

M. CHERIF BASSIOUNI

# CRIMES AGAINST HUMANITY

HISTORICAL EVOLUTION AND  
CONTEMPORARY APPLICATION

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## CRIMES AGAINST HUMANITY

This book traces the evolution of crimes against humanity (CAH) in terms of both historic legal analysis and subject-matter content, from their first expression in international criminal law in the aftermath of the atrocities committed by the Ottoman Empire against the Armenian population at the end of World War I, to the first prosecution of CAH before the International Military Tribunal at Nuremberg, to the present day.

The first part of the book addresses general issues pertaining to the characterization of CAH in normative, jurisprudential, and doctrinal terms, including the state policy element and the need to extend CAH to nonstate actors acting pursuant to an organizational policy. Next, some of the phenomenological characteristics of group violence that manifest themselves during the commission of CAH are considered. The historical phases in the development of CAH are then described, from the post-World War II proceedings to the international *ad hoc* and mixed model tribunals and the International Criminal Court (ICC). This part of the book includes both a normative and jurisprudential assessment, as well as a review of doctrinal material commenting on all of the above. It is followed by an analysis of the specific contents of CAH, in which issues of comparative criminal law are advanced in the context of the “general part,” including theories of individual criminal responsibility and defenses and exonerations.

Of all the books on CAH, this book is the first to include a world survey of national legislation and national prosecutions of CAH and CAH-type crimes that have occurred from the post-World War II era until the present. The book constitutes a unique and comprehensive treatment of all legal and historical aspects pertaining to CAH in a single definitive volume.

M. Cherif Bassiouni is a distinguished Research Professor of Law Emeritus at DePaul University College of Law and President Emeritus of the law school's International Human Rights Law Institute. He is also President of the International Institute of Higher Studies in Criminal Sciences in Syracuse, Italy, and Honorary President of the International Association of Penal Law in Paris, France. He has served the United Nations in a number of capacities and was nominated for the Nobel Peace Prize for his work in the field of international criminal justice and for his contribution to the creation of the ICC. Bassiouni is the author or editor of 79 books and the author of 241 articles on a wide range of legal issues.



# Crimes Against Humanity

HISTORICAL EVOLUTION AND CONTEMPORARY  
APPLICATION

**M. Cherif Bassiouni**

DePaul University, College of Law



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## Preface

In 1989, the Canadian Department of Justice asked me to serve as its legal expert in *R. v. Finta*,<sup>1</sup> Canada's first prosecution of crimes against humanity under a 1987 statute incorporating this international crime into Canadian criminal law. In this capacity I worked with the prosecution team for several months, prepared extensive memoranda of law, and testified before the trial court for four full, grueling days. It was one of my life's most gratifying and worthwhile experiences, one that I will never forget.

The Canadian statute, which is retrospective but not retroactive, (*sic*) requires *inter alia* that crimes against humanity be established under international law at the time that the alleged crime was committed, and that the specific crime charged under it also constitute a violation of Canadian criminal law at the time that the alleged criminal conduct occurred. These two requirements make it very difficult for the prosecution to succeed. This case was the only one brought under that law, and it revealed the difficulties in its application.

This first and last case involved a former Hungarian Gendarmerie Captain, Imre Finta, then a naturalized Canadian citizen, who was charged, *inter alia*, with the deportation of 8,617 Jews from Szeged, Hungary, to Auschwitz, Poland, and Strasshof, Austria, in June 1944 as part of the Nazi plan to exterminate the Jews of Europe. No one knows how many of these deportees died in transit, in the death camps, or under slave-labor conditions. Reviewing such horrors even forty-five years later was deeply moving and profoundly saddening. It reinforced my belief that such crimes should not go unpunished, nor should they ever be forgotten.

I was gratified that the Trial Court, and subsequently the Appellate and Supreme Court, accepted my explanation of the nature and history of crimes against humanity and that it ruled this international crime as existing under international law as an emerging custom and as a general principle of law prior to the London Charter.<sup>2</sup>

To establish before a common law court that crimes against humanity existed as an international crime in 1944 was not an easy task. I first studied the criminal laws of the seventy-four states that, at the time, constituted all the members of the international community and found that their criminal laws contained all the crimes listed in Article 6(c) of the London Charter. I prepared bound volumes of the texts of these laws, and, for each country, an affidavit of an expert to explain these crimes under the respective

<sup>1</sup> *Regina v. Finta*, 50 C.C.C. (3d) 247, 61 D.L.R. 85 (1989).

<sup>2</sup> *Regina v. Finta* [1994] 1 S.C.R. 701, at 96–7; *Regina v. Finta*, 92 D.L.R. 4th 1, 84, Ontario Court of Appeal, 1992.

national criminal laws. These volumes were submitted in evidence to the Court. Then came the reams of pages I read about Nuremberg, Tokyo, their sequels, and other national trials and the preparation of a lengthy memorandum on the history and nature of crimes against humanity. That too was submitted in evidence to the Court. Then came four days of expert testimony, six to eight hours a day, mostly of grueling cross-examination.<sup>3</sup> My work in preparation for the *Finta* case led to the first edition of a book published in December 1992 entitled *Crimes Against Humanity in International Law*.

Two years after my experience in the *Finta* case, the United Nations Security Council established the Commission of Experts, pursuant to Resolution 780,<sup>4</sup> to investigate grave breaches of the Geneva Convention and other serious violations of international humanitarian law in the former Yugoslavia.<sup>5</sup> The Secretary-General of the United Nations first appointed me to be a member of the Commission, and then Chairman. Within the Commission, I was also the Rapporteur on the Gathering and Analysis of the Facts. In these capacities, I documented, *inter alia*, crimes against humanity committed by both state and nonstate actors. The experience was shocking, to say the least, as evidenced by the Commission's Final Report<sup>6</sup> and the 3,300 pages of Annexes,<sup>7</sup> for which I was responsible.

Between March and May 1993, I drafted for the United Nations Office of Legal Affairs, in my capacity as a member of the Commission, a proposed definition of crimes against humanity that was included in the Secretary-General's Report and in the Statute for the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted by the Security Council.<sup>8</sup>

The definition of crimes against humanity in Article 5 of the ICTY Statute is patterned on the Nuremberg one and includes a connection to an armed conflict, whether international or noninternational. There was a strong belief among many publicists that the war-connecting link was no longer required because of the 1950 ILC Report, which had removed this connection. At the time, my concern was to make sure that crimes against

<sup>3</sup> As I recall it twenty years later, a brief moment of levity came when Mr. Christie, the defense counsel, who specialized in representing cases involving those taking issue with the Holocaust and expressing anti-Semitic views, asked me if I were Jewish, where I stood on Holocaust politics, and whether I had Jewish relatives. My response was no to the first question, that I failed to understand the second question, and yes to the third question. Mr. Christie's eyes seemed to light up and with some glee, he asked me to explain my Jewish family relations. With seriousness, and earnestness, I responded: "My ancestor had two children, one of them was Jewish." I then added that their names were Ishmael and Isaac as they understood the connection to Abraham. There was laughter in the courtroom, and the cross-examination continued.

<sup>4</sup> S. C. Res. 780, *On the Establishment of a Commission of Experts for the Former Yugoslavia*, S/RES/780 (1992), 6 October 1992.

<sup>5</sup> See generally M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992). 88 AM. J. INT'L L. 784–805 (1994) and M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. F. 279–340 (1994).

<sup>6</sup> *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), UN Doc. S/1994/674, 27 May 1994.

<sup>7</sup> *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), Annexes to the Final Report, UN SCOR, 47th Sess., UN Doc. S/1994/674/Add.2 (1994).

<sup>8</sup> S. C. Res. 808, 48 U.N. SCOR, (3175th mtg.), U.N. Doc. S/RES/808 (1993), reprinted in 32 I.L.M. 1159. See also generally M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 221–6 (1996) [hereinafter BASSIOUNI, *THE LAW OF THE ICTY*]; VIRGINIA MORRIS AND MICHAEL P. SCHARF, 1–2 *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1995) [hereinafter MORRIS & SCHARF, *INSIDER'S GUIDE TO THE ICTY*].

humanity applied to the complex situation of the conflict in the former Yugoslavia, which, at times and in some areas, was of an international character and/or of a non-international character.<sup>9</sup> I accomplished this by linking crimes against humanity to “a conflict of an international or non-international character.” This formula avoided having any questions asked about the removal of the war-connecting link that was required under the London Charter’s Article 6(c). I could have relied on the ILC’s 1950 Report,<sup>10</sup> which stated that customary international law no longer required that connection, but I was concerned that the report had little evidence to support this conclusion. As to the contents of crimes against humanity, I was confident that the specific inclusion of rape in Article 5 of the ICTY was amply supported by customary international law. Thus, forty-eight years after the Nuremberg Charter was adopted, a new formulation of crimes against humanity emerged in international criminal law, which I had the privilege of drafting.

Shortly thereafter, the Security Council established in 1994 the International Criminal Tribunal for Rwanda (ICTR).<sup>11</sup> Article 3 of the ICTR Statute contains a definition of crimes against humanity that differs from the one in Article 5 of the ICTY. The new definition removed any required connection between crimes against humanity and a conflict of any type. This removal of the war connection was as radical a change in the nature of the crime as was the 1945 Charter’s definition in comparison with the post World War I efforts of 1919, but it was needed because of the nature of the Rwandan conflict.

After the establishment of the ICTY and the ICTR, work on the International Criminal Court (ICC) began in 1995 when the General Assembly established an *Ad Hoc* Committee for the Establishment of an International Criminal Court. It was my privilege to have been elected as its vice chairman. The *Ad Hoc* Committee worked on the basis of the ILA’s 1994 Draft Statute, which did not contain a definition of crimes against humanity. Thus, the *Ad Hoc* Committee had to start working on a new definition. At that time, I proposed a text combining the features of Article 5 of the ICTY Statute and Article 3 of the ICTR Statute. That text was subsequently expanded by the General Assembly’s Preparatory Committee for the Establishment of an International Criminal Court, which served from January 1996 to April 1998. It also was my privilege to have been the vice chairman of this committee. In that capacity I continued to work on the definition of crimes against humanity.<sup>12</sup> Subsequently, I had the honor of being elected as Chairman of the Drafting Committee of the United Nations Diplomatic Conference on the International Criminal Court, which was held in Rome, June 15 to July 17, 1998.<sup>13</sup> The Diplomatic Conference succeeded in the adoption of the ICC Statute, which defined crimes against humanity in Article 7, as the Preparatory Committee had proposed. Article 7 included a state policy requirement, and the war-connecting link was removed.

<sup>9</sup> This was evidenced in the ICTY’s first case. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (Jul. 15, 1999) [hereinafter *Tadić* Appeals Judgment]; Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997) [hereinafter *Tadić* Trial Judgment].

<sup>10</sup> *Report of the International Law Commission Covering Its Second Session*, (1950) 5 U.N. G.A.O.R. Supp. No. 12, U.N. Doc. A/1316 [hereinafter 1950 ILC Report].

<sup>11</sup> S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).

<sup>12</sup> M. CHERIF BASSIOUNI, I-III THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT (2005) [hereinafter BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC].

<sup>13</sup> The Rome Statute of the International Criminal Court (ICC), 17 July 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998).

This book is, therefore, the result of my many years of work as an academic and as a participant in international legislative efforts. These experiences were rich and rewarding and provided me with useful insights, which, hopefully, will benefit the reader. This is a new book, not merely an update of previous editions of *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW*. This book includes all of the jurisprudential developments of CAH, from the post-World War II proceedings to the ICTY, ICTR, and ICC, as well as the mixed-model tribunals and relevant national prosecutions.

This Preface would not be complete if I did not also express my belief that the world community must develop a commitment to the prosecution of those who commit crimes against humanity, irrespective of time, place, and the identity or status of the perpetrators or victims. The motivation for that urging is not vindictiveness, but a belief in the need to provide accountability and victim redress. Prosecutions for such crimes must evidence, if nothing else, our human solidarity with the victims of such crimes – that is the least that we can do for them – as well as uphold our values. Along with this urging, I must also add a word of caution to all those engaged in such efforts – the greater the magnitude of the human depredations, the less it can countenance any type of compromise.

As one who has had direct personal experience with the human suffering of so many victims of these and other international crimes, I must bear witness. That is what I have tried to achieve in this book.

M. Cherif Bassiouni  
Chicago, March 2011



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The author acknowledges the research assistance of Lea Ann Chambers Fracasso, J.D. (DePaul University College of Law, 2010) and Neill S. Townsend, J.D. (DePaul University College of Law, 2008), who did the research on national legislation and prosecutions. Mr. Townsend also transcribed my many corrections and wrestled with the mounting number of citations. Both Mrs. Fracasso and Mr. Townsend are members of the Illinois bar.



## Table of Abbreviations

The abbreviations that follow are referred to in footnotes throughout the book.

1899 <i>Hague Convention</i>	Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, 26 MARTENS NOUVEAU RECUEIL (ser. 2) 949, <i>reprinted in</i> 1 AM. J. INT'L L. 129 (1907) (Supp.), 1 FRIEDMAN 221, SCHINDLER/TOMAN 57
1907 <i>Hague Convention</i>	Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 3 MARTENS NOUVEAU RECUEIL (ser. 3) 461, <i>reprinted in</i> 2 AM. J. INT'L L. 90 (1908) (Supp.), 1 FRIEDMAN 308, 1 BEVANS 631
1919 <i>Commission Report</i>	Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties (Conference of Paris 1919 Carnegie Endowment for International Peace, Division of International Law), Pamphlet No. 32 (1919), <i>reprinted in</i> 14 AM. J. INT'L L. 95 (1920) (Supp.), 1 FRIEDMAN 842
1948 <i>Genocide Convention</i>	Convention on the Prevention and Punishment of the Crime of Genocide (also Genocide Convention), Dec. 9, 1948, 78 U.N.T.S. 277, <i>reprinted in</i> 45 AM. J. INT'L L. 7 (1951) (Supp.)
1949 <i>Geneva Conventions</i>	Conventions signed at Geneva, Aug. 12, 1949: (a) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. No. 3362. (b) Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85, 6 U.S.T. 3217, T.I.A.S. No. 3363. (c) Convention Relative to the

	Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364. (d) Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365
1950 ILC Report	<i>Report of the International Law Commission</i> , U.N. GAOR, 5th Sess., U.N. Doc. A/CN.4/25 (1950)
1974 Definition of Aggression	Definition of Aggression (United Nations General Assembly Resolutions), Dec. 14, 1974, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974)
1977 Protocol I	Protocol Additional to Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, <i>opened for signature</i> Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, <i>reprinted in</i> 16 ILM 1391, SCHINDLER/TOMAN 551
1977 Protocol II	Protocol Additional to Geneva Convention of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, <i>opened for signature</i> , Dec. 12, 1977, U.N. Doc. A/32/144 Annex II, <i>reprinted in</i> 16 ILM 1391, SCHINDLER/TOMAN 619
1994 ILC Report	<i>Report of the International Law Commission</i> , 46th Sess., May 2–July 22, 1994, U.N. GAOR, 49th Sess., U.N. Doc. A/49/10 (1994)
1996 ILC Draft Code of Crimes	Draft Code of Crimes Against the Peace and Security of Crimes of Mankind, May 6–July 26, 1996, <i>Report of the ILC</i> , GAOR Supp. No. 10, U.N. Doc. A/51/10
1996 ICC Preparatory Committee Report	<i>Report of the Preparatory Committee on the Establishment of an International Criminal Court</i> , Vol. I, U.N. GAOR, 51st Sess., Supp. No. 22, U.N. Doc. A/51/22 (1996)
9/11	The terrorist attacks of September 11, 2001, on the World Trade Center in New York, and the Pentagon, outside of Washington, D.C.
Annexes to Final Report, Commission of Experts	Annexes to the Final Report, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994) (See also Final Report, Committee of Experts)
Annex II to 1919 Commission Report	Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, Annex II Apr. 4, 1919, <i>reprinted in</i> 14 AM. J. INT'L L. 127 (1920)

<i>Apartheid</i> Convention	International Convention on the Suppression and Punishment of the Crime of <i>Apartheid</i> , Nov. 30, 1973, U.N. G.A. Res. 3068 (XXVIII), 28th Sess., U.N. GAOR Supp. No. 30 at 75, U.N. Doc. A/9030 (1973), <i>reprinted in</i> 13 ILM 50 (1974)
ASP	Assembly of States Parties to the International Criminal Court
BASSIOUNI & WISE, AUT DEDERE AUT JUDICARE	M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW (1995)
BASSIOUNI, CRIMES AGAINST HUMANITY	M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d rev. ed., 1999)
BASSIOUNI, DRAFT CODE	M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE & DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987)
Bassiouni, <i>From Versailles to Rwanda</i>	M. Cherif Bassiouni, <i>From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court</i> , 10 HARV. HUM. RTS. J. 1 (1996)
Bassiouni, <i>General Principles</i>	M. Cherif Bassiouni, <i>A Functional Approach to "General Principles of International Law,"</i> 11 MICH. J. INT'L L. 768–818 (1990).
BASSIOUNI, INTERNATIONAL EXTRADITION	M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRAC- TICE (4th ed. 2002)
BASSIOUNI, HUMAN RIGHTS COMPENDIUM	M. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRI- MINAL JUSTICE (1994)
BASSIOUNI, INTERNATIONAL HUMANITARIAN LAW	A MANUAL ON INTERNATIONAL HUMANITA- RIAN LAW AND ARMS CONTROL AGREEMENTS (M. Cherif Bassiouni ed., 2000).
1 BASSIOUNI, ICL	INTERNATIONAL CRIMINAL LAW: CRIMES (M. Cherif Bassiouni ed., 3d. rev. ed. 2008)
2 BASSIOUNI, ICL	INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS (M. Cherif Bassiouni ed., 3d. rev. ed. 2008)
3 BASSIOUNI, ICL	INTERNATIONAL CRIMINAL LAW: ENFORCEMENT (M. Cherif Bassiouni ed., 3d. rev. ed. 2008)
BASSIOUNI, ICL CONVENTIONS	M. CHERIF BASSIOUNI, INTERNATIONAL CRIMI- NAL CONVENTIONS AND THEIR PENAL PROVISIONS (1997)
Bassiouni, <i>Negotiating the Treaty of Rome</i>	M. Cherif Bassiouni, <i>Negotiating the Treaty of Rome on the Establishment of an International Criminal Court</i> , 32 CORNELL INT'L L. J. 443 (1999).

BASSIOUNI, POST CONFLICT JUSTICE	POST CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2002)
BASSIOUNI, STATUTE OF THE ICC	THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY
BASSIOUNI, TERRORISM	INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937–2001
BASSIOUNI, TERRORISM DOCUMENTS	INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS (1972–2001) (M. Cherif Bassiouni ed., 2002, 2 vols.)
BASSIOUNI & NANDA TREATISE	A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni & V.P. Nanda eds., 1973, 2 vols.)
Bassiouni, <i>Universal Jurisdiction</i>	M. Cherif Bassiouni, <i>Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice</i> , 42 VA. J. INT'L L. 81 (2001)
BASSIOUNI, YUGOSLAVIA BEVANS	M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS)
BEVANS	TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776–1949 (C.F. Bevans ed. 1970, 13 vols.)
BSP	British and Foreign State Papers
CCL 10	Allied Control Council Law No. 10, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Jan. 31, 1946, <i>reprinted in</i> 1 Ferencz 488, 1 FRIEDMAN 908
CE	Council of Europe
<i>Commission of Experts on Former Yugoslavia</i>	Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, S.C. Res. 780, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/780 (1992)
EU	European Union
<i>The Eichmann Case</i>	Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 18, 39, (Isr. Dist. Ct. – Jerusalem 1961), <i>aff'd</i> , 36 I.L.R. 277 (Isr. Sup. Ct. 1962)
Eur. Ct. H.R.	European Court of Human Rights
Eur. T.S. – (Also ETS	European Treaty Series
ECHR)	European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 218 U.N.T.S. 221, E.T.S. No. 5
<i>Far Eastern Commission Secretary Report</i>	<i>Activities of the Far Eastern Commission, Report by the General</i> , February 26–July 10, 1947, 16 DEP'T ST. BULL. 804–06 (1947)
Far East Military Proceedings	Trials held in connection with the post-World War II Far East Military Activities conducted by

	(a) the United States, as special military trials; and (b) other countries including Great Britain, the Soviet Union, China, the Netherlands, Australia, and other Commonwealth nations
<i>Final Report, Commission of Experts</i>	<i>Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780</i> (1992), U.N. SCOR, Annex, U.N. Doc. S/1994/674 (27 May 1994) ( <i>See also</i> Annexes to Final Report of Yugoslavia Commission of Experts)
FSIA	Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (1994)
G.A.	(U.N.) General Assembly
GAOR ( <i>See also</i> U.N. GAOR)	(U.N.) General Assembly Official Records
G.A. Res. ( <i>See also</i> U.N. G.A. Res.)	(U.N.) General Assembly Resolution
General principles	“the general principles of law recognized by civilized nations” as contained in Article 38 of the ICJ Statute
HUDSON	INTERNATIONAL LEGISLATION (Michael Hudson ed., 1972)
ICC	International Criminal Court
ICC Draft Statute	<i>Report of the Preparatory Committee on the Establishment of an International Criminal Court</i> , A/Conf.183/2/Add.1 (1998)
ICC Statute	<i>Rome Statute of the International Criminal Court</i> , A/Conf.183/9, 17 July 1998
ICJ	International Court of Justice
ICJ Reports	International Court of Justice Reports
ICJ Statute	Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 BEVANS 1179
ICCPR	International Covenant on Civil and Political Rights, Dec. 19, 1966, 993 U.N.T.S. 3 ( <i>entered into force</i> Jan. 3, 1976)
ICL	International Criminal Law
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
<i>ICTR Statute</i>	International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994)
ICTY	International Criminal Tribunal for Yugoslavia
<i>ICTY Statute</i>	International Criminal Tribunal for Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993)
IHL	International Humanitarian Law
IHRL	International Human Rights Law

ILC	International Law Commission
ILC's Nuremberg Principles	Affirmation of the Principles of International Law Recognized by Nuremberg Principles the Charter of the Nuremberg Tribunal, Dec. 11, 1946, U.N. G.A. Res. 95(I), U.N. GAOR (Part II) at 188, U.N. Doc. A/64/Add. 1(1946), <i>reprinted in</i> 2 FRIEDMAN 1027; SCHINDLER/TOMAN 833
ILM	INTERNATIONAL LEGAL MATERIALS
IMO	International Maritime Organization
IMT ( <i>Also</i> Nuremberg Charter, Nuremberg Trials, and London Charter)	The International Military Tribunal at Nuremberg, established by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945; Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 E.A.S. No. 472, <i>reprinted in</i> 39 AM. J. INT'L L. 257 (1945) (Supp.), 1 Ferencz 454, 1 FRIEDMAN 883, SCHINDLER/TOMAN 823
IMTFE ( <i>See also</i> Tokyo Trials and Tokyo Charter)	International Military Tribunals for the Far East Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 BEVANS 20 Charter for the International Military Tribunal for the Far East, Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 BEVANS 27. <i>See also</i> Documents on the Tokyo International Military Tribunal (Neil Boisher and Robert Cryer eds. 2008).
IMTFE Proclamation ( <i>See also</i> Tokyo Trials, Tokyo Charter, and IMTFE proclamation)	Special Proclamation: Establishment of a Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 BEVANS 20
Law of the Charter	Refers to: (a) London Agreement and the Charter; (b) Indictments, Proceedings and Judgment of the International Military Tribunal at Nuremberg
LATTANZI, ICC COMMENTARY	THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE (Flavia Lattanzi ed., 1998)
Leipzig Trials	The trials of German war criminals after World War I held before the German Supreme Court ( <i>Reichsgericht</i> ) Sitting at Leipzig. <i>See generally</i> CLAUD MULLINS, THE LEIPZIG TRIALS (1921); <i>see also</i> 16 AM. J. INT'L L. 696 <i>et seq.</i> (1922)
LIA	London International Assembly, The Punishment of War Criminals: Recommendations of the London International Assembly (1944)
Lieber Code	U.S. Dept. of War, Instructions for the Government of the Armies of the United States in the



	Field, General Orders No. 100 (1863), <i>reprinted in</i> 1 FRIEDMAN 158
LNTS	League of Nations Treaty Series
LRTWC	LAW REPORTS OF TRIALS OF WAR CRIMINALS
MARTENS	MARTENS NOUVEAU RECUEIL GÉNÉRAL DES TRAITÉS
MLAT	Mutual Legal Assistance Treaty
Moscow Declaration	The Moscow Conference, Oct. 19–30, 1943 (Declaration of German Atrocities, Nov. 1, 1943), 1943 FOR. REL. (I) 749, <i>reprinted in</i> 38 AM. J. INT'L L. 3 (Supp.); 3 BEVANS 816
MOU	Memorandum of Understanding
MÜLLER-RAPPARD & BASSIOUNI, EUROPEAN INTER-STATE COOPERATION	EUROPEAN INTER-STATE COOPERATION IN CRIMINAL MATTERS (Ekkehart Müller-Rappard & M. Cherif Bassiouni eds., 2d rev. ed. 1992)
NGO	Non-governmental organization
<i>Nuremberg Indictment</i>	1 IMT 27
<i>Nuremberg Judgment</i>	1 IMT 171
Nuremberg Principles	<i>Principles of the Nuremberg Tribunal</i> 1950, <i>Report of the ILC (Principles of International Law Recognized in the Tribunal)</i> , July 29, 1950, U.N. GAOR, 5th Sess., Supp. (No. 12) 11, U.N. Doc. A/1316 (1950), <i>reprinted in</i> 4 AM. J. INT'L L. 126 (1950) (Supp.); 2 FERENCZ 235
NUREMBERG PROCEEDINGS	TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (Secretariat of the International Military Tribunal ed., 1947)
OAS	Organization of American States
OAU Convention	OAU Convention for the Elimination of Mercenaries in Africa, OAU Doc. Cm/433/Rev.L. (1972)
OLA	United Nations Office of Legal Affairs
Tadić Case	<i>The Prosecutor v. Tadić</i> , OPINION AND JUDGMENT, Case No. IT-94-I-T, 7 May 1997
Parry's	THE CONSOLIDATED TREATY SERIES (C. Parry ed., 1969 & Supp., 231 vols.)
PCIJ	Permanent Court of International Justice
PCIJ Statute	Statute of the Permanent Court of International Justice, 1926 P.C.I.J. (Ser. D) No. 1
Post-Charter Legal Developments	Refers to: (a) Affirmation of Nuremberg Principles; (b) Genocide Convention; (c) ILC Nuremberg Principles; (d) U.N. Non-Applicability of Statutory Limitations to War Crimes; (e) Resolutions on War Criminals, Dec. 15, 1970, U.N. G.A. Res. 2583 (XXIV), <i>reprinted in</i> 1 FRIEDMAN 754; (f) <i>Apartheid</i> Convention; (g)

	International Co-operation in Extradition; (h) European Non-Applicability of Statutory Limitations to War Crimes
Potsdam Conference	The Berlin (Potsdam) Conference (Protocol of Proceedings), Aug. 2, 1945, 1945 FOR. REL. Conference of Berlin (Potsdam II) 1499, <i>reprinted in</i> 3 BEVANS 1207; 39 AM. J. INT'L L. 245 (1945) (Supp.)
ICC Preparatory Committee	The Preparatory Committee on the Establishment of an International Criminal Court
Preparatory Committee Report	Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vols I, U.N. GAOR, 51st Sess., Supp. No. 22, ¶¶ 212–93, U.N. Doc. A/51/22 (1996)
RECUEIL DES COURS	RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE
RED CROSS REPORT	1 INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR (1948)
ICC Ad Hoc Committee	<i>Report of the Ad Hoc Committee on the Establishment of an International Criminal Court</i> , U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc A/50/22
Report of Robert H. Jackson	U.S. Dep't of State, Pub. No. 3080, Report of Robert H. Jackson
Res.	(U.N.) Resolution
Resolution on Aggression	Resolution on the Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1975)
RIDP	REVUE INTERNATIONALE DE DROIT PÉNAL
SC	(U.N.) Security Council
SCHABAS, ICC INTRODUCTION	WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2001)
SCOR	(U.N.) Security Council Official Records
Stat.	United States Statutes at Large
Subsequent Proceedings	(See also CCL N° 10 Trials) Proceedings by the Allied Powers held pursuant to Control Council Law No. 10, (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), Dec. 20, 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3, Berlin, Jan. 31, 1946, <i>reprinted in</i> 1 Ferencz 488, 1 FRIEDMAN 908. The U.S. Proceedings involved 12 Trials: (a) <i>The Einsatzgruppen Case</i> ; (b) <i>The I.G. Farben Case</i> ; (c) <i>The Flick Case</i> ; (d) <i>The High Command Case</i> ; (e) <i>The Hostage Case</i> ; (f) <i>The</i>

	<i>Justice Case</i> ; (g) <i>The Krupp Case</i> ; (h) <i>The Medical Case</i> ; (i) <i>The Milch Case</i> ; (j) <i>The Ministries Case</i> ; (k) <i>The Pohl Case</i> ; (l) <i>The Rusha Case</i>
T.I.A.S.	(U.S.) Treaties and Other International Acts Series
Tokyo Charter ( <i>See also</i> IMTFE and Tokyo Trials)	International Military Tribunal for the Far East: (a) Proclamation by the Supreme Commander for the Allied Powers, Jan. 19, 1946, T.I.A.S. 1589, <i>reprinted in</i> 4 BEVANS 20, 1 FERENCZ 522 (1975), FRIEDMAN 894; (b) Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589, <i>reprinted in</i> 1 Ferencz 523, 1 FRIEDMAN 895 ( <i>See also</i> IMTFE)
Tokyo Trials ( <i>See also</i> IMTFE)	International Military Tribunals for the Far East; Trial of the Major War Criminals, Proceedings of the International Military Tribunal for the Far East at Tokyo; <i>reprinted</i> (excerpts) <i>in</i> 4 BEVANS 20; 2 Ferencz 522 (1975); <i>compiled in</i> The International Military Tribunals for the Far East (R. John Pritchard & Sonia M. Zaide eds., 21 vols, 1981)
1984 Torture Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), <i>entered into force</i> June 26, 1987, <i>draft reprinted in</i> 23 ILM 1027 (1985), <i>with final changes in</i> 24 ILM 1027
1919 Treaty of Versailles	Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, 11 MARTENS NOUVEAU RECUEIL (ser 3) 323, <i>reprinted in</i> 2 BEVANS 43, 1 FRIEDMAN 417 (U.S.) Treaty Series
TS	(U.S.) Treaty Series
UN	United Nations
UNDCP	United Nations International Drug Control Programme
UNESCO	UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, <i>adopted</i> Nov. 14, 1970, 823 U.N.T.S. 23, <i>reprinted in</i> 10 I.L.M. 289
UNWCC	UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (1948)
UN Doc.	United Nations Document

UNTS	United Nations Treaty Series
Universal Declaration	Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III)
US	United States
UST	United States Treaty Series

# Introduction

The 1919 Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties<sup>1</sup> is the genesis of crimes against humanity (CAH) in international law. The report was presented to the Preliminary Peace Conference that brought about the Treaty of Versailles<sup>2</sup> and concluded World War I.

The Commission was established by the victorious Allies for purposes of bringing to trial persons of the defeated powers that the Allies believed to have committed war crimes under customary international law as embodied in the Convention Respecting the Laws and Customs of War on Land and Annexed Regulations.<sup>3</sup>

The Preamble of the 1907 Hague Convention<sup>4</sup> states that its contents reflect the customary practices of states that were deemed to exist at the time that the convention was adopted. The Preamble implicitly states that the contents of the Annexed Regulations do not reflect all that is part of the “laws of humanity” that inspired the contents of the Regulation, but only that portion of it that the State Parties had agreed upon at the time.<sup>5</sup> The Preamble recognizes that a concept exists, referred to as “the laws of humanity,” that embodies the human and humanitarian values that are at the basis of the international regulation of armed conflicts.<sup>6</sup>

Customary international law develops at different paces for different subject matters because it represents the evolving practices of states in light of state interests and the international community’s shared values and expectations.<sup>7</sup> There is, therefore, a period of gestation or maturation during which states are not always ready to agree among

<sup>1</sup> *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* 83 (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), *reprinted in* 14 AM. J. INT’L L. 95 (1920) [hereinafter 1919 Commission Report].

<sup>2</sup> Treaty of Peace Between the Allied and Associated Powers of Germany arts. 228–30, June 28, 1919, 225 C.T.S. 188, 285, 2 BEVANS 43, 136–37, at art. 227 [hereinafter Treaty of Versailles].

<sup>3</sup> Oct. 18, 1907, preamble, 36 Stat. 2277, T.S. No. 539, 3 MARTENS NOUVEAU RECUEIL (ser.3) 461, *reprinted in* 2 AM. J. INT’L L. 90 (1908)(Supp), 1 FRIEDMAN 308, 1 BEVANS 631, 632 [hereinafter 1907 Hague Convention].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., M. CHERIF BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 103 (2000); CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louis Doswald-Beck, eds., 2006).

<sup>7</sup> MICHAEL AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW (7th rev. ed., 1997); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (2009).

themselves as to what constitutes customary international law deemed binding upon all states.<sup>8</sup>

The binding character of customary international law is not only based on state practice, but also evidenced by states' intentions to be bound by certain practices, *opinio juris*. In 1907, there existed certain state practices connected to the conduct of war that were supported by *opinio juris*. But there were also customs in the making that states deemed too premature to include as binding. The foundation for what became CAH was the belief that "laws of humanity" constitute the higher law background from which states would periodically select what they agreed to be binding as an international legal obligation.

Based on the above, the Preamble of the 1907 Hague Convention assumes that, in the course of history, the practices of states in the context of armed conflicts reflect certain humanitarian values that derive from cultural and social values.<sup>9</sup> Thus, the international law of armed conflicts is necessarily a work in progress because it reflects certain values in different civilizations that, in turn, are reflected in the way these civilizations conduct themselves in the course of their armed conflicts with others.

Because the making of the 1907 Hague Convention was a Western European exercise, it reflected the evolution of Western European Christian values as they emerged from the natural law doctrine of these Christian states,<sup>10</sup> whether in connection with their interstate conflicts or in their conflicts with other civilizations. But the concept of "the laws of humanity" not only included the Christian doctrine of natural law and the practices of Christian states, but also that which Christian doctrine absorbed from the pre-Christian Greco-Roman civilizations, going back to the fifth century BCE, as well as what they had borrowed between the seventh and twelfth century CE from the Islamic civilization.<sup>11</sup>

The accumulation of doctrine and practice in diverse civilizations instructed European Christian states in their respective practices. But these doctrinal and practical aspects did not ripen at the same time into generalized acceptance of basic principles or rules of conduct by all Christian states. Thus, understandably, the 1907 Hague Convention reflected only a portion of that which "the laws of humanity" included (as reflecting the practices of states in question) and which they agreed at the time would create binding legal norms. This approach allowed for future developments and inclusion of that which would subsequently reach the level of states' recognition of binding international customs.<sup>12</sup>

The 1919 Commission, looking at the wartime practices of the defeated powers, namely Germany and Turkey, drew a list of particulars for war crimes against a number of German military personnel that were to be prosecuted under articles 228–229 of the Treaty of

<sup>8</sup> *Id.*

<sup>9</sup> See BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS, *supra* note 6 at 3.

<sup>10</sup> See, e.g., Francisco Suarez (1548–1584), *On War*, in 2 CLASSICS OF INTERNATIONAL LAW (James B. Scott ed., 1944); Balthazar Ayala, *Three Books on the Law of War*, in 2 CLASSICS OF INTERNATIONAL LAW (John P. Bate trans., 1912); Alberico Gentili (1552–1608), *De Jure Belli Libri Tres*, in CLASSICS OF INTERNATIONAL LAW (James B. Scott ed., 1933). For a contemporary view of natural law, see BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS, *supra* note 6, at 10–15.

<sup>11</sup> See MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM (1955).

<sup>12</sup> See BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS, *supra* note 6, at 45.

Versailles.<sup>13</sup> In examining the conduct of Turkey, the Commission concluded that Turkey had committed certain atrocities in 1915 against its Armenian minority population,<sup>14</sup> but that these did not constitute war crimes because the 1907 Hague Convention applied only to state combatants representing opposing states in their conduct against their opponents' combatants and their opponents' civilian population. Internal conduct involving the nationals of a given state was deemed to be within the sovereignty of a state and could not be deemed a war crime.

The 1919 Commission felt, however, that the substantial nature of the victimization in Turkey, as well as its connection with the then-ongoing World War I, justified the extension of the notion of war crimes to such internal conduct even when the perpetrators who were state agents acted against their own civilian population. The Commission found, based on an Allied memorandum of earlier investigation in 1915,<sup>15</sup> that the victimization of the civilian Armenian population of Turkey by Turkish public officials was conducted on a widespread and systematic scale pursuant to state policy during the conduct of an international armed conflict, namely World War I, and that such conduct justified extending the laws of armed conflict, as contained in the 1907 Hague Convention, to cover this type of situation. In other words, the Commission concluded that this type of conduct was within the meanings of "laws of humanity"<sup>16</sup> and that the conduct in question should be considered "crimes against the laws of humanity."<sup>17</sup> In so doing, the Commission argued that the same protection afforded to the civilian population of a combatant state should be extended to the domestic civilian population of a state that is at war with one state. Thus, it extended the same prohibitions that applied to the civilians of one state when in a conflict with another state, to the same conduct when performed by state agents when directed against their own civilian population. This was not, therefore, the establishment of a new international crime; instead, it was merely a jurisdictional extension of a pre-existing international crime to cover a heretofore unprotected civilian population. In that respect, the Commission felt that it was not infringing on the principles of legality, which prohibit *ex post facto* crimes.<sup>18</sup>

<sup>13</sup> By virtue of Article 228 of the Treaty of Versailles, *supra* note 2, Germany submitted to the right of the Allied Powers to try alleged war criminals. Although the Treaty originally provided that the trials would be administered by the state against whose nationals the alleged crimes were committed, it was subsequently agreed that the German *Reichsgericht* (Supreme Court) sitting at Leipzig would be the court to preside over these cases in Article 229 of the Treaty. For the Leipzig trials, see CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY* (1921); JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* (1982); GERD HANKEL, *DIE LEIPZIGER PROZESSE* (2003); JACKSON MAOGOTO, *INTERNATIONAL JUSTICE IN THE SHADOW OF REALPOLITIK* (2003); M. Cherif Bassiouni, *World War I: 'The War to End All Wars' and the Birth of a Handicapped International Criminal Justice System*, 30 *DENV. J. INT'L L. & POL'Y* 344 (2002).

<sup>14</sup> 1919 Commission Report, *supra* note 1, at Annex I. See also HENRY MORGENTHAU, *AMBASSADOR MORGENTHAU'S STORY* (1918); JAMES BRYCE & ARNOLD TOYNBEE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE* (2000).

<sup>15</sup> 1919 Commission Report, *supra* note 1, at Annex I.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See generally *infra* ch. 5; M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* (2003), at ch. 3, § 9 (discussing principles of legality) [hereinafter BASSIOUNI, *INTRO TO ICL*]; Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 *GEO. L.J.* 119 (2008); MACHTELD BOOT, *GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* (2002).

Notwithstanding these arguments, in 1919 the United States and Japan objected to this extension of jurisdiction, deeming it the expression of natural law doctrine, which these states felt violated legal positivism and thus, by implication, the principles of legality.<sup>19</sup> As a result of this opposition, the Commission's proposal to prosecute Turkish officials for "crimes against the laws of humanity" in connection with atrocities against the civilian Armenian population of Turkey during 1915 was dropped.

The opposition by the United States and Japan was not only based on legal grounds. At the time Turkey was seen by some Western powers as the first line of containment of the Communist regime that had taken over Russia in 1917.<sup>20</sup> This political consideration was evident in the fact that the 1920 Treaty of Sèvres,<sup>21</sup> which contained a clause on the prosecution of Turkish officials for "Crimes Against the Laws of Humanity" committed against the Armenian civilian population of that country, was deleted from the subsequent version contained in the Treaty of Lausanne.<sup>22</sup> The latter not only removed that prosecution provision, but also included a specific secret annex, granting Turkish officials immunity from prosecution. Political considerations prevailed over legal and moral ones.

This brief description of the genesis of CAH reveals how political realities and *Realpolitik* play a role in the development of international criminal law.<sup>23</sup> The subsequent historical developments of CAH confirm the influence of political realism on the development of international law.

By 1945, the victorious Allies concluded that the horrors Nazi Germany inflicted on its civilian population, particularly the Jews, necessitated prosecution.<sup>24</sup> The victorious Allies of World War II were at the same point they were in 1919; the realities were overwhelming but international law was lacking. The United States, instead of being in the opposition as it was after World War I, led the Allies in recognizing CAH as an international crime. The unsuccessful efforts of 1919 thus became the foundation for the Allies' inclusion of "crimes against humanity" in Article 6(c) of the Charter of the International Military Tribunal (IMT), whose seat was at Nuremberg.<sup>25</sup> Another difference between 1919 and 1945 was the substantiality of the victimization that occurred during World War II. But there is no doubt that the efforts of 1919 were the foundations of the developments of 1945. Political realism transformed what could be deemed a failure in 1919 into an emerging custom whose time had arrived. The enormity of the harm that

<sup>19</sup> 1919 Commission Report, *supra* note 1, at Annex II.

<sup>20</sup> See Bassiouni, *supra* note 13; WILLIS, *supra* note 13; and MAOGOTO, *supra* note 13; GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000). See also MULLINS, *supra* note 13; HANKEL, *supra* note 13.

<sup>21</sup> The Treaty of Peace between the Allied Powers and Turkey, Aug. 10, 1920 (Treaty of Sèvres), British Treaty Series No. 11 (1920), reprinted in 15 AM. J. INT'L L. 179 (Supp.) (1921).

<sup>22</sup> Treaty of Lausanne, July 24, 1923, 49 Stat. 2692, 8 L.N.T.S. 1133 (1922).

<sup>23</sup> See generally M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541 (2006); M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability Over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003); M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik*, 12 PACE INT'L L. REV. 213 (2000).

<sup>24</sup> The London Charter's formulation of Article 6(c) linked CAH to war and that meant that the CAH crimes committed before 1939 were not prosecuted. See LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933-1945* 18-20 (1975).

<sup>25</sup> Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter].



occurred during World War II compelled reconsideration of filling a gap in international law. Thus, the facts drove the law.

The modern significance of Article 6(c) of the London Charter is evident in the basic structure of the definitions of CAH found in its progeny: Article 5 of the ICTY Statute; Article 3 of the ICTR Statute; and Article 7 of the Rome Statute. In other words, a custom had emerged in 1919, which though not fully recognized at that time, had ripened in 1945. This was my position as Canada's legal expert in *R. v. Finta*,<sup>26</sup> which was based on Canada's 1987 law,<sup>27</sup> as mentioned in the Preface.

In 1945, CAH became an international crime that was linked to the existence of an armed conflict carried out by state actors against a civilian population of that state and other states in pursuit of a state policy. Implicitly, it included an element of substantiality of harm, which was reflected by widespread and systematic conduct evidencing state policy. In order to avoid contravening the principles of legality, for the reasons mentioned above in connection with the 1919 efforts, a war-connecting link with CAH was maintained until 1994, when the Security Council promulgated the ICTR Statute.

