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International Criminal Law Manual: Update (2013)

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Notes: Unless otherwise noted, footnotes in quotes have been omitted.
The footnotes in the text are the author's.

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Chapter 1 – International Criminal Law: General Introduction

Page 42: Example: gacaca courts

Update on gacaca courts:

The gacaca courts operated from 2001 and closed in June 2012. The courts have generated a substantial amount of literature and the assessment of their effectiveness and impact is ongoing. For one brief overview of the courts and their functioning, see the following report at **www.asil.org/insights110623.cfm#_edn2** (last accessed on 12 May 2013). For a more detailed study of the courts, although also prepared prior to the closure of the courts, see the Human Rights Watch report at **www.hrw.org/reports/2011/05/31/justice-compromised-0** (last accessed on 12 May 2013).

Chapter 2 – Historical Development and the Establishment of the International Courts and Tribunals

Page 67: Update on the Special Court for Sierra Leone (SCSL)
[Insert before The Extraordinary Chambers in the Courts of Cambodia]

As we saw in the cases of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) above, it is not unusual for international courts to overrun their estimated trial schedule deadlines by some margin. The same has proved to be true of the SCSL: the three cases to have been heard in Sierra Leone have all been completed, including appeals, and the trial of the former Liberian president, Charles Taylor, which took place in The Hague, has been completed. Judgment was handed down in April 2012; Taylor was convicted on all 11 counts. In May 2012, he was sentenced to 50 years' imprisonment. As at May 2013, the appeals emanating from the trial were ongoing.

Page 69: Update on Extraordinary Chambers in the Courts of Cambodia (ECCC)
[Insert before Special Tribunal for Lebanon (STL)]

As at May 2013, there were four cases at more or less advanced stages on the roster of the ECCC. The trial phase of Case 001, against Kaing Guek Eav alias Duch, was completed in July 2010; Duch was convicted on a range of crimes and sentenced to 35 years' imprisonment. Both he and the Co-Prosecutors appealed and the Supreme Court handed down its judgment in February 2012: it

dismissed Duch's appeal and quashed the sentence of 35 years' imprisonment, substituting it with one of life imprisonment.

There were initially four accused in Case 002: Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith. Ieng Sary died on 14 March 2013 and proceedings against him were accordingly terminated. Proceedings against Ieng Thirith were stayed in September 2012 as she was found unfit to stand trial. She was released from provisional detention. The case against Nuon Chea and Khieu Samphan has been split into a series of separate trials, each addressing a different section of the indictment. The first trial began in November 2011.

Cases 003 and 004 concern five additional suspects regarding whom introductory submissions have been made by the Co-Prosecutors. The investigation in Case 003 was completed in April 2011, but no trial has begun as yet. Case 004 was under investigation, but no charges had been brought, as at May 2013.[1]

In relation to the issue of amnesties before the ECCC, see the update to p 304, below, on Amnesty.

Page 71: Special Tribunal for Lebanon (STL)
[insert before East Timor: the Serious Crimes Panels]

The STL, uniquely amongst modern international courts or tribunals, is empowered by Article 22 of its Statute, to conduct trials in the absence of the accused. In February 2012, the Trial Chamber issued its decision to hold trial in absentia.[2] By this decision, the STL decided that the trial of the four accused would proceed in their absence. The Appeals Chamber subsequently dismissed a defence appeal against this decision.

In November 2012, the Prosecution filed its Confidential Pre-Trial Brief,[3] and the four defence teams filed their Pre-Trial Briefs in January 2013, two of which are publicly available.[4] The Defence Pre-Trial Briefs, apart from raising issues of non-disclosure of evidence by the Prosecution and non-cooperation by Lebanon, for instance, also highlight the problems of conducting trials in the absence of the accused in the first place, including, in particular, the inability to properly protect one's client in the absence of instructions. While the trial had been scheduled to begin in March 2013, the Pre-Trial Judge postponed the trial date in February 2013 and, as at May, no new date had been set.

Page 76: New title – Extraordinary African Chambers, Senegal
[insert as new section before Alternatives to criminal prosecution]

In August 2012, Senegal and the African Union (AU) signed an agreement by which Senegal agreed to establish special chambers within its court structure to try Hissène Habré for crimes allegedly committed during his presidency of Chad from 1982 to 1990. Habré stands accused of the killing and torture of thousands of political opponents during that time. He has been living in exile in Senegal since his ousting in 1990. Pursuant to the agreement with the AU, the Senegalese National

1 All information taken from the ECCC website at www.eccc.gov.kh/en, last accessed 13 May 2013.
2 *Prosecutor v Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi & Assad Hassan Sabra* (STL) Case No STL-11-01/I/TC, Decision to hold trial *in absentia* (1 February 2012).
3 See www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/office-of-the-prosecutor/f0534, accessed on 14 May 2013.
4 Badreddine: www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/defence-team-counsel/f0636, and for Sabra: http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/other-filings/defence-team-counsel/f0632, both accessed on 14 May 2013.

Assembly adopted the necessary legislation to create the chambers in December 2012 and the court officially commenced its work in February 2013. For a brief overview of the chambers and the process of setting them up, see: **www.hrw.org/news/2013/02/08/senegal-hissene-habre-court-opens**. The episode is remarkable in that it involved the International Court of Justice ruling on the responsibility of Senegal to try Habré or extradite him, and 'will mark the first time the domestic courts of one country try the former head of state of another country for alleged international crimes'.[5]

The Statute of the Extraordinary Chambers is available, in French, at **www.hrw.org/fr/news/2013/01/30/statut-des-chambres-africaines-extraordinaires** (all URLs last accessed 13 May 2013).

Page 77: Concluding remarks

Presciently, the Concluding Remarks above ended, expressing concern that trials before the ICTY and ICTR have taken too long. Perhaps unsurprisingly then, the completion strategy deadlines referred to have not been met: as at May 2013, the situation could be summarised as follows (letting the Tribunals speak for themselves):

ICTY 'Due to the late arrest of the remaining fugitives – the last of which, Goran Hadžić, was only arrested on 20 July 2011 – and the sheer complexity of certain cases, initial estimates had to be revised to ensure the highest standards of procedural fairness. Estimates as of December 2012 suggest that of the cases in the trial stage, four will be concluded in 2013. The trial of Radovan Karadžić is expected to finish in 2014. The estimates for the Hadžić and Mladić cases forecast those trials being completed by 31 December 2015 and 31 July 2016, respectively. It is anticipated that the judgements in the *Đorđević* and *Šainović et al* appeals cases will be delivered in 2013. The *Popović et al* appeals case is anticipated to be completed by July 2014'.[6]

As for the **ICTR**, its last trial judgment was handed down in December 2012. Nine indictees remain at large and of course there is a significant amount of appeal work to be done.[7]

Page 79: Case study (Chapter 2)

The date '1999' given in the second paragraph of the case study is amended to '2009' to reflect the ICC would not have jurisdiction over crimes committed before the entry into force of the ICC Statute on 1 July 2002.

5 See www.chathamhouse.org/media/comment/view/189331.
6 See www.icty.org/sid/10016, last accessed 13 May 2013.
7 A detailed overview of the state of its completion strategy, by way of a letter to the UN Security Council, as at November 2012, is available at www.unictr.org/Portals/0/English%5CFactSheets%5CCompletion_St%5CS-2012-836.pdf, last accessed 13 May 2013.

Chapter 3 – Substantive Law on International Crimes: Definitions

Page 87: new bullet point
[insert after Amendment to Article I of the CCW bullet point]

On 2 April 2013, a large majority of the General Assembly of the United Nations adopted the Arms Trade Treaty by resolution 67/234 B. The treaty will open for signature on 3 June 2013 and will enter into force upon the ratification or approval of 50 states. This is an historic effort to regulate the international trade in conventional weapons. For more information, see **www.un.org/disarmament/ATT** (last accessed 8 May 2013).

Page 89: The most basic rules of International Humanitarian Law
[insert at foot of page, before The development of the notion of war crimes on p 90]

Gotovina & Markač: The principle of distinction and its application

The judgment of the Appeals Chamber in *Gotovina & Markač* was one of the more important, and most controversial, of the reversals on appeal before the ICTY.[8] The case arose out of the Croatian military operation, known as Operation Storm, which involved the retaking by Croatia of the Krajina region from the Serbs. Both men had been convicted at trial, as members of a Joint Criminal Enterprise (JCE), of a range of crimes, including the crime against humanity of persecution. An important element of this conviction rested on their participation in unlawful attacks on civilians and civilian objects and, in particular, on unlawful artillery attacks on four towns. The Trial Chamber, in assessing the lawfulness of these artillery attacks, had derived a standard by which to assess them: whenever the impact of an artillery shell was more than 200 metres from what it considered a legitimate military target, that indicated that the artillery attack was indiscriminate, that is, it failed to distinguish between a military objective and the civilian population. The Appeals Chamber considered that the Trial Chamber did not 'explain the specific basis on which it arrived at a 200 metre margin of error as a reasonable interpretation of evidence on the record'[9] and that there was no evidence before the Trial Chamber suggesting such a margin of error. This constituted an error on the Trial Chamber's part. The remaining evidence of unlawful artillery attacks was ambiguous and insufficient, in the view of the Appeals Chamber, to sustain the Trial Chamber's findings in this regard. This meant that 'no reasonable trier of fact could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks'.[10] This finding had a devastating effect on the rest of the Trial Chamber's findings: 'Absent the finding of unlawful artillery attacks and resulting displacement, the Trial Chamber's conclusion that the common

8 *Prosecutor v Gotovina & Markač* (ICTY) Case No IT-06-90-A, Judgement (16 November 2012).
9 *Ibid*, para 58.
10 *Ibid*, para 83.

purpose crimes of deportation, forcible transfer, and related persecution took place cannot be sustained. In this context, no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a JCE with the common purpose of permanently removing the Serb civilian population from the Krajina by force or threat of force.

… In view of the Appeals Chamber's reversal of the Trial Chamber's finding that a JCE existed, the Appellants' convictions for the common purpose crimes of deportation, forcible transfer, and persecution fall.'[11]

Both accused were acquitted on all counts and their immediate release was ordered.

The judgment highlights the importance of the principle of distinction in International Humanitarian Law. It is important in other respects too, including for the way it applied JCE and the application of the standard of review on appeal. As already stated, it is a controversial decision, no less so for the strong dissenting opinions of two members of the Appeals Chamber, which also deserve close scrutiny.

Page 104: The ICC Statute
[insert at end of text]

At the Kampala Review Conference, held between 31 May and 11 June 2010, the Assembly of States Parties adopted an amendment, based on a Belgian proposal, to article 8 of the ICC Statute, in order to prohibit the use of certain weapons in internal armed conflicts. By Resolution RC/Res 5,[12] the following text is to be inserted into the text of article 8, paragraph 2(e) the ICC Statute:

'(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.'

The amendment brings the position in internal armed conflicts into line with that in international armed conflicts and will enter into force in accordance with article 121(5) of the ICC Statute. The Elements of Crimes have been amended accordingly (see update p 133 below).

11 *Ibid*, paras 96-97.
12 Available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf, last accessed 21 May 2013.

Page 131: War crime of using, conscripting and enlisting children
[insert before War crime of displacing civilians]

Lubanga *and the use of children in armed conflict*

Due to the number of individual war crimes in the ICC Statute and the sheer volume of potentially relevant jurisprudence (including from the ICTY, for instance), it has been the practice not to make reference to the case law in this section. However, the first trial judgment from the ICC, in the case of Thomas Lubanga, should not be passed over in silence. Furthermore, as the evidence in *Lubanga* showed, and as the jurisprudence of the SCSL also helps to demonstrate, the use of children in war is a depressingly common feature of some of the wars that have recently blighted Africa (and continue to do so). The protection offered by this provision of the ICC Statute to those who are amongst the most vulnerable in times of conflict, young children, therefore deserves some brief discussion.

