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# Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes

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**SEXUAL VIOLENCE AND INTERNATIONAL CRIMINAL LAW:  
AN ANALYSIS OF THE AD HOC TRIBUNAL'S JURISPRUDENCE  
& THE INTERNATIONAL CRIMINAL COURT'S ELEMENTS OF CRIMES**

**SEPTEMBER 2005**

Women's Initiatives for Gender Justice



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## I. INTRODUCTION

As the International Criminal Court (“ICC”) begins its work investigating wartime atrocities and prosecuting those who are criminally responsible, it will encounter countless acts of sexual violence. This report is a resource to assist in the effective analysis, prosecution, and adjudication of crimes involving sexual violence.

The ad hoc tribunals, the International Criminal Court for the former Yugoslavia (“ICTY”) and the International Criminal Court for Rwanda (“ICTR”), have convicted individuals of crimes against humanity and war crimes for various acts of sexual violence including rape, sexual mutilation, and sexual slavery. Perpetrators of acts like these have been convicted of enslavement, torture, rape, persecution, and other inhumane acts as crimes against humanity; torture, cruel treatment, and outrages upon personal dignity, including rape, as violations of the laws and customs of war; and the grave breaches of inhuman treatment and wilfully causing great suffering or serious injury to body or health. In addition to holding individuals criminally liable for sexual crimes, evidence regarding sexual violence has been relevant in establishing an important element for genocide charges—serious bodily or mental harm. Evidence of sexual violence has also been used to demonstrate a consistent pattern of conduct.<sup>1</sup>

This report provides lawyers, judges, academics, and activists with an overview of the jurisprudence that has developed at the ad hoc tribunals regarding sexual crimes. Each section begins with the elements of the relevant crimes as outlined in the ICC Elements of Crimes and then discusses the ad hoc tribunals’ jurisprudence.

## II. SUBJECT MATTER JURISDICTION: THE AD HOC TRIBUNALS AND THE ICC

The ad hoc tribunals and the ICC have similar subject matter jurisdictional mandates. All three institutions have jurisdiction over genocide, crimes against humanity, violations of the laws and customs of war, and grave breaches of the Geneva Conventions. The Rome Statute<sup>2</sup> however specifies a greater number of sexual violence crimes than either the ICTY Statute or the ICTR Statute.

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<sup>1</sup> See ICTY Rule 93, ICTR Rule 93.

<sup>2</sup> The Rome Statute is the document establishing the ICC and granting the ICC its jurisdictional mandate.



## **A. Crimes Against Humanity**

All three institutions have jurisdiction over enslavement, torture, rape, persecution, and other inhumane acts. The Rome Statute, however, enumerates sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity as within its jurisdiction as crimes against humanity. The ad hoc tribunals have not ignored these specific forms of sexual violence, but they were not specifically enumerated within their jurisdictional mandates. The ICTY and the ICTR have held that they have jurisdiction over these forms of sexual violence as crimes against humanity based on their jurisdiction over “other inhumane acts.” The ad hoc tribunals’ statutes grant jurisdiction over persecution on political, racial and religious grounds. The Rome Statute’s grant of jurisdiction over persecution is broader. It includes persecution

against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.<sup>3</sup>

## **B. War Crimes**

The ICTY, ICTR, and ICC have jurisdiction over torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and outrages upon personal dignity. The category of outrages upon personal dignity at the ICTR specifically mentions humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.<sup>4</sup> The Rome Statute creates separate sub-categories for rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence also constituting a grave breach of the Geneva Conventions (for international armed conflicts), or any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions (for non-international armed conflicts).<sup>5</sup>

Part III provides a detailed overview of the elements of the crimes relevant for acts of sexual violence within the ICC’s jurisdiction and the supporting jurisprudence from the ad hoc tribunals.

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<sup>3</sup> Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II at art. 7(1)(h), U.N. Doc. A/CONF. 183/9 (1998) [hereinafter Rome Statute].

<sup>4</sup> S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/RES/955 & Annex at art. 4(e) (1994) [hereinafter ICTR Statute].

<sup>5</sup> Rome Statute at art. 8(2)(b)(xxii), 8(2)(e)(vi).

### III. AD HOC TRIBUNAL SEXUAL VIOLENCE JURISPRUDENCE

#### A. Genocide

Article 6 of the Rome Statute grants the ICC jurisdiction over genocide. Genocide is defined as:

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.

Acts of sexual violence, like rape, constitute the *actus reus* for genocide because they cause “serious bodily or mental harm to members of the group.” If such acts are committed with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” then they qualify as genocide. This connection between sexual violence, specifically rape, and genocide was first made in 1998 by the ICTR in the *Akayesu* Trial Chamber Judgment.<sup>6</sup>

The ICC Elements of Crimes lists the elements for each of the five categories of genocidal acts that can constitute genocide. As acts of sexual violence typically fall within Articles 6(b) (causing serious bodily or mental harm to members of the group) and 6(d) (imposing measures intended to prevent births within the group), this section will address those genocidal acts.

Article 6(b) of the ICC Elements of Crimes states that the elements for genocide by causing serious bodily or mental harm are that:

1. The perpetrator caused serious bodily or mental harm to one or more persons.\*
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar

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<sup>6</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment at para. 731 (Sept. 2, 1998) [hereinafter *Akayesu* Trial Judgment].

\* This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.

conduct directed against that group or was conduct that could itself effect such destruction.

Pursuant to Article 6(d) of the ICC Elements of Crimes, genocide by imposing measures intended to prevent births requires showing that:

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 4 of the ICTY Statute and Article 2 of the ICTR Statute grant the respective tribunals jurisdiction over genocide. In *Akayesu* the Trial Chamber stated that rape and sexual violence are some “of the worst ways [to] inflict harm on the victim as he or she suffers both bodily and mental harm.”<sup>7</sup> In Rwanda sexual violence was an integral part of the process of destroying the Tutsi population. Tutsi women were specifically targeted and raped and other acts of sexual violence contributed to their destruction and the destruction of the Tutsi group.<sup>8</sup>

The idea that rape and other acts of sexual violence satisfy the serious bodily and mental harm element of genocide has been confirmed by the Trial Chambers in *Kayishema*, *Musema*, *Krstić*, *Kamuhanda*, *Stakic*, *Kajelijeli*, and *Gacumbitsi*.<sup>9</sup>

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<sup>7</sup> *Akayesu* Trial Judgment, *supra* note 6, at para. 731.

<sup>8</sup> *Id.* at para. 731, 732 (“Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi [*sic*] group - destruction of the spirit, of the will to live, and of life itself.”).

<sup>9</sup> Prosecutor v. *Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment & Sentence at para. 108 (May 21, 1999) [hereinafter *Kayishema* Trial Judgment]; Prosecutor v. *Musema*, Case No. ICTR-96-13, Judgment & Sentence at para. 156 (Jan. 27, 2000) [hereinafter *Musema* Trial Judgment] (“the Chamber understands the words ‘serious bodily or mental harm’ to include, but not limited to, acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution. The Chamber is of the opinion that ‘serious harm’ need not entail permanent or irremediable harm.”); Prosecutor v. *Krstić*, Case No. IT-98-33, Judgment at paras. 509, 513 (Aug. 2, 2001) [hereinafter *Krstić* Trial Judgment] (In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.”); Prosecutor v. *Kamuhanda*, Case No. ICTR-97-23-S, Judgment & Sentence at para. 634 (Sept. 4, 1998) [hereinafter *Kamuhanda* Trial Judgment]; Prosecutor v. *Stakic*, Case No.

Measures intended to prevent births within the group has been held to include both physical and mental measures.<sup>10</sup> Physical measures include sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and the prohibition of marriages.<sup>11</sup>

In *Kayishema*, the Trial Chamber concluded that there is a connection between rape and another *actus reus* for genocide—deliberately inflicting on the targeted group conditions of life calculated to bring about its physical destruction in whole or in part. The Trial Chamber held that this concept includes “circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion.”<sup>12</sup> Concluding that deliberately inflicting, on a group, conditions of life calculated to bring about its physical destruction in whole or in part includes acts that do not immediately lead to the death of members of the group, the Trial Chamber held that such conditions include rape.<sup>13</sup> Despite these pronouncements the accused in *Kayishema* were convicted of genocide based on killing and causing serious bodily and mental harm.<sup>14</sup> The serious bodily and mental harm element was supported with evidence of mutilations and rapes.<sup>15</sup>

Rape and other acts of sexual violence have also been used to establish an accused’s intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. In *Niyitegeka* the Trial Chamber held that “ordering Interahamwe to undress a Tutsi woman, and to insert a sharpened piece of wood into her genitalia, after ascertaining that she was of the Tutsi ethnic group” and leaving the body “with the piece of wood protruding from it, in plain view on a public road for some three days thereafter” helped establish the Accused’s intent to destroy the Tutsi ethnic group.<sup>16</sup> In *Muhimana* the Trial Chamber found that Muhimana

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IT-97-24, Judgment at 516 (July 31, 2003) [hereinafter *Stakic* Trial Judgment]; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment & Sentence at para. 815 (Dec. 1, 2003) [hereinafter *Kajelijeli* Trial Judgment] (noting the Trial Chambers of the ICTR have held that serious bodily harm includes the nonmortal acts of sexual violence, rape, and mutilation); Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment at para. 291 (June 17, 2004) [hereinafter *Gacumbitsi* Trial Judgment] (“Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence. Serious bodily harm does not necessarily mean that the harm is irremediable.”).

<sup>10</sup> *Musema* Trial Judgment, *supra* note 9, at para. 158.

<sup>11</sup> *Id.*

<sup>12</sup> *Kayishema* Trial Judgment, *supra* note 9, at para. 115.

<sup>13</sup> *Id.* at para. 116.

<sup>14</sup> *Id.* at para. 547.

<sup>15</sup> *Id.*

<sup>16</sup> Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment & Sentence at para. 416 (May 16, 2003) [hereinafter *Niyitegeka* Trial Judgment].

targeted Tutsi civilians during attacks by shooting and raping them.<sup>17</sup> He was found to have apologized to a young girl he raped after he realized that she was Hutu and not Tutsi and to have specifically referred to the Tutsi identity of his victims.<sup>18</sup> Based on this evidence the Trial Chamber concluded that Muhimana intended to destroy, in whole or in part, the Tutsi group.<sup>19</sup>

## **B. Crimes Against Humanity**

The ICC has jurisdiction over crimes against humanity pursuant to article 7 of the Rome Statute. The ad hoc tribunals' jurisdiction over crimes against humanity is based on articles 5 and 3 of the ICTY and ICTR Statutes respectively. The ad hoc tribunals' statutes enumerate nine crimes that constitute crimes against humanity when they are committed as part of a widespread or systematic attack against any civilian population.<sup>20</sup> The ICTY Statute states that the nine enumerated crimes are crimes against humanity when they are committed in an armed conflict, international or non-international, and are directed against any civilian population.<sup>21</sup> The ICTR's jurisdiction over crimes against humanity is narrower than that of the ICTY's. The ICTY Statute follows the customary international law approach, while the ICTR requires the acts to have taken place as part of a discriminatory attack—an attack on national, political, ethnical, racial or religious grounds.<sup>22</sup>

The *Tadic* Trial Chamber concluded that crimes against humanity include a discriminatory intent *mens rea* requirement, which was reversed on appeal. The *Tadic* Appeals Chamber held that the

Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.<sup>23</sup>

The ICC follows the customary international law definition like the ICTY after the *Tadic* Appeals Judgment. A crime against humanity for purposes of ICC jurisdiction exists when

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<sup>17</sup> Prosecutor v. Muhimana, Case No. ICTR-95-1-I, Judgment & Sentence at para. 517 (Apr. 28, 2005) [hereinafter *Muhimana* Trial Judgment].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at para. 518.

<sup>20</sup> ICTR Statute at art. 3; S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 28, U.N. Doc S/RES/827 at art. 5 (1993) [hereinafter ICTY Statute].

<sup>21</sup> ICTY Statute at art. 5.

<sup>22</sup> ICTR Statute at art. 3.

<sup>23</sup> Prosecutor v. Tadic, Case No. IT-95-1-A, Judgment at para. 305 (July 15, 1999) [hereinafter *Tadic* Appeals Judgment].

an act in one of eleven enumerated categories is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>24</sup>

Thus the common elements for all of the crimes against humanity discussed below are that:

1. There must be an attack.
2. The acts of the perpetrator must be part of the attack.
3. The attack must be “directed against any civilian population.”
4. The attack must be widespread and systematic, and
5. The perpetrator must know of the wider context in which he or she is acting and that his or her acts are part of the attack.

### *1. Enslavement*

Enslavement is a crime against humanity under Article 7(1)(C) of the Rome Statute. The ICC Elements of Crimes defines the elements of enslavement as follows:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.\*
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

At the ad hoc tribunals enslavement is a crime against humanity under Article 5(c) of the ICTY Statute and Article 3(c) of the ICTR Statute. There has been one significant case to address enslavement and that is the *Foca* case before the ICTY.<sup>25</sup> The ICTY Appeals Chamber stated that enslavement is a crime against humanity in customary international law. An enslaved person is one “over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>26</sup> The *actus rea* for enslavement is the exercise of any or all of the

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<sup>24</sup> Rome Statute at art. 7.

\* It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

<sup>25</sup> Prosecutor v. Kunarac, Kovac, Vukovic, Case No. IT-96-23&23/1, Judgment (Feb. 22, 2001) [hereinafter *Foca* Trial Judgment].

<sup>26</sup> The Appeals Chamber preferred this language, which was used in the 1926 Slavery Convention, to that used by the Trial Chamber. The Trial Chamber stated that enslavement consists of “the exercise of any or all of the

powers attaching to the right of ownership. Whether specific conditions constitute enslavement depends on the operation of various indicia of slavery.<sup>27</sup> The indicia of slavery identified by the Appeals Chamber include:

control over someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor.<sup>28</sup>

The mere ability to buy, sell, trade, or inherit a person or his or her labor is insufficient to establish enslavement, but the actual occurrence of such actions would be relevant.<sup>29</sup>

On December 4, 2001, the Women’s International War Crimes Tribunal for the Trial of Japan’s Military Sexual Slavery (“Tokyo Tribunal”) issued its judgment, which found Emperor Hirohito and other high-ranking officials guilty of rape and sexual slavery as crimes against humanity based on individual and command responsibility.<sup>30</sup> While this judgment was issued by a people’s tribunal and is not legally binding, its analysis of sexual slavery is thorough and progressive. Such analysis can serve as a guide for future sexual slavery cases. As noted above the ICC Elements of Crimes defines sexual slavery as existing when a perpetrator exercises “any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty” and causes such a person “to engage in one or more acts of a sexual nature.”<sup>31</sup> The Tokyo Tribunal similarly held that the *actus reus* of sexual slavery is “the exercise of any or all of the powers attaching to the right of ownership over a person.”<sup>32</sup> The Tokyo Tribunal, however, went further in explicitly stating that “exercising sexual control over a person or depriving a person of sexual autonomy” constitutes a power attaching to the right of ownership.<sup>33</sup>

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powers attaching to the right of ownership over a person.” Prosecutor v. Kunarac, Kovac, Vukovic, Case No. IT-96-23&23/1, Judgment at para. 118 (June 12, 2002) [hereinafter *Foca Appeals Judgment*] (quoting Trial Judgment at para. 539). The Appeals Chamber stated that because “the law does not know of a ‘right of ownership over a person,’” the more guarded language of 1926 Slavery Convention is preferable. *Id.*

<sup>27</sup> *Id.* at para. 119.

