Secretary-General to make a report on all matters related to the creation of such an *ad hoc* tribunal.³¹

The Secretary-General completed his report, which contained a proposed “Statute of the International Tribunal,” on May 3, 1993.³² Acting

25. Opinion and Judgment of the International Military Tribunal, Nuremberg, Sept. 30, 1946, 22 T.M.W.C. 411, extracts reprinted in LAWS OF WAR, *supra* note 15, at 155.

26. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 305 (3d ed. 1984).

27. FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 69 (2d ed. 1991); OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP’T OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶¶ S6.2.5.2-S6.2.5.3 (1989).

28. M. BASSIOUNI, *supra* note 11, at 232.

29. Patricia Forestier, *Psychiatric Genocide! How the Barbarities of ‘Ethnic Cleansing’ Were Spawned by Psychiatry*, FREEDOM, May 1993, at 6.

30. U.N.S.C.Res. 780 (Oct. 6, 1992).

31. U.N.S.C.Res. 808 (Feb. 22, 1993). The final report of the Commission of Experts was completed in May of 1994. After 18 months of studies and on-site investigations, the Commission of Experts concluded that “grave breaches of the Geneva Conventions and other violations of international humanitarian law have been committed . . . on a large scale, and were particularly brutal and ferocious in their execution.” *Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council*, U.N. Doc. S/1994/674 (May 27, 1994).

32. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council*

under the authority of Chapter VII of the Charter of the United Nations, the Security Council approved the report of the Secretary-General, adopted his proposed Statute, and established "an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace."³³ Articles 2 through 5 of the Statute of the International Tribunal grants the International Criminal Tribunal for the former Yugoslavia the power to prosecute persons suspected of grave breaches of the four Geneva Conventions of August 12, 1949, violations of the laws or customs of war, genocide, or crimes against humanity.³⁴ The Statute does not, however, detail the

Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993).

33. U.N.S.C.Res. 827 (May 25, 1993).

34. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (May 3, 1993), Annex (Statute of the International Tribunal). Specifically, article 2 of the Statute of the International Tribunal provides that:

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

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

Article 3 of the Statute of the International Tribunal provides that:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

elements of the offenses.

III. PROPOSED DEFINITION OF OFFENSES FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The proposed Definition of Offenses attached to this article delineates the elements of the crimes authorized by Articles 2 through 5 of the Statute of the International Tribunal. This proposal was drafted by this author in February 1994 at the request of Colonel James P. Terry, U.S. Marine Corps, then Legal Counsel to the Chairman of the Joint Chiefs of Staff. It was intended to serve as an official submission of the United States, after interagency coordination and Department of State approval, to the International Criminal Tribunal for the former Yugoslavia. The interagency coordination process began in May 1994, and several versions of the proposed Definition of Offenses exist throughout the interagency.

Article 4 of the Statute of the International Tribunal provides that:

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) killing members of the group;
 - (b) causing serious bodily or mental harm to members of the group;
 - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) imposing measures intended to prevent births within the group;
 - (e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
 - (a) genocide
 - (b) conspiracy to commit genocide;
 - (c) direct and public incitement to commit genocide;
 - (d) attempt to commit genocide;
 - (e) complicity in genocide.

Article 5 of the Statute of the International Tribunal provides that:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

The attached document, however, is the original February 1994 version that reflects no interagency input. The proposed Definition of Offenses was never formally submitted by the United States because its length and complexity made interagency coordination very difficult and time consuming, however, my proposed Definition of Offenses has been used extensively by an American Bar Association Task Force on War Crimes,³⁵ the U.S. Delegation to the United Nations *ad hoc* Committee for an International Criminal Court,³⁶ and the Office of the Prosecutor for the International Criminal Tribunal for the former Yugoslavia.³⁷

The purpose of drafting elements for each crime authorized for prosecution is to clearly identify those facts that must be proven beyond a reasonable doubt before a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia can reach a finding of guilty. This will ensure that the defense is fairly put on notice of the offense which must be defended against, and will ensure consistency in charging. The elements drafted for each offense in the proposed Definition of Offenses meet the level of specificity required by the Universal Declaration of Human Rights. The enumeration of the elements of the offenses are not intended to create law, but to reflect a consolidation of existing codified and customary international law.

Each offense is discussed in a six-part format which includes the elements of the offense, comment, lesser included offenses, maximum punishment, sample charge, and closely related offenses – similar in format

35. See Dorean Marguerite Koenig, *Women and Rape in Ethnic Conflict and War*, 5 HASTINGS WOMEN'S L.J. 129, 129 (1994).

36. At the request of Ambassador David J. Scheffer, U.S. Department of State, I tailored this document on June 18, 1995 for use by the U.S. Delegation to the United Nations *ad hoc* Committee for an International Criminal Court, of which I was a member at that time, to fit the proposed crimes then within the jurisdiction of the proposed standing international criminal court.

37. At the request of Michael J. Keegan, Office of the Prosecutor, the International Criminal Tribunal for the former Yugoslavia, I faxed a copy of this document to the International Tribunal on June 25, 1993. This document was provided to the International Tribunal with the permission of the U.S. Department of State so long as it was done with the understanding that it was not an official submission of the United States but simply a submission of a private citizen. See also LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: ESTABLISHMENT, ORGANIZATION, JURISDICTION AND PROCEEDINGS TO DATE 37-43(1995); Memorandum from Sheila Berry, Office of the Prosecutor, the International Criminal Tribunal for the former Yugoslavia, The Hague, The Netherlands, to Evan Bloom, Office of the Legal Advisor, U.S. Department of State (Mar. 6, 1996) (on file with author). Both of these two references contain a set of definition of offenses used by the International Criminal Tribunal for the former Yugoslavia that are taken substantially verbatim from my February 1994 proposed Definition of Offenses.

to the United States Manual for Courts-Martial. While the first part lists those constituent facts which must be proven by the prosecution, the comment that follows further defines terms used in the elements and cross-references the international law from which the elements are derived. A lesser included offense is one that is included within a charged offense when the charged offense contains allegations which, either expressly or by fair implication, puts the accused on notice to be prepared to defend against it in addition to the charged offense.

The fourth part for each offense specifies the maximum sentence allowable.³⁸ These are summarized at the end of the proposed Definition of Offenses in a Table of Maximum Punishments. The sample charge is a plain, concise statement of the essential facts constituting the offense charged. It is intended to serve as a guide for charging a suspect and is sufficient if it alleges every element of the charged offense expressly or by necessary implication. The final part for each offense lists closely related offenses, which should assist the prosecution in deciding what other offenses should be charged for contingencies of proof.

Definition one provides that any person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime proscribed by the Statute of the International Tribunal is individually responsible for the crime. A person in a position of superior authority is individually responsible for a failure to prevent a crime or to deter the unlawful behavior of his or her subordinates if the person of superior authority knew or should have known that such subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or halt the commission of such crimes or to punish the offenders. A person who commits a crime pursuant to an order of a superior is individually responsible unless the accused did not know, and a person of ordinary sense and understanding would not have known, that the order was unlawful. This definition also provides for attempts and conspiracies.

Definitions two through five list the substantive crimes authorized by articles two through five of the Statute of the International Tribunal. Definition two provides the elements of the offenses for grave breaches of the 1949 Geneva Conventions, which include the following acts when committed against a person protected under the 1949 Geneva Conven-

38. These maximum punishments specified were derived principally from an analysis of United States federal law. For two excellent comparative law analyses of sentencing guidelines for international tribunals, see Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123 (1997), and William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997).

tions: willful killing, torture, inhuman treatment, biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity, compelling service in the forces of a hostile power, willful deprivation of the rights of fair and regular trial, unlawful deportation or transfer or confinement, and taking of hostages. Rape was included as an offense under the definition of willfully causing great suffering.

The third definition proscribes violations of the laws or customs of war and reflects the principle that the right of belligerents to conduct warfare is not unlimited. The Statute lists five examples of violations of the laws or customs of war within the jurisdiction of the tribunal, but specifically states that the list is not exhaustive. The enumerated crimes prohibit the employment of weapons calculated to cause unnecessary suffering, wanton destruction or devastation not justified by military necessity, attack of undefended areas, seizure or destruction of cultural property, and plunder of public or private property. To allow a framework for charging violations not listed as an example in the Statute, a definition was included for "other violations of the laws or customs of war."

The elements of genocide found in the fourth definition were derived from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The key distinction between genocide and similar crimes in definition two, such as willful killing or causing serious bodily injury, is that a conviction of genocide requires proof that the act was committed with the intent to take part in a plan to destroy a particular national, ethnical, racial, or religious group.

Crimes against humanity are defined in the fifth definition as those serious offenses directed against persons as part of a widespread or systematic attack against any civilian population on national, political, ethnical, racial, or religious grounds. There is considerable overlap between these offenses and genocide, grave breaches of the Geneva Conventions, and violations of the laws or customs of war. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made objects of these other offenses. Although both are directed against a specific group, crimes against humanity can be distinguished from genocide in that they do not require an intent to destroy the group, only proof that the act was part of a widespread or systematic attack against a civilian population on national, political, ethnical, racial, or religious grounds.

The final definition identifies affirmative defenses, which are those that the defense must place at issue, but once at issue, the prosecution has the burden of proof to establish that the defense did not exist. These defenses include duress, coercion, and ignorance or mistake of fact. A subjective and objective standard of knowledge for persons in positions

of superior authority and persons acting pursuant to superior orders is also codified. Each of these definitions and issues is discussed in greater detail in the proposed Definition of Offenses.

IV. CONCLUSION—DRAFTING ELEMENTS OF CRIMES FOR A STANDING INTERNATIONAL CRIMINAL COURT

After four years of intense negotiations, delegates from more than 120 countries met in Rome, Italy on June 15, 1998 for a five-week United Nations conference to conform the final text of a treaty that would create a standing international criminal court.³⁹ By a vote of 120-7, on July 17, 1998, these States overwhelmingly adopted a treaty that would create a standing international criminal court after sixty ratifications.⁴⁰ The United States rejected the treaty because key provisions would create “the possibility of politically motivated and unjustified prosecution[s]”⁴¹ While the United States was seeking safeguards that would protect *all* countries, not just the United States, from a politicized and abusive court, it was frequently criticized and isolated for its position.⁴²

Article 5 of the Rome Statute of the International Criminal Court defines the crimes within the jurisdiction of the court.⁴³ This article provides that

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.