Trial Chamber I of the ICC gave judgment on 14 March 2012 in this case, the first trial to be completed before the ICC.[13] In brief, Lubanga, who was president of the Union of Congolese Patriots (UPC – a political organisation with a military wing active in north-east Democratic Republic of the Congo (DRC)), was charged with conscripting, enlisting or using children under 15 to participate actively in hostilities (or, to use the correct terminology as applicable at the ICC, had these charges against him confirmed). The Trial Chamber characterised the conflict as internal and so he faced charges under Article 8(2)(e)(vii) only. After setting out the relevant extract from the Elements of Crimes, the Trial Chamber undertook an analysis of the criteria. The Chamber held that there are three separate offences provided for: conscription, enlistment and use.[14] While conscription and enlistment are both forms of enrolment in a military body, what distinguishes them is the element of compulsion in the former.[15] The Trial Chamber accepted that the notion of 'voluntary' enrolment of a child under 15 is highly problematic in the context of armed conflict. The Chamber accepted that children of that age will frequently be unable to give genuine and informed consent and concluded, importantly, that 'the consent of a child to his or her recruitment does not provide an accused with a valid defence'.[16] In relation to 'use', the Trial Chamber held that the prohibition on use is a separate offence and does not require that child's earlier conscription or enlistment: 'a child can be "used" for the purposes of the Statute without evidence being provided as regards his or her earlier "conscription" or "enlistment" into the relevant armed force or group'.[17]

As for the requirement that the conduct took place 'in the context of and was associated with an armed conflict', the Trial Chamber held that the expression 'to participate actively in hostilities' (as opposed to 'direct participation' as is found in Additional Protocol I) was

13 *Prosecutor v Thomas Lubanga Dyilo* (ICC) Case No ICC-01/04-01/06, Judgement pursuant to Article 74 of the Statute (14 March 2012).
14 *Ibid*, para 609.
15 *Ibid*, para 608.
16 *Ibid*, para 617.
17 *Ibid*, para 620.

'clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children'.[18] Thus, even roles that are not clearly combat roles, but more in the nature of support roles (indirect participation) will be covered by the offence if the 'support provided by the child to the combatants exposed him or her to real danger as a potential target'.[19] The Trial Chamber was unable to address the important issue of whether sexual violence is properly to be regarded as the 'use' of children, as facts relating to this issue had not been included in the Decision on the Confirmation of Charges.

Page 133: Specific (underlying) offences: Elements of crimes
[insert before Crimes against Humanity]

The amendment to article 8(2)(e) of the ICC Statute (see update to p 104 above) necessitated the amendment of the Elements of Crimes. The following text has been added to the Elements of Crimes:

'Article 8 (2) (e) (xiii)

War crime of employing poison or poisoned weapons

Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xiv)

War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.[20]

18 *Ibid*, para 627.
19 *Ibid*, para 628.
20 Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons (footnote in original).

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xv)

War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.

2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.'

In relation to article 8(2)(e)(xv), it is instructive to have regard to the language of the adopting resolution[21] to determine whether element 3 of the Elements above captures the intention of the States Parties: 'Considering that the crime referred to in article 8, paragraph 2 (e) (xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and understanding that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law'.

Page 139: Existence of an attack
[insert after footnote 350 within text]

The Pre-Trial Chamber II of the ICC considered the meaning of 'attack directed against any civilian population' and the definition of that term provided in Article 7(2)(a) of the ICC Statute and in the Elements of Crimes in the Kenya situation, most recently in the confirmation decisions it gave.[22] In *Kenyatta*, the Chamber followed existing jurisprudence in deciding that in order for an attack to take place in furtherance of a 'policy', it was sufficient if the attack was 'planned, directed or organized', as opposed to incidents of spontaneous or isolated acts of violence.[23] One of the arguments advanced by the defence at confirmation was that the Pre-Trial Chamber's earlier decision authorising the Kenya

21 Available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf, last accessed 21 May 2013.

22 *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC) Case No ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012); *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC) Case No ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012).

23 *Ibid*, para 111.

investigation had misconstrued 'organisation'. The Pre-Trial Chamber made the obvious point that the wording of the Statute alone meant that non-state actors were clearly contemplated by the Statute ('State *or organizational* policy'). The Chamber also reiterated its earlier interpretation of 'organisation', stating that what was determinative was not the 'formal nature of a group and the level of its organization', but whether the group 'has the capability to perform acts which infringe on basic human values'.[24] That point aside, the Pre-Trial Chamber stood by its earlier decision on the authorization of the investigation.[25] In that Authorization Decision, the Pre-Trial Chamber decided that in determining whether one was dealing with an 'organisation' for the purposes of Article 7(2)(a) of the Statute, the following considerations, among others, were useful: '(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the above-mentioned criteria. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled'.[26] The determinative issue was, however, the group's ability to carry out the kinds of acts that constitute crimes against humanity.

The *Kenyatta* confirmation decision was by a majority of the Chamber. Judge Kaul, as he had done in respect of the Authorization Decision, appended a dissenting opinion in which he said that he believed the ICC did not have subject matter jurisdiction over the case precisely because he did not believe the crimes alleged took place in furtherance of a policy of an 'organisation'. He reaffirmed his analysis in his own earlier dissent to the Authorization Decision.[27] In a nutshell, his position is that while groups other than states can constitute an 'organisation' capable of having the requisite policy (as is evident from the wording of the Statute), such groups should 'partake of some characteristics of a State' with 'quasi-State abilities'.[28] He then listed a number of these characteristics, which need not be repeated here. It is unlikely that this is the last we will hear about the nature of the 'organization' referred to in Article 7(2)(a) of the Statute, particularly as, all the judges agree, each determination is so fact-specific.

The accused Ruto and Sang appealed the jurisdictional aspect of their confirmation decision,[29] in which the Pre-Trial Chamber had made a specific finding that the case fell within the jurisdiction of the Court. The two accused challenged the subject matter jurisdiction of the ICC over their case and the Pre-Trial Chamber's interpretation of 'organizational policy'. The Appeals Chamber held that 'treating the interpretation and existence of "organizational policy" as jurisdictional matters conflates the separate concepts of jurisdiction and the confirmation process'[30] and that 'the interpretation and existence of an 'organizational policy' relate to the substantive merits of this case as opposed to the issue of whether the Court has subject-matter jurisdiction to consider such questions.'[31] The issues

24 *Ibid*, at para 112.

25 *Situation in the Republic of Kenya* (ICC) Case No ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010) (the 'Authorization Decision').

26 *Ibid*, at para 93.

27 At para 7 of his dissenting opinion to the *Kenyatta* decision. The relevant paragraphs in the Authorization Decision are paras 51–53.

28 *Ibid.*

29 See n 43, *Ruto.*

30 *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC) Case No ICC-01/09-01/11 OA3 OA4, Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (24 May 2012) (the '*Ruto Appeal*'), para 29.

31 *Ibid*, para 30.

thus raised on appeal were not issues of subject-matter jurisdiction under Articles 19(6) and 82(1)(a) of the ICC Statute and that they were accordingly not properly before the Appeals Chamber. The appeal was dismissed.

The manner in which 'policy' has been used by other Chambers does not appear to be entirely consonant with the relatively low threshold used in *Kenyatta*. For instance, in the decision authorising the investigation into the situation in the Ivory Coast, Pre-Trial Chamber III, read the decisions of earlier Pre-Trial Chambers as establishing 'criteria', the elements of which were: '(a) it must be thoroughly organised and follow a regular pattern; (b) it must be conducted in furtherance of a common policy involving public or private resources; (c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and (d) it need not be explicitly defined or formalised (indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this particular criterion)'.[32] While this formulation incorporates the one used in *Kenyatta*, it also goes further and is considerably more exacting.

Page 143: The nexus with armed conflict (ICTY)
[insert after footnote 388 within text]

To confirm the point made in the Manual about there being no requirement of a nexus between crimes against humanity and armed conflict in customary international law, the Trial Chamber of the ECCC has confirmed that the 'armed conflict nexus was not part of the definition of crimes against humanity within customary international law' even during the period of the court's temporal jurisdiction, between 1975 and 1979.[33]

Page 146: Murder
[insert before Extermination]

ICTY Trial Chamber II, in its judgment in *Stanišić and Župljanin*,[34] restated the elements of the *actus reus* of murder as a crime against humanity as proof that 'the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible', the *mens rea* requiring proof of 'the intent of the accused or of the person or persons for whom he is criminally responsible (i) to kill the victim or (ii) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death…'[35] Again relying on established Appeals Chamber jurisprudence, the Trial Chamber proceeded with the reminder that 'proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered and that the fact of a victim's death can be inferred circumstantially from all of the evidence presented. All that is required to be established from that evidence is that the only reasonable inference is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible.'[36]

32 *Situation in the Republic of Côte d'Ivoire* (ICC) Case No ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire (3 October 2011) (the '*Ivory Coast*').

33 Case No 002/19-09-2007/ECCC/TC, Decision on Co-Prosecutors' Request to exclude armed conflict nexus requirement from the definition of crimes against humanity (26 October 2011), para 33.

34 *Prosecutor v Mićo Stanišić and Stojan Župljanin* (ICTY) Case No IT-08-91-T, Trial Judgement (27 March 2013).

35 *Ibid*, para 39.

36 *Ibid*, para 40.

Page 147: Extermination
[insert before Enslavement]

In *Lukić and Lukić,*[37] the ICTY Appeals Chamber had occasion to review the law on extermination. In doing so, it confirmed the essential elements of the *actus reus* and *mens rea* as set out in the main text. In determining whether or not the killings had been on a 'large scale', the element of 'massiveness', the Appeals Chamber confirmed that this issue had to be determined 'taking into account the circumstances in which the killings occurred.'[38] These include 'the time and place of the killings; the selection of the victims and the manner in which they were targeted; and whether the killings were aimed at the collective group rather than [at] victims in their individual capacity.'[39] While there was no numerical minimum number of victims required, the number of victims could be taken into account, as could the type of victims and their area of origin: 'While these factors may be taken into consideration in the assessment of massiveness for extermination is fulfilled, they do not constitute elements of the crime of extermination as a crime against humanity.'[40] The preparation and organisation of the crime could also be considered 'when determining the *actus reus* of extermination'.[41] Even a factor such as population density, understood as 'the number of individuals killed in a specific area in relation to the overall population of that area', could be considered.[42]

The Trial Chamber in *Stanišić and Župljanin* confirmed that the *mens rea* of extermination 'does not require intent to kill a certain threshold number of victims'.[43]

Page 148: Enslavement
[insert at end of text]

In Case 001 before the ECCC, the Supreme Court Chamber (SCC) of the ECCC gave judgment in relation to a number of appeals arising out of events that took place at S-21, 'a security centre in Phnom Penh, Cambodia, tasked with interrogating and executing perceived opponents of the Communist Party of Kampuchea (CPK)'.[44] The accused, Kaing Guek Eav (alias Duch), was the chairman of the security centre. He had been convicted in July 2010 of a range of crimes against humanity and grave breaches.[45] On appeal, the Co-Prosecutors took issue with the manner in which the Trial Chamber dealt with the crime of enslavement. In the course of a detailed consideration of the history of this crime against humanity, the SCC concluded by confirming the definition of enslavement, as well as the *actus reus* of the crime and the *mens rea* required, as set out in the *Kunarac* Trial and Appeal judgments of the ICTY, referred to in the main text.[46]

The SCC did wish to emphasise what it called the 'essence' of the *actus reus* and *mens rea* of the crime: 'the exercise over another human being of the powers that attach to *the right of ownership*'[47] Because of this, the SCC felt that 'the facts of an enslavement charge must be evaluated in accordance with

37 *Prosecutor v Lukić and Lukić* (ICTY) Case No IT-98-32/1-A, Appeal Judgement (4 December 2012).
38 *Ibid*, para 538.
39 *Ibid*.
40 *Ibid*, para 542.
41 *Ibid*, para 538.
42 *Ibid*, para 543.
43 See above, n 47, para 45.
44 Case No 001/18-07-2007-ECCC/SC, Appeal Judgement (3 February 2012) ('*Duch*'), para 2.
45 Case No 001/18-07-2007/ECCC/TC, Judgement (26 July 2010) ('*Duch Judgement*').
46 See above n 57, paras 146–150 & 152. The SCC confirmed that enslavement was well-established as a crime against humanity under customary international law at the applicable time, para 161.
47 *Ibid*, para 155, emphasis in the original.

the meaning of ownership understood as a category of civil law and economy. Therefore, in going through the checklist of indicia of enslavement, a Chamber must above all identify the indicia of "ownership", that is, facts pointing to the victim being reduced to a commodity, such that the person is an object of "enjoyment of possession"'.[48] The SCC thus concluded: 'Therefore, the requisite element of the *mens rea* and *actus reus* of the crime before it is an effort to accrue some gain through the exercise over the victim of the powers that attach to the right of ownership. The gain element is not an additional element of crime but rather the purpose implicit in the ownership powers as such.'[49] Concerning those detainees in respect of whom there had been no attempt to accrue some gain, the crime against humanity of enslavement had thus not been made out.