<sup>28</sup> *Id.* (quoting Trial Chamber at para. 543).

<sup>29</sup> *Foca Trial Judgment, supra* note 25, at para. 543.

<sup>30</sup> Judgment on the Common Indictment and the Application for Restitution and Reparation, at paras. 874-75 (4 Dec. 2001) (Women’s Int’l War Crimes Tribunal for the Trial of Japan’s Military Sexual Slavery) [hereinafter *Tokyo Judgment*].

<sup>31</sup> ICC Elements of Crimes, arts. 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2.

<sup>32</sup> *Tokyo Judgment, supra* note 30, at para. 620.

<sup>33</sup> *Id.* at para. 620.

The *mens rea* requirement for enslavement as stated in *Foca* is intentionally exercising, over another person, a power attaching to the right of ownership.<sup>34</sup>

a. Non-Elements that Could Be Relevant Factors

(1) *Consent*

The *Foca* Appeals Chamber specifically stated that lack of consent is not an element of the crime of enslavement,<sup>35</sup> but consent may be relevant for determining whether the accused exercised powers attaching to the right of ownership with respect to a specific victim or whether the victim voluntarily consented to take part in the relevant activities.<sup>36</sup>

(2) *Duration*

Duration is not an element of the crime of enslavement. The *Foca* Appeals Chamber stated that the key issue is the “quality of the relationship between the accused and the victim.”<sup>37</sup> Duration is one of many factors that should be examined to determine the quality of the relationship.<sup>38</sup>

2. *Torture*

Torture is a crime against humanity under Article 7(1)(f) of the Rome Statute and Article 5(f) of the ICTY Statute and Article 3(f) of the ICTR Statute. The ICC Elements of Crimes defines the elements of torture as follows:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic

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<sup>34</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 122.

<sup>35</sup> *Id.* at para. 120 (“Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, *lack of consent does not have to be proved by the Prosecutor as an element of the crime.*”) (emphasis added).

<sup>36</sup> The Appeals Chamber stated that “from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.” *Id.*

<sup>37</sup> *Id.* at para. 121.

<sup>38</sup> *Id.*



attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>39</sup>

Rape and other acts of sexual violence have been charged as torture at the ad hoc tribunals. Rape constitutes torture when the elements of torture are met.<sup>40</sup> The ad hoc tribunals require the severe pain or suffering necessary for torture to be inflicted for a specific purpose—to obtain “information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.” This element does not exist at the ICC and there is a specific note in the ICC Elements of Crimes for torture as a crime against humanity stating that “It is understood that no specific purpose need be proved for this crime.”<sup>41</sup>

The elements for torture as a crime against humanity before the ad hoc tribunals are:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) The act or omission must be intentional.
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.<sup>42</sup>

Prior to 2001, the ad hoc tribunals had a fourth element for torture. This element stated that “[t]he perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.”<sup>43</sup>

In 2001, the ICTY Trial Chamber in *Foca* held that pursuant to customary international law, torture does not have to be committed by an official, at the instigation of an

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<sup>39</sup> The heading for torture as a crime against humanity notes that “It is understood that no specific purpose need be proved for this crime.” International Criminal Court Elements of Crimes, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., Sept. 3-10, 2002, Part II(B) at art. 7(1)(f), ICC-ASP/1/3 (2002) [hereinafter ICC Elements of Crimes].

<sup>40</sup> Prosecutor v. Kvočka, Case No. IT-98-30/1, Judgment at para. 145 (Nov. 2, 2001) [hereinafter *Kvočka* Trial Judgment].

<sup>41</sup> ICC Elements of Crimes at Art. 7(1)(f).

<sup>42</sup> *Foca* Trial Judgment, *supra* note 25, at para. 497; *see also* *Kvočka* Trial Judgment, *supra* note 40, at para. 141; Prosecutor v. Semanza, Case No. ICTR-97-20, Judgment & Sentence at para. 343 (May 15, 2003) [hereinafter *Semanza* Trial Judgment].

<sup>43</sup> *Akayesu* Trial Judgment, *supra* note 6, at para. 594; *see also* Prosecutor v. Delalic, et al., Case No. IT-96-21, Judgment at para. 494 (Nov. 16, 1998) [hereinafter *Čelebići* Trial Judgment]; Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment at para. 162 (Dec. 10, 1998) [hereinafter *Furundzija* Trial Judgment].

official or with the consent of an official or a person acting in an official capacity.<sup>44</sup> This element comes from the Torture Convention, which is an instrument that reflects customary international law with regard to State obligations. It does not, as the Appeals Chamber stated in *Foca* reflect the definition of torture for individual responsibility outside of the framework of the Torture Convention.<sup>45</sup> Subsequent cases have followed *Foca* and held that torture does not have an official actor requirement.<sup>46</sup>

#### a. Rape as Torture

As noted above rape can constitute torture as a crime against humanity when the elements of torture are satisfied. In *Foca*, the Trial Chamber convicted two of the accused of torture based on their involvement in the rapes of several women. The Trial Chamber found that Kunarac acted for prohibited purposes when he raped his victims. He acted to discriminate, selecting his victims because of their ethnicity,<sup>47</sup> to obtain a confession from one victim about allegedly sending messages to the Muslim forces, to obtain information regarding the location of valuables, and to intimidate.<sup>48</sup> The Trial Chamber convicted Kunarac of torture after finding that the rapes resulted in severe mental and physical pain and suffering for the victims. Kunarac's co-accused, Vukovic was also convicted of torture based on acts of rape. The Trial Chamber concluded that he acted to discriminate against the victim because of her ethnicity. Vukovic argued that even if it was proven that he raped witness FSW-50, it was done out of sexual urge, not hatred, such that the prohibited purpose *mens rea* requirement for torture was not met. The Trial Chamber rejected this argument.<sup>49</sup>

#### b. Torture and Official Capacity

The *Foca*, *Kvočka*, and *Semanza* convictions for torture based on acts of rape utilized the later definition of torture, which does not require the accused to be an official or acting at

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<sup>44</sup> *Foca* Trial Judgment, *supra* note 25, at para. 496.

<sup>45</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 148 (“the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention”).

<sup>46</sup> *See, e.g., Kvočka* Trial Judgment, *supra* note 40, at para. 141; *Semanza* Trial Judgment, *supra* note 42, at para. 343. *But see* Prosecutor v. Simic, Case No. IT-95-9/2, Sentencing Judgment at para. 12 (Oct. 17, 2002) [hereinafter *Simic* Sentencing Judgment].

<sup>47</sup> *Foca* Trial Judgment, *supra* note 25, at para. 654 (“The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women, that they would give birth to Serb babies, or that they should ‘enjoy being fucked by a Serb.’”).

<sup>48</sup> *Id.* at paras. 669, 711.

<sup>49</sup> *See supra* text accompanying notes 56-59 for a discussion of the Trial Chamber's response to Vukovic's argument.

the instigation of or with the consent of an official or a person acting in an official capacity.<sup>50</sup> In this respect the definition of torture applied in these cases more closely matches that which is outlined in the ICC Elements of Crimes for torture as a crime against humanity.

### c. Prohibited Purpose

The elements of torture utilized by the ad hoc tribunals include a requirement that the act be committed for a prohibited purpose. The *Foca* Trial Chamber defined torture as the intentional infliction of severe pain or suffering, physical or mental, aimed at “obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.”<sup>51</sup> The Trial Chamber stated that there is no requirement that the conduct must be committed solely for a prohibited purpose. For the prohibited purpose element to be satisfied the Prosecutor must show that the prohibited purpose was part of the motivation behind the conduct; it does not have to be the “predominating or sole purpose.”<sup>52</sup> This approach was subsequently followed by the Trial Chambers in *Kvočka* and *Semanza*.<sup>53</sup>

In several rape as torture cases Trial Chambers at the ad hoc tribunals have found discrimination to be the prohibited purpose because the victims were selected as a result of their ethnicity. The *Foca* Trial Chamber found that the deliberate selection of Muslim victims constituted discrimination.<sup>54</sup> In *Semanza*, the Trial Chamber found that by encouraging a crowd to rape women because of their ethnicity the accused encouraged the infliction of pain and suffering for discriminatory purposes.<sup>55</sup>

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<sup>50</sup> See *Foca* Trial Judgment, *supra* note 25, at paras. 496-97; *Kvočka* Trial Judgment, *supra* note 40, at para. 137-41; *Semanza* Trial Judgment, *supra* note 42, at para. 342.

<sup>51</sup> *Foca* Trial Judgment, *supra* note 25, at para. 497.

<sup>52</sup> *Foca* Trial Judgment at para. 486 (“There is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. As was stated by the Trial Chamber in the *Delalic* case, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.”).

<sup>53</sup> *Kvočka* Trial Judgment at para. 140-41 (“The Trial Chamber also agrees with the *Čelebići* Trial Chamber that the prohibited purposes listed in the Torture Convention as reflected by customary international law “do not constitute an exhaustive list, and should be regarded as merely representative”, and notes that the *Furundzija* Trial Chamber concluded that humiliating the victim or a third person constitutes a prohibited purpose for torture under international humanitarian law.”); *Semanza* Trial Judgment, *supra* note 42, at para. 343 (“There is no requirement that the conduct be perpetrated solely for one of the prohibited aims.”).

<sup>54</sup> *Foca* Trial Judgment, *supra* note 25, at paras. 669, 711.

<sup>55</sup> *Semanza* Trial Judgment, *supra* note 42, at para. 485.

#### d. Intent, Torture, and Rape

The *Foca* Appeals Chamber made an important holding regarding the intent of an accused charged with torture as a crime against humanity for acts of rape. Vukovic argued before the Trial Chamber that even if it was proven that he raped FSW-50, it was done out of sexual urge, not hatred. Thus, the prohibited purpose *mens rea* requirement for torture was not met. The Trial Chamber rejected this argument stating:

The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose. The Trial Chamber has no doubt that it was at least a predominant purpose, as the accused obviously intended to discriminate against the group of which his victim was a member, i.e. the Muslims, and against his victim in particular.<sup>56</sup>

This holding was upheld on appeal. The Appeals Chamber stated:

The Appeals Chamber holds that, even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.<sup>57</sup>

The Appeals Chamber stated that the Prosecutor must establish whether the perpetrator intended to act in such a way that in the normal course of events would cause severe pain and suffering.<sup>58</sup> The *Foca* defendants were found to have intended to act in such a way—committing rape—so as to cause severe pain and suffering and because they acted in pursuance of a prohibited purpose—discrimination—their conviction for torture based on rape was upheld.<sup>59</sup>

#### e. Pain and Suffering

The *Foca* Appeals Chamber also had to address an argument from one of the accused convicted of torture based on rape that a victim's pain and suffering must be visible, even

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<sup>56</sup> *Foca* Trial Judgment, *supra* note 25, at para. 816.

<sup>57</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 153.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

long after the commission of the crime.<sup>60</sup> The Appeals Chamber dismissed this argument as erroneous and stated that

[g]enerally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. *Sexual violence necessarily gives rise to severe pain or suffering whether physical or medical, and in this way justifies its characterisation as an act of torture.*<sup>61</sup>

The pain and suffering requirement for torture is satisfied once rape has been proven because rape “necessarily implies such pain or suffering.”<sup>62</sup> Additional mental suffering is caused when a perpetrator forces people to watch a rape being committed. In *Kvočka* the Trial Chamber found that the “presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”<sup>63</sup> In 1998, the *Furundzija* Trial Chamber held that being forced to watch acquaintances being victimized in severe sexual attacks was torture for the forced observer.<sup>64</sup>

#### f. Other Acts of Sexual Violence as Torture

In 2002, Milan Simic pled guilty to torture as a crime against humanity and acts of sexual violence formed the basis for the plea. Simic kicked four individuals in their genitals and repeatedly pulled down the pants of an individual he was beating and threatened to cut off his penis.<sup>65</sup> Simic acknowledged that the Prosecutor would have shown that these acts inflicted severe mental or physical pain or suffering and that they were committed “for the purpose of punishing, intimidating or humiliating the victims with discriminatory intent.”<sup>66</sup>

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<sup>60</sup> *Id.* at para. 150.

<sup>61</sup> *Id.* (emphasis added). In 2001, the *Kvočka* Trial Chamber referenced the work of the UN Special Rapporteur on Torture, human rights bodies, and legal scholars and noted that they have listed several acts that are severe enough to constitute torture per se. These acts include “Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives.” *Kvočka* Trial Judgment, *supra* note 40, at para. 144.

<sup>62</sup> *Id.* at para. 145 (“The jurisprudence of the Tribunals, consistent with the jurisprudence of human rights bodies, has held that rape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.”); *see, e.g., Foca Appeals Judgment, supra* note 26, at para. 151.

<sup>63</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 149.

<sup>64</sup> *Furundzija* Trial Judgment, *supra* note 43, at para. 257.

<sup>65</sup> *Simic Sentencing Judgment, supra* note 46, at para. 4.

<sup>66</sup> *Id.* at para. 12.

### 3. Rape

Rape is enumerated as a crime against humanity in Article 5(g) of the ICTY Statute and Article 3(g) of the ICTR Statute. The Rome Statute similarly lists rape as a crime against humanity in Article 7(g); however, the Rome Statute goes further and also states that sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity are also crimes against humanity.<sup>67</sup> The ad hoc tribunals have addressed these and other acts of sexual violence within the “other inhumane acts” category of crimes against humanity. Part III(B)(5) below discusses that jurisprudence.

The elements for the crime against humanity of rape according to the ICC Elements of Crimes are as follows:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>68</sup>

The definition of rape before the ad hoc tribunals has evolved in cases that charged rape as a crime against humanity and as a war crime. To accurately portray the evolution of this jurisprudence this section discusses cases in which rape was charged as a crime against humanity and as a war crime. The difference between these two charges relates to the specific elements that must be established for crimes against humanity and for war crimes. For example, crimes against humanity must be part of a widespread and systematic attack

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<sup>67</sup> Rome Statute at art. 7(g).

<sup>68</sup> ICC Elements of Crimes at art. 7(1)(g)-1. Footnotes within this article specify that the “concept of ‘invasion’ is intended to be broad enough to be gender-neutral” and that “It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.”

while war crimes must be closely linked to an armed conflict and the victims must be protected persons.<sup>69</sup>

The Trial Chamber in *Akayesu* defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>70</sup> In adopting this definition the Trial Chamber noted that “rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.”<sup>71</sup> Several months later the Trial Chamber in *Čelebići* applied the same definition,<sup>72</sup> but the Trial Chamber in *Furundžija* applied a definition that focuses more on the “mechanical description of objects and body parts” just one month after the *Čelebići* judgment was issued.<sup>73</sup> In *Furundžija* rape is defined as:

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>74</sup>

The different approaches used in *Akayesu* and *Furundžija* were discussed in *Musema* and the *Musema* Trial Chamber noted that *Akayesu* adopts a conceptual approach while *Furundžija* utilizes a mechanical definition. The *Musema* Trial Chamber concluded that the conceptual approach of *Akayesu* was preferable to the definition set forth in *Furundžija* because of the “dynamic ongoing evolution of the understanding of rape and the incorporation of this understanding into principles of international law.”<sup>75</sup> The *Akayesu* definition “clearly encompasses all the conduct” described in the *Furundžija* definition and such an approach was deemed to be better for accommodating evolving norms of criminal justice.<sup>76</sup>

The focus on coercion and force in the *Furundžija* definition was directly challenged in *Foca*. The *Foca* Trial Chamber held that the *Furundžija* definition was “more narrowly

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<sup>69</sup> See, e.g., *Kvočka* Trial Judgment, *supra* note 40, at para. 127.