The tentative nature of CAH is, however, evident in the differences between the definitions of that crime in the three relevant instruments of the post-World War II experience: the London Charter's Article 6(c),<sup>28</sup> the IMTFE Charter's Article 5(c)<sup>29</sup>, and Control Council Law No. 10, Article II(c).<sup>30</sup> This is also reflected in the more than twelve international instruments elaborated between 1954 and 1998 that defined CAH, namely ICTY Article 5; ICTR Article 3; Rome Statute Article 7; the different formulations of the ILC's definition in its various texts, including those of 1954, 1991, and 1996; and the statutes of the mixed-model tribunals of Sierra Leone, Cambodia, and Timor-Leste.<sup>31</sup>

In 1993, the Security Council asked the Secretary-General to prepare a draft statute for the establishment of what became the ICTY.<sup>32</sup> The mandate was to draft such a statute in accordance with conventional and customary international law. As indicated in the Preface, at the time, I was first a member and then chair of the Security Council Commission to investigate violations of international humanitarian law in the former Yugoslavia,<sup>33</sup> and I was asked in this capacity to provide the Secretariat with proposed

<sup>26</sup> *Regina v. Finta*, 50 C.C.C. (3d.) 247, 61 D.L.R. 85 (4th 1989); *Regina v. Finta*, [1994] 1 S.C.R. 701, ¶ 72 (quoting M. Cherif Bassiouni "a war crime or a crime against humanity is not the same as a domestic offence.").

<sup>27</sup> R.S.C., ch. 30, § 1 (3d Supp. 1985) (Can.).

<sup>28</sup> IMT Charter, *supra* note 25.

<sup>29</sup> Charter for the international Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 BEVANS 27 [hereinafter IMTFE Charter].

<sup>30</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1945, *reprinted in* BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT A STEP TOWARD WORLD PEACE 488 (1980) [hereinafter CCL 10].

<sup>31</sup> For the different formulations, *see generally infra* ch. 4.

<sup>32</sup> S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

<sup>33</sup> S.C. Res. 780, ¶ 2, U.N. Doc. S/RES/780 (Oct. 6, 1992); *First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, Annex, U.N. Doc. S/25274 (Feb. 10, 1993); Annex II – Rape and Sexual Assault: A Legal Study and Annex IV – The Policy of Ethnic Cleansing of the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992); Annex III – The Military Structure, Strategy and Tactics of the Warring Factions of the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992) *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. Doc. S/1994/674 (May 27, 1994).

language for the three crimes to be included in the statute of the prospective ICTY: genocide, CAH, and war crimes.<sup>34</sup>

In the draft that I submitted for CAH, which was adopted by the Security Council, I preserved a link between CAH and an ongoing conflict by using in Article 5 the words “in connection with a conflict of an international or non-international character.”<sup>35</sup> The reason for that inclusion was my concern that this was the state of customary international law as a result of the post-World War II experiences. I was, of course, cognizant that the ILC in 1950 had issued a report to the effect that the war-connecting link to CAH was no longer necessary.<sup>36</sup> With all due respect to the ILC, I was concerned that its report would not be deemed sufficient to establish customary practice of states, and if so, there could be challenges before the ICTY or by a state before the ICJ. Remaining on the cautious side, I included the war-connecting link in the definition. I expanded the definition, however, to include a conflict of a noninternational character, believing that such an extension was within the scope of the customary international law. Article 5 states:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population.<sup>37</sup>

The same considerations pertaining to the ICTY could not be extended to the ICTR,<sup>38</sup> simply because the conflict between the Hutu and Tutsi within Rwanda was a purely internal conflict. Article 3 of the ICTR states: “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” The drafters of the ICTR Statute thus removed the war-connecting link, even though there was no prior customary practice to justify it. There is an argument, however, that the acceptance of the international community has now made it part of customary international law. Thus, when it came time to draft the Rome Statute, there was no longer a question as to the nonapplicability of the war-connecting link to CAH.

One of the current debates concerns whether a state policy element is required for a CAH. It is the opinion of this author that such a requirement reflects the historical continuity in the evolution of this international category of crimes since 1919. The conflicts addressed by the post-World War II tribunals, the *ad hoc* and mixed-model tribunals, and the ICC evidence the need for the existence of a state policy for CAH. In the conflicts in the former Yugoslavia and Rwanda, for instance, the perpetrators of CAH were often state actors who were acting pursuant to a state policy. In light of this, Article 7(2) of the Rome Statute provides that an “[a]ttack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred

<sup>34</sup> M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996) [hereinafter BASSIOUNI, *THE LAW OF THE ICTY*].

<sup>35</sup> Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1–2, U.N. Doc. S/RES/827 (1993); 32 I.L.M. 1159 [hereinafter ICTY Statute].

<sup>36</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. INT’L L. COMM’N pt. III, paras. 238–39, U.N. Doc. No. A/1316 (A/5/12) [hereinafter Nuremberg Principles].

<sup>37</sup> ICTY Statute art. 5, *supra* note 35.

<sup>38</sup> Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

to in paragraph (1) against any civilian population, *pursuant to or in furtherance of a State or organizational policy to commit such attack*” (emphasis added).

The new contents of CAH within Article 7 of the Rome Statute are important; but the fact that the contents changed did not mean that the crime had also changed from a crime of abuse of state power to a crime against human rights. Nevertheless, in a curious decision by the ICTY Appeals Chamber in the *Kunarac* case, support for an element of state policy was completely ignored, and the requirement was declared unnecessary insofar as the Statute provided for conduct that was conducted on a “widespread or systematic basis.”<sup>39</sup> Had the Appeals Chamber merely stated that “widespread or systematic” could be deemed a reflection of state policy, it would have been acceptable. But the opinion is fallacious, because in a footnote<sup>40</sup> the court cherry picks a number of historical precedents in support of its position. This not only was misleading, it was a distortion of the law it purported to rely upon.<sup>41</sup> There is probably no other instance in the jurisprudence of any international criminal tribunal to date where such a gross misstatement of precedents was made that was then erroneously relied upon by the court to produce a conclusion that differed from what the Chamber cited as authority. Only a few commentators, such as Professor Schabas, have caught this mistake.<sup>42</sup> Unfortunately, other tribunals and national courts have relied on the *Kunarac* case to hold that state policy is not a required element for CAH. It is also this writer’s opinion that the Appeals Chamber rejected the state policy requirement in order to extend CAH to nonstate actors.

The general ambiguity of states towards CAH is best evidenced by the fact that, to date, no specialized international convention on that crime exists.<sup>43</sup> In large part, this is due to the fact that CAH is directed toward state actors whose conduct reflects state policy. Understandably, states have little interest in criminalizing the conduct of their officials, and certainly their heads of state and other senior officials who could be charged with such a crime.<sup>44</sup>

Since World War II, conflicts have increasingly been noninternational in character, or purely internal conflicts, and nonstate actors have increasingly engaged in the various

<sup>39</sup> Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgment, ¶ 27–43 (February 22, 2001) [hereinafter *Kunarac Appeals Judgment*].

<sup>40</sup> *Kunarac Appeals Judgment*, *supra* note 39, ¶ 98 n. 114 discussed in William A. Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 347, 351 (Leila Nadya Sadat & Michael P. Scharf eds., 2008) (stating “The summary and obscure comment of the ICTY Appeals Chamber in *Kunarac* on this most important issue is especially striking because it fails to even mention Article 7(2) of the Rome Statute. The Appeals Chamber has not hesitated to invoke the Rome Statute as authority for customary international law when it corresponds with its own views on a particular point”). For a detailed discussion of the *Kunarac* case, see *infra* ch. 1, pp. 34–39 and accompanying text.

<sup>41</sup> See Schabas, *supra* note 40.

<sup>42</sup> A contrary position is expressed by Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L. J. 237, 281 (2002) (stating “Even bearing in mind the most recent draft of the ICC Statute, the overwhelming jurisprudence and laws reviewed above make it clear that there is nothing in customary international law which mandates the imposition of an additional requirement that the acts be connected to a policy or plan”). Professor Schabas provides a more detailed discussion of this issue. See Schabas, *supra* note 39; William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 962–63 (2008).

<sup>43</sup> See M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COL. J. TRANS. L. 457 (1994).

<sup>44</sup> See generally *infra* ch. 7.

acts deemed CAH.<sup>45</sup> This is another reason for a specialized international convention on CAH, notwithstanding the Article 7 of the Rome Statute,<sup>46</sup> which applies only to State Parties (at this time 113). Moreover, the Rome Statute establishes legal obligations between the ICC and State Parties, but it does not cover bilateral state relations in the pursuit of prevention, control, and punishment of CAH perpetrators. The Rome Statute also does not bind states that are not State Parties. Consequently, a normative gap exists in states' multilateral and bilateral relations with respect to CAH.

As stated above, since World War II, nonstate actors have increasingly engaged in conduct that falls within the meaning of CAH, resulting in substantial victimization of civilian populations. Moreover, governmental entities or groups within a state have engaged in conduct resulting in a high level of human victimization that falls within the meaning of CAH. CAH has never applied in this context, however, and the need exists to include nonstate actors within the meaning of CAH.

The elimination of the state policy requirement would make it easier to reach nonstate actors within a state who act pursuant to an internal organizational policy or plan, or who may even act without an organization or plan but in a widespread or systematic basis that produces substantial harm against civilian populations. The elimination of this requirement broadens CAH to reach nonstate actors in noninternational and purely internal conflicts. This change would transform CAH from a crime that reflects the abuse of state power to an international category of crimes that is really nothing more than the international criminalization of the contents of domestic criminal laws of almost all states on the basis that such conduct is widespread or systematic and causes substantial human harm. In other words, it would transform CAH from a crime punishing a state's abuse of power to the criminalization of human rights abuses that constitute domestic crimes.

A number of legal problems arise with this transformation of CAH. Some of them pertain to state actors and others pertain to nonstate actors. More importantly, this transformation would recognize that international crimes could be established without the existence of an international legal element. Until now, international crimes have been established because the conduct in question constitutes a threat to world peace and security, is an offense to humanity's conscience, and in very few exceptions, because the conduct cannot be controlled without being internationally criminalized.<sup>47</sup> In addition,

<sup>45</sup> M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 712–810 (2008).

<sup>46</sup> The Rome Statute of the International Criminal Court (ICC), 17 July 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC Statute or Rome Statute]. See also M. CHERIF BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT 206 (M. Cherif Bassiouni ed., 2005) [hereinafter BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC].

<sup>47</sup> See BASSIOUNI, INTRO TO ICL, *supra* note 18, at 91 (stating “For this author there are five criteria applicable to the policy of international criminalization. They are: (a) the prohibited conduct affects a significant international interest, in particular, if it constitutes a threat to international peace and security; (b) the prohibited conduct constitutes egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking to the conscience of humanity; (c) the prohibited conduct has transnational implications in that it involves or effects more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; (d) the conduct is harmful to an internationally protected person or interest; (e) the conduct violates an internationally protected interest but it does not rise to the level required by (a) or (b), however, because of its nature, it can best be prevented and suppressed by international criminalization”). See also *infra* ch. 1.

international criminalization has also occurred when the conduct affects the interest of the international community and is of a transnational nature. If the transformation of CAH occurs, none of these international elements will be present and the basis for international criminalization will be absent. Another legal basis is therefore required.

In addition, there are a number of problems of both a legal and factual nature that will have to be addressed if the extension of CAH is to encompass nonstate actors. For example, nonstate actors include organized crime groups, and to internationally criminalize this conduct would transform what is now a well-established domestic crime into an international crime. At least at this stage of world affairs, the legal elements of such a transformed crime would have to be carefully articulated. These include: the size of the perpetrator group; the quantum of harm required to be within the definition of CAH; the overall size of the civilian victim group; the geographic area within which the prohibited conduct takes place; and what is meant by widespread or systematic in this new context.

Understandably, human rights proponents would like to expand CAH to encompass more perpetrators as a way of preventing the harm caused by their conduct. The time has come at this stage of globalization to apply a Roman stoic philosophical approach to international criminalization, based on social interest that Cicero referred to as human dignity, and to extend it universally to what Marcus Aurelius referred to as universal society. This is simply because the present state of globalization, to paraphrase Aristotle, is one where the same law should be applied in both Athens and Rome. This laudable goal should be pursued in light of the international capabilities and willingness of states to investigate, prosecute, and punish such perpetrators. But its challenges arise from the scope of the offense and the size of the pool of perpetrators. A realistic goal would be to develop an international convention modeled after Article 7 of the Rome Statute, in order to enhance the capabilities of domestic criminal jurisdictions to investigate and prosecute the perpetrators of CAH and to expand universal jurisdiction. These expectations require a different approach to CAH, and in my opinion, the political will of states to support such a development.

As matters now stand, CAH is basically founded on the formulation of Article 6(c) of the London Charter, whose influence is evident in all subsequent formulations. Thus, a discussion of CAH at the *ad hoc* tribunals and the ICC, as well as under the mixed-model tribunals, is part of the continued evolution of customary international law that starts with Article 6(c). This is why, in this book, there is such an emphasis on that initial experience, which remains the matrix of all subsequent developments.

The book is divided into ten chapters. [Chapter 1](#) discusses the nature of CAH and the element of state policy. It includes analysis of the concept and characteristics of this element, the discriminatory element in “civilian population,” the crime’s historical connection to war, the policy connection between individual conduct and state policy in the London Charter, the imputability of individual conduct to the State, and the applicability of the policy requirement in the context of nonstate actors. It concludes with some philosophical considerations.

[Chapter 2](#) contemplates phenomenological and criminological considerations of CAH as a crime of state. The chapter begins with an etiology of crimes of state, followed by phenomenological observations concerning the protagonists, neutralization, apathy, indifference, passivity, de- and subhumanization, objectification, and the “banality of evil.” It next focuses on the legal controls of crimes of state by considering legal philosophy

and both international and domestic criminal law regimes. It concludes by lamenting the historical enforcement gap of prosecuting atrocity crimes.

**Chapter 3** discusses the emergence of CAH in positive international law from the Law of the Charter to the post-World War II formulations arising out of the Charter: the IMTFE and Control Council Law No. 10. The chapter begins with the concept of the “laws of humanity” in the history of the law of armed conflict. It next addresses the London Charter, specifically Article 6(c), wherein CAH acquired its own identity. The analysis then shifts to post-Charter formulations that arose out of the Charter – the IMTFE and CCL 10. The chapter concludes with the prosecutions pursuant to the Charters of Nuremberg and Tokyo and those of the CCL 10 Proceedings.

**Chapter 4** centers on post-Charter developments and is divided into two parts. Part A moves from the substantive developments of CAH from the ILC’s codification efforts from 1947 to 1996, to the Security Council’s codifications in the Statutes of the ICTY and ICTR, to the Rome Statute. It next considers the CAH prosecutions of the *ad hoc* tribunals, as well as the status of prosecutions at the ICC. The next section considers other normative proscriptions applicable to the same protected interests as those protected by CAH. The subject of the penultimate section is the mixed-model tribunals, including those of Kosovo, Bosnia and Herzegovina, Sierra Leone, Timor-Leste, Cambodia, and Iraq. Part A ends with an analysis of CAH’s status as a part of *jus cogens*. Part B examines the post-Charter procedural developments, including the concept of *aut dedere aut judicare*, the duty to prosecute or extradite, the principle of nonapplicability of statutes of limitations, and universal jurisdiction. **Chapter 4** also contains its own concluding assessment of the post-Charter substantive and procedural developments.

**Chapter 5** covers the principles of legality in the London Charter and in post-Charter legal developments. It starts by examining the principles of legality in international criminal law. The Charter’s approach to the issue follows. The next section reflects on the Prosecution’s treatment of the question under the Charter, the IMTFE, and CCL 10. The chapter next assesses legality issues in the post-World War II prosecutions. It then finishes with an evaluation of the issue of legality in post-Charter developments of the ICTY, the ICTR, and the ICC.

**Chapter 6** analyzes the specific acts listed in the different formulations of CAH. After an introductory section on the meaning, method, and function of general principles of law, the specific crimes contained in the four primary formulations of CAH, including murder, extermination, enslavement, deportation, persecution, other inhumane acts, torture, unlawful human experimentation, rape and sexual violence, imprisonment, *apartheid*, and forced disappearance. **Chapter 6** concludes by examining the normative overlap between the three major international crimes: war crimes, CAH, and genocide.

**Chapter 7** necessarily changes gears in order to consider *ratione personae* and the theories and elements of criminal responsibility. It begins with the issue of international criminal responsibility of individuals. Its first subsection generally considers the doctrinal differences between international law and national criminal law related to individual, group, and state responsibility. The second subsection analyzes the responsibility for the conduct of another and group responsibility in the London Charter, the IMTFE, and CCL 10. The next section considers criminal responsibility and the “general part,” moving from a discussion of national legal standards and their relevance to international criminal law, to an evaluation of the problems in identifying the “general part” from the London Charter to the Rome Statute, and finishing with a historical analysis of the application

of the “general part” by the various tribunals. After a section considering the issue of knowledge of the law and intent, this chapter concludes by reviewing two important theories of liability, namely command responsibility and joint criminal responsibility.

Chapter 8 details the theoretical and jurisprudential histories of defenses and exonerations in the context of CAH, including obedience to superior orders, compulsion, reprisals, and *tu quoque*. The next section specifically considers the nonapplicability of reprisals and *tu quoque* to CAH. The chapter ends with a section examining the immunity of heads of state.

Chapter 9 discusses national prosecutions for CAH and CAH-type crimes. The chapter begins with two sections devoted to individual criminal responsibility in pre- and post-World War I international prosecutions, as well as a third section concerning other evidence of international individual criminal responsibility during the same period. The next section surveys some of the post-World War II national prosecutions of CAH and CAH-type crimes, including the prosecutions in Israel, France, Italy, Canada, Austria, Germany, Spain, Argentina, Indonesia, and Iraq. The next section considers other recent developments in national prosecutions of CAH and CAH-type crimes, and in situations that potentially give rise to such prosecutions. The penultimate section confronts the historical issue of the selective enforcement of CAH.

In the tenth and final chapter, this writer provides his concluding assessment.





# 1 Legal Nature

Notwithstanding the marvelous accomplishments of human genius, the veneer of human civilization remains thin. Scratch its surface, and atavism appears. History demonstrates that all it takes for human atrocities is for a few to initiate the trickle down effect, and for the many to remain passive.

M. Cherif Bassiouni

## Introduction

The past century witnessed more people killed in various types of conflicts and regime victimization than has ever occurred at any other point in the history of mankind.<sup>1</sup> Most of the victimization falls within the meaning of crimes against humanity (CAH).

The origin of the term “crimes against humanity” can be traced back to a joint declaration of the French, British, and Russian governments, dated May 24, 1915, that addressed the World War I-era crimes committed by the Ottoman Empire against its Armenian population. An estimated twenty million people were killed in World War I. Most of the casualties were combatants, and civilian deaths, for the most part, were unintended consequences of war.<sup>2</sup> The situation in Turkey stood out, as it was a massacre of an estimated 200,000 to 800,000 Armenian civilians.<sup>3</sup> The declaration proclaimed that “[i]n the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres.”<sup>4</sup> In 1919, the Inter-Allied

<sup>1</sup> From the end of World War II until 2008, some 313 conflicts of various types took place worldwide; the number of casualties is estimated at 92 million, most of whom were non-combatants. See Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, in 1 *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 67, 67 (M. Cherif Bassiouni ed., 2010).

<sup>2</sup> See JOHN KEEGAN, *THE FIRST WORLD WAR* 422–23 (2000).

<sup>3</sup> See generally JAMES BRYCE & ARNOLD TOYNBEE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE, 1915–1916: DOCUMENTS PRESENTED TO VISCOUNT GREY OF FALLODEN BY VISCOUNT BRYCE* (2000). The position of the Republic of Turkey is that the numbers are inflated, and that the violence against Armenians was popular and spontaneous, because the Armenians collaborated with the Russians during a war in which the Russians were enemies of Turkey. The ultimate truth in these competing allegations has never been established, but the number of Armenian casualties, and the support of the massacre by Turkish officials, clearly reveal the Armenians to have been helpless victims.

<sup>4</sup> United Nations War Crimes Commission, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* 35 (1948) (English translation).

Commission (excluding the U.S. and Japan) called for the prosecution of the Turkish officials deemed responsible for the massacre.<sup>5</sup> This call was grounded in the preamble of the 1907 Hague Convention, which referred to the “laws of humanity,”<sup>6</sup> but a secret annex to the Treaty of Lausanne granted amnesty to Turkey, and prosecutions never took place.<sup>7</sup>

Since the end of World War I, international criminal law (ICL) has sought to criminalize individual conduct for certain categories of crimes committed by state actors that are the product of state action or state policy. In addition to CAH,<sup>8</sup> this category of crimes includes crimes against peace (now the crime of aggression)<sup>9</sup> and genocide.<sup>10</sup>

The first prosecutions of crimes against humanity (CAH) took place at Nuremberg in the aftermath of World War II, which resulted in an estimated sixty million casualties, most of whom were civilians, including six million Jews and twenty million Slavs who were killed.<sup>11</sup> But whereas no prosecutions materialized after World War I, the victorious Allies of World War II established the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East in Tokyo (IMTFE), which each contained CAH respectively in Articles 6(c) and 5(c) of these tribunals’ Charters.

Since its first codification in the London Charter of the IMT, alongside crimes against peace (now known as the crime of aggression) and war crimes,<sup>12</sup> CAH has progressively evolved into a category of international crimes whose specific contents consist of a number of crimes contained in the laws of most national legal systems.<sup>13</sup> But in order to distinguish CAH from nationally defined crimes, it is necessary to clearly identify the jurisdictional element that gives rise to its classification as an international crime.

<sup>5</sup> COMMISSION ON THE RESPONSIBILITIES OF THE AUTHORS OF THE WAR AND ON THE ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE, in PAMPHLET NO. 32 (Carnegie Endowment for International Peace, Division of International Law ed., 1919), *reprinted in* 14 AM. J. INT’L L. 95 (1920).

<sup>6</sup> Convention Respecting the Laws and Customs of the War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9, *reprinted in* 2 AM. J. INT’L L. 90 (Supp. 1908).

<sup>7</sup> See Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S. 11, *reprinted in* 18 AM. J. INT’L L. 1 (Supp. 1924).

<sup>8</sup> LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (2004); GEOFFREY ROBERTSON, THE STRUGGLE FOR GLOBAL JUSTICE (2003).

<sup>9</sup> See M. CHERIF BASSIOUNI AND BENJAMIN B. FERENCZ, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 207 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>10</sup> These are essentially “crimes of state” as discussed in [Chapter 2](#). Although war crimes can be crimes of state, state actors can also commit war crimes without such crimes being the product of state policy or action. With respect to the crime of genocide, *see* Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2000); Matthew Lippman, *Genocide*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS, *supra* note 1, at 403; PIETER N. DROST, THE CRIME OF STATE (1959).

<sup>11</sup> GERHARD L. WEINBERG, A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR 894 (2d ed. 2005). *See also* MICHAEL BESS, CHOICE UNDER FIRE: MORAL DIMENSIONS OF WORLD WAR II 88–110 (2006) (discussing the increased targeting of civilian populations during World War II).

<sup>12</sup> All three crimes were included in the London Charter, as well as under the Statute of the International Tribunal for the Far East. *See* Charter of the International Military Tribunal at Nuremberg art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, [hereinafter IMT Charter]; Charter for the International Military Tribunal for the Far East art. 5(a), *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 BEVANS 27, [hereinafter IMTFE Charter].

<sup>13</sup> *See generally infra* ch. 6.

The modern usage of “crimes against humanity” has its genesis in Article 6(c) of the London Charter, which states:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, whether before or during the war, or persecutions on political, racial, or religious grounds in execution with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>14</sup>

Article 6(c) of the London Charter did not explicitly refer to state policy, but the *chapeau* of Article 6(c) requires that the accused must have been “acting in the interests of the European Axis countries, whether as individuals or as members of organizations.” Moreover, the requirement that CAH as defined in Article 6(c) be committed “in connection with any crime within the jurisdiction of the Tribunal” links CAH to crimes associated with a state plan or policy, namely war crimes and crimes against peace. Thus, CAH, like the crime of aggression, is one of the quintessential crimes of state, even though nonstate actors have increasingly committed CAH in post-World War II conflicts.<sup>15</sup>

For reasons of state interests, crimes of state have not been codified in an international convention,<sup>16</sup> but since the end of World War II, genocide,<sup>17</sup> apartheid,<sup>18</sup> and torture<sup>19</sup> have been separately included in conventions. All three crimes require that state actors engage in the prohibited conduct as part of state action or reflecting state policy. Nevertheless, these international crimes address only individual, and not state, criminal responsibility.<sup>20</sup>

No norm exists under ICL that embodies the principle of state criminal responsibility, even though it was applied to Germany and Turkey after World War I in the form of reparations and other sanctions. In that context, responsibility derived from the concept

<sup>14</sup> IMT Charter art. 6(c), *supra* note 12.

<sup>15</sup> “Crimes of state” as referred to herein is a generic label for harmful conduct committed by state actors who abuse their power as part of state action or in execution of state policy against a civilian population. A separate concept, “other forms of collective group violence by non-state actors,” refers to aberrant conduct having some characteristics of crimes of state, when committed by nonstate actors acting outside the state structure. Both concepts share similar phenomenological characteristics, produce significant human and material harm, and are not adequately controlled by social and legal mechanisms. They differ primarily as to their participants and the institutional means that they control. It is necessary to distinguish between these two forms of violent interactions in order to identify their respective phenomenology and devise the appropriate prevention, control, and suppression mechanisms necessary to control them. *See infra* ch. 2.

<sup>16</sup> Aggression has not been the subject of prosecution since the IMT and IMTTFE.

<sup>17</sup> *See supra* note 10.

<sup>18</sup> International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter *Apartheid Convention*]; Roger S. Clark, *Apartheid*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* 599 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>19</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46 (10 Dec. 1984), *opened for signature* 4 Feb. 1985, 23 I.L.M. 1027, 24 I.L.M. 535 [hereinafter *Torture Convention*]; Daniel H. Derby, *The International Prohibition of Torture*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 621 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); MANFRED NOWAK AND ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* (2008).

<sup>20</sup> *See* M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW*, ch. 2 (2008) [hereinafter *BASSIOUNI, INTRO TO ICL*]. Individual criminal responsibility also exists for the perpetrators of *jus cogens* crimes. *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *LAW & CONTEMP. PROBS.* 63 (1996).

of reparations, which arose from the historical practices of exactions imposed upon the defeated.<sup>21</sup> This punitive concept was rejected after World War II in favor of individual criminal responsibility presumably because it imposed an unfair burden on future generations for wrongs committed by previous ones. Moreover, the new approach was premised on the belief that collective criminal responsibility is inherently unjust because it does not distinguish between those deemed responsible for international crimes and those who are not. Aside from this basic assumption, no studies were developed on the possible deterrent and preventive impact of collective criminal responsibility on the prospective conduct of states.<sup>22</sup>

The international human rights law regime that developed after World War II provides only certain administrative and civil remedies to victims of crimes of state. Whenever the state conduct is deemed “wrongful conduct,”<sup>23</sup> it is actionable by one state against another, even when the aggrieved party is a single national of the state undertaking the international diplomatic and legal actions on his/her behalf. This type of legal action gives rise to damages, but does not provide for criminal sanctions against the state or the collectivity that engaged in the “wrongful conduct.”

The European human rights system provides direct access to justice by individuals against states before the European Court of Human Rights with monetary remedies,<sup>24</sup> but it does not provide for direct action by individual complainants before that court. The Inter-American regional human rights system is a close follow-up.<sup>25</sup> Although the Inter-American regime has made much progress it is yet to have reached its European counterpart. This is due in part to U.S. nonparticipation. The African human rights system is barely nascent.<sup>26</sup> None of these legal regimes, however, have direct enforcement mechanisms. Compliance with them remains a matter of state discretion. But the European system, because of its connection to the European Union, is susceptible to that regional system’s economic consequences for noncompliance with the European Convention and the decisions of the European Court. Thus, as noted by Professor Schabas, CAH can also be seen as “an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by a State against its own population, crimes against humanity are focused on prosecuting the individuals who commit such violations.”<sup>27</sup>

Domestic and international laws are essentially reactive as opposed to being proactive in anticipating forms of aberrant social behavior. More often than not, the law lags behind the manifestations of collective violent conduct. This is evident in the fact that the evolution of international law since World War II has had little effect on interstate

<sup>21</sup> For the modern equivalent see *Principles on State Responsibility*, Report of the International Law Commission on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, U.N. Doc. GAOR A/56/10 (2001). See also IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* (1983).

<sup>22</sup> See also INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph H.H. Weiler, Antonio Cassese, and Marina Spinedi ed., 1989).

<sup>23</sup> BROWNLIE, *supra* note 22.

<sup>24</sup> European Convention on Human Rights, art. 7(1), Nov. 4, 1950, EUR. TS. Nos. 5, 213 U.N.T.S. 221.

<sup>25</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. A/16.

<sup>26</sup> African Charter on Human and Peoples’ Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 58 (1982).

<sup>27</sup> WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 139 (2010).

and international conflict prevention, conflict resolution, and post-conflict justice.<sup>28</sup> The absence of an international legislative policy reflected in coordinated international legislation has resulted in normative gaps, overlaps, and ambiguities that impact the effectiveness of enforcement, and favor selective enforcement conditioned by political considerations.<sup>29</sup>

Political, social, and behavioral sciences have each developed techniques and methodologies for determining the causes of violent manifestations, as well as some measurements to assess their outcomes. But these disciplines are insufficiently developed to influence policymaking in connection with the prevention or limiting of violent interaction, whether at the interstate or domestic levels. International law, which is the product of state decision-making, has largely ignored social and behavioral sciences to be less encumbered by scientific findings when state interests are at stake. Thus, the synergies and complementarities between legal and other social control mechanisms are lost, resulting in the reduction of the preventive effects of the law on collective violent conduct whether at the domestic or international level.<sup>30</sup>

The greatest manifestations of CAH and other crimes of state<sup>31</sup> remain, as they have been throughout history, the authoritarianism of domestic power-holders over the vast majority of the populations they control; and the exercise of power and hegemony, be it military or economic, by stronger states over weaker ones. Mass killings; slavery; torture; deprivation of civil, economic, political, and cultural rights; and other forms of oppression and exploitation, whether at the domestic or international level, are all on the same continuum when they are the product of state policy or action.<sup>32</sup>

Combined with the few international and national prosecutions for atrocity crimes, perpetrators of these crimes too often benefit from impunity.<sup>33</sup> Moreover, the cynicism of the international community's prevailing *Realpolitik* approach when addressing conflict prevention and postconflict justice is reflected in the false dichotomy between peace and justice.<sup>34</sup> The outcome of this dichotomy has all too often translated into offering immunity to the leaders who perpetrate atrocity crimes and amnesty for their followers

<sup>28</sup> This is evidenced by the fact that 313 conflicts have occurred between 1945 and 2008 that have produced 92 million victims. See Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 67 (M. Cherif Bassiouni, ed., 2010).

<sup>29</sup> M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* 493 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>30</sup> See also MARK OSIEL, *MAKING SENSE OF MASS ATROCITY* (2009); MARK A. DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* (2007); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005); Mark Osiel, *Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005).

<sup>31</sup> <sup>2</sup>See generally *infra* ch. 2.

<sup>32</sup> DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW*, *supra* note 21. David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 113 (2008); David Scheffer, *The Merits of Unifying Terms: "Atrocity Crimes,"* in 2 GENOCIDE STUDIES AND PREVENTION 91 (2007).

<sup>33</sup> M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in 1 *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 3 (M. Cherif Bassiouni ed., 2010); M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269 (2010); see also *infra* ch. 9.

<sup>34</sup> M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541 (2006); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000).

in exchange for the cessation of hostilities. The result is the triumph of impunity over accountability. This approach induces costly escalation of conflicts until they reach a level at which it can be argued that offering immunity to the leader and amnesty to the followers is wiser than insisting on accountability and having the conflict continue.<sup>35</sup> The cynicism of this argument derives from the fact that had it not been for the failure of the U.N. and major states to intervene to prevent or stop the given conflict, these hard choices would not have to be faced. Because of the same *Realpolitik* considerations, the Responsibility to Protect concept has been stymied at the U.N.<sup>36</sup>

The definition of CAH provided in Article 6(c) of the London Charter is the matrix of the statutory provisions of the international tribunals that have followed, namely: the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>37</sup> the International Criminal Tribunal for Rwanda (ICTR),<sup>38</sup> the International Criminal Court (ICC),<sup>39</sup> and, the mixed-model tribunals: the Special Court for Sierra Leone (SCSL),<sup>40</sup> the Extraordinary Chambers in the Courts of Cambodia (ECCC),<sup>41</sup> the Special Panels of the Dili District Court (also called the East Timor Tribunal) for Timor-Leste,<sup>42</sup> and

<sup>35</sup> M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in M. CHERIF BASSIOUNI, 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 3 (2 vols., M. Cherif Bassiouni ed., 2010); RUTI TEITEL, TRANSITIONAL JUSTICE (2008); Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003); Miriam J. Aukerman, *Extraordinary Evil. Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. 39 (2002).

<sup>36</sup> 2005 World Summit Outcome, U.N. GAOR, 60th Sess., U.N. Doc. A/60/L.1, ¶¶ 138-139 (Sept. 15, 2005); Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, *supra* note 23; GARETH J. EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2009); ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT (2009); RICHARD H. COOPER AND JULIETTE VOINOV KOHLER, RESPONSIBILITY TO PROTECT: THE GLOBAL COMPACT FOR THE 21ST CENTURY (2009); JAMES PATTISON, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE? (2010).

<sup>37</sup> Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute]; M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996) [hereinafter BASSIOUNI, THE LAW OF THE ICTY]; VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2 vols. 1995) [hereinafter MORRIS & SCHARF, INSIDER'S GUIDE TO THE ICTY].

<sup>38</sup> Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute]; VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998).

<sup>39</sup> The Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 [hereinafter ICC Statute]; M. CHERIF BASSIOUNI 1-3 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT (M. Cherif Bassiouni ed., 2005) [hereinafter BASSIOUNI, 1-3 LEGISLATIVE HISTORY OF THE ICC].

<sup>40</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *available at* <http://www.sc-sl.org/Documents/scsl-agreement.html> [hereinafter SCSL Statute]. The Statute was endorsed through S.C. Res. 1400, U.N. Doc. S/RES/1400, ¶ 9 (Mar. 28, 2002); WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE (2006).

<sup>41</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, NS/RKM/1004/006 (with inclusion of amendments as promulgated on 27 October 2004) [hereinafter ECCC Law].

<sup>42</sup> Regulation 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (entered into force March 6, 2000) *as amended by* Regulation 2000/14 UNTAET/REG/2000/11 (entered into force May 10, 2000).



the Serbian War Crimes Tribunal (for Kosovo).<sup>43</sup> CAH's existence as a crime of state within the matrix of Article 6(c) of the London Charter continued unchanged until the jurisprudence of the ICTY.<sup>44</sup>

A new reality emerged from the conflicts in the former Yugoslavia and Rwanda, namely the participation of nonstate actors in conflicts, which lead to jurisprudential difficulties in characterizing the armed conflict as being international, noninternational, or purely internal.<sup>45</sup> The confusion surrounding the characterization of a conflict involving the participation of nonstate actors is further complicated when the conflict has multistate characteristics – namely when a conflict occurs in contiguous states, and the participants include state actors and nonstate actors who move from the territory of one state to another (as was the case in the Rwanda conflict). For these reasons, the jurisprudence of the ICTY and the ICTR utilized a more pragmatic or practical element to define CAH: a “widespread or systematic” attack, irrespective of the conflict's legal characterization or the status of perpetrators as state or nonstate actors.<sup>46</sup>

In the *Kunarac* case<sup>47</sup> the ICTY Appeals Chamber concluded that the nature of armed conflicts had evolved, and the capacity of nonstate actors had expanded, to the point where CAH is no longer a crime of state, but can also be committed by nonstate actors. Undoubtedly, the increasingly harmful conduct of nonstate actors in modern armed conflict presents a challenge that must be addressed. But, as discussed below, the *Kunarac* Appeals Judgment is mistaken because it created a historical shift to broaden CAH on a questionable legal basis. The Chamber cherry picked precedents, and ignored altogether Article 7(2) of the Rome Statute and the various commentaries that support

<sup>43</sup> UNMIK Regulation 1999/1, on the Authority of the Interim Administration in Kosovo (July 25, 1999).

<sup>44</sup> See generally *infra* ch. 4, §3.

<sup>45</sup> In the *Tadić* case, the ICTY Trial Chamber took its cue from the Final Report and Annexes of the Commission of Experts and concluded that some portions of the conflict may be of an international character, while others may be of an internal character:

Having regard then to the nature and scope of the conflict in the Republic of Bosnia and Herzegovina and the parties involved in that conflict, and irrespective of the relationship between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces, the Trial Chamber finds that, at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the laws or customs of war embodied in Article 3 to the four Geneva Conventions of 12 August 1949, applicable as it is to armed conflicts in general, including armed conflicts not of an international character.

Prosecutor v. *Tadić*, Case No IT-94-I-T, Judgment, ¶ 568 (May 7, 1997) [hereinafter *Tadić* Trial Judgment].  
<sup>46</sup> See, e.g., the *Vukovar Hospital* Rule 61 Decision:

Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.

Prosecutor v. Mrkšić et al., Case No IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 30 (Apr. 3, 1996) [hereinafter *Vukovar Hosp.* Rule 61 Decision], cited in *Tadić* v. Prosecutor, Case No IT-94-I-A, Judgment, ¶ 248 n. 311 (Jul. 1, 1999) [hereinafter *Tadić* Appeals Judgment].

<sup>47</sup> See *infra* §7.

a state policy requirement.<sup>48</sup> Because the international community faces a new set of facts involving the commission of CAH-type crimes by nonstate actors, there is a need to address the responsibility of these actors for CAH. But this has to be dealt with forthrightly by extending the concept of state policy to apply to nonstate actors with state-like characteristics, and not by relying on selective readings of past cases.

## §1. The Characteristics of International Crimes and Their Applicability to CAH

It is well established that an international crime must have a distinguishing element that transforms what is usually a crime under national criminal law to one under international law.<sup>49</sup> In other words, an international element is necessary to distinguish international crimes from national ones. An analysis of international crimes reveals the following characteristics that reflect the social interest sought to be protected:<sup>50</sup>

- (a) The prohibited conduct affects a significant international interest;
- (b) The prohibited conduct constitutes egregious conduct deemed offensive to the commonly shared values of the world community;
- (c) The prohibited conduct involves more than one state in its planning, preparation, or commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; or
- (d) The effects of the conduct bear upon an internationally protected interest that is not sufficient to fall into either (a) or (b) above, but requires international criminalization in order to ensure its prevention, control, and suppression because it is predicated on “state policy,” without which it could not be performed.

On the basis of these characteristics and on the basis of the nature and scope of all 267 multilateral instruments,<sup>51</sup> it can be concluded that each of the 25 categories of international crimes reflects the existence of any one or a combination of the following elements:

- 1. International:
  - (a) Conduct constituting a threat to the peace and security of the international community, whether directly or indirectly; or

<sup>48</sup> Prosecutor v. Kumarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98, n.114 (Jun. 12, 2002). See, e.g., M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY* 240–50 (1992); Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43 (1999); William A. Schabas, *Crimes Against Humanity: The State Policy or Plan Element*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW* 347 (Leila Nadya Sadat and Michael P. Scharf eds., 2008); William Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008); Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT’L L. 855 (2010).

<sup>49</sup> See INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 15–44 (M. Cherif Bassiouni ed., 1997) [hereinafter BASSIOUNI, ICL CONVENTIONS].

<sup>50</sup> See M. Cherif Bassiouni, *The Discipline of International Criminal Law*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 3 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 45 (1987) [hereinafter BASSIOUNI, DRAFT CODE].

<sup>51</sup> See BASSIOUNI, *INTRO TO ICL*, *supra* note 20, at 6.



- (b) Conduct recognized by commonly shared world community values as shocking to the collective conscience of the world community.
- 2. Transnational:
  - (a) Conduct affecting the public safety and economic interests of more than one state whose commission transcends national boundaries; or
  - (b) Conduct involving citizens of more than one state (either as victims or perpetrators) or conduct performed across national boundaries.
- 3. State Policy:
  - Conduct containing in part any one of the first two elements but whose prevention, control and suppression necessitates international cooperation because it is predicated on state policy, without which the conduct in question could not be performed.<sup>52</sup>

CAH is a category of international crimes that satisfies in part the first criterion and fully the third criterion for international criminalization. Some events, like the conduct of Nazi Germany during World War II, satisfy all three categories. That conduct was shocking to the commonly shared values of the world community, it did disrupt the peace and security of humankind, and it was predicated on state policy. Moreover, what occurred in that situation could not have been prevented, controlled, or suppressed without military intervention and the responsibility of the perpetrators subsequently addressed through international criminalization and international enforcement, as was the case.

The drafters of the London Charter were, therefore, right in formulating CAH as a new international category of crimes under positive ICL, thus extending the efforts of World War I, and bringing them to conclusion, as discussed in [Chapter 3](#). The post-Charter legal developments discussed in [Chapter 4](#) reaffirm the validity of the Charter, even though a more preferable approach is to have a new convention on CAH.<sup>53</sup> This is particularly necessary because CAH includes a series of criminal acts, all of which are criminalized under domestic law, and also because of the need to extend CAH to encompass nonstate actors.<sup>54</sup>

<sup>52</sup> *Id.*; see also the discussion of the policy element for nonstate actors, *infra*, Sections 2 and 3.

<sup>53</sup> See M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457–94 (1994).

<sup>54</sup> This question is similar to the one that arose in 1977 in connection with the Draft Convention on the Prevention and Suppression of Torture. At the time this writer was co-chair along with the late Niall MacDermot of the Committee of Experts that prepared the first draft of this convention, see U.N. Doc. E/CN/4/NGO/213, Feb. 1, 1978; see also M. Cherif Bassiouni, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 REVUE INTERNATIONALE DE DROIT PÉNAL 23 (1977).

Torture is a crime under the domestic law of most legal systems, but what makes it an international crime? In other words, what is the international or jurisdictional element that can transform torture from a crime under domestic law to an international crime? This writer's proposal was the element of "state policy," insofar as torture is committed by or for the benefit of state agents and for the purposes of obtaining a statement or confession, etc. Article 1 of the Torture Convention, *supra* note 11, specifically states: "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering . . . where 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 [ . . . ]."

The analogy between torture and other specific crimes listed in the enumeration contained in Article 6(c) of the London Charter; Article 5 of the ICTY Statute; Article 3 of the ICTR Statute; and Article 7 of the Rome Statute (discussed *infra* ch. 6) is that these enumerated crimes are all crimes under the domestic law of most legal systems. Thus, if the international or jurisdictional element needed for the international crimes of torture was state policy, then it would follow that similar crimes contained in the enumeration

ICL does not criminalize domestic crimes only because they happen to exist in the criminal laws of all or most states. If that were the case, then murder, manslaughter, rape, battery, robbery, and several other crimes found in all or most criminal laws of the world would become international crimes. They are not international crimes, because they lack an international element, which characterizes the crimes as subject to international law. The need for international criminalization of the specific crimes reflected in the various definitions of CAH is essential, because when such crimes are committed as part of a state's policy, it is likely to produce large-scale victimization. Thus, the abuse of state power transforms a domestic crime or series of crimes into an international crime. Furthermore, it is not the quantum of the resulting harm that controls, but the potentiality of large-scale harm that could derive from a state's abuse of power. In other words, when state actors abuse the power of a state, there is little that can stop them before they carry out their course of conduct against a civilian population that is no longer protected by these state actors, but victimized by them.