39. *The UN and war criminals: How strong a court?*, THE ECONOMIST, June 13, 1998, at 46.

40. Thomas W. Lippman, *Worldwide War Crimes High Court Is Approved: Delegates Overrule U.S. Objections*, WASH. POST, July 18, 1998, at A1.

41. *Id.*

42. *See id.* *See also* Thomas W. Lippman, *America Avoids The Stand: Why the U.S. Objects To A World Criminal Court*, WASH. POST, July 26, 1998, at C1; T.R. Goldman, *A World Apart? U.S. Stance on a New International Criminal Court Concerns Rights Groups*, LEGAL TIMES, June 8, 1998, at 1.

43. Rome Statute of the International Criminal Court, July 17, 1998, art. 5, U.N. Doc. A/CONF.183/9.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.⁴⁴

Articles 6 through 8 then define in more detail the offenses of genocide, crimes against humanity, and war crimes, respectively.⁴⁵ Article 8 includes grave breaches of the 1949 Geneva Conventions as well as violations of the laws and customs of war.⁴⁶ Finally, article 9 provides that elements of crimes "shall assist the Court in the interpretation and application of articles 6, 7 and 8" and that they "shall be adopted by a two-thirds majority of the members of the Assembly of States Parties."⁴⁷

To ensure a timely establishment of an international criminal court, the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court decided in its Final Act that a Preparatory Commission should be established to prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

- (a) Rules of Procedure and Evidence;
- (b) Elements of Crimes;
- (c) A relationship agreement between the Court and the United Nations;
- (d) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;
- (e) Financial regulations and rules;
- (f) An agreement on the privileges and immunities of the Court;
- (g) A budget for the first financial year;
- (h) The rules of procedure of the Assembly of States Parties.⁴⁸

44. *Id.*

45. *Id.* arts. 6-8.

46. *Id.* art. 8.

47. *Id.* art. 9.

48. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex I, U.N. Doc. A/CONF.183/10.

The Final Act provides that the draft texts of the rules of procedure and evidence and of the elements of crimes shall be finalized before 30 June 2000.⁴⁹ There will only be a “common understanding” of the rights and freedoms guaranteed by the Universal Declaration of Human Rights when these rules and elements of crimes are detailed as part of the jurisdiction documents of a newly established international criminal court.

The fiftieth anniversary of the Universal Declaration of Human Rights coincides with the birth of the first standing international criminal court that has the jurisdiction to enforce international human rights. I strongly support the creation of an international criminal court, and the scope of jurisdiction of this draft statute is an excellent starting point. It begins conservatively with only those crimes that the international community has at least some experience in prosecuting – war crimes and those closely related crimes such as genocide. The Preparatory Committee should learn from and build upon its experience with the International Criminal Tribunal for the former Yugoslavia.

The proposed Definition of Offenses that is attached embraces the principles of the Universal Declaration of Human Rights, the International Criminal Tribunal for the former Yugoslavia, and the Rome Statute for an International Criminal Court. It comprehensively details the elements of the offenses for the great majority of those crimes within the jurisdiction of the international criminal court proposed by the Rome Statute, and has been used extensively by the American Bar Association, the United States, and the International Criminal Tribunal for the former Yugoslavia. The proposed Definition of Offenses attached are offered to the Preparatory Commission as a baseline to begin its work for drafting elements of the offenses for a standing international criminal court.

49. *Id.*

PROPOSED DEFINITION OF OFFENSES

**FOR THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS
RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN
LAW COMMITTED IN THE FORMER YUGOSLAVIA**

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PREAMBLE

This code comprises the definitions of those offenses authorized by articles 2 through 5 of the *Statute of the International Tribunal*. Each offense is discussed in the following format:

- (A) Elements of the offense
- (B) Comment
- (C) Lesser included offenses
- (D) Maximum punishment
- (E) Sample charge
- (F) Closely related offenses

The elements of the offense are those constituent facts of the offense which must be proven beyond a reasonable doubt by the prosecution to enable the Trial Chamber to reach a finding of guilty. The comments further define terms used in the elements of the offense, and, where appropriate, discuss the conventions and the law from which the elements are derived.

A lesser included offense is one that is included in a charged offense when the charge contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This notice requirement may be met when:

(A) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical or legally less serious; or,

(B) All of the elements of the lesser offense are pled and included in the greater offense charged, even though the included offense requires proof of an element not required in the greater offense charged.

Article 24 of the *Tribunal Statute* limits authorized punishments to imprisonment and the return of any property and proceeds acquired by criminal conduct to the rightful owners. The subparagraphs which define the maximum punishment for each offense only lists the maximum allowable imprisonment; however, the punishment of any offense may include the return of any property or proceeds unlawfully obtained. The Trial Chamber may also specify in its judgment whether or not the sentences for multiple offenses shall be served concurrently or consecutively.

The charge is a plain, concise statement of the essential facts constituting the offense charged. It is sufficient if it alleges every element of the charged offense expressly or by necessary implication. When the name of a victim is not available, it is sufficient in the charge to describe them. The sample charge provided is intended to serve as a guide in drafting charges, and can be varied in form and content as necessary. In

considering what offenses should be charged, it is envisioned that the prosecution will charge multiple offenses that are factually related for contingencies of proof. To aid in this process, the last subparagraph of each Definition lists closely related offenses which may be separately charged.

PROPOSED DEFINITION OF OFFENSES

FOR THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE FORMER YUGOSLAVIA

DEFINITION 1: PRINCIPALS, ATTEMPTS, AND CONSPIRACIES

1.1 PRINCIPALS.

(A) *Defined.* Any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime proscribed by international law and under the jurisdiction of the International Tribunal shall be individually responsible for the crime. Presence at the scene of the crime is not necessary to make a superior individually responsible for the crimes committed by his or her subordinates. In contrast, the mere presence at the scene of the crime does not make one a principal unless the requirements of subparagraph 1.1(B), below, have been met. A person may be a principal, even if the perpetrator is not identified or prosecuted, or is found not guilty.

(B) *Persons in positions of superior authority.*

(1) A person in a position of superior authority is individually responsible for offenses committed pursuant to his or her unlawful orders.

(2) A person in a position of superior authority is individually responsible for failure to prevent a crime or to deter the unlawful behavior of his or her subordinates. Such individual responsibility extends to all crimes committed by subordinates if the person of superior authority knew or should have known that such subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or halt the commission of such crimes or to punish the offenders. (See Definition 6.3)

(C) *Persons acting pursuant to superior orders.* A person who commits a crime pursuant to an order of a Government or a superior is individually responsible; however, it is a defense that the accused was acting pursuant to orders which he or she did not know, and a person of ordi-

nary sense and understanding would not have known, were unlawful. (See Definition 6.4)

COMMENTARY

Article 7, paragraph (1), of the *Tribunal Statute* provides that any person who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” This article is intended to ensure that all persons bear criminal responsibility for crimes they commit or to which they materially contribute. A person who is in a position of superior authority who orders an offense makes a material contribution toward the commission of a crime even though that superior did not actually commit the crime. Paragraph (4) of article 7 defines those acts that *do not* relieve such persons of responsibility, such as acts of subordinates committed pursuant to superior orders.

Subparagraph (B) of this Definition places the burden of proof of imputed responsibilities for superiors upon the prosecution. In so doing, it reconciles a disparity between the Secretary-General’s Report’s commentary and article 7. Paragraph 56 of the Secretary General’s Report imputes criminal responsibility to superiors who give unlawful orders or who knew or had reason to know of their subordinates’ crimes and did nothing to stop or punish them. It is worded in such a way as to require the prosecutor to prove the superior’s conduct. In slight contrast, article 7, paragraph 3, is worded a bit differently. It states that the fact that criminal offenses were committed by subordinates “does not relieve . . . superior[s] of criminal responsibility if [they] knew or had reason to know that the subordinate[s]” committed or were about to commit the offenses. This might be construed to impose upon the accused the burden of showing that he or she neither knew nor had reason to know of subordinate misconduct. If so, that burden is misplaced. It should remain with the prosecutor.

1.2 ATTEMPTS.

(A) *Elements of the offense.*

- (1) That the accused did a certain overt act;
- (2) That the act was done with the specific intent to commit a certain offense proscribed by international law and under the jurisdiction of the International Tribunal;
- (3) That the act amounted to more than mere preparation; and,
- (4) That the act apparently tended to effect the commission of the intended offense.

(B) *Comment.*

(1) *Intent.* To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) *Preparation.* Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn and damage an undefended town is not an attempt to commit the wanton destruction of the town under Definition 3.3, but it is an attempt to commit wanton destruction if the accused applies a burning match to a building, even if no fire or damage results. The overt act need not be the last act essential to the consummation of the offense.

(3) *Factual impossibility.* A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if the accused, without justification or excuse and with intent to kill a person, points a weapon at that person and pulls the trigger, the accused may be guilty of an attempt to willfully kill or murder, even though, unknown to the accused, the weapon is defective and will not fire.

(C) *Lesser included offenses.* None.

(D) *Maximum punishment.* Any person found guilty of an attempt under this Definition shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall imprisonment exceeding twenty years be adjudged.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element of the offense attempted).

(F) *Closely related offenses.* None.

1.3 CONSPIRACIES.

(A) *Elements of the offense.*

(1) That the accused entered into an agreement with one or more persons to commit an offense proscribed by international law and under the jurisdiction of the International Tribunal; and,

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

(B) *Comment.*

(1) *Co-conspirators.* Two or more persons are required in order to have a conspiracy; however, knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

(2) *Agreement.* The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

(3) *Object of the agreement.* The object of the agreement must, at least in part, involve the commission of one or more offenses proscribed by international law and under the jurisdiction of the International Tribunal. An agreement to commit several offenses is ordinarily but a single conspiracy.

(4) *Overt act.* The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and, must be done to effectuate the object of the agreement. The overt act need not be criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed. An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) *Liability for offenses.* Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to the conspiracy.

(6) *Withdrawal.* A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement

and which shows that the party has severed all connection with the conspiracy.

(7) *Factual impossibility*. It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, or that the conspirators were not physically able to accomplish their intended object.