<sup>70</sup> *Akayesu* Trial Judgment, *supra* note 6, at para. 598.

<sup>71</sup> *Id.* at para. 597.

<sup>72</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 479 (Rape is “a physical invasion of a sexual nature, committed on a person under circumstances that are coercive.”).

<sup>73</sup> See *Akayesu* Trial Judgment, *supra* note 6, at para. 597.

<sup>74</sup> *Furundžija* Trial Judgment, *supra* note 43, at para. 185.

<sup>75</sup> *Musema* Trial Judgment, *supra* note 9, at para. 228.

<sup>76</sup> *Id.*

stated than required by international law.”<sup>77</sup> The *Foca* Trial Chamber concluded that lack of voluntary consent was the key aspect of rape. Therefore in requiring the sexual penetration to take place by coercion, force, or threat of force, the *Furundzija* Trial Chamber did “not refer to other factors that would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.”<sup>78</sup> Therefore the *Foca* Trial Chamber adopted the following definition of rape:

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; *where such sexual penetration occurs without the consent of the victim*. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>79</sup>

The *Foca* Appeals Chamber concurred with this definition and it has been applied by the Trial Chambers in *Kvočka*, *Kamuhanda*, *Semanza*, *Stakic*, *Nikolic*, *Kajelijeli*, *Gacumbitsi*, and *Muhimana*.<sup>80</sup> The ICC Elements of Crimes similarly uses a more mechanical definition, but it does require the sexual penetration to occur by force, threat of force, or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent. Thus the ICC definition covers a range of ways in which sexual penetration can be non-consensual.

The *Kvočka* Trial Chamber stated that rape is a “violation of sexual autonomy,” and the *Foca* definition of rape focuses on sexual autonomy and various ways in which it can be violated.<sup>81</sup> In order for sexual activity to constitute rape it must fall within one of the following two categories:

- (i) the sexual activity must be accompanied by force or threat of force to

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<sup>77</sup> *Foca* Trial Judgment, *supra* note 25, at para. 438.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at para. 460 (emphasis added).

<sup>80</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 177; *Kamuhanda* Trial Judgment, *supra* note 9, at para. 495-97, 707 (Accused not guilty for the crime against humanity of rape because the witnesses who testified regarding the rapes did not witness the rapes themselves, but were told about them after the fact); *Semanza* Trial Judgment, *supra* note 42, at para. 344-46 (Accused not guilty for rape as a crime against humanity because indictment provided insufficient notice to Accused); *Stakic* Trial Judgment at para. 755; Prosecutor v. *Nikolic*, Case No. IT-94-2, Sentencing Judgment at para. 113 (Dec. 18, 2003) [hereinafter *Nikolic* Sentencing Judgment] (stating “the perpetrator intended the sexual penetration and knew that it was committed against the will of the victim.”); *Kajelijeli* Trial Judgment, *supra* note 9, at para. 915; *Gacumbitsi* Trial Judgment, *supra* note 9, at para. 321, 325 (noting “[u]nder such circumstances, the utterances made by the Accused to the effect that in case of resistance the victims should be killed in an atrocious manner, and the fact that rape victims were attacked by those they were fleeing from, adequately establish the victims’ lack of consent to the rapes.”).

<sup>81</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 128; *Kvočka* Trial Judgment, *supra* note 40, at para. 177.



the victim or a third party;

- (ii) the sexual activity must be accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or the sexual activity must occur without the consent of the victim.<sup>82</sup>

The *mens rea* requirement for rape is “the intent to effect a sexual penetration and the knowledge that it occurs without the consent of the victim.”<sup>83</sup>

While the *Foca* definition is more “mechanical” than the *Akayesu* definition, the *Muhimana* Trial Chamber stated that the *Akayesu* and *Foca* definitions of rape are not incompatible and it endorsed “the conceptual definition of rape established in *Akayesu*, which encompasses the elements set out in *Kunarac* [*Foca*].”<sup>84</sup>

#### a. Evidence of Resistance

The accused in *Foca* appealed their rape convictions contending that the definition of rape adopted by the Trial Chamber did not include two necessary elements. One, that the sexual penetration took place by force or threat of force, and two that the victim’s resistance was continuous or genuine.<sup>85</sup> On the first point, the Appeals Chamber upheld the Trial Chamber’s definition, which does not require the use or threat of force, but instead requires voluntary consent.<sup>86</sup> On the second point, the Appellants argued that “nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted.”<sup>87</sup> The Appeals Chamber rejected this argument finding it “wrong on the law and absurd on the facts.”<sup>88</sup> The Appeals Chamber in *Kvočka* similarly rejected a request by an appellant to require a showing of “permanent and lasting resistance” by the victim and “simultaneous use of force or threat.”<sup>89</sup>

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<sup>82</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 177.

<sup>83</sup> *Foca* Trial Judgment, *supra* note 25, at para. 179; *see also* *Kvočka* Trial Judgment, *supra* note 40, at para. 177.

<sup>84</sup> *Muhimana* Trial Judgment, *supra* note 17, at para. 551 (“The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a ‘physical invasion of a sexual nature’, *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.”).

<sup>85</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 125.

<sup>86</sup> *See* text accompanying notes 90-93 for an additional discussion of the relationship between the use of force and consent.

<sup>87</sup> *Id.* at para. 128.

<sup>88</sup> *Id.*

<sup>89</sup> Prosecutor v. *Kvočka*, Case No. IT-98-30/1, Appeals Judgment at paras. 393, 395 (Feb 28, 2005) [hereinafter *Kvočka* Appeals Judgment] (noting that the continuous resistance requirement was wrong on the law and absurd on the facts as the *Foca* Appeals Chamber stated).

## b. Consent

The *Foca* Appeals Chamber stated that the *Foca* Trial Judgment did not “disavow the Tribunal’s earlier jurisprudence,” but rather sought to explain the relationship between force and consent.<sup>90</sup> The Appeals Chamber clarified that

there are “factors ‘other than force’ which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim”. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.<sup>91</sup>

The Appeals Chamber went on to note that the circumstances giving rise to rape charges as crimes against humanity or war crimes “will be almost universally coercive” such that “true consent will not be possible.”<sup>92</sup> The Trial Chambers in both *Čelebići* and *Furundžija* made similar findings.<sup>93</sup>

## 4. Persecution

Persecution is a crime against humanity within the jurisdiction of the ICC, ICTY, and ICTR based on Article 7(1)(h) of the Rome Statute, Article 5(h) of the ICTY Statute, and Article 3(h) of the ICTR Statute. The ICC Elements of Crimes defines the elements of persecution as follows:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

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<sup>90</sup> *Foca* Appeals Judgment at para. 129.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at para. 130; *see also id.* at para. 132 (“For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers’ residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.”).

<sup>93</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 495 (noting that coercive conditions are inherent in armed conflicts); *Furundžija* Trial Judgment, *supra* note 43, at para. 271 (“any form of captivity vitiates consent”). The facts in *Gacumbitsi* caused the Trial Chamber to reach a similar conclusion. The Accused stated that if the victims resisted they should be “killed in an atrocious manner” and the rape victims were attacked by those from whom they were fleeing. These factors caused the Trial Chamber to find that the rape victims did not consent. *Gacumbitsi* Trial Judgment, *supra* note 9, at para. 325.

3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Persecution before the ad hoc tribunals has an additional element—it must be committed with an intent to discriminate on political, racial, or religious grounds. A footnote to Article 7(1)(h)(4) of the ICC Elements of Crimes suggests that this element does not exist before the ICC, stating that “[i]t is understood that no additional mental element is necessary for this element other than that inherent in element 6.”<sup>94</sup>

The Trial Chamber in *Kupreskić* held that persecution is “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 [crimes against humanity].”<sup>95</sup> Other courts have included murder, extermination, torture, enslavement, deportation, imprisonment, rape, and other serious acts like those enumerated in Article 5 of the ICTY Statute as underlying acts for persecution.<sup>96</sup>

This definition evolved over time and the Trial Chamber in *Stakić* restated the “settled definition” of persecution as an act or omission that “1. discriminates in fact and which denies or infringes upon a fundamental right laid down in customary international or treaty law (the *actus reus*); and 2. was carried out deliberately with the intent to discriminate on political, racial and religious grounds (*mens rea*).”<sup>97</sup>

There have been several ICTY cases in which accused have been charged and convicted of persecution based on rape and acts of sexual violence. For example, Steven Todorović pled guilty to one count of persecution and the underlying acts supporting this

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<sup>94</sup> ICC Elements of Crimes at art. 7(1)(h)(4) n.22.

<sup>95</sup> Prosecutor v. Kupreskić, et al., Case No. IT-95-16, Judgment at para. 631 (Jan. 14, 2000) [hereinafter *Kupreskić* Trial Judgment].

<sup>96</sup> *Id.* at para. 615(b), n.895.

<sup>97</sup> *Stakić* Trial Judgment, *supra* note 9, at para. 732 (citing *Vasiljević* Trial Judgment at para. 244).

charge included sexual assaults on Bosnian Croats and Bosnian Muslims detained in various detention camps in and around the Bosanski Šamac municipality.<sup>98</sup> General Radislav Krstić was charged with persecution based on the cruel and inhumane treatment of Bosnian Muslim civilians. The cruel and inhumane treatment consisted of severe beatings, lack of food and water, rape, and killings.<sup>99</sup> The Trial Chamber found Krstić liable for the murders, rapes, beatings, and abuses that took place within what they determined to be a criminal enterprise at Potočari.<sup>100</sup> Biljana Plavsic pled guilty to persecution and the underlying acts were cruel or inhumane treatment, which consisted of acts of sexual violence that took place in Zvornik at the Ekonomija farm and the Čelopek camp.<sup>101</sup> In *Stakic*, the Trial Chamber found that acts of sexual assault and rape were committed and these acts supported the persecution charge.<sup>102</sup> Nikolic pled guilty to persecution and the underlying acts supporting this conviction were sexual violence and aiding and abetting rape. Nikolic had been separately charged with sexual violence and aiding and abetting rape but he entered a guilty plea to persecution, which the Plea Agreement stated was based on the acts individually charged in the indictment.<sup>103</sup>

The Trial Chamber in *Kvočka* held that sexual violence can constitute persecution when it is committed with the requisite discriminatory intent, yet discriminatory intent will not have to be shown for a successful persecution conviction at the ICC.<sup>104</sup>

### 5. *Other inhumane acts*

Article 7(1)(k) of the Rome Statute grants the ICC jurisdiction over “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” The ICC Elements of Crimes states that the elements for other inhumane acts are as follows:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article

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<sup>98</sup> Prosecutor v. Todorović, Case No. IT-95-9/1, Second Amended Indictment at para. 34 (Mar. 25, 1999); Prosecutor v. Todorović, Case No. IT-95-9/1, Sentencing Judgment at para. 9 (July 31, 2001) (Todorović agreed that he ordered six men to “perform fellatio on each other at the police station in Bosanski Samac on three different occasions in May and June 1992.”)

<sup>99</sup> *Krstić* Trial Judgment, *supra* note 9, at para. 517, 45-46 (rapes).

<sup>100</sup> *Id.* at para. 617.

<sup>101</sup> Prosecutor v. Plavsic, Case No. IT-00-39 & 40/1, Sentencing Judgment at para. 29 (Feb. 27, 2003).

<sup>102</sup> *Stakic* Trial Judgment, *supra* note 9, at para. 818.

<sup>103</sup> *Nikolic* Sentencing Judgment, *supra* note 80, at paras. 118-19.

<sup>104</sup> *Kvočka* Trial Judgment at para. 186.

7, paragraph 1, of the Statute.

3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Other inhumane acts as a crime against humanity are within the ad hoc tribunals' jurisdiction pursuant to Article 5(i) of the ICTY Statute and Article 3(i) of the ICTR Statute. The *Kayishema* Trial Chamber has stated that in relation to the ICTR Statute other inhumane acts include those

that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.<sup>105</sup>

Furthermore there must be a “nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim.”<sup>106</sup> Other inhumane acts must be committed deliberately.

[An] accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result.<sup>107</sup>

The *Bagilishema* Trial Chamber utilized the same definition of other inhumane acts.<sup>108</sup> Both chambers stated that whether a specific act falls within the category of other inhumane acts is

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<sup>105</sup> *Kayishema* Trial Judgment, *supra* note 9, at para. 151.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at para. 153.

<sup>108</sup> The *Bagilishema* Trial Chamber stated that other inhumane acts include acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial, and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. Prosecutor v. *Bagilishema*, Case No. ICTR-95-1A-T, Judgment at para. 92 (June 7, 2001) [hereinafter *Bagilishema* Trial Judgment].

a decision that must be made on a case-by-case basis.<sup>109</sup> Applying the *Kayishema* definition of other inhumane acts, the *Niyitegeka* Trial Chamber found the Accused guilty of other inhumane acts for two acts of sexual violence.<sup>110</sup> The Accused rejoiced when an individual was killed, decapitated, and castrated. The victim's skull was pierced through the ears with a spike and his genitals were hung on the spike in public view.<sup>111</sup> The Accused also ordered Interahamwe to undress the body of a recently shot Tutsi woman, to sharpen a piece of wood, and to insert the wood into her genitalia.<sup>112</sup> The Trial Chamber concluded that these acts are "acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole."<sup>113</sup>

The Trial Chamber in *Kajelijeli* applied the *Kayishema* definition of other inhumane acts and concluded that

[c]utting a woman's breast off and licking it, and piercing a woman's sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them.<sup>114</sup>

While the accused was not convicted for these acts, the case provides an example of the types of acts that the ad hoc tribunals have found to constitute other inhumane acts.<sup>115</sup> Other examples of sexual violence that have been found to constitute other inhumane acts are forcing prisoners to perform oral sexual acts on each other, forcing a prisoner to bite off the testicle of another prisoner,<sup>116</sup> the forced undressing of a woman outside in a public area after making her sit in mud, the forced undressing and public marching of a woman in a public area, and the forced undressing of women and making them perform physical exercises in a public area naked.<sup>117</sup>

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<sup>109</sup> *Kayishema* Trial Judgment, *supra* note 9, at paras. 151; *Bagilishema* Trial Judgment, *supra* note 108, at para. 92.

<sup>110</sup> *Niyitegeka* Trial Judgment, *supra* note 16, at para. 467.

<sup>111</sup> *Id.* at para. 462.

<sup>112</sup> *Id.* at para. 463.

<sup>113</sup> *Id.* at para. 465.

<sup>114</sup> *Kajelijeli* Trial Judgment, *supra* note 9, at para. 936.

<sup>115</sup> The Trial Chamber found that there was no evidence that he was present during these acts or ordered that they take place. The Trial Chamber further concluded that the Prosecutor failed to prove beyond a reasonable doubt that the accused planned, instigated, ordered, committed, or aided and abetted in the planning, preparation, or execution of the acts. *Id.* at para. 937.

<sup>116</sup> Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion & Judgment at para. 198 (May 7, 1997) [hereinafter *Tadic* Trial Judgment].

<sup>117</sup> *Akayesu* Trial Judgment, *supra* note 6, at para. 697.