A policy choice arises, namely whether to rely on (a) the state policy character of CAH, as has been the case since the London Charter; (b) the quantum of the harm performed by state actors; (c) the manner in which state actors engage in the conduct (i.e., widespread or systematic); and (d) the inclusion of nonstate actors on the same level as state actors.

There are several issues with all but the first of these policy approaches:

1. A policy choice based on quantum of harm to internationally criminalize given conduct irrespective of its actors is arbitrary and dependent upon factual outcomes. Its enforcement will depend on outcomes arising out of conduct that cannot be objectively defined before the fact. Thus, it would violate the principles of legality discussed in [Chapter 5](#). More significantly, it could turn into a selective targeting of some of the perpetrators of quantum-driven crimes, while shielding others. Such an approach, however, could distinguish between state and nonstate actors, or include both within the scope of the prohibition. Last, there would have to be a test of relativity to determine the quantum of harm in relative or proportionate terms to victim population each in relation to a geographic area. Such an approach based on relativity would cause significant variations in the application of such a quantum-driven defined crime. This problem also arises in connection with genocide. The Commission of Experts that investigated crimes in the former Yugoslavia between 1992 and 1994 addressed this problem in the province of Prijedor, Bosnia in 1992–93. The conclusion was that the disappearance of an estimated 90 percent of the Muslim population (out of a total Muslim population of some 57,000 persons) amounted to genocide. This conclusion was based on the identification of a civilian population in a given area, which was targeted on the basis of its religion. If the test had been on the basis of the total Muslim population in all of Bosnia, the elimination of 90 percent of the Muslim population in the province of Prijedor

of CAH also require state policy as their international or jurisdictional element. But it must be added that this is not the only reason for the proposition that state policy is required for CAH when the policy or conduct is established or carried out by state actors and by analogy thereto, the requirement of policy when the conduct is carried out by non-state actors. Other reasons include the large-scale nature of the victimization that “shocks the conscience of humanity” and which can affect “peace and security.” These are two additional international elements that provide the jurisdictional basis for an international crime. See Bassiouni, *The Discipline of International Criminal Law*, *supra* note 50, at 3.

would not have qualified as genocide.<sup>55</sup> The same issue would arise in connection with a quantum-driven criteria for CAH.

2. Reliance on the sole criteria of “widespread or systematic” may eliminate spontaneous or uncontrolled group conflict from the scope of the crime. This appears from the plain language and meaning of the text, because the terms “widespread or systematic” characterize not only the manner in which the victimization takes place, but also the very nature of the conduct that reflects the underlying policy that brought it about. This feature has been summarized as the requirement of “organizational responsibility.”<sup>56</sup> With respect to the Article 5 of the ICTY, in the *Tadić* case,<sup>57</sup> the issue of “widespread or systematic” and the underlying notion of “state policy” was examined with respect to whether or not the “acts must be taken on, for example, racial, religious, ethnic, or political grounds, thus requiring a discriminatory intent for all crimes against humanity and not only persecution.”<sup>58</sup> The Trial Chamber judges ultimately decided that the discriminatory intent was applicable to all specific crimes included in CAH and not only to “persecution” as a distinct specific mode of committing CAH. The Appeals Chamber, however, disagreed and overruled this interpretation of the Statute, stating “[t]he ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with discriminatory intent.”<sup>59</sup> The Appeals Chamber also noted the lack of evidence in customary international law that a discriminatory intent was required in CAH.<sup>60</sup> The Appeals Chamber therefore held that discriminatory intent was only required as to those crimes listed in Article 5(h) of the Statute.
3. If the terms “widespread or systematic” are interpreted in a way that applies only to the manner in which the victimization occurs and not also to the nature of the conduct and the underlying policy, they could apply to purely domestic crimes,

<sup>55</sup> See Annex IV – The Policy of Ethnic Cleansing of the *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992).

<sup>56</sup> The case law uniformly demands that the defendant knew that his or her crime was part of a widespread or systematic attack. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 62 (2d. ed. 2001).

<sup>57</sup> *Tadić* Appeals Judgment, *supra* note 46.

<sup>58</sup> *Tadić* Trial Judgment, *supra* note 45, ¶ 650.

<sup>59</sup> *Id.* ¶ 283. But see *Kunarac et al.*, *infra* note 165, and discussed in more detail *infra* §7.

<sup>60</sup> *Tadić* Appeals Judgment, *supra* note 48, ¶¶ 288, 293, 299. However, the Court did not point to relevant authority on that conclusion. For national judicial practices, see France, in both the *Barbie* and *Touvier* cases, and Canada, in *Finta*, read a discriminatory intent requirement into the definition of CAH. See Cour d'Appel (CA) [court of appeal] Paris, 1e ch., Apr. 13, 1992, Gaz. Pal. 1992, I, 387, translated and reprinted in 100 INT'L L. REP. 338, 341 (1995) (holding an individual “cannot be held to have committed a crime against humanity unless it is also established that he had a specific motivation to take part in the execution of a common plan by committing in a systematic manner inhuman acts or persecutions in the name of a State practicing a policy of ideological supremacy.”); Cass. crim. [highest court of ordinary jurisdiction, criminal chamber], Dec. 20, 1985, Bull. crim. No. 407 (holding “[L]es actes inhumain et les persecutions qui, au nom d'un état pratiquant une politique d'hégémonie idéologique, ont été commis d'une façon systématique, non seulement des personnes en raison de leur appartenance à une collectivité raciale ou religieuse, mais aussi contre les adversaires de cette politique, quelle que soit la forme de leur opposition.” (emphasis added). For information on the *Touvier* case, see *infra* ch. 9, §3.2.

For Canada, see *R. v. Finta*, [1994] 1 S.C.R. 701, 814 (holding “[w]hat distinguishes a [CAH] from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.” Neither decision demonstrates the dominant view of CAH. See *infra* ch. 9, §3.3.

such as organized crime killings, because they are systematic. The danger in interpreting the terms “widespread or systematic” as only descriptive of the manner in which the victimization occurs is that it simply transforms domestic crimes into international crimes on the basis of the manner in which it is performed. In the opinion of this writer, this approach would eliminate the international jurisdictional element that is presently required for international crimes.

Aside from the technical legal difficulties created by the proposition of interpreting “widespread and systematic” as not reflecting state policy, as described above, there are also important political and policy consequences. The political consequence of transforming CAH from a crime requiring state policy to a mass crime type of conduct that can be committed by anyone will face the opposition of states, thus reducing the already limited political willingness of states to apprehend, prosecute, and extradite persons believed to have committed or been accused or charged with the commission of CAH. It would also deter states from acceding to the Rome Statute and to any new specialized convention on CAH. The policy implications from a misguided, though well-intentioned, approach would be to reduce the standing of CAH from its present status of *jus cogens* to a lesser category of international crimes. This would be the case for two reasons. First, this new approach to CAH would have far less than universal recognition; second, it would become much less “shocking to the conscience of humanity.”<sup>61</sup> But that does not mean that nonstate actors should be exempted from CAH. What is needed is a better legislative approach than the muddled one undertaken by *Kunarac*, and those desirous of reading into the ICC something that is not there.

Admittedly, since the end of World War II, nonstate actors have increasingly participated in various types of conflicts, and have increasingly committed war crimes and CAH. Because of the different legal regimes of international humanitarian law applicable to international and noninternational conflicts, nonstate actors may not be responsible for war crimes in conflicts of a noninternational character, and instead may be subject to a state’s domestic criminal laws. Moreover, international humanitarian law does not apply in purely domestic conflict, where only domestic criminal laws apply. So, unless CAH is extended to nonstate actors in all conflict contexts based on similar criteria as those applicable to state actors, the same crimes deemed to fall within the meaning of CAH when committed by nonstate actors would not be subject to CAH. Such an extension of responsibility to nonstate actors should be judicious, in order not to convert purely domestic crimes to international crimes. How wide the net of CAH should be spread is first a matter of international legislative policy, taking into consideration the effective reach of ICL. Because the war-connecting element is no longer required,<sup>62</sup> it is important to preserve an unambiguous and clearly identifiable international jurisdictional element for CAH. This is why the international element of state policy for state actors is necessary, and also why it should be extended by analogy to nonstate actors when their conduct manifests an express or implied group policy. This is why the terms “widespread or systematic” contained in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute should be interpreted as reflecting state policy for state

<sup>61</sup> See generally *infra* ch. 4, Part A, §8.

<sup>62</sup> See *infra* ch. 3, §7.

actors and an organizational or group policy for nonstate actors who have some of the characteristics of state actors.

This requirement of similarity between the characteristics of state and nonstate actors is necessary in order to avoid including certain domestic criminal organizations' harmful conduct within the meaning of CAH, particularly when these organizations engage in terrorism and organized crime activities (both of which cause relatively large-scale harm). CAH should be defined in a way that focuses on the organizational policy of the harmful conduct aimed at civilians. This excludes collateral harmful conduct to civilians occurring as a collateral consequence of organized crime activities whose purpose is unlawful enrichment. The distinction is more delicate with respect to terrorism groups whose goals may be enrichment as well as power-oriented goals, which may or may not include indiscriminate or discriminate targeting of civilians. Striking a balance between goals and means of nonstate actors groups who engage in violence is admittedly not easy, but it needs to be done in order to avoid having CAH become a catchall crime for a variety of human rights violations whether committed by state actors or nonstate actors.

It should be noted that of all the CAH formulations,<sup>63</sup> only one text specifically addresses nonstate actors, the 1996 Draft Code of Crimes Against the Peace and Security of Mankind:<sup>64</sup>

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- (a) Murder;
- (b) Extermination;
- (c) Torture;
- (d) Enslavement;
- (e) Persecution on political, racial, religious or ethnic grounds;
- (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) Arbitrary deportation or forcible transfer of population;
- (h) Arbitrary imprisonment;
- (i) Forced disappearance of persons;
- (j) Rape, enforced prostitution and other forms of sexual abuse;
- (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and sever bodily harm.

This formulation has not been adopted by the General Assembly, before which the ILC's report has been languishing since then. The diverse formulations of CAH underscore the absence of an established consensus as to what developments have been accepted in customary international law since World War II, particularly as to the removal of the state policy element and the inclusion of nonstate actors within CAH.

In addition to extending CAH's *ratione personae*, there is a need to also extend its *ratione materiae*. At present, CAH's protected interests have been limited to direct

<sup>63</sup> See *infra* ch. 4, Part A.

<sup>64</sup> Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, Adopted by the International Law Commission on Its Forty-Eighth Session, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), *rev'd* by U.N. Doc. A/CN.4L.532/Corr.1 and U.N. Doc. A/CN.4L.532/Corr.3.

harm against persons. It does not take into account certain attacks upon other protected interests that may have effects or consequences on the life, health, and well-being of persons. This is particularly true with respect to environmental, cyber and other conduct harmful to humans. With respect to some of these, there are a number of relevant international conventions for the protection of the environment but they seldom include criminal sanctions,<sup>65</sup> even though such environmental violations as the dumping of nuclear waste material can have serious life and health impacts including other forms of dangerous chemicals released into the air, soil, and water. Similarly, cyber crime, or for that matter what is now being referred to as cyber terrorism, may well cause serious threats to life, health, and well-being, particularly if one takes into account the scenario of shutting down hospital and healthcare facilities. These and other acts, which are not directly aimed at human beings, but which ultimately impact upon human beings, should be included in an expanded *ratione materiae* of a more progressive definition of CAH. There are, of course, other extensions of the present listing of human protections, such as the persecution of persons with disabilities and persecutions based on sexual orientation.

## §2. The Concept and Relevance of State Policy

The notion of state policy means unlawful conduct by state actors using public power and resources under color of law to commit harmful conduct against a civilian population.<sup>66</sup> This includes any individual or group capable of using the powers and resources of government to institutionalize violence against a civilian population.<sup>67</sup> Sometimes it is government by terror, but most of the time it is the abusive exercise of power in less visible ways, but which nonetheless causes significant human harm to a defenseless part of the civilian population.

By virtue of its nature and scale, CAH requires the use of governmental institutions, structures, resources, and personnel acting in reliance on their powers and resources without being subject to effective legal controls. This includes government leaders who manage to override legal processes and to engage in unlawful practices under the pretense of legality. By sustaining an absolutist-positivist approach to law, totalitarian leaders claim the authority of positive law, which they are able to fashion as they please to provide apparent legitimacy for their exercise of power.<sup>68</sup> Positive law may thus be used to give a color of legality to otherwise unlawful conduct, rejecting any claim of discrepancy between law as an instrument of the ideology of a power-system and the legitimacy of the law as understood in its substantive meaning, which goes beyond its textual meaning, and which transcends its procedural formalism.<sup>69</sup> In short, it is what U.S. constitutional

<sup>65</sup> Stephen C. McCaffrey, *Criminalization of Environmental Protection*, 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 1013 (M. Cherif Bassiouni ed., 3d. ed. 2008).

<sup>66</sup> CAH “must be strictly construed to exclude isolated cases of atrocities or persecutions.” United States v. Alstötter (the *Justice* case), reprinted in VI LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1948), at 47. See also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 104 (2004); Rodney Dixon, *Article 7: Introduction/General Remarks*, in OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 123 (2d. ed., 2008).

<sup>67</sup> See HANNAH ARENDT, TOTALITARIANISM 158 (1968).

<sup>68</sup> For a discussion of legal positivism, see *infra* ch. 5 §1.

<sup>69</sup> *Id.*

law doctrine refers to as substantive due process, as distinguished from procedural due process.

Since the 1900s most state policies resulting in mass killings and other mass human rights violations have been committed in reliance on four interactive factors: power, ideology, terror, and the manipulation of the law.<sup>70</sup> Since World War II, with few exceptions, totalitarian regimes and dictatorships have enacted laws having the appearance of legitimacy to carry out their terror-inspiring strategies and tactics.<sup>71</sup> Invariably, tyrannical regimes, no matter what their ideology may be, if any, rely on the same manipulative techniques of the positive law to achieve their nefarious ends. With uncanny resemblance, the methods and terminologies of rightist and leftist ideologically based tyrannical regimes have been similar.

Positive laws are specifically enacted to provide measures designed to protect whatever the regime considers the public order (*ordre public*), the best interest of society, and other similar terms designed to falsely convey an impression of legitimacy and lawfulness. The Nazis spoke of the “sound instinct of the people” as a basis for their discriminatory and terror-inspiring strategies and tactics.<sup>72</sup> They also referred to their racial supremacist “laws” as the “law of nature,” to convey a perception of legitimacy and lawfulness for their otherwise unlawful conduct.<sup>73</sup> Marxism, for example, relied on “the law of history” to fashion the theory of class struggle that is at the heart of that ideology.<sup>74</sup> Every tyrannical regime since the turn of this century has claimed to be acting for the greater good of the people, and has justified its excesses as necessary to preserve or restore public order (*ordre public*). These regimes have invariably relied on the Machiavellian-consequentialist maxim that the end justifies the means – a maxim whose lack of moral foundation lays in the very proposition it espouses. Totalitarian regimes have almost always relied on the authority of positive law to govern through terror.

To prevent such abuses of power, the principles of legality should not be limited to form, but should extend to substance. This is what national constitutions and international (and regional) human rights conventions seek to accomplish by requiring specificity in penal norms and by limiting the subject-matter safe and sanctions of laws and power.

In totalitarian regimes law is transformed from being the embodiment of legitimate consensus to an instrument of sociopolitical change devoid of historical legitimacy and legal validity. Law enacted pursuant to this concept and designed to serve power and wealth interests therefore never ceases its motion in quest of constant expansion, that type of law that serves it is inconsistent or in contradiction with the higher background of the law.<sup>75</sup>

<sup>70</sup> For conflicts occurring since World War II, see BASSIOUNI, 1–2 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE, *supra* note 24.

<sup>71</sup> See M. Cherif Bassiouni, *A Policy-Oriented Inquiry into the Different Forms and Manifestations of ‘International Terrorism,’* in LEGAL RESPONSES TO INTERNATIONAL TERRORISM XV, XXXV–XL (M. Cherif Bassiouni ed., 1988).

<sup>72</sup> See *infra* ch. 3, §§5, 6.

<sup>73</sup> See, e.g., ADOLF HITLER, MEIN KAMPF (1930).

<sup>74</sup> See, e.g., FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 1 (1890); see also VLADIMIR I. LENIN, STATE AND REVOLUTION (1918).

<sup>75</sup> As Hannah Arendt describes it:



When the substance of law is not bound by higher values and principles, it can whimsically be used to serve the vagaries of power. When that occurs, basic values and principles are distorted and new realities emerge that contradict social experiences and historical legacies.<sup>76</sup>

Every regime that combines ideology and terror as a form of government starts with the proposition that an initial state of flux is necessary, *voire*, indispensable, to achieve the ultimate goal that invariably promises all or some of man's perennial high or noble hopes and expectations, such as peace, justice, order, stability, security, well-being, and happiness. The goals are made to appear valid, and only the means appear different, but then only for a brief transitional phase. Afterward, all is predicted to be well and good. Such ideological rationalizations, to use Marx's description of religion, are the "opium of the people" are seductive slogans designed to convey the notion that the terror is only temporary, exceptional, and discriminating – as it befalls only the few errant individuals, thus excluding the righteous and those willing to accept a passive role. That is why passivity and indifference are the most propitious and favorable attitudes that foster the existence of such regimes under which CAH occur.

As one looks at the pattern of behavior of such regimes, there is invariably an apparent sense of order, at times even objectivity, in the selection of the victims. This order is usually presented as a rationale for the strategies of legitimized terror imposed in the name of the higher ideology or for the sake of its ultimate lofty goals, or simply to safeguard the nation or protect the state. The higher good is invariably invoked, as is the best interest of the collectivity. All of that provides a semblance of credibility for the believer, the gullible, the faint of heart, and the indifferent. A certain straitjacketed logic compels those who accept the rationalized premises of such regimes to accept the

Whether the driving force of this development was called nature or history is relatively secondary. In these ideologies, the term "law" itself changed its meaning: from expressing the framework of stability within which actions and motions can take place, it became the expression of the motion itself.

See ARENDT, *supra* note 67, at 162.

<sup>76</sup> Hannah Arendt perspicaciously states:

Terror is lawfulness, if law is the law of the movement of some superhuman force, Nature or History.

Terror as the execution of a law of movement whose ultimate goal is not the welfare of men or the interest of one man but the fabrication of mankind, eliminates individuals for the sake of the species, sacrifices the "parts" for the sake of the "whole." The superhuman force of Nature or History has its own beginning and its own end, so that it can be hindered only by the new beginning and the individual end which the life of each man actually is.

Positive laws in constitutional government are designed to erect boundaries and establish channels of communication between men whose community is continually endangered by the new men born into it. With each new birth, a new beginning is born into the world, a new world has potentially come into being. The stability of the laws corresponds to the constant motion of all human affairs, a motion which can never end as long as men are born and die. The laws hedge in each new beginning and at the same time assure its freedom of movement, the potentiality of something entirely new and unpredictable; the boundaries of positive laws are for the political existence of man what memory is for his historical existence: they guarantee the pre-existence of a common world, the reality of some continuity which transcends the individual life span of each generation, absorbs all new origins and is nourished by them.

*Id.* at 163.



means of terror as the inevitable consequence, irrespective of its outcomes. Thus, the end justifies the means.

Crimes committed by virtue of state policy alter the nature and character of their singular parts. These are crimes committed by relatively few people, but made possible by instrumentalizing the social system while neutralizing potential internal and external opposition. This includes overcoming legal limitations by curtailing the rule of law and by placing those in power beyond the reach of the law.<sup>77</sup> This is why the existence of state policy, whether explicit or implicit, is integral to CAH. This element must, however, also be extended to groups or organizations of nonstate actors who have characteristics and capabilities similar to state actors, and who engage in large-scale atrocities against civilian populations.

The relevance of the element of state policy for state actors rests first in distinguishing this international category of crimes from similar domestic crimes, and second in distinguishing CAH from other international crimes that proscribe the same or similar conduct.<sup>78</sup> Genocide, which also requires states policy, is distinguishable from CAH,<sup>79</sup> in that the former requires a specific intent to “destroy in whole or in part” a specifically protected group, limited in definition as “national, religious or ethnic,”<sup>80</sup> while CAH extends to all persons irrespective of their belonging to a specific group and does not require a specific intent to destroy a given group. Thus, the protective scheme of CAH is broader than that of genocide, though it shares with that crime the requirement of an overall state policy, which in genocide is reflected in the “intent to destroy in whole or in part,”<sup>81</sup> and with respect to CAH is reflected in the policy of carrying out the specific crimes contained in the applicable definition, irrespective of whether that policy emanates from state actors or nonstate actors, acting for and on behalf of a state or in support of state actors and by extension to nonstate actors, who have similar characteristics as those of state actors and who are capable of developing a policy similar to that of a state or an organizational unit within the state (i.e., an army, police, or intelligence service).

Another relevant aspect of the state policy element is that it constitutes the basis for reaching the authors of the decisions, policymakers and senior executors of the policy who set in motion the chain of events that brought about the execution of the policy by others. Indeed, unlike the crime of murder contained in the criminal laws of all states, and for which the perpetrator is usually the only person responsible (save for responsibility for the conduct of another and accomplice liability), murder under CAH is the product of collective action by many perpetrators against many victims who are civilians.<sup>82</sup> That does not mean that a single act of murder does not qualify for CAH; it can. But the nature of the crime presupposes that multiple murders will occur, and the overall conduct of the perpetrators is intended to generate a certain quantum of human harm. It is therefore

<sup>77</sup> See *infra* §2.

<sup>78</sup> This is the case with respect to the overlap between genocide, CAH, and war crimes. *Supra* note 29.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See IMT Charter, art. 6(c), *supra* note 12; ICTY Statute art. 4, *supra* note 37; ICTR Statute art. 3, *supra* note 38; ICC Statute, art. 7, *supra* note 39. As discussed *infra* ch. 6, all of these formulations include “murder.”

a collective attack by state actors and nonstate actors against members of a collectivity, a civilian population, which is the product, result, or outcome of a given policy.

Criminal law doctrine, irrespective of the diversity of the world's criminal justice systems, recognizes three connected circles of criminal responsibility: (1) individual responsibility for the perpetrators of the crime; (2) the aiders and abettors; and (3) those who order, command, induce, or solicit the commission of the crime, but who do not participate in the commission of its material element or in any conduct deemed to fall within the meaning of aiding and abetting.

The extension of criminal responsibility beyond the circle of the immediate perpetrators and those providing assistance and support by aiding and abetting is limited to a slightly wider circle (depending upon different legal systems). Other forms of vicarious criminal responsibility also exist. That extended circle encompasses, but does not easily apply to decision-makers and policymakers who, in connection with the particular nature of CAH, are able to set in motion events that ultimately result in the commission of those specific acts defined in that category of crimes, without having a direct connection to commission of the material element of the crime or without having ordered the commission of the crime. In this type there is a space or distance between the moral author of the crime, namely the decision-maker, and the actual perpetrator who is the material author of the crime of responsibility, particularly when the former causes a trickle-down effect to the latter. Thus, proof of the connection between the moral and the material author of the crime may be difficult to establish also because of the ability of decision-makers to conceal the connection between their conduct and the commission of the crime.<sup>83</sup>

The term moral author does not connote a concept of morality, but refers to a type of perpetrator who, having the requisite mental element, sets in motion events leading others to the commission of the crime. Thus, the moral author does not perform the *actus reus*, and does not necessarily aid or abet in the classical meaning of these terms under generally accepted principles of criminal law.<sup>84</sup> The moral author of the crime causes others to perpetrate the acts contained in the definition of CAH. Initiators and instigators, including decision-makers and senior executor state agents, hold certain powers capable of unleashing a high level of harm on a defenseless civilian population that becomes their victim, both as a collectivity and as individuals. These persons may not commit any of the acts against any of the victims, but they are the moral authors of the crimes in question.

The intermediate category of criminally responsible persons encompasses those who are facilitators. They are usually persons who operate within the layers of bureaucracy and conceal their deeds in the maze of administrative hierarchies that allow them to

<sup>83</sup> Conspiracy is a separate crime in common law systems and is found in some fifty states out of 192. A counterpart to conspiracy has been developed through the jurisprudence of the ICTY, namely joint criminal enterprise, a legal doctrine first utilized by the ICTY that considers each member of an organized group individually responsible for crimes committed by the group within its common purpose or plan. See *infra* ch. 7; Allison Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 110 (2005); Mark Osiel, *The Banality of Good: Aligning Incentives against Mass Atrocity*, 105 COLUM L. REV. 1751 (2005).

<sup>84</sup> That concept is found in systems inspired by the Romanist-civilist and Germanic concepts of criminal responsibility and is best expressed in the French legal terms "*l'auteur moral de l'infraction*." See R. MERLE & A. VITU, 1 TRAITÉ DE DROIT CRIMINEL 352 (4th ed. 1989).

escape detection. Without them, most CAH could not be perpetrated, yet rarely do any of these faceless bureaucrats garner detection, let alone criminal responsibility.<sup>85</sup>

In cases involving the wider and intermediate circles of criminal responsibility, the question arises as to what type of mental element is required.<sup>86</sup> What the common law refers to as “general intent” should be the requisite mental element with respect to policymakers and senior executives, because it can be assumed that such persons have a greater level of knowledge of the facts; therefore, they can be held to the objective standard of reasonableness of knowledge and foreseeability without requiring the higher standard of specific intent (or *dolus specialis*). This approach also permits overcoming the barriers of plausible deniability that leaders can erect to conceal their actions in ways that would tend to insulate them from criminal responsibility based on specific intent.

The same policy considerations cannot however be extended to low-level executors who do not have the capacity to set in motion events leading to mass victimization, and who do not have the means to conceal their actions behind such subterfuges as plausible deniability or bureaucratic mazes. Nor can they be presumed to have the knowledge and information available to decision-makers and senior executors. Thus, for such low-level executors, it is more appropriate to require an element of knowledge that is closer to specific intent. This higher legal standard is in part that which would distinguish a specific criminal charge of CAH from other crimes perpetrated by low-level executors.<sup>87</sup> The element of state policy for state actors serves as a legal nexus between these different circles of criminal responsibility.

### §3. The Legal Elements that Characterize CAH as an International Crime

With the exception of aggression, every other socially protected interest reflected in an international crime is also reflected in a crime under the criminal laws of the world’s major criminal justice systems.<sup>88</sup> The label and elements of these crimes may be different in the various national legal systems, but the same facts that would support prosecution and punishment for any international crime (save for aggression) would also support prosecution and punishment under equivalent or counterpart national criminal law.<sup>89</sup> In other words, a functional equivalence exists between certain international and national

<sup>85</sup> But see the *Papon* case, *infra* ch. 9, § 3.2.

<sup>86</sup> See generally *infra* ch. 6.

<sup>87</sup> This was this writer’s position when he was Chief Legal Expert for the Canadian Government in the case of *R. v. Finta*. The Canadian Supreme Court affirmed that position. See *R. v. Finta*, [1989] 61 D.L.R. 85 (4th).

<sup>88</sup> See *infra* ch. 6, §2.1.

<sup>89</sup> These crimes are aggression; genocide; CAH; war crimes; crimes against the United Nations and associated personnel; unlawful possession or use or emplacement of weapons; theft of nuclear materials; mercenarism; *apartheid*; slavery and slave-related practices; torture and other forms of cruel, inhuman or degrading treatment or punishment; unlawful human experimentation; piracy; aircraft hijacking and unlawful acts against international air safety; unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas; threat and use of force against internationally protected persons; taking of civilian hostages; unlawful use of the mail; unlawful traffic in drugs and related drug offenses; destruction and/or theft of national treasures; unlawful acts against certain internationally protected elements of the environment; international traffic in obscene materials; falsification and counterfeiting; unlawful interference with international submarine cables; bribery of foreign public officials. See BASSIOUNI, INTRO TO ICL, *supra* note 20, at ch. 3, pp. 6–7.

crimes, even though the former have a characterizing international element and one or more additional or different legal elements. The reason for this functional equivalence is that the legal elements of the specific crimes are substantially similar.<sup>90</sup>

Like war crimes, CAH is a label for an entire category of specific acts contained in the formulations set forth respectively in Article 6(c) of the London Charter, Article 4 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute, and other formulations.<sup>91</sup> Some of these formulations, however, lack certain general part elements, which must therefore be found elsewhere. Since these specific crimes are also crimes in the laws of most states, their legal elements can be adduced from “general principles of law.”<sup>92</sup> This includes the material element (or *actus reus*), the mental element (or *mens rea*), and causation.

The acts specifically listed in Article 6(c) and subsequent formulations of conventional and customary international law can be found, as stated above, in the criminal laws of the world’s major legal systems. But the identification of these crimes in national criminal laws does not, however, make these national crimes *ipso jure* international crimes; it makes the protected interest and prohibited conduct part of “general principles of law” for purposes of defining the legal elements of these acts that constitute the specific crimes of the category of crimes called CAH. What makes the specific crimes contained in Article 6(c) and subsequent formulations part of the international crime category of CAH is their nexus to one overarching international element, namely state policy. It is therefore the indispensable link that warrants inclusion in the international criminal category of that which would otherwise remain within the category of national crimes. This understanding of the necessary link between CAH and a state policy is reflected in the words of Justice Robert Jackson, the United States Delegate to the Nuremberg Conference:

[O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to States only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German State.<sup>93</sup>

<sup>90</sup> Compare the CAH elements identified *infra* ch. 6 with the criminal laws of almost all countries and it will readily appear that murder, rape, and physical harm are contained in these laws and are also part of the specific acts contained in all CAH definitions. This is the position taken by this writer in the *Finta* case in Canada, whereby a comparison between the world’s 74 countries in 1944 and the specific acts contained in the London Charter’s Article 6(c) are identical. *R. v. Finta*, [1989] 61 D.L.R. 85; see also *infra* ch. 3. The methodology of this study presented by this writer to the Canadian trial court, and which was accepted all the way up to the Supreme Court. The methodology was subsequently published. See *infra* ch.9, §3.2.6; see M. Cherif Bassiouni, *A Functional Approach to General Principles of International Law*, 11 MICH. J. INT’L L. 768 (1990).

<sup>91</sup> See generally *infra* ch. 6, Part A.

<sup>92</sup> *Id*; Bassiouni, *supra* note 90.

<sup>93</sup> Justice Jackson, United States Delegate, London Conference, Minutes of Conference Session of July 23, 1945, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 333 (1949).

In its definition of CAH, the London Charter established two international jurisdictional elements, the first being the connection to war,<sup>94</sup> and the second being the use of the term “persecution,” which implicates state policy much as the first element does. But some confusion appears to have existed at the time as to these two elements. One approach was to consider the specific crimes contained in Article 6(c) as falling into two separate and distinct categories, namely “murder, extermination, enslavement, deportation and other inhumane acts” in one category and the other being “persecution.” Another approach was to consider that all the specific crimes contained in Article 6(c) must be connected to war and also deemed part of a policy of persecution. The latter was the approach followed by the IMT, IMTFE, and the CCL 10 Proceedings. The Nazi regime’s commission of these crimes was the product of careful planning and methodical execution; they left a paper trail that removed any doubt in law or in fact about the state’s policy and the state’s execution of that policy in all its facets. In a similar way, though without leaving the same paper trail as did the Nazi regime, this was the case with the CAH committed by the Khmer Rouge in Cambodia over a thirteen-year period from 1975 to 1988.<sup>95</sup>

In conclusion, the characteristics of the element of state policy for state actors, or by extension, the element of organizational policy for nonstate actors are:

- (1) The action or policy is directed against an identifiable group of civilians within society, usually reflecting a persecutorial motivation but necessarily so;
- (2) The acts committed are or would be deemed criminal under the laws of that state;
- (3) The specific crimes are ordered, instigated and committed by agents of the state acting in their official capacity, or under color of legal authority, or they are allowed to occur by state agents whose omission to prevent their occurrence evidences a pattern reflecting an existing policy;
- (4) The scale of the victimization is significant and it is carried out on what is now called a widespread or systematic basis;
- (5) The specific crimes are connected to war under the Law of the Charter, but not under Post-Charter legal developments.

<sup>94</sup> See generally *infra* ch. 3, §7.

<sup>95</sup> See generally GENOCIDE AND DEMOCRACY IN CAMBODIA (Ben Kiernan ed., 1993); DAVID P. CHANDLER, BEN KIERNAN & CHANTHAN BORJA, *POL POT PLANS THE FUTURE* (1988); Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989); REPORT OF THE CAMBODIAN GENOCIDE PROJECT (1984); Nancy Blodgett, *Cambodia Case: Lawyer Wants Genocide Trial*, 71 A.B.A. J. 31 (1995); I.C.J. *Report on Democratic Kampuchea*, 201 I.C.J. REV. 19 (1978); KAMPUCHEA: DECADE OF THE GENOCIDE (Kimmo Kiljunen ed., 1984); Jordan J. Paust, *Political Oppression in the Name of National Security: Authority, Participation, and the Necessity Within Democratic Limits Test*, 9 YALE J. WORLD PUB. ORD. 178 (1982); Michael J. Bazyley, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT’L L. 547 (1987); Gregory H. Stanton, *Kumpuchean Genocide and the World Court*, 2 CONN. J. INT’L L. 341 (1987).

In contrast the Hutu massacres of Tutsi in Rwanda in 1993–94 were widespread and systematic, but had fewer organizational planning and methodical characteristics than the other two situations, though there was no doubt from the manner in which these crimes were executed that they were the product of state policy, even when they were committed by armed bands of civilians. What differs between these and other cases is the evidence available to prove this element. In addition, so far it is not clear how to prove state policy, and how to prove it with respect to each single person who is criminally accused of that category of crime. Furthermore, no distinctions clearly exist as to the difference between proving the mental element of the category of crimes for decision-makers, senior executors, and low-level executors.

At this time, none of the formulations of CAH, except for the ICTR's Article 3 and the ILC's definition, specifically extend to nonstate actors, except when they are deemed agents of the state, as that concept of agency is recognized in customary international law.<sup>96</sup> But considering that nonstate actors have committed many large-scale atrocities in the various types of armed conflict following World War II (an estimated 313 armed conflicts and an estimated 92 to 101 million casualties),<sup>97</sup> it is imperative that CAH encompass nonstate actors. As it now stands, CAH applies only to state actors and requires a state policy element.

CAH involve the use of the state's institutions, personnel, and resources in order to commit or refrain from preventing the commission of the specific crimes identified in the applicable definition.<sup>98</sup> But that does not alter the fact that the perpetrators of each specific crime, such as "murder" or "enslavement," are individually accountable for each one of these crimes perpetrated against each individual victim.

State policy can be based on a decision by the head of state, or a common design agreed to by senior officials, who rely on the state's powers and resources, in whole or in part, to carry out such a policy, or when the conduct of low-ranking public officials relying on state powers and resources is committed with the connivance or knowledge of higher-ranking public officials, or when such higher-ranking officials fail to carry out their obligation to prevent the conduct in question or fail to punish the perpetrators when the conduct is discovered or reasonably discoverable.

The agency relationship between the individual and the state can be found in accordance with international law norms and standards of imputability. The rationale for the requisite of state policy, as discussed above, is that CAH, like other international crimes such as genocide<sup>99</sup> and *apartheid*,<sup>100</sup> cannot be committed without it because of the nature and scale of the crime.

The policy of extermination of Jews, gypsies, and the mentally ill established by the Nazis was clearly developed at the highest level of state decision-making, starting with the head of state.<sup>101</sup> The execution of these policies involved several state organs and required substantial state personnel and resources at various levels of the hierarchies of government agencies.

As a corollary and consequence of the state policy requirement, the traditional immunity for heads of state and the defense of obedience to superior orders has to be eliminated, to subject decision-makers and those who carried out such acts to individual criminal

<sup>96</sup> See the ICJ's formulation of agency for purposes of state responsibility in *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 331–47 (June 27). See also the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts. G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

<sup>97</sup> Mullins, *supra* note 1, at 67.

<sup>98</sup> See *infra* ch. 6.

<sup>99</sup> See Lippman, *supra* note 10, at 403; SCHABAS, *supra* note 10; LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* (1981).

<sup>100</sup> See Clark, *supra* note 18, at 599.

<sup>101</sup> In addition to the ample documentation that was revealed at the IMT, the *Justice Case*, reprinted in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 985 (1951) (involving public officials, clearly reveals how state policy can subvert a system of justice to produce what would otherwise be criminal, and what was still then criminal had it been carried against the non-targeted groups.); see also HENRI DONNEDIEU DE VABRES, *LA POLITIQUE CRIMINELLE DES ETATS AUTORITAIRES* (1938); ARENDT, *supra* note 67.

responsibility.<sup>102</sup> The combination of state policy and systematic implementation of the policy, as well as massive victimizations, are characteristics found in the cases from Nazi Germany, Leninist/Stalinist Russia, Cambodia, or, as a more recent example, Peru under the regime of Alberto Fujimori.<sup>103</sup> This does not always seem to be the case in other state practices since World War II, even when these state practices resulted in mass killings.<sup>104</sup> Thus, the question arises as to whether the same characteristics as those that existed in these regimes needs to be present in other situations resulting in the violations included within the meaning of CAH. In that context, five issues remain open to further interpretation:

1. The scope of the state policy;
2. The level at which such state policy is formulated;
3. The degree of participation of the various strata of the state's power structure;
4. The extent of utilization of state personnel and resources involved in carrying out the state policy; and
5. The state's failure to prevent and control spontaneous, popular uprising by one civilian group against another within society.

The issues mentioned above reflect the highest standard of state policy, and it should be understood that this higher legal threshold is not required in CAH owing to its evolution under customary international law since the Law of Charter.

Article 7 of the Rome Statute, like the ICTR's Article 3, removes the need for any connection between armed conflict and CAH. This development in customary international law is now affirmed.<sup>105</sup> Without the state policy element would transform CAH from what its characterization under Article 6(c) of the London Charter to a different category – one that generally criminalizes large-scale victimization or human rights abuses committed exclusively on a “widespread or systematic” basis. In the absence of state or organizational policy, what is “widespread or systematic” will depend on the context of the situation and will necessarily vary in its application. At the very least, “widespread or systematic” implicates an underlying policy and should be interpreted as a result. On this point, Kai Ambos has stated:

The common denominator of a systematic attack is that it is carried out according to a preconceived plan or policy, emphasizing the organized nature of the attack. The attack is systematic if it is based on a policy or a plan that provides guidance to the individual perpetrators with regard to the attack, i.e., the specific victims [...]. This is, in fact, the international element of crimes against humanity, since it is what makes criminal acts that would be common crimes under other circumstances acquire the character of crimes against humanity. In essence, the political factor only requires the exclusion of the casual acts of individuals acting on their own, in an isolated manner and without anyone coordinating them [...]. Such common criminal acts, even if committed on a widespread scale, are not crimes against humanity if they are not tolerated, at least by

<sup>102</sup> See generally *infra* ch. 7, §1.

<sup>103</sup> See *supra* note 95.

<sup>104</sup> This is true with respect to a number of situations arising out of internal political conflict, such as those in Biafra, Nigeria, and Bangladesh, though many of these characteristics appear in the case of Rwanda. For a survey of world conflicts since World War II see BASSIOUNI, 1–2 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE, *supra* note 1.

<sup>105</sup> See also SCHABAS, *supra* note 10, at 144–47.



some State or organization [ . . . ]. Thus, in order to be crimes against humanity, crimes committed on a widespread scale must be linked to some form or another of state or organized authority: they must at least be tolerated by such authority.<sup>106</sup>

The phrase “state or organizational policy” in Article 7(2) of the Rome Statute was not included in the Statutes of the *ad hoc* tribunals; nevertheless, the term “organizational policy” applies to organizations within a state, such as a segment of the military, intelligence services, the police, or similar organizational units within a state.<sup>107</sup> That term was not intended to apply to any organization whose membership consists of nonstate actors, as is the case with the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which the General Assembly has yet to endorse.<sup>108</sup> Some judges and jurists seek to extend the meaning of CAH under Article 7(2) to encompass nonstate actors, thus altering the meaning of CAH. In so doing, it bears repeating that they would remove the international element that is necessary to convert an otherwise common domestic crime into CAH.<sup>109</sup>

In a confusing opinion, the Trial Chamber in the *Tadić* case seemed to consider that the phrase “directed against any civilian population” in Article 5 of the Statute affirmed that “there must be some form of a governmental, organizational or group policy to commit these acts.”<sup>110</sup> But under the given approach, “policy” would not be limited to the policy of states, but could also apply to state-like bodies:

An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy “because their commission requires the use of the state’s institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nurnberg Charter].” While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising the de facto control over a particular territory but without international recognition or formal status of a “de jure” state, or by a terrorist

<sup>106</sup> Translation: *The Judgment Against Fujimori for Human Rights Violations*, 25 AM. U. INT’L L. REV. 657, 800–01 (2010) (trans. Aimee Sullivan), quoting KAI AMBOS, ESTUDIOS DE DERECHO PENAL INTERNACIONAL 133–35 (2007).

<sup>107</sup> See BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC, *supra* note 39, at 151–52; see also M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 243–81 (2d rev. ed. 1999).

<sup>108</sup> Draft Code of Crimes Against the Peace and Security of Mankind, *supra* note 64.

<sup>109</sup> See, e.g., Guénaél Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in LEILA NADYA SADAT, FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142 *et seq.* (2010); Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 244, 271–83 (2002).

<sup>110</sup> Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion and Judgment, ¶ 644 (May 7, 1997).



group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.<sup>111</sup>

Then, the Appeals Chamber in the *Kunarac* case rejected the view that there is a requirement of a state or organizational policy for CAH at customary international law.<sup>112</sup> The Chamber, however, explicitly rejected any policy requirement for CAH at customary international law in order to broaden the scope of CAH to apply to nonstate actors:

Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.<sup>113</sup>

The portion of the Appeals Chamber judgment in *Kunarac* that purports to eliminate the state policy requirement is regrettable for many reasons. The ICTY Statute, as adopted, was intended to reflect customary international law as it then existed. As described above, the state policy element has been an element of CAH since its implication at the IMT. None the post-Charter developments eliminated the requirement, though some case law and national legislation on CAH reaffirmed it.<sup>114</sup> Moreover, the Appeals Chamber entirely ignored Article 7 of the Rome Statute and commentaries, which have also confirmed such a requirement.<sup>115</sup> Nevertheless, the Appeals Chamber

<sup>111</sup> *Tadić* Trial Judgment, *supra* note 110, ¶ 654.

<sup>112</sup> *Kunarac et al. v. Prosecutor*, Case No. IT-96-23/1-A, Judgment, ¶ 98, n.114 (June 12, 2002) [hereinafter *Kunarac Appeals Judgment*]; *Blaškić v. Prosecutor*, Case No. IT-95-14-A, Judgment, ¶ 120 (July 29, 2004); *Kordić & Čerkez v. Prosecutor*, Case No. IT-95-14/2-A, Judgment, ¶ 98 (Dec. 17, 2004); *see also* Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, *supra* note 48; and Schabas, *State Policy as an Element of International Crimes*, *supra* note 48.