(8) *Conspiracy as a separate offense*. A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

(C) *Lesser included offenses. Attempt*. (See Definition 1.2)

(D) *Maximum punishment*. Any person found guilty of conspiracy under this Definition shall be subject to the same maximum punishment authorized for the commission of the offense which is the object of the conspiracy, except that in no case shall imprisonment exceeding twenty years be adjudged.

(E) *Sample charge*.

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), conspire with (name of co-conspirator(s)) to commit an offense proscribed by international law and under the jurisdiction of the International Tribunal, to wit: (description of offense), and in order to effect the object of the conspiracy the said (name of co-conspirator(s) who committed the overt act) did (description of overt act).

(F) *Closely related offenses*. None.

DEFINITION 2: GRAVE BREACHES OF THE 1949 GENEVA CONVENTIONS

2.1 GENERALLY. The Geneva Conventions of 1949 proscribe certain acts of commission or omission and classify them as "grave breaches." Article 2 of the Statute of the International Tribunal gives the Tribunal jurisdiction over such offenses. Conviction of these offenses requires proof of the underlying elements.

(A) *Grave breaches*. Grave breaches are considered to be the following acts when committed against a person or persons protected under the 1949 Geneva Conventions: willful killing, torture, inhuman treatment including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling service in the forces of a hostile power, willful deprivation of the rights of fair and regular trial, unlawful deportation or transfer or confinement, and taking of hostages.

(B) *Protected persons*. To determine whether a particular person is protected under one or more of the 1949 Geneva Conventions, one must

resort to various articles of the Conventions. Generally, the wounded and sick, medical personnel, chaplains, prisoners of war, shipwrecked persons, and civilians in occupied territories who are not of the nationality of the occupying State, are protected persons.

COMMENTARY

Generally, grave breaches are those serious acts delineated by the Geneva Conventions when directed against persons or property protected by one of the four conventions. By giving the Tribunal the power to prosecute persons committing or ordering to be committed grave breaches, the UN Security Council has determined that such acts are crimes punishable under international law. The definitions that follow draw primarily from Pictet's Commentary on the Geneva Conventions.

2.2 WILLFUL KILLING.

(A) *Elements of the offense.*

- (1) That a certain named or described person is dead;
- (2) That the person was protected under one or more of the 1949 Geneva Conventions;
- (3) That the death resulted from the act or omission of the accused;
- (4) That the killing was unlawful; and,
- (5) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

(B) *Comment.*

(1) *Generally.* Known in most legal systems as murder, willful killing requires, first, that the victim be dead and, second, that the death be caused by the intentional act or omission of the accused. In most penal codes, the gravity of the offense and, therefore, the punishment varies according to the level of intent. Certainly, premeditation is the most serious level; negligence is the least. Finally, the killing must be unlawful. This factor forecloses the prosecution of lawful acts of war, but does not prevent prosecution for the execution of persons without minimum due process. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission.

(2) *Intent to kill or inflict great bodily harm.* An unlawful killing is willful when the accused had either an intent to kill or an intent to inflict great bodily harm.

(a) *Intent.* A person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional

act likely to result in death or great bodily injury, that death or great bodily injury was intended may be inferred. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission.

(b) *Great bodily harm* means serious injury. It does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, and other serious bodily injuries.

(3) *Omissions*. Willful killing clearly encompasses faults of omission. Of course the omission must have been willful and intended to cause death or great bodily harm. Again, if death is the foreseeable consequence of such omission, intent is inferred. Examples include giving instructions for the food rations of prisoners of war to be reduced to such a point that malnutrition causes death and letting wounded persons die for want of care that was reasonably available.

(C) *Lesser included offenses*.

(1) *Attempt*. (See Definition 1.2)

(2) *Inhuman treatment, including biological experiments*. (See Definition 2.4)

(3) *Willfully causing great suffering*. (See Definition 2.5)

(4) *Causing serious injury to body or health*. (See Definition 2.6)

(D) *Maximum punishment*. Imprisonment for life.

(E) *Sample charge*.

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and willfully kill (name or description of person), a person protected under one or more of the 1949 Geneva Conventions, by means of (description of act or omission).

(F) *Closely related offenses*.

(1) *Torture*. (See Definition 2.3)

(2) *Genocide*. (See Definition 4.2)

(3) *Murder*. (See Definition 5.2)

(4) *Extermination*. (See Definition 5.3)

2.3 TORTURE.

(A) *Elements of the offense*.

(1) That the accused committed an act resulting in the infliction of severe physical or mental pain or suffering upon a certain named or described person;

(2) That such person was protected under one or more of the 1949 Geneva Conventions;

(3) That the accused, at the time of such act, had the specific intent to inflict severe physical or mental pain or suffering;

(4) That the torture was inflicted for such purposes as obtaining from the immediate victim or a third person information or a confession, punishing him or her for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or her, or for any reason based on discrimination of any kind;

(5) That the torture is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity; and,

(6) That the pain or suffering inflicted was unlawful and did not arise only from or was inherent in or incidental to lawful sanctions.

(B) *Comment.* These elements derive from the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, UNGA Res. 39/46 (1987). The impetus of this offense is the infliction of pain or injury for certain listed purposes. Serious injury to body or health is not an element of this offense. If serious injury results from the torture, it should be pled as a matter in aggravation, and consequently a lesser offense will be included. The force used in inflicting the pain or suffering upon the victim may have been directly or indirectly applied. Great suffering not only includes injury to body or physical health, but also severe pain and mental anguish.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Inhuman treatment, including biological experiments.* (See Definition 2.4)

(3) *Willfully causing great suffering.* (See Definition 2.5)

(4) *Causing serious injury to body or health* (See Definition 2.6)

(D) *Maximum punishment.* Imprisonment for forty years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally torture (name or description of person), a person protected under one or more of the 1949 Geneva Conventions, for such purposes of [obtaining from such person or a third person information or a confession] [punishing such person for an act he or a third person committed or is suspected of having committed] [intimidating or coercing such person] [description of any other reason based on discrimination of any kind], by means of (description of act or omission), and (at the instigation) (with the consent or acquiescence) of (description of public official or other person acting in an official capacity).

(F) *Closely related offenses. Torture and mutilation* (See Definition 5.7)

2.4 INHUMAN TREATMENT, INCLUDING BIOLOGICAL EXPERIMENTS.

(A) *Elements of the offense.*

(1) *Biological experimentation.*

(a) That the accused subjected a certain named or described person to a particular medical or biological procedure or treatment;

(b) That such person was protected under one or more of the 1949 Geneva Conventions;

(c) That the accused intended to subject such person to non-therapeutic procedures or treatment; and,

(d) That, under the circumstances, the procedure was unlawful and not part of or justified by the proper medical, dental, or psychological treatment of such person. [Note: When serious injury to body or health results, add the following element:]

(e) That serious injury to body or health resulted therefrom.

(2) *Other inhuman treatment.*

(a) That the accused committed a certain act or omission against a certain described or named person;

(b) That such person was a protected person under one or more of the 1949 Geneva Conventions; and,

(c) That the accused intended to unlawfully impair the physical or moral integrity of such person or otherwise subject him or her to indignities, pain, or suffering grossly out of proportion to the treatment expected of one human being from another. [Note: When serious injury to body or health results, add the following element:]

(d) That serious injury to body or health resulted therefrom.

(B) *Comment.* These acts describe some injurious treatment accorded persons protected by the Geneva Conventions. The types of acts contemplated in this section include, but are not limited to, treatment that causes physical or mental injury, unnecessary physical treatment by medical providers or others unrelated to therapy offered for other than therapeutic purposes, or assault on the physical or moral integrity of a person for any reason.

(1) *Biological experimentation.* The Geneva Conventions do not prohibit doctors from using new methods of treatment justified by medical reasons and based solely on the concern to improve a patient's health. It must be possible to use new treatments provided they are administered for therapeutic purposes.

(2) *Inhuman treatment.* The Geneva Conventions provide that protected persons must always be treated with humanity; therefore, the sort of treatment covered here would be whatever is contrary to that general rule. It certainly encompasses more than just injury to body or health. The object of the Conventions is to preserve human dignity; therefore, inhuman treatment is any act or omission inconsistent with that object.

(3) *Examples.* Any act of violence or intimidation inspired not by military requirements or a legitimate desire for security but by a systematic scorn for human values constitutes inhuman treatment. Insults, exposing prisoners to corporal punishment and forcing a woman into prostitution are examples.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Willfully causing great suffering.* (See Definition 2.5)

(3) *Causing serious injury to body or health* (See Definition

2.6)

(D) *Maximum punishment.*

(1) *Biological experimentation.* Imprisonment for life.

(2) *Other inhuman treatment.* Imprisonment for twenty years.

(E) *Sample charge.*

(1) *Biological experimentation.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), subject (name or description of person), a person protected under one or more of the 1949 Geneva Conventions, to unlawful biological treatment by means of (description of act or omission) [and did thereby inflict serious injury upon his/her body/health].

(2) *Other inhuman treatment.*

In that (name of accused) did (location of act or omission), on or about (date of act or omission), subject (name of person), a person protected under one or more of the 1949 Geneva Conventions, to unlawful inhuman treatment by means of (description of act or omission) [and did thereby inflict serious injury upon his/her body/health].

(F) *Closely related offenses.* None.

2.5 WILLFULLY CAUSING GREAT SUFFERING.

(A) *Elements of the offense.*

(1) That the accused committed a certain act or omission upon a certain named or described person;

(2) That such person was protected under one or more of the 1949 Geneva Conventions;

(3) That the accused, at the time, committed the certain act with the intent to unlawfully inflict great suffering; and,

(4) That great suffering was thereby inflicted.

[Note: When rape is the certain act, add the following elements:]

(5) That the certain act consisted of sexual intercourse with such person; and,

(6) That the act was done by force and without such person's consent.

(B) *Comment.*

(1) *Nature of offense.* This refers to suffering inflicted without the underlying purposes necessary for a charge of torture or biological experimentation. This offense is a general offense in that it encompasses many intentional acts (such as rape, forcible sodomy, and indecent acts) or omissions which cause great mental and/or physical suffering.