As noted above, the Rome Statute enumerates more sexual violence crimes than the ICTY and ICTR Statutes and Article 7(1)(g) of the Rome Statute covers “any other form of sexual violence of comparable gravity.” Consequently acts of sexual violence that are not specifically enumerated in the Rome Statute may have to be charged as Article 7(1)(g) crimes, rather than Article 7(1)(k) (other inhumane acts) crimes. The Statute for the Special Court for Sierra Leone is similar to the Rome Statute and Article 2(g) grants the Special Court jurisdiction over “[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.”<sup>118</sup> In a May 2005 decision, the Special Court for Sierra Leone (“SCSL”) held that other acts of sexual violence must be charged as Article 2(g) crimes and not as Article 2(i) (other inhumane acts) crimes. The Trial Chamber in the Civil Defence Forces (“CDF”) case held that

in light of the separate and distinct residual category of sexual offenses under Article 2(g), it is impermissible to allege acts of sexual violence (other than rape, sexual slavery, enforced prostitution, forced pregnancy) under Article 2(i) [other inhumane acts] since ‘*other inhumane acts*’, even if residual, must logically be restrictively interpreted as covering only acts of a non-sexual nature amounting to an affront to human dignity.<sup>119</sup>

The Trial Chamber concluded that the

clear legislative intent behind the statutory formula “*any other form of sexual violence*” in Article 2(g) is the creation of a category of offenses of sexual violence of a character that do not amount to any of the earlier enumerated sexual crimes, and that to permit such other forms of sexual violence to be charged under “*other inhumane acts*” offends the rule against multiplicity and uncertainty.<sup>120</sup>

The SCSL was faced with this issue because the CDF indictment charged the accused with other inhumane acts as a crime against humanity, but did not charge them with violations of Article 2(g). The indictment did not mention acts of sexual violence and the Chamber denied the Prosecutor’s motion to amend the indictment to add Article 2(g) charges for sexual violence. In light of this denial the Prosecutor sought leave to introduce evidence of sexual violence under the Article 2(i) (other inhumane acts) charge. This motion was denied. The Trial Chamber concluded that the defendants did not have adequate notice that they would

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<sup>118</sup> Letter Dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council, U.N. SCOR, 56th Sess., Attachment: Statute of the Special Court for Sierra Leone, at 29, U.N. Doc. S/2002/246 (2002), available at <http://www.specialcourt.org/documents/Statute.html> (last visited Aug. 2, 2005) [hereinafter SCSL Statute].

<sup>119</sup> Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, at para. 19(iii)(b) (May 24, 2005) (filed June 22, 2005) [hereinafter CDF Case].

<sup>120</sup> *Id.* at para. 19(iii)(c).

have to address acts of sexual violence because such acts were not mentioned in the indictment.<sup>121</sup> In a separate concurring opinion the presiding judge, Judge Itoe, stated that “a failure to plead in the Indictment, material facts and elements of offenses which the Prosecution intends to rely on to prove it, renders it vague, unspecific, and defective.”<sup>122</sup> The Chamber concluded that

nothing in the record seems to support the Prosecution’s assertion that the evidentiary material under reference had been disclosed to the Defence “in some form” over 12 months ago and even if there were, there is nothing in the Consolidated Indictment, the principal accusatory instrument, to sustain such an assertion.<sup>123</sup>

The Trial Chamber’s insistence that the indictment provide notice as to the specific acts giving rise to the other inhumane acts charge is contrary to the jurisprudence of the ICTY and ICTR. The indictment in *Kayishema* did not specify the acts, or the nature of the acts, that the Prosecutor relied upon for the other inhumane acts charge.<sup>124</sup> The Trial Chamber concluded that it was therefore “incumbent upon the Prosecution to rectify the vagueness of the counts during its presentation of evidence.”<sup>125</sup> Citing *Blaskic*, the Trial Chamber noted, “[i]ndeed the question of knowing whether the allegations appearing in the Indictment are vague will, in the final analysis, be settled at Trial.”<sup>126</sup>

The SCSL’s decision has two implications for the ICC. The first is that acts of sexual violence may have to be charged as Article 7(1)(g) crimes and not “other inhumane acts.” The second is what means are available for the Prosecutor to give accused adequate notice of the underlying acts relied upon for the charges in the indictment. The ICC will have to decide whether those acts have to be specified in the indictment as held by the SCSL or whether the Prosecutor can provide the necessary details during the course of the trial as held by the ICTY and ICTR.

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<sup>121</sup> *Id.* at para. 19(viii).

<sup>122</sup> CDF Case, Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, at para. 36 (24 May 2005) (filed June 22, 2005).

<sup>123</sup> CDF Case, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, at para. 19(iv) (24 May 2005) (filed 22 June 2005).

<sup>124</sup> *Kayishema* Trial Judgment, *supra* note 9, at para. 584.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (citing *The Prosecutor v. Tihomir Blaskic*, IT-95-14-PT, Decision on the Defence Motion Based Upon Defects in the Form Thereof, 4.4.97, at p. 12). Note that the Trial Chamber found that the Prosecutor never particularized which evidence supported the other inhumane act charges, therefore the accused were found not guilty of this charge. *See id.* at paras. 586-88.



### C. War Crimes

Article 8 of the Rome Statute grants the ICC jurisdiction over war crimes. Article 8(2)(a) addresses grave breaches of the Geneva Conventions of 12 August 1949 (“Geneva Conventions”), Article 8(2)(b) covers “[o]ther serious violations of the laws and customs applicable in international armed conflict,” Article 8(2)(c) deals with serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 for non-international armed conflicts, and Article 8(2)(e) covers “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character.”

The ad hoc tribunals’ jurisdictional mandate similarly covers war crimes. Article 2 of the ICTY Statute grants the ICTY jurisdiction over grave breaches of the Geneva Conventions. Article 3 states that the “International Tribunal shall have the power to prosecute persons violating the laws or customs of war.” The *Tadic* Appeals Chamber held that Article 3 “functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.”<sup>127</sup> Thus violations of Common Article 3 of the Geneva Conventions (“Common Article 3”), which are not specifically mentioned in the ICTY Statute, are within the ICTY’s jurisdiction pursuant to Article 3.<sup>128</sup>

Article 4 of the ICTR Statute grants the ICTR jurisdiction over serious violations of Common Article 3 and of Additional Protocol II of 8 June 1977. The grave breaches of the Geneva Conventions only apply to international conflicts therefore the ICTR does not have jurisdiction over grave breaches.

Acts of sexual violence have been charged as various war crimes, such as torture pursuant to Articles 2(b) and 3 of the ICTY Statute and Article 4(a) of the ICTR Statute, cruel treatment pursuant to Article 3 of the ICTY Statute and Article 4(a) of the ICTR Statute, outrages upon personal dignity pursuant to Article 3 of the ICTY Statute and Article 4(e) of the ICTR Statute, willfully causing great suffering or serious injury to body or health pursuant to Article 2(c) of the ICTY Statute, and inhuman treatment based on Article 2(b) of the ICTY Statute.

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<sup>127</sup> Prosecutor v. *Tadic*, Case No. IT-95-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction at para. 91 (Oct. 2, 1995) [hereinafter *Tadic* Jurisdiction Appeal].

<sup>128</sup> In *Furundzija* the accused was charged with torture and rape as violations of Common Article 3 of the Geneva Conventions and the Trial Chamber held that this was appropriate pursuant to Article 3 of the ICTY Statute, which is a residual clause. Prosecutor v. *Furundzija*, Case No. IT-95-17/1, Decision on the Defendant’s Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), at para. 6(d) (May 29, 1998).

## 1. Torture

The ICC has jurisdiction over torture as a grave breach of the Geneva Conventions and as a serious violation of Common Article 3. The ICC Elements of Crimes lists the elements for torture as a grave breach as follows:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>129</sup>

The ICTY Statute, but not the ICTR Statute, grants the ICTY jurisdiction over grave breaches of the Geneva Conventions. As can be seen by element five noted above, grave breaches must take place within the context of an international conflict. As the conflict in Rwanda was internal, the ICTY provides the only jurisprudence on grave breaches. There has been one significant ICTY case in which acts of sexual violence have been charged as grave breaches and convictions were obtained—*Čelebići*. In *Čelebići* the accused were charged with torture, inhuman treatment, and willfully causing great suffering or serious injury to body or health for rapes and acts of sexual violence. The elements of torture as a grave breach before the ICTY are as follows:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she

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<sup>129</sup> ICC Elements of Crimes at art. 8(2)(a)(ii)-1.

or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,

and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.<sup>130</sup>

As noted in the discussion of torture as a crime against humanity, the official actor requirement is now understood to be limited to prosecutions pursuant to the Torture Convention. As a grave breach, there is the additional requirement that the acts take place within the context of an armed conflict and that the victims be protected persons under the Geneva Conventions.<sup>131</sup>

Pursuant to the ICC Elements of Crimes torture is a serious violation of Common Article 3 when:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The jurisprudence of the ad hoc tribunals establishes that the elements of torture as a serious violation of Common Article 3 of are as follows:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.

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<sup>130</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 494.

<sup>131</sup> *Id.* at para. 201; *Tadić* Appeals Judgment, *supra* note 23, at para. 80; *Tadić* Jurisdiction Appeal, *supra* note 127, at para. 84.

- (ii) The act or omission must be intentional.

The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.<sup>132</sup>

As with torture as a crime against humanity, the early ad hoc tribunal cases required that the perpetrator be an official or that the perpetrator act “at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.”<sup>133</sup> The 2001 *Foca* holding, which was upheld by the Appeals Chamber in 2002,<sup>134</sup> stating that pursuant to customary international law, the elements of torture do not include an official actor requirement is equally applicable to torture as a crime against humanity, a grave breach of the Geneva Conventions and a serious violation of Common Article 3.<sup>135</sup>

a. Rape as Torture

As with torture as a crime against humanity, the ad hoc tribunals have concluded that rape and other acts of sexual violence can constitute torture as a grave breach of the Geneva Conventions or a serious violation of Common Article 3 if the elements of torture are satisfied.<sup>136</sup> As noted by the *Furundzija* Trial Chamber,

Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. *In human rights law, in such situations the rape may amount to torture*, as demonstrated by the finding of the European Court of Human Rights in *Aydin* and the Inter-American Court

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<sup>132</sup> *Foca* Trial Judgment, *supra* note 25, at para. 497. The *Kvočka* Trial Chamber adopted a similar definition:

- (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
- (ii) the act or omission must be intentional; and
- (iii) the act or omission must be for a prohibited purpose, such as obtaining information or a confession, punishing, intimidating, humiliating, or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person.

*Kvočka* Trial Judgment, *supra* note 40, at para. 141.

<sup>133</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 494; *Furundzija* Trial Judgment, *supra* note 43, at para. 162, *Musema* Trial Judgment, *supra* note 9, at para. 285.

<sup>134</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 148.

<sup>135</sup> See *supra* Part III(B)(2) for a fuller discussion of this matter.

<sup>136</sup> See e.g., *Furundzija* Trial Judgment, *supra* note 43, at para. 172 (“Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war, or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly.”); *Kvočka* Trial Judgment, *supra* note 40, at para. 144 (“Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as those likely to constitute torture.”).

of Human Rights in *Meijja*.<sup>137</sup>

*Čelebići* was the first case in which an accused was convicted of torture for committing rape. The Trial Chamber concluded that Delić's rape of Grozdana Cecez constituted torture because it caused Cecez to suffer severe mental pain and suffering, the rape was intentional, and the rape was committed for several prohibited purposes. It was later held in *Foca* that once rape has been proven, the pain and suffering element of torture has also been proven.<sup>138</sup>

The *Čelebići* Trial Chamber found that because Cecez lived “in a state of constant fear and depression, suicidal tendencies, and exhaustion, both mental and physical,” there could be no question that she suffered severe mental pain and suffering.<sup>139</sup> This Trial Chamber also found that the “acts of vaginal penetration by the penis under circumstances that were coercive, quite clearly constitute rape” and that they were committed intentionally.<sup>140</sup> The prohibited purposes included obtaining information about the whereabouts of the victim's husband, punishing the victim for failing to provide the requested information, coercing the victim to provide the desired information, punishing the victim for her husband's alleged actions,<sup>141</sup> intimidating the victim and other inmates in the prison-camp where the rape took place,<sup>142</sup> and finally discrimination because the specific violent act committed—rape—was chosen because of the victim's gender.<sup>143</sup>

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<sup>137</sup> *Furundzija* Trial Judgment, *supra* note 43, at para. 163 (emphasis added).

<sup>138</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 151 (“Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.”). The Appeals Chamber also noted

Generally speaking, some acts establish per se the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or medical, and in this way justifies its characterization as an act of torture.

*Id.* at para. 150; *see also Kvočka* Trial Judgment, *supra* note 40, at para. 145 (“The jurisprudence of the Tribunals, consistent with the jurisprudence of human rights bodies, has held that rape may constitute severe pain and suffering amounting to torture, provided that the other elements of torture, such as a prohibited purpose, are met.”).

<sup>139</sup> *Čelebići* Trial Judgment, *supra* note 43, at 942.

<sup>140</sup> *Id.* at 940.

<sup>141</sup> The Trial Chamber found that the purposes of the rapes committed were to “obtain information about the whereabouts of Ms. Cecez's husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce and intimidate her into providing such information; and to punish her for the acts of her husband.” *Id.* at 941.

<sup>142</sup> *Id.* (“The fact that these acts were committed in a prison-camp, by an armed official, and were known of by the commander of the prison-camp, the guards, other people who worked in the prison-camp and most importantly, the inmates, evidences Mr. Delić's purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness.”).

<sup>143</sup> *Id.* (“In addition, the violence suffered by Ms. Cecez in the form of rape, was inflicted upon her by Delić because she is a woman. As discussed above, this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture.”).

In *Furundzija* the rape of Witness A constituted torture because the accused intentionally raped Witness A to obtain information. The accused also forced Witness D to watch the sexual attack of Witness A in order to obtain information about his alleged betrayal of the Croatian Defence Council and his assistance to Witness A and her children. The Trial Chamber concluded that this constituted torture. Forcing Witness D to “watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering” and the act was committed for a prohibited purpose.<sup>144</sup>

b. *Mens rea*

The *Foca* Appeals Chamber holdings regarding intent and torture are equally applicable for torture as a crime against humanity, a grave breach, and a serious violation of Common Article 3. Thus

even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.<sup>145</sup>

2. *Cruel treatment*

Cruel treatment as a serious violation of Common Article 3 is within the ICC’s jurisdiction pursuant to Article 8(2)(c)(i) of the Rome Statute. The elements stated in the ICC Elements of Crimes are as follows:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.<sup>146</sup>

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<sup>144</sup> *Furundzija* Trial Judgment, *supra* note 43, at para. 267.

<sup>145</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 153.

<sup>146</sup> ICC Elements of Crimes at art. 8(2)(c)(i)-3.

The ad hoc tribunals' jurisdiction over this crime is based on Article 3 of the ICTY Statute and Article 4(a) of the ICTR Statute. Cruel treatment as outlined by the ad hoc tribunals consists of:

1. an intentional act or omission,
2. that is deliberate and not accidental,
3. which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.<sup>147</sup>

There have been three significant cases in which acts of sexual violence have been charged as cruel treatment as a serious violation of Common Article 3. These cases are *Čelebići*, *Simic*, and *Semanza*.

In *Čelebići* Mucic was convicted of cruel treatment for his role in tying an electric cord around the genitals of prisoners and forcing prisoners to perform fellatio on one another.<sup>148</sup> Delic, another accused in *Čelebići*, was acquitted of cruel treatment for the rape of Grozdana Cecez because it was included as a lesser offense to torture as a grave breach of the Geneva Conventions and torture as a serious violation of Common Article 3, both of which he was convicted.<sup>149</sup>

Simic was charged with cruel treatment for kicking four individuals in their genitals and repeatedly pulling down the pants of one individual while he beat him and threatening to cut off his penis.<sup>150</sup> Simic pled guilty, but only to the torture as a crime against humanity charges.<sup>151</sup>

In *Semanza* the facts that gave rise to the cruel treatment charge were the same facts underlying the charges of rape as a crime against humanity and torture as a crime against humanity. Two of the three judges in the Trial Chamber found sufficient evidence to conclude that Semanza was responsible for the rape of Victim A and Victim B. Thus convictions on the rape as a crime against humanity and torture as a crime against humanity charges were entered. One of the two judges concluded, however, that it would be “impermissible to convict on Count 13 [cruel treatment] because of the apparent ideal

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<sup>147</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 552.