<sup>113</sup> *Kunarac Appeals Judgment*, *supra* note 112, ¶ 98; *see also* *Prosecutor v. Kamuhanda*, Case No. ICTR-95-54A-T, Judgment, ¶ 665 (Jan. 22, 2004) ("The Chamber agrees with the reasoning followed in *Semanza* and finds the existence of a plan is not an independent legal element of crimes against humanity.").

<sup>114</sup> From the ICTR, *see* *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 69 (Dec. 6, 1999); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 204 (Jan. 27, 2000). For national prosecutions considering the state policy requirement, *see, e.g.*, the *Menten* case from the Netherlands, *Public Prosecutor v. Menton*, Supreme Court, *reprinted in* 75 INT'L L. REP. 332, 361–66 (1987) (Neth.); the French prosecutions of Touvier and Barbie: *Barbie* case, Cass. crim., 20 Dec. 1985, Bull. Crim. No. 394, at 1085; *Touvier* case, Cass. crim., 27 Nov. 1992, Bull. Crim. No. 394, at 1085; the Canadian *Finta* case, [1994] 1 Sup. Ct. Rep. 701, 814; *see also* the Canadian prosecution in the *Mugesera* case: *Mugesera v. Canada* (Minister of Citizenship and Immigration, [2005] 2 SCR 100, ¶ 158; and the Argentine prosecution in the *Simón* case: 11/7/2007, "Recurso de Hecho, Derecho, René Jesús s/ incidente de prescripción de la acción penal, Causa N° 24.079C", pp. 10–12 (Arg.) (relying on Rome Statute Article 7 to conclude that the facts must be linked to a policy). These prosecutions are also discussed *supra* ch. 9, § xx.

<sup>115</sup> ICC Statute art. 7(2)(a); *See, e.g.*, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sept. 2, 1998); *see also* BASSIOUNI, *supra* note 48, at 240–50; Robinson, *supra* note 48; Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, *supra* note 48; Schabas, *State Plan or Policy as an Element of International Crimes*, *supra* note 48;

simply ignored these authorities. Instead, buried in a footnote, it chose to state its view of customary international law by cherry picking cases that, upon further examination, do not even stand for the proposition asserted.<sup>116</sup> In light of the dubious nature of this decision, Professor Schabas writes,

In Jelisić, the ICTY had relied on a literal reading of the definition of [genocide]. The text of the definition contains no explicit requirement of a plan or policy. Similarly, with respect to crimes against humanity, the text of the Statute contains no explicit requirement of a plan or policy. On the other hand, the Appeals Chamber noted that there had been a significant debate on the matter in the case law and the academic literature. Astonishingly, however, the discussion of this important point was confined to a footnote in the judgment of the Appeals Chamber! When the authorities cited in the reference are scrutinized, it is not at all apparent how many of them assist in the conclusion that a State plan or policy is not an element of crimes against humanity.

Generally speaking, the ICTY's very summary discussion of the issue of a State plan or policy with respect to both crimes against humanity and genocide has an air of the superficial. The result reached – that a State plan or policy is not a required element – appears to be a results-oriented decision rather than a profound analysis of the history of the two crimes or of their theoretical underpinnings. The ICTY also appears to have ignored the drafting histories of the crimes as well as subsequent developments such as the work of the International Law Commission.

The ICTY's determination that no state plan or policy is required for crimes against humanity has proven to be more significant than in the case of genocide. For example, the Kunarac case involved the detention of women civilians in appalling conditions and their regular mistreatment, including rape. These were crimes committed by members of an organized paramilitary group, but they were not necessarily attributable to a State plan or policy. Kunarac was convicted of crimes against humanity. Expanding the concept of crimes against humanity by eliminating any requirement of a State plan or policy was therefore of considerable legal significance.<sup>117</sup>

And,

An important objection to such an interpretation of genocide, and crimes against humanity, is the exclusion of non-State actors. This problem can be adequately addressed by a broad construction of the conception of State policy so as to apply to State-like actors as well as States in the formal sense. Bodies like the Republika Srpska, the FARC, the Palestinian Authority, and perhaps the government of Taiwan could be addressed in this manner, but not organizations like Hell's Angels or the mafia.

Even outside the context of customary international law, this issue will arise in the interpretation of Article 7(2)(a) of the Rome Statute, with its reference to a "State or organizational policy" as a contextual requirement for crimes against humanity.

<sup>116</sup> As pointed out by Professor Schabas, for instance, although the Appeals Chamber refers to the 1954 ILC draft Code of Offences Against the Peace and Security of Mankind in support of rejecting the state policy requirement, the ILC actually incorporated a connection to state policy: "Inhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities." See SCHABAS, *supra* note 48, at 151, n.96. See also Draft Code of Offences against the Peace and Security of Mankind, U.N. Doc. A/CN.4/SER.A/1954/Add.1, p.48.

<sup>117</sup> Schabas, *supra* note 48, at 959–60.

Dictionary definitions consider an organization to comprise any organized group of people, such as a club, society, trade union, or business. Surely the drafters of the Rome Statute did not intend for Article 7 to have such a broad scope, given that all previous case law concerning crimes against humanity, and all evidence of national prosecutions for crimes against humanity, had concerned State-supported atrocities. If they really meant to include any type of organization, such as a highly theoretical “organization” of two people, why did they put these words in at all? The biggest problem for the proponents of the broad view is their inability to explain how the term organization is to be qualified.

In his recent three-volume work, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT*, one of the leading experts on crimes against humanity, Professor M. Cherif Bassiouni, argues:

Contrary to what some advocates advance, Article 7 does not bring a new development to crimes against humanity, namely its applicability to non-state actors. If that were the case, the mafia, for example, could be charged with such crimes before the ICC, and that is clearly neither the letter nor the spirit of Article 7. The question arose after 9/11 as to whether a group such as al-Qaeda, which operates on a worldwide basis and is capable of inflicting significant harm in more than one state, falls within this category. In this author’s opinion, such a group does not qualify for inclusion within the meaning of crimes against humanity as defined in Article 7, and for that matter, under any definition of that crime up to Article 6(c) of the IMT, notwithstanding the international dangers that it poses [ . . . ]. The text [of article 7(2)] clearly refers to state policy, and the words “organisational policy” do not refer to the policy of an organization, but the policy of a state. It does not refer to state actors [ . . . ].

Professor Bassiouni may be pitching this a little too high because his approach excludes the State-like actors. As I understand his view, the term organization is meant to encompass bodies within a State such as the Gestapo and the SS.<sup>118</sup>

Although this statement was addressing the interpretation of Article 7 of the Rome Statute,<sup>119</sup> it also affirms the element of state policy for CAH at customary international law. In further response to these developments, Professor Schabas writes:<sup>120</sup>

Underpinning this development in the law may be a concern that the requirement of a State policy as an element of such crimes will make prosecution of so-called non-State actors more difficult.

In practice, however, there have been few if any cases before the international tribunals involving entrepreneurial villains who have exploited a situation of conflict in order to advance their own perverse personal agendas. Essentially all prosecutions have involved offenders acting on behalf of a State and in accordance with a State policy, or those acting on behalf of an organization that was State-like in its attempts to exercise control over territory and seize political power, such as the Republika Srpska. Indeed, in 2005,

<sup>118</sup> Schabas, *supra* note 48, at 972–74 (internal citations omitted); *see also* Ambos & Wirth, *supra* note 106, § 7 mn, 188; BASSIOUNI, *LEGISLATIVE HISTORY OF THE ICC*, *supra* note 39, at 245 (nonstate actors “partake of the characteristics of state actors in that they exercise some dominion or control over territory and people, and carry out ‘policy’ which has similar characteristics of those of ‘state action or policy’”).

<sup>119</sup> BASSIOUNI, *LEGISLATIVE HISTORY OF THE ICC*, *supra* note 39, at 151–52.

<sup>120</sup> Prosecutor v. Jelisić, Case No IT-95-10-T, Judgment, ¶ 100 (Dec. 14, 1999), *aff’d*, Jelisić v. Prosecutor, Case No IT-95-10-A, Judgment, ¶ 48 (July 5, 2001); *see also* Schabas, *State Policy as an Element of International Crimes*, *supra* note 48, at 957–58.

an expert commission of inquiry mandated by the U.N. Security Council to investigate whether genocide was being committed in Darfur answered the question “whether or not acts of genocide have occurred” not by examining acts of individual offenders, but by concluding “that the Government of Sudan has not pursued a policy of genocide.”<sup>121</sup>

It is the opinion of this writer that the Appeals Chamber in *Kunarac* sought to transform CAH into a crime that includes nonstate actors by refusing to recognize state policy as an element of CAH. Troublingly, other courts have chosen to follow the mistaken *Kunarac* decision in prosecutions of CAH.<sup>122</sup>

Although the ICC has yet to issue its first conviction for CAH, several Pre-Trial Chambers decisions have addressed the element of “state or organizational policy.” Pre-Trial Chamber I in the *Katanga* case provided that the requirement is intended to ensure that an attack, “even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern.”<sup>123</sup> Pre-Trial Chamber II in the *Bemba* case ruled that a policy “may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalized.”<sup>124</sup> These decisions lead this writer to the conclusion that the ICC may interpret the Rome Statute so as to bring nonstate actors groups within the scope of CAH. However, in order for CAH to apply, such nonstate actors groups should have state-like characteristics.

#### §4. The Protected Civilian Population under CAH

A civilian population can be the target of abuse of power by state actors resulting in human rights violations, but these violations are not necessarily CAH. The acts must fall within the specific contents of CAH as defined in the applicable instrument,<sup>125</sup> and they must also be the product of state policy and committed by state actors and nonstate actors acting for or on behalf of a state.

The victim group must be a civilian group specifically targeted, as in the cases of persecution or gender identity, or as in the case of the ICTR Article 3, which identifies national, political, ethnic, racial, and religious in a manner reminiscent of the elements of genocide. But the civilian group does not have to be identified in any particular

<sup>121</sup> Schabas, *State Policy as an Element of International Crimes*, *supra* note 48, at 954–55.

<sup>122</sup> For the ICTY, *see, e.g.*, Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, ¶ 98 (Dec. 17, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 120 (Jul. 29, 2004). For the ICTR, *see, e.g.*, Prosecutor v. Muvunyi, Case No. ICTR-55A-T (Sept. 12, 2006); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, ¶ 872; Prosecutor v. Semanza, Case No. ICTR-97-20-T, ¶ 329 (May 15, 2002); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, ¶ 527 (Apr. 28, 2005); Prosecutor v. Gacumbitsi, Case No. ICTR-01-64-T, ¶ 299 (Jun. 17, 2004); Prosecutor v. Ntagerura et al., ICTR-99-46-T, ¶ 698 (Feb. 25, 2004).

From the Special Court for Sierra Leone, *see, e.g.*, Prosecutor v. Sesay, Kallon, and Gbao, SCSL-04-15-T, Judgment, ¶¶ 78–79 (Mar. 2, 2009) [hereinafter the *RUF* case] (internal citation omitted).

*See also* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3832 (Jun. 18, 1996) (holding that nonstate actors could be held liable for the commission of genocide, which the court characterized as the most serious CAH).

<sup>123</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 398 (Sept. 30, 2008).

<sup>124</sup> Prosecutor v. Bemba, 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, ¶ 81 (Jun. 15, 2009).

<sup>125</sup> *See generally infra* ch. 4, Part A.

way. For instance, a violent totalitarian regime can indiscriminately target a civilian group with the intention of instilling terror in the population at large but without the intention of targeting that civilian group. More commonly, the violence is used against any opponents or would-be opponents of the regime.<sup>126</sup>

The Statutes of the ICTY and the ICTR, much like the London Charter at its time, took into account the nature of the facts that brought about these normative developments. The Charter was a reflection of the Nazi regime's practices during World War II, much as the ICTY reflected the nature of the conflict in the former Yugoslavia, and the ICTR, the Hutu practices against the Tutsi in Rwanda. In the former Yugoslavia, when the conflict erupted in 1991, and within a short period thereafter, there were six official warring factions, all of which claimed statehood, and eighty-nine paramilitary groups supporting the armies of each one of these six warring factions.<sup>127</sup> These paramilitary groups operated subject to varying degrees of control of the respective states and putative states they supported. These groups engaged in large-scale organized crime activities, as well as carrying out a policy of "ethnic cleansing," which in some cases involved systematic rape.<sup>128</sup>

There is no doubt that these practices are CAH. But to hold individuals from such groups responsible for CAH requires considering them as agents of a state under the international law of responsibility for the conduct of agents.<sup>129</sup> It could also be argued that whenever such groups acquired characteristics similar to those of a state, such as controlling a given territory or exercising control over a given civilian population,<sup>130</sup> and whose structure, whether civilian, military, or both, is capable of developing a policy similar to that of a state, the responsibility for CAH should be extended to such groups.<sup>131</sup>

This proposition is a logical extension of the prohibition designed to protect the same human interest, a civilian population, but extending it to a new category of perpetrators who are nonstate actors. The policy question is whether to merely extend the criminal responsibility of CAH to nonstate actors by analogy to the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, or whether to go beyond it and fashion a new concept of policy for nonstate actors that parallels that of state policy for state actors. A new convention can do that, but it is not excluded that the ICC's future jurisprudence can also reach this conclusion. A policy requirement for nonstate actors to whom responsibility under CAH is extended is necessary to distinguish such nonstate actors from those who engage in organized crime and other criminal activities, whether

<sup>126</sup> In Cambodia between 1975 and 1985 educated people were presumed enemies of the regime and were either killed or sent to rehabilitation centers that conducted slave labor camps. See *supra* note 95.

<sup>127</sup> See Annex III – The Military Structure, Strategy and Tactics of the Warring Factions of the *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992).

<sup>128</sup> See Annex II – Rape and Sexual Assault: A Legal Study and Annex IV – The Policy of Ethnic Cleansing of the *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992).

<sup>129</sup> See Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 86. See also *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *Application of the Convention on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 91 (Feb. 26).

<sup>130</sup> This would apply to a group called FARC in Colombia. See generally *How many hostages? More than the government claims*, *ECONOMIST*, Apr. 23, 2009, at 44; Benjamin Ryder Howe, *Revolutionaries or Crooks?*, *FOREIGN POLICY*, No. 122 (Jan–Feb. 2001), at 98–100.

<sup>131</sup> See M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008).

domestic or transnational, for their own gains or for the advancement of their own views.<sup>132</sup> In time this category of nonstate actors could also be extended to terrorist groups.<sup>133</sup>

It should be noted that international humanitarian law protects the same civilian population in time of war that CAH protects in time of war and peace. It follows that there is an overlap during wartime. But even though international humanitarian law is the *lex specialis* in time of war, it does not exclude the applicability of CAH in the same context. Both equally apply.

#### §4.1. *The Distinguishing Element of an Attack against a Civilian Population*

The London Charter's Article 6(c) refers to "persecution," and a question arises as to whether the term is intended to create another specific crime or whether it is meant to evidence state policy. In the opinion of this writer, it is more logically intended to refer to state policy and thus to be read in addition to the term discrimination, as used below. But that does not exclude consideration of "persecution" as a separate specific crime, whose contents in this case have to be identified with some degree of specificity to satisfy the principles of legality.

Article 6(c) referred to two specific discriminatory grounds: "political" and "religious." But the IMT and CCL 10 Proceedings included the discriminatory categories of race, religion, political belief, and health conditions. Presumably, this is broad enough to encompass contemporary international definitions of discrimination that have expanded the meaning of the term to include other factors such as color, sex, and age, but that is not what the London Charter postulates. Furthermore, all these groups have not been included within the meaning of genocide,<sup>134</sup> which only includes "national, religious or ethnic" groups, or *apartheid*,<sup>135</sup> which is only racially based.

Discrimination, as required in CAH, is the exclusion, without valid legal justification, of a group of persons from the protection afforded to others, by national laws, or the subjection of that identified group of persons to laws from which others are exempted,

<sup>132</sup> Jennifer M. Smith, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 GEO. L.J. 1111 (2009).

<sup>133</sup> It should be noted that a group such as al-Qaeda fits within the meaning of nonstate actors described above under CAH at a time when it was headquartered in Afghanistan under the protection of the then Taliban regime. See generally LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* (2006); STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004). Since 2003, the core group operates in the mountainous border areas of Afghanistan and Pakistan and thus continues to fall within the meaning of nonstate actors described above.

By extension, this meaning could also be applied to their affiliates working in other territories, such as those working in Iraq and those who carry out acts of violence against civilian populations, similar to those that occurred on 9/11 in the United States, in London, and Madrid. This means that other groups labeled as terrorists may not fall subject to CAH. See National Commission on Terrorist Attacks Upon the United States (2002).

It should be noted that states have a tendency to define their opponents as "terrorists," irrespective of whether the group in question has international legitimacy in resorting to armed force. Nevertheless, such a group would be subject to international humanitarian law, and if they attack a civilian population, such acts would be deemed war crimes. See M. Cherif Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, in *VALUES & VIOLENCE: INTANGIBLE ACTS OF TERRORISM* (Wayne McCormack ed., 2008).

<sup>134</sup> See Lippman, *supra* note 10; SCHABAS, *supra* note 10; KUPER, *supra* note 99.

<sup>135</sup> *Id.* It is to be noted that the *Apartheid* Convention refers to that crime as a "crime against humanity," and also refers to the practices of *apartheid* as "inhumane acts." See *Apartheid Convention* art. 1, *supra* note 18.



with the result that harm befalls the targeted group. If this definition is accepted, then it is inconceivable that any targeted group, no matter what its affinity may be, could be excluded.

The element of discrimination evidences the collective nature of the crime and its scope should not be defined in a way that excludes certain groups because of their particularity. For the same reasons there should be no quantitative standards for the number of persons to be included in the targeted group other than that of being a civilian group. Consequently, even a limited number of persons in a targeted category, no matter how defined, should suffice. The criterion in this case should not be objective, but subjective, namely what the intent of the policy was, as opposed to how the target group is defined, other than being a civilian group. In other words, if the purpose is to protect victims, it should make no difference what objective group or category they belong to.<sup>136</sup> The intent of the policy of targeting a civilian group should be controlling. This is the approach followed by the Genocide Convention, whereby the killing of a single individual with the intent to “exterminate the group in whole or in part” suffices.<sup>137</sup>

Reference to historical antecedents is relevant to contemporary formulations and to the future jurisprudence of the ICC and other *ad hoc* and mixed model tribunals. It is also relevant to national jurisprudence seeking to identify the content of customary international law. As stated above, the term “persecution” can have two different applications: (1) “persecution” could be linked to a specific crime like “murder,” “extermination,” “enslavement,” “deportation,” and “other inhumane acts;” or (2) it could be deemed a prerequisite legal element to be read *in pari materia* with the discriminatory requirements based on political, racial, or religious grounds.

The question about these two applications of the term “persecution” stems from the positioning of the words “persecution [ . . . ] on political or religious grounds” in Article 6(c), which follows in sequence after the listing of specific crimes and “other inhumane acts committed against any civilian population,” but which is separated therefrom by a general qualifying requirement, namely “before or during the war,” and with the word “or” preceding “persecution.”<sup>138</sup> It therefore seems logical that “persecution” refers to the discriminatory requirement because it would otherwise be impossible to distinguish discriminatory state policy that constitutes a violation of domestic civil rights and those that are CAH. Such a distinction would be relevant with respect to the national legislation of United States<sup>139</sup> and Canada<sup>140</sup> by virtue of which their Japanese citizens were

<sup>136</sup> See M. Cherif Bassiouni, *The Protection of ‘Collective Victims’ in International Law*, 2 HUM. RTS. ANN. 239 (1985).

<sup>137</sup> See Lippman, *supra* note 10; SCHABAS, *supra* note 10; KUPER, *supra* note 99.

<sup>138</sup> Article 6(c) defines “crimes against humanity” as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

<sup>139</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944) (rationalizing the illegal internment of Japanese-Americans during WWII). In *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), the judgment of the 1940’s was vacated because the government in that original case had submitted false information, as well as the deliberate omission of relevant information. The Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903, formally apologized for the internment of Japanese-Americans during WWII and provided for reparations. On the question of forceful transfer of population, see *infra* ch. 6, §3.3.

<sup>140</sup> See PROCLAMATIONS AND ORDERS IN COUNCIL FOR THE INTERNMENT OF ENEMY ALIENS (1939) (interning Canadian citizens of Japanese descent during WWII). Canada had previous legislation providing for the

interned during World War II, and Nazi Germany interning its citizens who were Jews or Communists. In the first instance the violation by the United States and Canada is of the civil rights of its citizens because, *inter alia*, it was not motivated by, nor seeking to result in, “persecution” of that group of persons, even though it discriminated against an identifiable group.<sup>141</sup>

The IMT judgment and the judgments of the CCL 10 Proceedings are not clear as to when “persecution” is exclusively a prerequisite element and when it is a separate specific crime. Some cases deemed it a specific crime, akin to “other inhumane acts,” but under both of these headings there has to be a finding that other crimes have been committed. A crime labeled “persecution” cannot be defined in itself without reference to other harmful conduct. Consequently, it can be defined only by reference to another common crime whereby the “persecution” is an additional characteristic that justifies giving the crime a different character that results in an increased penalty.

During the historical evolution of CAH, “persecution” was affirmed as a specific crime in and of itself, though it should be noted that there are no similar crimes in the domestic criminal laws of most countries and the world. “Persecution” was included in Article 6(c) simply because it was an *ad hoc* basis for the then unique experiences of the victimization of civilians by the Nazi regime during World War II. More particularly, it was formulated in response to the discriminatory policies and practices of that regime in connection with the Jews, the Gypsies, the mentally ill, and other groups that were identified and targeted for victimization. When individuals within such groups were killed, these acts fell under the specifics of “extermination” and “murder.” Confiscation of property, anti-miscegenation laws, and others were thus covered by either “persecution” or by “other inhumane acts.”

To some extent, the Genocide Convention overtook the Charter’s formulation by developing a new specific crime that reflects a state’s policy of persecution, which may be carried out in ways that are similar to those described in the Charter.<sup>142</sup> The subsequent formulations described in Chapters 3 and 4 all preserve “persecution” as a specific crime, much as they preserve all other contents of Article 6(c), though adding to their more specific acts, particularly in the area of gender crimes.<sup>143</sup>

The ICTR Statute’s Article 3 is the only post-Charter formulation that adds to the civilian population specific limitations similar to that which the Genocide Convention refers to, namely national, political, ethnic, racial, and religious. In the *Kayishema* case, the Trial Chamber noted that the term “civilian population” must be given as wide an interpretation as possible.<sup>144</sup>

same practice. CANADIAN WAR ORDERS AND REGULATIONS, THE WAR MEASURES ACT R.S.C. ch. 206 (1927).

<sup>141</sup> For the definition of the term “persecution,” see *infra* ch. 6, §3.4.

<sup>142</sup> The Genocide Convention encompasses the following acts: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group, conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) and forcibly transferring children of the group to another group. Genocide Convention, *supra* note 10.

<sup>143</sup> See *infra* ch. 6, §3.4.

<sup>144</sup> Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 127 (May 21, 1999) [hereinafter *Kayishema* Trial Judgment] (holding that “civilian population” should mean “all persons except those who have the duty to maintain public order and have the legitimate means to exercise force”).



The characteristics described above assume that the acts committed against the targeted civilian group constitute a crime that the discriminatory-prosecutorial state policy makes permissible, with respect to the discriminated-persecuted category of person. Thus, the discriminatory-persecutory policy, therefore, denies the legal consequences of the revocation, alteration, waiver, or non-enforcement of the national criminal laws by making such crimes a category of international crimes. The conclusion is that the criminal nature of the acts performed overrides any national legislative measure that seeks to so justify the discriminatory-prosecutorial policy or by allowing a defense to those who carry it out.

A better approach is to consider discriminatory grounds in CAH as merely indicative of the perpetrators' targeting of a given group constituting part of a civilian population. Surely, if the protected social interest is civilian population, then it does not matter what the targeted group within it may be. This is what distinguishes CAH from genocide, which for political reasons defined the protected social group as being limited to "national, ethnical, racial or religious."<sup>145</sup> The purposeful goal was to exclude social and political groups because, at the time, they were targeted by the Stalinist communist regime. Surprisingly, not to say shockingly, the exclusion of other groups has never been remedied, even in the Rome Statute's Article 6.<sup>146</sup> As to persecution, it may be an identifiable purpose of the perpetrators, or it may be a technique or method they employ to harm a given segment of the civilian population.

It should be noted that an overlap exists between genocide, CAH, and war crimes. None of these crimes excludes the other. This overlap makes it difficult for prosecutors to choose which of these crimes they should choose to charge certain perpetrators. It also makes it difficult for courts to distinguish between these crimes for determination of guilt and for sentencing.

## §5. CAH's Historical Connection to War

At the time of the London Charter, the war-connecting element was the only connecting factor between crimes committed within the jurisdiction of a given state and an internationally regulated activity.<sup>147</sup> Thus, it provides an international element to what would otherwise be an activity wholly within the context of the national criminal jurisdiction of states and would not therefore be subject to international law because of the doctrine of state sovereignty.

When the Charter was enacted, the war-connecting element was indispensable to link CAH to pre-existing conventional and customary international law prohibiting certain conduct in time of war, which CAH extended to the civilian population of states.<sup>148</sup> Without such a connecting element the Charter would have violated the national sovereignty of states.

Article II(c) of CCL 10 removed the war-connecting element by virtue of the complete powers that the Council had at that time over Germany, which had unconditionally surrendered to the Allies, who exercised German sovereignty in that country's territory.<sup>149</sup>

<sup>145</sup> Genocide Convention art II, *supra* note 10.

<sup>146</sup> BASSIOUNI, 1 LEGISLATIVE HISTORY OF THE ICC, *supra* note 39, at 149–50.

<sup>147</sup> See *infra* ch. 3, §7.

<sup>148</sup> *Id.*

<sup>149</sup> See *infra* ch. 3, §6.

But since that provision applied to conduct preceding its promulgation, it is of questionable legality. Article 6(c) of the Charter, however, for purposes of emphasis, also contains a redundancy with reference to this war-connecting element, since it mentions the connection to war as well as the connection between the specific crimes enumerated and “connection with any crime within the jurisdiction of the Tribunal,” namely “Crimes Against Peace” in Article 6(a) and “War Crimes” in Article 6(b) – both of which are related to war.<sup>150</sup>

The national practices of states involving conduct falling within the meaning of Article 6(c) did not need, for obvious reasons, the connection to war.<sup>151</sup> Post-Charter legal developments, discussed in [Chapter 4](#), removed the war-connecting link. It started in 1950 with the ILC’s Report on the Reaffirmation of the Nuremberg Principles, which was followed by a more cautious definition of CAH of the ICTY Statute.<sup>152</sup> Article 5 does require that the acts be committed “in armed conflict, whether international or internal in character.”<sup>153</sup> The ICTR Statute removes the war connection altogether.<sup>154</sup> Article 3 of the ICTR simply states that the statute has the power to prosecute for the listed crimes “when committed as a part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds [ . . . ].”<sup>155</sup> The 1996 Draft Code of Crimes Against the Peace and Security of Mankind likewise removes the war connection.<sup>156</sup> It states in relevant part: “A crime against humanity means any of the [listed] acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group [ . . . ].”<sup>157</sup> The work of the United Nations Preparatory Committee on the Establishment of an International Criminal Court moved in that same direction. The various draft proposals did not contain a war-connecting link; most of them used the terms “widespread and systematic” or “widespread or systematic,” reflected in Article 7 of the Rome Statute.<sup>158</sup> This approach implicitly recognizes the need for a policy element.

## §6. Imputability of Individual Conduct to the Responsibility of the State

Individual conduct can be imputed to the state and state policy can be deduced from the actions of state actors. Customary rules of international law have been well established for the former, not for the latter.

The existence or absence of state policy as a factor controlling or shaping individual responsibility has also historically been viewed as a question of the imputability or attributability of an agent’s conduct to the state. For some, like Kelsen, the consequence

<sup>150</sup> *Id.*

<sup>151</sup> See *infra* ch. 3, §7.

<sup>152</sup> ICTY Statute art. 5, *supra* note 37; see also BASSIOUNI, *THE LAW OF THE ICTY*, *supra* note 37, at 491.

<sup>153</sup> *Id.*

<sup>154</sup> ICTR Statute art. 3, *supra* note 38.

<sup>155</sup> *Id.*; and see *Kayishema* Trial Judgment, *supra* note 112, wherein the Trial Chamber required policy as an element of CAH. However, the Chamber found that “either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan.” *Id.* ¶ 124.

<sup>156</sup> Report of the International Law Commission on the Work of Its Forty-Eighth Session art. 18, [1996] 2 Y.B. Int’l L. Comm’n 17, 45, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

<sup>157</sup> *Id.*

<sup>158</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II (Compilation of proposals), U.N. GAOR, fifty-first session, Supp. No. 22A (A/51/22) (1996), at 65–9; see also *Final Report of the Preparatory Committee on the Establishment of an International Criminal Court* art. 5, U.N. Doc. A/CONF.183/2 (April 14, 1998); and ICC Statute art. 5, *supra* note 39.

of such imputability is a sufficient basis for the individual's exoneration.<sup>159</sup> Such a position, which was also shared by Hersch Lauterpacht at least until 1940, necessarily meant that individuals acting for or on behalf of their state or acting pursuant to superior orders would be exonerated from any criminal responsibility.<sup>160</sup> This position has been repudiated by the London Charter with respect to war crimes and CAH, and subsequently by the Genocide Convention, as well as other international instruments and the ICC's Article 27.<sup>161</sup> An individual, up to and including a head of state, can act for and on behalf of a state and still be held accountable for conduct that violates ICL, even when that conduct is attributable to the state. Furthermore, imputing responsibility of an individual's conduct to a state is not based on the official representation, or authoritative capacity or nationality of the individual deemed to be an agent of the state.<sup>162</sup> In this regard, Bin Cheng states:

As regards the imputability of the acts of each particular officer, it will be seen that, in the last analysis, this also is a question of fact, namely whether the officer occupies a position in which he exercises the authority, or a fraction of the authority, possessed by the Government as a whole. His acts, in the exercise of that fraction of state authority, constituted a manifestation of the State's will and are imputable to the State, whatever may be his nationality, his function, his rank, or whether he has acted in error, in disobedience to instructions, or in contravention of municipal law.<sup>163</sup>

By analogy it can be concluded that nationality, rank, and function of the individual are not outcome-determinative of the question of individual criminal responsibility, even though they are relevant to the question of assessing the degree of that individual's responsibility and the appropriate punishment. Concepts that are relevant with respect to imputability of the acts of an individual to a state for purposes of determining whether state responsibility exists are separate from those of individual criminal responsibility, though they may be relevant with respect to exoneration from criminal responsibility and for purposes of mitigation of punishment. Consequently, responsibility applies irrespective of whether a person acted on behalf of a state or pursuant to superior orders.<sup>164</sup>

Individual criminal responsibility is an axiomatic principle of ICL.<sup>165</sup> It is also a basic principle of criminal responsibility in every national legal system, save for some primitive tribal legal systems that extend the conduct of one to the entire group.<sup>166</sup>

<sup>159</sup> See Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530 (1943).

<sup>160</sup> LASSA F.L. OPPENHEIM, *INTERNATIONAL LAW* (6th ed. 1940) (reflecting the then traditional position of an almost absolute defense). He subsequently changed his position in 1942 in preparation for the foreseeable prosecutions of the Axis Powers. See *infra* ch. 8, §1.

<sup>161</sup> See *infra* ch. 8 §1.

<sup>162</sup> See, e.g., BIN CHENG, *GENERAL PRINCIPLES OF LAW, AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1987); EMMERICH DE VATTTEL, *LE DROIT DES GENS* (1887); Dionisio Anzilotti, *Teoria Generale Della Responsabilita Dello Stato Nel Diritto Internazionale*, in DIONISIO ANZILOTTI, *CORSO DI DIRITTO INTERNAZIONALE* (1928); KARL STRUPP, 3 *HANDBUCH DES VÖLKERRECHTS – DAS VÖLKERRECHTLICHE DELIKT* (1920); CHARLES DE VISSCHER, *LA RESPONSABILITÉ DES ETATS* (1924); CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928); JEAN PERSONNAZ, *LA RÉPARATION DU PRÉJUDICE EN DROIT INTERNATIONAL PUBLIC* (1939).

<sup>163</sup> CHENG, *supra* note 162, at 192–93.

<sup>164</sup> See *infra* ch. 8, §1.

<sup>165</sup> See *infra* ch. 7, §1.

<sup>166</sup> See, e.g., HENRY J. MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* (15th ed. 1894).

Bin Cheng further states, “[t]his principle that everyone should only be responsible for his own acts or those of his agents may be called the *principle of individual responsibility*.”<sup>167</sup> The Permanent Court of International Arbitration succinctly referred to this principle of individual responsibility as the “juridical essence of the notion of responsibility in the very nature of law.”<sup>168</sup> Such a principle is part of those general principles that Professor Hersch Lauterpacht described as “[T]hose principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of general and fundamental character.”<sup>169</sup>

Conditions of imputability of an individual agent’s conduct to a state should not, however, be confused with the elements of individual responsibility under the general part of ICL.<sup>170</sup> The legal reasoning here is the same as with respect to the laws of agency applicable to civil responsibility and those of responsibility for the conduct of another applicable to criminal responsibility. Thus, if a person is not a national of a given state, but acted at the behest of that state, his acts may be imputed to that state under principles of state responsibility because the nationality of the actor is irrelevant. That principle was relied upon in the *Damas-Hainah* case,<sup>171</sup> decided by the mixed Franco-German Arbitral Tribunal, where the issue was whether the acts of German nationals working for the Turkish government would be imputed to Germany or Turkey. The Tribunal held “[o]ne could not object that Von Kress, as well as Dickmann, are both of German Nationality, it being clear that, in this case, they acted in their capacity as officials of the Turkish government, on behalf of this government.”<sup>172</sup>

In 1923 the PCIJ held that: “states can act only by and through their agents and representatives.”<sup>173</sup>

Principles of state responsibility can be applied by analogy to ICL, and as such they give rise to two separate but related principles: imputability of an agent’s conduct to a state and individual criminal responsibility.

Justice Robert Jackson, in his opening statement at the Nuremberg trials, stated:

While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity. The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states [ . . . ]. The Charter also recognizes a vicarious liability, which responsibility is recognized by most modern systems of law, for acts committed by others in carrying out a common plan or conspiracy to which a defendant has become a party [ . . . ]. [M]en are convicted for acts that they did not personally commit but for which they were held responsible because of membership in illegal combinations or plans or conspiracies.<sup>174</sup>

<sup>167</sup> CHENG, *supra* note 162, at 208 (emphasis added).

<sup>168</sup> Russian Indemnity Case, 1 H.C.R., 532, 541 (1912).

<sup>169</sup> 1 INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 69 (Elihu Lauterpacht ed., 1970).

<sup>170</sup> See *infra* ch. 7, §1.

<sup>171</sup> *Damas-Hainah*, 4 T.A.M. 801 (1924).

<sup>172</sup> *Id.* at 804, also cited in CHENG, *supra* note 162, at 193.

<sup>173</sup> German Settlers in Poland, 1923 P.C.I.J. No. 6, at 22. See also the decision of the ICJ, in *Reparations for Injuries Suffered in the Service of the United Nations* Advisory Opinion, 1949 I.C.J., 174, 177.

<sup>174</sup> ROBERT H. JACKSON, THE NÜRNBERG CASE 88–9 (1971).

The London Charter, however, commingled the principle of individual responsibility with that of collective responsibility and with that of attribution of group or institutional conduct to the individual.<sup>175</sup> There is no doubt that some confusion existed in the minds of the IMT judges, and later among protagonists and critics of the Charter, with respect to the question of imputability or attributability of the acts of an agent to the state for purposes of state responsibility, as distinguished from individual criminal responsibility for acts that are outside the realm of legality under international law even when committed for or on behalf of a state. The former shields the individual from civil and criminal responsibility, while the latter is outside the scope of such a legal shield, though subject to certain conditions pertaining to individual criminal responsibility.<sup>176</sup>

The historical record of prosecutions for international crimes *delicti jus gentium*<sup>177</sup> clearly shows that the responsibility of those who act in violation of international law is individual, whether based on responsibility for one's own conduct or for the conduct of another, and that such persons are deemed *hostis humani generi*.<sup>178</sup> This position, however, does not exclude the civil or even criminal responsibility of the state under customary international law or "general principles of law."

But the problems of relating state responsibility to individual criminal responsibility remain. In the ICJ's opinion in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*,<sup>179</sup> the principle of state responsibility was adjudicated on the traditional basis of an agency relationship between the actors and the mandating state. While that standard is well recognized in connection with establishing state responsibility, it is partially applicable to CAH. The purpose and policy of state policy are different from those of establishing a state-to-state basis for responsibility, and for what is essentially civil responsibility. The purpose of state policy with respect to CAH is to determine the existence of a prerequisite legal element for individual criminal responsibility; that is not the purpose of state responsibility. The requirement of state policy is to meant to prevent, deter, and suppress CAH, and that too is not the policy of state responsibility.

The agency relationship needed to establish state responsibility for the essential purposes of civil damages is also distinguishable from the legal standard required to establish whether a given conflict is of an international or non-international character. The ICTY, in its trial majority opinion in the *Tadić* case,<sup>180</sup> erred by confusing the agency relations needed for purposes of state responsibility with the elements needed to show whether a conflict is of an international character.<sup>181</sup>

<sup>175</sup> See *infra* ch. 7, §1.

<sup>176</sup> See 2 IMT 150 (1949); see also *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (1919), reprinted in 14 AM. J. INT'L L. 95, 121 (1920).

<sup>177</sup> See generally *infra* ch. 9.

<sup>178</sup> See ALFRED P. RUBIN, *THE LAW OF PIRACY* (1988); Jacob W.F. Sundberg, *The Crime of Piracy*, in BASSIOUNI, ICL, *supra* note 9, at 799; G.O.W. MUELLER & FRED A. ADLER, *OUTLAWS OF THE OCEAN* (1985).

<sup>179</sup> *Nicaragua v. U.S.*, *supra* note 96.

<sup>180</sup> See *Tadić* Trial Judgment, *supra* note 45; see also Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 311, 327–28 (2000); MICHAEL P. SCHARF, *BALKAN JUSTICE* (1997).

<sup>181</sup> Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236 (1998).

Professor Theodor Meron, who aptly commented on this confusion, stated:

In its opinion and judgment of May 7, 1997, in *Prosecutor v. Tadić*, the trial chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 faced the question whether the conflict in Bosnia-Herzegovina was an international armed conflict. If so, the grave breaches provisions of the Geneva Conventions for the Protection of Victims of War would become applicable, in addition to other provisions of international humanitarian law applying to such armed conflicts. In resolving that question, the majority of the trial chamber (Judges Vohrah and Stephen) sought guidance in the ruling of the International Court of Justice in the *Nicaragua* case. That resort was inappropriate because the *Nicaragua* case dealt with quite a different question—whether, for legal purposes, the contras either constituted an organ of the United States Government or were acting in its behalf. If so, their acts could be attributed to the United States for purposes of state responsibility. The pending appeals of the trial chamber’s decision offer the appeals chamber a unique opportunity to correct the course.”

In her impressive dissent Presiding Judge McDonald disagreed, suggesting that the majority had misapplied the *Nicaragua* test, which requires a showing of effective control only when no agency relationship has been found to impute liability to a state. She believed that the evidence proved beyond a reasonable doubt that the VRS had acted as an agent of Belgrade and that the facts supported the existence of effective control. During the relevant period, therefore, the armed conflict in the area specified in the indictments was international in character, the victims were “protected persons,” and the grave breaches provisions were applicable.

Judge McDonald appeared aware of the possible pitfalls *Nicaragua* had created for the *Tadić* case. The former applied imputability, a concept given wide currency by Article 8 of the International Law Commission’s articles on state responsibility, in the attribution of fault and liability to a state. In contrast, the *Tadić* Tribunal’s concern is the criminal responsibility of individuals: the analysis of “responsibility [in *Tadić*, stated Judge McDonald] is *solely* for the purpose of identifying the occupying power.” However, this was not an issue of (state) responsibility at all. Identifying the foreign intervenor was only the question of state responsibility. Conceptually, it cannot determine whether a conflict is international or internal. In practice, applying the *Nicaragua* test to the question produces artificial and incongruous conclusions.

The appeals chamber did not create any artificial tests for deciding whether a conflict is international and, like most scholars of international humanitarian law, probably did not even consider that the *Nicaragua* criteria of imputability for state responsibility were at all pertinent. Indeed, even a quick perusal of international law literature would establish that imputability is not a test commonly used in judging whether a foreign intervention leads to the internationalization of the conflict and the applicability of those rules of international humanitarian law that govern armed conflicts of an international character.

To justify resort to the *Nicaragua* test of attribution and at the same time acknowledge that, while that case concerned the responsibility of states, the case before it involved the wholly different issue of individual criminal responsibility, the *Tadić* Tribunal juxtaposed the discussion of attribution in the *Nicaragua* case with that case’s conclusions on humanitarian law. Early in the Judgment, the International Court of Justice found that there was no direct U.S. intervention in combat or combat support for the contras in

Nicaragua and rejected the claim that the contras were subject to United States influence to the extent that their acts were imputable to the United States. Concluding that the contras were responsible for their own acts, the ICJ stated that the United States was nonetheless responsible to Nicaragua for any unlawful acts it had committed. Next the Court reviewed the claims that the United States had violated several legal obligations vis-à-vis Nicaragua, such as the use of force and resort to unlawful intervention. The ICJ then examined the law of self-defense and, in light of the U.S. multilateral treaty reservation to the compulsory jurisdiction of the Court, the applicable customary law. Strictly in the context of the direct responsibility of the United States for its own acts and the applicable customary law, the Court held that U.S. acts against Nicaragua fell under the humanitarian law relating to international conflicts, while the relations between Nicaragua and the contras were governed by the humanitarian law applicable to conflicts of a noninternational character.

The ICJ's conclusion that the rules of international conflicts applied to United States-Nicaragua relations was obvious and could have been reached independently or even in the absence of any discussion of imputability. The nexus between attribution and the character of the conflict found in *Tadić* was thus never preset in the ICJ's discussion. To demonstrate the dangers and artificiality of the attribution test, as applied in *Tadić*, consider a conflict in a country where practically all the fighting is done by a foreign state, but where the rebels maintain their independence from the intervening power and do not satisfy the Nicaragua test. Could anyone seriously question the international character of such a conflict?

Professor Dinstein agrees that intervention by a foreign state on behalf of the insurgents turns a civil war into an interstate war. Specifically with regard to Yugoslavia, he writes:

The *Tadić* trial chamber has already accepted that, before the announced withdrawal of JNA forces from the territory of Bosnia-Herzegovina, the conflict was an international armed conflict. The facts of the situation and the rules of international humanitarian law should determine whether the JNA continued to be involved after that date and during the period pertinent to the indictments; if so, the international character of the conflict would have remained unchanged. The provisions of the Fourth Geneva Convention on termination of the application of the Convention, including Article 6, are relevant, not the legal tests of imputability and state responsibility. Finally, the appeals chamber would also be well-advised to abandon its adherence to the literal requirements of the definition of protected persons and help adapt it to the principal challenges of contemporary conflicts.<sup>182</sup>

The ICTY Appeals Chamber, perhaps recognizing this confusion, ruled the state responsibility test in *Nicaragua* inapplicable to the *Tadić* case.<sup>183</sup> The Chamber went on to find that "the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY."<sup>184</sup> It declined to adopt the reasoning of Justice MacDonald.<sup>185</sup>

The confusion between the legal standard of imputability for state responsibility and the legal standard for determining whether a conflict of an international or a conflict of a non-international character exists reveals how important it is to also distinguish between

<sup>182</sup> *Id.* (citations omitted).