(2) *Intent to inflict great suffering.* The additional requirement that the underlying act must be intended to cause great suffering is included to avoid the problem of *nullem crimen sine lege* (no crime without law). Without it, even innocuous acts or omissions might, if resulting in great suffering, be subject to prosecution. Examples include acts considered tortious but not criminal under many national legal systems.

(3) *Great suffering.* This not only includes injury to body or physical health, but also severe pain and mental anguish.

(4) *Rape.* This offense is sexual intercourse with a person by force and without his or her consent. This includes forcible sodomy. For either offense, any penetration of the mouth, anus, or sexual organ of a person with the accused's sexual organ is sufficient to complete the offense. Forced intercourse or sodomy with a third person or animal is also contemplated by this offense. For both offenses, force and lack of consent are required. The lack of consent required is more than mere lack of acquiescence. If a person in possession of his or her mental and physical faculties fails to make his or her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that he or she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a person gave his or her consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or serious injury. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the person is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Causing serious injury to body or health.* (See Definition

2.6)

(D) *Maximum punishment.*

(1) *Rape or forcible sodomy.* Imprisonment for life.

(2) *Other acts causing great suffering.* Imprisonment for forty years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and willfully cause great suffering to (name or description of person), a person protected under one or more of the 1949 Geneva Conventions, by means of (description of act or omission)(rape)(forcible sodomy).

(F) *Closely related offenses. Rape and other forms of sexual assault, including enforced prostitution.* (See Definition 5.8)

2.6 CAUSING SERIOUS INJURY TO BODY OR HEALTH.

(A) *Elements of the offense.*

(1) That the accused committed a certain act or omission upon a certain named or described person;

(2) That such person was protected under one or more of the 1949 Geneva Conventions;

(3) That the accused thereby inflicted serious injury upon the person; and,

(4) That the accused, at the time, intended to unlawfully inflict serious injury to body or health. [Note: When maiming is the certain act, add the following element:]

(5) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to the organ or member.

(B) *Comment.* Serious injury to body or health includes any serious injury. Unlike the offense of willfully causing great suffering, this offense requires that injury actually have been inflicted. The offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of that part of his or her body injured. Maiming is an aggravated form of serious injury characterized by causing the loss of or loss of function of a member or organ. Intent sufficient to constitute this offense may be to injure and not necessarily to inflict serious injury or maim. When serious injury has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that serious injury was intended.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.*

(1) *Willfully causing serious injury.* Imprisonment for ten years.

(2) *Maiming.* Imprisonment for forty years.

(E) *Sample charge.*

(1) *Willfully causing serious injury.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and seriously injure the (body or health) of (name or description of person), a person protected under

one or more of the 1949 Geneva Conventions, by (description of act or omission and of injury).

(2) *Maiming.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully maim (name of person), a person protected under one or more of the 1949 Geneva Conventions, by (description of act or omission and of injury).

(F) *Closely related offenses.*

(1) *Willfully causing serious injury.* None.

(2) *Maiming, Torture, and Mutilation.* (See Definition 5.7)

2.7 EXTENSIVE DESTRUCTION OR APPROPRIATION OF PROPERTY, NOT JUSTIFIED BY MILITARY NECESSITY AND CARRIED OUT UNLAWFULLY AND WANTONLY.

(A) *Elements of the offense.*

(1) *Extensive destruction.*

(a) That the accused willfully or recklessly destroyed or damaged certain real or personal property;

(b) That the property was protected by one or more of the 1949 Geneva Conventions;

(c) That the destruction or damage was unlawful;

(d) That the destruction clearly exceeded that required by military necessity; and,

(e) That the amount of destruction was extensive.

(2) *Extensive appropriation.*

(a) That the accused willfully and unlawfully took, obtained, or withheld certain real or personal property from the possession of the owner or any other person;

(b) That such property was protected under one or more of the 1949 Geneva Conventions;

(c) That the taking, obtaining, or withholding by the accused was 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;

(d) That under the circumstances, the appropriation clearly exceeded that required by military necessity; and,

(e) That the amount of appropriation was extensive.

(B) *Comment.* The elements of this offense are contained in its description:

(1) *Destruction or appropriation of property.* First, there must be destruction or appropriation of property. This offense does not require the complete destruction of property. Extensive damage is within the definition of this offense. The type of property contemplated here is property protected by one or more of the Geneva Conventions. For example,

the Fourth Convention forbids the destruction of civilian hospitals. If the other elements are satisfied, such destruction might give rise to this offense. In contrast, the destruction of enemy military property is not prohibited and, therefore, is not an offense.

(2) *Appropriation*. In this context, "appropriation" means taking the property from its lawful owner with or without the intent to permanently deprive.

(3) *Extensive*. The destruction and appropriation must be extensive. Thus, an isolated incident would not be enough. Beyond that, what constitutes "excessive" is left for the Tribunal to decide. It might, however, consider the commonly-defined act of pillage to be an apt analogy.

(4) *Unlawful*. The destruction and appropriation must be unlawful. As with the crime of willful killing, it must be proved that such acts were not results of lawful acts of war. Acts undertaken during war as a result of military necessity should not be considered unlawful.

(5) *Intent*. Finally, there must be intent; here, defined as "wanton."

(6) *Collateral damage*. It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The rule of proportionality, however, requires that incidental injury or collateral damage should not be excessive in light of the military advantage anticipated by the attack. Commanders and unit leaders must take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. In each instance, the commander or unit leader must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him. Similarly, the commander or unit leader must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.

(7) *Military necessity*. Military necessity provides that only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied. This principle permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded

by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.

(8) *Proportionality*. This principle is derived from that of military necessity, in that the latter allows only that use of force necessary for the purpose of armed conflict. Proportionality is intended to prohibit force which needlessly or unnecessarily causes or aggravates both human suffering or physical destruction. The principle of proportionality, therefore, prohibits attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

(9) *Military objective*. Military objectives are those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability *and* whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations including the security of the attacking force. Proper targets for attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries, naval and military bases ashore, warship construction and repair facilities, military depots and warehouses, fuel oil storage areas, docks, port facilities, harbors, bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication and other objects used to conduct or support military operations. Proper targets also include geographic targets, such as a mountain pass or a specific sea area, and buildings and facilities that provide administrative and personnel support for military and naval operations such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas. Proper economic targets for naval attack include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.

(C) *Lesser included offenses*.

(1) *Extensive destruction*.

(a) *Attempt.* (See Definition 1.2)

(b) *Wanton destruction of cities, towns or villages, or devastation not justified by military necessity.* (See Definition 3.3)

(c) *Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings.* (See Definition 3.4)

(d) *Seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.* (See Definition 3.5)

(e) *Plunder of public or private property.* (See Definition 3.6)

(2) *Extensive appropriation.*

(a) *Attempt.* (See Definition 1.2)

(b) *Seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.* (See Definition 3.5)

(c) *Plunder of public or private property.* (See Definition 3.6)

(D) *Maximum punishment.*

(1) *Extensive destruction.* Imprisonment for forty years.

(2) *Extensive appropriation.* Imprisonment for twenty years.

(E) *Sample charge.*

(1) *Extensive destruction.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and (willfully) (wantonly) (destroy) (damage) (description of property) by (description of act or omission), property protected under one or more of the 1949 Geneva Conventions, and, that under the circumstances, the (destruction) (damage) was extensive.

(2) *Extensive appropriation.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and wantonly appropriate (description of property) by (description of act or omission), property protected under one or more of the 1949 Geneva Conventions, and, that under the circumstances, the appropriation was extensive.

(F) *Closely related offenses.* None.

2.8 COMPELLING A PRISONER OF WAR OR A CIVILIAN TO SERVE IN THE FORCES OF A HOSTILE POWER.

(A) *Elements of the offense.*

(1) That the accused coerced a certain named or described person, by act or threat of death or serious harm to that person or a third person, to engage in armed combat against that person's own country;

(2) That the person coerced is a prisoner of war or civilian protected by one or more of the 1949 Geneva Conventions; and,

(3) That the acts compelled do not constitute lawful prisoner of war or civilian labor as defined by the 1949 Geneva Conventions.

(B) *Comment.* This offense is derived from a similar provision in article 23 of the (Hague) Convention (IV) Respecting the Laws and Customs of War on Land, which states that “a belligerent is . . . forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country” The essence of this offense, then, is the *coerced* recruitment of nationals of a party to the hostilities to take part in combat operations directed against their own country. It is important to distinguish coerced recruitment to conduct hostilities from the lawful practice of requiring prisoners of war to perform work defined by articles 49-57 of (Geneva) Convention (III) Relative to the Treatment of Prisoners of War, 1949, and requiring civilians to perform work defined by articles 51 and 52 of (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.* Imprisonment for ten years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully compel (name or description of person), a prisoner of war or civilian protected under one or more of the 1949 Geneva Conventions, to serve against (his) (her) will in the forces of (belligerent State), a power engaged in armed conflict with such person’s State.

(F) *Closely related offenses.* None.

2.9 WILLFULLY DEPRIVING A PRISONER OF WAR OR A CIVILIAN OF THE RIGHTS OF FAIR AND REGULAR TRIAL.

(A) *Elements of the offense.*

(1) That the accused executed, confined, or otherwise punished a certain named or described prisoner of war or civilian within his control or authority;

(2) That the prisoner of war or civilian is a person protected by one or more of the 1949 Geneva Conventions;

(3) That such act was unlawful in that it exceeded what is allowed by the 1949 Geneva Conventions in such cases as detention pending determination of status or offense, as a prisoner of war, or for the safety and security of the person;

(4) That the act was performed without first according the person a fair and regular trial as defined by the Third or Fourth Geneva Conventions of 1949; and,

(5) That the accused intended to deprive the person of such fair and regular trial.

(B) *Comment.* The substance of this offense is the violation of one or more of the penal provisions of articles 82 - 88; 99 - 108 of (Geneva) Convention (III) Relative to the Treatment of Prisoners of War, 1949, and articles 64 - 78 of (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949. These provisions establish procedural and substantive rights that must be respected by any detaining or occupying force. Elements of this offense must necessarily be derived from the language of the particular article violated. Therefore, those articles are incorporated by reference here.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Unlawful confinement of a civilian.* (See Definition 2.10)

(D) *Maximum punishment.* Imprisonment for five years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and willfully deprive (name or description of person), a prisoner of war or civilian protected under one or more of the 1949 Geneva Conventions, of (description of right deprived), a right prescribed by one or more of the 1949 Geneva Conventions as necessary to a fair and regular trial.

