

UYGHUR TRIBUNAL

ADVISORY OPINION ON THE APPLICABLE LAW ON GENOCIDE AND CRIMES
AGAINST HUMANITY

1. Counsel to the Uyghur Tribunal (“**Tribunal**”) and the External Independent Advisor to Tribunal are instructed by Members of the Tribunal to provide advice on the law that may be applicable in relation to allegations of international crimes being committed against the Uyghurs and other Turkic groups in the Xinjiang Uygur Autonomous Region (“**XUAR**”).
2. This advice provides a brief presentation of the applicable law, with reference to current jurisprudence, predominantly relating to the crime of genocide, crimes against humanity (“**CAH(s)**”) and/or the crime of torture.
3. This advice does not make any conclusions on the application of the law to any facts. This advice *may* be complemented by reading the legal opinions and submissions of legal experts which are in evidence before the Tribunal although those opinions and submissions make specific legal findings which this advice does not provide a view on, either way.
4. The character of certain crimes under international law (including genocide, crimes against humanity, torture, slavery, apartheid and racial discrimination) are such that States must ensure they are not committed; States generally owe the duties and obligations to the international community of states to prohibit such crimes and protect individuals from them.¹
5. This advice also does not provide detailed directions on issues related to state responsibility or standards of proof or forms of individual criminal responsibility save for the final section which provides a straightforward direction on the delineation between individual criminal responsibility and state responsibility when attributing crimes (CAH or genocide) to State agents, organs and officials. The final section also considers the standard of proof ordinarily applied to state attribution of crimes (genocide, CAH and torture) under proceedings before extant international bodies such as the International Criminal Court (“**ICC**”) or the International Court of Justice (“**ICJ**”).
 - a. Members of the Tribunal will be aware that there are divergent views among academics and practitioners as to state responsibility and individual criminal responsibility, as well as with respect to standards of proof, and Counsel-led evidence on the same during the September 2021 hearings. Further clarification on the divergent views or the complexity arising can be provided, if necessary.
 - b. Members will also be aware that there are various forms of criminal responsibility: direct commission (by high-level, mid-level or low-level perpetrators); conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide;

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aiding and abetting, *among others*. This advice is restricted to the commission of genocide by direct perpetration (by high-level, mid-level or low-level perpetrators). Further advice can be provided on other forms of responsibility, if necessary.

6. This advice on the applicable law below is provided, as instructed, in as succinct a manner possible without losing important, and sometimes critical, legal nuance and specificity. The advice is in summary form only.
7. The application of the law relating to the underlying prohibited acts of genocide or CAHs, and the requisite intent, to factual scenarios generates legal complexity on which there is (often, but not always) jurisprudence or precedent. The complexity has been omitted for reasons of readability and ease of access.
 - a. Counsel and External Advisor to the Tribunal remain willing to assist with identifying relevant precedents in relation to complexity arising from application of the relevant law, where such precedents are available and given sufficient direction and notice by Members.

GENOCIDE

8. Genocide is the commission of certain prohibited acts ("*actus reus*") committed with an intent to destroy, in whole or in part, ("*mens rea*") a protected group, as such.² The protected groups are national, ethnical, racial or religious groups and no others.³
9. The protected group must constitute a collection of people with a particular group identity⁴ which must be defined positively and have unique distinguishing characteristics either objectively or subjectively ascertained.⁵ If subjective, then from the psyche of the perpetrator, the group should still be, in some form, "stable" or "permanent" such that victims cannot ordinarily be dissociated from the group.⁶ A protected group cannot be defined negatively.⁷
10. When assessing the *actus reus* of genocide, the acts or omissions of perpetrators must relate to at least one of the prohibited acts; other culpable acts such as arbitrary detention, enforced disappearances and other general human rights violations, in and of themselves, are not within scope. The underlying prohibited acts, or *actus reus*, of genocide, each of which is required to be volitional or intentional,⁸ are:
 - a. killing members of the group;
 - i. The material elements of killing are equivalent to the elements of murder.⁹
 - b. causing serious bodily or mental harm to members of the group;
 - i. The bodily or mental harm caused must be of such a serious nature "as to contribute or tend to contribute" to the destruction of the group.¹⁰ The acts

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causing such harm may include torture, rape, sexual violence, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.¹¹ The harm must be inflicted intentionally.¹² The harm does not need to be inflicted on each and every member of the group.

- c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part;
 - i. The acts may include: systematic expulsion from homes; denial of medical services; and the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing, and hygiene or excessive work or physical exertion.¹³ The acts must be carried out ‘deliberately’.¹⁴
- d. imposing measures intended to prevent births within the group; and
 - i. The intended measures may be evidenced, *inter alia*, by ‘sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages’.¹⁵ The words ‘intended to’ can be interpreted in two ways. On the one hand, the words may indicate that the perpetrator’s subjective belief that the measures are capable of preventing births is sufficient for the *actus reus* to exist. On the other, they may indicate that the imposed measures ought to be objectively capable of preventing births, and thus that the perpetrator’s sole “subjective tendency” is not sufficient.¹⁶
- e. forcibly transferring children of the group to another group.¹⁷
 - i. The forcible transfer must be of at least one child from the protected group to another.¹⁸ A child is a person under the age of 18.¹⁹ The term ‘forcibly’ is not confined to physical force but may include other forms of coercion such as threat of violence, psychological pressure, duress and detention.²⁰

11. Three of the five acts above require proof of a result (namely, killing, causing serious bodily or mental harm and the transfer of children from one group to another). Two do not demand such proof (namely, the conditions of life element and measures intended to restrict births).

Mens rea – intent to destroy the protected group, in whole or in part, as such

12. The intent, or *mens rea*, required for genocide is a specific intent to destroy, in whole or in part, a protected group, as such.²¹ This specific intent distinguishes genocide from other international crimes as it requires that the perpetrator is targeting an individual *because* they belong to the protected group rather than as an individual *per se*.²² Specific intent has been described in the following way:

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“For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group.”