Page 150: Deportation or forcible transfer of population

[insert before Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law]

Stanišić and Župljanin[50] confirms that the law on deportation and forcible transfer remains as elucidated by the Appeals Chamber in *Stakić*.[51] Furthermore, in prosecutions before the ICTY, the prosecution will also have to prove the elements of the separate crime against humanity of 'other inhumane acts'.[52]

Page 151: Imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law

[insert before Torture]

Stanišić and Župljanin[53] confirms the central tenets of the crime of imprisonment (in addition to the *chapeau* elements, of course) as (a) an individual is deprived of his or her liberty; (b) the deprivation of liberty is carried out arbitrarily, that is, there is no legal basis for it; and (c) the perpetrator acted with the intent to deprive the individual arbitrarily of his or her liberty.[54] Furthermore, confirming earlier ICTY case law, the Trial Chamber held that if there is a legal basis for the imprisonment, such legal basis 'must apply throughout the entire period of the individual's imprisonment; and, as soon as that legal basis ceases to exist, such a deprivation of liberty will become arbitrary. Any national law that is relied upon to justify the deprivation of liberty may not violate international law.'[55]

Page 152: Torture

[insert at bottom of page]

Stanišić and Župljanin[56] confirms the law as set out in the ICTY Appeals Chamber's judgment in *Kunarac*[57] and in the body of the Manual.

48 *Ibid*, para 156.
49 *Ibid*, para 158.
50 See above, n 47, paras 61–64.
51 *Prosecutor v Milomir Stakić* (ICTY) Case No IT-97-24-A, Appeal Judgement (22 March 2006).
52 See above, n 47, para 65.
53 See above, n 47.
54 *Ibid*, para 78.
55 *Ibid*, para 79.
56 See above, n 47, paras 46–49.
57 *Prosecutor v Kunarac and others* (ICTY) Case No IT-96-23 & IT-96-23/1-A, Appeal Judgement (12 June 2002).

Page 154: Rape
[insert before Sexual Slavery and Enforced Prostitution]

Duch, *rape as a crime against humanity in 1975, and torture*

The Co-Prosecutors in *Duch* also appealed in relation to the Trial Chamber's findings on rape, arguing that the Trial Chamber had erred in characterising an act of rape at S-21 as the crime against humanity of torture. The Supreme Court Chamber was requested to convict the accused of both rape and torture, in order to reflect the full gravity of the crime. While the Trial Chamber had found the act to have met the legal requirements of both crimes, it considered the rape to have been a component of the prolonged torture of the victim and characterised it as such. No separate conviction for rape was entered.

The SCC held that while rape as a war crime was well-established by the start of the ECCC's temporal jurisdiction in 1975, its status as a crime against humanity under international law had not yet 'crystallised' as at that date. The SCC pointed out that no convictions for rape had been entered by the post-Second World War tribunals, it was not included in the 1950 Nuremburg Principles, and no convention or treaty prohibited rape as a crime against humanity in the relevant period (1975-1979). The case law of the various ad hoc tribunals that it was referred to (ICTY, ICTR and SCSL, for instance) was considered unhelpful in that it did not establish that rape was considered a crime against humanity by 1975; indeed, the SCC considered that 'by the era of the ad hoc tribunals, rape as a crime against humanity still remained a nascent notion. In fact, recognition of rape as a crime against humanity did not begin to take shape until the 1990s'.[58] Because of the absence of the *chapeau* elements from domestic prohibitions of rape, these could also not be used to show the emergence of rape was a crime against humanity on the basis of general principles of law recognised by the community of nations. The Trial Chamber had therefore erred in finding that the rape that occurred constituted a crime against humanity under customary international law.[59] The SCC nevertheless, having established that torture *was* clearly prohibited under customary international law by 1975, and that its definition as set out in the 1975 UN General Assembly Resolution on Torture had also attained customary international law status by the relevant time, held that the Trial Chamber had been correct in finding that the rape constituted the crime against humanity of torture, albeit not as the separate crime against humanity of rape.[60]

While in a sense of historical importance only, dealing as it does with the state of the law in 1975, this judgment clearly has ongoing significance for all current and future trials before the ECCC: no prosecution for rape as a distinct crime against humanity will be successful.

58 See above, n 57, para 179.
59 *Ibid*, para 183.
60 *Ibid*, para 210.

Page 158: Persecution
[insert after footnote 481 within text]

Stanišić and Župljanin[61] confirms in general terms the state of the law as set out in the Manual. It is also a reminder that '[W]hile the crime of persecution may be considered as an "umbrella" crime, the principle of legality requires that the Prosecution nonetheless charge particular acts or omissions amounting to persecution, rather than persecution in general. Persecution cannot, because of its nebulous character, be used as a catch-all charge, and it is not sufficient for an indictment to charge a crime in generic terms.'[62] Leaving aside that there are no indictments as such at the ICC, and bearing in mind the different formulations of the crime at the ICTY ('persecutions') and ICC ('persecution'), it will be interesting to see how the ICC addresses the principle of legality referred to and whether it imposes the same requirement. This might well be another reason for the otherwise odd requirement that persecution be committed 'in connection with' any other act referred to in Article 7(1) of the Statute or any crime within the jurisdiction of the Court. As a matter of fact, in the *Gbagbo* case, the Prosecutor of the ICC has relied on specific acts, those underlying separate charges of murder, rape and inhumane acts, as the underlying conduct for the crime of persecution.[63]

Duch *and persecution as a crime against humanity: current state of the law?*

In *Duch*,[64] the SCC of the ECCC had to consider the Trial Chamber's findings concerning persecution. After an extensive review of the relevant law and history, it concluded, first, that it was established that persecution was a crime against humanity under customary international law by 1975.[65] The SCC then examined the Trial Chamber's articulation of the *actus reus* and *mens rea* of persecution, based on the jurisprudence of the ICTY, and concluded that it was largely correct: '(i) an act or omission which discriminates in fact and which denies or infringes upon a right laid down in international customary or treaty law (*actus reus*) and (ii) deliberate perpetration of an act or omission with the intent to discriminate on political, racial or religious grounds (*mens rea*).'[66] However, the SCC did have some critical points to make regarding the formulation of, particularly, the *actus reus* element, which the SCC only considered to have become settled with the *Krnojelac* Appeal Judgement of the ICTY in 2003. Regarding the requirement that a fundamental right is breached or denied, the SCC highlighted that 'the crux of the analysis lies not in determining whether a specific persecutory act or omission *itself* breaches a human right that is fundamental in nature. Rather, it lies in determining whether or not the persecutory acts or omissions, when considered cumulatively and in context, result in a gross or blatant breach of fundamental rights such that it is *equal in gravity or severity to other underlying crimes against humanity*.'[67]

61 See above, n 47.
62 *Ibid*, para 67.
63 *Prosecutor v Laurent Koudou Gbagbo* (ICC) Case No ICC-02/11-01/11, Public redacted version of 'Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo' (30 November 2011) ('*Gbagbo Arrest Warrant*').
64 See above, n 57.
65 *Ibid*, para 225.
66 *Ibid*, paras 226, 240, 267 and 278.
67 *Ibid*, para 257, emphasis in the original.

Importantly, the SCC had to confront the question whether there can be said to be discrimination in fact if 'the perpetrator is objectively mistakenly as to the victim's membership in the targeted group.'[68] While accepting the Trial Chamber's finding to the effect that 'an act or omission is discriminatory in fact where "a victim is targeted because of the victim's membership in a group *defined by the perpetrator* on specific grounds, namely on political, racial or religious basis"',[69] the SCC emphasised that the 'requirement of discrimination in fact is "connected to the requirement that the victim *actually belong* to a sufficiently *discernible* political, racial or religious group"'.[70] The SCC could therefore not agree with the Trial Chamber's conclusion that persecution would be established even when the perpetrator was objectively mistaken as to the victim's membership of the targeted group. While agreeing that it is the perpetrator who 'determines the criteria for targeting on political grounds',[71] this would not allow persecutory intent by itself to establish the crime of persecution in the absence of proof that the victim is a member of a 'discernible targeted group'.[72] There is thus 'no discrimination in fact where: 1) there is a mistake of fact by the perpetrator as to whether a victim actually belongs to the defined target group; or 2) the perpetrator targets victims irrespective of whether they fall under the discriminatory criterion, in other words, where the targeting is *indiscriminate*.'[73]

Genocide

Page 179: National, Ethnical, Racial or Religious Groups
[insert before Contextual Element (ICC)]

Pre-Trial Chamber I of the ICC has had occasion to examine the manner in which the groups targeted by an alleged genocide are defined, albeit in a rather cursory way and at an early (pre-trial) phase of proceedings.[74] Accepting the underlying ICTY and ICTR jurisprudence to the effect that a group ought not to be negatively defined for the purposes of a finding of genocide, the Chamber adopted an objective approach, focusing on the attributes of the groups in question, the Fur, Masalit and Zaghawa peoples of Darfur, rather than on any subjective definition of such groups by the alleged perpetrators. The Chamber held that each was a 'distinct ethnic group' as 'there are reasonable grounds to believe that each of the groups… has its own language, its own tribal customs and its own traditional links to its lands.'[75]

68 *Ibid*, para 269.
69 *Ibid*, para 272, emphasis in the original.
70 *Ibid*, para 272, emphasis in the original.
71 *Ibid*, para 275.
72 *Ibid*.
73 *Ibid*, para 277, emphasis in the original.
74 *Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC) Case No ICC-02/05-01/09, Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009) ('*First Bashir Decision*').
75 *Ibid* at para 137.

Page 181: Contextual Element (ICC)
[insert before Specific Intent of Genocide (Dolus Specialis)]

In the *First Bashir Decision*, Pre-Trial Chamber I of the ICC also had the opportunity to interpret the contextual element and its impact on the definition of genocide.[76] The Chamber noted that the case law of the ICTY and ICTR has interpreted the definition of genocide in the Genocide Convention, the same as that provided in their respective Statutes, 'as excluding any type of contextual element, such as a genocidal policy or plan', such that the killing of a single individual, with the requisite special intent, is sufficient to constitute the crime of genocide. Accordingly, as the Pre-Trial Chamber reads the case law of the two Tribunals, in order to 'complete' the crime of genocide, 'it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof'.[77] By contrast, because of the inclusion of the contextual element in the Statute of the ICC, the majority of the Pre-Trial Chamber held that the crime of genocide would only be completed under the ICC Statute 'when the relevant conduct presents a concrete threat to the existence of the targeted group… In other words, the protection offered by the penal norm defining the crime of genocide – as an *ultima ratio* mechanism to preserve the highest values of the international community – is only triggered when the threat against the existence of the targeted group… becomes concrete and real, as opposed to just being latent or hypothetical.'[78]

In the *Second Bashir Decision*, Pre-Trial Chamber I examined the application of the contextual element.[79] After reviewing the evidence, and to the extent that it takes the matter any further, it held that 'as the attacks and acts of violence committed by GoS [Government of Sudan] against a part of the Fur, Masalit and Zaghawa groups were large in scale, systematic and followed a similar pattern… there are reasonable grounds to believe that the acts took place in the context of a manifest pattern of similar conduct directed against the targeted group.'[80]

Page 187: Proof of specific intent
[insert before Does specific intent always need to be proved?]

In *Munyakazi*, the Appeals Chamber of the ICTR confirmed that the specific intent necessary to found a conviction for committing genocide can be inferred from circumstantial evidence, including the accused's active participation in an attack.[81]

Page 188: Does specific intent always need to be proved?
[insert after footnote 626 at top of page]

In *Kalimanzira*, the ICTR Appeals Chamber confirmed that to satisfy the specific intent of genocide in the context of aiding and abetting, requires that 'the aider and abettor must know of the principal perpetrator's specific intent'.[82] The Appeals Chamber also reaffirmed the applicability to the context of genocide of the general rule that the principal perpetrator does not need to be aware of the assistance of the aider and abettor.[83]

76 *Ibid.*
77 *Ibid*, para 119.
78 *Ibid*, para 124.
79 *Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC) Case No ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest (12 July 2010) ('*Second Bashir Decision*').
80 *Ibid*, para 16.
81 *Prosecutor v Munyakazi* (ICTR) Case No ICTR-97-36A-A (28 September 2011), para 142.
82 *Prosecutor v Kalimanzira* (ICTR) Case No ICTR-05-88-A, Appeal Judgement (20 October 2010), para 86.
83 *Ibid*, para 87.