<sup>148</sup> *Id.* at para. 24 & Part IV.

<sup>149</sup> *Id.*

<sup>150</sup> *Simic* Sentencing Judgment, *supra* note 46, at para. 11.

<sup>151</sup> *Id.* at para. 3, 10.

concurrence of the crime charged therein with rape, torture, and murder as crimes against humanity charged in Counts 10, 11, and 12.”<sup>152</sup> This conclusion was overturned on appeal.

Cumulative convictions under different statutory provisions for the same conduct are permissible if the statutory provisions have materially distinct elements that are not contained in the other.<sup>153</sup> “An element is materially distinct from another if it requires proof of a fact not required by the other.”<sup>154</sup> The *Semanza* Appeals Chamber concluded that the Trial Chamber’s failure to enter a conviction for the cruel treatment count was an error. The Appeals Chamber concluded that *Semanza*’s “convictions for crimes against humanity necessitated proof of a widespread or systematic attack against a civilian population, whereas convictions for war crimes require that the offences charged be closely related to the armed conflict.”<sup>155</sup> The Appeals Chamber noted that the Trial Chamber found the necessary nexus was established such that the necessary elements of the crimes against humanity and the serious violations of Common Article 3 were established. To remedy the Trial Chamber’s error, the Appeals Chamber entered a conviction for Count 13 (cruel treatment) of the indictment.<sup>156</sup>

### 3. *Outrages upon personal dignity*

The ICC has jurisdiction over outrages upon personal dignity, including humiliating and degrading treatment as a serious violation of Common Article 3 based on Article 8(2)(c)(ii) of the Rome Statute. The elements of this crime are:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.\*
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal

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<sup>152</sup> *Semanza* Trial Judgment, *supra* note 42, at para. 552.

<sup>153</sup> Prosecutor v. *Semanza*, Case No. ICTR-97-20-A, Judgment, at para. 368 (May 20, 2005) [hereinafter *Semanza* Appeals Judgment]; Prosecutor v. *Musema*, Case No. ICTR-96-13-A, Judgment, at paras. 361, 363 (Nov. 16, 2001) [hereinafter *Musema* Appeals Judgment] (quoting Prosecutor v. *Delalic*, et al., Case No. IT-96-21-A, Judgment at paras. 412-13, (Feb. 20, 2001) [hereinafter *Čelebići* Appeals Judgment]; *see also* Prosecutor v. *Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A, ICTR-96-17-A, Judgment, at para. 542 (Dec. 13, 2004) [hereinafter *Ntakirutimana* Appeals Judgment]. Part III(D) contains a more detailed discussion on cumulative convictions.

<sup>154</sup> *Semanza* Appeals Judgment, *supra* note 153, at para. 368 (quoting *Musema* Appeals Judgment, paras 361, 363 (quoting *Čelebići* Appeals Judgment, paras 412-13)). *See also* *Ntakirutimana* Appeals Judgment, *supra* note 153, at para. 542.

<sup>155</sup> *Semanza* Appeals Judgment, *supra* note 153, at para. 369.

<sup>156</sup> *Id.* at para. 371.

\* For this crime “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.



dignity.

3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Outrages upon personal dignity are within the ad hoc tribunals' jurisdiction pursuant to Article 3 of the ICTY Statute and Article 4(e) of the ICTR Statute. The ICTR Statute specifically grants jurisdiction over "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."<sup>157</sup> The ICTY's jurisdiction over this crime is based on Common Article 3, which prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment."<sup>158</sup> While the ICTR included "rape, enforced prostitution and any form of indecent assault" within the outrages upon personal dignity category, the Rome Statute enumerates these and other acts of sexual violence separately in Article 8(2)(e)(vi). This article grants the ICC jurisdiction over "rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions."<sup>159</sup>

The elements for establishing outrages upon personal dignity before the ad hoc tribunals are

1. that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and
2. that he knew that the act or omission could have that effect.<sup>160</sup>

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<sup>157</sup> ICTR Statute at art. 4(e).

<sup>158</sup> See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War at art. 33 (Aug. 12, 1949), 75 U.N.T.S. 287; *Foca* Trial Judgment at para. 436 ("The jurisdiction to charge rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 . . . is clearly established.").

<sup>159</sup> Rome Statute at art. 8(2)(e)(vi).

<sup>160</sup> *Foca* Trial Judgment, *supra* note 25, at para. 514.

The *Foca* Appeals Chamber affirmed this definition rejecting the appellant's contention that the Trial Chamber should have provided a list of acts that constitute an outrage upon personal dignity and that the appropriate *mens rea* requirement is that the perpetrator knew his act or omission would cause serious humiliation, degradation or otherwise be a serious attack on human dignity.<sup>161</sup>

An earlier ICTY case stated that with regard to outrages upon personal dignity

[i]t is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule. The degree of suffering which the victim endures will obviously depend on his/her temperament.<sup>162</sup>

The *Foca* Trial Chamber took issue with this aspect of the definition, stating

the Trial Chamber would not agree with any indication from the passage above that this humiliation or degradation must cause "lasting suffering" to the victim. So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be "lasting". In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity. Obviously, if the humiliation and suffering caused is only fleeting in nature, it may be difficult to accept that it is real and serious. However this does not suggest that any sort of minimum temporal requirement of the effects of an outrage upon personal dignity is an *element* of the offence.<sup>163</sup>

The *Foca* approach was followed by the *Kvočka* Trial Chamber.<sup>164</sup>

The acts that gave rise to the outrages upon personal dignity charge in *Foca* included holding four young women in an apartment and forcing them to dance naked on a table while

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<sup>161</sup> *Foca* Appeals Judgment, *supra* note 26, at paras. 163, 165. The Trial Chamber had specifically held that "an accused must know that his act or omission is of that character – i.e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the *actual* consequences of the act." *Foca* Trial Judgment, *supra* note 25, at para. 512. This conclusion was upheld by the Appeals Chamber.

<sup>162</sup> Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgment at para. 56 (June 25, 1999).

<sup>163</sup> *Foca* Trial Judgment, *supra* note 25, at para. 501.

<sup>164</sup> The *Kvočka* Trial Chamber stated

This Trial Chamber agrees with the *Kunarac* Judgment that the act or omission need not cause lasting suffering; it is sufficient if the act or omission "would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity." *Kunarac* further found that the *mens rea* element of the offence did not require any specific intent from the perpetrator to humiliate, ridicule, or degrade the victim, but that it was enough if the perpetrator knew that his or her act or omission "could cause serious humiliation, degradation or affront to human dignity."

*Kvočka* Trial Judgment, *supra* note 40, at para. 168.

one of the accused watched, selling one woman to a man for 200 deutschmarks and another two women for 500 deutschmarks, and handing one woman over to two men.<sup>165</sup> Rape and other acts of sexual violence were the basis for charges of outrages upon personal dignity in *Kamuhanda*, *Semanza*, and *Cesic*. The Trial Chamber concluded that there was insufficient evidence to support the charges in both *Kamuhanda* and *Semanza*. *Cesic* pled guilty to humiliating and degrading treatment as a serious violation of Common Article 3 for forcing two Muslim detainees to perform fellatio on each other.<sup>166</sup> Consequently these three cases do not address the elements of outrages upon personal dignity as a serious violation of Common Article 3.

In *Musema* the Trial Chamber enumerated the elements of humiliating and degrading treatment pursuant to Article 4(e) of the ICTR Statute. The elements include

[s]ubjecting victims to treatment designed to subvert their self-regard. Like outrages upon personal dignity, these offences may be regarded as a lesser forms [*sic*] of torture; moreover ones in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority.<sup>167</sup>

The elements of rape as a crime against humanity are equally applicable for rape as an Article 4(e) offense.<sup>168</sup> Finally, indecent assault occurs when an individual causes “the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual.”<sup>169</sup>

a. *Mens rea*

On appeal the Appellant in *Foca* argued that the Prosecutor had not proven that he acted with the intention to humiliate his victims. He argued that his “objective was of an exclusively sexual nature.”<sup>170</sup> The Appeals Chamber rejected this argument concluding that “the Trial Chamber properly demonstrated that the crime of outrages upon personal dignity requires only . . . knowledge of the ‘possible’ consequences of the charged act or omission.”<sup>171</sup> With regard to the facts at issue the Appeals Chamber stated,

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<sup>165</sup> *Foca* Appeals Judgment, *supra* note 26, at paras. 16-17.

<sup>166</sup> Prosecutor v. *Cesic*, Case No. IT-95-10/1, Sentencing Judgment at para. 13 (Mar. 11, 2004). He also pled guilty to five counts of murder as a crime against humanity, five counts of murder as a violation of the laws and customs of war, and one count of rape as a crime against humanity. *Id.* at paras. 3-4.

<sup>167</sup> *Musema* Trial Judgment, *supra* note 9, at para. 285.

<sup>168</sup> *Id.*; *see also id.* at para. 229 (adopting the *Akayesu* definition of rape).

<sup>169</sup> *Id.* at para. 285.

<sup>170</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 158.

<sup>171</sup> *Id.* at para. 165.

[s]ince the nature of the acts committed by the Appellant against FWS-75, FWS-87, A.S. and A.B. undeniably reaches the objective threshold for the crime of outrages upon personal dignity set out in the Trial Judgement, the Trial Chamber correctly concluded that any reasonable person would have perceived his acts “to cause serious humiliation, degradation or otherwise be a serious attack on human dignity”. Therefore, it appears highly improbable that the Appellant was not, at the very least, aware that his acts could have such an effect.<sup>172</sup>

b. Rape<sup>173</sup>

The *Foca* Appeals Chamber holdings regarding force or threat of force and consent, which are discussed in Part III(B)(3) (rape as a crime against humanity) also apply to rape charges under outrages upon personal dignity as a serious violation of Common Article 3.

4. *Wilfully causing great suffering or serious injury to body or health*

Article 8(2)(a)(iii) grants the ICC jurisdiction over wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions. The ICC Elements of Crimes states that the elements for this offence are as follows:

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>174</sup>

The ICTY has jurisdiction over this offense pursuant to Article 2(c) of the ICTY Statute, and because this is a grave breach that must take place within the context of an international armed conflict, the ICTR does not have jurisdiction over this offense. The ICTY has held that wilfully causing great suffering or serious injury to body or health requires:

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<sup>172</sup> *Id.* at para. 166.

<sup>173</sup> See Part III(B)(3) for a detailed discussion of the jurisprudence regarding rape.

<sup>174</sup> ICC Elements of Crimes at art. 8(2)(a)(iii).

1. an intentional act or omission
2. that, when judged objectively, is deliberate and not accidental,
3. which causes serious mental or physical suffering or injury.<sup>175</sup>

As a grave breach the act must also take place within the context of an international armed conflict and the victim must be a protected person pursuant to the Geneva Conventions of 12 August 1949. Acts that qualify as “wilfully causing great suffering or serious injury to body or health” include acts that “do not meet the purposive requirements for the offence of torture.”<sup>176</sup> The *Čelebići* Trial Chamber noted, however, that all acts that constitute torture also constitute wilfully causing great suffering or serious injury to body or health.<sup>177</sup> Mucic, one of the accused in *Čelebići*, was charged with wilfully causing great suffering or serious injury to body or health based on superior responsibility for placing a burning fuse cord around the genitals of Vukašin Mrkajic and Duško Bendo.<sup>178</sup> The Trial Chamber found that “the intentional act of placing of a burning fuse cord against Vukašin Mrkajic’s bare body caused the victim such serious suffering and injury that it constitutes the offence of wilfully causing great suffering or serious injury to body or health under Article 2 . . . of the Statute.”<sup>179</sup>

The offense of wilfully causing great suffering or serious injury to body or health as a grave breach is very similar to that of inhuman treatment as a grave breach. The similarities and differences between the offenses will be discussed below.

### 5. *Inhuman Treatment*

The ICC has jurisdiction over inhuman treatment as a grave breach pursuant to Article 8(2)(a)(ii) of the Rome Statute. The ICC Elements of Crime state that inhuman treatment as a grave breach occurs when:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were protected under one or more of the

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<sup>175</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 511.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at para. 1019.

<sup>179</sup> *Id.* at para. 1040. The Trial Chamber found that the Prosecution failed to present sufficient evidence regarding the allegations involving Duško Bendo and concluded that the charge had not been proven. *Id.* at para. 1045.

Geneva Conventions of 1949.

3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>180</sup>

The ICTY has jurisdiction over this offense pursuant to Article 2(b) of the ICTY Statute, and because this is a grave breach that must take place within the context of an international armed conflict, the ICTR does not have jurisdiction over this offense. Inhuman treatment consists of:

1. an intentional act or omission
- 2 that, when judged objectively, is deliberate and not accidental,
3. which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.<sup>181</sup>

As a grave breach the act must also take place within the context of an international armed conflict and the victim must be a protected person pursuant to the Geneva Conventions of 12 August 1949. All acts that constitute torture or willfully causing great suffering or serious injury to body or health also constitute inhuman treatment.<sup>182</sup> Inhuman treatment extends beyond torture and willfully causing great suffering or serious injury to body or health to include acts that “violate the basic principle of humane treatment, particularly the respect for human dignity.”<sup>183</sup> Recognizing the fact-specific nature of this offense, the *Čelebići* Trial Chamber concluded that “whether any particular act . . . is inconsistent with the principle of humane treatment, and thus constitutes inhuman(e) treatment, is a question of fact to be judged in all the circumstances of the particular case.”<sup>184</sup>

Mucic, one of the accused in *Čelebići*, was charged with inhuman treatment, based on superior responsibility, for forcing Vaso Dordic and Veseljko Dordic, Muslim brothers who were prisoners, to perform fellatio on one another for two to three minutes in full view of the

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<sup>180</sup> ICC Elements of Crimes at art. 8(2)(a)(ii)-2.

<sup>181</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 543.

<sup>182</sup> *Id.* at para. 544.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

other detainees.<sup>185</sup> The Trial Chamber concluded that this act “constituted, at least, a fundamental attack on their human dignity,” and thus constituted inhuman treatment under Article 2 of the ICTY Statute.<sup>186</sup>

6. *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence*

Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the Rome Statute grant the ICC jurisdiction over rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. Article 8(2)(b)(xxii) also grants the Court jurisdiction over any other form of sexual violence also constituting a grave breach of the Geneva Conventions and article 8(2)(e)(vi) grants the Court jurisdiction over any other form of sexual violence also constituting a serious violation of Common Article 3.

The specific enumeration of acts of sexual violence makes the Rome Statute unique. While most of these acts have been found to be within the ad hoc tribunals’ jurisdiction the chambers have found jurisdiction based on customary international law or international humanitarian treaty law rather than the statutes. Thus, when looking for jurisprudence from the ad hoc tribunals for Article 8(2)(b)(xxii) offenses one will have to examine the ICTY Article 2 cases on torture, willfully causing great suffering or serious injury to body or health, and inhuman treatment. For Article 8(2)(e)(vi) offenses one should look to the ICTY Article 3 and ICTR Article 4 cases on torture, cruel treatment, and outrages upon personal dignity.