13. The specific intent must be directed at the destruction of the protected group. The destruction need not objectively occur but merely be intended.
14. The term ‘destroy’, in respect of the intent requirement, is limited to the *physical* or *biological* destruction of all or part of the group.²³ This restrictive interpretation has been advanced by the International Law Commission,²⁴ the jurisprudence of all international courts to date,²⁵ and some academics.
 - a. The original basis for this interpretation is said to be found in the *preparatory works* to the Genocide Convention whereby “cultural genocide in the form of destroying a group’s national, linguistic, religious, cultural, or other existence was ultimately (despite a proposal by the Ad Hoc Committee) not included in the Convention.” Cultural destruction or destruction resulting in ‘mere dissolution of the group’, therefore, have not been accepted by the ICC, ICTY or ICTR.²⁶
 - b. There is a view, although not currently reflected in the international jurisprudence, that a plain reading of Convention and reference to the “group, as such” shows that the prohibition on genocide “is intended to protect not only the physical existence of the individual members of the group, but the group as a *social entity*.” The German Federal Supreme Court (*Bundesgerichtshof*) and Federal Constitutional Court (*Bundesverfassungsgericht*), have found in 2000 that the intent to destroy ‘extends beyond physical and biological interpretation’²⁷ and that “text of the law does not...compel the interpretations that the culprit’s intent must be to exterminate physically...members of the group.”²⁸ Ambos (2014) has approved of the broader approach noting “Such a broader interpretation also conforms to the fact that the actual destruction of peoples often begins with vicious assaults on culture, particular languages, and religious and cultural monuments and institutions. Thus, such acts will often indicate the perpetrators’ intent to destroy.”²⁹ This view has been considered albeit, to date, discounted by the *ad hoc* international Tribunals and not adopted by any international court or tribunal:

“The Trial Chamber is aware that it must interpret the Convention with due regard for the principle of nullum crimen sine lege. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts

¹ Rutaganda, ICTR-96-3-T, para. 60.

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seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.”³⁰

15. Specific intent to destroy may thus be found in direct oral and/or written statements made by perpetrators advocating for the destruction of a protected group. However, because *direct evidence of intent* is, in most cases, lacking, specific intent may be *inferred* from the surrounding facts and circumstances in which prohibited acts occur.³¹
- a. When assessing specific intent, consideration ought to be given to all of the evidence collectively.³² The circumstances of the case may include: “(a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) proof of the mental state with respect to the commission of the underlying prohibited acts, (i) the repetition of destructive and discriminatory acts, (j) the existence of a plan or policy³³, and (k) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.”³⁴ Ordinarily, “other culpable acts” do not constitute prohibited acts, but they may be considered as evidence pointing towards the specific intent of a perpetrator to destroy the group.³⁵
 - b. The existence of a plan or policy is not a legal element of the crime of genocide; it *may* become a possible relevant factor to prove the specific intent.³⁶ But just the same, evidence of policies or motives of alleged perpetrators may not be reflective or relevant at all to the issue of intent; *motive* generally is irrelevant.³⁷ Intent (i.e. a psychological state of mind) must attach to the commission of crimes; policies or motives *may*, however, be achieved through the commission of crimes.³⁸

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- c. Finally, the courts and tribunals have consistently rejected³⁹ a knowledge-based approach to genocide i.e., that it is sufficient that the perpetrator knew or ought to have known about the destruction of the protected group.⁴⁰ A perpetrator must “clearly seek[s] to produce the act charged⁴¹ or, in other words, have “the clear intent to cause the offence”.⁴²

Mens rea – intent to destroy ‘a part’ of the protected group

16. It is sufficient that a perpetrator’s specific intent is directed at the destruction of the group ‘in part’ as opposed to the whole. Where only part of a protected group is targeted, that part must constitute a substantial part of that group such that it is significant enough to have an impact on the group, as a whole.⁴³ In determining substantiality, non-exhaustive considerations may include: as a starting point, the numerical size of the targeted part (evaluated not only in absolute terms, but also in relation to the overall size of the entire group); the prominence of the part of the group within the larger whole; whether the targeted part is emblematic of the overall group or essential to its survival; the area of the perpetrators’ activity and control; and the perpetrators’ potential reach.⁴⁴

- a. In the *Karadžić* and *Mladić* cases at the ICTY, the Bosnian Muslims of Srebrenica were seen as a substantial part of the protected group (i.e. Bosnian Muslims in BiH) notwithstanding that they comprised just 2% of the Bosnian Muslim population. This was because the Trial Chamber found Srebrenica: had a strategic political significance; was designated a UN safe area; carried some emblematic significance; and was controlled by the physical perpetrators (*Mladić*, paras 3553-3554). The Trial Chamber reiterated that neither the absolute nor the relative numbers were determinative and that trial chambers may consider any number of non-exhaustive criteria both objective and subjective (following guidelines in the *Krstić* Appeal Judgment, paras 12-14).

17. As the question of substantiality is one of intent, it follows that the part of the group itself need not be *actually* targeted by a perpetrator but merely that the perpetrator intends to target ‘a substantial part’ of the protected group.