Kalimanzira had also been convicted of aiding and abetting genocide by his attendance at the inauguration of a *bourgmestre*, during which the killing of Tsutsis was called for. Killings allegedly directly followed the inauguration. The Appeals Chamber accepted that in light of the accused's position of authority, it was reasonable to conclude that his silent presence would have constituted tacit approval of the message. Confirming earlier Appeals Chamber case law to the effect that such tacit approval and encouragement can constitute aiding and abetting, provided the conduct also substantially contributes to the crime, the Appeals Chamber confirmed that where 'this form of aiding and abetting has been a basis of a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it" [citing to *Brđanin* Appeal Judgment[84]]'.[85] His conviction on this ground was nevertheless reversed due to a lack of evidence concerning the killings that allegedly followed the speech.

Page 211: Aggression
[insert before Torture]

Update on the crime of aggression

The major achievement of the first Review Conference of the ICC, which took place in Kampala, Uganda from 31 May to 11 June 2010, was the agreement on the definition of the crime of aggression and the consequent amendment to the ICC Statute that this required.[86] The definition of aggression adopted at the Review Conference on 11 May 2010 is in the terms set out at page 210 of the Manual. It has been inserted into the ICC Statute by resolution RC/Res 6 of 11 June 2010.[87] Also adopted at the Review Conference were new articles 15 *bis* and 15 *ter* of the ICC Statute, dealing with the exercise of jurisdiction over the crime of aggression, and new Elements of Crimes to cater for aggression. The ICC will only have jurisdiction over crimes of aggression committed one year after 30 States Parties have ratified or accepted the relevant amendments. Additionally, the ICC's jurisdiction will be 'subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute', in accordance with article 15 *bis* (3). The full text of the new articles of the ICC Statute and the Elements of Crimes follows:

84 *Prosecutor v Brđanin* (ICTY) Case No IT-99-36-A, Appeal Judgement (3 April 2007), para 277.
85 See above, n 108, para 74.
86 An overview of the Review Conference is available at www.iccnow.org/documents/RC_Report_finalweb.pdf.
87 Available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, accessed 21 May 2013.

'Article 15 bis

Exercise of jurisdiction over the crime of aggression

(State referral, ***proprio motu***)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 ter

Exercise of jurisdiction over the crime of aggression

(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.'

Elements of Crimes amendments

'Article 8 bis

Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term 'manifest' is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the 'manifest' nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.'

Agreement on the definition of the crime of aggression also meant that article 25(3) of the ICC Statute was amended, as to which see the update below to p 254 of the Manual. Finally, articles 9(1) and 20(3) of the Statute were replaced in order to include a reference to article 8 *bis*.

The implementing Resolution also adopted a number of 'understandings regarding the interpretation' of the amendments, which will be important guidance for how the definition is applied by the ICC. For the sake of completeness, the understandings are reproduced here:

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself.'

   In 12 May 2012, Liechtenstein deposited its instrument of ratification of the amendments to the ICC Statute on the crime of aggression, thereby becoming the first State Party to ratify the amendments. In early June 2013, the ratifications by Germany and Botswana brought this number to seven.

Page 220: Torture: Jurisdictional issues
[insert before Other relevant instruments]

For a discussion of a recent ICJ case concerning the duty of States Parties to the UNCAT to extradite or prosecute alleged torturers, please see the update to p 368, Extradition, below.

Page 229: Terrorism as a discrete international crime
[insert before Terrorism as a war crime]

The Manual points to the example of the STL as an international tribunal having jurisdiction over terrorism, albeit as defined in domestic (Lebanese) law.[88] For the purpose of deciding whether or not to confirm the indictment that had been submitted to him, the Pre-Trial Judge in Case No STL-11-01/I submitted a number of questions to the Appeals Chamber for resolution. One group of these

88 Manual, p 227.

questions concerned the notion of terrorism that the Tribunal had to apply: was international law to be examined for the definition of terrorism? If so, how were any discrepancies with the domestic definition to be reconciled? And in any event, what were the objective and subjective elements of the crime that had to be applied? The Appeals Chamber decided that the STL would apply the crime of terrorism as defined in Lebanese law, but interpreted in consonance with international law binding on Lebanon, in particular as expressed in treaties to which Lebanon was a State Party and as defined in customary international law.[89]

The Appeals Chamber held that a survey of treaties, resolutions and the legislative and judicial practice of states showed that 'a customary rule of international law regarding the international crime of terrorism, at least *in time of peace,* has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.'[90]

The Appeals Chamber found that there was sufficient state practice and the necessary *opinion juris* to establish the duty on states to suppress and punish acts of terrorism as defined above.[91] That these acts have also been sufficiently criminalised and that this was foreseeable to any Lebanese national at the time, was clear. The Chamber concluded as follows concerning the elements of the offence: 'In sum, the subjective element of the crime under discussion is twofold, (i) the intent or *dolus* of the underlying crime and (ii) the special intent *(dolus specialis)* to spread fear or coerce an authority. The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc). The crime of terrorism at international law of course requires as well that (ii) the terrorist act be transnational.'[92]

The Appeals Chamber concluded as follows: 'To sum up, we hold that the Tribunal must apply the crime of terrorism as defined by Lebanese law. There are two significant differences between the crime of terrorism under international customary law and under the Lebanese Criminal Code. First, under the former but not the latter, the underlying conduct must be a crime, which means the perpetrator must also harbour the *mens rea* required for that crime in addition to the special intent required for the crime of terrorism. Instead, under Lebanese law the results of terrorist acts such as deaths, destruction of property and other impacts designated in Article 6 of the Law of II January 1958 constitute an aggravating circumstance of the terrorist act *(not* a material element); thus in the cases submitted to the Tribunal, the Prosecutor will have to prove only that the underlying act was volitional, in addition to the special intent to 'cause a state of terror'. Second, under the latter but not the former, the means used for perpetrating the terrorist act must be of a type that will endanger the public. The type of means that can create a public danger has been interpreted rather narrowly

89 Case No STL-11-01/I/AC/R176bis Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (16 February 2011) ('*Terrorism Decision*'), paras 43—46.

90 *Ibid*, para 85.

91 *Ibid*, para 102.

92 *Ibid*, para 111. The Chamber compared the international offence of terrorism thus defined with the domestic offence and concluded: 'A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is much *broader* with regard to the means of carrying out the terrorist act, which are not limited under customary international law, whereas it is *narrower* in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act, and (iii) it involves a transnational element'. *Ibid*, para 113.

by some Lebanese courts in the past. We have explained why this Tribunal will instead apply a less narrow interpretation to the phrase "means liable to create a public danger", in light of international law binding on Lebanon and depending on the particular circumstances of the cases brought before it.'[93] This decision will henceforth doubtless form an important part of discussions concerning the definition of terrorism in international law.

Page 235: Multiplicity of offences
[insert before Concluding remarks]

Not only is cumulative charging permissible in international law, it is sometimes desirable. In the *Duch Judgement*, the Trial Chamber of the ECCC had subsumed individual crimes against humanity, which it had found the accused to be responsible for, into a single conviction: the crime against humanity of persecution on political grounds. In *Duch*, the Supreme Court Chamber held that this was not the proper way to deal with the multiple offences for which the accused bore responsibility. It held that while cumulative convictions would not substantially infringe the accused's rights, failing to convict cumulatively 'undermines the societal interests in describing "the full culpability of a particular accused or providing a complete picture of his criminal conduct."'[94] The accused had been found criminally responsible for some of the most serious underlying acts that qualify as crimes against humanity, while he had been convicted of persecution only: 'subsuming all of the other crimes against humanity for which the Accused was found responsible within a sole conviction for persecution instead of reaching cumulative convictions fails to sufficiently address the injury to each individual societal interest represented by proscriptions constituting different crimes against humanity.'[95] The proper application of the law as set out in the *Čelebići* Appeals Chamber judgment required the accused's cumulative conviction for the different crimes against humanity;[96] additional convictions in respect of extermination (encompassing murder), enslavement, imprisonment, torture and other inhumane acts were consequently entered against the accused.[97]

93 *Ibid*, para 145.
94 See above n 57, para 330, citing Trial Judgement.
95 *Ibid*, para 331.
96 *Ibid*, para 332.
97 *Ibid*, para 336.

Chapter 4 – Individual Criminal Responsibility

Page 254: Article 25 of the ICC Statute
[insert before Article 28 of the ICC Statute]

As a result of the adoption of the definition of the crime of aggression at the Review Conference in June 2010, the following text has been inserted after article 25, paragraph 3, of the Statute:

'3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.'[98]

Page 262: Direct and public incitement to commit genocide
[insert before Conspiracy to commit genocide]

In *Kalimanzira*, the Appeals Chamber of the ICTY confirmed the elements of direct and public incitement to commit genocide as they were set out in the *Nahimana* judgment: a finding of guilt may follow if the accused 'directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*)'.[99] Confirming that comments made to a small group of persons manning a roadblock could not constitute the crime of incitement, the Appeals Chamber pointed out that, with the exception of the Trial Chamber in *Kalimanzira* itself, 'all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area. These convictions involved audiences which were by definition much broader than the groups of individuals manning the Jaguar and Kajyanama roadblocks, who formed Kalimanzira's audience.'[100] The Appeals Chamber also referred to the fact that the *travaux preparatoires* of the Genocide Convention 'confirms that public incitement to genocide pertains to mass communications'.[101] Private incitement, such as contained in conversations or private meetings, were specifically excluded from the definition of genocide.[102] This restatement of the law on incitement has subsequently been followed by the Trial Chamber in *Ngirabatware*.[103] *Ngirabatware* also confirms the importance of context when assessing direct and public incitement; while confirming the distinction between hate speech and incitement referred to in the main body of the Manual, the Trial Chamber, relying once more on *Nahimana*, said: 'However, even when a speech contains no explicit appeal to commit genocide, it may still constitute direct incitement to commit genocide in a particular context, so long as the speech is not considered ambiguous within that context. In order to determine the speech's true meaning, it may be helpful to examine how it was understood by the intended audience. In the context of Rwanda, the culture

98 Available at www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, last accessed 21 May 2013.
99 See above n 108, para 155.
100 See above n 108, para 156.
101 *Ibid*, para 158.
102 *Ibid*.
103 *Prosecutor v Ngirabatware* (ICTR) Case No ICTR-99-54-T, Judgement and Sentence (20 December 2012) at paras 1352–1355.

and nuances of the Kinyarwanda language should be considered when determining what constitutes direct incitement to commit genocide.'[104]

Page 265: Direct and individual perpetration
[insert before Perpetration through a group]

The Appeals Chamber in *Kalimanzira* confirmed, in the context of genocide, that 'physical perpetration need not only mean physical killing and that other acts can constitute direct participation in the *actus reus* of the crime. The question is whether an accused's conduct "was as much an integral part of the genocide as were the killings which it enabled."'[105]

Page 275: Joint Criminal Enterprise
[insert after footnote 1086]

Update on Joint Criminal Enterprise (JCE)

While the elements of JCE in its various forms have become fairly settled, its applicability before some of the international courts and tribunals has not always been certain, as reflected in the Manual. This section provides a brief overview of how the doctrine has fared recently.

In the *Duch Judgement*,[106] the Trial Chamber of the ECCC accepted that the 'notion of commission through participation in a joint criminal enterprise is included in Article 29 (new) of the ECCC Law'.[107] The Trial Chamber also held that JCE in its basic and systemic forms (JCE I and II) were both part of customary international law by 1975 and thus applicable to the case before it. It was not called upon to decide the applicability of the extended form of JCE (JCE III).[108] The Trial Chamber therefore found, for instance, that the accused bore individual criminal responsibility for numerous crimes against humanity and grave breaches on the basis of the systemic version of JCE for acts committed in the S-21 detention centre.[109] The applicability of JCE was not raised by any party on appeal.

In Case No 002, the Co-Prosecutors had requested the Trial Chamber to retain the discretion to criminalise certain discreet conduct under JCE III in the event it was found that such conduct was not encompassed by the main theory of their case under JCE I. The Trial Chamber thus had to grapple with this question in its *Decision on the applicability of Joint Criminal Enterprise*.[110] The Trial Chamber confirmed the finding in the *Duch Judgement* to the effect that JCE I and II were both part of customary international law by 1975 and therefore part of the applicable law of the ECCC.[111] In respect of JCE III, however, the Trial Chamber held that, consistent with an earlier Pre-Trial Chamber decision, this form of liability was neither part of international customary law by 1975, nor a general principle of law during the relevant period.[112]

104 *Ibid*, para 1353.
105 See above n 108, para 219.
106 See above n 58.
107 *Ibid*, para 511.
108 *Ibid*, paras 512 and 513, respectively.
109 *Ibid*, para 516.
110 Case No 002/19-09-2007/ECCC/TC, Decision on the applicability of Joint Criminal Enterprise (12 September 2011) (*JCE Applicability*).
111 *Ibid*, para 22.
112 *Ibid*, paras 27, 29, 35, 37 and 38.