(F) *Closely related offenses.*

(1) *Imprisonment.* (See Definition 5.6)

(2) *The passing of sentence 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.* (See Definition 5.10)

2.10 UNLAWFUL DEPORTATION OR TRANSFER, OR UNLAWFUL CONFINEMENT OF A CIVILIAN.

(A) *Elements of the offense.*

(1) *Unlawful deportation or transfer of a civilian*

(a) That the accused unlawfully expelled a certain named or described person from the territory of the State in which that person resides.

(b) That the person was a civilian protected under one or more of the 1949 Geneva Conventions;

(c) That the accused knew the person's status as lawful resident of the territory; and,

(d) That the deportation was not conducted as an evacuation for safety or any other lawful reason.

(2) *Unlawful confinement of a civilian*

(a) That the accused unlawfully held, confined, or otherwise restrained the liberty of a person;

(b) That the person was a civilian protected under one or more of the 1949 Geneva Conventions; and,

(c) That such restraint was effected without affording the procedural and substantive protections prescribed in the Fourth Geneva Convention (1949).

(B) *Comment.* Articles 45 and 49 of (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, prohibit the transfer or deportation of civilians under some conditions. Violations of these articles are prosecutable. Similarly, occupying powers are authorized, for imperative reasons of security, to intern civilians. Articles 78 - 104 discuss the bases and conditions of such internment. Unlawful confinement of a civilian is a violation of article 78 — defining the permissible bases for internment — and not the subsequent articles defining internment conditions. It is the prosecutor's burden to prove that internment of civilians was not undertaken for security purposes.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.*

(1) *Unlawful deportation or transfer of a civilian.* Imprisonment for ten years.

(2) *Unlawful confinement of a civilian.* Imprisonment for five years.

(E) *Sample charge.*

(1) *Unlawful deportation or transfer of a civilian*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully (deport) (transport) (name or description of person), a civilian person protected under one or more of the 1949 Geneva Conventions, from the territory known by the accused to be the person's lawful residence, by means of (description of act or omission).

(2) *Unlawful confinement of a civilian*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully confine (name or description of person), a civilian person protected under one or more of the 1949 Geneva Conventions, without the procedural and substantive protections prescribed by the Fourth Geneva Convention (1949), by means of (description of act or omission).

(F) *Closely related offenses.*

(1) *Unlawful deportation or transfer of a civilian. Deportation.* (See Definition 5.5)

(2) *Unlawful confinement of a civilian*

(a) *Imprisonment.* (See Definition 5.6)

(b) *The passing of sentence 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. (See Definition 5.10)

2.11 TAKING CIVILIANS AS HOSTAGES.

(A) *Elements of the offense.* see hostages convention

(1) That the accused seized, detained, or otherwise unlawfully held hostage a certain named or described person;

(2) That the person was protected under one or more of the 1949 Geneva Conventions;

(3) That the accused threatened to injure, kill, or continue to detain such person; and,

(4) That the act was performed with the intent to compel a State, international intergovernmental organization, a natural or juridical person, or a group of persons to do or refrain from doing any act as an explicit or implicit condition for the safe release of the hostage.

(B) *Comment.* Similar to the unlawful confinement or internment of civilians, this offense requires proof that particular civilians were unlawfully deprived of their liberty. What distinguishes this offense, however, is the additional element that the accused threatened either to prolong the hostage's detention or to put him or her to death.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.* Imprisonment for five years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully hold hostage (name or description of person), a civilian person protected under one or more of the 1949 Geneva Conventions, with the intent to compel (name of the State, international intergovernmental organization, natural or juridical person, or group of persons) to refrain from (description of act) as an (explicit) (implicit) condition for the safe release of the person.

(F) *Closely related offenses.*

(1) *Enslavement.* (See Definition 5.4)

(2) *Imprisonment.* (See Definition 5.6)

(3) *Taking of hostages.* (See Definition 5.10)

DEFINITION 3: VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR

3.1 GENERALLY.

The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Regulations define the permissible means and methods of warfare accepted as customary international law. The International Military Tribunal at Nuremberg recognized in 1946 that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited. Whereas the offenses defined above were violations of Geneva Convention and customary humanitarian law, the following crimes are more accurately characterized as breaches

of the laws and customs regulating the methods of waging war. The *Tribunal Statute* includes only the offenses listed at Definitions 3.2 through 3.6. Article 23 of Hague IV lists these and a number of acts "especially forbidden." These other acts are incorporated in Definitions 3.2 through 3.6, or are covered in Definition 3.7. The detailed discussion of collateral damage, military necessity, proportionality, and military objectives found in Definition 2.7 applies to all offenses found under Definition 3. Conviction of these offenses requires proof of the underlying elements.

3.2 EMPLOYMENT OF POISONOUS WEAPONS OR OTHER WEAPONS CALCULATED TO CAUSE UNNECESSARY SUFFERING.

(A) *Elements of the offense.*

- (1) That the accused intentionally used certain weapons during combat;
- (2) That such weapon is prohibited by international law, or is lawful but used in a manner calculated to cause unnecessary suffering; and,
- (3) That the accused knew the use of such weapons to be unlawful and prohibited under international law.

(B) *Comment.*

(1) *Combat.* The first element includes the word "combat" in order to distinguish law enforcement activity from armed conflict. Since it is not settled under international law the extent to which some weapons may be used in non-combat situations, this term limits this offense to those situations in which the international community agrees that employment of prohibited weapons constitutes an offense.

(2) *Unnecessary suffering.* This principle states that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited because the degree of pain or injury, or the certainty of death, they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use. For example, using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds. Use of such materials as incidental components in ammunition, for example, as wadding or packing, is not prohibited. A few weapons, such as poisoned projectiles, are unlawful, no matter how employed. Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Finally, any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and property, such as use of artillery to fire upon undefended towns.

(2) *Indiscriminate effect.* A corollary concept to the principle of unnecessary suffering is that weapons which by their nature are incapable

of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.* Imprisonment for twenty years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally use (name or description of weapon) during combat, a weapon known to the accused to be (prohibited by international law) (used in a manner calculated to cause unnecessary suffering), by (description of act or omission).

(F) *Closely related offenses.* None.

COMMENTARY

This offense is a violation of article 23 of the (Hague) Convention (IV) Respecting the Laws and Customs of War on Land, 1907. The following is a listing, by way of example only, of other international agreements which further define the means and methods of warfare which are illegal under international law.

(1) (St. Petersburg) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868.

(2) (Hague) Declaration (IV, .2) Concerning Asphyxiating Gases, 1899.

(3) (Hague) Declaration (IV, 3) Concerning Expanding Bullets, 1899 (Dum-Dum Declaration).

(4) (Geneva) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 1925.

(5) Convention on the Prohibition of Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1972.

3.3 WANTON DESTRUCTION OF CITIES, TOWNS OR VILLAGES, OR DEVASTATION NOT JUSTIFIED BY MILITARY NECESSITY.

(A) *Elements of the offense.*

(1) That the accused intentionally or recklessly destroyed or devastated cities, towns, or villages, or significant parts thereof; and,

(2) The destruction or devastation was unlawful in that it clearly exceeded that required by military necessity.

(B) *Comment.* This offense is similar to Definition 3.4 in that it relates to the destruction of cities, towns, and villages. The key distinction is that it is alleged here that the cities, towns, and villages were lawful military targets. The essence of the offense is that, although attacking such places is permissible, the level of damage that may be inflicted must be proportional to the objectives sought. Where such damage is clearly disproportionate, prosecution may be warranted. The word "clearly" is emphasized here because the distinction between lawful and unlawful levels of force is often blurred on the battlefield. Thus, to constitute an offense, the excessive force must have been intentionally or recklessly inflicted.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings.* (See Definition 3.4)

(3) *Seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.* (See Definition 3.5)

(4) *Plunder of public or private property.* (See Definition 3.6)

(D) *Maximum punishment.* Imprisonment for twenty years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and (intentionally) (recklessly) (destroyed) (devastated) (name or description of the city, town, or village, or significant part thereof), and, that under the circumstances, the (destruction) (devastation) clearly exceeded the requirements of military necessity.

(F) *Closely related offenses. Extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.* (See Definition 2.7)

3.4 ATTACK, OR BOMBARDMENT, BY WHATEVER MEANS, OF UNDEFENDED TOWNS, VILLAGES, DWELLINGS, OR BUILDINGS.

(A) *Elements of the offense.*

(1) That the accused intentionally attacked, by any means or method, an undefended town, village, dwelling, or building that was not otherwise a lawful military target; and,

(2) That the accused knew or should reasonably have known the place attacked was undefended and clearly not a lawful military target.

(B) *Comment.* The concept of “defended place” has been subordinated in recent years to the concept of “legitimate military target.” Defended places generally include:

(1) A fort or fortified place;
 (2) A city or town surrounded by detached defense positions, which is considered jointly with such defense positions as an indivisible whole; or,

(3) A place which is occupied by a combatant military force or through which such a force is passing. The occupation of such a place by medical units alone is not sufficient to make it a defended place.

The fact that a place attacked does not conform to any of these descriptions is not, however, sufficient basis upon which to rest prosecution for this offense. While a place may be “undefended” in a traditional sense, international law also recognizes that individual locations within undefended areas may be attacked. Such lawful targets include factories producing military munitions and supplies, ports and railroads used for transportation of military supplies, and other places devoted to support of military operations. The intent requirement makes clear that unintentional damage done to objects within close proximity to lawful targets is not prosecutable. The presence of United Nations forces, regardless of whether or not they are armed, does not make an otherwise undefended place a military objective.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.* (See Definition 3.5)

(3) *Plunder of public or private property.* (See Definition 3.6)

(D) *Maximum punishment.* Imprisonment for twenty years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally attacked (name or description of the town, village, dwelling, or building), a place that the accused knew or should reasonably have known was undefended and clearly not a lawful military target.

(F) *Closely related offenses.* None.

3.5 SEIZURE OF, DESTRUCTION OR WILLFUL DAMAGE DONE TO INSTITUTIONS DEDICATED TO RELIGION, CHARITY AND EDUCATION, THE ARTS AND SCIENCES, HISTORIC MONUMENTS AND WORKS OF ART AND SCIENCE.