Standard of proof and state responsibility for genocide

18. The ordinary standard of proof in establishing individual criminal responsibility for genocide (or indeed CAH (see below)) in international courts or tribunals is beyond reasonable doubt.⁴⁵

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Where an inference is drawn as to specific intent, that inference must be the only reasonable inference from the totality of the evidence.⁴⁶

19. States are prohibited from committing any act of genocide, which means they must refrain from: (a) the commission of prohibited acts by its own organs, agents and/or officials; and/or (b) the commission of prohibited acts by others acting on their behalf or at their direction and control. (Genocide Convention, Art III)⁴⁷ (“**State attribution**”). States can, thereby, incur responsibility for the commission of genocide.⁴⁸

f. In addition, States as a matter of customary international law and treaty:

- i. must not be complicit in prohibited acts committed by others within its State. (Genocide Convention, Art III(e), IV)
- ii. must use all means reasonably available to prevent genocide and to punish persons where the crime has occurred. (Genocide Convention, Art I, IV) The latter would necessarily entail efforts at investigating whether genocide has occurred and/or is occurring.
- iii. must enact necessary legislation to give effect to its obligations under the Genocide Convention. (Genocide Convention, Art V)

20. The attribution of crimes to State organs, agents and officials is not to be confused with other duties on States under customary international law or the Convention, as detailed above. For instance, States have an (ongoing) duty to prevent genocide. That duty necessarily is prior to the commission of genocide and entails a duty to stop (prevent) further prohibited acts once genocide might have begun. The standard of proof to be applied to state responsibility for genocide is set out at paragraph 22.

21. In respect of State attribution, a state absent a person (organ, agent or official) cannot commit a crime as the ILC and the ICJ have rejected the notion of state crimes and there is no consistent state practice or significant jurisprudence relating to the same. However, that does not preclude a finding of State responsibility for genocide where no individual has been convicted of the crime (as the State itself may have hindered prosecution and/or conviction of individuals). [*Bosnia v Serbia*, para. 182]

22. The ICJ has applied a standard of proof “at a high level of certainty appropriate to the seriousness of the allegation” given the “charges of exceptional gravity” [ICJ, *Bosnia v Serbia*, paras 209-210] such that the evidence “is fully conclusive”. [ICJ, *Bosnia v. Serbia*, 2007, para. 209] In another case involving genocide the ICJ re-stated with respect to standard of proof that it “requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.” [ICJ, *Croatia v Serbia*, paras 177-179]

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- a. There is academic and practitioner disagreement about the law relating to state responsibility for genocide and the standard of proof required. (Professor Packer’s written and oral evidence elicited the extent of the disagreement). This advice does not go into the disagreement or complexity other than provide a summary (as above) of state attribution for the crime of genocide and the standard of proof applied to date in an international forum seized of jurisdiction, namely the ICJ. Counsel and External Adviser note that academic experts specialised in this area, and of differing views, remain willing to provide further written or oral advice and be subject to public scrutiny, if necessary.
- b. It should be noted that the ICJ’s ruling on standard of proof in relation to genocide does not apply to CAH as it determined it had no jurisdiction to rule on them in the particular case.⁴⁹

CRIMES AGAINST HUMANITY

General Elements and Jurisdictional Requirements

23. Certain crimes (or prohibited acts) when committed as part of a widespread or systematic attack⁵⁰ directed against a civilian population, constitute crimes against humanity (**CAH(s)**).⁵¹ The relevant prohibited acts of CAH for the purposes of the Tribunal are persecution, murder, extermination, torture and sexual and gender-based violence (“**SGBV**”) and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, deportation/forcible transfer, enslavement, imprisonment, and enforced disappearances. The crime of apartheid is omitted from this advice; the crime is prohibited by customary international law, the Rome Statute, the Apartheid Convention and the Convention on the Elimination of All Forms of Racial Discrimination (“**ICERD**”). (Definitions are provided at Annex A).
24. An “attack” attack is not limited to the use of force but encompasses any mistreatment of the civilian population.⁵² An attack is composed of acts of violence, or the kind of prohibited acts referred to at para 23. above.⁵³
25. ‘Widespread’ refers to the large-scale nature of the attack and the number of targeted persons.⁵⁴ ‘Systematic’ refers to the ‘organized nature of the acts of violence’.⁵⁵ The existence of a plan or policy can be indicative of the systematic character of the attack, but it is not a distinct legal element.⁵⁶

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26. A perpetrator must know that there is a widespread or systematic attack against a civilian population and that his or her acts are part of that attack but need not have detailed knowledge of the attack or share the purpose of it.⁵⁷
27. The crimes (or prohibited acts) constituting CAH must satisfy the specific elements of those prohibited acts, and these are set out, by way of summary only, at Annex A.

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4 OCTOBER 2021

ANNEX A

Summary of Specific Elements of Crimes – persecution; murder; extermination; torture, SGBV, or other inhumane treatment; deportation/forcible transfer; enslavement; imprisonment; and enforced disappearance. [Note: the elements are drawn from custom where appropriate, as determined by the international tribunals, but supplemented by Elements of Crimes at the ICC where clarification is required.]

28. **Murder.** Requires proof that: (a) the victim died; (b) an act or omission of the perpetrator caused the victim's death; and (c) the act or omission was committed with intent to kill the victim or to wilfully cause serious bodily harm which the perpetrator should reasonably have known.⁵⁸
29. **Extermination.** Requires proof that the killings constituting murder occur on a mass scale.⁵⁹ Although 'mass scale' refers primarily to the number of killings, it does not suggest a numerical minimum.⁶⁰ Relevant factors to consider when assessing whether the killings occurred on a mass scale 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 victims in their individual capacity.⁶¹ The mental element of extermination is intention to either: (a) kill the victim, or (b) wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death, with the additional intention to do so on a mass scale.⁶²
30. **Deportation and forcible transfer.** Both entail the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law.⁶³ Deportation requires that the victims be displaced across a *de jure* state border, or, in certain circumstances, a *de facto* border.⁶⁴ Forcible transfer involves displacement of persons within national boundaries.⁶⁵
 - a. Forcible displacement means that people are moved against their will or without a genuine choice.⁶⁶ Fear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to the forcible displacement of people.⁶⁷
 - b. The perpetrator of deportation or forcible transfer must intend to forcibly displace the persons, however, the intent need not be to displace on a permanent basis.⁶⁸
31. **Persecution.** This requires proof that an act or omission: (a) discriminates in fact and denies a fundamental human right laid down in international law; and (b) is carried out with the intention to discriminate on political, racial, ethnic or religious grounds.⁶⁹
 - a. Crimes (or prohibited acts) constituting CAH as well as acts not explicitly mentioned in the list of prohibited acts of CAH, may qualify as underlying acts of persecution.⁷⁰ The