#### **D. Cumulative Convictions**

Cumulative convictions under different statutory provisions for the same conduct are permissible if the statutory provisions have materially distinct elements that are not contained in the other.<sup>187</sup> “An element is materially distinct from another if it requires proof of a fact not required by the other.”<sup>188</sup> For example, crimes against humanity contain an element that is materially distinct from violations of the laws and customs of war. There must be a close link between the alleged acts and the armed conflict for an act to be a violation of the laws and customs of war and this requirement does not exist for crimes against humanity. Additionally, crimes against humanity must take place within the context of a widespread or systematic attack against a civilian population. Thus, the same conduct can be the basis of

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<sup>185</sup> *Id.* at para. 1065.

<sup>186</sup> *Id.* at para. 1066. The Trial Chamber also noted that “the aforementioned act could constitute rape for which liability could have been found if pled in the appropriate manner.” *Id.*

convictions for both crimes against humanity and violations of the laws and customs of war if the necessary elements are met.<sup>189</sup>

The *Foca* Trial Chamber applied this test and convicted Kunarac and Vukovic of rape and torture as crimes against humanity and as violations of the laws and customs of war for the same acts.<sup>190</sup> As noted above the crimes against humanity charges and the violations of the laws and customs of war charges each have materially distinct elements. Rape and torture also contain materially distinct elements. Rape contains a sexual penetration requirement, which torture does not, and torture requires the severe infliction of pain or suffering *for a prohibited purpose*, which rape does not.<sup>191</sup> This analysis and holding was upheld by the *Foca* Appeals Chamber.<sup>192</sup> Based on this jurisprudence Radic in *Kvočka* was convicted of persecution as a crime against humanity and torture as a violation of the laws and customs of war based on the rapes and sexual assaults that were committed at the Omarska Camp.<sup>193</sup>

As noted in Part III(C)(2), the *Semanza* Trial Chamber did not convict the Accused of cruel treatment as a violation of the laws and customs of war because that charge was based on the same facts as the rape as a crime against humanity charge upon which he was convicted. The *Semanza* Appeals Chamber reversed the acquittal on the cruel treatment charge concluding that the Trial Chamber's failure to enter the conviction was an error. The Appeals Chamber concluded that Semanza's "convictions for crimes against humanity necessitated proof of a widespread or systematic attack against a civilian population, whereas convictions for war crimes require that the offences charged be closely related to the armed conflict."<sup>194</sup> The Appeals Chamber noted that the Trial Chamber found the necessary nexus was established such that the necessary elements of the crimes against humanity and the serious violations of Common Article 3 of the Geneva Conventions were established. To

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<sup>187</sup> Prosecutor v. Delalic, et al., Case No. IT-96-21-Abis, Judgment on Sentence Appeal at para. 412 (Apr. 8, 2003) [hereinafter *Čelebići* Appeals Sentencing Judgment]; see also *Semanza* Appeals Judgment at para. 368; *Kvočka* Trial Judgment at para. 214; *Foca* Trial Judgment, *supra* note 25, at para. 556; *Musema* Appeals Judgment, *supra* note 153, paras 361, 363 (quoting *Čelebići* Appeals Judgment, paras 412-413). See also *Ntakirutimana* Appeals Judgment, *supra* note 153, para. 542.

<sup>188</sup> *Čelebići* Appeals Sentencing Judgment, *supra* note 187, at para. 412; see also *Semanza* Appeals Judgment, *supra* note 153, at para. 368; *Kvočka* Trial Judgment at para. 214; *Foca* Trial Judgment at para. 556; *Musema* Appeals Judgment, *supra* note 153, at paras 361, 363 (quoting *Čelebići* Appeals Judgment, *supra* note 187, at paras 412-13). See also *Ntakirutimana* Appeals Judgment, *supra* note 153, at para. 542.

<sup>189</sup> See, e.g., *Foca* Trial Judgment at para. 556. The Jelusic Appeals Chamber held that a chamber can convict an accused of crimes against humanity and violations of the laws and customs of war for the same conduct if all of the necessary elements are satisfied. Prosecutor v. Jelusic, Case No. IT-95-10, Judgment at para. 82 (July 5, 2001).

<sup>190</sup> *Foca* Trial Judgment, *supra* note 25, at paras. 883, 888.

<sup>191</sup> *Id.* at para. 557.

<sup>192</sup> *Foca* Appeals Judgment, *supra* note 26, at para. 176.

<sup>193</sup> *Kvočka* Trial Judgment, *supra* note 40, at paras. 229-30.

<sup>194</sup> *Semanza* Appeals Judgment, *supra* note 153, at para. 369.



remedy the Trial Chamber's error, the Appeals Chamber entered a conviction on the cruel treatment charge in the indictment.<sup>195</sup>

Krstić was charged with persecution and genocide. The Trial Chamber held that the persecution count was subsumed within the genocide count, thus it was inappropriate to convict him on both counts.<sup>196</sup> This ruling was reversed on appeal. The Appeals Chamber concluded that persecution as a crime against humanity and genocide have different statutory elements such that genocide does not subsume persecution.<sup>197</sup> Genocide must be committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Persecution as a crime against humanity does not require such intent, but it must be committed as part of a widespread or systematic attack on a civilian population and the perpetrator must be aware of the relationship.<sup>198</sup>

When faced with charges under statutory provisions that do not contain materially distinct elements, the chambers at the ad hoc tribunals have to decide upon which statutory provision they will enter a conviction.<sup>199</sup> The chamber should enter a conviction for the more specific provision—the one that contains the materially distinct element.<sup>200</sup> For example, grave breaches contain an element that is materially distinct from violations of the laws and customs of war—that the victim be a protected person.<sup>201</sup> Violations of the laws and customs of war, however, do not contain an element that is materially distinct from grave breaches. Consequently chambers should enter convictions on the grave breach charges because they are more specific.<sup>202</sup>

## **E. Criminal Responsibility**

### *1. Individual Responsibility*

Pursuant to the Rome Statute, an individual will be criminally responsible for a crime within the Court's jurisdiction if that person "[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other

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<sup>195</sup> *Id.* at para. 371.

<sup>196</sup> *Krstić* Trial Judgment, *supra* note 9, at paras. 682-84.

<sup>197</sup> Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment at para. 229 (Apr. 19, 2004) [hereinafter *Krstić* Appeals Judgment].

<sup>198</sup> *Id.* at paras. 223-23, 228-29; *see also* *Musema* Appeals Judgment at paras. 336-37 (holding that multiple convictions for genocide and extermination as a crime against humanity are permissible).

<sup>199</sup> *Čelebići* Appeals Judgment, *supra* note 153, at para. 413.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at para. 424.

<sup>202</sup> *See, e.g., id.* at paras. 427.

person is criminally responsible.”<sup>203</sup> Criminal liability also exists for those that facilitate “the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”<sup>204</sup> or

[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.<sup>205</sup>

Attempts give rise to criminal liability when an individual takes action

that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.<sup>206</sup>

The ICTY and ICTR Statutes state that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 [2 to 4 for the ICTR] of the present Statute, shall be individually responsible for the crime.”<sup>207</sup> The ad hoc tribunals have convicted persons of genocide, crimes against humanity, and war crimes for committing, instigating, aiding and abetting, and encouraging acts of sexual violence.

#### a. Instigating

The *Akayesu* Trial Chamber found the Accused criminally responsible for the multiple rapes of ten girls and women in the cultural center of the bureau communal, “the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal,” and “the forced undressing and public marching of Chantal naked at the bureau

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<sup>203</sup> Rome Statute at art. 25(3)(a).

<sup>204</sup> *Id.* at art. 25(3)(c).

<sup>205</sup> *Id.* at art. 25(3)(d).

<sup>206</sup> *Id.* at art. 25(3)(f).

<sup>207</sup> ICTY Statute at art. 7(1); ICTR Statute at art. 6(1).

communal.”<sup>208</sup> Akayesu’s responsibility was based on verbal instigation. Instigating is “prompting another to commit an offence.”<sup>209</sup>

The Trial Chamber found that when “Witness OO and two other girls were apprehended by Interahamwe in flight from the bureau communal, the Interahamwe went to the Accused and told him that they were taking the girls away to sleep with them. The Accused said ‘take them.’”<sup>210</sup> He also “told the Interahamwe to undress Chantal and march her around. He was laughing and happy to be watching and afterwards told the Interahamwe to take her away and said ‘you should first of all make sure that you sleep with this girl.’”<sup>211</sup> The Trial Chamber concluded that these actions were evidence that Akayesu ordered and instigated sexual violence.<sup>212</sup>

Semanza was found guilty of rape (crime against humanity) for encouraging a crowd, in front of commune and military authorities, to rape Tutsi women before killing them.<sup>213</sup> Immediately after Semanza’s speech one of the men in the audience “had non-consensual sexual intercourse with Victim A, who was hiding in a nearby home.”<sup>214</sup> The Trial Chamber concluded that due to the

influence of the Accused and to the fact that the rape of Victim A occurred directly after the Accused instructed the group to rape, the Chamber finds that the Accused’s encouragement constituted instigation because it was causally connected and substantially contributed to the actions of the principal perpetrator. The assailant’s statement that he had been given permission to rape Victim A is evidence of a clear link between the Accused’s statement and the crime. The Chamber also finds that the Accused made his statement intentionally with the awareness that he was influencing the perpetrator to commit the crime.<sup>215</sup>

Gacumbitsi was similarly found guilty of rape (crime against humanity) for instigating the rape of Tutsi girls “by specifying that sticks be inserted into their genitals in case they resisted.”<sup>216</sup> The Trial Chamber concluded that the rapes that took place were a direct consequence of Gacumbitsi’s instigation due to the closeness in time and space between the instigation and the commission of the rapes.<sup>217</sup>

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<sup>208</sup> *Akayesu* Trial Judgment, *supra* note 6, 692.

<sup>209</sup> *Id.* at para. 482.

<sup>210</sup> *Id.*, at para. 452.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Semanza* Trial Judgment, *supra* note 42, at para. 476.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at para. 478.

<sup>216</sup> *Gacumbitsi* Trial Judgment, *supra* note 9, at para. 224.

<sup>217</sup> *Id.* at para. 227.

b. Ordering

Niyitegeka ordered Interahamwe to undress a dead Tutsi woman and insert a piece of sharpened wood into her genitalia.<sup>218</sup> After the order was given the act was carried out.<sup>219</sup> Finding that the Accused intended this act to be carried out and knew that it was part of a widespread and systematic attack on the Tutsi population based on ethnic grounds, the Trial Chamber convicted Niyitegeka of other inhumane acts (crime against humanity).<sup>220</sup>

c. Committing

An individual is criminally responsible for committing a crime “when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law.”<sup>221</sup> There can be multiple perpetrators of the same crime when “the conduct of each one of them fulfills the requisite elements of the definition of the substantive offence.”<sup>222</sup>

Delic, an accused in the *Čelebići* case, personally raped Grozdana Cecez and Witness A repeatedly and he was convicted of rape based on committing the crime.<sup>223</sup> Muhimana was similarly found to have personally raped seven women and was convicted of rape (crime against humanity).<sup>224</sup> In several recent ICTR cases convictions for rape based on the accused

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<sup>218</sup> *Niyitegeka* Trial Judgment, *supra* note 16, at para. 463.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at paras. 466-67.

<sup>221</sup> *Foca* Trial Judgment, *supra* note 25, at para. 390 (citing Prosecutor v. Tadic, Case IT-94-1-A, Judgment at para.188 (July 15, 1999)).

<sup>222</sup> *Id.*

<sup>223</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 940, 943.

<sup>224</sup> *Muhimana* Trial Judgment, *supra* note 17, at para. 552. The accused was found to have committed the following rapes:

- (a) On 7 April 1994, in Gishyita town, the Accused took two women, Gorretti Mukashyaka and Languida Kamukina, into his house and raped them. Thereafter he drove them out of his house naked and invited *Interahamwe* and other civilians to see what naked *Tutsi* girls looked like;
- (b) During the first week after the eruption of hostilities, the Accused pushed Esperance Mukagasana onto his bed, stripped her naked, and raped her. He raped her in his home several times;
- (c) On 15 April 1994, the Accused, acting in concert with a group of *Interahamwe*, abducted a group of *Tutsi* girls and led them to a cemetery near Mubuga Parish Church. The Accused then raped one of the abducted girls, Agnes Mukagatere;
- (d) On 16 April 1994, in the basement of Mugonero Hospital, at Mugonero Complex, the Accused raped Mukasine Kajongi;
- (e) On 16 April 1994, in a room of the basement of Mugonero Hospital, at Mugonero Complex, the Accused raped Witness AU twice;
- (f) On 16 April 1994, in the basement of Mugonero Hospital, at Mugonero Complex, the Accused raped Witness BJ, a young *Hutu* girl, whom he mistook for a *Tutsi*. He later apologised to her for the rape, when he was informed by an *Interahamwe* that BJ was not a *Tutsi*.

personally committing the rape have not been obtained or they have been overturned because of insufficient evidence. The *Musema* Appeals Chamber overturned Musema's rape conviction because new evidence was presented to the Appeals Chamber that established reasonable doubt as to Musema's guilt.<sup>225</sup> In *Kamuhanda* the Trial Chamber acquitted the accused of rape (crime against humanity) because the witnesses who testified about the rapes did not observe the rapes themselves, but were told about them after the fact. The Trial Chamber held that such hearsay evidence was insufficient for a rape (crime against humanity) conviction.<sup>226</sup>

#### d. Aiding and Abetting

Aiding and abetting is "rendering a substantial contribution to the commission of a crime."<sup>227</sup> In *Furundzija*, the Trial Chamber held that the *actus reus* of aiding and abetting in international criminal law "requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."<sup>228</sup> The act of assistance need not have caused the act of the principal; it could be an act or omission that took place before, during, or after the commission of the crime.<sup>229</sup> For example, bringing women to a specific location to be raped by soldiers has been held to constitute aiding and abetting rape.<sup>230</sup>

Presence during the commission of a crime within the ad hoc tribunals' jurisprudence has been held to constitute aiding and abetting. The *Kayishema* Trial Chamber held that the presence of a spectator who knew that his or her presence would encourage perpetrators in committing their criminal activities can lead to criminal responsibility for the acts committed by the perpetrators.<sup>231</sup> The *Foca* Trial Chamber similarly held that while presence at the scene of the crime alone is not conclusive evidence of aiding and abetting, such presence can constitute aiding and abetting when it "is shown to have a significant legitimizing or

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*Id.*

<sup>225</sup> *Musema* Appeals Judgment, *supra* note 153, at paras. 193-94 (concluding that "if the testimonies of Witnesses N, CB and EB had been presented before a reasonable tribunal of fact, it would have reached the conclusion that there was a reasonable doubt as to the guilt of Musema in respect of Count 7 [rape as a crime against humanity] of the Amended Indictment.").

<sup>226</sup> *Kamuhanda* Trial Judgment, *supra* note 9, at paras. 495-97.

<sup>227</sup> *Krstić* Trial Judgment, *supra* note 9, at para. 601; *see also Furundzija* Trial Judgment, *supra* note 43, at para. 257(ii).

<sup>228</sup> *Furundzija* Trial Judgment, *supra* note 43, at para. 235; *see also Foca* Trial Judgment, *supra* note 25, at para. 391; *Kayishema* Trial Judgment at para. 207.

<sup>229</sup> *Foca* Trial Judgment, *supra* note 25, at para. 391.

<sup>230</sup> *Id.* at para. 656.