(A) *Elements of the offense.*

(1) That the accused seized, destroyed, or willfully damaged certain cultural property protected by conventional or customary international law such as institutions dedicated to religion, charity and educa-

tion, the arts and sciences, historic monuments, and works of art and science; and,

(2) That the seizure, destruction, or damage was unlawful in that it clearly exceeded that required by military necessity.

(B) *Comment.* Cultural property as contemplated by this offense includes institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, and works of art and science. Conventional and customary international law has long provided for the protection of cultural property during occupation and armed conflict. Combatants have an obligation to safeguard cultural property. They are not permitted to use cultural property for military purposes or to attack cultural property; however, this protection is not absolute. That portion of cultural property used for military purposes, such as a location for an observation post or a platform for sniper fire, is a lawful military objective for so long as it is unlawfully used and military necessity requires that it be attacked.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Plunder of public or private property.* (See Definition 3.6)

(D) *Maximum punishment.* Imprisonment for twenty years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully (seized) (and willfully) (destroyed) (damaged) cultural property protected by international law, to wit: (name or description of the institution dedicated to religion, charity or education, the arts or sciences, historic monuments or works of art or science), and, that under the circumstances, the (seizure) (destruction) (damage) of such property clearly exceeded the requirements of military necessity.

(F) *Closely related offenses.* None.

COMMENTARY

Article 3 of the *Tribunal Statute* defines cultural property as institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, and works of art and science. To determine the protection accorded cultural property and to determine what is an unlawful attack, reference must be made to customary and conventional international law.

3.6 PLUNDER OF PUBLIC OR PRIVATE PROPERTY.

(A) *Elements of the offense.*

(1) That the accused wasted, spoiled, or stole certain public or private property protected by conventional or customary international law;

(2) That the property belonged to another person or to a State;

(3) That the wasting, spoiling, or stealing was done with the intent to permanently deprive the lawful owner of the property; and,

(4) That the acts were unlawful in that they were clearly not required by military necessity.

(B) *Comment.* This offense is a violation of article 33 of the Fourth Geneva Convention of 1949, as well as articles 28 and 47 of the (Hague) Convention (IV) Respecting the Laws and Customs of War on Land of 1907. It is reflective of an old principle of international law intended to alleviate the suffering resulting from the destruction and theft of real and personal property.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.* Imprisonment for ten years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully (wasted) (spoiled) (stole) property protected by international law, to wit: (name or description of the public or private property), with the intent to permanently deprive the lawful owner of protected property not belonging to the accused, and, that under the circumstances, the acts clearly exceeded the requirements of military necessity.

(F) *Closely related offenses.* None.

3.7 OTHER VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR.

(A) *Elements of the offense.*

(1) That the accused intentionally did or failed to do certain acts;

(2) That, under the circumstances, the accused's conduct was a violation of the laws or customs of war; and,

(3) That the accused knew or should reasonably have known that the act or omission alleged was unlawful in that it was clearly a violation of the laws or customs of war.

(B) *Comment.* Article 3 of the *Tribunal Statute* enumerates five examples of the violations of the laws or customs of war within the jurisdiction of the Tribunal, but specifically states that the list is not exhaustive. This Definition is intended to capture those offenses within the jurisdiction of the Tribunal that are not otherwise specifically mentioned elsewhere within this code. If any offense is specifically made punishable by another Definition, it should be charged as a violation of that Definition. The requirement of the third element that the accused knew or should reasonably have known that the act or omission alleged was un-

lawful in that it was *clearly* a violation of the laws or customs of war makes this Definition consistent with the principle of *nullen crimen sine lege*.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.* Imprisonment for ten years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally (description of the violation of the laws or customs of war), an act that the accused knew or should reasonably have known was clearly a violation of the laws or customs of war.

(F) *Closely related offenses.* None.

DEFINITION 4: GENOCIDE

4.1 GENERALLY.

The crime of genocide is committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The elements of this offense are derived from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

4.2 GENOCIDE.

(A) *Elements of the offense.*

(1) That the accused committed an act or omission against a certain named or described person;

(2) That such person was a member of a national, ethnical, racial, or religious group;

(3) That the accused committed such act or omission with the intent to take part in a plan to destroy such group in whole or in part; and,

(4) That the act or omission was unlawful and one of the following:

(a) Willful killing;

(b) Causing serious bodily or mental harm;

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

(d) Imposing measures intended to prevent births within the group; or,

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

(B) *Comment.* The origins of the Genocide Convention are rooted in the Nazi atrocities against groups of people during World War II. Since then, however, numerous other examples of genocide have occurred throughout the world, including, arguably, Iraq's systematic killing of Kuwaiti citizens in an attempt to eradicate their national identity. The key distinction between genocide and any other crime described in Defini-

tions 2.2 through 2.6 is that conviction of genocide requires proof of intent to destroy a group of the type described in the last element. Article 2 of the *Tribunal Statute* makes acts of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and complicity in genocide, punishable as an act of genocide. Definition 1 regarding the individual responsibility of principals contemplates criminal culpability for acts of genocide themselves or any conspiracy, incitement, attempt, or complicity in such crimes. Article 2 also includes an attempt to commit genocide. Since only one or more of the enumerated acts are required with the intent to destroy a group in whole or in part, and not the actual destruction of the group, it is unnecessary to specifically include an attempted genocide within the elements of the offense or as a separate offense.

(C) *Lesser included offenses.*

- (1) *Attempt.* (See Definition 1.2)
- (2) *Willful killing.* (See Definition 2.2)
- (3) *Torture.* (See Definition 2.3)
- (4) *Inhuman treatment, including biological experiments.* (See Definition 2.4)
- (5) *Willfully causing great suffering.* (See Definition 2.5)
- (6) *Causing serious injury to body or health.* (See Definition 2.6)
- (7) *Willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial.* (See Definition 2.9)
- (8) *Unlawful deportation or transfer, or unlawful confinement of a civilian.* (See Definition 2.10)
- (9) *Taking civilians as hostages.* (See Definition 2.11)
- (10) *Murder.* (See Definition 5.2)
- (11) *Extermination.* (See Definition 5.3)
- (12) *Enslavement.* (See Definition 5.4)
- (13) *Deportation.* (See Definition 5.5)
- (14) *Imprisonment.* (See Definition 5.6)
- (15) *Torture and mutilation.* (See Definition 5.7)
- (16) *Rape and other forms of sexual assault, including enforced prostitution.* (See Definition 5.8)

(D) *Maximum punishment.* Imprisonment for life.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully commit an act against a person who was a member of (name or description of the national, ethnical, racial, or religious group), with the intent to take part in a plan to destroy such group in whole or in part, to wit: [willfully kill (name or description of person)] [(cause serious bodily or mental harm to (name or

description of person)] [deliberately inflict on (name or description of person) conditions of life calculated to bring about the physical destruction of the group in whole or in part] [impose measures on (name or description of person) intended to prevent births within the group] [forcibly transfer a child of the group, (name or description of child), to another group], by means of (description of act or omission).

(F) *Closely related offenses.* None.

DEFINITION 5: CRIMES AGAINST HUMANITY

5.1 GENERALLY.

Crimes against humanity are serious offenses directed against persons as part of a widespread or systematic attack against any civilian population on national, political, ethnical, racial or religious grounds. Thus, isolated offenses have not been considered as crimes against humanity, and crimes against humanity require proof that the acts alleged resulted from some systematic action.

There is considerable overlap between these offenses and genocide, grave breaches of the Geneva Conventions, and violations of the laws or customs of war. The possible victims of crimes against humanity constitute a wider class than those who are capable of being made the objects of these other offense, and may include fellow-citizens of the person committing the offense as well as stateless persons. Although both are directed against a specific group, crimes against humanity can be distinguished from genocide in that they do not require an intent to destroy the group, only proof that the act was part of a widespread or systematic attack against a civilian population on national, political, ethnical, racial, or religious grounds. Conviction of these offenses requires proof of the underlying elements.

5.2 MURDER.

(A) *Elements of the offense.*

- (1) That a certain named or described person is dead;
- (2) That the death resulted from the act or omission of the accused;
- (3) That the killing was unlawful; and,
- (4) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person; and,
- (5) That the act or omission was part of a widespread or systematic attack against a civilian population on national, political, ethnical, racial, or religious grounds.

(B) *Comment.* This Definition differs from Definition 2.2, willful killing, in two important respects. First, this offense does not require that the victim was protected under one or more of the 1949 Geneva Conventions. Second, this offense does require the additional element that the act or omission was part of a widespread or systematic attack against a civil-

ian population on national, political, ethnical, racial, or religious grounds. For this reason, willful killing is a lesser included offense of this Definition.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Willful killing.* (See Definition 2.2)

(3) *Inhuman treatment, including biological experiments.* (See Definition 2.4)

(4) *Willfully causing great suffering.* (See Definition 2.5)

(5) *Causing serious injury to body or health.* (See Definition 2.6)

(6) *Rape and other forms of sexual assault, including enforced prostitution.* (See Definition 5.8)

(D) *Maximum punishment.* Imprisonment for life.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), with the intent to kill or inflict great bodily harm upon some person, unlawfully kill (name or description of person), by means of (description of act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnical) (racial) (religious) grounds.