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underlying act itself need not constitute a crime in international law.⁷¹ However, not every denial of a fundamental human right will be serious enough to constitute a crime against humanity.⁷² The underlying act committed on discriminatory grounds, considered in isolation or in conjunction with other acts, must be of the same gravity as other crimes (or prohibited acts) listed under CAH.⁷³

32. **Torture, SGBV, other inhumane treatment.**

33. Torture has two relevant definitions depending on state or individual criminal responsibility. In relation to state responsibility, the definition in UNCAT may be relevant. In that respect, torture requires proof of ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person... for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’ (Art 1, UNCAT, Customary International Law).⁷⁴ In relation to individual criminal responsibility, the definition under the Rome Statute may be relevant. In that respect, torture requires proof of “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” (Art 7(2)(e), Rome Statute). The term “lawful sanctions” must be those that conform with international human rights norms and standards, and not merely sanctions that are authorised by domestic law or domestic legal processes.

34. The level of harm an act or omission must cause in order to constitute torture must be “severe pain or suffering, whether physical or mental”.⁷⁵

a. There is no exhaustive enumeration of all the acts or omissions which may constitute torture.⁷⁶ Acts inflicting physical pain may amount to torture even when they do not cause pain of the type accompanying serious injury, as long as severe pain or suffering is inflicted.⁷⁷

b. The perpetrator must intentionally act in such a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to the victim(s), in pursuance of one of the purposes prohibited by the definition of the crime of torture as stated above.⁷⁸ This purpose need not be the “predominant or sole purpose” behind inflicting the severe pain or suffering.⁷⁹

c. There is no requirement, under the Rome Statute (as opposed to UNCAT), that the perpetrator acted in an official capacity as a state official or other person in authority.⁸⁰

35. SGBV. Rape is listed as a CAH. Rape involves sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the

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perpetrator or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.⁸¹ Consent for this purpose must be given voluntarily, as a result of the victim's free will, and is assessed in the context of the surrounding circumstances.⁸² The perpetrator must intend to effect this penetration and have the knowledge that it occurs without the consent of the victim.⁸³

- a. Other acts of sexual violence encompass acts which may fall short of rape, including crimes such as sexual slavery or molestation, but are of equal gravity to other crimes under CAH.⁸⁴ These acts are often characterised as “sexual assault”.⁸⁵ Serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force, or intimidation in a way that is humiliating and degrading to the victim's dignity may constitute other acts of sexual violence.⁸⁶ These acts are not limited to the physical invasion of the human body and may include acts which do not involve penetration or even physical contact.⁸⁷
- b. Sexual violence is found when (i) the perpetrator commits an act of a sexual nature on another or requires the victim to perform such an act, (ii) that act infringes on the victim's physical integrity or amounts to an outrage to the victim's personal dignity, and (iii) the victim does not consent to the act.⁸⁸ The perpetrator must intentionally commit the act, and be aware that the victim did not consent to the act.⁸⁹

36. Other inhuman treatment. The category of “other inhumane acts” is a residual category of CAH which includes serious criminal acts that are not exhaustively enumerated in statutes relating to CAH.⁹⁰ It requires proof that an act or omission: (i) was of similar seriousness to the other enumerated acts under CAH; (ii) caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) was committed with the intent to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or with the knowledge that this act or omission was likely to cause such suffering or a serious attack upon human dignity.⁹¹ The Tribunal must, therefore, assess on a case-by-case basis if the specific instances of acts or omissions are sufficiently serious to amount to “other inhumane acts”.⁹²

37. Imprisonment. The term imprisonment is understood as arbitrary imprisonment, that is deprivation of liberty of an individual without due process of law.⁹³ Imprisonment requires proof that: (1) an individual is deprived of his or her liberty; (2) the deprivation of liberty is carried out arbitrarily, that is, there is no legal basis for it; and (3) the perpetrator acted with the intent to arbitrarily deprive the individual of his or her liberty.⁹⁴ If there is a legal basis for the deprivation of liberty, it must apply throughout the period of imprisonment, for the deprivation of liberty will be rendered arbitrary as soon as its legal basis ceases to exist.⁹⁵ When a national law is relied

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upon to justify deprivation of liberty, that law must not violate international law.⁹⁶ The question of legal basis is appropriately dealt with when considering the general elements of crimes against humanity.⁹⁷

38. **Slavery.** ‘Slavery’ is defined as “the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised’. (Art 1, Slavery Convention) The act of ‘enslavement’ as a crime against humanity is defined in similar terms: “enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.⁹⁸ Indicia of contemporary forms of slavery and ‘enslavement’ include ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force, coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’.⁹⁹ Slavery requires proof of: the exercise of any or all of the powers attaching to the right of ownership over a person with intentional exercise of such powers.¹⁰⁰
39. **Enforced disappearances.** The crime is defined as "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time" (Art 7(2)(i), Rome Statute). There is particular complexity in relation to this underlying prohibited act of CAH. Further advice may be provided, if necessary.
40. **Apartheid.** The crime of ‘apartheid’ is defined differently in the Rome Statute as compared with the Apartheid Convention (adopted in ICERD).¹⁰¹ The definition in the Apartheid Convention may be relevant to the issue of state responsibility and the definition in the Rome Statute relevant for individual criminal responsibility. In respect of the latter, ‘apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. (Art 7(2)(h), Rome Statute). At paragraph 1 (Art 7) is a list of other acts that may constitute a crime against humanity in the Rome Statute, namely: murder, extermination, enslavement, deportation or forcible transfer, serious acts of sexual violence, persecution, enforced disappearance, and 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. In respect of the Apartheid Convention, “the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts

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committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.” (Art 2, Apartheid Convention; note that the specific inhuman acts envisaged are set out in Art 2(a)-(f)).