<sup>183</sup> *Tadić* Appeals Judgment, *supra* note 45, at ¶ 115.

<sup>184</sup> *Id.* ¶ 162.

<sup>185</sup> *Id.* ¶ 113.



those aspects of state agency relationships required for imputability of state responsibility and which are relevant to the determination of state policy, and the realization that there are also other relevant tests to determine the existence of state policy, as discussed below.

In the ICJ case of *Bosnia v. Serbia*,<sup>186</sup> the Court held that the responsibility of states for wrongful international conduct included genocide,<sup>187</sup> even though the Genocide Convention deals exclusively with individual criminal responsibility.<sup>188</sup>

## §7. The Policy Requirement for Nonstate Actors

Until World War II, and for a short period thereafter, state agents perpetrated massive victimization of civilians as the product of state policy, and usually by utilizing one or more segments of the state apparatus, including the armed forces, police forces, paramilitary units, and other elements of the civilian bureaucracy. In some cases, civilians have been enlisted to carry out the commission of these crimes in whole or in part.

Since World War II, however, nonstate actors have increasingly engaged in the practice of mass victimization of civilians in the context of conflicts of a noninternational character and purely international conflicts.<sup>189</sup> In many cases, this victimization arises to the level of CAH. These nonstate actors include paramilitary units, armed civilian groups, and children under the age of eighteen. In the conflict in the former Yugoslavia, for instance, paramilitary groups and armed civilian groups committed most of the CAH. In the Rwanda conflict, Hutu civilians were incited to commit genocide and other CAH against Tutsi civilians. In the end, both sides to the conflict committed CAH. On numerous occasions, children under the age of eighteen committed the worst crimes.<sup>190</sup> In other criminal conflicts, like in the case of Liberia, armed civilians, including child soldiers, also committed CAH.<sup>191</sup> These conflicts revealed new facts that were not contemplated by the London Charter and were not susceptible to the application of Article 6(c).

The post-Charter developments of CAH,<sup>192</sup> particularly Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute, evolved the definition set forth in Article 6(c), but did not broaden the crime to apply to nonstate actors. The removal of the war-connecting link, however, facilitated the next step of extending CAH to nonstate actors.

But, as discussed above, the notion of CAH as a “widespread or systematic” attack directed against a civilian population, as contained in the *ad hoc* tribunals and the Rome Statute, refers not only to the manner in which the large-scale victimization occurred, but it also characterizes the means or methods by which the crime can be committed. It also reflects on the nature of CAH, as that characterization relates to a policy underlying

<sup>186</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) 2007 I.C.J. 121.

<sup>187</sup> See Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 21 and 22.

<sup>188</sup> See *Bosnia v. Serbia*, *supra* note 98 (separate opinion of Judge Owada), ¶ 73.

<sup>189</sup> Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, BASSIOUNI, THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE, *supra* note 1, at 67.

<sup>190</sup> See GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (1995).

<sup>191</sup> See *Children in Armed Conflict, Interim Report of Special Representative of the Secretary-General, Mr. Olara A. Otunnu, Submitted Pursuant to General Assembly Resolution 52/107, E/CN.4/1998/119; Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Fourth Session, E/CN.4/1998/102.*

<sup>192</sup> See *infra* ch. 4.



the large-scale victimization. It is this underlying policy that constitutes the element that distinguishes common crimes within the domestic jurisdiction of the state where the crimes in question occurred from CAH. Thus, the policy element can be deduced from conduct that is “widespread or systematic.”

Any extension of CAH to include nonstate actors would still require a policy element for similar reasons that necessitate the state policy element with respect to state actors. A policy element is necessary, for example, to avoid expanding CAH to nonstate actors engaged in organized crime or other transnational criminal activities, as well as to avoid extending the notion of CAH to include criminal conduct covered by domestic criminal legislation. Without a policy element, CAH would simply become a form of international criminalization of human rights violations exclusively on the basis of the substantiality of the harm when performed on a widespread or systematic basis.

In light of this, the ICTY Appeals Chamber judgment in the *Kunarac* case, which, for reasons discussed above, erroneously declared that the non-existence of a state policy requirement for CAH at customary international law, is all the more problematic. It is the opinion of this writer that, by eliminating this requirement, the Appeals Chamber sought to transform CAH into a crime that includes nonstate actors. Troublingly, other courts have chosen to follow this mistaken decision in prosecutions of CAH.<sup>193</sup>

Indeed, contrary to the ICTY’s view in the *Kunarac* case, which has been advanced by some advocates, Article 7(2) of the Rome Statute does not bring a new development to CAH, namely its applicability to nonstate actors.<sup>194</sup> The text clearly refers to state policy, but the words “organizational policy” do not refer to the policy of an organization of nonstate actors. Rather, “organizational policy” refers to the policy of an organization within the state. For example, if the military, police, or intelligence organs of a state formulate a separate policy that does not involve the overall policy of the state.<sup>195</sup> Although this view addresses the interpretation of Article 7 of the Rome Statute, the position under customary international law is a different one.

Without question, the intentions of those who would extend CAH to include to nonstate actors are meritorious. Although international law has primarily focused on state actors, recent experience evidences that violent social interactions derive not only from the conduct of state actors, but also from nonstate actors. The role of nonstate actors can be complex and extraordinarily flexible, and participation in violent interactive processes varies.<sup>196</sup> For instance some nonstate actors are noncombatants, but their participatory or support roles in conflicts are not covered under international humanitarian law

<sup>193</sup> See *supra* note 112.

<sup>194</sup> See, e.g., Jordan J. Paust, *The International Criminal Court Does Not Have Complete Jurisdiction over Customary Crimes Against Humanity and War Crimes*, 43 JOHN MARSHALL L. REV. (2010), at 3, available at <http://ssrn.com/abstract=1598440>; Guénaél Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in LEILA NADYA SADAT, *FORGING A CONVENTION ON CRIMES AGAINST HUMANITY* 142 *et seq.* (2010); Machteld Boot, Rodney Dixon, and Christopher K. Hall, *Article 7 – Crimes Against Humanity*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVERS’ NOTES, ARTICLE BY ARTICLE 159 (Otto Triffterer ed., 2d ed., 2008); GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 172 (2005); Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 271–83 (2002).

<sup>195</sup> See BASSIOUNI, *LEGISLATIVE HISTORY OF THE ICC*, *supra* note 39, at 151–2.

<sup>196</sup> Bassiouni, *supra* note 132.

norms.<sup>197</sup> These groups drift in and out of the combatant role and engage in criminal conduct that often falls within the legal definition of organized crime.<sup>198</sup>

At the same time, nonstate actors have conducted themselves much as do state actors in connection with abuse of power against civilian populations. This includes the commission of, or participation in, the commission of CAH-type crimes, including murder, torture, forced disappearance, and slavery. Consequently, some nonstate actors have some of the characteristics of states, such as *de facto* control of a defined territory and its population, and exercise dominion and control over some territory and population.<sup>199</sup> Additionally, nonstate actors are capable of developing an organizational policy. That they should be held accountable to the same level as state actors for CAH is self-evident; however, it is this writer's position that an organizational policy element would be required in such a case.

Such an extension of international criminal responsibility is necessary. But presently the extension of CAH to nonstate actors may be a bridge too far. As discussed above, the policy question is whether to extend criminal responsibility for CAH to nonstate actors by analogy to the Articles on the Responsibility of States for Internationally Wrongful Acts,<sup>200</sup> or whether to fashion a new concept of policy for nonstate actors that would parallel the concept of state policy for state actors. A new convention could achieve this goal, but the Rome Statute could also reach this conclusion in its future jurisprudence.

## §8. Some Philosophical Considerations

Ever since the London Charter's articulation of CAH, it has acquired a worldwide and enduring resonance in the public conscience of the world's peoples, irrespective of race, ethnicity, religion, gender, or other differences that have also been part of social consciousness. If nothing else, it evidences the almost universal acceptance of the concept of protecting humanity from certain mass atrocity crimes.

The proposition that there is one single humankind, whether created by God through Adam and Eve as believed by the Abrahamic faiths of Judaism, Christianity, and Islam, or created by a process of scientific evolution as believed by followers of these religions and others, is indeed well engrained in human consciousness. Thus, the acceptance of the existence of a single humankind is hardly at issue. At issue is what harmful acts directed against humankind can be deemed to constitute CAH.

A basic postulate that relates to human beings is that humans are social animals and that explains their need for social organization. This is what distinguishes human beings from animal organizational structures. Unlike the bees' or the ants' social structure, the individual human does not live for the rest of society, maintaining an individual characteristic that is separate from the group's. This is why in human society there are conflicts between the individual and society, between individuals, and between societies. Thus, early human groups have necessarily developed laws to protect themselves from certain individual depredations, and that included interpersonal harmful conduct and

<sup>197</sup> *Id.*; ORGANIZED CRIME: A COMPILATION OF UNITED NATIONS DOCUMENTS, 1975–1998 (M. Cherif Bassiouni & Eduardo Vetere eds., 1999); U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/55/383 (Nov. 15, 2000).

<sup>198</sup> Bassiouni, *supra* note 112.

<sup>199</sup> 1991 ILC Draft Code, *supra* note 64, at 266.

<sup>200</sup> *Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 21–22.

individual harmful conduct having an impact on the group. In time it was seen that individual harmful conduct is also an attack upon the group, either because it reflected disobedience of the group's prohibitions, or because in some way harming the individual was perceived as impacting upon the group as a whole.

The combination of legal realism with humanism is neither inconsistent nor contradictory. It is, however, a question of how accurately the law can articulate the social values and goals sought to be achieved, and how precise its terms could be formulated to provide unambiguous notice to all.

To define human society as that of a social animal necessarily implies that the social is political in nature. In other words, human society reflects the political animal that is part of the social one. It is self-evident that the narrower the social group, and the less it interacts with other such groups, the less it needs to identify, formulate, and apply norms applicable to intergroup interactions. Thus, legal history<sup>201</sup> reveals that some 4,000 years ago, for example, in the code of Hammurabi, the norms arose from the experiences of that society and applied to it. There were no intergroup norms in that code or in any other norms developed by neighboring societies, even though they had interactions and were frequently at war with one another. This applied to Mesopotamia, Assyria, Babylonia, and Persia.<sup>202</sup> The point is that societies develop norms when they need to and in order to address their needs.<sup>203</sup> Just as domestic law evolved on the basics of need and interest for the realist, and on the identification and appraisal of values for the naturalist, so did what we now call international law since the time of the Ancient Greeks in the fifth century BCE. The course of history is best characterized as a process of accretion reflecting interests and needs, but also values. There is nothing strange or surprising in having reached a point in time when the international community, acting in one way or another, expresses its needs, interests, and values in the formulation of a proscriptive norm labeled "crimes against humanity."

The recognition that the human species is organized on the basis of its characteristic as a sociopolitical animal distinguishes human beings from other natural beings. In the course of human history attacks upon the life and physical integrity of the human beings within a society by others have been deemed crimes requiring punishment of the perpetrator and redress for the victim. As human societies developed more interactions and perceived common needs and interests developed, in turn that gave rise to the identification of commonly shared values and the need to protect these needs, interests, and values. Increased awareness of these commonalities within societies engendered the need international norms applicable to a host of human interests, including the criminalization of certain human transgressions such as CAH. Because of the evolutionary process briefly described above, CAH will continue to evolve, as we have seen since its inception in 1915.<sup>204</sup>

Philosophers ask if there is something called humanity that is the object of the norm prohibiting attacks upon it as described in the various normative formulations of CAH. I join those who recognize a concept of humanity. Considering the vast number of people in the world who share these values, is it not useful to ask what humanity is and why

<sup>201</sup> PIERRE-CLÉMENT TIMBAL AND ANDRÉ CASTALDO, *HISTOIRE DES INSTITUTIONS PUBLIQUES ET DES FAITS SOCIAUX* (11th ed. 2004); JOHN H. WIGMORE, I-III *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* (1928).

<sup>202</sup> This existed between 7000 BCE and the seventh century CE, when the Muslims developed norms.

<sup>203</sup> See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1947).

<sup>204</sup> See *infra* chs. 3 and 4.

there should be CAH? Intellectual inquiry has no end, and even at the brink of absolute sophistry, these and other related questions can be asked. The pertinent questions should not be about the nature of humanity or whether it is a word intended to be synonymous with humankind, or whether there are inherent rules of humanity whose transgressions should be criminalized, or whether it is only the international community (assuming that such a community exists) that has the right, or maybe even the obligation, to formulate and enforce such norms.<sup>205</sup> Instead the questions should be about the need for the norm, its scope and contents, its enforcement, its sanctions and remedies, and, to close the circle, whether all that achieves prevention or at least a reduction of the human harm. This is why the formulations of CAH discussed in Chapters 3 and 4 are too restrictive when limited to state actors and to certain internationally protected groups.<sup>206</sup>

The philosophical debate also leads to the legal policy question of who is the victim. Certainly it is the individual who is victimized, but then the circle widens. It includes the family and loved ones, the smaller and larger communities, the nation, and ultimately all of humankind. For whom then is the prohibition made? Should anyone of these potentially harmed or aggrieved parties be excluded? What purpose would it achieve? Nevertheless, the assessment of the different interests of these circles is important in order to devise remedies. But more importantly, the identification of these circles leads to the assessment of the degree of responsibility that the international community should develop to protect these circles of victims.<sup>207</sup>

Roman law took a much more realistic approach to the philosophical considerations mentioned above. The Roman Empire included many peoples of different cultures, and saw the need to develop a *jus gentium*, which applied to all peoples under Roman control or protection.<sup>208</sup> Certain transgressions of the *jus gentium* were deemed universally condemned because they were against peoples everywhere. They were labeled *hostis humani generis*, transgressions against the human *genre*.<sup>209</sup> That concept embodied universal condemnation and having universal reach and enforcement, is much closer to what modern ICL is than to the philosophical musings on whether there is something intrinsic in the human *genre* that is identified as humaneness and whose transgression is against humankind or humanity.

*Hostis humani generis* was simply a label like contemporary international law is, whose contents included a variety of crimes deemed by the legislator, wherever that authority rested. It had international, as opposed to purely limited tribal or national application.<sup>210</sup> This did not mean that there could not be concurrent jurisdiction between international and domestic jurisdiction. Thus, judicial organs on an international and national level can exercise complementary jurisdiction as contemplated by the Rome Statute's

<sup>205</sup> HANNAH ARENDT, PROLOGUE, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 268–69. See also MARK OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR (2001); MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR (1999).

<sup>206</sup> This would extend to protect the environment, sharing of food, medicine and other resources necessary for human survival, the use of weapons of mass destruction, protection from certain forms of oppression, and cyber terrorism.

<sup>207</sup> S.C. Res. 1674, U.N. Doc. S/RES/1674 (April 28, 2006).

<sup>208</sup> M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2002).

<sup>209</sup> *Id.*

<sup>210</sup> BASSIOUNI, INTRO TO ICL, *supra* note 20, ch. 3.

Article 17.<sup>211</sup> This concept implies that international law supercedes domestic law with respect to certain international crimes.

## §9. Policy Considerations

Entities that have a juridical personality, like states and international organizations, do not have the capacity to engage in conduct – only persons do. Those who direct such

<sup>211</sup> For an analysis of the Rome Statute's provisions on complementarity, see, e.g., Jeffrey L. Bleich, *Complementarity*, 13 NOUVELLES ETUDES PÉNALES 231 (1997); John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41 (Roy S. Lee ed., 1999); Mahnouch H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT 57 (Herman von Hebel et al., eds., 1999); Katherine L. Doherty & Timothy L.H. McCormack, 'Complementarity,' as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. DAVIS J. INT'L L. POL'Y (1999); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L. J. 507 (1999); Ruth B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L.F. 61 (1999); Jennifer J. Llewellyn, *A Comment on the Complementarity Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?*, 24 DALHOUSIE L. J. 192 (2001); Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001); Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions*, 35 CORNELL INT'L L. J. 1 (2001–02); John T. Holmes, *Complementarity: National Courts Versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones eds., 2002) [hereinafter CASSESE ET AL., COMMENTARY ON THE ROME STATUTE]; John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in CASSESE ET AL., COMMENTARY ON THE ROME STATUTE, *supra*, at 693; Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86 (2003); Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Justice Between State Sovereignty and the Fight Against Impunity*, 7 M.P. Y.B. UN L. 591 (2004); William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multilevel Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2004); André Klip, *Complementarity and Concurrent Jurisdiction*, 19 NOUVELLES ETUDES PÉNALES 173 (2004); Claus Kress, "Self-Referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy, 2 J. INT'L C. JUST. 944 (2004); Enrique Camero Rojo, *The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace Without Justice" to "No Peace Without Victor's Justice"*, 18 LEIDEN J. INT'L L. 829 (2005); Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE J. INT'L L. 121 (2005); Héctor Olásolo, *The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principal of Complementarity, and the Role of the Office of the Prosecutor*, 5 INT'L C. L. REV. 121 (2005); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L C. JUST. 695 (2005); Megan A. Fairlie, *Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?*, 39 INT'L LAWYER 817 (2005); Federica Gioia, *State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT'L L. 1095 (2006); Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255 (2006); Frank Meyer, *Complementing Complementarity*, 6 INT'L C. L. REV. 549 (2006); Mohamed El Zeidy, *Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court*, 19 LEIDEN J. INT'L L. 1 (2006); Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L.F. 281 (2006); William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 18 CRIM. L.F. (2007); William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 18 CRIM. L.F. (2007); Carsten Stahn, *Complementarity: A Tale of Two Notions*, 18 CRIM. L.F. (2007); Mohamed El Zeidy, *The Gravity Threshold Under the Statute of the International Criminal Court*, 18 CRIM. L.F. (2007).

entities are individually accountable for international criminal conduct. Consequently, from a factual as well as a legal policy perspective, individual conduct needs to be deterred to prevent harmful results.<sup>212</sup> However, deterrence, as the history of criminal law teaches, depends on the existence of a punitive system capable of inducing the belief that reasonably prompt and fairly certain punishment is the likely outcome of a transgression of the law, and that the punishment outweighs the benefits of the transgression. Consequently, the less frequently the processes of criminal justice produce this outcome, the less effective the criminal law will be in deterring, and thus, preventing future potential unlawful conduct. This applies to ICL as well as to domestic criminal law.

Unlike national systems that have their own enforcement machinery, the international system does not, save for some exceptional occurrences, where they have the machinery for direct enforcement.<sup>213</sup> Even the ICC depends on the voluntary cooperation of state parties.<sup>214</sup> Thus, the ICC is as effective as the cooperation of national legal systems permit. This is the weakness of ICL and the consequences of this weakness includes the inability or difficulty that national systems have in controlling individual conduct that is the product of state policy.<sup>215</sup>

National legal systems have few effective mechanisms designed to control errant behavior by those entrusted with operating the organs of state. Democratic processes, when they function, are the best means with which to control errant political conduct by public officials who violate their public duties by commission or omission.<sup>216</sup> What follows depends on whether the national administration of justice is sufficiently independent of political control or influence to effectively enforce applicable legal norms.<sup>217</sup> The problem, therefore, is whether persons in authority who violate or abuse the law become above the law or beyond the reach of the law.<sup>218</sup>

The international legal system developed principles by which to determine state responsibility<sup>219</sup> on the basis of customary norms and standards for the imputability of individual conduct to the state. But the question arises as to whether the same approach

<sup>212</sup> This does not, however, exclude the responsibility of organizations or states *see infra* ch. 7, §1.

<sup>213</sup> The Rome Statute entered into force in 2002 after receiving the required 60 ratifications. It may take some more years before the ICC is sufficiently effective to generate deterrence and crime prevention.

<sup>214</sup> *See* ICC Statute arts. 98–111, *supra* note 39; *see also*, M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

<sup>215</sup> Throughout this chapter when reference is made to “state,” it includes in the meaning of the term state-like-entities, and in some cases nonstate actors.

<sup>216</sup> M. Cherif Bassiouni, *Toward a Universal Declaration on the Basic Principles of Democracy: From Principles to Realization*, in *DEMOCRACY: ITS PRINCIPLES AND ACHIEVEMENT* (1998).

<sup>217</sup> *See* Mark Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463 (1993).

<sup>218</sup> This was one of the subjects of the Sixth United Nations Congress on Crime Prevention and the Treatment of Offenders (Caracas, Venezuela, Aug.-Sept. 1980), U.N. Doc. E/CN.4/NGO.213. *See* Reynald Ottenhof, General Report of the International Association of Penal Law to the Sixth United Nations Congress on Crime Prevention and the Treatment of Offenders (Caracas, Venezuela, Aug. 25–Sept. 2, 1980) *Crime and the Abuse of Offenders Beyond the Reach of the Law. See also* RESOLUTIONS OF THE SIXTH CONGRESS, A/CONF.87/14/REV. (1981).

<sup>219</sup> *See* Draft Principles of State Responsibility elaborated by the ILC in the annual reports of the ILC from 1976 to 1991 and also in the *YEARBOOK OF THE ILC*; *see also* BROWNLIE, *supra* note 13. For the criminal responsibility of states, *see* Article 19 of Draft Principles of State Responsibility, and the Draft Code of Crimes Against the Peace and Security of Mankind, *supra* note 64, particularly the version contained in the Report of the ILC on the work of its forty-third session, Apr. 29–July 19, 1991, GAOR 46th Sess., Supp. No. 10 (A/46/10); *see also* FARHAD MALEKIAN, *INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES* (1985); Bassiouni, *The Discipline of International Criminal Law*, *supra* note 50.



can apply *mutatis mutandi* to “state policy” as creating criminal responsibility for individuals. The relevance of these principles, norms, and standards of imputability of individual conduct to the state and the determination that such conduct represents state policy is particularly relevant to CAH and to all other international crimes that require state policy as an element of international criminalization.<sup>220</sup> But the nature of the element of state policy must be distinguished from the standards of imputability of state responsibility and concepts of individual criminal responsibility for group participation or for responsibility for the conduct of another; these concepts are discussed in [Chapter 8](#).

State policy is an essential characteristic of CAH that distinguishes that category of crimes from others, such as piracy, slavery, and drug trafficking, as well as from crimes within the domestic jurisdiction of states. The element of state policy is the jurisdictional element that makes CAH a distinct category of international crimes. As discussed above, state policy applies to state actors and that was the case until WWII, and certainly at the time of the making of the Charter. Since then, however, nonstate actors have demonstrated their capacity for harm in conflicts of a noninternational character and in purely internal conflicts that equals that of state actors. In the 313 conflicts that occurred since WWII, nonstate actors have frequently exercised the same type of dominion and control over territory and people, as have state actors.<sup>221</sup> They have also paralleled the organizational power structure of the state, albeit in a less structured manner. Because these nonstate actors partake in the characteristics of a state or a state’s structure and exercise dominion and control over territory or people, they are the functional equivalent of state actors. Consequently, the counterpart element of state policy for nonstate actors is these groups’ organizational policy.

Mass victimization crimes can occur without state policy or its equivalent for nonstate actors, but CAH is not a catchall crime designated to encompass all types of criminal harm against the person, because domestic criminal law applies to such crimes. Mass victimization can be “widespread or systematic” without involving a state’s actions or policies, if it is the result of spontaneous or uncontrolled group conflict. That is one of the reasons that the terms “widespread or systematic” should be construed with respect to state actors as reflecting state policy, and to nonstate actors as evidencing an underlying organizational policy.

Mass victimization is accomplished by using armies, police forces, paramilitary forces, and armed civilians and almost always with the express or tacit complicity or support of the state’s bureaucratic apparatus. It can also be generated by nongovernmental groups on incitation by, or with the support of governmental authorities.

The difference between the direct role of armies, police forces, or paramilitary forces and the indirect role of the bureaucratic apparatus is not reflected however in the international and national norms on criminalization of conduct that produces or contributes to mass victimization. The reason is that traditional concepts of individual criminal

<sup>220</sup> See, e.g., *infra* ch. 9 on individual criminal responsibility and international prosecutions, which reveals that concepts of state imputability and state responsibility have not been applied in such international prosecutions.

<sup>221</sup> BASSIOUNI, 1–2 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE, *supra* note 1. See, e.g., M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROB. 9 (1996); see also Jennifer Balint, *The Place of Law in Addressing International Regime Conflicts*, 59 LAW & CONTEMP. PROB. 103 (1996); Jennifer Balint, *Conflict, Conflict Victimization, and Legal Redress, 1945–1996*, 59 LAW & CONTEMP. PROB. 231 (1996); RATNER & ABRAMS, *supra* note 56.

responsibility focus on the specific conduct of individual perpetrators and requires either specific or general criminal intent to be proven.<sup>222</sup> Group criminal responsibility with respect to mass victimization crimes is however seldom addressed in traditional concepts of criminal responsibility.<sup>223</sup>

Also seldom addressed is the concept of complicity by civilian bureaucrats whose support is so frequently necessary to produce mass victimization,<sup>224</sup> and whose actions may have the appearance of formal legality. Factually, the compartmentalization of the bureaucratic apparatus shields these bureaucrats from criminal responsibility and makes it easier for its leaders to generate the resources and personnel needed to produce such mass victimization without visibly committing or participating in the commission of any crime. The compartmentalization of the bureaucratic apparatus also permits its personnel to claim ignorance of the overall plan or of its consequences or to avoid or evade such knowledge, giving rise to what is referred to in American political parlance as “plausible deniability.”<sup>225</sup>

The problem in ascertaining the responsibility of individual members of the bureaucratic apparatus is difficult and complex under existing legal standards of criminal responsibility in most of the world’s criminal justice systems.<sup>226</sup> Furthermore, most criminal justice systems require proof of specific intent to commit the most serious crimes and that makes prosecutions even more difficult.<sup>227</sup>

The characteristic of this state policy for state actors and policy for nonstate actors raises the following questions:

### **State Actors**

- (1) When does the conduct of state officials constitute state policy, as distinguished from an agency relationship for purposes of state responsibility under existing principles of state responsibility in customary international law?
- (2) When does the responsibility of a state carry implications with respect to individual criminal responsibility for its agents whose otherwise formal legal actions under existing national law carry out the state’s policy of mass victimization?
- (3) What standard of criminal responsibility should apply to policymakers and senior executors of a state’s policy and whether the same or other legal standards should apply to those in the bureaucratic apparatus whose support was necessary to carry out the mass victimization?
- (4) Should there be a new standard of individual criminal responsibility based on complicity for personnel in the bureaucratic apparatus whose otherwise formal

<sup>222</sup> See *infra* ch. 2 and also ch. 7, §3.

<sup>223</sup> See *infra* ch. 2 and also ch. 7, §1.2.

<sup>224</sup> See *infra* ch. 2 and also ch.7, §5.2.

<sup>225</sup> See generally *infra* ch. 2.

<sup>226</sup> See *infra* ch. 7, §5.

<sup>227</sup> Some systems, however, allow proof of general intent, and that standard reduces the difficulty in prosecutions. But even so, bureaucratic personnel can be shielded by policy planners and decision-makers who reinforce the compartmentalization of bureaucratic actions, and parcel out information in bits and pieces that either prevent knowledge of the plans for mass victimization or their outcomes, or which allow bureaucratic personnel to avoid having such knowledge or avoid arriving at such knowledge through reasonable deduction. While these questions relate more directly to the elements of criminal responsibility discussed *infra* ch. 7, they nonetheless are relevant to the determination of whether mass victimization is the product of spontaneous group conflict, or the product of state policy for state actors and policy for nonstate actors.



legal conduct nevertheless contributed to mass victimization? And, what standards of proof are needed?

- (5) To what extent can personnel in the bureaucratic apparatus whose support contributed to the mass victimization claim deniability by shielding themselves from criminal responsibility behind the partitions of compartmentalized bureaucracy? And what standards of proof are needed to break through these bureaucratic separations?
- (6) When and at what point is failure to prevent, to intervene, to control, or to punish perpetrators evidence of state policy?
- (7) How systematic or widespread must the victimization be? And on what scale?
- (8) Should there be a new basis of individual criminal responsibility based only on membership in a given group whose aims are criminal?
- (9) Should the doctrine of “joint criminal enterprise” developed by the jurisprudence of the ICTY and discussed in [Chapter 7](#) be recognized as established in customary international law?
- (10) Should the concept of state criminal responsibility be revisited?
- (11) Should economic and other social sanctions be developed for individuals, collectivities, and states?
- (12) How to provide for accountability of those who are above or beyond the reach of the law to reduce impunity.

### ***Nonstate Actors***

- (1) What characteristics must a group of nonstate actors have to be analogized to state actors?
- (2) What constitutes organizational policy for nonstate actors as the equivalent to state policy for state actors?
- (3) Can the manifestations of “widespread or systematic” violations be sufficient to establish an objective basis from which to determine the existence of a policy?
- (4) How is spontaneous or unplanned victimization distinguishable from a policy of victimization?
- (5) How is command responsibility for nonstate actor’s groups established?
- (6) What are the criminal responsibility implications of belonging to a group of nonstate actors that commits CAH?
- (7) How can ICL and IHL develop a credible system of deterrence for nonstate actors?
- (8) What new approaches should be developed for sanctions and for their enforcement for individuals and groups?

### ***General***

- (1) How can the policy of criminalization in international and national criminal justice systems be enhanced to achieve better results with respect to the goals of prevention, deterrence, and suppression of CAH, particularly as it relates to the conduct of decision-makers, senior executors, and those in the bureaucratic apparatus that facilitate the execution of the mass victimization policies?
- (2) How can that policy be reflected in evidentiary standards, particularly as to the legal implications of a duty to refuse to carry out administrative acts that contribute to mass victimization?
- (3) How to reduce the impunity gap and enhance accountability.

ICL is still in its early stages. In time, it may develop and address some or all of these issues. But that is not a certainty. Globalization may strengthen ICL and international criminal justice, but it could also move in the opposite directions if state interests prevail over the interests of justice.

The future of enhanced prosecution of atrocity crimes is not a given.<sup>228</sup> By 2012, the ICTY, ICTR, and mixed model tribunals will come to an end; only the ICC will remain. Whether it will have the capacity to adhere the needs of international criminal justice with respect to atrocity crimes remains to be seen. The political will of states will largely determine that outcome, and that political will also depends on how vigorously international civil society will be able to exert pressure on governments, particularly those of the permanent members of the Security Council.

More importantly, the future of CAH will depend on whether a specialized convention will be adopted as called for by this writer.<sup>229</sup> The Whitney R. Harris World Law Institute of Washington University in St. Louis Law School, under the leadership of Professor Leila Sadat, answered the call for this appeal. The initiative of a new convention on CAH is well under way.<sup>230</sup> The work has been led by Professor Sadat, who deserves credit, as do Dean Kent D. Syverud and the members of the project's steering committee, a group of outstanding scholars and experts, namely Hans Corell, Richard Goldstone, Juan E. Méndez, Professor Leila Sadat, William A. Schabas, Dr. Christine Van Den Wyngaert, and this writer. The extensive work done so far was coordinated by the Harris Center's Executive Director Don Taylor, who has done yeoman's work on this project. It was my privilege to have been the principal drafter of this proposed convention, which was unveiled at the Brookings Institution on March 10, 2010.<sup>231</sup>

<sup>228</sup> M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269 (2010).

<sup>229</sup> Bassiouni, *supra* note 53.

<sup>230</sup> A draft text of the convention can be found at the program's [website, available at](http://law.wustl.edu/crimesagainsthumanity/documents/CAHInitiative031210.pdf) <http://law.wustl.edu/crimesagainsthumanity/documents/CAHInitiative031210.pdf> (last visited Dec. 13, 2010).

<sup>231</sup> See LEILA NADYA SADAT, *FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY* (2010).

## 2 Phenomenological Considerations

Power is never the property of an individual, it belongs to a group and remains in existence only so long as the group stays together.

– HANNAH ARENDT, *ON VIOLENCE* 44 (1970)

### Introduction

Throughout history, abuses of power by tyrannical rulers and ruling-regime elites, which were carried out under their direction mostly by state actors, have occasioned significant human, social, and material harm to their respective national societies as well as to other societies (in the contexts of wars and colonization). Since the end of World War II, forms of collective violent social interactions between ethnic, religious, and political groups have increased significantly, but only limited reliable data have been gathered to document this phenomenon.<sup>1</sup>

Political, social, and behavioral sciences have developed techniques and methodologies for determining the various causes of these violent manifestations, as well as some measurements to assess their outcomes.<sup>2</sup> They are not sufficiently developed to influence policy-making in connection with the prevention or limitation of violent actions, whether at the domestic or interstate levels. Whether or not the absence of policies at the levels of intergovernmental organizations and national governments to prevent and control violent conflicts is the reason for international law's failure to account for the findings and insights of other disciplines is speculative.<sup>3</sup> More likely, international law, as

<sup>1</sup> See, e.g., M. CHERIF BASSIOUNI, *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* (2 vols., M. Cherif Bassiouni ed., 2010), a two-year long research project (directed by this writer) conducted by the International Institute of Higher Studies in Criminal Sciences with European Union funds. They reveal that between 1948 and 2008, 313 conflicts took place, which produced 92–101 million persons killed. Prosecutions occurred for no more than one percent of the perpetrators. The twentieth century has resulted in an estimated range of victims of mass killings (including genocides) between 60 and 150 million, as distinguished from war casualties not including war crimes. BENJAMIN VALENTINO, *FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY* 1, 255 (2004).

<sup>2</sup> See e.g., Valentino, *supra* note 1; Jacques Semelin, *Purify and Destroy: The Political Uses of Massacre and Genocide* (2007); James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (2002).

<sup>3</sup> “From Dachau to Darfur, it is often surprisingly hard to say precisely who is really responsible for what horrors, for which share of a long and tangled episode of mass atrocity. Historians and social scientists generally pride themselves on explaining such a large event entirely in collective terms, irreducible to the acts or intentions of any participant. These scholars are content to speak of Serbs and Bosnians, armies

the product of state decision-making, has simply ignored social and behavioral sciences to be less encumbered by scientific findings that may impede state action based on state interests.

Notwithstanding its progress in the last few decades, ICL<sup>4</sup> continues to lag behind the needs of the international community to enhance its goals of peace, security, justice, and the protection of human rights. This is due to ICL's unavoidable linkage to states' strategic, economic, and political interests, which has historically hampered its development.<sup>5</sup>

Although international law has primarily focused on state actors, experience evidences that violent social interactions not only derive from state actors, but also from nonstate actors. Forms of collective group violence by nonstate actors are varied. In these cases the conduct of nonstate actors has many of the characteristics of crimes of state, as described in this chapter. The phenomenological characteristics of violent systemic conduct carried out by state actors are similar to that of violent interaction carried out by nonstate actors. Among these characteristics are significant human and material harm and the failure of social and legal mechanisms to prevent and control occurrences that bring about these outcomes. Thus, a parallel paradigm exists for violent systemic conduct carried out by state actors and violent interaction carried out by nonstate actors, even though the means and outcomes may differ among these categories of perpetrators.

That said, the complexities of addressing the two phenomena are significant, because, their common characteristics notwithstanding, they also have differences. A principal reason is that nonstate actors' groups drift in and out of the combatant role and engage in criminal conduct that falls within the legal meaning of organized crime<sup>6</sup> or terrorism.<sup>7</sup> Moreover, these groups' participatory or support roles in conflicts of a noninternational character and in purely internal conflicts are not covered under international humanitarian law norms.<sup>8</sup>

In the context of noninternational, purely internal conflict, nonstate actors have conducted themselves much as do state actors in connection with abuse of power against civilian populations. This includes commission of, or participation in the commission of genocide, CAH, war crimes, torture, piracy, and slavery and slave-related practices. Thus nonstate actors who have some of the characteristics of states, such as control of a defined territory and its population, exercise dominion and control over some territory and population, and are capable of developing an organizational policy should be held accountable to the same level as states and state actors.

and terrorist networks, of the political dynamics and social forces at play." MARK OSIEL, *MAKING SENSE OF MASS ATROCITY* 1 (2009).

<sup>4</sup> For a more detailed discussion of ICL, see 1 *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>5</sup> M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269 (2010); M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. U. L. REV. 541 (2006); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000).

<sup>6</sup> This includes organized crime activities. See *ORGANIZED CRIME: A COMPILATION OF UNITED NATIONS DOCUMENTS, 1975-1998* (M. Cherif Bassiouni and Eduardo Vetere eds., 1999); U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/55/383 (Nov. 15, 2000).

<sup>7</sup> M. Cherif Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, in *VALUES & VIOLENCE: INTANGIBLE ACTS OF TERRORISM* (Wayne McCormack ed. 2008).

<sup>8</sup> M. CHERIF BASSIOUNI, *A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS* (2000) [hereinafter BASSIOUNI, *MANUAL*]; see also E. VAN SLIEDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* (2003).

The causes of collective violence, resulting in high levels of human victimization and other harmful outcomes, as well as their processes and methods, should inform ICL and domestic criminal law. Experience shows, however, that these separate bodies of law have only marginally benefitted from the useful observations of social and behavioral scientists. ICL theory and policy has only slightly developed its methods and legal techniques beyond its domestic counterpart, particularly Western approaches to individual criminal responsibility.<sup>9</sup> The rejection of new models of group criminal responsibility by ICL and the extension of financial sanctions to collectivities are only two examples. ICL's reluctance to expand the traditional concept of participatory or vicarious criminal responsibility is another example of how ICL remains anchored to historic Western conceptions of individual criminality.<sup>10</sup>

The fact is that manifestations of collective violence, whether initiated from the top down or from the bottom up, have certain phenomenological characteristics that are relevant to nonlegal prevention and social control policies and methods. These manifestations are also relevant to the type of criminal justice policy and its methods that need to be developed to achieve the greatest possible level of preventive deterrence and eventual resocialization and reconciliation between warring and opposing groups, as well as between victims and perpetrators. Understanding how things happen is indispensable to understanding how to deal with them. The phenomenology of collective violence, which is only briefly described in this chapter, is essential to the legal policy of formulating CAH, defining its subjects, contents, and legal elements. This in turn has a bearing on identifying modes of criminal responsibility, and addressing the practical issues of how to prosecute, what evidence is required, how to convict perpetrators for purposes of criminal responsibility, and what remedies should be available to victims.<sup>11</sup>

## §1. Etiology and Phenomenological Characteristics

The etiology of crimes of state and similar crimes committed by nonstate actors needs to be addressed from a perspective other than direct physical human harm.<sup>12</sup> This is

<sup>9</sup> See, e.g., Frédéric Mégret, *The Politics of International Criminal Justice*, 13 EUR. J. INT'L L. 1261, 1282 (2002) (acknowledging the unlikelihood of deterring criminal elites who monopolize state power); see also Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 5.

<sup>10</sup> See OSIEL, MAKING SENSE OF MASS ATROCITY, *supra* note 3. The views of Osiel are remarkably similar to this writer's views, though these respective views have not been shared in advance of their publications.

<sup>11</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. GAOR, 96th plen. mtg., U.N. Doc. A/RES/40/34 (Nov. 29, 1985); see also M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 Hum. Rts. L. Rev. 203 (2006).

<sup>12</sup> For instance, this limited scope fails to account for attacks upon other protected interests that may have detrimental effects or consequences on the life, health, and well-being of persons. Such is the case with environmental and cyber crimes. While there are a number of relevant international conventions for environmental protection, they seldom include criminal sanctions even though certain environmental violations, i.e., the dumping of nuclear and hazardous waste, can seriously impact the life and health of persons. Stephen C. McCaffrey, *Criminalization of Environmental Protection*, 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 1013 (M. Cherif Bassiouni ed., 3d. ed., 2008). Likewise, cyber crime and cyber terrorism may also constitute serious threats to the life and health of persons, i.e., the shutdown of hospitals and healthcare facilities. Therefore, these and other acts that are not directly aimed at human beings, but that ultimately impact them, should be included in an expanded *ratione materiae* of a more progressive definition of CAH. The list of human protections could also extend to the persecution of persons with disabilities and persecution based on sexual orientation. See also COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE: AN INTERDISCIPLINARY APPROACH (Alette Smeulders ed., 2010).

necessary to distinguish among the range of abuses of power and those that impact other internationally protected rights, such as social, economic, and cultural rights. Admittedly, it is difficult to sort out these abuses by categories on the basis of their legal characterization, particularly when these legal characterizations fail to take impact into account. For example, how does international human rights law categorize and address the plundering of a state's public treasury by a dictator or members of a ruling regime and other forms of large-scale corruption by public officials? A whole range of domestic and international activities by abusive state actors, particularly heads of state, ruling regimes, and oligarchies, fall outside the control of international human rights law. Presumably, because these types of unlawful conduct fall under domestic law, international human rights law does not address them. As a result, these activities are left exclusively subject to the control of those who have the power to engage in them, and it gives them the opportunity, through abuse of power, to place themselves above or beyond the reach of domestic law. Moreover, when the determination of what is and is not legitimate is left in the hands of those who wield unbridled power, the result is invariably manipulated to the benefit of those who have the power.

There is also an array of issues that affect the interests of the international community, but are not internationally protected or only subject to soft law, thus leaving those who wield power with a wide margin of discretion with respect to the lawfulness of their actions. This applies, for example, to most aspects of international protection of the environment<sup>13</sup> and to the manufacturing and trafficking of weapons, in particular weapons of mass destruction. Conduct by states in connection with these activities, notwithstanding their harmful human consequences, remains subject to the discretion of states, even though a variety of treaties prohibiting the use of certain weapons exist.<sup>14</sup> The doctrinal basis for such a prohibition is that these weapons produce "indiscriminate harm to civilian population," and that they produce "unnecessary pain and suffering" to combatants.<sup>15</sup> The record of states in the use of such weapons throughout the history

<sup>13</sup> McCaffrey, *supra* note 12; Ranee K. L. Panjabi, *Idealism and Self-Interest in International Environmental Law: The Rio Dilemma*, 23 CAL. W. INT'L L.J. 177, 191 (1992).

<sup>14</sup> Matthew Meselson and Julian Robinson, *Weapons of Mass Destruction and the Proliferation Dilemma: A Draft Convention to Prohibit Biological and Chemical Weapons under International Criminal Law*, 28 FLETCHER F. WORLD AFF. 57 (2004).

<sup>15</sup> See BASSIOUNI, *MANUAL*, *supra* note 8; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137; Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (BWC), Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 1974 UNTS 45; *see also* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 75 U.N.T.S. 31, 6 U.S.T. 3114; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85, 6 U.S.T. 3217; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135, 6 U.S.T. 3316; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention for the Peaceful Adjustment of International Disputes (First Hague, I), The Hague, July 29, 1899, 26 Martens (2d) 920, 32 Stat. 1779, T.S. No. 392, *reprinted in* 1 AM. J. INT'L L. 107 (1907); Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of Aug. 22, 1864 (First Hague, III), signed at The Hague, July 29, 1899, 26 Martens (2d) 979, 32 Stat. 1827, T.S. No. 396, *reprinted in* 1 AM. J. INT'L L. 159 (1907); Declaration Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature

of armed conflicts reveals how little effect these international norms have had on states' usage of such weapons. Exceptionalism rests in the power of state unilateralism.<sup>16</sup>

Another contemporary activity controlled by states that is largely outside international regulation is the use of private contractors who engage in violent activities that are likened to mercenarism.<sup>17</sup> However, neither the law of armed conflicts nor other international laws regulate such groups and their violent activities. The members of such private organizations are subject to the law of the place in which their conduct occurs or under their national laws, provided that they can apply extraterritorial jurisdiction.<sup>18</sup> In the cases mentioned, there are no existing international controls, and, where there is some regulation, it is weak and ineffective. In addition, there is virtually no enforcement.<sup>19</sup>

All of the above points to the need for the expression of traditional etiology of what is referred to as crimes of state,<sup>20</sup> as well as "atrocities crimes,"<sup>21</sup> when committed by state actors and their agents, namely the top-down form of collective violence;<sup>22</sup> and also the different etiology of the bottom-up form of intergroup collective violence, and the range of hybrid manifestations of collective violence that exist between these two archetypical models.