In the ICTY, where the concept of JCE originated, the doctrine, and its variants, are now well-established. A recent iteration of this mode of liability came in *Stanišić and Župljanin*,[113] and the Trial Chamber's judgment illustrates just how settled the law on JCE has become before the ICTY. The judgment reaffirms that there are three forms of JCE; that they all share the same physical elements (*actus reus*) as are set out at page 267 of the manual; and that these elements are still understood in the same terms.[114] Similarly, with respect to the required *mens rea* of forms JCE I and JCE III (the two forms charged in *Stanišić and Župljanin*), the Trial Chamber confirmed that the law is still as set out in the relevant passages in the Manual.

Furthermore, in *Stanišić and Simatović*, the Trial Chamber confirmed earlier case law to the effect that in relation to the first two elements of JCE liability (plurality of persons and common objective), 'it is the common objective that begins to transform a plurality of persons into a group, or enterprise, because what this plurality then has in common is the particular objective. It is evident, however, that a common objective alone is not always sufficient to determine a group, because different and independent groups may happen to share identical objectives. It is thus the interaction or cooperation among persons – their joint action – in addition to their common objective, that forges a group out of a mere plurality. In other words, the persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for crimes committed through the JCE.'[115]

Page 278: Co-perpetration doctrines
[insert before Ordering, instigating, soliciting and planning]

Lubanga, Kenyatta *and the doctrine of co-perpetration*

The judgment in the case of *Lubanga*,[116] apart from being the ICC's first trial judgment, also represented the first occasion on which a Trial Chamber of the ICC (as opposed to a Pre-Trial Chamber) would get to grapple with the notion of co-perpetration. Lubanga had been charged as a co-perpetrator under Article 25(3)(a) of the ICC Statute with the war crime of conscripting or enlisting children under the age of 15 or using children under that age to participate actively in hostilities.

113 See above n 47.
114 *Ibid*, paras 100–104.
115 *Prosecutor v Stanišić and Simatović* (ICTY) Case No IT-03-69-T, Judgement (30 May 2013), para 1259.
116 See above, n 19.

Whereas the Decision on the Confirmation of Charges had confirmed charges in relation to both internal and international armed conflict under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute, the Trial Chamber, after carefully reviewing the evidence on the issue, changed 'the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character'.[117] Therefore only Article 8(2)(e)(vii) of the Statute was applicable.

Regarding the individual criminal responsibility of the co-perpetrator, the Majority of the Trial Chamber held that the objective requirements of co-perpetration were: '(i) the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of the crime; and (ii) that the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime', a substantial contribution not being sufficient.[118] While the accused did not need to be present at the scene of the crime, it sufficed if 'he exercised, jointly with others, control over the crime'.[119] As for the mental element of this mode of liability, the Majority held that the prosecution needed to establish that '(i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence "will occur in the ordinary course of events"; and (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan.'[120]

The lesser mental requirement of 'should have known [that such person or persons were under 15 years]' was not charged in this case and so was not considered by the Trial Chamber. In addition, in relation to each charge, the prosecution also has to prove the contextual element that 'the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct'.[121]

Kenyatta*: 'indirect co-perpetration'*

Less than two months before the *Lubanga* judgment, Pre-Trial Chamber II had had the opportunity to examine once more the extended form of co-perpetration known as indirect co-perpetration in the confirmation of charges decision in *Kenyatta*.[122] Confirming what has become relatively settled ICC law, the Pre-Trial Chamber listed the elements of this mode of liability:

- the suspect must be part of a common plan or an agreement with one or more persons;
- the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime;

117 *Ibid*, para 566.
118 *Ibid*, para 1006.
119 *Ibid*, para 1005.
120 *Ibid*, para 1013.
121 *Ibid*, para 1018(v).
122 See above n 35.

- the suspect must have control over the organisation;
- the organisation must consist of an organised and hierarchal apparatus of power;
- the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect;
- the suspect must satisfy the subjective elements of the crimes;
- the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and
- the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).[123]

Page 279: Planning
[insert at the end of text, bottom of page]

Stanišić and Župljanin confirmed the elements of planning as set out at p 279 of the Manual. The Trial Chamber also reminded us that 'Planning can be done by one person acting alone. It is not necessary to establish that the crime at issue would not have been committed absent the accused's plan. An individual cannot be liable for planning a crime that was not actually committed.'[124]

Page 280: Instigating
[insert before Ordering]

Stanišić and Župljanin confirms the elements of instigating as set out at p 280 of the Manual.[125] The prompting need not be direct or public and there is no need to establish that the accused has any authority over the person committing the crime.[126]

Page 280: Ordering
[insert before Aiding, abetting or otherwise assisting]

Stanišić and Župljanin also makes clear that the requirements of a conviction for ordering remain in the terms summarised at p 280 of the Manual.[127]

123 *Ibid*, para 297.
124 See above n 47, para 94.
125 *Ibid*, para 95.
126 *Ibid*, para 96.
127 *Ibid*, paras 97–98.

Page 282: Aiding, abetting or otherwise assisting
[insert before Mental elements (*mens rea*)]

The Perišić *case and 'specific direction'*[128]

On 28 February 2013, the Appeals Chamber of the ICTY handed down its judgment in the *Perišić* case. Perišić had been the Chief of the Yugoslav Army (VJ) General Staff and, consequently, the VJ's most senior officer. He held this position over a period during which the VJ had given significant aid and logistical support to the Army of the Republika Srpska (VRS) and during which the VRS had been responsible for the commission of numerous crimes in Sarajevo and Srebrenica. The Trial Chamber had found Perišić to be guilty of the commission of these crimes as an aider and abettor. He was sentenced to 27 years' imprisonment. The Trial Chamber had reached its verdict on the basis that 'specific direction', the notion that the actions of the accused need to be specifically directed towards assisting the crimes of the principal perpetrators for a finding of aiding and abetting to be entered, was not a 'requisite element' of the *actus reus* of aiding and abetting. It had made this finding on the basis of the Appeals Chamber's earlier decision in *Mrkšić and Šljivančanin*, in which the Appeals Chamber had said that specific direction was not an 'essential ingredient' of the *actus reus* of aiding and abetting. In *Perišić*, the majority of the Appeals Chamber clarified that specific direction was indeed a necessary element of the *actus reus* of aiding and abetting, the 'culpable link between assistance provided by an accused individual and the crimes of principal perpetrators'.[129] It found that while previous judgments had not always specifically referred to or analysed this requirement, it had often not been necessary to do so in circumstances where it could be inferred from, for instance, the temporal or geographic proximity of the acts of the accused to the acts of the principal perpetrator, or where the separate element of substantial contribution demonstrated the specific direction. The Appeals Chamber held that whenever the provision of general assistance could be used for both lawful and unlawful activities, then it would be necessary for the evidence to establish a 'direct link between the aid provided by an accused individual and the relevant crimes committed by the principal perpetrators'.[130] The complexity of the approach adopted by the Appeals Chamber is illustrated by the multiple tests it found it necessary to employ in order to determine whether Perišić specifically directed assistance to the commission of VRS crimes: see paragraphs 47, 51 and 52. Employing these tests, the majority of the Appeals Chamber held that the evidence did not establish that Perišić had specifically directed the assistance and aid in question to the commission of crimes by the VRS. His convictions on this basis were reversed.

The decision has not been universally welcomed. See, for instance, the cogent criticism at http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1.

128 *Prosecutor v Perišić* (ICTY) Case No IT-04-81-A, Appeal Judgment (28 February 2013).
129 *Ibid*, para 37.
130 *Ibid*, para 44.

It is difficult to square *Perišić* with the Appeals Chamber's judgment of December 2012, in *Lukić and Lukić*,[131] despite the Appeals Chamber in *Perišić* attempting to do so. In *Lukić*, one of the accused directly raised the issue on appeal of the Trial Chamber having applied an 'incomplete' *actus reus* in that it did not require that his actions had been specifically directed at assisting the principal perpetrators. While the Appeals Chamber rehearsed much of the same jurisprudence on the issue as the differently constituted Appeals Chamber in *Perišić* did, to the effect that specific direction had not always been included as an element of aiding and abetting and that it would often be implicit in a finding of the accused having provided practical support, it specifically held that the issue had subsequently been 'clarified' by the Appeals Chamber and that specific direction 'is not an essential ingredient of the *actus reus* of aiding and abetting' and found that there was no cogent reason to depart from that jurisprudence.[132] On that basis, it rejected the accused's appeal on this point. It is not clear what the result would have been had the Appeals Chamber felt constrained to apply the requirement of specific direction.

It is also instructive to compare *Perišić* with the outcome of the *Taylor* case before the SCSL: Trial Chamber II handed down its judgment against the former president of Liberia in April 2012, convicting Taylor on, amongst other bases, the fact that he aided and abetted the commission of certain crimes.[133] Basing its decision in part on the ICTY Trial Chamber's finding in *Perišić*, to the effect that the '*actus reus* of aiding and abetting does not require "specific direction"',[134] the Trial Chamber held that this form of liability consists of the physical elements of (i) providing practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offence and (ii) such assistance, encouragement, etc, had a substantial effect upon the commission of the crime.[135] The mental element of aiding and abetting requires that the accused '(i) … performed an act with the knowledge that such act would assist the commission of a crime or underlying offence, or that he was aware of the substantial likelihood that his acts would assist the commission of underlying offence; and (ii) the Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender'.[136] Using that framework, and after reviewing the relevant evidence, the Trial Chamber concluded that Taylor was criminally responsible under Article 6(1) of the SCSL Statute for aiding and abetting the commission of crimes.

It cannot be said with certainty what the outcome would have been had the Trial Chamber had to employ 'specific direction'. Given that the Defence appeal notice in *Taylor* predated the Appeals Chamber decision in *Perišić*, this issue was not included in that notice. In a decision of 20 March 2013, the Appeals Chamber, noting that it was aware of the ICTY Appeals Chamber's decision in *Perišić*, denied a prosecution motion to file additional written submissions on the decision, considering that additional submissions by the parties were unnecessary.[137]

131 *Prosecutor v Lukić and Lukić* (ICTY) Case No IT-98-32/1-A, Appeal Judgement (4 December 2012).
132 *Ibid*, para 424.
133 *Prosecutor v Charles Ghankay Taylor* (SCSL) Case No SCSL-03-1-T, Judgment (26 April 2012).
134 *Ibid*, para 484.
135 *Ibid*, para 482.
136 *Ibid*, para 486.
137 *Prosecutor v Charles Ghankay Taylor* (SCSL) Case No SCSL-03-01-A, Decision on Prosecution Motion for leave to file additional written submissions regarding the ICTY Appeals Judgment in Perišić (20 March 2013).

The judgment of the Trial Chamber in *Stanišić and Župljanin* confirms that as far as the other elements of aiding and abetting liability are concerned, the law remains as set out at pp 280–282 of the Manual.[138]

Page 283: Complicity in genocide
[insert before Superior or command responsibility]

Ngirabatware confirms, unfortunately, that the lack of clarity highlighted in the body of the Manual concerning the possibly different forms of *mens rea* that might apply in the case of aiding and abetting and other forms of complicity in genocide (instigating or procuring of genocide), persists in the jurisprudence of the ad hoc Tribunals: 'Complicity in genocide by aiding and abetting requires knowledge of the specific genocidal intent of the principal perpetrators, while the other forms of complicity may require proof that the accomplice shared that specific intent.'[139] The Trial Chamber also reaffirms the potentially removed nature of the accomplice's involvement: 'The accomplice's criminal participation may occur before or after the act of the principal perpetrator, and the accomplice need not be present during the commission of the crime.'[140]

Page 288: Superior or command responsibility
[insert before *Prosecutor v Naser Orić* grey box]

Stanišić and Župljanin confirms, in large measure, that the law on superior responsibility remains as set out at pp 283–288 of the Manual. In particular, the elements of this mode of liability are confirmed,[141] as are the essential characteristics of the requisite *actus reus*[142] and *mens rea,*[143] and the superior–subordinate relationship[144] It is, however, worth highlighting the following points: while civilian superiors 'often may not have the direct power to punish subordinates; however, effective control may be found if they have the authority to report to the appropriate authorities and these reports are likely to trigger an investigation'.[145] Furthermore, there must be a 'temporal concurrence' between the effective control of the superior and the subordinate's underlying acts (he can't be liable for crimes committed by those who were not under his command at the time); a superior can be liable for the criminal acts of a subordinate, no matter how far the chain of command the perpetrator is, including in respect of an intermediary who has committed crimes through intermediaries; the relationship between superior and subordinate does not have to be permanent; and the superior does not have to know the identity of the subordinate.[146]