(F) *Closely related offenses.*

(1) *Torture.* (See Definition 2.3)

(2) *Extermination.* (See Definition 5.3)

(3) *Torture and mutilation.* (See Definition 5.7)

5.3 EXTERMINATION.

(A) *Elements of the offense.*

(1) That the accused committed an act or omission against a certain named or described person;

(2) That such person was a member of a national, ethnical, racial, or religious group;

(3) That the accused committed such act or omission with the intent to take part in a widespread or systematic attack against a civilian population on national, political, ethnical, racial, or religious grounds; and,

(4) That the act or omission was unlawful and one of the following:

(a) Willful killing;

(b) Causing serious bodily or mental harm;

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

(d) Imposing measures intended to prevent births within the group; or,

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

(B) *Comment.* This offense is identical to the offense of genocide specifically defined as “killing members of the group,” except that this offense requires proof that the offense was part of a widespread or systematic attack against a civilian population on national, political, ethnical, racial, or religious grounds, not intent to destroy the group. The genesis of the Genocide Convention were the crimes against humanity. Specifically, the extermination of racial and religious minorities by the Nazis during World War II. Thus, “extermination” is essentially the same as genocide, with the intent to destroy a particular group.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Willful killing.* (See Definition 2.2)

(3) *Murder.* (See Definition 5.2)

(4) *Enslavement.* (See Definition 5.4)

(5) *Deportation.* (See Definition 5.5)

(6) *Imprisonment.* (See Definition 5.6)

(7) *Torture and mutilation.* (See Definition 5.7)

(8) *Rape and other forms of sexual assault, including enforced prostitution.* (See Definition 5.8)

(9) *Persecutions on political, racial, and religious grounds.* (See Definition 5.9)

(10) *Other inhumane acts.* (See Definition 5.10)

(D) *Maximum punishment.* Imprisonment for life.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully commit an act against a person who was a member of (name or description of the national, ethnical, racial, or religious group), with the intent to take part in a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnical) (racial) (religious) grounds, to wit: [willfully kill (name or description of person)] [(cause serious bodily or mental harm to (name or description of person)] [deliberately inflict on (name or description of person) conditions of life calculated to bring about the physical destruction of the group in whole or in part] [impose measures on (name or description of person) intended to prevent births within the group] [forcibly transfer a child of the group, (name or description of child), to another group], by means of (description of act or omission).

(F) *Closely related offenses. Genocide.* (See Definition 4.2)

5.4 ENSLAVEMENT.

(A) *Elements of the offense.*

(1) That the accused held a person against that person’s will;

(2) That the accused did so willfully and unlawfully;

(3) That the accused coerced the person to perform labor inconsistent with that allowed under international law; and,

(4) That the offense was part of a widespread or systematic attack against any civilian population on national, political, ethnical, racial or religious grounds.

(B) *Comment.* This offense essentially requires a showing that the accused willfully held another person for the purpose of performing labor. Key considerations here are, first, that the restraint imposed must have been wrongful or unlawful. This eliminates from prosecution cases in which persons are captured during battle and confined prior to or after a determination of their prisoner of war status. Second, that the labor performed must be inconsistent with international law recognizes those situations, like POW labor, that are provided for in such conventions as the Geneva Conventions.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Unlawful deportation or transfer, or unlawful confinement of a civilian.* (See Definition 2.10)

(3) *Taking civilians as hostages.* (See Definition 2.11)

(4) *Imprisonment.* (See Definition 5.6)

(D) *Maximum punishment.* Imprisonment for ten years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and willfully held (name or description of person) against (his) (her) will, and coerced (him) (her) to perform labor which exceeded that allowed by international law, as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnical) (racial) (religious) grounds, to wit: (name or description of act or omission).

(F) *Closely related offenses.* None.

5.5 DEPORTATION.

(A) *Elements of the offense.*

(1) That the accused unlawfully expelled a person from the territory of the State in which that person resides;

(2) That the accused knew the inhabitant's status as lawful resident of the territory;

(3) That the deportation was not conducted as an evacuation for safety or any other lawful reason; and,

(4) That the expulsion was part of a widespread or systematic attack against any civilian population on national, political, ethnical, racial, or religious grounds.

(B) *Comment.* This offense requires an expulsion of persons from territory occupied by the accused. A key point is that the expulsion must be unlawful; it must be part of an attack against the civilian population or defined subgroup. Movement of civilians for safety or other legitimate purposes during war is permitted. This offense should not be construed so broadly as to impair an armed force's ability to protect the indigenous population.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Unlawful deportation or transfer of a civilian.* (See Definition 2.10)

(D) *Maximum punishment.* Imprisonment for ten years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully deport (name or description of person), from the territory known by the accused to be the person's lawful residence, by means of (description of act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(F) *Closely related offenses.* None.

5.6 IMPRISONMENT.

(A) *Elements of the offense.*

(1) That the accused unlawfully held, confined, or otherwise restrained the liberty of a person;

(2) That such restraint was effected without affording the procedural and substantive protections prescribed in the Fourth Geneva Convention (1949); and,

(3) That such restraint was part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(B) *Comment.* This nature of this offense is the restraint, without due process or the intent to provide due process, of a person as part of a campaign to attack a civilian population or any subgroup. This offense does not reach situations in which civilians are imprisoned or otherwise restrained as a result of offenses they have committed or prior to a prisoner of war determination. An example of such an offense is the placement of civilian groups in concentration camps as was done by the Nazis to racial and religious minorities during World War II. The word "unlawfully" is used in the first element in recognition of the fact that during armed conflicts, occupying powers may intern civilians "for imperative reasons of security" or safety. Article 78, 1949 Geneva Convention (IV). Such restrictions on liberty are, of course, lawful.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Unlawful confinement of a civilian.* (See Definition 2.10)

(D) *Maximum punishment.* Imprisonment for five years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully confine (name or description of person), by means of (description of act or omission), without the procedural and substantive protections prescribed by the Fourth Geneva Convention (1949), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(F) *Closely related offenses. Willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial.* (See Definition 2.9)

5.7 TORTURE AND MUTILATION.

(A) *Elements of the offense.*

(1) *Torture.*

(a) That the accused committed an act resulting in the infliction of severe physical or mental pain or suffering upon a certain named or described person;

(b) That the accused, at the time of such act, had the specific intent to inflict severe physical or mental pain or suffering;

(c) That the torture was inflicted for such purposes as obtaining from the immediate victim or a third person information or a confession, punishing him or her for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or her, or for any reason based on discrimination of any kind;

(d) That the torture is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity;

(e) That the pain or suffering did not arise only from or was inherent in or incidental to lawful sanctions; and,

(f) That the act or omission was part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds.

(2) *Mutilation.*

(a) That the accused committed a certain act or omission upon a certain named or described person;

(b) That the accused thereby unlawfully caused serious injury upon the person;

(c) That the accused, at the time, intended to cause serious injury upon the person;

(d) That this injury seriously disfigured the person's body; and,

(e) That the act or omission was part of a widespread or systematic attack against a civilian population on national, political, ethnical, racial, or religious grounds.

(B) *Comment.*

(1) *Generally.* These elements of torture derive from the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, UNGA Res. 39/46 (1987). The impetus of this offense is the infliction of pain or injury for certain listed purposes. Serious injury to body or health is not an element of torture. If serious injury results from the torture, a separate offense should be charged. The force used in inflicting the pain or suffering upon the victim may have been directly or indirectly applied. Great suffering not only includes injury to body or physical health, but also severe pain and mental anguish.

(2) *Mutilation.* Mutilation includes any serious injury that disfigures the body. Unlike the offense of willfully causing great suffering or torture, this offense requires that physical injury actually have been inflicted. The offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of that part of his or her body injured. Mutilation is an aggravated form of serious injury characterized by disfigurement of the body. Intent sufficient to constitute this offense may be to injure and not necessarily to inflict serious injury or mutilate. When serious injury has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that serious injury and mutilation was intended.

(C) *Lesser included offenses.*

(1) *Torture.*

(a) *Attempt.* (See Definition 1.2)

(b) *Torture.* (See Definition 2.3)

(c) *Inhuman treatment, including biological experiments.*
(See Definition 2.4)

(d) *Willfully causing great suffering.* (See Definition 2.5)

(e) *Causing serious injury to body or health.* (See Definition 2.6)

(2) *Mutilation.*

(a) *Attempt.* (See Definition 1.2)

(b) *Causing serious injury to body or health.* (See Definition 2.6)

(D) *Maximum punishment.*

(1) *Torture.* Imprisonment for forty years.

(2) *Mutilation.* Imprisonment for forty years.

(E) *Sample charge.*

(1) *Torture.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally torture (name or description of person), for such purposes of [obtaining from such person or a third person information or a confession] [punishing such person for an act he or a third person committed or is suspected of having committed] [intimidating or coercing such person] [description of any other reason based on discrimination of any kind], by means of (description of act or omission), and (at the instigation) (with the consent or acquiescence) of (description of public official or other person acting in an official capacity), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(2) *Mutilation.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally mutilate (name or description of person), by means of (description of act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(F) *Closely related offenses.* None.

5.8 RAPE AND OTHER FORMS OF SEXUAL ASSAULT, INCLUDING ENFORCED PROSTITUTION.

(A) *Elements of the offenses.*

(1) *Rape.*

(a) That the accused committed an act of sexual intercourse or forcible sodomy with a person;

(b) That the act of sexual intercourse or forcible sodomy was done unlawfully by force and without consent; and,

(c) That the act was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(2) *Sexual assault.*

(a) That the accused, with unlawful force or violence, inflicted bodily harm of a sexual nature on a person; and,

(b) That the act was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(3) *Enforced prostitution.*

(a) That the accused unlawfully coerced a person to engage in sexual acts with another; and,

(b) That the act of coercion was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(B) *Comment.* This offense differs from the classic offense of rape in that it requires the additional element that it be part of a campaign to attack the civilian population or a subgroup. Modification of this offense to include "other forms of sexual assault, including enforced prostitution" is based on language found throughout various UN Security Council Resolutions denouncing the practice of "ethnic cleansing" and in the Report of the Secretary General proposing the *Tribunal Statute*. Such universal condemnation of "ethnic cleansing" is sufficient to place potential offenders on notice that the acts thus defined are unlawful as a matter of international law. The offense of rape is sexual intercourse with a person by force and without his or her consent. This includes forcible sodomy. For either offense, any penetration of the mouth, anus, or sexual organ of a person with the accused's sexual organ is sufficient to complete the offense. Forced intercourse or sodomy with a third person or animal is also contemplated by this offense. For both offenses, force and lack of consent are required. The lack of consent required is more than mere lack of acquiescence. If a person in possession of his or her mental and physical faculties fails to make his or her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that he or she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a person gave his or her consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or serious injury. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the person is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape.

(C) *Lesser included offenses.*

(1) *Attempt.* (See Definition 1.2)

(2) *Willfully causing great suffering.* (See Definition 2.5)

(D) *Maximum punishment.*

(1) *Rape.* Imprisonment for life.

(2) *Sexual assault.* Imprisonment for life.

(3) *Enforced prostitution.* Imprisonment for life.