<sup>231</sup> *Kayishema* Trial Judgment at para. 201.

encouraging effect on the principal.”<sup>232</sup> In *Furundzija*, the accused interrogated Witness A and he was present while another individual repeatedly raped her. The Trial Chamber concluded that Furundzija’s “presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.”<sup>233</sup> He was thus found guilty of aiding and abetting the rape of Witness A.<sup>234</sup>

The required *mens rea* is “knowledge that these acts assist the commission of the offence.”<sup>235</sup> The individual aiding and abetting does not have to share the principal’s *mens rea*, but he or she must know about the essential elements of the crime, which includes the perpetrator’s *mens rea*, and make the conscious decision to act knowing that he or she is supporting the commission of the crime.<sup>236</sup>

#### e. Joint Criminal Enterprise

The ad hoc tribunals have held that “the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan.”<sup>237</sup> In *Tadic* the Appeals Chamber identified three categories of joint criminal liability or common purpose cases. The first is when all of those participating have the same criminal intention.<sup>238</sup> For example, the co-perpetrators develop a plan to kill a group of people and even though members of the group have different tasks, they all possess the intent to kill.<sup>239</sup> The second category is similar to the first and it is referred to as the “concentration camp” cases. In such cases individuals with a position of authority within a concentration camp were held criminally liable for the atrocities that took place within the concentration camps. Liability was based on finding that the individual was actively involved in the repressive system (as could be inferred from their authoritative position), he or she was aware of the nature of the system, and he or she intended to further the common purpose of mistreating prisoners.<sup>240</sup> The final category of cases addresses individuals who participate in a joint criminal enterprise and one of the co-perpetrators commits an act that was outside of the

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<sup>232</sup> *Foca* Trial Judgment, *supra* note 25, at para. 393.

<sup>233</sup> *Furundzija* Trial Judgment, *supra* note 43, at para. 273.

<sup>234</sup> *Id.* at para. 274.

<sup>235</sup> *Id.* at para. 249; *see also Foca* Trial Judgment, *supra* note 25 at para. 392.

<sup>236</sup> *Foca* Trial Judgment, *supra* note 25, at para. 392; *Kayishema* Trial Judgment, *supra* note 9, at para. 205.

<sup>237</sup> *Tadic* Appeals Judgment, *supra* note 23, at para. 185(i).

<sup>238</sup> *Id.* at para. 196.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at para. 203.

common design, but was nonetheless a natural and foreseeable consequence of carrying out the common design.<sup>241</sup>

The *Tadic* Appeals Chamber held that participating in a common criminal enterprise gives rise to criminal responsibility pursuant to Article 7(1) of the ICTY Statute. Based on the object and purpose of the ICTY Statute, the Appeals Chamber concluded that the Statute “intends to extend the jurisdiction of the International Tribunal to *all* those ‘responsible for serious violations of international humanitarian law’ committed in the former Yugoslavia (Article 1).”<sup>242</sup> Thus the Statute does not limit its jurisdiction to those who plan, instigate, order, physically perpetuate a crime, or aid and abet in the commission of a crime. It also includes those who work together with several persons having a common purpose to “embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.”<sup>243</sup> The Rome Statute explicitly provides for jurisdiction over those who contribute “to the commission or attempted commission of [a crime within the Court’s jurisdiction] by a group of persons acting with a common purpose.”<sup>244</sup>

The *Tadic* Appeals Chamber held that the *actus reus* for participating in a joint criminal enterprise or acting with a common criminal purpose requires:

1. A plurality of persons.
2. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.
3. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.<sup>245</sup>

The people working together do not have to be organized in a particular military, political, or administrative structure and their common plan, design, or purpose need not have been previously arranged or formulated.<sup>246</sup> The necessary participation does not have to involve the commission of the crime, but can be assisting in or contributing to the execution of the common plan, design, or purpose.<sup>247</sup>

The *mens rea* requirements for joint criminal enterprise liability vary depending upon the category of common liability at issue. For the first category in which the co-perpetrators

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<sup>241</sup> *Id.* at para. 204.

<sup>242</sup> *Id.* at para. 189.

<sup>243</sup> *Id.* at para. 190.

<sup>244</sup> Rome Statute at art. 25(3)(d).

<sup>245</sup> *Tadic* Appeals Judgment, *supra* note 23, at para. 227.

<sup>246</sup> *Id.* at para. 227.

<sup>247</sup> *Id.*

have the same criminal intention, each accused must have the intent to perpetrate the particular crime.<sup>248</sup> For “concentration camp” cases, the accused must have personal knowledge of the system of ill-treatment and the intent to further the common system of ill-treatment.<sup>249</sup> In the third category of cases, the accused must intend to participate in and further the joint criminal enterprise, it must have been foreseeable that a member of the group would commit the criminal act outside of the common plan, and the accused must have willingly taken that risk.<sup>250</sup>

These elements have been applied in *Furundzija*, *Krstić*, and *Kvočka* to hold individuals criminally responsible for acts of sexual violence. The *Furundzija* Trial Chamber found Furundzija guilty of torture (violation of the laws and customs of war) for his involvement in the rape and sexual assault of Witness A. Furundzija interrogated Witness A while she was “in a state of nudity.”<sup>251</sup> During the interrogation another individual referred to as Accused B “rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused.”<sup>252</sup> A second phase of the interrogation involved Witness A being confronted with Witness D [a friend of Witness A’s] to make her confess. Accused B raped Witness A “by the mouth, vagina and anus and forced her to lick his penis clean.”<sup>253</sup> Furundzija continued to interrogate Witness A and as the interrogation intensified the sexual assaults and rapes intensified as well.<sup>254</sup> The Trial Chamber concluded that Furundzija’s interrogation and Accused B’s rape and sexual assault of Witness A became one process.<sup>255</sup> The Trial Chamber found that Furundzija and Accused B intended to obtain information from Witness A that they believed would be helpful to the Croatian Defence Council.

The *Furundzija* Trial Chamber held that to be guilty of torture as a co-perpetrator an individual must “participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.”<sup>256</sup>

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<sup>248</sup> *Id.* at para. 228.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Furundzija* Trial Judgment, *supra* note 43, at para. 264.

<sup>252</sup> *Id.* at para. 264.

<sup>253</sup> *Id.* at para. 266.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at para. 264.

<sup>256</sup> *Id.* at para. 257(i).



Furundzija was found criminally liable for the torture of Witness A as a co-perpetrator “by virtue of his interrogation of her as an integral part of the torture.”<sup>257</sup>

On appeal Furundzija argued that the Prosecutor failed to prove that there was a direct connection between his interrogation of Witness A and Accused B’s attacks on Witness A. He further contended that there was no proof that he “planned, agreed, or intended that Witness A would be touched or threatened in any way in the course of his questioning.”<sup>258</sup> Recalling the *Tadic* Appeals Judgment, the *Furundzija* Appeals Chamber stated that co-perpetrators do not have to have a previously arranged plan, design, or purpose.<sup>259</sup> The

way the events in this case developed precludes any reasonable doubt that the Appellant and Accused B knew what they were doing to Witness A and for what purpose they were treating her in that manner; that they had a common purpose may be readily inferred from all the circumstances, including (1) the interrogation of Witness A by the Appellant in both the Large Room while she was in a state of nudity, and the Pantry where she was sexually assaulted in the Appellant’s presence; and (2) the acts of sexual assault committed by Accused B on Witness A in both rooms, as charged in the Amended Indictment.<sup>260</sup>

The Appeals Chamber concluded by stating, “[w]here the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable.”<sup>261</sup>

In *Kvočka* the accused were tried for their role in the criminal acts that were committed at the Omarska camp. Thus this case closely resembles the second category of cases—the concentration camp cases. Following the *Tadic* Appeals Chamber, the *Kvočka* Trial Chamber held that to be criminally responsible based on a joint criminal enterprise the accused “must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise.”<sup>262</sup> Individuals “who work in a job or participate in a system in which crimes are committed on such a large scale and systematic basis incur individual criminal responsibility if they knowingly participate in the criminal

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<sup>257</sup> *Id.* at para. 267(i).

<sup>258</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment at para. 115 (July 21, 2000) [hereinafter *Furundzija* Appeals Judgment] (quoting Prosecutor’s Response at para. 4.31).

<sup>259</sup> *Id.* at para. 119.

<sup>260</sup> *Id.* at para. 120.

<sup>261</sup> *Id.*

<sup>262</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 312.

endeavor, and their acts or omissions significantly assist or facilitate the commission of the crimes.”<sup>263</sup>

The *Kvočka* Trial Chamber concluded that Omarska camp functioned as a joint criminal enterprise in which a mix of serious crimes were “committed intentionally, maliciously, selectively, and in some instances sadistically against the non-Serbs detained in the camp.”<sup>264</sup> The crimes were committed by a plurality of persons and the common purpose was “to persecute and subjugate non-Serb detainees.”<sup>265</sup>

The five accused were all found guilty of persecution for the sexual assaults and rapes that took place in the Omarska camp. They each worked at the camp and the Trial Chamber concluded that they were aware that persecution and ethnic violence were prevalent in the camp and that their work facilitated the commission of crimes.<sup>266</sup> As for their knowledge, the Trial Chamber stated

anyone regularly working in or visiting Omarska camp would have had to know that crimes were widespread throughout the camp. Knowledge of the joint criminal enterprise can be inferred from such indicia as the position held by the accused, the amount of time spent in the camp, the function he performs, his movement throughout the camp, and any contact he has with detainees, staff personnel, or outsiders visiting the camp. Knowledge of the abuses could also be gained through ordinary senses. Even if the accused were not eye-witnesses to crimes committed in Omarska camp, evidence of abuses could be *seen* by observing the bloodied, bruised, and injured bodies of detainees, by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor condition of detainees, as well as by observing the cramped facilities or the bloodstained walls. Evidence of abuses could be *heard* from the screams of pain and cries of suffering, from the sounds of the detainees begging for food and water and beseeching their tormentors not to beat or kill them, and from the gunshots heard everywhere in the camp. Evidence of the abusive conditions in the camp could also be *smelled* as a result of the deteriorating corpses, the urine and feces soiling the detainees['] clothes, the broken and overflowing toilets, the dysentery afflicting the detainees, and the inability of detainees to wash or bathe for weeks or months.<sup>267</sup>

Kvočka’s conviction for persecution was overturned on appeal. Kvočka argued that the Prosecution did not prove beyond a reasonable doubt that the rapes and sexual assaults took place during his stay at Omarska camp. The Trial Chamber held that the accused would not

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<sup>263</sup> *Id.* at para. 308.

<sup>264</sup> *Id.* at para. 319.

<sup>265</sup> *Id.* at para. 320.

<sup>266</sup> *Id.* at paras. 408, 464, 500 (finding Kos’ role as a guard shift leader was a substantial contribution to the maintenance and functioning of the camp), 566, 688.

<sup>267</sup> *Id.* at para. 324.

be criminally responsible for crimes committed before they arrived at Omarska camp or after they left. The Appeals Chamber found that there was no evidence before the Trial Chamber regarding when the relevant rapes and sexual assaults took place and it noted that the Trial Chamber did not rule on this point.<sup>268</sup> Thus Kvočka's conviction for persecution was overturned.<sup>269</sup>

*Krstić* illustrates the third category of common purpose liability. *Krstić* participated in a joint criminal enterprise "to forcibly transfer the Bosnian Muslim women, children and elderly from Potočari on 12 and 13 July and to create a humanitarian crisis."<sup>270</sup> Rape, murder, beating, and abuse were not the object of the joint criminal enterprise, but the Trial Chamber concluded that such acts were a natural and foreseeable consequence of the ethnic cleansing campaign.<sup>271</sup> The finding that *Krstić* participated in a joint criminal enterprise to ethnically cleanse the Srebrenica enclave was based on evidence demonstrating that

the political and/or military leadership of the VRS formulated a plan to permanently remove the Bosnian Muslim population from Srebrenica, following the take-over of the enclave. From 11 through 13 July, this plan of what is colloquially referred to as "ethnic cleansing" was realised mainly through the forcible transfer of the bulk of the civilian population out of Potočari, once the military aged men had been separated from the rest of the population. General *Krstić* was a key participant in the forcible transfer, working in close co-operation with other military officials of the VRS Main Staff and the Drina Corps.<sup>272</sup>

The Trial Chamber found the *mens rea* requirements established—rape, murder, beating, and abuse were natural and foreseeable consequences of the campaign to ethnically cleanse the Srebrenica enclave.

General *Krstić* must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. In fact, on 12 July, the VRS organised and implemented the transportation of the women, children and elderly outside the enclave; General *Krstić* was himself on the scene and exposed to firsthand knowledge that the refugees were being mistreated by

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<sup>268</sup> *Id.* at paras. 332-33.

<sup>269</sup> *Kvočka* Appeals Judgment, *supra* note 89, at para. 334.

<sup>270</sup> *Krstić* Trial Judgment, *supra* note 9, at para. 615. The Trial Chamber found that "General *Krstić* subscribed to the creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians. This is the only plausible inference that can be drawn from his active participation in the holding and transfer operation at Potočari and from his total declination to attempt any effort to alleviate that crisis despite his on the scene presence."

<sup>271</sup> *Id.* at para. 616.

<sup>272</sup> *Id.* at para. 612.

VRS or other armed forces.<sup>273</sup>

Krstić was charged with persecution and rape was one of the underlying acts. Krstić was held criminally responsible for the rapes that took place in Potočari based on his involvement in a joint criminal enterprise in which rape, while not the object of the criminal enterprise, was a natural and foreseeable consequence.

## 2. Superior or Command Responsibility

Individuals can also be criminally responsible, as superiors or commanders, for the actions of their subordinates. Article 28 of the Rome Statute states that

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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<sup>273</sup> *Id.* at para. 616.

The ad hoc tribunals' statutes similarly address superior or commander responsibility.

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>274</sup>

The details of this type of responsibility with regard to acts of sexual violence were first addressed by the *Čelebići* Trial Chamber. This chamber held that the elements for superior or command responsibility are:

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.<sup>275</sup>

The *Čelebići* articulation of the superior responsibility elements states the rule applied by the ad hoc tribunals. This statement of the elements was approved by the *Čelebići* and *Blaskić* Appeals Chambers and has been applied by the Trial Chambers in *Foca*, *Musema*, *Kvočka*, *Kamuhanda*, and *Semanza*.

#### a. Superior-Subordinate Relationship

To demonstrate a superior-subordinate relationship the accused must have had “effective control over the persons committing the underlying violations of international

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<sup>274</sup> ICTY Statute at art. 7(3). The ICTR Statute uses similar language:

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

ICTR Statute at art. 6(3).

<sup>275</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 346; *see also* Prosecutor v. Blaskić, Case No. IT-95-14, Judgment at para. 612 (July 29, 2004) [hereinafter *Blaskić* Appeals Judgment] (conviction for persecution based on command responsibility was reversed on appeal); *Čelebići* Appeals Judgment, *supra* note 153, at para. 196; *Foca* Trial Judgment, *supra* note 25, at para. 395; *Kvočka* Trial Judgment, *supra* note 40, at para. 314; *Kamuhanda* Trial Judgment, *supra* note 9, at para. 603; *Semanza* Trial Judgment, *supra* note 42, at para. 400 (Semanza was found guilty of crimes against humanity—rape and torture—based on Article 6(1) and no Article 6(3) liability for genocide);

humanitarian law.”<sup>276</sup> He or she must have the “material ability to prevent and punish the commission of these offenses.”<sup>277</sup> The effective control test was adopted in Article 28 of the Rome Statute.<sup>278</sup> Having effective control and the “material ability to prevent and punish the commission of these offenses” does not require being the person that actually dispenses the punishment. The *Kvočka* Trial Chamber held that the superior need only “take an important step in the disciplinary process.”<sup>279</sup>

The superior’s authority can be *de jure* or *de facto* and the superior responsibility concept applies equally to military and civilian supervisors.<sup>280</sup> *De jure* power by itself is not enough to establish command or superior responsibility—there must also be a finding of effective control.<sup>281</sup> The *Čelebići* Appeals Chamber held, however, that “a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.”<sup>282</sup>

Substantial influence is not sufficient for establishing effective control. In addressing an argument advanced by the Prosecution on appeal, the Appeals Chamber found that

customary law has specified a standard of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.<sup>283</sup>

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<sup>276</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 378; *Foca* Trial Judgment, *supra* note 25, at para. 396; *Kvočka* Trial Judgment, *supra* note 40, at para. 315; *Kamuhanda* Trial Judgment, *supra* note 9, at para. 604; *Semanza* Trial Judgment, *supra* note 42, at para. 402.