Before the ECCC, the Trial Chamber in *Duch* found that it was satisfied that the accused's criminal liability could also be established on the basis of superior responsibility,[147] which had been charged as an alternative mode of criminal liability. Because the accused was also guilty on the basis of direct forms of responsibility, the Trial Chamber only took his superior responsibility into consideration

138 See above n 47, paras 107–108.
139 See above n 131, para 1347.
140 *Ibid.*
141 See above n 47, at para 109.
142 *Ibid*, paras 116–117. Paragraph 117 of the judgment provides examples of the kinds of 'necessary and reasonable' measures that can be undertaken.
143 *Ibid*, para 115.
144 *Ibid*, paras 111–114.
145 *Ibid*, para 113.
146 *Ibid*, para 114.
147 See above n 58, para 549.

as an aggravating factor in sentencing.[148] However, in arriving at that conclusion, the Trial Chamber reviewed the relevant law in this area and, as far as applicable in the case before it, confirmed its central tenets before the ECCC.[149]

Page 304: Amnesty

[insert after box: Article 11(1) of the ECCC Agreement]

The accused Ieng Sary brought a preliminary objection before the Trial Chamber of the ECCC arguing that the Court lacked jurisdiction to try him as a result of an amnesty and pardon granted him by Royal Decree in 1996. The pardon related to an *in absentia* conviction for genocide rendered by a court in 1979. Article 11(2) of the agreement between the UN and the Cambodian Government states that 'the scope of this pardon is a matter to be decided by the Extraordinary Chambers'. In its decision on this preliminary objection to its jurisdiction, the Trial Chamber, noting that the issue of amnesty and pardon had previously been litigated on a number of occasions before the ECCC, confirmed the previous jurisprudence and held that the 1979 trial was not conducted by an impartial and independent tribunal and that the deficiencies affecting that trial meant that it was 'incapable of producing valid legal effects'. This meant the sentences pronounced could not be subject to pardon.[150] The 1979 trial could therefore also not form the basis of a successful *ne bis in idem* challenge. Furthermore, international prohibitions on double jeopardy, such as those found in the ICCPR, only prohibit such proceedings before domestic courts, and not before internationalised courts such as the ECCC. As regards the purported amnesty from future prosecution, the Chamber concluded that international treaties placed Cambodia under an absolute obligation to prosecute grave breaches of the Geneva Conventions and acts of genocide and torture, such that the Royal Decree could not be construed as granting immunity for those offences.[151] Concerning crimes against humanity, the Chamber held that an 'emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators'.[152] While there was not yet an absolute prohibition of amnesties in relation to them, the Chamber decided that it had a 'discretion to attribute no weight to a grant of such amnesty which it considers contrary to the direction in which customary international law is developing and to Cambodia's international obligations'.[153] It therefore refused to extend the terms of the Royal Decree to the other serious international crimes with which the accused was charged.

148 *Ibid.*
149 *Ibid*, paras 538–547.
150 Case No 002/19-09-2007/ECCC/TC, Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon) (3 November 2011) ('*Amnesty Decision*'), para 30.
151 *Ibid*, para 39.
152 *Ibid*, para 53.
153 *Ibid*, para 54.

Page 320: Defences: Duress (and necessity)
[insert before Superior Orders]

The Trial Chamber in *Duch*, noting that there was no express provision on duress before the ECCC, relied on the position of the ICTY Appeals Chamber in *Erdemovic*.[154] The Chamber recounted the accused's participation in, and zeal for, the policy that led to the crimes committed, and held that while he may at times have feared that he or his close relatives would be killed if his conduct was found to be unsatisfactory, nevertheless concluded that: '[D]uress cannot however be invoked when the perceived threat results from the implementation of a policy of terror in which he himself has willingly and actively participated.'[155] The accused could not, therefore, rely on this defence either so as to exclude criminal responsibility or in mitigation.

Page 322: Defences: Superior orders
[insert before Military Necessity]

Article 29(4) of the ECCC Law provides: 'The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.' In *Duch*, the Trial Chamber referred to the general position that adherence to superior orders was not a legitimate defence to crimes against humanity and war crimes, and also cited Article 33 of the ICC Statute. It concluded that the accused could not in any event avail himself of this defence because he knew that 'orders to kill, torture and arbitrarily detain persons protected under the Geneva Conventions were unlawful'[156] and it inferred that the accused knew that the acts that constituted grave breaches of the Geneva Conventions were criminal acts; the accused therefore also knew that orders to commit such acts were unlawful. The Supreme Court Chamber confirmed that because the accused knew of the illegality of the superior orders he may have received, no mitigating effect could be attached to them.[157]

154 Discussed in the Manual at pages 317–318.
155 See above, n 58, para 557.
156 *Ibid*, para 552.
157 *Ibid*, para 365.

Chapter 5 – Prosecution before National Courts

Page 354: Impact of international law on national prosecution
[insert in grey box Article 7(1) of the Torture Convention]

For a discussion of a recent ICJ case on the obligation of a state party to the UNCAT to extradite or prosecute under this provision, see update to p 368, Extradition, below.

Page 355: Impact of international law on national prosecution
[insert before Specially established national courts]

On 10 May 2013, Efrain Rios Montt, former military dictator of Guatemala, was convicted before a Guatemalan court of genocide and crimes against humanity for crimes committed during his brief period as head of state from 1982-1983, one of the first, if not the first, occasion on which a former head of state has been convicted of genocide.[158] He was sentenced to 80 years' imprisonment. On 20 May 2013, the Guatemalan Constitutional Court overturned his convictions and ordered that the trial be restarted from the point it had reached on 19 April 2013.[159] No English version of the trial judgment or the law on which the prosecution was based, was available as at 23 May 2013. The Constitutional Court's decision, in the original Spanish, is available online.[160] The potential importance of this development certainly warrants close attention.

Page 368: Extradition
[insert before Double criminality and double jeopardy]

*ICJ (*Belgium v Senegal*): 'Extradite or prosecute under the UN Convention Against Torture'*

In July 2012, the International Court of Justice (ICJ) handed down its judgment in *Questions relating to the obligation to prosecute or extradite.*[161] Belgium had, for a long time, sought the extradition from Senegal of the former Chadian president, Hissène Habré, for crimes, including torture, allegedly committed while he was in power between 1982 and 1990. It had been unsuccessful in these attempts and so brought a case against Senegal, where Habré had been living since his exile in 1990. Belgium invoked Article 30 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984) (UNCAT) as the basis of the Court's jurisdiction as both Belgium and Senegal are States Parties to the Convention. Under the UNCAT, each State Party undertakes to ensure torture is criminalised under its law (Article 4); that it establishes jurisdiction over torture

158 See www.riosmontt-trial.org/2013/05/718-page-rios-montt-judgement-released-all-eyes-on-constitutional-court/; www.hrw.org/news/2013/05/10/guatemala-rios-montt-convicted-genocide.

159 See www.riosmontt-trial.org/2013/05/constitutional-court-overturns-rios-montt-conviction-and-sends-trial-back-to-april-19; www.nytimes.com/2013/05/21/world/americas/guatemalas-highest-court-overturns-genocide-conviction-of-former-dictator.html?src=un&feedurl=http%3A%2F%2Fjson8.nytimes.com%2Fpages%2Fworld%2Famericas%2Findex.jsonp (both last accessed 21 May 2013).

160 See www.right2info.org/resources/publications/constitutional-court-judgment-5.20.2013, last accessed 23 May 2013.

161 *Belgium v Senegal*; available at www.icj-cij.org/docket/files/144/17064.pdf, last accessed 13 May 2013 ('*Extradition Judgment*').

offences in specified circumstances (Article 5); that a state upon whose territory a person accused of torture offences is found will take that person into custody and 'immediately make a preliminary inquiry into the facts' (Article 6); and that such state shall, if it does not extradite the person taken into custody, 'submit the case to its competent authorities for the purpose of prosecution' (Article 7). Complainants, Chadians and some persons bearing duel Belgian-Chadian nationality, had laid complaints before an investigating magistrate in Belgium. An investigation was initiated and in 2005 an international warrant of arrest in respect of Habré was issued. The matter was complicated by the refusal of Senegalese courts to extradite Habré, as a former head of state, to Belgium. Senegal also referred the matter to the African Union (AU). The AU mandated Senegal to try Habré and indicated that it would provide the support necessary for an effective trial. In response to further requests by Belgium, Senegal appeared to suggest that since it had now referred the matter to the AU, the judicial stage of proceedings was at an end. Belgium then took the matter to the ICJ, but not before Senegal had amended its domestic legislation to bring it into line with its international obligations, including under the UNCAT. Before the ICJ, Senegal argued that due to its legislative reforms, there was no longer a breach of its obligations to implement the UNCAT and, therefore, no jurisdictional base for the claims. The Court agreed on this point, but decided that there remained the alleged breach of Articles 6 and 7 of the UNCAT regarding the duty to investigate and extradite or prosecute. On admissibility, the Court agreed with Belgium that the victims' nationalities were irrelevant due to the obligation of all States Parties to take steps to put an end to the practices proscribed under the UNCAT. On the merits, the Court found Senegal had breached its obligations under the UNCAT in several respects: 'The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution';[162] the Court also held that Senegal had breached its duty under Article 6(2) of the UNCAT by failing to carry out the preliminary investigation required to corroborate, or not, the allegations made against the person in question. Senegal ought to have taken these steps as soon as the suspect was identified on its territory and, at the latest, once a complaint against him was filed in Senegal in 2000. The Court held that, under Article 7(1) of the UNCAT, a state has a duty to submit the case to its competent authorities for the purpose of prosecution regardless of whether or not an extradition request has been received from another state. The duty to prosecute is thus an independent, international obligation under the UNCAT ('the violation of which is a wrongful act engaging the responsibility of the State',[163] whereas extradition is merely an option the UNCAT gives to the state in the event another state makes such a request. The Court also determined that neither the referral of the matter to the AU, nor Senegal's financial constraints, had any bearing on its obligations under the UNCAT, and did not justify Senegal's failure to institute proceedings against Habré. Consequently, the Court ordered Senegal to take 'without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr Habré'.[164]

162 *Extradition Judgment*, n 158, para 76.
163 *Extradition Judgment*, n 158, para 95.
164 *Extradition Judgment*, n 158, para 121.

The case is a fascinating study of the interplay of treaty law obligations, obligations under international customary law, the relationship between international and domestic law, and the role of regional inter-governmental organisations, such as the AU, in resolving international disputes. The upshot of the ICJ's Judgment is the establishment of the Extraordinary African Chambers within Senegal's existing court structure in order to try Habré, as to which, see the brief addendum to p 76 above.

Page 371: Bars to Extradition

[insert before Other considerations relating to extradition]

In *Ahorugeze v Sweden*, the European Court of Human Rights considered the effect of Articles 3 and 6 of the European Convention on Human Rights in the context of the proposed extradition of the applicant who alleged his proposed extradition from Sweden to Rwanda to face charges of genocide would violate his rights under Articles 3 (prohibition of torture) and 6 (fair trial rights) of the Convention.[165] Among other grounds, the Court rejected his contention that he would be persecuted because of his ethnicity, as there was no evidence that suggested a general situation of persecution or ill treatment of Hutu peoples in Rwanda. The Court also noted that none of the ICTR or national cases which had previously declined to extradite individuals to Rwanda had been based on such a consideration. The Court also declined to accept his argument that prison conditions in Rwanda would violate his Article 3 rights, given that the Rwandan Government had provided assurances as to where he would be detained and that numerous other courts had found that the specific prisons referred to complied with international standards.[166] The Court found no evidence that he would be tortured in prison.[167]

As to his challenge under Article 6, the Court, accepting that the 'flagrant denial of justice' test is a stringent one,[168] decided that in the absence of evidence showing that there are substantial grounds for believing he would be exposed to a real risk of suffering such a denial, such a challenge could not be sustained. The Court highlighted recent improvements in the Rwandan justice system, such as the abolition of the death penalty and of life imprisonment in isolation. In respect of the central issue in the case, the applicant's ability to obtain witnesses in his defence in Rwanda and ensure the consideration of his evidence, the Court pointed to improvements in the witness protection programme and to new avenues for the recording of witness testimony, including the making of depositions in Rwanda or abroad and the use of video-link technology and held that there was no reason to believe the applicant's ability to adduce evidence and have it considered would be circumscribed in a manner inconsistent with Article 6.[169] The Court thus concluded that the applicant's extradition to Rwanda would not constitute a breach of either Article 3 or 6 of the Convention.