(E) *Sample charge.*

(1) *Rape.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), (rape) (unlawfully commit an act of sodomy upon) (name or description of person), by means of (description of

act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(2) *Sexual assault.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), inflict bodily harm of a sexual nature upon (name or description of person), by means of (description of act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(3) *Enforced prostitution.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully coerce (name or description of person) to engage in sexual acts with others, by means of (description of act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(F) *Closely related offenses.* None.

5.9 PERSECUTIONS ON POLITICAL, RACIAL, AND RELIGIOUS GROUNDS.

(A) *Elements of the offense.*

(1) That the accused committed an act or omission against a certain named or described person;

(2) That the act or omission was intended to harass, cause suffering, or otherwise limit the human rights or fundamental freedoms of such person;

(3) That the act was unlawful in that it was not authorized by one or more of the 1949 Geneva Conventions; and,

(4) That the act or omission was part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(B) *Comment.* The second element of this offense is based on the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948. The intent of this Definition is to proscribe those acts of persecution that are not legitimate methods of controlling a civilian population authorized under the 1949 Geneva Conventions. Although the prohibited acts described may appear to include those of a fairly minor nature, the fourth element ensures that only serious acts of persecutions are included in this Definition. This Definition includes, for example, the act of being a prison guard of a concentration camp that is not authorized by one or more of the 1949 Geneva Conventions, but was part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.* Imprisonment for ten years.

(E) *Sample charge.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally persecute (name or description of person), by means of (description of act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(F) *Closely related offenses. Outrages upon personal dignity, in particular humiliating and degrading treatment.* (See Definition 5.10)

5.10 OTHER INHUMANE ACTS.

(A) *Elements of the offense.*

(1) *Taking of hostages.*

(a) That the accused seized or detained a certain named or described person, or committed some other act or omission which resulted in a certain named or described person being held hostage;

(b) That the act or omission was unlawful in that it exceeded that allowed by the 1949 Geneva Conventions; and,

(c) That the act or omission was part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(2) *Outrages upon personal dignity, in particular humiliating and degrading treatment.*

(a) That the accused committed a certain act or omission against a certain named or described person;

(b) That the act or omission was an outrage upon the personal dignity of, or was particularly humiliating and degrading treatment toward, such person;

(c) That the act or omission was unlawful in that it exceeded that allowed by the 1949 Geneva Conventions; and,

(d) That the act or omission was part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

(3) *The passing of sentence 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.*

(a) That the accused executed, confined, or otherwise punished a certain named or described person within his control or authority;

(b) That such act or omission was unlawful in that it exceeded that allowed by the 1949 Geneva Conventions;

(c) That the act or omission was performed without first according the person a fair and regular trial as defined by the Third or Fourth Geneva Conventions of 1949;

(d) That the accused intended to deprive the person of such fair and regular trial; and,

(e) That the act or omission was part of a widespread or systematic attack against any civilian population on national, political, ethnical, racial, or religious grounds.

(B) *Comment.* Article 5(i) of the *Tribunal Statute* makes criminal those “other inhumane acts” that rise to the level of being crimes against humanity. It is clear from the text of the *Tribunal Statute* that this provision should capture those crimes against humanity which are not otherwise identified in article 5 of the *Tribunal Statute*. This Definition is intended to capture those offenses not enumerated within the jurisdiction of the Tribunal. If any offense is specifically made punishable by another Definition, it should be charged as a violation of that Definition. The language of article 5 of the *Tribunal Statute* is derived from Control Council Law No. 10, article II(1)(c). Having thus been defined, there is no question but that these offenses are part of customary international law and, therefore, consistent with the principle of *nullem crimen sine lege*. As an illustration of those offenses included in this definition, paragraphs (A)(1) through (A)(3) are listed. These three examples are derived from common article 3 of the 1949 Geneva Conventions, but should not be considered as an exhaustive list of offenses which can be charged under this Definition.

(C) *Lesser included offenses. Attempt.* (See Definition 1.2)

(D) *Maximum punishment.*

(1) *Taking of hostages.* Imprisonment for five years.

(2) *Outrages upon personal dignity, in particular humiliating and degrading treatment.* Imprisonment for five years.

(3) *The passing of sentence 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.* Imprisonment for five years.

(E) *Sample charge.*

(1) *Taking of hostages.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and willfully held (name or description of person) against (his) (her) will, as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnical) (racial) (religious) grounds.

(2) *Outrages upon personal dignity, in particular humiliating and degrading treatment.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and willfully (commit an outrage upon the personal dignity of) (humiliate and degrade) (name or description of person), by means of (description of act or omission), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(3) *The passing of sentence 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.*

In that (name of accused) did, at (location of act or omission), on or about (date of act or omission), unlawfully and intentionally (pass sentence) (carry out the execution) of (name or description of person), by means of (description of act or omission), without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees of a fair and regular trial prescribed by the Third or Fourth Geneva Conventions (1949), as a part of a (widespread) (systematic) attack against (description of the civilian population) on (national) (political) (ethnic) (racial) (religious) grounds.

(F) *Closely related offenses.*

(1) *Taking of hostages. Taking civilians as hostages.* (See Definition 2.11)

(2) *Outrages upon personal dignity, in particular humiliating and degrading treatment. Persecutions on political, racial, and religious grounds.* (See Definition 5.9)

(3) *The passing of sentence 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.*

(a) *Willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial.* (See Definition 2.9)

(b) *Unlawful confinement of a civilian.* (See Definition 2.10)

DEFINITION 6: AFFIRMATIVE DEFENSES

6.1 GENERALLY.

Any defense may be raised by evidence presented by the defense, the prosecution, or the Tribunal. Placing upon the prosecution the burden of proving that the defense did not exist is in keeping with its burden of proving that the accused committed the crime charged.

6.2 BURDEN OF PROOF.

Once a defense under these rules is placed in issue by some evidence, the prosecution shall have the burden of proving beyond reasonable doubt that the defense did not exist.

6.3 PERSONS IN POSITIONS OF SUPERIOR AUTHORITY.

It is a defense to any offense that the accused, who is a person in a position of superior authority charged as a principal pursuant to Definition 1.1(B)(2), did not know or that a person of ordinary sense and understanding should not have known that his or her subordinates were about to commit or had committed crimes, or that the accused did take the necessary and reasonable steps to prevent or halt the commission of such crimes or to punish the offenders.

6.4 PERSONS ACTING PURSUANT TO SUPERIOR ORDERS.

It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

COMMENTARY

Although article 7 of the *Tribunal Statute* broadly states “the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment . . . ,” it is a long-standing practice, dating from the Nuremberg “subsequent proceedings,” that under some circumstances there is a legitimate defense of obedience to superior orders. This Definition recognizes the defense of superior orders in accordance with international law. In order to be effective, however, the accused must neither have subjective or objective knowledge of the superior order’s unlawfulness.

6.5 DURESS OR COERCION.

It is a defense to any offense except any crime involving killing that the accused’s participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The Tribunal may consider, as a matter of mitigation in offenses involving killing, the extent to which the accused was compelled by duress to commit the crime.

COMMENTARY

This rule is an expression of the principle, common in many legal systems, that duress should also be considered in mitigation of punishment. This principle is applied, in one context, to narrow the effect of an imperfect obedience to superior orders defense. Even if the accused knew

or should have known that the orders he or she was given were unlawful, it remains a matter for the Tribunal to consider in mitigation that the accused committed offenses while under duress.

6.6 IGNORANCE OR MISTAKE OF FACT.

It is a defense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. The ignorance or mistake must have been reasonable under all the circumstances.

COMMENTARY

This defense is particularly important in armed conflict where the “fog of war” sometimes clouds the true nature of a situation. For example, a reasonable mistake of fact that an object is a legitimate military target should not lead to prosecution or, if it does, should allow a defense.

Proposed
DEFINITION OF OFFENSES

FOR THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS
RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN
LAW COMMITTED IN THE FORMER YUGOSLAVIA

TABLE OF MAXIMUM PUNISHMENTS

(All punishments, except for “life,” reflect the number of years of imprisonment.)

Definition 1: Principals, attempts, and conspiracies

1.2 Attempts 20

(Any person found guilty of an attempt under this Definition shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall imprisonment exceeding twenty years be adjudged.)

1.3 Conspiracies..... 20

(Any person found guilty of conspiracy under this Definition shall be subject to the same maximum punishment authorized for the commission of the offense which is the object of the conspiracy, except that in no case shall imprisonment exceeding twenty years be adjudged.)

DEFINITION 2: GRAVE BREACHES OF THE 1949 GENEVA CONVENTIONS

2.2 Willful killing life

2.3 Torture 40

2.4 Inhuman treatment, including biological experiments

(1) Biological experimentation life	
(2) Other inhuman treatment.....	20
2.5 Willfully causing great suffering	
(1) Rape or forcible sodomy life	
(2) Other acts causing great suffering.....	40
2.6 Causing serious injury to body or health	
(1) Maiming	40
(2) Willfully causing serious injury.....	10
2.7 Extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly	
(1) Extensive destruction	40
(2) Extensive appropriation.....	20
2.8 Compelling a prisoner of war or a civilian to serve in the forces of a hostile power	10
2.9 Willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial	5
2.10 Unlawful deportation or transfer, or unlawful confinement of a civilian	
(1) Unlawful deportation or transfer.....	10
(2) Unlawful confinement	5
2.11 Taking civilians as hostages.....	5
DEFINITION 3: VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR	
3.2 Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering	20
3.3 Wanton destruction of cities, towns or villages, or devastation not justified by military necessity	20
3.4 Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings	20
3.5 Seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science	20
3.6 Plunder of public or private property	10
3.7 Other violations of the laws or customs of war.....	10
DEFINITION 4: GENOCIDE	
4.2 Genocide	life
DEFINITION 5: CRIMES AGAINST HUMANITY	
5.2 Murder	life
5.3 Extermination	life
5.4 Enslavement.....	10
5.5 Deportation.....	10
5.6 Imprisonment	5
5.7 Torture and mutilation	

(1) Torture.....	40
(2) Mutilation.....	40
5.8 Rape and other forms of sexual assault, including enforced prostitution	
(1) Rape life	
(2) Sexual assault and enforced prostitution life	
5.9 Persecutions on political, racial, and religious grounds	
10	
5.10 Other inhumane acts.....	5