Crimes of state have, in some form or another, existed throughout human history and have essentially manifested themselves when the state's organizational structure is under the control of a tyrannical ruler or a ruling elite engaging in abuses of power. Robespierre, Stalin, Hitler, and Pol Pot are among the most salient historic cases where a ruler was able to exercise complete control over the apparatus of state and, consequently, on all of society, thereby generating extraordinarily high numbers of victims with no viable internal opposition capable of preventing or mitigating the harmful outcomes.

(First Hague, IV, 1), signed at The Hague, July 29, 1899, 26 Martens (2d) 994, 32 Stat. 1839, T.S. No. 393, *reprinted in* 1 AM. J. INT'L L. 153 (1907); Declaration Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases (First Hague, IV, 2), signed at The Hague, July 29, 1899, 26 Martens (2d) 998, 187 Parry's 453, *reprinted in* 1 AM. J. INT'L L. 157 (1907); Declaration Concerning the Prohibition of the Use of Expanding Bullets (First Hague, IV, 3), signed at The Hague, July 29, 1899, 26 Martens (2d) 1002, 187 Parry's 459, *reprinted in* 1 AM. J. INT'L L. 155 (1907) (Supp.).

<sup>16</sup> Widespread aerial bombing of the city of Dresden, Germany in 1945 resulted in 35,000 civilian deaths. The bombings of Hiroshima and Nagasaki, Japan in August 1945, resulted in an estimated toll of 200,000 civilian deaths, but these crimes remained unpunished because the power to punish rested with the victorious.

<sup>17</sup> PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS (Simon Chesterman & Angelina Fisher eds., 2009); Ryan M. Scoville, Note, *Toward an Accountability-Based Definition of "Mercenary"*, 37 GEO. J. INT'L L. 541 (2006); Jordan J. Paust, *Recruitment, Use, Financing and Training of Mercenaries*, 11 NOUVELLES ÉTUDES PÉNALES 271 (M. Cherif Bassiouni ed., 1993).

<sup>18</sup> See Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. ch. 212 (2006); *see also*, M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711 (2008).

<sup>19</sup> Ian W. Baldwin, *Notes Comrades in Arms: Using the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to Prosecute Civilian-Contractor Misconduct*, 94 IOWA L. REV. 287 (2008) (discussing the failed attempts to prosecute civilian contractors in Iraq).

<sup>20</sup> PIETER N. DROST, *THE CRIME OF STATE* 125 (1959) (defining genocide); *see also* SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002); William A. Schabas, *Genocide in International Law* (2000); *COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 12.

<sup>21</sup> For additional discussions of atrocity crimes, *see* Osiel, *supra* note 3; MARK DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* (2007); and David Scheffer, *Genocide and Atrocity Crimes*, in *GENOCIDE STUDIES AND PREVENTION* 229–50 (2006).

<sup>22</sup> As George Fletcher writes, "those who generate a climate of moral degeneracy bear some of the guilt for the criminal actions that are thereby endorsed." George Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1541–42 (2002).



Victimization at the hands of ruling-elite regimes has also produced significant, though quantitatively less harmful, outcomes.<sup>23</sup>

Tyrannical ruler-initiated violence, as distinct from that of ruling elites, is more susceptible to generating greater levels of violence due to the ruler's ability to exclusively marshal the resources of a state's apparatus than in the case of ruling elites, though that is not an absolute rule.

Most tyrannical rulers are charismatic leaders who have a significant impact on their respective populations,<sup>24</sup> which ruling elites are not likely to have. The ruler's ability to use propaganda and their control of means of mass communications enhance their ability to affect collective behavior. They have the ability to create facts, impressions and perceptions, which they can convert into violent action.<sup>25</sup> They use rhetoric to redefine what is allowed and what is condemned according to their own desires and uses. However, it is erroneous to think that there is a prototype for this form of collective violence.

Many still look at Nazi Germany's bureaucratic model as the model, thus conditioning the legal policy and its methods on the modes of criminal responsibility (i.e., individual, superior, vicarious, participatory, and collective), but there is no such thing as a single model. Every occurrence is *sui generis*, even if there are close similarities between these occurrences.

There are rare instances of highly integrated, vertically controlled systems like those of Hitler's Germany and Stalin's USSR. Some of these systems' characteristics existed in Mao's China, Pol Pot's Cambodia, Saddam's Iraq, and others, but each of these situations had different characteristics, if nothing else, contextual ones including cultural particularities. Milosevic's Serbia and his command over Bosnian Serbs and Kosovar Serbs is one example of this diversity; another is Charles Taylor's operation in Liberia and Sierra Leone. However, they all share some phenomenological characteristics.

The same is true for bottom-up group violence. The violent group dynamics that erupt in conflict are different from what is described above, and thus they have their own phenomenological characteristics, contrary to the top-down model. These bottom-up models are often beyond the state's ability to control. Violent group dynamics are

<sup>23</sup> This does not mean that ruling elites operate without a leader, but in these situations, the leader represents a group and is not the sole decision-maker to be obeyed without question, as in the case of tyrannical rulers. Such situations have existed in the past forty years in, for example, Argentina, Rwanda, Guatemala, Indonesia, Pakistan (during Bangladesh's war of independence), and Nigeria (in its oppression of the Ibo). In comparison to the examples of ruler-initiated violence mentioned above, the levels of violence in this category are lesser than in the former, but they are nonetheless significant. In the last situations, Pakistan and Nigeria have respectively caused over 1 million casualties, and in both of these situations no post-conflict justice was applied. No sooner had these crimes of state been completed than they were forgotten, both domestically and internationally. Had it not been for the sense of guilt or shame on the part of the United States and France, and others, the Rwandan genocide would have also been forgotten then and there.

<sup>24</sup> The charismatic leader engenders admiration and support, no matter how perverse that person may be, while ruling elites tend to engender suspicion and mistrust, at some point or another during their assumption or control of power. This is not to imply that there is no connection between tyrannical rulers and ruling elites. In fact, no such ruler ever existed since the twentieth century, who did not have a supporting ruling-elite. The difference between tyrannical rulers and ruling regimes is not that one necessarily exists without the other or to the exclusion of the other, but that single authoritarian rulers are likely to bring about higher levels of violence than ruling elites, domestically and internationally. See Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013 (2005).

<sup>25</sup> Jens Meierhenrich, *Analogies at War*, 11 J. CONFLICT & SEC. L. 1, 5 (2006).



almost always occasioned by interethnic, intertribal, and interreligious groups. They can be initiated by tyrannical rulers and ruling elites, but they are essentially the product of group dynamics.<sup>26</sup> In their modern manifestations, this form of collective violence has evidenced increased harmful consequences, while at the same time it has also revealed that, in the absence of forceful internal or external controls, very little else is useful in preventing, curtailing, or stopping this collective violent dynamics. Mechanisms for reconciliation necessarily come after mass atrocities have already been committed and do not play a part in preventing the acts themselves.<sup>27</sup>

The differences that exist between the two typologies of collective violence mentioned here, namely that which is initiated by tyrannical rulers and ruling elites and that which is the product of violent group dynamics, the top-down and bottom-up models, are relevant to the choice of legal policies and methods needed to address these phenomena.

The following are some of these differences:

1. Tyrannical ruler-initiated violence and ruling elites-initiated violence originate from the top and involve a state's organizational structure,<sup>28</sup> whereas violent group dynamics originate from the bottom and do not involve a state's structure;
2. State organizational structure violent practices tend to be systematic, and their tactics direct violence in a discriminate manner,<sup>29</sup> whereas violent group dynamics tend to be indiscriminate;
3. Both are widespread, though in the case of violent group dynamics, there may be a more limited geographic focus;
4. External or internal state intervention to halt violence is more likely to produce effective results in violent group dynamics;
5. State organizational structure violence can essentially be halted only by external intervention;
6. State-sponsored violence usually produces more human harm than violent group dynamics;
7. State-sponsored violence constitutes a betrayal of trust by the state actors who are violating the rights of those who have entrusted them with their protection. The abuse of power by state actors renders a civilian group even more helpless, because its attackers are those who were entrusted with their protection;
8. Both forms of violence have the potential for collateral consequences, such as generating new cycles of domestic and regional violence, disrupting world peace and

<sup>26</sup> MAHMOUD MAMDANI, *WHEN VICTIMS BECOME KILLERS* (2001).

<sup>27</sup> Miriam J. Aukerman, *Extraordinary Evil. Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. 39, 92 (2002)

<sup>28</sup> Mass atrocities of the state tend to be "the product of collective, systematic, bureaucratic activity, made possible only by the collaboration of massive and complex organizations in the execution of criminal policies initiated at the highest levels of government. How, then, is individual responsibility to be located, limited, and defined within the vast bureaucratic apparatuses that make possible the pulling of a trigger or the dropping of a gas canister in some far-flung place?" David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS 53 (Carla Hesse and Robert Post, eds., 1999).

<sup>29</sup> "The entrepreneurs of genocide are like the organizers of Adam Smith's pin factory who have discovered the division of labor. Ideologues conjure up a monstrous conspiracy. Ambitious administrators define target categories and compete for jurisdiction; different officials pass sentences or create administrative authorities; others arrest, some load onto trains, others unload, some guard, others herd people to the killing ground or into the gas chambers; still others shake cyanide crystals into the vents." CHARLES MAIER, *THE UNMASTERABLE PAST* 69–70 (1988).

security, and compelling high economic costs of peacekeeping and reconstruction costs;

9. Both engender criminogenic factors that characterize them in ways that should be relevant to understanding their phenomenology; and
10. Both have predictability factors that are consistently ignored or underestimated at the domestic and international levels.

These observations are both elementary and self-evident. Scientific research is needed to make more data and options available to policy-makers. More importantly, government elites in the world and in international civil society should become more aware of the phenomenology of these forms of collective violent interactions to make it possible for action to be taken to prevent and control these processes, as well as to deter and punish their perpetrators. ICL does not reflect these considerations.<sup>30</sup>

Human experience indicates that social and legal control mechanisms, including external use of force, reduce the number of victims and the levels of harm. That this has only sporadically taken place is due to *Realpolitik*.<sup>31</sup>

### §1.1. *The Protagonists*

With respect to the top-down model, accounts of mass atrocities since 1915, to pick a starting date for the modern and postmodern periods,<sup>32</sup> reveal that “atrocities crimes”<sup>33</sup> committed with the involvement of state organizations or as a result of violent group dynamics, invariably involve the participation of a large number of protagonists. Some are directly or indirectly active, whereas others are passive participants or mere observers of these violent processes. Carrying out mass atrocities is more like an industrial mass production model, except that in the situation of mass atrocities, it is mass infliction of human harm ranging from physical extermination and injury to persons, to violations of human, social, economic, political, and cultural rights. Experience reveals that the larger the scale of the harm, the more persons it requires to be actively, let alone passively, involved in carrying out the harmful conduct.

The numbers of active protagonists vary from one situation to another: Stalin’s and Hitler’s bureaucracies included millions within the army, police, security services, civil service, and party personnel, as well as those in support functions, such as industry. This does not include external support from other segments of society. At a minimum, the respective numbers of protagonists in the atrocities committed during these regimes had to exceed the million directly active participants in each of these regimes. In addition, there had to be millions in the state apparatus who facilitated the process of committing mass atrocities through the running of prisons, the transportation systems, disposal of the dead, industrial production, the justice and foreign sectors, and so on. Moreover, since these mass atrocities did not occur in a social vacuum, there had to be millions within

<sup>30</sup> M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* (M. Cherif Bassiouni ed., 1997).

<sup>31</sup> Bassiouni, *The Perennial Conflict*, *supra* note 5; Bassiouni, *Combating Impunity*, *supra* note 5.

<sup>32</sup> JAMES BRYCE AND ARNOLD TOYNBEE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE* (2000); VAHAKN N. DADRAN, *GERMAN RESPONSIBILITY IN THE ARMENIAN GENOCIDE: A REVIEW OF THE HISTORICAL EVIDENCE OF GERMAN COMPLICITY* (1996); Vahakn Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 *YALE J. INT’L L.* 221 (1989); *see also infra* ch. 3 n. 10.

<sup>33</sup> Osiel, *supra* note 3; Drumbl, *supra* note 23; Scheffer, *supra* note 23.

society whose conduct ranged from the supportive to the indifferent, thereby contributing in some way to the overall outcomes.

In addition to the large number of domestic participants, supporters, and passive bystanders, there are also external participants who contribute to these outcomes. They include other states and their respective societies, whose roles also range from the supportive to the indifferent, and other nonstate actors operating outside the territorial arena of the conflict who have a bearing on the conflict. In the supportive category are those states who provide weapons and needed commodities, make credits available, and provide political support. Indeed, what better way for a tyrannical ruler or regime than to have international support in the Security Council? This was evidenced during the Cold War when the USSR and the United States used surrogate states to fight their geopolitical war. When the surrogates committed genocide, CAH, and war crimes, they were shielded from accountability by their principals.<sup>34</sup>

With respect to the bottom-up model, there is no archetypical example because there is frequently a hierarchical or statelike system of organizational control that exercises some type of control or influence over the group. Two examples are Cambodia and Rwanda, where the impetus for the group violent interactions may have come from a hierarchical state source or state-like source.<sup>35</sup> The violence that ensued had a life of its own that was largely dominated by actors whose conduct was not directed by a state bureaucracy or by a top-down command and control structure.<sup>36</sup> The protagonists in these situations are mostly nonstate actors or a mixture of state actors and others who may be deemed state actor agents or not. These nonstate actors, however, also mutate into state actors, either by openly joining the former or by acquiring state power, as in the case of many decolonization conflicts where yesterday's guerillas become the legitimate government of the new state. Another model should be recalled, namely that of an entire society, or a substantial portion thereof, who become willing supporters, as Daniel Jonah Goldhagen described in his 1996 book *HITLER'S WILLING EXECUTIONERS*.

Between 1948 and 2008 there were 313 conflicts that produced 92 to 101 million casualties, in addition to other harms; the number of perpetrators involved has to exceed 1 million persons, though this estimate is at best speculative.<sup>37</sup> Assuming the hypothetical validity of this number, what would the expected number of international prosecutions

<sup>34</sup> Bassiouni, *supra* note 18; GERRY J. SIMPSON AND TIMOTHY L.H. MCCORMACK, *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* (1997).

<sup>35</sup> "Not all of the killings of the Khmer Rouge regime were directly ordered by the central leadership. Authority to kill certain categories of individuals was delegated to local administrations, and they used this power liberally. Once the central directives to exterminate certain categories of "enemies" had been disseminated, and the bureaucratic apparatus became fully engaged with the task, local officials sometimes misinterpreted the leadership directives as requiring even greater scope of killing. Others used the authority they had been granted to pursue personal agendas, taking revenge for slights felt in local disputes." CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE* 84 (2005).

<sup>36</sup> It was Max Weber who viewed bureaucracy as the epitome of modern rationality and the most effective method of organizational control. MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196–244 (H.H. Gerth and C. Wright Mills, eds., trans., 1946). In this regard, Kuper stated that the German "bureaucratic apparatus showed concern for correct bureaucratic procedure, for the niceties of precise definition, for the minutiae of bureaucratic regulation, and for compliance with the law." LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* 121 (1981). Thus, the ordinary henchman participating in the commission of mass atrocity came to be seen as the "organization man," whose motivation was merely to fit in with his peers. See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974).

<sup>37</sup> M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in 1 *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* 3 (M. Cherif Bassiouni ed., 2010).

be, considering that states have provided blanket amnesty laws in over half of these conflicts, and *de facto* amnesty from domestic prosecution in most other states, except for some token prosecutions. Significantly, the number of international prosecutions arising out of these conflicts from 1948 to 2008 is 867 perpetrators. In sum, a potential pool of one million perpetrators causing 92 to 101 million deaths resulted in 867 prosecutions at the international level and an undetermined number of domestic prosecutions, which, in light of the *de jure* and *de facto* amnesties, are not likely to amount to one percent of the pool of perpetrators. So much for future deterrence.

### §1.2. *Neutralization*

Neutralization is a characteristic of top-down state crimes. Since the states' decision-makers cannot direct their abuses of power against all of society, they have to find ways to neutralize some of the elements capable of opposing it. Neutralization of opponents and potential opponents is by incentives and disincentives, by offering advantage and profit arising from the plight of its victims, and the former by the threat of inclusion in that group. Time and again, these simple techniques have been successfully used.<sup>38</sup> Other intimidating approaches are used with the rest of society to allow the intended outcomes to be obtained without resistance, mainly through techniques likely to produce reactions of fear, apathy, indifference, and passivity. Combining or alternating misinformation about factual situations and using propaganda to create climates of fear based on perception of internal or external dangers and threats have been consistently employed.<sup>39</sup>

Experience in these types of situations indicates that a variety of mechanisms operate, sometimes simultaneously, to engender the highest level of public compliance through propaganda and fear and by means of compartmentalization of the perpetrators' actions. Paradoxically, the larger the scale of social involvement, the easier it is to manipulate a larger number of society's members, which can be stimulated in what social psychologists call crowd-conditioning psychology. This is paradoxical, because the same group of persons, if taken individually, would, for the most part, not act individually in the same way as when they are swept into collective frenzy or regimented to act as a crowd.<sup>40</sup> These observations, though basic to behavioral scientists, have hardly had an effect on law, which harkens to the simplistic conception of individual criminal responsibility and, thus, legal norms are fashioned to suit only this model of individual conduct.

The obvious conclusion is that the larger the number of persons involved in the mass production of human harm, the greater the resulting harm. But even though harmful outcomes are in part determined by the number of perpetrators, the question remains as to whether that type of harmful behavior by some against others is in the inherent nature of humans shaped by cultural, religious, and ideological beliefs, or whether social organizational systems are more susceptible to control human behavior and produce outcomes

<sup>38</sup> Suffice it to recall the practices of the USSR's Communist regime under Lenin and Stalin (1917–50s) and the Nazi regime under Hitler (1932–45); see also DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: WILLING GERMANS AND THE HOLOCAUST* (1996).

<sup>39</sup> This technique has even worked in the United States under the George W. Bush ruling elite regime of neo-conservatives after the terrorist attack of September 11, 2001. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 411–13 (2006); see also M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE IN THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE?* (2010).

<sup>40</sup> See, e.g., FREUD, *infra* note 68.

that are contrary to a given society's professed values. Moreover, unanswered questions remain with respect to what motivates the group dynamics that produce violent collective actions by some social groups against others. Understanding these phenomenological differences is necessary to devise appropriate social and legal control mechanisms. So far, ICL, international human rights law, and international humanitarian law have not exhibited that such understandings have informed the normative development of these disciplines. What follows, though part of the phenomenology of atrocity crimes (which include CAH), has hardly influenced the international legal approach to such crimes.

### §1.3. *Apathy, Indifference, and Passivity*

State crimes are characterized by the fear, apathy, indifference, and passivity of the societies in which they occur. At the domestic and international levels, apathy, indifference and failure to act, intervene, intercede, or create obstacles to the unfolding of the various manifestations of state abuse of power, and other forms of violent social interaction have in some way contributed to the commission of "atrocity crimes." Pastor Martin Niemöller best described this phenomenon during World War II, when he stated about the Nazi regime:

In Germany, [the Nazis] first came for the Communists, and I did not speak up, because I was not a communist. Then they came for the Jews, and I did not speak up, because I was not a Jew. Then they came for the trade unionists, and I did not speak up, because I was not a trade unionist. Then they came for the Catholics, and I did not speak up, because I was a Protestant. Then they came for me – and by that time no one was left to speak up.<sup>41</sup>

Modern and postmodern manifestations of the phenomenon of state crimes also reveal that the organizational structure of such endeavors is likely to be such that its various components are kept separate from one another or without knowledge of the ultimate goal. The Nazi regime's organizational structure, in a perverse sense, is the perfect example of how so many persons could have been marshaled, with so much effectiveness, to produce such a high level of human harm with as little or no resistance from the rest of society. Through the compartmentalization of the execution of mass atrocities, by means of apportioning and preassigning tasks, the state apparatus as a whole and society can be kept relatively unknowing of the overall plan and how it is executed. If nothing else, it facilitates the task of those who prefer to ignore the facts by allowing them not to connect the dots – the disassociative effect. This approach also contributes to the neutralization of possible opposition or obstacles by certain segments of the state's apparatus or society. Concealing the overall scheme also gives other states the opportunity to claim political, plausible deniability in connection with their failure to act.

The same observations concerning the large number of protagonists and observers apply to the other form under which mass atrocities also occur. Violent group dynamics may or may not be directly attributable to a state's organizational structure, and it may be totally independent of it, or even contrary to state policy but beyond its control. This is

<sup>41</sup> Harold Marcuse, UC Santa Barbara available at <http://www.history.ucsb.edu/faculty/marcuse/niem.htm> (last visited Dec. 6, 2009); see also James Bentley, Martin Neimoller (1984).

evident in situations involving certain forms of interethnic and interreligious conflict; however, they too involve large number of persons.

The question thus arises as to why these and other forms of collective violence that involve large numbers can take place. To answer this question requires a diagnosis of various forms and types of mass social violence. No matter how tentative this diagnosis may be, it is necessary in order to devise the social and legal techniques to address this form of collective aberrant behavior. The need for countervailing social and legal controls, both domestic and international, are self-evident to prevent and contain "atrocities crimes," and when all else fails, punish those who commit such crimes.

For mass atrocity crimes to take place, it is necessary for a paradigm shift to occur. Thousands, perhaps more, must be convinced that actions that are otherwise prohibited are acceptable, even laudable, under existing circumstances, and that the state, and those responsible for enforcing its laws, also lead or support such actions. There is obviously a range in this category of collective violent behavior that goes from the Goldhagen hypothesis of Nazi policy as constituting an entire population being willing executioners, with that model applying to the Rwandan *genocidaires* in 1994 (an estimated 800,000 Tutsis killed in four months), to what this author would call the indifferent executions, as was the case in Pakistan in 1973 in the independence war of Bangladesh (an estimated one million killed in six months).

Legal experts Laurel Fletcher and Harvey Weinstein researched mass violence in Bosnia and found that atrocity crimes were linked to behavioral and social norms.<sup>42</sup> When a norm in a society changes, individuals of that society may seek to conform to that norm, even where conformity means committing or ignoring atrocity crimes. The well-known Milgram experiment<sup>43</sup> proved what common sense observation recognizes. The human person responds to authority, and the more authoritarian a society becomes, the more compliance it elicits from its members. The essence of Milgram's experiment is the detachment of personal responsibility from the individual actor. Instead, the individual self-identifies as an agent of the authority. This identification works to override any internal ethical blocks the individual may have to committing atrocity crimes. An additional consideration is that individuals who oppose or refuse to carry out the orders of the state or authoritative nonstate actors are punished for their nonconformity. In an ordered society, nonconformity usually results in traditional crimes; in a society where mass atrocity crimes become possible, the paradigm not only shifts, but is turned on its head, making atrocity crimes the norm.

A few steps toward mass atrocity crimes are necessary. First, the targeted population must be singled out using immutable characteristics.<sup>44</sup> The society's complaints must also be directed toward the population as the cause of the society's ills. Individuals in the society are rewarded for their compliance and conformity with these ideas. The elevation of certain types of persons to authority positions may also play a role in influencing the

<sup>42</sup> Laurel E. Fletcher and Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 Hum. Rts. Q. 573, 607 (2002).

<sup>43</sup> A series of social psychology experiments conducted by Yale University psychologist Stanley Milgram, which measured the willingness of study participants to obey an authority figure who instructed them to perform acts that conflicted with their personal conscience. Milgram first described his research in 1963 in an article published in the JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY, and later discussed his findings in greater depth in his 1974 book, OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW.

<sup>44</sup> Osiel, *supra* note 3; Drumbl, Atrocity, *supra* note 21, at 33; Scheffer, *supra* note 21.

general population to commit atrocity crimes, as was done in the case of Rudolf Hoess, the Commandant of Auschwitz, who was no stranger to domestic crimes before being promoted to a position of power within the Reich hierarchy.<sup>45</sup> Nonconformists are punished. In the end, bystanders and actors turn to mass atrocities to benefit the group they have now identified with and to satisfy those authority figures who direct their actions. The state or equivalent nonstate actors effectively create two groups, the “in” group and the “out” group. The “in” group is rewarded and the “out” group punished.<sup>46</sup> Belonging to groups draws on some of the most basic human behavior, and thus allows perpetrators to use the labeling of groups to the best advantage and, sometimes, to the most destruction in terms of atrocity crimes. But in the final analysis, it is a combination of passivity and indifference within the society and the failure of the international community to intervene.

In the age of globalization, Western societies have so well isolated the individual from traditional family, tribal, village, or other group contact that it makes response to authority more willing than when inhibiting factors deriving from social values and practices exist.

#### §1.4. *Dehumanization, Subhumanization, and Objectification*

Almost every violent social interaction, whether at the domestic or interstate level or whether it falls into the top-down, bottom-up model, or those in between, has the characteristic of dehumanizing, subhumanizing, or objectivizing “the other,” upon whom violence is to be unleashed. This technique is necessary, since a variety of human inhibitory mechanisms would prevent anyone from engaging in indiscriminate and mass killing, torturing, and raping of those who are in the same objectivized category. The victim has to be perceived as different or undeserving of humane treatment. If all else fails, the rationalization can always be the necessity of survival due to the dangerous threat posed by the group about to be victimized. This characteristic exists irrespective of whether a tyrannical ruler or ruling-elite initiated the violence, or whether it is outcome of ethnic, religious, tribal, or national rivalries. This is why the best predictor of such impending violence is hate propaganda.

Can the international community take steps to recognize societies that may be vulnerable to mass atrocities? Are there specific signs or characteristics of a society that make it more likely to suffer from mass atrocities? And, more importantly, if a society can be described as vulnerable, what steps can be taken to prevent mass atrocities from being committed? Some researchers suggest that any attempt by the international community to control and prevent mass atrocities will be hampered by actions on the part of the state or nonstate actors, including censure, scapegoating, obfuscation, retaliation, defiance, plausible deniability, self-righteousness, redirection, and fear mongering.<sup>47</sup> As state authorities attempt to thwart control, they isolate themselves and could possibly drive the society closer to mass-atrocity.

The most prevalent term for vulnerable states is “failed state.” Although failed states all present similar risks to the international community, as well as pose significant risks for their own internal domestic communities, each failed state has unique challenges

<sup>45</sup> JOACHIM C. FEST, *THE FACES OF THE THIRD REICH* 411 (1970).

<sup>46</sup> Adolfo Ceretti, *Collective Violence and International Crimes*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 1, 8 (2009).

<sup>47</sup> JEFFREY IAN ROSS AND DAWN L. ROTHE, *THE IRONIES OF CONTROLLING STATE CRIME* (2008).



and reasons for its instability. Although some states suffer from weak governments and, therefore, are vulnerable to nonstate actors, other states have tyrannical governments that pose as threats. A “failed state index” has been produced for the past five years based on twelve indicators of vulnerability.<sup>48</sup> Those factors are: demographic pressures, refugees and internally displaced persons, group grievance, human flight, uneven development, economic decline, delegitimization of the state, public services, human rights, security apparatus, factionalized elites, and external intervention. Those countries appearing on the index of failed states or potential failed states may be vulnerable to “atrocities crimes” as the populations within, and their governments, become increasingly desperate.

Creating a less vulnerable society requires internal change to hail a strong Rule of Law system of government. But this requires external intervention and foreign resources in order to address the twelve factors identifying a failed state mentioned above. One critical element cited by experts is a robust educational system and, at its core, literacy.<sup>49</sup> As a companion to literacy, freedom of information, whether it be through the media or through transparency in government, are also important, but are by no means the only ways of preventing atrocities crimes, and are vulnerable to censure by state and nonstate actors. Another critical factor is the existence of an effective legal system with strong enforcement capabilities operating within the rule of law. So far, the U.N., the E.U., and major donor countries have yet to develop an effective policy, let alone implementation mechanisms, to achieve these goals. In fact, there is not even effective coordination between international agencies and these international governmental organizations and donor states. The case in point is Afghanistan, as highlighted by this writer in the reports written in his capacity as the U.N. Independent Expert on Human Rights for Afghanistan in 2004–2005.

### §1.5. *The “Banality of Evil”*

In her observations on the Eichmann trial in Jerusalem, 1961, Hannah Arendt described certain aspects of the Holocaust as representing the “banality of evil.”<sup>50</sup> Another way of putting it is that evil is frequently done under the appearance of banality, so lacking in originality as to be obvious and banal. Thus banality is the outer appearance of evil. In all cases, banality is intended to make evil not appear as such. Consequently, many can commit evil acts with greater ease. This is especially evident in postconflict situations, where a society trying to recover from mass atrocities looks with tired eyes upon everyday violent crimes, such as domestic or gang violence, as ordinary, instead of exceptional.<sup>51</sup>

The commission of human wrongs is, for many, particularly those who are followers of the Abrahamic faiths, the product of human evil. How that is theologically defined varies in faith-belief systems. In most faiths it is the breach of a divinely revealed obligation to refrain from doing injustice. The same exists in human laws and their transgressions are deemed social wrongdoing. Nevertheless, the content of the prohibition incorporates of an unarticulated moral contract because laws reflect social values.

<sup>48</sup> *The Failed States Index*, FOREIGN POLICY 80 (July/August 2009).

<sup>49</sup> PAULO FREIRE, *THE POLITICS OF EDUCATION: CULTURE, POWER, AND LIBERATION* (1985); Henry A. Giroux, *Theory and resistance in education: a pedagogy for the opposition*, in *CRITICAL PERSPECTIVES IN SOCIAL THEORY* (1983).

<sup>50</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

<sup>51</sup> Aukerman, *supra* note 27, at 63.



Evil *per se* is both a theological and a teleological concept that presupposes for certain faith-belief systems that every human being is the creation of a supreme being with inherent characteristics of good and evil. These faith-belief systems vary as to their interpretations of the connection between free will and free choice and predetermination and predestination. However, this is not the place to argue the merits of these propositions. It is, however, relevant to examine the processes by which “atrocious crimes” produce the appearance of banality and thus remove from its commission the perception of the evil or wrongdoing that is being accomplished.

Another perspective is how evil can be transformed into an appearance of banality, where a person loses sight of the moral significance of his conduct. “Instead of matching the image of the paranoiac ideological warriors so often invoked when describing the fieldworkers of the Nazi genocide,” writes de Mildt, “their background profile far more clearly matches that of rather ordinary citizens with a well-developed calculating instinct for their private interests. [ . . . ] The key word which springs to mind when reviewing the criminal biographies of the ‘Euthanasia’ and *Aktion Reinhard* hangmen is not ‘idealism’ but ‘opportunism.’”<sup>52</sup>

As Mildt stated, compartmentalization is a way of neutralizing actors’ negative reactions by having them see only a small part of the whole. This conveys the impression that the singular acts, unrelated to the whole, are not wrongful *per se*. The technique can also neutralize actors’ inhibitions against carrying out such acts, which are evil when completed, but which can be viewed as banal with respect to its several components.

Banalization induces people to engage in the commission of certain acts that are part of a bigger picture or that are simply decoupled from the act’s consequences. The push of a button to unleash a bomb that will kill many whom the button-pusher will never see is such an act. The CIA drone operator sitting in a trailer in some remote and hidden mountainous area of the U.S. who looks at a screen and gives a command to a computer for the drone to descend on people somewhere in Pakistan may be perceived by the operator as a banal act. The fact that the act is so common, and the disconnection between the act and its consequences, causes the phenomenon of the banality of evil. The study of this human phenomenon is particularly relevant in identifying social and legal controls designed to prevent it.

It deserves mention that what transforms a banal act into a wrongful act resides in its outcome. Two examples illustrate this proposition. The first is a form letter produced by a manufacturer to a client, indicating that the merchandise ordered has been produced and is ready to be picked up. On its face, it is the most banal form of everyday commercial communication. If the merchandise, however, is a crematorium for human beings, which is intended for shipment to Auschwitz in 1943, the evil resulting from the use of the crematorium is obvious.<sup>53</sup>

The second is one of the many similar situations I encountered in the former Yugoslavia between 1992 and 1994, when I chaired the United Nations Security Council Commission to Investigate War Crimes.<sup>54</sup> This case involved a Serb militiaman who was assigned to

<sup>52</sup> DICK DE MILD, IN THE NAME OF THE PEOPLE: PERPETRATORS OF GENOCIDE IN THE REFLECTION OF THEIR POST-WAR PROSECUTION IN WEST GERMANY: THE ‘EUTHANASIA’ AND AKTION REINHARD TRIAL CASES (1996).

<sup>53</sup> Arendt, *supra* note 50.

<sup>54</sup> S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992) (asking the Secretary-General to establish an impartial Commission of Experts); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigation of Violations of International Humanitarian Law in the Former*

the front desk of a motel near Pale, in the mountains above Sarajevo. He gave out keys to the rooms in the motel to other Serb Militiamen, who kept coming in and out: On its face, a banal function. However, Bosnian women, who were seized by force and imprisoned, occupied the rooms; those in possession of the keys had access to rape these women. The rapes transformed the banal act of passing out door keys into an evil act. This, too, may fall under the category of cognitive dissidence.

Nearly every country in the world lacks grade and high school educational curricula with a component dealing with the moral issues described here. How can we then expect people will understand what their actions signify in a social context? If the international community is serious about preventing atrocity crimes and CAH, how can we explain away the absence of prevention through education? The answer is: we can't, because the international community is not sufficiently interested in preventing these human depredations to make either prevention or punishment work.

### §1.6. *Euphemisms and Rationalizations*

Euphemisms are value-laden labels made up to refer to situations, groups, and actions as a way of conditioning individual and collective acceptance of the premises contained in them, as well as acceptance of these premises' consequential outcomes. The nineteenth century euphemism "Manifest Destiny" that motivated American pioneers to "Go West" became the rationalization for the extermination of the Native Americans. The 1930s Nazi "Final Solution of the Jewish Question" was the euphemism that led to the Holocaust.<sup>55</sup> The call to "Islamic Jihad" throughout the Muslim world, starting in the 1980s, is the euphemism leading Muslims to engage in indiscriminate violence even though it is explicitly rejected by the very values they embrace. The "War on Terror" has been the American euphemism leading to the institutionalization of torture in America since 2001. Israel has also adopted the euphemism "War on Terror," using it as a self-defense justification to inflict collective punishment on the Palestinians of Gaza, attacking the territory and causing a disproportionate harm than the harm it perceived itself facing.

Euphemistic language serves to distort reality, conceal its logical outcomes, and distance individuals from the moral consequences of their actions. It brings about new perceptions of reality that, in turn, permit individual rationalizations of violent actions, even when contrary to the moral values of those who engage in it. This is achieved through the euphemism's redefinition of a given fact or situation, thereby removing inhibitions such as guilt that may stand as a barrier between the factors driving the individual toward violence and actually carrying out the violence.

Euphemisms are part of the war of words in every conflict, which historically has been as important as the war of swords. One contemporary example is the term "terrorism." The primary use of euphemisms is for one party to a conflict to delegitimize the other's cause. When Israel and its supporters use the term with respect to the Palestinians, the hidden

*Yugoslavia*, 5 CRIM. L. F. 279 (1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), 88 AM. J. INT'L L. 784 (1994). See also Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia, U.N. SCOR U.N. Doc. S/1994/674 (May 27, 1994), available at: [http://www.law.depaul.edu/centers\\_institutes/ihrl/publications/yugoslavia.asp](http://www.law.depaul.edu/centers_institutes/ihrl/publications/yugoslavia.asp) (last visited March 9, 2010).

<sup>55</sup> The "final solution of the Jewish Question" euphemized the extermination of the Jews. The Nazi extermination squads were the "Special Troops" (*Einsatzgruppen*). ERVIN STAUB, *THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE* 29 (1989).

meaning and purpose is delegitimization of the Palestinian cause. The illegitimate conduct of a protagonist is bootstrapped into the delegitimization of the cause.

The polarization and radicalization effects of the value-laden term “terrorism” increase collective violence and enhance the rationalization of abuses committed by both sides of a given conflict. The 1980s explanation of the phenomenon was “what is terrorism to some is heroism to others.” Thus, each side of the argument not only contradicted the other, but legitimized each side while simultaneously delegitimizing the opposing one.

Euphemistic language is not necessarily limited to the slogans or shorthand statements mentioned above. It is also the product of a wider scale of indoctrination that may be contextual to certain social or historical injustices or that may be made up from historical claims whose validity may only derive from an accumulation of past teachings, legend, and lore. Suffice it to examine the narratives of certain historical conflicts to see that rousing and shocking stories are perpetuated for decades, if not longer. During the first Balkan War was in 1915 and the 1991–95 war in the former Yugoslavia, the same tales of horror were repeated and carried out by the same historical protagonists who used the same euphemisms and labels in referring to each other. Euphemisms are not always necessary for collective violence to take place. The fratricidal war in Iraq between Muslim Sunni and Shi’a is a case in point.

Tyrannical regime rulers, elite ruling regimes, and religious, political, and social leaders are usually the makers or proponents of euphemistic language, whose purposes are to bring about collective compliance with their goals. Religious wars throughout history are notorious for euphemisms developed by religious leaders, as was the case with the 100 and 30 Year Wars between Catholics and Protestants in Europe, and those used during the Crusades of the eleventh, twelfth, and thirteenth centuries. Similarly, all revolutionary wars have started with euphemisms and slogans. For example, France in 1789, whose revolution started with “*legalité, liberté, and fraternité*,” led to Robespierre’s reign of terror in 1793–94. Later, from 1917–89 in Marxist regimes starting with Lenin, the euphemism for massive collective violence was the “dictatorship of the proletariat.” Between 1975 and 1985, one-fourth of the Cambodian population was killed based on the euphemism “enemies of the people.”<sup>56</sup>

Euphemistic language shapes and even makes public opinion. In turn, that leads to collective violent action without an explicit demand for such action being made by its proponents. Euphemistic language is also the basis for rationalization of the collective violent behavior, even when contrary to individual and collective moral values. The system of repression under the military dictatorship in Argentina from 1976–83 serves as an illustration:

Whoever designed the system had an intuitive sense of the psychology of perpetrators and aimed at diminishing all constraints on their behavior. The prisoners were identified only by numbers. As in Nazi Germany, euphemisms were used. The torture chamber was the “intensive therapy room.” A person about to be killed was sometimes said to have “gotten his ticket.” Those who were to be killed were “transferees.” Prisoners were blindfolded, not only to disorient them and protect perpetrators from recognition, but I believe also to give perpetrators a feeling of total unaccountability and reduce restraint. Perpetrators usually referred to each other by pseudonyms in the presence of victims.<sup>57</sup>

<sup>56</sup> The Khmer Rouge’s aim was to kill all enemies, actual or potential, “everyone who could not adopt the world view and way of life required in the new state.” *Id.* at 193.

<sup>57</sup> *Id.* at 227 (internal citations omitted).

In the context of collective violence, rationalizations, whether based on euphemisms or not, are accompanied by the dehumanization, subhumanization, and objectivization of the other, who is part of the victimized group. This phenomenon is integral to the rationalization of collective violence and is evident in nearly all manifestations of collective violence. The Native Americans were “savages,” those who were tortured by the Bush Administration were “terrorists,” the Jews were an “inferior race” to the Nazi Aryans, the Hutu referred to the Tutsi as “cockroaches,” the Argentine juntas sought to eliminate “subversives,” and so on.<sup>58</sup> In the case of junta leader Emilio Massera,

Certain words he wished to grab hold of and nail, with his own definitions, to the mast: “duty”, “rationality”, “obedience”, “patriotism”, “sacrifice”. The meanings of others he altered for good. By 1978 the word *capucha*, “hood”, meant murky basements across the land in which ordinary Argentines were kept for years blindfolded, chained and shackled. A *paquete* was now a bound human being, delivered up to torture. A *submarino* was no longer just a submarine, or a children’s treat of chocolate squares melting in hot milk, but a way of holding a suspect’s head under water fouled with faeces and urine until they thought they were drowning. And *desaparecer*, to disappear, became a transitive verb, meaning to kidnap innocent citizens, drug them and load them on to military aircraft from which they would be tossed, living, into the sea. Perhaps 10,000 Argentines died this way in the seven years the junta was in power.<sup>59</sup>

Proponents of euphemistic language also instrumentalize rationalizations to eliminate or erode individual inhibitions leading a group to engage in conduct that is otherwise contrary to moral and social values. This explains why after so many historical events involving collective forms of violence, rationalizations are presented as a way of excusing or explaining what occurred.

The techniques of modern propaganda developed by Joseph Goebbels in the 1930s during the Nazi regime continue to demonstrate their effectiveness. The use of mass media to propagate euphemistic messages, communicating fear or reflecting a compelling religious or superior ideology to sway the masses, has been consistently noted in situations of collective violence. The Rwandan genocide of 1994 is an example of the use of radio by the Hutu to promote the ideology of Hutu extremism, including the incitement of murder and persecution of the Tutsi population and moderate Hutus.<sup>60</sup> It

<sup>58</sup> The definition of “subversive” was imprecise, as was the line between the “in” group and the “out” group. *Id.* at 224.

<sup>59</sup> *Obituary, Commander of the “dirty war”; Emilio Massera*, *ECONOMIST*, Nov. 27, 2010.

<sup>60</sup> The broadcasts from the Rwandan radio station *Radio Télévision Libre des Mille Collines* played a significant role in broadcasting racist propaganda during the Rwandan genocide. “The Media Trial” (*Nahimana et al.* case) before the ICTR involved the prosecution of RTLM board member Jean Bosco Barayagwiza and its founder and ideologist Ferdinand Nahimana, as well as the editor-in-chief of the KANGURA newspaper, Hassan Ngeze. Nahimana and Barayagwiza were indicted for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and CAH of persecution, extermination, and murder. See *Prosecutor v. Nahimana et al.*, Case No. ICTR-96-11-I, Indictment (Nov. 15, 1999). Nahimana was found guilty of incitement to commit genocide and persecution as a CAH and sentenced to 30 years’ imprisonment. Barayagwiza was found guilty of instigating the perpetration of acts of genocide and extermination and persecution as CAH and sentenced to 32 years’ imprisonment. See *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Summary of Judgment (Nov. 28, 2007).

The ICTR also prosecuted a RTLM presenter, Georges Ruggiu, for incitement to genocide and the CAH of persecution. *Prosecutor v. Ruggiu*, Case No. ICTR-97-32, Indictment (Dec. 18, 1998). He was convicted of incitement to genocide and sentenced to 12 years’ imprisonment. *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-T, Judgment (Jun. 1, 2000).

was so compelling that it overcame the inhibitions of Christians to using violence against other Christians.