It should be noted that the persons whose extradition was blocked by the British High Court in *Brown*[170] have subsequently been re-arrested and have appeared in court once more in June 2013. Their extradition hearing is scheduled to commence later in the year.

165 *Ahorugeze v Sweden* (Application no 37075/09), 27 October 2011 (the judgment became final on 4 June 2012).
166 *Ibid*, para 95.
167 *Ibid*, para 92.
168 *Ibid*, para 115.
169 *Ibid*, para 123.
170 *Brown and others v Government of Rwanda and another* [2009] EWCH 770 (Admin).

Chapter 6 – Prosecution before the International Courts and Tribunals

Page 386: Complementarity
[insert before Cooperation under the ICTY, ICTR and ICC]

Kenya

Complementarity and related issues of admissibility were always likely to prove contentious for the ICC, particularly during the early part of its life, and this has proved to be the case. The *Kenya* situation represented the first occasion in which a state directly challenged admissibility of a case on the basis that it was being investigated by the state concerned, which state had jurisdiction over the case. The challenge, brought pursuant to Articles 17(1)(a) and 19(2)(b) of the ICC Statute, was dismissed by the Pre-Trial Chamber and was then appealed to the Appeals Chamber on the basis of alleged legal, factual and procedural errors. The first point of interest in the decision of the Appeals Chamber is confirmation, that 'a State that challenges the admissibility of a case bears the burden to show that the case is inadmissible'.[171] This is perhaps surprising in the context of a system that is premised on the primacy of national jurisdiction: in such a system, might it not be preferable to expect the Court (broadly defined as including the judges, prosecutor and, perhaps even the Registrar) to justify usurping, as it were, the national system's jurisdiction in a particular case? That is not, however, the case. The Appeals Chamber went on to explain that: 'To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.'[172] The Appeals Chamber therefore dismissed the contention that the state concerned did not need to provide details of the investigation and that it had to take the statements of the government concerned as accurate and in good faith in the absence of 'compelling evidence to the contrary'.[173]

The primary legal error alleged by Kenya was that the Pre-Trial Chamber erred in interpreting Article 17(1)(a) as requiring the investigation to cover the same person and the same conduct; rather the test should refer to the same conduct 'in respect of persons at the same level in the hierarchy being investigated by the ICC'.[174] The Appeals Chamber rejected this argument. Noting that this was the first time the Appeals Chamber had ruled on the correctness of the 'same person' element of the test, the Appeals Chamber held that the 'meaning of the words "case is being investigated" in article 17(1)(a) of the Statute must... be understood in the context to which it is applied... article 19 of the Statute relates to the admissibility of concrete cases. The cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61… Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17(1)(c) and 20(3) of the

171 *Situation in the Republic of Kenya: Prosecutor v Ruto, Kosgey & Sang* and *Prosecutor v Muthaura, Kenyatta & Hussein Ali* (ICC), Case Nos ICC-01/-09-01/11 and ICC-01/09-02/11, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' (30 August 2011) ('*Kenya Admissibility*'), para 61.
172 *Ibid.*
173 *Ibid*, para 62.
174 *Ibid*, para 27.

Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20(3)(a) or (b) of the Statute are met. Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.'[175] The Court also noted that 'determining the existence of an investigation must be distinguished from assessing whether the State is "unwilling or unable genuinely to carry out the investigation or prosecution", which is the second question to consider when determining the admissibility of a case.'[176] The admissibility challenge thus failed.

Libya

The government of Libya has subsequently also brought an application under Article 19(2)(b) of the ICC Statute to challenge the admissibility of the case against Saif Al-Islam Gaddafi,[177] also on the basis that investigations into alleged criminal conduct by the accused are ongoing in Libya. Trial Chamber I decided that the evidence submitted by Libya as support for its admissibility challenge did not allow the Chamber to 'discern the actual contours of the national case against Mr Gaddafi such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court. Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court.'[178] More importantly, perhaps, the Chamber, applying Article 17(3) of the ICC Statute, then went on to determine that Libya was genuinely unable to carry out the requisite investigation. This was due to its national system, or aspects of it, being 'unavailable' as that term is understood in the Statute. Libya was thus 'unable to obtain the accused' and the necessary testimony and was also 'otherwise unable to carry out [the] proceedings.'[179] This conclusion was based on the fact that Gaddafi was still under the control of the Zintan militia who had captured him, and there was no prospect of the central government gaining control of him soon. The Chamber also expressed concern over the apparent inability of the Libyan government to gain the necessary testimony and provide adequate witness protection, also noting various instances of torture of high-level detainees. The failure to exercise control over all detention facilities would also adversely affect the investigation against Gaddafi. The fact that the accused had also not been able, or allowed, to appoint a lawyer thus far, was a further factor that the Chamber considered impeded the progress of domestic proceedings. Overall, the Chamber held that Libya was, at the time of the decision, unable genuinely to carry out an investigation against the accused and declared the case admissible before the ICC.

175 *Ibid*, paras 38 and 39.

176 *Ibid*, para 40.

177 *Prosecutor v Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi* (ICC), Case No ICC-01/11-01/11, Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute (1 May 2012). See also Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi (23 January 2013).

178 *Prosecutor v Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi* (ICC), Case No ICC-01/11-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi (31 May *2013)('Gaddafi Admissibility Decision*'), para 135.

179 *Ibid*, para 205.

Page 391: Cooperation under the ICTY, ICTR and ICC
[insert before Organisation of the international tribunals]

The ICC and state cooperation: the case of Sudan

The cooperation model of state assistance has faced early and stubborn resistance in the Darfur situation. Without recounting the entire history of the failure of certain states to comply with their obligations to the ICC, whether as States Parties or as members of the UN, suffice it to say that two arrest warrants issued in respect of President Omar Al-Bashir of Sudan have not been acted upon, despite that fact that he has travelled relatively freely to neighbouring states and further afield in Africa. We need only recount the latest episode in this saga to provide a sense of what the cooperation model looks like in action, and of its inherent limitations.[180]

In February 2013, Pre-Trial Chamber II was notified by the Prosecutor that Al-Bashir might soon be visiting Chad and Libya, the former, a State Party to the ICC Statute and a serial non-cooperator in executing the arrest warrant against Al-Bashir, the latter, not a State Party. Consequently, having rehearsed all the relevant provisions of the ICC Statute concerning cooperation, Security Council resolutions and earlier decisions and orders of the Court, the Pre-Trial Chamber issued an order on 15 February 2013 in which it confirmed that the Republic of Chad, as a State Party to the ICC Statute, 'is under the obligation, in accordance with articles 86 and 89 of the Statute, to execute the pending Court's decisions concerning the arrest and surrender of Omar Al-Bashir.'[181] The Chamber also pointed to its power to refer any consequent non-cooperation to the Assembly of States Parties or, where the Security Council had referred the matter to the ICC, as in the present case, to the Security Council itself.[182] The Chamber went on to highlight Libya's obligation to cooperate under Security Council resolutions. The Chamber then instructed the Registry to send *notes verbales* to the states enquiring about the visits and to transmit the order immediately to Chad and Libya, and prepare a report in due course on the potential visits.

When the inevitable visits took place, the Pre-Trial Chamber was once again seized of the matter. The Registry, having confirmed that the visit to Chad had taken place, observations were requested from the state concerned. Because Chad then missed the deadline to submit observations, the Chamber held that it had waived its right to be heard on the matter and disregarded Chad's observations. The Chamber found that Chad 'continues to welcome the visits of Omar Al-Bashir on its territory without any attempt to arrest him… By so doing, the Government of the Republic of Chad is engaging in a consistent pattern of deliberately disregarding not only the Court's decisions and orders related to its obligation to cooperate

180 While beyond the scope of this work, it is important, however, to keep in mind the political context when considering this area: the relationship between the ICC and the continent where it has thus far directed the bulk of its investigative and prosecutorial effort and resources, Africa, has often been fraught, with some African states and commentators alleging an unfair targeting of African states. There is a large quantity of literature available online dealing with this fascinating topic.

181 *Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC), Case No ICC-02/05-01/09, Order Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad and to the State of Libya (15 February *2013)('Bashir Order*'), para 10.

182 *Ibid*, para 11.

in the arrest and surrender of Omar Al-Bashir, but also the Security Council Resolution 1593 (2005). This course of action calls upon the Security Council to take the necessary measures it deems appropriate.'[183] The Chamber also pointed out that referrals by the Security Council will be futile unless the Council takes appropriate action in the event of state non-compliance. The Chamber made a formal finding of non-compliance on the part of Chad and referred its decision to both the Security Council and the Assembly of States Parties. If history is anything to go by, these referrals will unfortunately have little practical effect.

Page 415: Equality of arms
[insert before Right to a public hearing]

Lubanga and Banda & Jerbo*: Fair trial rights, intermediaries and stays of proceedings*

Conducting trials before any of the international courts and tribunals makes special and, sometimes, unexpected demands of counsel, whether for the prosecution or defence. Two examples of these kinds of problems, which potentially affect the accused person's fair-trial rights, are briefly discussed below, together with one method of addressing such potential breaches of those rights.

In *Lubanga*, the prosecution had to rely on the assistance of third parties, not employed by or under the formal control of the ICC, to conduct part of its investigations. The use of these so-called 'intermediaries', 'ie, persons who have introduced witnesses to the Prosecutor or who have contacted witnesses on his behalf',[184] has generated a jurisprudence all by itself, which, due in part to the complex nature of the factual underpinnings of the issue, will not be reviewed in its entirety here. Upon evidence having been received that certain intermediaries may have influenced the evidence of witnesses they contacted, the Trial Chamber ordered certain intermediaries to be called to give evidence directly, and the identity of another such person to be disclosed to the defence to enable them to carry out meaningful investigations and secure a fair trial for the accused.[185] The Prosecutor had refused to disclose the identity and, in the circumstances, the Trial Chamber then decided that to stay the proceedings as an abuse of process was the only appropriate remedy, as a fair trial was no longer possible and because it had lost control of the trial.[186] While the Appeals Chamber later overruled the Trial Chamber (finding as a fact that it had not yet lost control of the trial), it did confirm the

183 *Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC), Case No ICC-02/05-01/09, Decision on the non-compliance of the Republic of Chad with the Cooperation Requests issued by the Court regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (26 March 2013) ('*Bashir Cooperation Decision*'), para 21.

184 *Prosecutor v Thomas Lubanga Dyilo* (ICC), Case No ICC-01/04-01/06, OA 18, Appeals Chamber Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU' (8 October 2010) *('Lubanga Stay Appeal*'), para 4.

185 *Prosecutor v Thomas Lubanga Dyilo* (ICC), Case No ICC-01/04-01/06, Related decision on intermediaries (31 May 2010) *('Lubanga Intermediaries Decision*'), para 143.

186 *Prosecutor v Thomas Lubanga Dyilo* (ICC), Case No ICC-01/04-01/06, Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU (8 July 2010) *('Lubanga Stay Decision*').

notion that a stay of proceedings would be the appropriate remedy in certain situations to ensure a fair trial, although this would always be an exceptional measure of last resort.[187]

In *Banda & Jerbo*, the defence confronted the particular challenges of defending persons accused of crimes in a country – Sudan – that is not cooperating with the ICC. Except for a brief period early in its investigation into the Darfur situation, Sudan has not allowed persons working for or with the ICC, whether prosecution or defence, into the territory of Sudan to carry out investigations. Defence counsel and investigators, therefore, may not visit the scene of alleged crimes to try to find relevant witnesses, or do any of the things that would be considered standard, and often essential, in preparing a criminal defence case. This factor, amongst others, led the defence in the *Banda & Jerbo* case to apply for a temporary stay of proceedings before the Pre-Trial Chamber, until such time as conditions had changed to the extent necessary to permit the carrying out of these investigative activities. It based its application in part on alleged breaches of the rights enshrined in Article 67(1) and, in particular, in paragraphs (b) 'adequate time and facilities for the preparation of the defence' and (e) '… obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her… and to present other evidence admissible under this Statute'. The Pre-Trial Chamber dismissed the application.[188] After confirming that the Court had the inherent power to stay proceedings if it was in the interests of justice to do so or to remedy breaches in its process, this was an exceptional remedy, 'when the specific circumstances of the case render a fair trial impossible'.[189] Accepting that such an application would need to be 'properly substantiated',[190] the Chamber held that the present application did not meet the required high threshold. The majority of the Trial Chamber held that for the unavailability of evidence to ground a successful stay application, the unavailable evidence would need to relate to the 'heart of the case', that is, go to the contested issues, although it would not be necessary to show that the absence of the evidence would have a 'decisive impact' on the outcome of the case, as this would be too onerous on the defence.[191] The defence is, however, required to identify the missing evidence with 'sufficient specificity' in light of the information available to it. Relying on principles drawn from national jurisdictions, the Chamber also required that '[The] evidence must both possess an apparent exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Mere speculation for which there is no evidential support falls short of that mark.'[192] The Chamber held that the fair-trial rights referred to above do not include an absolute right to on-site investigations, that a fair trial had not become an impossibility: the Trial Chamber would have to be alert to potential unfairness in the trial and take steps to guard against it arising from the unavailability of certain

187 See above, n 245.

188 *Prosecutor v Banda & Jerbo* (ICC), Case No ICC-02/05-03/09, Decision on the defence request for a temporary stay of proceedings (26 October 2012) ('*Banda Stay Decision*'). The bulk of the defence submissions are summarised at paras 3–14. Additional submissions regarding the breach of Articles 67(1)(b) and (e) are summarised at para 44.