41. There is *significant* complexity in relation to understanding and applying the crime of apartheid as an underlying prohibited act of CAH. Further advice may be provided, if necessary.

[END]

ANNEX B - REFERENCES

- ¹ A *Jus cogens* or peremptory norm is a norm accepted and recognised by the international community of States as a whole, from which no derogation is permitted. (Art 53, 64 VCLT 1969); According to the International Law Commission (ILC), ‘Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination’ (ILC, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1., pp. 112-113.)
- ² Convention on the Prevention and Punishment of the Crime of Genocide, 1948, (entered into force 12 January 1951), art. II; Note the importance of the term “as such”, which shows that the offence “requires intent to destroy a collection of people who have a particular group identity”. See ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 20.
- ³ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, Chamber I, 2 September 1998, paras. 512-515.
- ⁴ ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 20.
- ⁵ *Ibid.*, paras 16-28.
- ⁶ ICTR, *Prosecutor v Akayesu*, No. ICTR-96-4-T, paras 511, 516, 702; ICTR, *Prosecutor v Rutaganda*, No. ICTR-96-3-T, para. 56; ICTY, *Prosecutor v Jelisić*, No. IT-95-10-T, para. 69.
- ⁷ ICTY, *Prosecutor v. Goran Jelisić*, Trial Judgment, Case No. IT-95-10-T, Trial Chamber, 14 December 1999, para.72.
- ⁸ ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), para. 186.
- ⁹ ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Appeal Judgment, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001, para. 151.
- ¹⁰ ICTR, *The Prosecutor v. Athanase Seromba*, Appeal Judgment, Case No. ICTR-2001-66-A, Appeals Chamber, 12 March 2008, para. 46; ICTY, *Prosecutor v. Tolimir*, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, para. 203.
- ¹¹ ICTR, *The Prosecutor v. Athanase Seromba*, ICTR-2001-66-A, Appeal Judgment,, 12 March 2008, para. 46. The Appeal Chamber in *Krstić* held that ‘forcible transfer does not constitute in and of itself a genocidal act’. In some circumstances, however, forcible transfer can be an underlying act that causes serious bodily or mental harm, in particular if the forcible transfer operation was attended by such circumstances as to lead to the death of the whole or part of the displaced population. See ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 33; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeal Judgment, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007, para. 123.
- ¹² ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para. 690; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Judgment, Case No. IT-02-60-T, Trial Chamber I Section A, 17 January 2005, para. 645.
- ¹³ ICTY, *Prosecutor v. Milomir Stakić*, Trial Judgment, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003, para. 517; ICTY, *Prosecutor v. Radoslav Brđanin*, Trial Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para. 691; ICTY, *Prosecutor v. Vujadin Popović et al.*, Trial Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010, para. 815. As noted above, the Appeal Chamber in *Krstić* held that ‘forcible transfer does not constitute in and of itself a genocidal act’. In some cases, however, systematic expulsion from homes, which may amount to forcible transfer, may be a potential means of inflicting conditions of life calculated to bring about destruction. See ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 33; ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeal Judgment, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007, para. 123.
- ¹⁴ ICTY, *Prosecutor v. Milomir Stakić*, Trial Judgment, Case No. IT-97-24-T, Trial Chamber II, 31 July 2003, para. 508.
- ¹⁵ ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, Chamber I, 2 September 1998, para. 507.
- ¹⁶ K. Kreß, The Crime of Genocide under International Law, *International Criminal Law Review*, 6, 2006, p. 483
- ¹⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 1948, (entered into force 12 January 1951), art. 2.
- ¹⁸ *Elements of Crimes reproduced from the International Criminal Court*, Assembly of State Parties First Session, ICC-ASP/1/3, 3-10 September 2002, Art.6(e)(1).
- ¹⁹ Convention on the Rights of the Child, 1989, (entered into force 2 September 1990), art. I.; *Elements of Crimes reproduced from the International Criminal Court*, Assembly of State Parties First Session, ICC-ASP/1/3, 3-10 September 2002, Art.6(e)(5).
- ²⁰ *Elements of Crimes reproduced from the International Criminal Court*, Assembly of State Parties First Session, ICC-ASP/1/3, 3-10 September 2002, Art.6(e) footnote 5.
- ²¹ ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Judgment, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999, para.59.
- ²² ICTY, *Prosecutor v. Goran Jelisić*, Trial Judgment, Case No. IT-95-10-T, Trial Chamber, 14 December 1999, para.67.
- ²³ ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 25.