<sup>277</sup> *Čelebići* Appeals Judgment, *supra* note 153, at para. 198 (“As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.”); *Čelebići* Trial Judgment, *supra* note 43, at para. 378; *Foca* Trial Judgment, *supra* note 25, at para. 396; *Kvočka* Trial Judgment, *supra* note 40, at para. 315; *Kamuhanda* Trial Judgment, *supra* note 9, at para. 605.

<sup>278</sup> Rome Statute at art. 28; *see also* *Čelebići* Appeals Judgment, *supra* note 153, at para. 196.

<sup>279</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 316.

<sup>280</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 378; *Musema* Trial Judgment, *supra* note 9, at para. 148; *Kamuhanda* Trial Judgment, *supra* note 9, at para. 604; *Semanza* Trial Judgment, *supra* note 42, at para. 401. The *Čelebići* Appeals Chamber upheld the Trial Chamber’s definition of superior responsibility and its conclusion that it applied to those with *de jure* and *de facto* authority and to military and civilian supervisors equally. *Čelebići* Appeals Judgment, *supra* note 153, at paras. 192, 196.

<sup>281</sup> *Čelebići* Appeals Judgment, *supra* note 153, at para. 197.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at para. 266.

Additionally, general influence in the relevant community is not sufficient. In *Semanza*, the Trial Chamber reiterated that the correct legal standard for establishing a superior-subordinate relationship is showing “a formal or informal hierarchical relationship involving an accused’s *effective control* over the direct perpetrators. A simple showing of an accused’s general influence in the community is insufficient to establish a superior-subordinate relationship.”<sup>284</sup> The Trial Chamber noted that

[o]ther than general evidence of the Accused’s influence, there is no credible or reliable evidence detailing the specific nature of the superior-subordinate relationship between the Accused and any of the known perpetrators, including those to whom he gave instructions or encouragement to rape and kill. Absent this type of evidence, there is no concrete indication that the Accused had actual authority over the principal perpetrators.

b. *Mens rea*

Superior responsibility does not create strict liability for supervisors who fail to prevent or punish the crimes of their subordinates.<sup>285</sup> The *mens rea* requirement is that the superior

- (1) had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Article 2 to 5 of the Statute, or
- (2) . . . had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.<sup>286</sup>

Prosecutors must present direct evidence of knowledge or establish that the superior had such knowledge via circumstantial evidence.<sup>287</sup> The existence of such knowledge cannot be presumed.<sup>288</sup> The following indicia can be considered by a Trial Chamber in determining whether or not a superior had the requisite knowledge:

- (a) The number of illegal acts;
- (b) The type of illegal acts;

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<sup>284</sup> *Semanza* Trial Judgment, *supra* note 42, at para. 415.

<sup>285</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 383; *Kamuhanda* Trial Judgment, *supra* note 9, at para. 607; *Semanza* Trial Judgment, *supra* note 42, at para. 404.

<sup>286</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 383; *see also Semanza* Trial Judgment, *supra* note 42, at para. 404.

<sup>287</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 386; *Kamuhanda* Trial Judgment, *supra* note 9, at para. 609.

<sup>288</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 386; *Semanza* Trial Judgment, *supra* note 42, at para. 404.

- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;
- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The modus operandi of similar illegal acts;
- (k) The officers and staff involved; [and]
- (l) The location of the commander at the time.<sup>289</sup>

In the same way that *de jure* authority does not prove effective control, it does not prove knowledge.<sup>290</sup> The information that a superior must have can be written or oral and, while it does not have to be explicit, it must “suggest the need to inquire further.”<sup>291</sup> The *Kvočka* Trial Chamber specifically noted that “if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.”<sup>292</sup>

The Prosecutor has sought to expand the *mens rea* requirement for superior responsibility. In *Čelebići* the Prosecution sought to satisfy the *mens rea* requirement by showing that a superior lacked the information that put him on notice of the perpetration of war crimes “as a result of a serious dereliction of his duty to obtain the information within his reasonable access.”<sup>293</sup> The Appeals Chamber rejected this argument concluding that “[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”<sup>294</sup> The *Kvočka* Trial Chamber applied this reasoning when it stated that “Article 7(3) does not impose a duty upon a superior to go out of his way to obtain information about crimes committed by subordinates, unless he is in some way put on notice that criminal activity is afoot.”<sup>295</sup>

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<sup>289</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 386.

<sup>290</sup> *Kamuhanda* Trial Judgment, *supra* note 9, at para. 607.

<sup>291</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 318; *see also* *Kamuhanda* Trial Judgment, *supra* note 9, at para. 609.

<sup>292</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 318.

<sup>293</sup> *Čelebići* Appeals Judgment, *supra* note 153, at para. 224.

<sup>294</sup> *Id.* at para. 226.

<sup>295</sup> *Kvočka* Trial Judgment, *supra* note 40, at para. 317 (citing *Čelebići* Appeals Judgment, *supra* note 153).



In *Blaskic* the Trial Chamber concluded that the “know or reason to know” requirement is satisfied if it is shown that the accused “should have known.”<sup>296</sup> The Appeals Chamber reversed the Trial Chamber’s conclusion that General Blaskic knew or had reason to know about the rapes that took place at the Dubravica primary school. The Trial Chamber’s conclusion was based on circumstantial evidence, and from this evidence it concluded that “General Blaskic could not have been unaware of the atmosphere of terror and the rapes which occurred at the school.”<sup>297</sup> The Appeals Chamber overturned this ruling stating that

the *Čelebići* Appeal Judgement has settled the issue of the interpretation of the standard of “had reason to know.” In that judgement, the Appeals Chamber stated that “a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates.”<sup>298</sup>

The Appeals Chamber concluded that the Trial Chamber’s interpretation of the *mens rea* requirement was “not consistent with the jurisprudence of the Appeals Chamber.”<sup>299</sup> It then applied the *Čelebići* interpretation and concluded that General Blaskic did not have effective command or control over the units that committed the rapes and thus reversed his conviction for persecution as a crime against humanity, which was partially based on rape.<sup>300</sup>

c. *Actus rea*

Superiors are required to “take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof.”<sup>301</sup> Stating that the evaluation of this factor is “inextricably linked to the facts,” the *Čelebići* Appeals Chamber did not offer a general standard.<sup>302</sup> Superiors can only be criminally liable for failing to take action that is within their powers.<sup>303</sup> What is within a superior’s power is that which is “within his material possibility.”<sup>304</sup> Additionally, causation is not an element of superior responsibility.<sup>305</sup>

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<sup>296</sup> Prosecutor v. Blaskic, Case No. IT-95-14, Judgment at para. 322 (Mar. 3, 2000).

<sup>297</sup> *Id.* at para. 732.

<sup>298</sup> *Blaskic* Appeals Judgment, *supra* note 275, at para. 62.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at paras. 612-13.

<sup>301</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 394.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at para. 395; *see also* *Kamuhanda* Trial Judgment, *supra* note 9, at para. 610.

<sup>304</sup> *Čelebići* Trial Judgment, *supra* note 43, at para. 395.

<sup>305</sup> *Id.* at para. 398. The Trial Chamber concluded:

Notwithstanding the central place assumed by the principle of causation in criminal law,

#### IV. CONCLUSION

Sexual violence is as much a part of war as murder is. The ad hoc tribunals' jurisprudence provides persuasive authority for the adjudication of sexual crimes at the ICC. While there is always room for improvement, the ad hoc tribunals have provided a strong foundation upon which the ICC can build. As the ad hoc tribunals implement their Completion Strategies, there are several cases currently pending at the ICTR that should be monitored for further jurisprudential developments. These cases include the *Butre Case*, *Karamera*, *Muranyi*, *Military I*, *Military II*, and *Government I*.<sup>306</sup> The charges in these cases include rape and inhumane acts as crimes against humanity. Additionally, there are several other cases in which indictments have been issued, but the trials have yet to begin that address acts of sexual violence. In *Bisengimana* the accused is charged with rape, torture, and inhumane acts as crimes against humanity, cruel treatment and torture as violations of the laws and customs of war.<sup>307</sup> Juvenal Rugambarara has been charged with rape and torture as crimes against humanity and outrages upon personal dignity, in particular rape and enforced prostitution as serious violations of the laws and customs of war.<sup>308</sup> In *Hategekiman*, *Mpambara*, *Bikindi*, and *Nzabirinda* the accused are charged with a variety of crimes including genocide based on acts of sexual violence, rape, persecution and inhumane acts as crimes against humanity.<sup>309</sup>

The Preamble to the Rome Statute states that “the most serious crimes of concern to the international community as a whole must not go unpunished” and that the State Parties are determined “to put an end to impunity for the perpetrators of these crimes and thus to

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causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility, either in the existing body of case law, the formulation of the principle in existing treaty law, or, with one exception, in the abundant literature on this subject.

*Id.*

<sup>306</sup> Prosecutor v. Nyiramasuhuko & Ntahobali, Case No. ICTR-97-21-I, Amended Indictment at paras. 6.31, 6.53 (Mar. 1, 2001); Prosecutor v. Karamera, Nigirumpatse, & Nzirorera, Case No. ICTR-98-44-I, Amended Indictment at paras. 67-70 (Feb. 23, 2004); Prosecutor v. Muvunyi, Case No. ICTR-2000-54A-I at paras. 3.41-3.41(i), Indictment (Nov. 7, 2000); Prosecutor v. Bagosora, Kabiligi, Ntabakuze, & Nsengiyumva, Case Nos. ICTR-96-7-I, ICTR-97-34-I, ICTR-97-30-I, ICTR-96-12-I, Amended Indictment (Aug. 12, 1999); Prosecutor v. C. Bizimungu, et al., Case No. ICTR-99-50-I, Indictment (May 7, 1999); Prosecutor v. A. Bizimungu et al., Case No. ICTR-2000-56-I, Indictment (Jan. 20, 2000) (amended Mar. 26, 2004).

<sup>307</sup> Prosecutor v. Bisengimana, Case No. ICTR-2000-60-I, Indictment (July 1, 2000).

<sup>308</sup> Prosecutor v. Rugambarara, Case No. ICTR-2000-59-I, Indictment (July 10, 2000).

<sup>309</sup> Prosecutor v. Hategekimana, Case No. ICTR-2000-55-I, Indictment (Nov. 17, 2000); Prosecutor v. Mpambara, Case No. ICTR-2001-65-I, Indictment (July 23, 2001); Prosecutor v. Bikindi, Case No. ICTR-2001-72-I, Amended Indictment (Jun. 15, 2005); Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-I, Indictment (Dec. 7, 2001).

contribute to the prevention of such crimes.” It is hoped that this report will aid lawyers, judges, academics, and activists in ensuring that these pledges are implemented with regard to wartime acts of sexual violence.

**ANNEX I: CRIMINAL CHARGES & THE RELEVANT AD HOC TRIBUNAL  
CASES**

<b>CRIME</b>	<b>CASE</b>	<b>TRIBUNAL/COURT</b>
GENOCIDE	<i>Akayesu</i>	ICTR
	<i>Gacumbitsi</i>	ICTR
	<i>Kajelijeli</i>	ICTR
	<i>Kamuhanda</i>	ICTR
	<i>Kayishema</i>	ICTR
	<i>Krstić</i>	ICTY
	<i>Muhimana</i>	ICTR
	<i>Musema</i>	ICTR
	<i>Niyitegeka</i>	ICTR
	<i>Stakic</i>	ICTY
CRIMES AGAINST HUMANITY		
Enslavement	<i>Foca</i>	ICTY
Torture	<i>Foca</i>	ICTY
	<i>Kvočka</i>	ICTY
	<i>Semanza</i>	ICTR
	<i>Simic</i>	ICTY
Rape	<i>Akayesu</i>	ICTR
	<i>Foca</i>	ICTY
	<i>Gacumbitsi</i>	ICTR
	<i>Kajelijeli</i>	ICTR
	<i>Kamuhanda</i>	ICTR
	<i>Kvočka</i>	ICTY
	<i>Muhimana</i>	ICTR
	<i>Musema</i>	ICTR
	<i>Nikolic</i>	ICTY
	<i>Semanza</i>	ICTR
	<i>Stakic</i>	ICTY
Persecution	<i>Krstić</i>	ICTY
	<i>Kupreskić</i>	ICTY
	<i>Kvočka</i>	ICTY
	<i>Nikolic</i>	ICTY
	<i>Plavsic</i>	ICTY
	<i>Stakic</i>	ICTY
	<i>Todorović</i>	ICTY
Other inhumane acts	<i>Bagilishema</i>	ICTR
	<i>CDF</i>	SCSL
	<i>Kayishema</i>	ICTR
	<i>Niyitegeka</i>	ICTR
WAR CRIMES		
Torture	<i>Čelebići</i>	ICTY

CRIME	CASE	TRIBUNAL/COURT
	<i>Foca</i>	ICTY
	<i>Furundzija</i>	ICTY
	<i>Musema</i>	ICTR
Rape	<i>Čelebići</i>	ICTY
	<i>Furundzija</i>	ICTY
Cruel Treatment	<i>Čelebići</i>	ICTY
	<i>Semanza</i>	ICTR
	<i>Simic</i>	ICTY
Outrages upon personal dignity	<i>Cesic</i>	ICTY
	<i>Foca</i>	ICTY
	<i>Kamuhanda</i>	ICTR
	<i>Musema</i>	ICTR
	<i>Semanza</i>	ICTR
Wilfully causing great suffering or serious injury to body or health	<i>Čelebići</i>	ICTY
Inhuman treatment	<i>Čelebići</i>	ICTY
CUMULATIVE CONVICTIONS	<i>Čelebići</i>	ICTY
	<i>Foca</i>	ICTY
	<i>Krstić</i>	ICTY
	<i>Kvočka</i>	ICTY
	<i>Semanza</i>	ICTR
CRIMINAL RESPONSIBILITY		
Individual Responsibility	<i>Akayesu</i>	ICTR
	<i>Čelebići</i>	ICTY
	<i>Foca</i>	ICTY
	<i>Furundzija</i>	ICTY
	<i>Gacumbitsi</i>	ICTR
	<i>Kamuhanda</i>	ICTR
	<i>Kayishema</i>	ICTR
	<i>Krstić</i>	ICTY
	<i>Kvočka</i>	ICTY
	<i>Muhimana</i>	ICTR
	<i>Niyitegeka</i>	ICTR
	<i>Semanza</i>	ICTR
	<i>Tadic</i>	ICTY
Superior or Command Responsibility	<i>Blaskic</i>	ICTY
	<i>Čelebići</i>	ICTY
	<i>Foca</i>	ICTY
	<i>Kamuhanda</i>	ICTR
	<i>Krstić</i>	ICTY
	<i>Kvočka</i>	ICTY
	<i>Musema</i>	ICTR
	<i>Semanza</i>	ICTR