Surprisingly, throughout history, such forms of instigation to violence invariably start in what appears to be tolerable euphemisms, as is evident since 2001 in the rhetoric of violent symbolism used by some social/religious/political groups in the United States, particularly in connection with the Islamophobia campaign. Suffice it to note the escalation of such rhetoric and the broader diffusion of violent language in the public political discourse. This could very well lead to wider manifestations of individual violence and, eventually, to group violence. Unlike similar phenomena in other contexts, the difference in the United States may well be the existence of social control mechanisms supported by institutions that have the capacity to prevent the exacerbation or expansion of the phenomenon of euphemisms as a precursor to collective violence.

Observation of other historical phenomena where euphemisms, rationalizations, and propaganda have ripened into collective violence reveals that the existence of social control mechanisms supported by institutions, particularly legal institutions that have generated respect for and observance of the rule of law, can prevent collective violence.

### §1.7. *Motivation*

Psychological and social psychological assessments of both individual and group motivation vary as to their content and interaction. This is understandable due to the many factors and variables that exist, as well as the impact of these factors and variables on each individual and on the group.<sup>61</sup> For individuals, in a Freudian perspective, the motivation to act is essentially instigated by pain, pleasure, or greed.<sup>62</sup> For groups, motivating factors derive *inter alia* from culture, religion, ideology,<sup>63</sup> economic necessity, and perceptions of danger, goals, and values.

Motivation, with all of its diverse factors and variables, is generated by internal psychological factors, as well as by external social and psychosocial factors.<sup>64</sup> The combination of all these factors and what results from their interaction in different contexts, helps explain behavior resulting in collective violence, even though there are some particularly egregious and atrocious acts of violence that will never be fully explainable, and surely never fully understood.<sup>65</sup> This may well be what leads to some to ascribe such acts

<sup>61</sup> See STAUB, *supra* note 55, at 28 (“But in both individuals and groups the organization of characteristics and psychological processes is not static but dynamic. As a result, very rarely are either evil or good immutable. Influences acting on persons and groups can change their thoughts, feelings, motivations, and actions.”).

<sup>62</sup> See, e.g., SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (translated by James Strachey, 1989).

<sup>63</sup> Ideology was a motivating factor to commit atrocity crimes, whether nationalistic (exalting the nation, its purity and greatness) or “better world” ideologies (providing a view of the world and a vision of the kind of society that would improve life for future generations). While Turkey stressed nationalism, the Khmer Rouge stressed a “better world” ideology. Often, however, nationalistic and “better world” ideologies are combined, as in the cases of Argentina and Germany. STAUB, *supra* note 55, at 235.

<sup>64</sup> MARK S. BLUMBERG, *BASIC INSTINCT: THE GENESIS OF BEHAVIOR* 119–21 (2005).

<sup>65</sup> See STAUB, *supra* note 55, at 22–3 (“[B]oth individual human beings and cultures possess a hierarchy of motives. Individuals and cultures do not always act on their most important motives. Circumstances can activate motives lower in the hierarchy. For example, the need for self-defense and the need for connection to other people can be important or relatively unimportant motives. The lower a motive is in an individual’s or culture’s hierarchy, the more extreme the life conditions needed to make it active and dominant. Whether a motive is expressed in behavior depends on the skills and competencies of

to what they call evil. However, what is evil's source, how does it arise within the individual, to what extent does it have an impact on individual motivation, and ultimately, what is its collective impact on the group are all questions yet to be answered, except by religious moralists. Evil is not a scientifically determined concept, but its manifestations are evident by reference to either a moral/ethical standard or by reference to its harmful human outcomes, which in turn is judged by moral, ethical, or social standards. The argument about evil is reminiscent of the observation made by U.S. Supreme Court Justice Potter Stewart to the effect that obscenity cannot be defined, rather it is recognized once seen.<sup>66</sup>

The debate over whether evil is something arising out of basic human instincts or learned behavior or whether it is genetically transmitted partakes of the debate of nature and nurture and is far from being settled, save for those who give it a religious meaning (i.e., evil is the work of the devil, and so forth).<sup>67</sup> Admittedly, powerful natural impulses such as survival and self-protection are primary motivational factors.

There are many other factors, such as individual self-worth and internalized values. How individuals and groups cope with their needs, particularly when they are unfulfilled and what they perceive to be threats to their survival or well-being; and how they can channel their internalized fears, anxieties, and hostility are among the factors that determine motivational outcomes. These and other factors have an impact on the individual and the group. And, as previously stated, another set of related factors contribute to the mix, such as: culture, education, religion, ideology, and collective needs and goals.

Collective violence may be the outcome of the sum total of all these factors, but it arises spontaneously in only a few cases. Usually, these cases involve leaders who cause others to engage in violent conduct. It can hardly be said that there are specific causes that inevitably lead to collective violence without more. For example, standard poverty is not in and of itself a cause of crime, but it is the combination of the consequences of poverty and other factors that leads to criminality.

There are other factors that also contribute to collective violence outcomes. They include respect for or subservience to authority and the degree to which conformism and conformity is part of the culture.<sup>68</sup> These latter factors are more likely to be exacerbated in authoritarian and monolithic societies, but attenuated in pluralistic and diverse societies, where tolerance not only is part of cultural values but also is sustained by institutional mechanisms. This explains why totalitarian regimes in monolithic societies are more likely to witness, if not engender, collective violence than in other societies that we call pluralistic democracies.

individuals, or on the social institutions. Even the intention to commit genocide cannot fully evolve without a machinery of destruction").

<sup>66</sup> "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>67</sup> See generally Blumberg, *supra* note 63.

<sup>68</sup> See, e.g., SIGMUND FREUD, *GROUP PSYCHOLOGY AND ANALYSIS OF THE EGO* (1921). Freud listed some of the traits of behaviors of individuals in groups, including the diminishment of conscious individual personality, the focusing of thoughts and feelings channeled into one common direction, the domination of emotions and the unconscious over reason and judgment, and inclination to instantly carry out intentions when they manifest. See JAMES WALLER, *BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING* (2002).

Ultimately, it is the combination of individual psychological and collective socio-psychological factors and their interactions that, when triggered by external factors or by leadership instigation, produce violent outcomes. These multiple factors and their variables can be analogized to that which occurs inside a big cauldron where all of its contents are boiling, thus constantly mixing in different ways – some coming to the surface at certain times and others dipping below the surface, unseen but still simmering. They may boil over and spill out of the cauldron when the fire increases in intensity. However, it is the belief in the inevitability of violent outcomes that is the final link in the chain of proximate cause, preceding the commission of collective violence.

Human experience reveals that social controls can contain individual and collective violent action, even when based on whatever evil is understood to be at the individual or social level or both. Conversely, experience indicates that without such controls, existential circumstances may haphazardly bring about collective violence and evil outcomes. Moreover, individuals engaged in collective violence may morally reject their actions, but, for circumstances and/or the rationalizations underlying their conduct, they may nevertheless engage in conduct producing harmful human outcomes.

For purposes of developing social control mechanisms, it may be sufficient to identify certain characteristics of human behavior, their variables, and what influences drive or lead people to engage in collective violence, including the intangible factor of evil. Therefore, the relevant set of questions is what constitutes primary and other forms of individual motivation and how they can ripen into collective action leading to collective violence and harm. This in turn leads to what policies and mechanisms are needed to produce prevention.

## §2. Legal Controls

### §2.1. *Considerations on Legal Philosophy*

In the two examples described in the previous section, does the banality of the isolated act, which in itself is ordinary and devoid of moral significance, make it easier for the human mind (and perhaps the human conscience) to detach itself from the resulting proximate or ultimate cause of their action? Should the law accept such distinctions as to legally cognizable acts, which are part of an enterprise whose end is to commit mass atrocities? To all but strict legal positivists, the answer is clearly no. Yet, the influence of positivism on domestic criminal law and ICL is still strong enough to make it so difficult to effectively prosecute such persons.

Moral philosophers have long addressed these questions, but their findings have not sufficiently permeated legal thinking. Jurists are still divided among positivists, relativists, naturalists, and other philosophical schools.<sup>69</sup> Criminal law, however, both at the domestic and international levels, remains largely positivistic and substantially devoid of the understanding of what motivates human behavior and how to impact it by social and legal controls.<sup>70</sup>

<sup>69</sup> Compare H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968) with Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

<sup>70</sup> JOHN JACKSON, MAXIMO LANGER AND PETER TILLERS, CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF PROFESSOR MIRIAN DAMASKA (2008).



Natural law philosophy, like other philosophical doctrines, has different premises leading to different perspectives.<sup>71</sup> Legal positivists oppose naturalists, in part, because natural law has been associated with Christianity. However, Judaism and Islam also have their counterpart to Christian natural law with the significant difference that, for the latter, divine law is codified in their respective holy books. In turn, however, theologians of these faiths have interpreted these legal canons either literally or in accordance with the intended purposes and scope. Because these religions are in force in states that declare them to be binding as a state religion, religious norms constitute the higher-law background of positive law. Irrespective of what higher law exists in a given legal system, whether it is the constitution or treaties or both, every legal system has a hierarchy of sources of law. Resort to higher sources of law beyond positive law inevitably leads to another sphere of inquiry for substantive content.

This was the dilemma for the drafters of the London Charter.<sup>72</sup> Do they go by the positive law of the Third Reich? Do they consider these laws null and void because they violated some higher law principle? Or do they fashion norms that largely partake of *ex post facto*, but with some plausible legal connection to international law in order not to violate the “principles of legality?”<sup>73</sup> The last formula was chosen, though a declaration of nullity of Nazi laws and the recognition of validity of the pre-1932 German laws would have boosted the legitimacy of prosecuting the Nazis before the IMT and before the Allied Tribunals established pursuant to Control Council Order No. 10.<sup>74</sup>

The comparison between the pre-1932 laws of Germany, particularly its Criminal Code of 1871, would have shown how unjust the Nazi laws were by comparison to these pre-existing legal norms. This led the German philosopher Gustaf Radbruch to articulate a post-World War II rationale for retroactive application based on the relativity of the positive law’s violation in comparison with the harm committed. Since the Nazi atrocities were not only a case of *lex iniusta* (unjust law), but also of *lex iniustissima* (immoral law), retroactive application of the law under the Radbruch formula was deemed acceptable. But where does this qualitative judgment come from, if not from a higher source of law, whether that be morality or ethics as reflected in the social values of a given society?<sup>75</sup> Why then is the identification and formulation of these values such a daunting task for jurists? The answers, varied as they may be, inevitably include political considerations. This is not only the case for the *grande politique*, but for the *petite politique* that animates

<sup>71</sup> *Id.*; see also IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE (Ladd trans., 2d ed. 1999).

<sup>72</sup> Nazi Conspiracy and Aggression, Opinion and Judgment of the IMT (1947).

<sup>73</sup> Though the principles of legality can be found in several legal systems, their modern European origin is attributed to Paul Anselm von Feuerbach who first articulated them in his 1801 *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS*. This period was the height of intellectual liberalism and revolutionary liberalism in Europe, which also coincided with the highest point of modern western classicism. For a survey of these principles of legality see Giuliano Vassalli, *Nullum Crimen Sine Lege*, APPENDICE DEL NUOVISSIMO DIGESTO ITALIANO 292, vol. 5 (1984); Stefan Glaser, *Le Principe de la Légalité en Matière Pénale, Notamment en Droit Codifié et en Droit Coutumier*, 46 *REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE* 889 (1966); Jerome Hall, *Nulla Poena Sine Lege*, 47 *YALE L.J.* 165 (1937); Giuliano Vassalli, *Nullum Crimen Sine Lege*, 8 *NUOVO DIGESTO ITALIANO* 1173 (1939); and LÉON F. JULLIOT DE LA MORANDIÈRE, *DE LA RÉGLE NULLA POENA SINE LEGE* (1910).

<sup>74</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 *Official Gazette Control Council for Germany* 50–55 (1946); see also GIULIANO VASSALLI, *FORMULA DI RADBRUCH E DIRITTO PENALE: NOTE SULLA PUNIZIONE DEI DELITTI DI STATO NELLA GERMANIA POSTNAZISTA E NELLA GERMANIA POSTCOMUNISTA* (2001).

<sup>75</sup> See JUDITH SHKLAR, *LEGALISM: LAWS, MORALS, AND POLITICAL TRIALS* (1964).



the public life of every state. As for the undemocratic states, the question is never reached, let alone addressed.

Crimes of state are a form of aberrant social and collective criminality, which generates so much harm that it should compel jurists at both the domestic and international levels to address the phenomenon with clear and precise legal norms and effective enforcement measures. That this has not occurred is a political or policy choice by states represented by state actors who have demonstrated their reluctance to do so, if for no other reason than to avoid personal responsibility under the theory of command responsibility.<sup>76</sup>

To many jurists and other social scientists, the answer to the questions posed above is democracy and the rule of law. Both are intended to produce checks and balances likely to prevent, or bring to an early halt, the excesses of rulers and ruling elites, the assumption being that democracies eliminate tyrannical rulers and provide checks and balances on the exercise of the majority's power. Based on experience, however, this assumption has many limitations. In fact, experience proves that political and legal controls have their limits and limitations. They either cannot go far enough or they cannot encompass the range of their intended goals. In the end, even if there was one controller for every citizen in a given country, who would control the controllers?

Moralists counter with the need to strengthen internalized individual controls. But virtue also has its limits. If nothing else, as history demonstrates, the virtuous are not likely to stop the violence of others only with their virtue.<sup>77</sup> And so long as they do not respond to force with force, the courage of speaking truth to power seldom prevents power from pursuing its goals. The exception is mass social disobedience, as Gandhi demonstrated in India during that country's struggle for independence.<sup>78</sup> Peaceful resistance alone in *Apartheid* South Africa was not enough to bring this regime to its end. It took a combination of domestic violence and external political and economic pressures.<sup>79</sup>

One question asked by researchers is whether the criminal concept of individualized guilt leads to an understanding of collective innocence.<sup>80</sup> Or, in other words, if society holds the few responsible, does it necessarily exonerate the many? One aim of criminal justice is that punishment will act as a deterrent to future criminal actors. Adding to the question is ICL, which exists to hold individuals responsible for those crimes that necessarily require the complicity of many to be accomplished.

Addressing "atrocities crimes" through legal means becomes complicated by the fact that the domestic jurisdiction is not equipped to handle the aftermath of such crimes. External entities are often responsible for establishing a judicial system to cope with the atrocities. It thus becomes more difficult for the society to internalize the justice. This is especially true in Rwanda, where the seat of the Tribunal is located outside that country. A society unable to internalize justice postconflict will find it hard to envision justice as possible preconflict.

Although international criminal justice meted out by the ICTY and ICTR cannot be seen as a deterrent to individual actors, especially after atrocity crimes have already been

<sup>76</sup> Evan Wallach and I Maxine Marcus, *Command Responsibility*, in *INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT* 459 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Leslie C. Green, *Superior Orders and Command Responsibility*, 27 *CAN. Y.B. INT'L L.* 167 (1989); Anthony A. D'Amato, *Agora: Superior Orders vs. Command Responsibility*, 80 *AM. J. INT'L L.* 604 (1986).

<sup>77</sup> See, e.g., Waller, *supra* note 67.

<sup>78</sup> ERIK H. ERIKSON, *GANDHI'S TRUTH: ON THE ORIGINS OF MILITANT NONVIOLENCE* (1969).

<sup>79</sup> OZDEMIR OZGUR, *APARTHEID, THE UNITED NATIONS AND PEACEFUL CHANGE IN SOUTH AFRICA* (1982).

<sup>80</sup> Fletcher and Weinstein, *supra* note 42, at 580.

completed, it is perhaps notable to consider the effect these systems of justice have on political elites. Political elites may have the power to censure opposition within their own borders, but accountability before the ICC remains a realistic possibility. Although political elites may operate above the law in their own territory, they are not above international law. Following the trials of former rulers, such as Milosevic, Kambanda, Fujimori, and Habre, no elite can claim ignorance of international accountability mechanisms. But these cases are more the exception than the rule. Too many dictators have brought about the death and suffering of thousands only to remain free, including but not limited to Pol Pot of Cambodia, Idi Amin of Uganda, Mengistu of Ethiopia, Raoul Cédras and Jean-Claude Duvalier (Bébé Doc) of Haiti, and Omar Al Bashir of the Sudan. When heads of state and government officials can evade accountability, deterrence with respect to future leaders is lost, and the likelihood of more atrocity crimes and CAH is enhanced. The same goes for the leaders and the elites of nonstate actors' groups who commit these crimes.

### §2.2. *International and Domestic Criminal Law Considerations*

Consensus must be reached as to the social interests sought to be protected to proceed on a policy-oriented basis to devise the different social, political, economic, and legal mechanisms that need to be brought to bear on the phenomenon of "mass atrocities" to achieve prevention and control and, when needed, to punish the individual perpetrators and the class (collectively) of perpetrators. This means the making of normative and enforcement choices at the domestic and international levels. At every level, prosecutors must make decisions of what to do with limited resources.<sup>81</sup>

The normative choices include whether there is to be: state criminal responsibility under ICL; collective or group criminal responsibility under international and domestic criminal law; new forms of vicarious criminal responsibility; new types of penalties to be applied; or the extension of legal mechanisms to both international and domestic to civil and administrative sanctions. Adding to these normative policy-based choices are the enforcement mechanisms of interstate and international cooperation for the apprehension, investigation, prosecution, and punishment of persons accused of, charged with, or convicted of crimes arising out of the established norms. All of this translates into the need to have an international and domestic policy of accountability to guard against impunity.

An examination of the national criminal laws of all states reveals that none contain a crime labeled as "crimes of state." It also reveals that the state is never collectively responsible. No domestic laws exist anywhere that hold criminally responsible those who have collectively participated in mass atrocity crimes, which include that which is otherwise defined as a common crime under domestic criminal laws. State officials are criminally responsible on an individual basis in every state, but the forms of criminal responsibility, the evidentiary requirements, and the political influences on the investigation, prosecution, and adjudication processes afford wide latitude of impunity to state actors. Legal forms of group or vicarious criminal responsibility, which exist in some states, however, are scarcely enforced. A low percentage of prosecutions occur under these legal forms in

<sup>81</sup> Aukerman, *supra* note 27, at 53.

comparison to the estimated black figures (unknown estimates) of those who could, and maybe should, be prosecuted for mass atrocities.<sup>82</sup>

Understandably, elites in any state are neither likely to criminalize their own conduct nor to allow the law to easily reach them. Thus there are many ways in which rulers and ruling elites can place themselves above the law or beyond the reach of the law and protect those who carried out their misdeeds. The same is true under ICL, where there is no established criminal responsibility of states, where international crimes apply only to individuals, and where heads of state have *de jure* temporal immunity, though not substantive immunity for certain *jus cogens* crimes.<sup>83</sup> It is possible that populations will resist criminal accountability if it calls into question the actions of bystanders complicit in the perpetration of crimes.<sup>84</sup> Studies show that populations in the areas where mass atrocities occur do not necessarily link “reconciliation” to criminal trials, but instead to a much broader set of actions.<sup>85</sup> Whether this is because international criminal trials can still be considered nascent or because the international criminal process takes a considerable amount of time, is yet to be seen.

The responsibility of heads of state for certain international crimes exists, but its carrying out is still a work in progress.<sup>86</sup> The political reasons for such a state of affairs are too obvious for comment. That fact is generally well accepted among the world’s ruling elite, notwithstanding the Western state’s professions to the contrary. Nondemocratic leaders and regimes, such as those in Africa, Asia, and the Arab world, have no need to hide behind a fig leaf of support for the principle. They blatantly stand against it. They are comforted by the fact that Western states are largely passive. In any event, states know that double standards and exceptionalism still prevail, and that it is essentially how well a state plays its political cards at a given moment, which avoids being placed in the category of perpetrators of “crimes of states,” no matter how episodic and elusive accountability may be.

The historic record shows some recent successes, but they are scant. Kambanda of Rwanda was prosecuted by ICTR after his regime was toppled and is now in prison.<sup>87</sup> Milosevic of Serbia was prosecuted by the ICTY after he left office on the heels of his renewed aggressive plan in Kosovo that led the United States to lift its protection of him. He died during the proceedings.<sup>88</sup> Taylor of Liberia is on trial before the Special Court of Sierra Leone.<sup>89</sup> He was surrendered by Nigeria, which had first given him asylum under

<sup>82</sup> M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, *supra* note 37; Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 5.

<sup>83</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 9 (1998); M. Cherif Bassiouni, *The Need for International Accountability*, in 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 3 (3d ed., M. Cherif Bassiouni ed., 2008); *see also* ROSANNE VAN ALEBEEK, *THE IMMUNITIES OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* (2008).

<sup>84</sup> Fletcher, *supra* note 24, at 1033.

<sup>85</sup> *Id.* at 1022.

<sup>86</sup> General Douglas MacArthur exemplified U.S. military and political considerations in shielding Emperor Hirohito of Japan and members of the Imperial Family from prosecutions before the International Military Tribunal for the Far East (IMTFE), the Emperor for acquiescing to war including the attack on Pearl Harbor, and his uncle for directing the destruction of Nanking in Manchuria in 1932, which produced an estimated 250,000 civilians killed, men, women, and children.

<sup>87</sup> Prosecutor v. Kambanda, Case No. ICTR 97-23-T, Judgment (Sept. 4, 1998).

<sup>88</sup> *See Weighing the Evidence: Lessons from the Slobodan Milosevic Trial*, HUM. RTS. WATCH, vol.18 no.10d (Dec. 2006).

<sup>89</sup> Prosecutor v. Taylor, Case No. SCSL-2003-01-PT, Second Amended Indictment (May 29, 2007).

the Lomé Peace Accords and which allowed him to resign as president of Liberia. Taylor expected to live happily thereafter with the millions he is believed to have removed to Switzerland and the U.K. from blood diamonds.<sup>90</sup> Then there is Pinochet of Chile, who after leaving power was about to be prosecuted but managed to avoid extradition to Spain, compliments of the U.K. He returned to Chile,<sup>91</sup> where he died before he could be prosecuted. Habré of Chad avoided prosecution by obtaining asylum in Senegal, which did not, however, surrender him to Belgium when Belgium asked to prosecute him.<sup>92</sup> Al Bashir of the Sudan was indicted by the ICC<sup>93</sup> and so far sits uneasily as that country's head of state with the support and comfort of African and Arab states, and of China due to its oil interests in that country. The U.S. is also a passive contributor to this situation for a variety of strategic and political considerations.

The lessons to be learned are self-evident, but they have yet to be learned or acted upon. These and other examples are intended to show that no matter what is so obvious, the cynicism of *Realpolitik* prevails all too often, the cost and consequences to humankind notwithstanding.

When the conduct of state actors has the characteristics described above and is committed wholly within the confines of a given state, domestic criminal law applies, unless the conduct in question falls within the definition of a given international crime. If the conduct is across state boundaries and takes place in another state, then ICL applies, as well as the domestic criminal law of the state wherein the conduct occurred or the state whose nationals have been victimized or the state whose nationals have committed the crime. Universal jurisdiction also applies to certain international crimes, but few states presently have legislation that allows a state to exercise this form of jurisdiction. No state, however, has legislation that can be described as pure universal jurisdiction, meaning that no link to the prosecuting state is required.

The absence of adequate legal norms and their effective and consistent enforcement gives rise to two basic questions. The first is how domestic and international law legislatively address crimes of state. The second is how effective is the enforcement of these applicable norms. In turn, these two questions raise additional questions, such as

1. How to fill the gaps that exist in domestic criminal laws and in international laws;
2. How to address the overlaps that exist between domestic and international laws;
3. How to reconcile the multiplicity of international legal regimes, and their sub-regimes which apply to the same protected interest;
4. How to assess the effectiveness of coercive enforcement capabilities of the domestic and international law regimes; and
5. How to develop noncoercive compliance-inducing legal and social mechanisms.

<sup>90</sup> Press Release, Special Court for Sierra Leone Office of the Prosecutor, Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court, (Mar. 29, 2006), available at <http://www.sc-sl.org/Press/prosecutor-032906.pdf> (last visited Dec. 6, 2009).

<sup>91</sup> A. Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 249 (1999).

<sup>92</sup> Chad confirms former president Habré's conviction, Agence France Presse, Aug. 19, 2008, available at <http://afp.google.com/article/ALeqM5jRB8NagF4CYAzVwngJZzPdkgKFw>. Documents on the Habré Case can be found at <http://www.hrw.org/justice/habre>; see also *infra* ch. 9 §3.4.2.

<sup>93</sup> Press Release, International Criminal Court, ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur, ICC-OTP-20080714-PR341-ENG (July 14, 2008).

The aggregate effect of these questions raises the ultimate question of the limits of social and legal controls in the prevention of mass atrocity crimes, particularly in the face of *Realpolitik*'s manipulation of these processes, particularly because of their inherent limitations. Those who are inclined to moralist solutions tend toward reinforcing internalized individual controls and inhibiting factors likely to prevent individual involvement in crimes of violence. But as stated here, virtue has its limits, which are lost in the frenzy of collective violence, and this approach largely ignores bystanders who may do nothing in the face of mass atrocities.<sup>94</sup>

The more effective approach is a comprehensive strategic approach that combines these personal, internalized controls with a wide array of external, social, and legal controls deriving from both international and domestic measures, including what is presently advocated as the international Responsibility to Protect, which includes external intervention by force when needed.<sup>95</sup>

### §2.2.1. ICL Considerations

ICL comes closest to addressing crimes of state, though not by that name. The crimes in question are aggression,<sup>96</sup> genocide,<sup>97</sup> CAH,<sup>98</sup> and torture.<sup>99</sup> Other international crimes may also fall within that meaning if committed by state-actors and others in furtherance of a state plan or policy. These crimes include war crimes, slavery and slave-related practices, and a variety of "terrorism" of distinct prohibitions (airplane hijacking, kidnapping of diplomats, taking of hostages, piracy and certain types of violent crimes aboard ships, use of explosives, and theft and attack upon nuclear materials and facilities).<sup>100</sup> Careful consideration of these international crimes, however, reveals how *Realpolitik* manipulates them for the benefit of the state and state actors. Following are some examples:

Aggression is not defined in any international treaty that criminalizes its commission, and it does not extend to neo-imperial forms of foreign domination and exploitation. Genocide is limited to "national, ethnic, or religious" groups, thus excluding social and political groups, and there has to be a specific intent "to destroy the group in whole or in part," which is a very high legal standard to prove. CAH, as articulated in the preceding Chapter, requires proof of a state policy, and it does not extend to nonstate actors.

<sup>94</sup> "I am very much drawn to the idea that the guilt of the German nation as a whole should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime." Fletcher, *supra* note 22, at 1539.

<sup>95</sup> David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 111, 112 (2007).

<sup>96</sup> See M. Cherif Bassiouni and Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 207 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>97</sup> Schabas, *supra* note 20.

<sup>98</sup> M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d rev. ed. 1999); M. Cherif Bassiouni, *Crimes Against Humanity*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 437 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>99</sup> THE U.N. CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (J. Herman Burgers and Hans Danelius eds., 1988).

<sup>100</sup> See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, ch. 3 (1998) (discussing international crimes).

War crimes will depend on which legal subregime applies, since there is one regime concerning conflicts of an international character and another concerning conflicts of a noninternational character, the latter being weaker and offering no inducement for compliance to belligerents who are not granted POW status (instead, they are to be treated as common criminals under domestic criminal laws for performing the very same acts that their counterpart state actors engage in). Moreover, neither conventional nor customary international humanitarian law applies to purely domestic conflicts; thus, the commission of crimes of state in these contexts is beyond the reach of the law. Torture is limited to its use by state actors seeking to extract a confession or statement from a victim and does not, therefore, extend to the sole infliction of harm. Terrorism is not comprehensively defined in any given treaty and does not include acts of state. It is compartmentalized by a series of twelve conventions essentially applicable to nonstate actors.<sup>101</sup>

More importantly, the piecemeal approach of ICL allows for significant normative and enforcement gaps. For example, there are very few manifestations of environmental harm that are criminalized. Although there are crimes to protect endangered species that apply to individuals, more harmful state conduct, such as global warming and the dumping of hazardous waste, remains outside the sphere of international criminalization. ICL also provides no mechanism for bystander participation. Although the ICC has initiated more involvement in the criminal process for victims of international crimes, bystanders are largely absent from the process and therefore cannot provide insight into their inaction.

ICL criminalizes certain international human right violations, but not every violation of human rights is criminalized, even when that violation constitutes a crime under the domestic laws of every country in the world. This is the case for murder, which is criminalized in every country of the world but which does not, in and of itself, constitute an international crime. It is only when the mass killing of persons is committed on a “widespread or systematic” basis that it will constitute CAH.<sup>102</sup> Even so, there is a legal requirement that a link be established between the conduct in question and a state policy directing that conduct against a given civilian population.

ICL has, since the end of World War I, sought to criminalize individual conduct for certain crimes committed by state actors that are the product of state action or state policy. This includes crimes against peace (now the crime of aggression),<sup>103</sup> which are not necessarily the product of state action or state policy, CAH, and war crimes. All three crimes were included in the London Charter,<sup>104</sup> as well as under the Statute of the IMTFE.<sup>105</sup> Even though the crime of aggression and CAH are among the quintessential

<sup>101</sup> INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS (M. Cherif Bassiouni ed., 2002); LEGAL RESPONSES TO INTERNATIONAL TERRORISM (M. Cherif Bassiouni ed., 1988); LEGAL ASPECTS OF INTERNATIONAL TERRORISM (Alona E. Evans and John F. Murphy eds., 1978).

<sup>102</sup> Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73 (2004).

<sup>103</sup> Bassiouni and Ferencz, *supra* note 95.

<sup>104</sup> Charter of the International Military Tribunal at Nuremberg art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>105</sup> Charter for the International Military Tribunal for the Far East art. 5(a), *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 Bevans 27.



crimes of state, they have not, for political reasons, been included in an international convention.<sup>106</sup> Aggression has also not been the subject of any prosecution since both the IMT and IMTFE.

Since the end of World War II, ICL has added genocide,<sup>107</sup> *Apartheid*,<sup>108</sup> and torture<sup>109</sup> to the category of crimes of state. The elements of all three crimes require state actors to perform the conduct at issue as part of state action or reflecting state policy. All international crimes, however, address only individuals and not state criminal responsibility.<sup>110</sup> Individual criminal responsibility also exists for the perpetrators of the international crimes mentioned under the concept of *jus cogens*.<sup>111</sup>

Genocide and CAH, which require the element of state policy or state action as discussed in Chapter 1, are contained in the statutes of several international tribunals established between 1993 and 1998, namely the ICTY,<sup>112</sup> the ICTR,<sup>113</sup> the ICC,<sup>114</sup> and, the mixed-model tribunals: the Special Court for Sierra Leone,<sup>115</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>116</sup> the Special Panels of the Dili District Court for

<sup>106</sup> M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

<sup>107</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. II, 78 U.N.T.S. 277 (Dec. 9, 1948); Schabas, *supra* note 20; Drost, *supra* note 20.

<sup>108</sup> Convention on Apartheid, art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243; Roger S. Clark, *Apartheid*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 599 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>109</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46 (10 Dec. 1984), *opened for signature* 4 Feb. 1985, 23 I.L.M. 1027, 24 I.L.M. 535; Daniel H. Derby, *The International Prohibition of Torture*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 621 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); MANFRED NOWAK AND ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY (2008).

<sup>110</sup> See BASSIOUNI, INTRODUCTION TO ICL, *supra* note 99, at ch. 2.

<sup>111</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, *supra* note 82.

<sup>112</sup> Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1–2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159; M. CHERIF BASSIOUNI, (WITH THE COLLABORATION OF PETER MANIKAS), THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996); VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2 vols. 1995).

<sup>113</sup> Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994); VIRGINIA MORRIS AND MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998).

<sup>114</sup> The Rome Statute of the International Criminal Court (ICC), 17 July 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998); M. CHERIF BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT (M. Cherif Bassiouni ed., 2005); M. CHERIF BASSIOUNI, 2 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE FROM 1994–1998 (M. Cherif Bassiouni ed., 2005); M. CHERIF BASSIOUNI, 3 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: THE 1988 DIPLOMATIC CONFERENCE (M. Cherif Bassiouni ed., 2005).

<sup>115</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *available at* <http://www.sc-sl.org/Documents/scsl-agreement.html>. The Statute was endorsed through S.C. Res. 1400, U.N. Doc. S/RES/1400, ¶ 9 (Mar. 28, 2002); WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE (2006).

<sup>116</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, NS/RKM/1004/006 (with inclusion of amendments as promulgated on 27 October 2004).

Timor-Leste,<sup>117</sup> and the Serbian War Crimes Tribunal.<sup>118</sup> War crimes<sup>119</sup> are also included in these statutes, but they do not require state policy or state action because individuals acting alone can commit them. However, they can be the product of state policy or state action. Aggression is not criminalized under these statutes. The ICC is in the process of debating the definition of aggression to be included in the Rome Statute.<sup>120</sup>

There is no norm under ICL that embodies the principle of state criminal responsibility, even though it was applied to Germany and Turkey after World War I. It derived from the historic concept of “reparations,” which arose from the historic practices of exactions imposed upon the defeated.<sup>121</sup> This concept was rejected after World War II in favor of individual criminal responsibility. The new approach was premised on the belief that any form of collective criminal responsibility is inherently unjust, because it does not distinguish between those who are deemed responsible and those who are not. Aside from this basic assumption, no studies were developed on the possible deterrent and preventive impact of collective criminal responsibility on the future conduct of collectives, which are part of the international community.<sup>122</sup>

### §2.2.2. International Human Rights Law<sup>123</sup>

The international human rights law regime provides only certain administrative and civil remedies. Whenever the state conduct is deemed “wrongful conduct,”<sup>124</sup> it is actionable by one state against another. It does not, however, give rise to functions other than damages. It does not provide for state criminal sanctions against the state or the collectivity that engages in such conduct. The European human rights system provides direct access to justice by individuals against states,<sup>125</sup> but the remedy is only monetary. The Inter-American regional human rights system is a close follow-up,<sup>126</sup> which has made much progress but is yet to have reached its European counterpart. In part, this is due to U.S. nonparticipation. The African human rights system is barely nascent.<sup>127</sup> However, none of these regimes have effective enforcement mechanisms. Compliance with these regimes remains at the discretion of states.

<sup>117</sup> Regulation 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (entered into force March 6, 2000) *as amended by* Regulation 2000/14 UNTAET/REG/2000/11 (entered into force May 10, 2000).

<sup>118</sup> UNMIK Regulation 1999/1, on the Authority of the Interim Administration in Kosovo (July 25, 1999).

<sup>119</sup> See BASSIUNI, *MANUAL*, *supra* note 8; K. DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY* (2003).

<sup>120</sup> Bassiuni and Ferencz, *supra* note 95.

<sup>121</sup> See *Principles on State Responsibility*, Report of the International Law Commission on the work of its fifty-third session, 23 April–1 June and 2 July–10 August 2001, U.N. Doc. GAOR A/56/10 (2001).

<sup>122</sup> GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2003); *INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY* (Joseph H.H. Weiler, Antonio Cassese and Marina Spinedi ed., 1989).

<sup>123</sup> See *infra* ch. 4, Part A, §6.8.

<sup>124</sup> IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* (1983).

<sup>125</sup> European Convention on Human Rights art. 7(1), Nov. 4, 1950, EUR. TS. Nos. 5, 213 U.N.T.S. 221.

<sup>126</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. A/16.

<sup>127</sup> African Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), *reprinted in* 21 I.L.M. 58 (1982).



### §3. The Enforcement Gap

The greatest manifestations of crimes of state remain, as they have been throughout history, the despotism of domestic power-holders over the vast majority of the populations they control and the exercise of power and hegemony, be it military or economic, by stronger states over weaker ones.

Killings, slavery, torture, deprivation of civil, economic, political, and cultural rights, and other forms of oppression and exploitation, whether at the domestic or international level, are all on the same continuum, when they are the product of state policy or action. For all practical purposes, these and other similar state actions benefit from a combined normative and enforcement gap at both the domestic and international levels, which creates a window of opportunity for the commission of atrocity crimes and other crimes. Although international, mixed-model, and national prosecutions for atrocity crimes have been on the rise, and states have shown an increased willingness to pursue domestic prosecutions for international crimes, the result is too often impunity for the perpetrators of these crimes. Moreover, the cynicism of the international community's prevailing *Realpolitik* approach is exemplified by the false dichotomy of peace versus justice.<sup>128</sup> This translates into offering immunity and amnesty in exchange for the cessation of violence.

Prosecution of international crimes necessarily means that choices must be made as to which offender to pursue, but the decision to not prosecute at all carries greater consequences. The result is the triumph of impunity over accountability. What this approach achieves is to induce conflicts to escalate until they reach a level where it can be argued that offering immunity to the leader and amnesty to the followers is wiser than insisting on accountability.<sup>129</sup> The cynicism of this argument derives from the fact that, had it not been for the failure of major states to intervene, these situations would not have occurred in the first place.

It should be noted, however, that in states that have achieved a certain level of democratization secured by the rule of law, the manifestations of state abuses of power are circumscribed. Such abuses are either reduced or eliminated. In the majority of the world's 198 states, however, this is not the case, as is evidenced by the level of CAH in failed states. The number of these states has, for the past few decades, been almost permanently at the level of forty states.<sup>130</sup> They are known, as are the conditions that are likely to drive them toward mass atrocities. Yet even in cases relatively easy to address by collective external intervention, as in Somalia, the world stands immobile. One has only to consider the self-imposed powerlessness of the world's major navies in the face of a few pirates riding powerboats, armed with a few old rocket launchers and Kalashnikovs.<sup>131</sup>

There is an apocryphal story reported to have occurred in 1939, when Hitler visited the frontlines of his troops about to invade Czechoslovakia. There he is said to have

<sup>128</sup> Bassiouni, *The Perennial Conflict*, *supra* note 5; Bassiouni, *Combating Impunity*, *supra* note 5.

<sup>129</sup> Aukerman, *supra* note 27, at 71, 82; RUTI TEITEL, *TRANSITIONAL JUSTICE* (2008); Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

<sup>130</sup> THE INTERNATIONAL INSTITUTE OF STRATEGIC STUDIES: 2000 CHART OF ARMED CONFLICT (2000); *see also*, Jennifer L. Balint, *An Empirical Study of Conflict, Conflict Victimization and Legal Redress*, 14 NOUVELLES ÉTUDES PÉNALES 101 (Christopher C. Joyner special ed. and M. Cherif Bassiouni, general ed. 1998).

<sup>131</sup> Zou Keyuan, *New Developments in the International Law of Piracy*, 8 CHINESE J. INT'L L. 323 (2009).

gathered his generals, many of whom were reluctant to invade a peaceful neighboring country. Hitler is reported to have said the following to quiet their concerns: “And who now remembers the Armenians?”<sup>132</sup> Even if untrue, it is a valuable reminder that norms on crimes of state and their enforcement have some general prevention, but whenever norms are not comprehensive or have escape hatches, and whenever their enforcement is periodic, symbolic, or selective, the preventive effect is sharply attenuated.<sup>133</sup>

In some instances, effective and selective prosecutions have proven how, in a perverse way, they accomplish the opposite result of what is intended by the form of justice, allowing states to put their past behind them and hand their collective responsibility on to the few token guilty ones who were prosecuted.<sup>134</sup> After World War II, Austria conducted a few prosecutions, but, having declared itself the first victim of Nazism, it was able to put its past behind it as of the mid-1950s. The United States conducted the prosecution for the infamous Mathausen concentration camp, which was in Austria, as were others. Italy did not address the crimes of its fascist leaders or their military action overseas. Only a year ago, Italy signed a compensation agreement with Libya, but the funds will go to Italian companies doing development projects there. Italy pursued a few token prosecutions for German military personnel, like the *Priebke* case, in the last thirty years, for crimes committed in occupied Italy between 1943 and 1945. Thousand of Italian military and civilians were killed by Germany, yet the Italian authorities did not pursue any action, except for opening a number of investigatory files by military prosecutors, which remained closed or not acted upon to date. The CAH committed by the Vichy regime in France government, such as the deportation of French Jews for slave labor in Germany and handing escaped Jews from German-controlled territory back to Germany to be killed or sent to slave-labor camps, resulted in only three major prosecutions between the 1960s and the 1980s – the cases of *Barbie*, *Touvier*, and *Papon*.<sup>135</sup> With that the record was closed. Seeming selective enforcement of the law leads to accusations among civilian populations that the law is used for political ends rather than in the pursuit of justice.

The serious effort to address crimes of state must also close the loophole that allows states to engage in the deceptive game of holding some token aspects of postconflict justice modalities, such as domestic prosecutions and truth commissions, only to justify issuing general and indiscriminate amnesties (or something similar), and then conveniently absolve themselves from all past responsibility. The French Vichy government’s slate was wiped clean with three prosecutions some twenty to thirty years after the fact (there were, however, many prosecutions between 1945 and 1955) for “collaboration” with the Nazi occupiers, but they had nothing to do with international crimes and “crimes of state.” Italy wiped its slate clean after signing the 1945 Armistice Agreement and the prosecution on false grounds of the scapegoat General Bellomo. Since then, it has done nothing about its fascist past and alliance with Nazi Germany. Spain, for years, did not address its Franco regime past on the grounds that Franco himself made the transition to democracy possible. A truth commission has recently been established, and with the

<sup>132</sup> Dadrian, German Responsibility, *supra* note 32.

<sup>133</sup> For a discussion of prevention see Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005).

<sup>134</sup> ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME (2005). For a look at East German practices, see Peter E. Quint, *The Border Guard Trials and the East German Past – Seven Arguments*, 48 AM. J. COMP. L. 541 (2000).

<sup>135</sup> For more detail and full citations to these cases, see *infra* ch. 9, §3.2.4.

issuance of its report and a few measures to be implemented, that slate too will be cleaned. In Latin America, Argentina, Chile, Peru, and Uruguay are still engaged in the long struggle to prosecute the crimes of their bloody pasts under military rule. These continents are responsible for the most recent developments in national prosecutions for CAH.

To revisit Hitler's quip: How many today remember the one million Ibo killed in Nigeria in the 1960s, the one million Bangladeshi killed in the 1970s, and at least one million Khmer killed in Cambodia between the 1970s and 1980s? And who even knows of the estimated 3 million killed in the DRC in the last five years? Who will remember in a few years the 800,000 killed in Rwanda and the 500,000 killed in Liberia and Sierra Leone? The list is tragically long, and the memory of what happened in a given generation may survive for one or two succeeding generation, but it is then lost to the future. To paraphrase George Santayana, the forgotten lessons of the past are what make possible repeating the same mistakes.<sup>136</sup> Chapter 9 assesses the progress made in national prosecutions and the development of national legislation.

## Conclusion

Two observations merit consideration with respect to contemporary manifestations of crimes of state. The first is the reduction in violent power takeovers in states and a reduction of situations in which tyrannical rulers who abuse power and victimize their societies have been able to cling to power for as long as they have in certain countries. Whether the overall consequences of regime victimization may have been reduced in the coming decades is speculative at best. What is certain is that international political, economic, and military intervention is needed to deter and stop these types of crimes. This is why the Responsibility to Protect is so important.<sup>137</sup>

The second observation is that political realism is reasserting itself in this era of globalization. States and multinational corporations, whose goals and policies are characterized by the pursuits of power and wealth over the values of human, social, and economic justice, are reacquiring a predominant position in international affairs. The present tendency is marked by an abandonment of the ideals of universal justice that emerged during the age of enlightenment. These ideals would compel the search for redressing imbalances of power and wealth, instead of accepting them as the natural order of things. As a consequence, the focus of states has shifted from trying to strengthen commonly shared values as a factor that unites peoples of the world, accepting that which divides peoples of the world as part of the natural order of things. Accepting disparities in power and wealth between states eliminates the value of universal social solidarity that would require sharing of wealth, reducing power disparities, and eliminating exceptionalism

<sup>136</sup> An effective comprehensive strategy must include education at the general level and starting at the pre-high school level, as well as in every aspect of relevant professional studies and professional training (i.e., law enforcement and the military; and certainly in legal education as well as specialized training for lawyers, prosecutors and judges).