- ²⁴ 1996 ILC Report, pp. 90–1: ‘As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group’; see also the earlier statement in Report of the ILC to the General Assembly on the Work of its Forty-First Session, UN Doc. A/CN.4/SER.A/1989/Add.1 (part 2), p. 102, para. (4). See further, Ambos, Kai, *Treatise on International Criminal Law, Volume II, The Crimes and Sentencing*. Oxford: OUP, 2014, pp.38.
- ²⁵ ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment para. 580; ICTR, *Prosecutor v. Mubimana*, ICTR-95-1B-T, Trial Judgment, para. 497 with further references in n. 456; see also ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), paras. 190, 328.
- ²⁶ ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment para. 580; ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Appeal Judgment, para. 25; ICTY, *Prosecutor v. Stakić*, No. IT-97-24-T, Trial Judgment, para. 519.
- ²⁷ German Federal Constitutional Court (BVerfG), NJW, 54 (2001), 1850 (‘Die Zerstörungsabsicht wird ebenfalls weiter verstanden als physisch-biologische Vernichtung’; English translation quoted according to Krstić, No. IT-98-33-T, para. 579); similar, Blagojević and Jokić, No. IT-02-60-T, para. 666; Krajišnik, No. IT-00-39-T, para. 854; Werle, ‘Rechtsprechung zur Zerstörungsabsicht’, in Hettinger et al., FS Küper (2007), pp. 688–9. See further Ambos (2014, Vol II), pp. 39-40, from which this reference is taken.
- ²⁸ German Federal Constitutional Court (BVerfG), NJW, 54 (2001), 1850–1 (‘Im völkerrechtlichen Schrifttum wird der Völkermordtatbestand zum Teil als auf die physisch-biologische Vernichtung einer geschützten Gruppe bzw. einer substantiellen Zahl ihrer Mitglieder beschränkt gesehen. Dies ist nach dem Wortlaut der Vorschrift jedoch nicht zwingend’). See further Ambos (2014, Vol II), pp. 39-40, from which this reference is taken.
- ²⁹ Ambos (2014, Vol II), p 40.
- ³⁰ ICTY, *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgment para. 580;
- ³¹ ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Judgment, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999, para.63.; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998, para.523.
- ³² ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 55; ICTY, *Prosecutor v. Radovan Karadžić*, Rule 98 bis Appeal Judgment, Case No. IT-95-5/18-AR98bis.1, Appeals Chamber, 11 July 2013, para. 56. See also ICTY, *Prosecutor v. Tolimir*, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, paras 246–248, 253.
- ³³ ICTY, *Prosecutor v. Mladic*, IT-09-92, Trial Judgment, para. 3545; ICTY, *Prosecutor v. Goran Jelisić*, Appeal Judgment, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001, paras 47-48; ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 34; ICTY, *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 55; ICTR, *Ildephonse Hategekimana v. The Prosecutor*, Appeal Judgment, Case No. ICTR-00-55B-A, Appeals Chamber, 8 May 2012, para. 133; ICTY, *Prosecutor v. Radovan Karadžić*, Rule 98 bis Appeal Judgment, Case No. IT-95-5/18-AR98bis.1, Appeals Chamber, 11 July 2013, paras 80, 99; ICTY, *Prosecutor v. Vujadin Popović et al.*, Appeal Judgment, Case No. IT-05-88-A, Appeals Chamber, 30 January 2015, paras 430, 440, 468; also ICTY, *Prosecutor v. Tolimir*, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, paras 246, 248, 253.
- ³⁴ ICTR, *The Prosecutor v. Athanase Seromba*, ICTR-2001-66-A, Appeal Judgment,, 12 March 2008, para. 178 citing *Seromba*, Trial Judgment, 21 May 1999, para. 320.
- ³⁵ For instance, the forcible transfer or deportation of a group - a culpable act which is not one of the prohibited acts of genocide (ICTY, *Prosecutor v. Milomir Stakić*, Trial Judgment, IT-97-24-T, Trial Chamber II, 31 July 2003, para. 519) - may indicate intent to destroy if the perpetrators expel all members of a protected group from a specific area, while detaining only women of child-bearing age, as the culpable act indicates specific intent to destroy by imposing measures intended to prevent births. ICTY, *Prosecutor v. Radislav Krstić*, Trial Judgment, Case No. IT-98-33-T, Trial Chamber, 2 August 2001, para. 580; ICTY, *Prosecutor v. Tolimir*, Appeal Judgment, Case No. IT-05-88/2-A, Appeals Chamber, 8 April 2015, paras 230, 254. See also ICTY, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeal Judgment, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007, para. 123; ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, paras 33, 133.
- ³⁶ ICTY, *Prosecutor v. Jelisić*, No. IT-95-10-A, Appeal Judgment, para. 48; ICTY, *Prosecutor v. Krstić*, IT-98-33-A, Appeal Judgment, para. 225; *Prosecutor v. Jelisić*, IT-95-10-T, Trial Judgment paras. 100, 101; ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-A, Appeal Judgment, Judgment (Reasons), para. 138 (1 June 2001); ICTR, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Trial Judgment, para. 276; ICTR, *Prosecutor v Simba*, ICTR-01-76-A, Appeal Judgment, para. 260 (27 November 2007); ICTY, ICTR, *Prosecutor v Popović et al.*, IT-05-88-T, Trial Judgment, para. 830;
- ³⁷ ICTY, *Prosecutor v Jelisić*, IT-95-10-A, Appeal Judgment, para. 71; ICTR, ICTR, *Prosecutor v Kayishema and Ruzindana* Appeal Judgment, para. 161; ICTR, ICTR, *Prosecutor v Kanyarukiga*, Appeal Judgment, para. 262.
- ³⁸ ICTY, *Prosecutor v Jelisić*, IT-95-10-A, para. 49, citing ICTY, *Prosecutor v Duško Tadić*, IT-94-1-A, Appeal Judgment, para. 269 (15 July 2009).
- ³⁹ Although many academics support a knowledge-based approach. See further, Ambos (2014, Vol II), pp. 20-38.
- ⁴⁰ ICTY, *Prosecutor v Jelisić*, IT-95-10-A, Appeal Judgment, para. 52; ICTY, *Prosecutor v Krstić*, IT-98-33, Appeal Judgment, para. 134. See further Ambos (2014, Vol II), pp 23-25, and footnote 178: “Al Bashir, No. ICC-02/05-

01/09, paras. 139-40 with n. 154 following the ICJ position in ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, Judgment (26 February 2007), and stating (in n. 154) that the ‘knowledge-based approach’ would only make a difference as to low- or mid-level perpetrators and is, therefore, not relevant for the ICC.”

41 ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Judgment, para. 498.

42 ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Judgment, para. 518.

43 ICTY, *Prosecutor v. Radislav Krstić*, Appeal Judgment, Case No. IT-98-33-A, Appeals Chamber, 19 April 2004, para. 8; ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), para. 198.

44 *Ibid.*, paras 12-14; ICTY, *Prosecutor v Mladic*, MICT-13-56-A, Appeal Judgment, paras 578-583; ICTY, *Prosecutor v Mladic*, IT-09-92, Trial Judgment, para. 3528.