189 *Ibid*, para 78, relying on earlier Appeals Chamber jurisprudence.

190 *Ibid*, para 90.

191 *Ibid*, para 92.

192 *Ibid*, para 95.

evidence.[193] Given the nature of the problems experienced by the defence in this case, as well as in other cases, it is likely that further such applications will be made in future. While these decisions are necessarily heavily fact-specific, and include much detailed discussion of issues that cannot be summarised here, they do provide a good overview of the difficulties many international trials throw up, and of the problems these pose for the protection of fair-trial rights.

Page 430: Indictment

[insert before Preparation for the trial]

Confirmation of charges under Article 61 of the ICC Statute

In the still relatively short life of the Court, confirmation proceedings under Article 61 of the ICC Statute have undergone quite a change: from proceedings that defence counsel may initially have viewed with some scepticism, they have evolved into a potentially powerful tool for sifting out weak cases at an early stage in proceedings, and without the need for a full trial. The applicable legal standard at confirmation requires the prosecution to support each charge in the document containing the charges with sufficient evidence to allow the Pre-Trial Chamber to find that there are 'substantial grounds to believe' that the crimes alleged have been committed by the person. The jurisprudence of the Pre-Trial Chambers has been fairly consistent in applying this standard, and the Pre-Trial Chambers have proved themselves fairly robust in its application. The confirmation decision in *Bemba* made it clear that the Statute adopted three progressively higher standards of proof at the application for arrest warrant, confirmation and trial stage (articles 58(1), 61(7) and 66(3), respectively.[194] The Pre-Trial Chamber also confirmed the earlier *Lubanga* decision to the effect that in order to pass the confirmation test, the prosecution must produce 'concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations',[195] and clarified that 'substantial' grounds to believe could be understood as 'significant', 'solid', 'material', 'well built' and 'real', as opposed to 'imaginary'.[196] This standard has been applied consistently since then, and in *Abu Garda*, resulted for the first time in charges not being confirmed.[197] That decision made it plain that it will be expected of the prosecution case at confirmation that it will be 'generally coherent, and that the most important pieces of evidence against the person charges will contribute to, rather than conflict with, the central tenets of its overall theory of the case'.[198] The standard has subsequently resulted in charges not being confirmed in

193 *Ibid*, para 114.
194 *Prosecutor v Jean-Pierre Bemba Gombo* (ICC), Case No ICC-01/05-01/08, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo (15 June 2009) ('*Bemba Decision*'), para 27.
195 *Ibid*, paras 28-29.
196 *Ibid*, para 29.
197 *Prosecutor v Bahr Idriss Abu Garda* (ICC), Case No ICC-02/05-02/09, Decision on the Confirmation of Charges (8 February 2010) ('*Abu Garda*').
198 Andrew Burrow, 'The Standard of Proof in Pre-Trial Proceedings' in Khan, Buisman & Gosnell (eds) *Principles of Evidence in International Criminal Justice* (OUP, Oxford 2010), 684.

Mbarushimana[199] (situation in the DRC) and in the Kenya situation in respect of the accused Hussein Ali[200] and Kosgey.[201] The rationale for the application of what has become a fairly rigorous standard is that it is '"designed to protect the rights of the Defence against wrongful and wholly unfounded charges" and a means to ensure judicial economy by distinguishing those cases that should go to trial from those that should not.'[202] The prosecution has so far not exercised its right under Article 61(8) of the ICC Statute to seek confirmation of charges a second time in respect of any of the above-mentioned cases. The gate-keeping function of confirmation, separating those trials that ought to proceed to trial from those that should not, as well as the general approach to the assessment of evidence and the interpretation of the confirmation standard, have in large part been confirmed by the Appeals Chamber in the *Mbarushimana* case.[203]

So, while in many cases defence counsel may think it wise not to contest confirmation too rigorously, and to simply enjoy a run-through of the prosecution case without pointing out any weaknesses, these decisions demonstrate that in the right circumstances, confirmation is an invaluable tool for bringing an early end to weak cases.

As a third option at confirmation, the Pre-Trial Chamber may, under Article 61(7)(c), adjourn the hearing and request the Prosecutor either to provide further evidence or carry out further investigations or to amend a charge if the evidence appears to establish a different crime to that charged. Pre-Trial Chamber I has exercised this third option recently in the *Gbagbo* case.[204] In its decision adjourning the confirmation hearing, the Pre-Trial Chamber confirmed that this course of action is available when, although the evidence presented is insufficient to meet the confirmation standard of 'substantial ground to believe', it is nevertheless not 'so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges under article 61(7)(b) of the Statute'.[205] The Chamber also confirmed earlier case law to the effect that such an adjournment of the confirmation hearing may take place 'subsequent to the oral sessions and as long as the Chamber has not made its final determination on the merits and issued a decision whether or not to confirm the charges'.[206] In the *Gbagbo* case, the prosecution's case 'relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity'.[207] The Chamber held that such evidence 'cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute'. Basing its decision on this finding, amongst others, the Chamber adjourned the hearing for the presentation or collection of further evidence and provided the prosecution with a detailed list of issues it wanted addressed.

199 *Prosecutor v Callixte Mbarushimana* (ICC), Case No ICC-01/04-01/10, Decision on the Confirmation of Charges (16 December 2011). See para 40 for the confirmation of the applicable standard.
200 See above, n 35. See para 52 for confirmation of the applicable standard.
201 See above, n 35. See para 40 for confirmation of the applicable standard.
202 See above, n 70, para 41.
203 *Prosecutor v Callixte Mbarushimana* (ICC), Case No ICC-01/04-01/10 OA 4, Judgement on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges' (30 May 2012) ('*Mbarushimana Appeal*').
204 *Prosecutor v Laurent Gbagbo* (ICC) Case No ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013) ('*Gbagbo Confirmation*').
205 *Ibid*, para 15.
206 *Ibid*, para 14.
207 See above n 275, para 35.

Page 441: Victims' participation in the proceedings
[insert before Reparation or compensation to victims]

In the course of the *Lubanga* case, the following principles for the participation of victims in the proceedings in accordance with Article 68(3) of the ICC Statute were established: 'i) … applicants may establish proof of their identity by way of a range of official and non-official documents. ii) … a victim is someone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss. iii) Participation by victims at trial will first and foremost take place by way of the procedure established in Rule 89(1) of the Rules. iv) Only those who suffered harm as a result of the crimes charged may be considered victims in the case. Applicants need to demonstrate a link between the harm they suffered and the crimes faced by the accused, and they should demonstrate in written applications that they are victims of these offences. v) "[P]ursuant to Article 68(3) of the Statute, victims will first have to demonstrate that their personal interests are affected by the trial in order to be permitted to present their views and concerns at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial." Participation is to be decided on the basis of the evidence or issues under consideration at any particular stage in the proceedings and victims wishing to participate should set out in a discrete written application the nature and the detail of the proposed intervention. vi) In accordance with Rule 131(2) of the Rules, victims have the right to consult the record of the proceedings, including the index, subject to any restrictions concerning confidentiality and the protection of national security information. In principle, victims have the right to access and receive notification of all public filings and those confidential filings which concern them (as identified by the parties), insofar as this does not breach any protective measures that are in place. vii) Victims may request the Chamber to use its broad powers to call all the material it considers relevant for the determination of the truth, in order that the evidence identified by victims concerning the guilt or innocence of the accused is introduced (to the extent appropriate). Victims may tender evidence, examine witnesses and challenge the admissibility or relevance of evidence during the trial so long as: (i) they submit a discrete application; (ii) notice is given to the parties; (iii) the personal interests of one or more victims are affected by the evidence; (iv) there is compliance with their "disclosure obligations and [any] protection orders"; (v) the Chamber determines this course is appropriate and (vi) there is consistency with the rights of the accused and a fair trial. viii) Victims have the right to participate in public hearings and to file written submissions, and they may be permitted to participate in closed or ex parte hearings or to file confidential or ex parte submissions, depending on the circumstances. ix) Victims' views and concerns may be presented by a common legal representative in order to provide for the fairness and expeditiousness of the trial. x) Victims may apply to the Chamber for leave to call evidence relating to reparations during the trial under Regulation 56 of the Regulations of the Court. xi) Anonymous victims may participate in the trial. However, the greater the extent and significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself.'[208] The Appeals Chamber has confirmed that the right of victims to participate in proceedings continues on appeal.[209]

208 See above, n 19, para 14.

209 *Prosecutor v Thomas Lubanga Dyilo* (ICC) Case No ICC-01/04-01/06, A4, A5, A6 Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions (13 December 2012).

In recognition of the fact that the number of victims participating in cases has increased markedly (the number of applications for victim status was expected to run into the thousands in the Kenya cases), and considering that the screening of such applications has been a very time-consuming process, Trial Chamber V has adopted a somewhat modified and simplified victim participation procedure in the *Ruto* case. The Chamber held that it would not require all victims who wished to participate in the proceedings to complete the detailed application form required in all previous cases. This would only be required of those 'victims who wish to present their views and concerns individually by appearing directly before the Chamber'.[210] The views and concerns of those victims who wished to participate without appearing before the Chamber directly would be presented though a common legal representative.[211] It will be that legal representative's duty to ensure that she does not represent the views or concerns of persons she has reason to believe do not qualify as victims in that case.[212]

Page 442: Reparation or compensation to victims
[insert before Sentencing]

The *Lubanga* case established principles on reparations.[213] The decision is an important intervention in the ongoing debate about how reparations ought to work; it deserves to be read in full. Necessarily, only a sample of the most important principles can be reproduced here:

- 'All victims are to be treated fairly and equally as regards reparations**,** irrespective of whether they participated in the trial proceedings…';
- 'The victims of the present crimes… are to enjoy equal access to any information relating to their right to reparations and to assistance from the Court, as part of their entitlement to fair and equal treatment throughout the proceedings';
- 'In all matters relating to reparations, the Court shall take into account the needs of all the victims, and particularly children, the elderly, those with disabilities and the victims of sexual or gender violence…';
- 'The Court shall treat victims with humanity and dignity and reparations will be granted without adverse distinction based on discriminatory grounds';
- 'Reparations should secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities';
- '… reparations may be granted to direct and indirect victims, including the family members of direct victims (see below); anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings';

210 *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (ICC), Case No ICC-01/09-01/11, Decision on victims' representation and participation (3 October 2012) ('*Ruto victims' decision*'), para 25.
211 *Ibid.*
212 *Ibid*, para 53.
213 *Prosecutor v Thomas Lubanga Dyilo* (ICC), Case No ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations (7 August 2012) ('*Lubanga Reparations*'). The Principles are set out at para 187 onwards. References to individual paragraphs are not provided in the following text.

- ‘Reparations can be granted to legal entities… These may include, inter alia, non-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals’;
- ‘The Chamber recognises that priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance. These may include, inter alia, the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children’;
- ‘A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation’;
- ‘The Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence’;
- ‘Victims should receive appropriate, adequate and prompt reparations’;
- ‘Whenever possible, reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights’;
- ‘The “damage, loss and injury”, which form the basis of a reparations claim, must have resulted from the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities’; and
- ‘Given the Article 74 stage of the trial has concluded, the standard of “a balance of probabilities” is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person.’

The decision has been appealed and proceedings in this regard were ongoing in early June 2013.

Glossary of Acronyms

AU	The African Union
CCW	The Convention on Certain Conventional Weapons
CPK	Communist Party of Kampuchea
DRC	The Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Court of Cambodia
IBAHRI	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JCE	joint criminal enterprise
SCC	Supreme Court Chamber
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations
UNCAT	United Nations Convention against Torture
UPC	Union of Congolese Patriots

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