45 See, for instance: Article 66, Rome Statute; ICTY, *Prosecutor v. Stakić*, Appeal Judgment, IT-97-24-A, Appeal Judgment, 22 March 2006, paras 219-220; ICTY, *Prosecutor v. Vasiljević* Appeal Judgement, para. 120; ICTR, *Prosecutor v. Ntakirutimana* Appeal Judgement, para. 171; ICTR, *Prosecutor v. Semanza* Trial Judgement, para. 148; ICTR, *Prosecutor v. Musema* Trial Judgement, para. 108; *Čelebići* Trial Judgement, para. 601.

46 ICTR, *Nahimana et al.* Appeal Judgment, para. 524; ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, ICTR-2001-64-A, Appeal Judgment, 7 July 2006; ICTY, *Prosecutor v Krstić*, IT-98-33, Appeal Judgment, para. 34.

47 ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), paras 385-386, 391-393; *Croatia v Serbia*, para. 170-179. See also, Article 8, ILC Articles on State Responsibility.

48 ICJ, *Bosnia and Herzegovina v Yugoslavia*, Judgment (26 February 2007), paras 168-169, 174 and 471, sub-para. (5)]

49 The ICJ held it: “has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*” (ICJ, *Bosnia v. Serbia*, 2007, para. 147).”

50 ‘Attacks’ against the civilian population are not limited to military attacks. International Criminal Court, *The Elements of Crimes*, ‘Crimes against Humanity’, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 10-12 May 2010, p5 [Hereafter ‘*The Elements of Crimes*’]; Draft Articles on the Prevent and Punishment of Crimes against Humanity, Article 2(2), A/74/10 p.12. ‘Directed against’ indicates that it is the civilian population which is the primary object of the attack: *Kunarac et al.* Appeal Judgment, para. 90.

51 Customary international law, as codified by Arts. 2 and 3, ILC, draft Articles on Crimes against Humanity provisionally adopted by the ILC at its 67th Session (2015), A/70/10, p.50 and commentary pp.58-72 and Art. 7, Rome Statute of the International Criminal Court (17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

52 *Tadić* Appeal Judgment, para. 251; *Kunarac et al.* Appeal Judgment, para. 86; *Kordić and Cerkez* Appeal Judgment, para. 666.

53 *Nahimana et al.* Appeal Judgment, para. 918

54 *Kunarac et al.* Appeal Judgment, para. 94; *Blaškić* Appeal Judgment, para. 101; *Kordić and Cerkez* Appeal Judgment, paras 94, 666; *Nahimana et al.* Appeal Judgment, para. 920.

55 *Kunarac et al.* Appeal Judgment, para. 94; *Blaškić* Appeal Judgment, para. 101; *Kordić and Cerkez* Appeal Judgment, para. 666; *Nahimana et al.* Appeal Judgment, para. 920.

56 *Kunarac et al.* Appeal Judgment, paras 98, 101; *Blaškić* Appeal Judgment, para. 120; *Nahimana et al.* Appeal Judgment, para. 922.

57 *Kunarac et al.* Appeal Judgment, para. 99; *Blaškić* Appeal Judgment, paras 124, 126; *Kordić and Cerkez* Appeal Judgment, paras 99-100; *Tadić* Appeal Judgment, paras 248, 252; *Kunarac et al.* Appeal Judgment, paras 102-103; *Blaškić* Appeal Judgment, para. 124; *Kordić and Cerkez* Appeal Judgment, para. 99.

58 *Kvočka et al.* Appeal Judgment, para. 261.

59 *Ntakirutimana and Ntakirutimana* Appeal Judgment, paras 522, 542; *Stakić* Appeal Judgment, paras 259-260; *Bagosora and Nsengiyumva* Appeal Judgment, para. 394; *Stanišić and Zupljanin* Appeal Judgment, para. 1021.

60 *Ntakirutimana and Ntakirutimana* Appeal Judgment, para. 516; *Stakić* Appeal Judgment, para. 260; *Lukić and Lukić* Appeal Judgment, para. 537; *Stanišić and Zupljanin* Appeal Judgment, para. 1021. In the *Lukić and Lukić* case, the Appeals Chamber found that the killing of 59 persons was sufficiently large so as to constitute extermination (*Lukić and Lukić* Appeal Judgment, para. 543). In the *Akayesu* case, the ICTR Appeals Chamber upheld the finding that the killing of 16 persons constituted extermination (see *Akayesu* Appeal Judgment, paras 423-424; *Akayesu* Trial Judgment, paras 737-744).

61 *Stakić* Trial Judgment, para. 640; *Blagojević and Jokić* Trial Judgment, para. 573; *Nahimana et al.* Trial Judgment, para. 1061; *Lukić and Lukić* Appeal Judgment, para. 538; *Stanišić and Zupljanin* Appeal Judgment, para. 1022.

62 *Ntakirutimana and Ntakirutimana* Appeal Judgment, paras 522, 542; *Stakić* Appeal Judgment, paras 259-260; *Bagosora and Nsengiyumva* Appeal Judgment, para. 394; *Lukić and Lukić* Appeal Judgment, para. 536; *Stanišić and Zupljanin* Appeal Judgment, para. 1036.

63 *Stakić* Appeal Judgment, paras 278, 317; *Krajišnik* Appeal Judgment, paras 304, 308.

64 *Stakić* Appeal Judgment, paras 278, 300; *Krajišnik* Appeal Judgment, para. 304.

65 *Stakić* Appeal Judgment, para. 317.

66 *Krnojelac* Appeal Judgment, paras 229, 233; *Stakić* Appeal Judgment, para. 279.

67 *Stakić* Appeal Judgment, para. 281.

- 68 *Stakić* Appeal Judgment, paras 278, 304-307, 317; *Brđanin* Appeal Judgment, para. 206; *Krajišnik* Appeal Judgment, para. 304.
- 69 *Krnjelac* Appeal Judgment, para. 185; *Vasiljević* Appeal Judgment, para. 113; *Blaskeić* Appeal Judgment, para. 131; *Kordić and Cerkez* Appeal Judgment, paras 101, 671, 674; *Kvočka et al.* Appeal Judgment, para. 320; *Stakić* Appeal Judgment, para. 327; *Simić et al.* Appeal Judgment, para. 177. According to this case law, the definition also includes discrimination on grounds of ethnicity.
- 70 *Krnjelac* Appeal Judgment, para. 219; *Brđanin* Appeal Judgment, para. 296; *Tadić* Trial Judgment, paras 700, 702-703; *Kupreskeić et al.* Trial Judgment, paras 605, 614.
- 71 *Kvočka et al.* Appeal Judgment, para. 323; *Brđanin* Appeal Judgment, para. 296.
- 72 *Kupreskeić et al.* Trial Judgment, para. 621; *Krnjelac* Trial Judgment, para. 434; *Krajišnik* Trial Judgment, para. 735.
- 73 *Krnjelac* Appeal Judgment, paras 199, 221; *Blaskeić* Appeal Judgment, para. 135; *Kordić and Cerkez* Appeal Judgment, paras 102, 671; *Kvočka et al.* Appeal Judgment, para. 321; *Naletilić and Martinović* Appeal Judgment, para. 574; *Simić et al.* Appeal Judgment, para. 177; *Brđanin* Appeal Judgment, para. 296.
- 74 The definition of torture, as set out in the Convention Against Torture may be considered to reflect customary international law. *Brđanin* Appeal Judgment, para. 246; *Kunarac et al.* Appeal Judgment, para. 146; *Furundžija* Appeal Judgment, para. 111.
- 75 *Brđanin* Appeal Judgment, para. 246. See also *Furundžija* Appeal Judgment, para. 111; Convention Against Torture, Article 1(1).
- 76 *Naletilić and Martinović* Appeal Judgment, para. 299, affirmed by *Brđanin* Appeal Judgment, para. 251.
- 77 *Brđanin Appeal Judgment, para. 251.*
- 78 *Kunarac et al.* Appeal Judgment, para. 153.
- 79 *Simić et al.* Trial Judgment, para. 81; *Krnjelac* Trial Judgment, para. 184; *Kvočka et al.* Trial Judgment, para. 153; *Čelibići* Trial Judgment, para. 470.
- 80 *Kvočka et al.* Appeal Judgment, para. 284 (affirming *Kunarac et al.* Appeal Judgment, para. 148).
- 81 *Kunarac et al.* Appeal Judgment, paras. 127–128; *Kvočka et al.* Appeal Judgment, para. 395 (confirming *Kunarac et al.* Trial Judgment, para. 460).
- 82 *Kunarac et al.* Appeal Judgment, paras. 127–128; *Kvočka et al.* Appeal Judgment, para. 395 (confirming *Kunarac et al.* Trial Judgment, para. 460).
- 83 *Kunarac et al.* Appeal Judgment, paras. 127–128 (confirming *Kunarac et al.* Trial Judgment, para. 460).
- 84 *Kvočka et al.* Trial Judgment, para. 180.
- 85 *Đorđević* Trial Judgment, para. 1766; *Akayesu* Trial Judgment, para. 688.
- 86 *Brđanin* Trial Judgment, para. 1012; *Stakić* Trial Judgment, para. 757. See also *Brima et al.* Trial Judgment, para. 720.
- 87 *Akayesu* Trial Judgment, para. 688; *Furundžija* Trial Judgment, para. 186.
- 88 *Đorđević* Trial Judgment, para. 1768; *Milutinović* Trial Judgment, Vol. I, para. 201.
- 89 *Đorđević* Trial Judgment, para. 1768; *Milutinović* Trial Judgment, Vol. I, para. 201.
- 90 *Stakić* Appeal Judgment, paras. 315–316; *Kordić and Cerkez* Appeal Judgment, para. 117 (quoting *Kupreskeić et al.* Trial Judgment, para. 563).
- 91 *Kordić and Cerkez* Appeal Judgment, para. 117. See also *Vasiljević* Trial Judgment, paras. 234–236; *Krnjelac* Trial Judgment, paras. 130–132; *Kayishema and Ruzindana* Trial Judgment, paras. 153–154.
- 92 *Krajišnik* Appeal Judgment, para. 331; *Stakić* Appeal Judgment, para. 317; *Kordić and Cerkez* Appeal Judgment, para. 117.
- 93 *Kordić and Cerkez* Appeal Judgment, para. 116; *Krajišnik* Trial Judgment, para. 752; *Martić* Trial Judgment, para. 87.
- 94 *Krnjelac* Trial Judgment, para. 115; *Simić et al.* Trial Judgment, paras 64-65; *Krajišnik* Trial Judgment, para. 752.
- 95 *Krnjelac* Trial Judgment, para. 114; *Krajišnik* Trial Judgment, para. 753.
- 96 *Krnjelac* Trial Judgment, para. 114; *Krajišnik* Trial Judgment, para. 753.
- 97 See *Brđanin* Appeal Judgment, para. 167.
- 98 Article 7(2)(c), Rome Statute; International Criminal Court, *The Elements of Crimes*, Article 7(1)(c), p. 6.
- 99 For instance, ICTY, *Prosecutor v Kunarac*, IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 119.
- 100 ICTY, *Prosecutor v Kunarac, Kovac and Vuković*, Appeal Judgment, IT-96-23-T and IT-96-23/1-A, 12 June 2001, para. 116; *Krnjelac* Trial Judgment, paras. 350-360.
- 101 See further, Jackson, Miles, Expert Opinion on the Interplay between the Legal Regime Applicable to Belligerent Occupation and the Prohibition of Apartheid under International Law. Oxford, Diakonia, March 2021.