<sup>137</sup> 2005 World Summit Outcome, U.N. GAOR, 60th Sess., U.N. Doc. A/60/L.1, ¶¶ 138–139 (Sept. 15, 2005); Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, *supra* note 94; GARETH J. EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* (2009); ALEX J. BELLAMY, *RESPONSIBILITY TO PROTECT* (2009); RICHARD H. COOPER AND JULIETTE VOINOV KOHLER, *RESPONSIBILITY TO PROTECT: THE GLOBAL COMPACT FOR THE 21ST CENTURY* (2009); JAMES PATTISON, *HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE?* (2010).

for the mighty. The consequences of this new paradigm shift includes accepting power outcomes instead of legitimacy outcomes, placing order above justice, and confirming the primacy of power and wealth over the values of universal justice.

Any question of legitimacy necessarily involves a dichotomy between ends and means. Modern terrorism raises the question of whether both the ends and means must be legitimate, or if not, which of the two takes precedence over the other. In addition, if legitimate means are used, does it matter if illegitimate ends are sought? There is some general consensus in the international community that certain means are deemed to be unlawful. Arguments that center on justifying means because of legitimate ends are more self-serving than anything else. Certain victims are also deemed off limits to attack. The international community has not been consistent in applying these norms to both state and nonstate actors.<sup>138</sup>

In a perverse sense, the law, which has yet to catch-up with crimes of state when committed by state actors is already lagging behind the needs of addressing the same manifestations of aberrant social behavior when committed by nonstate actors. There are few indicators that ICL's future development will address the issues of state and collective responsibility, both criminal and civil, and the inclusion of nonstate actors in a parallel category to state actors for purposes of individual and group criminal responsibility. But that may well be wishful thinking.

Atrocity crimes are not inevitable. They are preventable, though not entirely or at all times, and their harmful consequences can be limited. This can be accomplished by the international community's adoption of the concept of Responsibility to Protect<sup>139</sup> and by undertaking, *inter alia*, the following measures:

1. Establishing at the level of the United Nations and other International Governmental Organizations (IGOs) early warning systems and maintaining a database on post-conflict justice, their causes, and consequences;
2. Institutionalizing preventative diplomacy;
3. Developing assistance programs to enhance national capacity-building to observe and enforce the Rule of Law;
4. Addressing human rights grievances at the IGO level before they erupt in conflicts;
5. Providing and enforcing credible sanctions as a means of prevention and control of violent social interactions by the Security Council, IGOs, and responsible states;
6. Developing, at the IGO level, effective crisis management techniques, including monitoring systems of impending and actual conflicts; and
7. Providing economic and other forms of assistance to failed states and states on the verge of becoming failed states by IGOs and responsible states.

Recent developments in the area of international criminal justice, such as the establishment of the ICTY,<sup>140</sup> ICTR,<sup>141</sup> ICC,<sup>142</sup> and mixed-model tribunals for Cambodia, Sierra-Leone, Timor-Leste, and Kosovo are a sure sign of progress.<sup>143</sup> However, they have

<sup>138</sup> M. Cherif Bassiouni, "Terrorism": *Reflections on Legitimacy and Policy Considerations*, in *VALUES & VIOLENCE: INTANGIBLE ACTS OF TERRORISM* 219–20 (Wayne McCormack ed. 2008).

<sup>139</sup> See *supra* note 37 and Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, *supra* note 95.

<sup>140</sup> See *supra* note 112.

<sup>141</sup> See *supra* note 113.

<sup>142</sup> See *supra* note 114.

<sup>143</sup> See *supra* notes 115–121.

yet to produce a deterring effect on widespread transgressions against basic human rights and on atrocity crimes.<sup>144</sup> Deterrence is limited among those acting under the authority of the state or nonstate actors operating under the belief that apprehension is unlikely. Even the internalization of international norms, such as the Geneva Convention, is no guarantee that the norms will not be violated.<sup>145</sup>

International criminal justice is still a work in progress. Suffice it to recall that, during the very short period in which international criminal justice received its contemporary start-up in 1992, when the Security Council established the Commission of Experts to Investigate Violations of International Humanitarian Law in the Former Yugoslavia (which was the first action-oriented decision of the U.N. since the post-World War II prosecutions), the international community has witnessed many tragedies with a large-scale level of human victimization (as described above, between 92 and 101 million victims). These crimes continue, as in the recent cases of Darfur (Sudan) and the Democratic Republic of Congo. Crimes of state in these and other areas of the world are alive and well. The promise of accountability, notwithstanding the ICTY, ICTR, mixed-model tribunals, and the ICC, is yet to be redeemed by the international community, however.<sup>146</sup> Only 867 international prosecutions have taken place since post-World War II from a pool of perpetrators that is minimally estimated at 1 million, who killed an estimated 92 million persons.

The post-World War II promise of “never again” is far from having been redeemed. Will it ever be redeemed? This question has periodically been posited during the ages after cataclysmic warring events. The end of the Napoleonic wars brought about such a question, as did World War I. Each of these devastating wars brought about the same questions. In her celebrated song, “Where Have All the Flowers Gone,”<sup>147</sup> Joan Baez’s words echo vividly: “When will they ever learn?”

<sup>144</sup> David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 *FORDHAM INT’L L.J.* 473, 477 (1999); see also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 *AM. J. INT’L L.* 7, 30 (2001).

<sup>145</sup> *Id.* at 487 (referring to Canadian soldiers in Somalia and U.S. soldiers during the Korean War). A more contemporary example would be that of the crimes committed during the Iraq War at Abu Gharib.

<sup>146</sup> M. Cherif Bassiouni, *Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, 59 *LAW & CONTEMP. PROBS.* (M. Cherif Bassiouni, special ed., 1996).

<sup>147</sup> The reference is to a folk song written by Pete Seeger and Joe Hickerson (1961).

### 3 Emergence in Positive International Law

There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things.

– MACHIAVELLI, *THE PRINCE* (1537).

#### §1. Early History

The genesis of CAH is in the Preambles of the First Hague Convention of 1899 on the Laws and Customs of War and expanded in the Fourth Hague Convention of 1907 and in their annexed Regulations Respecting the Laws and Customs of War on Land. The Preambles of the two conventions used the term “laws of humanity” and based their prescriptions on these inarticulated humanistic values.<sup>1</sup>

Until 1945 the words used in the Preambles of the two Hague Conventions were the only references in conventional international law from which to draw on in formulating

<sup>1</sup> These values permeate a number of other conventions elaborated at around that same period of time: Convention for the Peaceful Adjustment of International Disputes (First Hague, I), The Hague, July 29, 1899, 26 Martens (2d) 920, 32 Stat. 1779, T.S. No. 392, *reprinted in* 1 AM. J. INT’L L. 107 (1907); 1899 Hague Convention; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of Aug. 22, 1864 (First Hague, III), signed at The Hague, July 29, 1899, 26 Martens (2d) 979, 32 Stat. 1827, T.S. No. 396, *reprinted in* 1 AM. J. INT’L L. 159 (1907); Declaration Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature (First Hague, IV, 1), signed at The Hague, July 29, 1899, 26 Martens (2d) 994, 32 Stat. 1839, T.S. No. 393, *reprinted in* 1 AM. J. INT’L L. 153 (1907); Declaration Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases (First Hague, IV, 2), signed at The Hague, July 29, 1899, 26 Martens (2d) 998, 187 Parry’s 453, *reprinted in* 1 AM. J. INT’L L. 157 (1907); Declaration Concerning the Prohibition of the Use of Expanding Bullets (First Hague, IV, 3), signed at The Hague, July 29, 1899, 26 Martens (2d) 1002, 187 Parry’s 459, *reprinted in* 1 AM. J. INT’L L. 155 (1907) (Supp.); Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, preamble, 36 Stat. 2277, T.S. No. 539, 3 Martens Nouveau Recueil (ser.3) 461, *reprinted in* 2 AM. J. INT’L L. 90 (1908) (Supp.), 1 FRIEDMAN 308, 1 BEVANS 631, 632 [hereinafter 1907 Hague Convention]. The 1907 Hague Convention provides that:

the inhabitants and the belligerents shall remain under the protection and the rule of principles of the laws of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the dictates of the public conscience.

1907 Hague Convention pmb., *supra* 1 (emphasis added). The preamble of the 1899 Hague Convention is similarly phrased.

the term “crimes against humanity.”<sup>2</sup> Though the Hague Conventions concerned war crimes in a very specific sense, these crimes derived from the larger meaning of violations of “the laws of humanity.”<sup>3</sup> Thus, these words were intended to provide an overarching concept to protect against unspecified violations whose identification in positive international law was left to future normative development.

As the predecessor to the 1907 Hague Convention, the 1899 Hague Convention was the first comprehensive international instrument to develop rules derived from the customary practices of states in time of war.<sup>4</sup> At the time, it went even further when it stated that in cases not covered by specific regulations:

*populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.*<sup>5</sup>

The basis for such protection of the principles of international law was then reinforced and expanded in the Preamble to the 1907 Hague Convention which states:

*It has not been found possible at present to concert regulations covering all the circumstances which arise in practice.*

*On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.*

*Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*<sup>6</sup>

<sup>2</sup> It should be noted that the humanistic conception of humanity originated in Greek philosophy in the fifth century B.C.E., but that it has been supplanted by the concept of humanitarianism, which is reflected in post-World War II international humanitarian law. The two concepts are also different from the contemporary philosophical underpinnings of international human rights law. For a contemporary perspective based on a human rights approach that argues for prosecuting CAH.

<sup>3</sup> See Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 180 (1946). Professor Schwelb's article is probably the most reliable scholarly article on the IMT's Charter Article 6(c), which was the first definition of CAH in positive international law. See EUGÈNE ARONÉANU, *LE CRIME CONTRE L'HUMANITÉ* (1961), where the author espouses a human rights theory for CAH. For a philosophical approach, see David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004); see also SÉVANE GARIBIAN, *LE CRIME CONTRE L'HUMANITÉ AU REGARD DES PRINCIPES FONDATEURS DE L'ÉTAT MODERNE* (2009); LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* (2004); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (1999).

<sup>4</sup> The 1874 Declaration of Brussels also developed rules derived from the customary laws of war, but it never entered into force. Project of an International Declaration Concerning the Laws and Customs of War (Declaration of Brussels) [Brussels Conference on the Laws and Customs of War, No. 18], adopted at Brussels, Aug. 27, 1874, 4 Martens (2d) 219 and 226, 148 Parry's 133, *reprinted in* 1 AM. J. INT'L L. 96 (1907) (Supp.).

<sup>5</sup> 1899 Hague Convention pmbl, *supra* note 1 (emphasis added).

<sup>6</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land pmbl, The Hague, 18 October 1907 [hereinafter Hague IV] (emphasis added).



This language embodies the well-known Martens clause<sup>7</sup> that permits the resort to “general principles” as a means of interpreting provisions in international instruments and to fill gaps in conventional textual language.<sup>8</sup>

The extension of the general principle contained in Preamble of the 1899 and 1907 Conventions is reflected in Article 22 of the Hague Regulations in the 1899 and 1907 Conventions, which provides for another general norm that “*the right of belligerents to adopt means of injuring the enemy is not unlimited.*”<sup>9</sup>

CAH was first used as the label for a category of international crimes in 1915. The governments of France, Great Britain, and Russia issued a joint declaration on May 28, 1915, denouncing the Turkish government’s massacre of the Armenian population in Turkey as constituting “crimes against civilization and humanity,” for which all members of the Turkish government would be held responsible, together with its agents implicated in the massacres.<sup>10</sup> Nothing came out of this pronouncement. Four years later, the

<sup>7</sup> The Martens Clause is named after Fyodor Martens, the Russian diplomat and jurist who drafted it. A similar formula appears in each of the 1949 Geneva Conventions and in the 1977 Protocols. See First Geneva Convention of 1949 at art. 63(4); Second Geneva Convention of 1949 at art. 62(4); Third Geneva Convention of 1949 at art. 142(4); Fourth Geneva Convention of 1949 at art. 158(4); Protocol I at art. 1(2); Protocol II at pmbl. PAOLO BENVENUTI, *La Clausola Martens e la Tradizione Classica del Diritto Naturale nella Codificazione dei Conflitti Armati*, in SCRITTI DEGLI ALLIEVI IN MEMORIA DI GIUSEPPE BARILE 173 (1995).

<sup>8</sup> See M. Cherif Bassiouni, *A Functional Approach to A General Principles of International Law*, 11 MICH. J. INT’L L. 768 (1990). The same formulation of the Hague Conventions has been used in the latest international instrument on the humanitarian law of armed conflicts, Protocol I states:

*In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.*

1997 Geneva Protocol I, at art. 1 (emphasis added). See also Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT’L L. & POL’Y 117 (1986).

<sup>9</sup> Article 35(1) of Protocol I parallels the Hague Conventions’ general norm on the implicit limitation on the “methods” of war. That article states “*in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited*” (emphasis added).

<sup>10</sup> This statement is quoted in the Armenian Memorandum presented by the Greek delegation to the 1919 Commission on Mar. 14, 1919, as reproduced in Schwelb, *supra* note 2 at 178, 181. See also JAMES BRYCE & ARNOLD TOYNBEE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE* (2000); JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* 27 (1982), citing HENRY MORGENTHAU, *AMBASSADOR MORGENTHAU’S STORY* 359 (1918).

See also Vahakn Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT’L L. 221 (1989).

VAHAKN DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* (1995); VAHAKN N. DADRIAN, *GERMAN RESPONSIBILITY IN THE ARMENIAN GENOCIDE: A REVIEW OF THE HISTORICAL EVIDENCE OF GERMAN COMPLICITY* (1996). The succeeding governments in Turkey, since 1919, have denied that there was a policy to exterminate the Armenians. However, there was a policy of discrimination against the Armenians that resulted in estimates ranging from 200,000 to 800,000 Armenians killed, including a large number of displaced Armenians and significant loss of property. There was never a full-fledged independent assessment of what happened in 1915 and the number of casualties. The result has been a constant debate between Armenians and Turks as to what happened, how it happened, and what the consequences have been. To date, this dispute has not been settled. A retired Turkish military judge recently published an article arguing that Turkish massacres of Armenians began as long ago as the period between 1843 and 1908, followed by another period of massacres, ethnic cleansing, and forced relocations. New forced relocations began again in 1915 only this time they included all Christians in eastern Anatolia and the specified destinations were uninhabitable. Most people, including women and children, however, died



Treaty of Versailles, which reflected these major Allies' will, did not include such a crime, although it contained provisions for prosecuting German military personnel for war crimes (Article 228), excluding what the 1919 *Report of the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War* termed "crimes against civilization and humanity."<sup>11</sup>

The exclusion of "crimes against civilization and humanity" was essentially due to the United States' position that the legal content of "the laws of humanity" could not be defined because it was based on natural law, which was not part of international law.<sup>12</sup> Japan supported the position of the United States, and both countries, which were members of the Commission, dissented from the Final Report of the Commission. Nevertheless, the Final Report repeatedly used such words as "laws of humanity," "offences against the laws of humanity," and "breach of the laws of humanity."<sup>13</sup> The Commission, whose participating states were the United States, the United Kingdom, France, Italy,

on the way and were subject to rape and kidnappings. They were denied food, water, and shelter. See, e.g., Ümit Kardaş, *Do we have to defend the actions of the Committee of Union and Progress?*, TODAY'S ZAMAN, May 2, 2010.

The Turkish position has been that in 1915 the Armenians collaborated with the Russians at a time when Turkey and Russia were at war. While this is not a justification for the large-scale killing of Armenians both by Turkish officials and by the Turkish population, it is an important contextual fact to be taken into account when assessing what clearly appears to fall in the category of CAH, which in 1919 was referred to as "crimes against the laws of humanity." No prosecutions were pursued after World War I for reasons discussed above. See also Gary Bass, *Stay the Hand of Vengeance*.

<sup>11</sup> Treaty of Versailles, arts. 228–30, as well as the Treaty of Peace Between the Allied and Associated Powers and Austria (Treaty of St. Germain-en-Laye) arts. 118–120, Sept. 10, 1919, 11 Martens (3d) 691, 226 Parry's 8, *reprinted in* 14 AM. J. INT'L L. 1 (1920); Treaty of Peace Between the Allied and Associated Powers and Bulgaria (Treaty of Neuilly-sur-Seine), Nov. 27, 1919, 226 Parry's 332, *reprinted in* 14 AM. J. INT'L L. 185 (1920). The phrase "laws of humanity" does not appear in those treaties, which dealt only with acts committed in violation of the laws and customs of war. However, the Treaty of Sèvres, signed on Aug. 10, 1920, *infra* note 27, contained, in addition to the provisions of its arts. 226–28, which corresponded to arts. 228–30 of the Treaty of Versailles and art. 229 that regulated the position of the territories that ceased to be parts of the Turkish Empire, art. 230, which states:

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August 1914.

The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such Tribunal. In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such Tribunal, and the Turkish Government undertakes equally to recognize such Tribunal.

This is in conformity with the Allied note of 1919, *supra* note 10 and accompanying text, expressing their intent to bring justice to persons who, during the war, had committed on Turkish territory crimes against persons of Turkish citizenship of Armenian or Greek ethnic background, a clear example of CAH as understood in the 1945 Charter. The Treaty of Sèvres, however, was not ratified and did not come into force; it was replaced by the Treaty of Lausanne, *infra* note 38, which did not contain provisions respecting the punishment of war crimes, but was accompanied by a "Declaration of Amnesty" for all offenses committed between 1914 and 1922.

<sup>12</sup> See Schwelb, *supra* note 2, at 182.

<sup>13</sup> See *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* 83 (Carnegie Endowment for International Peace,

Belgium, Greece, Poland, Romania, Serbia, and Japan, concluded unanimously that “[t]he war [...] carried on by the Central Empires together with their allies, Turkey and Bulgaria was conducted by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity.”<sup>14</sup> Regarding individual criminal responsibility, the Commission concluded that:

[A]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of State, who have been guilty of offences against the laws and customs of war or *the laws of humanity*, are liable to criminal prosecution.<sup>15</sup>

The Commission also concluded that such individual criminal responsibility had no ceiling on rank or position: “[T]he degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.”<sup>16</sup>

To prosecute war criminals for their offenses, the Commission called for the establishment of a High Tribunal. The Commission also identified “[t]wo classes of culpable acts”<sup>17</sup> for which the Tribunal could try accused war criminals:

- (a) Acts that provoked the world war and accompanied its inception.
- (b) Violations of the laws and customs of war and the laws of humanity.<sup>18</sup>

Moreover, the Report found four categories of charges:

- (a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labor in mines where prisoners of more than one nationality were forced to work;
- (b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct of operations against several of the Allied armies;
- (c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of States, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators);
- (d) Against such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered

Division of International Law Pamphlet No. 32, 1919), *reprinted* in 14 AM. J. INT’L L. 95 (1920) [hereinafter 1919 Commission Report].

<sup>14</sup> *Id.* at 19. Thus, the 1919 Commission acted upon the warning that had been issued to the Turkish government four years earlier by the Triple Entente, which provided that those responsible for the Armenian massacre would be held accountable.

<sup>15</sup> *Id.* at 20 (emphasis added).

<sup>16</sup> *Id.* at 19.

<sup>17</sup> *Id.* at 21.

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

advisable not to proceed before a court other than the High Tribunal hereafter referred to.<sup>19</sup>

The Commission also recommended that the law applied by this High Tribunal ought to be “*the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.*”<sup>20</sup>

The two members of the Commission from the United States dissented from the Report’s use of “laws of humanity” on the grounds that the legal concept of “offences against the laws of humanity” was too vague to support prosecutions, and they pointed out the difficulty of determining a universal standard for humanity.<sup>21</sup> Specifically, the American position was expressed as follows:

The duty of the Commission was [...] to determine whether the facts found were violations of the laws and customs of war. It was not asked whether these facts were violations of the laws or of the principles of humanity. Nevertheless, the report of the Commission does not, as in the opinion of the American Representatives it should, confine itself to the ascertainment of the facts and to their violation of the laws and customs of war, but, going beyond the terms of the mandate, declares that the facts found and acts committed were in violation of the laws of the elementary principles of humanity. The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law. The American Representatives, therefore, objected to the references to the laws and principles of humanity, to be found in the report, in what they believed was meant to be a judicial proceeding, as, in their opinion, the facts found were to be violations or breaches of the laws and customs of war, and the persons singled out for trial and punishment for acts committed during the war were only to be those persons guilty of acts which should have been committed in violation of the laws and customs of war.<sup>22</sup>

<sup>19</sup> *Id.* at 23–24.

<sup>20</sup> *Id.* at 24 (emphasis added).

<sup>21</sup> *Id.*, Annex II, Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities. *Id.* at 49. Lord Wright, *War Crimes Under International Law*, 62 L. Q. REV. 40 (1946) (pointing out that in the common law principles of negligence and equity are equally uncertain legal concepts, but nonetheless they are established parts of our legal system). As he states: “If these elastic standards are of as wide utility as they have proved to be, there is no reason why the doctrine of crimes against humanity should not be equally valid and valuable in International Law.” *Id.* at 49.

<sup>22</sup> 1919 Commission Report, *supra* note 13, at 63–64. Twenty-seven years later the Chairman of the United Nations War Crimes Commission, criticizing the 1919 United States position, stated:

They said there was no fixed and universal standard of humanity [...]. They referred to the place of equity in the Anglo-American legal system and to John Seldon’s definition of equity as a roguish thing. But, [...] equity has established itself as a regular branch of [the American] legal system. Equally, it might be said that the negligence is too indeterminate to constitute a legal head of liability, but [...] in the Anglo-American law of tort it has become one of the widest and most comprehensive and most important categories of liability.

If these elastic standards are of as wide utility as they have proved to be there is no reason why the doctrine of crimes against humanity should not be equally valid and valuable in [i]nternational [l]aw. That law deals with large concepts and not with the meticulous distinctions of [m]unicipal [l]aw.

Lord Wright, *supra* note 21.

The United States' delegate, Secretary of State Robert Lansing, concluded that "[a] judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity."<sup>23</sup>

Despite the American and Japanese dissent, the Report clearly expressed recognition that "laws of humanity" did exist, could be ascertained, and could be breached, and that such breaches constituted "offences" that were punishable.<sup>24</sup> Nevertheless, there were no international or national prosecutions for violations of "laws of humanity," other than for some war crimes before a German national court.<sup>25</sup>

In 1945, twenty-six years later, it was found that some acts committed during World War II violated the same principle that was violated during the course of World War I when the term "offences against the laws of humanity" was coined.<sup>26</sup>

The influence of the United States, which opposed prosecutions for "offences against the laws of humanity" after World War I, was also evident in other respects. In the original peace treaty with Turkey, the Treaty of Sèvres,<sup>27</sup> the other Allied Powers included several provisions that called for the trial and punishment of those responsible for the

<sup>23</sup> See 1919 Commission Report, *supra* note 13, at 83.

<sup>24</sup> Indeed, similar words have been used since the eighteenth century and attached to more general violations of the law of nations. See, e.g., 1 OP. ATT'Y GEN. 509, 513 (1821) ("crimes against mankind") (citing Hugo Grotius); *id.* at 515 ("enemies of the whole human family"); EMMERICH DE VATTTEL, LAW OF NATIONS 464–65 (Joseph Chitty ed. 1883) ("crime against mankind;" in 1758); *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 108, 116 (Pa. 1784) ("crime against the whole world"); *Henfield's Case*, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6,360) (criminally sanctionable "duties of humanity," "duty of humanity"). See generally Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 211–14 (1983).

During the 1915 massacre of Armenians in Turkey, the governments of Great Britain, France, and Russia had condemned the massacres as "crimes against humanity and civilization," see LORD WRIGHT OF DURLEY, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948). Later, a former United States Secretary of State wrote that the slave trade had become a "crime against humanity." Robert Lansing, *Notes on World Sovereignty*, 15 AM. J. INT'L L. 13, 25 (1921). But Lansing, who represented the U.S. at the 1919 Commission, dissented from the Commission's report on "crimes against the laws of humanity," see *supra* notes 13–15 and accompanying text: see also Joseph L. Kunz, *La Primauté du Droit des Gens*, in *Revue de Droit International et de Législation Comparée* 556 (1925); James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1926).

<sup>25</sup> Twenty-two persons out of an initial 24,000 persons were prosecuted before the German Supreme Court, sitting in Leipzig as a trial court. See M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. & POL'Y 344 (2002): see also WILLIS, *supra* note 10; GERD HANKEL, *DIE LEIPZIGER PROZESSE* (2003); CLAUD MULLINS, *THE LEIPZIG TRIALS* (1921).

<sup>26</sup> *Id.* The timidity and political interests of certain governments in 1919 in prosecuting "offences against the laws of humanity" may well have contributed to the crimes committed in World War II. No one can assess what the potential deterrent effect of international prosecutions for international crimes is on the behavior of state agents and non-state actors. But national experiences have surely demonstrated that impunity enhances violations. See JANE E. STROMSETH, ROSA EHRENREICH & DAVID WIPPMAN, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (2006); M. CHERIF BASSIOUNI, *POST-CONFLICT JUSTICE* (2002).

<sup>27</sup> The Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres), Aug. 10, 1920, 15 AM. J. INT'L L. 179 (1921) (Supp.). Twenty countries other than Turkey signed the Treaty. The U.S., however, was not a party. For further elaboration of the Treaty of Sèvres, see David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORDHAM INT'L L.J. 86 (1990).

Armenian genocide.<sup>28</sup> Specifically, Article 226 stipulated that the Turkish government recognized the Allied Powers' right to try and punish the perpetrators "notwithstanding any proceedings or prosecutions before a Tribunal in Turkey." Article 230 of the Treaty also obligated Turkey to:

[H]and over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914. The Allied powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such tribunal. The provisions of Article 228 apply to the cases dealt with in this Article.<sup>29</sup>

The parties to the Treaty of Sèvres intended to bring to justice those who committed "crimes against civilization and humanity" as that crime was later defined in the Charter as "crimes against humanity."<sup>30</sup> The Treaty of Sèvres, however, was never ratified and its replacement, the Treaty of Lausanne, did not include provisions for the prosecution of Turkish nationals for these "crimes against civilization and humanity."<sup>31</sup> The obvious reason for this omission is found in the Declaration of Amnesty for all offenses committed between 1914 and 1922, which the Allies gave Turkey as part of the Treaty of Lausanne's

<sup>28</sup> Treaty of Sèvres, *supra* note 27. Of course the Treaty of Sèvres was never put into effect, but rather was replaced by the Treaty of Lausanne, which did not contain such provisions. Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S., 11, 18 AM. J. INT'L L. 1 (1924) (Supp.).

<sup>29</sup> In early 1919, at the direction of the Allied Powers, the Turkish government began to arrest and detain a number of war criminals. The custody of the offenders was very unpopular in Turkey and created serious problems. As one author writes, there was an imminent danger of "storming the Bekiraga military prison in the style of the Bastille raid." BİLÂL N. SIMSİR, MALTA SÜRGÜNLERİ (The Malta Exiles) 113 (1976).

In personal correspondence of November 17, 1989 received from Professor Dadrian, he stated that while the Turkish Military Tribunal did prosecute and convict a number of offenders between April 1919 and July 1920, thirty-four offenders were convicted, with fifteen sentenced to death. Of the fifteen sentenced to death, only three were actually executed, eleven received the sentence in absentia, and one escaped. The remaining nineteen received sentences of fifteen years (5), ten years (3), six years and three months (1), five years and four months (1), two years (2), one year (1), and less than a year (6). Public opinion forced the Ottoman Grand Vezir to release 41 prisoners. SIMSİR, *supra*, at 103.

This prompted Great Britain to request the transfer of the remaining detainees to British custody. The Turkish government objected, claiming that such a transfer:

[W]ould be in direct contradiction with its sovereign rights in view of the fact that by international law each State has [the] right to try its own tribunals. Moreover, His Britannic Majesty having by conclusion of an armistice with the Ottoman Empire recognized [the] latter as a *de facto* and *de jure* sovereign State, it is incontestably evident that the Imperial Government possesses all the prerogatives for freely exercising [the] principles inherent in its sovereignty. [FO 608/244/3749 (folio 315)].

Reprinted in Dadrian, *supra* note 10, at 285.

In May 1919, the British seized sixty-seven detainees from the military prison. Twelve of them – mostly ex-ministers – were sent to the island of Mudos and later sent to Malta where the other Turks were imprisoned. By August 1920, the British had detained 118 Turks at Malta. However, none of these detainees were prosecuted. Political considerations aimed at winning the favor of the new Turkish government provided a major roadblock to the prosecutions. The British eventually succumbed to political expediency rather than pursue justice. *Id.*

<sup>30</sup> See Schwelb, *supra* note 2, at 182.

<sup>31</sup> See Treaty of Lausanne, *supra* note 28.

political package.<sup>32</sup> As such, the potential prosecution of those charged with violations of the “laws of humanity” for crimes against the Armenians of Turkey was removed. Such a clearly politically motivated decision did not, however, alter the fact that criminal responsibility had been recognized, even though actual prosecution of individual offenders was subsequently foregone.<sup>33</sup> Moreover, it is noteworthy that an amnesty can only be for a crime. The fact that a crime was not prosecuted does not negate its legal existence. Indeed, the only reason to provide amnesty is the existence of a crime whose

<sup>32</sup> See Schwelb, *supra* note 2, at 182. For a more complete contextual description of the political situation relating to World War I, see BARBARA TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR, 1890–1914* (1996); and DAVID STEVENSON, *THE FIRST WORLD WAR AND INTERNATIONAL POLITICS* (1988).

<sup>33</sup> See WILLIS, *supra* note 10, at 158 (quoting Robert Vansittart Report to Lord Curzon, Jan. 12, 1920, in DOCUMENTS ON BRITISH FOREIGN POLICY, first series, 4:1016–25: “Delays in making peace also undermined the war crimes project. During the two years between the armistice of Madros and the signing of the Treaty of Sèvres, the Turkish Nationalist movement grew into a major force, and the Allied coalition virtually dissolved. By 1920, most of the victors no longer included among their aims the punishment of Turkish war criminals. . . the American government, which had never declared war on the Ottoman Empire, took no part in drawing up the Treaty of Sèvres.”) (citing the footnote to dispatch of Rumbold to Curzon, Apr. 24, 1922, in DOCUMENTS ON BRITISH FOREIGN POLICY, first series, 17:791–92, regarding the capitulation to Turkish Nationalists with the Treaty of Lausanne: “Later, Curzon had regrets and wrote: ‘I think we made a great mistake in ever letting these people [the Turks] out. I had to yield at the time to a pressure which I always felt to be mistaken’”).

For a comprehensive survey of the Armenian legal issues, see Dadrian, *supra* note 10. Willis advances that the failure to prosecute Turkish officials may well have encouraged Hitler to conduct his policies against the Jews. Hitler is quoted to have said concerning the Armenian massacre, “Our strength lies in our quickness and in our brutality; Genghis Khan has sent millions of women and children into death knowingly and with a light heart. History sees in him only the great founder of States . . . [a]nd so for the present only in the East I have put my death-head formations in place with the command relentlessly and without compassion to send into death many women and children of Polish origin and language. Only thus we can gain the living space we need. Who after all is today speaking about the destruction of the Armenians?” WILLIS, *supra* note 10, at 173 (citing George Ogilvie-Forbes to Kirkpatrick, Aug. 25, 1939, with enclosures of Hitler’s speech to Chief Commanders and Commanding Generals, Aug. 22, 1939, Great Britain, Foreign Office, 7 DOCUMENTS ON BRITISH FOREIGN POLICY, 1919–1939 258 (3d ser. Edward L. Woodward et al., eds., 9 vols. 1949–55)).

The statement, reported in SEVEN DOCUMENTS ON BRITISH FOREIGN POLICY 1919–1939 258 (E.L. Woodward & Rohan Butler eds., 3d ser. 1954), was originally transmitted to British diplomats in Berlin in August 1939 by the Associated Press Berlin Bureau Chief Louis Lochner. Subsequently, on August 25, 1939, the British Ambassador, Sir Nevil Henderson, transmitted it to London. That statement was found in a document that purports to summarize one or two of the five speeches delivered by Hitler to Army Corps Commanders and Commanding Generals at Obersalzberg on August 22, 1939. Hitler was prepping his officers for the imminent invasion of Poland. Speaking extemporaneously, he urged his officers to act decisively, and, if need be, ruthlessly and without regard to mercy, in order to achieve a quick victory with less cost to German life. In that context, he also made several analogies praising the effectiveness of Genghis Khan. This historical chronology is recorded in Vahakn D. Dadrian, *The Historical and Legal Interconnection Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 YALE J. INT’L L. 503, 537–40 (1998). The author also cites Winfried Baumgart, *Zur Ansprache Hitlers vor den Führen der Wehrmach Am 22 August 1939: Eine Quellenkritische Untersuchung [on Hitler’s Address to the Leaders of the Armed Forces on August 22, 1939: A Critical Inquiry]*, 16 VIERTELJAHRESHEFTE FÜR 4 ZEITGESCHICHTE [QUARTERLY SERIES FOR CONTEMPORARY HISTORY] 120 (1969).

The reason that this statement became the subject of some dispute was that it was originally introduced as evidence by the prosecution at Nuremberg, but the prosecution was unable to authenticate its original source and therefore the document was not admitted into evidence. Thus, the admissibility that Winfried Baumgart, *supra*, verifies from several sources among the senior officers who attended these meetings. See also BASS, *supra* note 10, at 58 *et seq.*



prosecution is thereby waived. Consequently, even though no precedent existed in 1945 that defined CAH or for individual prosecutions for its violations, the legal basis for both existed and justified the declarative nature of Article 6(c) of the London Charter.

Justice Robert H. Jackson, in his capacity as Chief Counsel for the United States in the Nuremberg prosecution, relied on this very principle as he wrote in his Report to the President of the United States on June 6, 1945: “These principles [CAH] have been assimilated as a part of International Law at least since 1907.”<sup>34</sup> Thus, the Charter’s recognition of CAH as constituting violations of already existing conventional and customary international law, as well as general principles of law, is evidenced by previous efforts of the international community to prohibit conduct proscribed by Article 6(c) of the Charter, as discussed below.<sup>35</sup>

The London Charter, which was appended to the London Agreement of August 8, 1945, was the first international instrument to define CAH in positive international law. Article 6(c) of the Charter provides the following definition of CAH:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or *in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated.<sup>36</sup>

The Charter connected this generic category of international crimes to the context of war because it deemed it an extension of war crimes. Since then, as discussed below,<sup>37</sup> CAH has acquired its own separate identity as a distinct category of international crimes that is not linked to war. But unlike other international crimes, CAH did not, so far, become the subject of a specialized convention.<sup>38</sup>

The facts that gave rise to the inclusion of CAH in the London Charter were too barbarous and too momentous to foresee. Thus, no positive ICL text existed that specifically covered these terrible deeds. It was simply a situation where the facts went beyond the law’s anticipation. As is mostly the case, the law, whether domestic or international, seldom anticipates the unthinkable, and the acts committed before and during World War II were in the category of the unthinkable. Even more so, they were unimaginable.<sup>39</sup>

Though Article 6(c) represents the first time in history that this category of international crimes was defined in positive international law, similar prohibitions, reflected in the concepts *delicti jus gentium* and *hostis humani generi*, preceded the Charter

<sup>34</sup> REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 50 (U.S. Gov’t Print. Off. 1945) [hereinafter JACKSON’S REPORT].

<sup>35</sup> See *infra* §8.

<sup>36</sup> Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (emphasis added).

<sup>37</sup> See *infra* §7.

<sup>38</sup> See M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT’L L. 457–94 (1994).

<sup>39</sup> It should be noted that the linkage to war in Article 6(c) meant that the crimes committed after September 1939, when the war started, were not applicable before that date. Thus, the crimes committed by the Nazi regime of Germany between 1933 and 1939 were not included within the scope of Article 6(c). See LUCY DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933–1939*.

by centuries.<sup>40</sup> However, the specific acts prohibited in CAH were prohibited in the domestic criminal laws of every state at that time for centuries before.

Half a century after the 1907 Hague Convention, Protocols I and II of 1977 to the four Geneva Conventions of August 12, 1949 used language similar to that of the Convention's Preamble, thus attesting to the continued validity of Martens' concept.<sup>41</sup>

Protocol I states in Article 1–2:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under *the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience*.<sup>42</sup>

Protocol II states in its Preamble:

*Recalling* that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character.

*Recalling* furthermore that international instruments relating to human rights offer a basic protection to the human person.

*Emphasizing* the need to ensure a better protection for the victims of those armed conflicts,

*Recalling* that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.<sup>43</sup>

## §2. The Concept of “Laws of Humanity” in the History of the Law of Armed Conflicts

The humanistic perspective underlying the regulation of armed conflicts is best expressed by Montesquieu, who he stated “*Le droit des gens est naturellement fondé sur ce principe*

<sup>40</sup> As stated by Professor Leslie C. Green: “It has often been assumed that the campaign for the trial and punishment of war criminals is a modern innovation, based on feelings of revenge and political ideology rather than on legal considerations. In fact, it can be traced back to the code of chivalry that prevailed in the Middle Ages among the orders of knighthood, while in the early part of the sixteenth century, Vitoria was asserting that “a prince who has on hand a just war is *ipso jure* the judge of his enemies and can inflict a legal punishment on them, according to the scale of wrongdoing.” See Leslie C. Green, *The Law of Armed Conflict and the Enforcement of International Criminal Law*, 27 ANNUAIRE CANADIEN DE DROIT INTERNATIONAL 4 (1984); Leslie C. Green, *Human Rights and the Law of Armed Conflict*, 10 ISR. Y.B. HUM. RTS. 9 (1980) (citing Belli (1563), Ayala (1582), Gentili (1612), Grotius (1625)); see also LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* (1985). For a very useful contemporary appraisal, see *THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES* (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

<sup>41</sup> See BENVENUTI, *supra* note 7.

<sup>42</sup> Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature*, Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, *reprinted* in 16 I.L.M. 1391 (emphasis added).

<sup>43</sup> Protocol (II) Additional to Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-international Conflicts, *opened for signature*, Dec. 12, 1977, U.N. Doc. A/32/144 Annex II, *reprinted* in 16 I.L.M. 1391 (emphasis added).



*que les diverses nations doivent se faire dans la paix le plus de bien et dans la guerre le moins de mal qu'il est possible, sans nuire à leurs véritable intérêts,*"<sup>44</sup> namely the parties to an armed conflict (war) should inflict on each other the least possible harm.

In contrast, Carl von Clausewitz affirmed that in war the party seeking to win should inflict upon the enemy as much harm as is necessary to insure swift and decisive victory.<sup>45</sup> Though von Clausewitz's approach may theoretically reduce overall victimization by limiting protracted war, it is not the primary goal in the conduct of war. This was in contrast with Montesquieu's primary goal: the reduction of victimization.

In time, Montesquieu's humanistic view prevailed and was expressed in the international community's commonly shared values, as reflected in conventional and customary international humanitarian and human rights law, as well as in the domestic laws of a number of states. Regrettably, the practices of states remained consistent with the teachings of von Clausewitz, and not those of Montesquieu.

The basic premise of military and legal doctrine has not changed since that time, but the anachronistic term "law of war" gave way to "humanitarian law of armed conflicts." Thus, the concept of humanism gave way to a new concept of humanitarianism.

The symbolism of the terminological change was not the only change. Many changes occurred in the laws and practices of the armed forces of a large number of states. The professionalism of regular armed forces and their higher level and degree of compliance with international humanitarian law became more evident after the end of World War II and particularly after the 1949 Geneva Conventions, when military personnel received training in the contents of the Geneva Conventions, as required by the Conventions. These positive developments were not however matched in the practices of irregular combatants, paramilitary groups, and other nonstate actors active in "conflicts of a non-international character" and in purely internal conflicts. The enormously increased level of victimization that occurred since the end of World War II reveals that nonstate actors have mostly committed war crimes and CAH.<sup>46</sup>

The enhanced development of international humanitarian law norms since 1949 has not brought about increased compliance, nor has it reduced victimization. Regrettably,

<sup>44</sup> See CHARLES DE SECONDAT MONTESQUIEU, *DE L'ESPRIT DES LOIS*, Livre I, c. 3, 1748 (La Pléiade ed. 1974).

<sup>45</sup> See CARL VON CLAUSEWITZ, *ON WAR* (Anatol Rapoport trans., 1968); see also JOHN KEEGAN, *A HISTORY OF WARFARE* 3 (1993) (wherein the author contradicts the heretofore dominant view of von Clausewitz that "war is the continuation of diplomacy by other means."); JOHN KEEGAN, *THE FACE OF BATTLE* (1976); and STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 161–214 (2005); MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* 33–42 (1991) (discussing the "Trinitarian War" concept developed by von Clausewitz).

Keegan asserts that war "is always an expression of culture." KEEGAN, *A HISTORY OF WARFARE*, *supra*. Keegan further expands on the iconoclastic view of Victor Davis Hanson in *THE WESTERN WAY OF WAR: INFANTRY BATTLE IN CLASSICAL GREECE* and other works. See John Keegan, *Foreword to* VICTOR DAVIS HANSON, *THE WESTERN WAY OF WAR: INFANTRY BATTLE IN CLASSICAL GREECE* (1989). See also DAVID KENNEDY, *OF WAR AND LAW* (2006); VICTOR DAVIS HANSON, *CARNAGE AND CULTURE: LANDMARK BATTLES IN THE RISE OF WESTERN POWER* (2001); BEST, *WAR AND LAW SINCE 1945* (1994); GEOFFREY BEST, *HUMANITY IN WARFARE* (1983). Conversely, John A. Lynn in *BATTLE: A HISTORY OF COMBAT AND CULTURE* shows how culture, irrespective of values, laws, and humanitarian concepts, is a dominant factor in war. JOHN A. LYNN, *BATTLE: A HISTORY OF COMBAT AND CULTURE* (2003).

<sup>46</sup> See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 594 *LAW & CONTEMP. PROBS.* 57 (1996); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 *LAW & CONTEMP. PROBS.* 6 (1996); ANDRÉ DE HOOGH, *OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES* 91–127 (1996).

international humanitarian law does not incentivize nonstate actors under Common Article 3 and Protocol II to comply with international humanitarian law norms, because it does not grant such combatants POW status. Moreover, ICL does not provide the disincentive of effective prosecution. Without the combined effects of carrot and stick, compliance decreases and harm increases, leaving scores of CAH victims in the wake of conflicts.

For some 5,000 years, humanistic principles regulating armed conflicts evolved gradually in different civilizations.<sup>47</sup> In time these principles became known as international humanitarian law, and they shaped an interwoven fabric of norms and rules designed to prevent certain forms of physical harm and hardships from befalling noncombatants, as well as certain categories of combatants, such as the sick, wounded, shipwrecked, and prisoners of war.<sup>48</sup> As the protective scheme of prescriptions and proscriptions contained in customary international law increased both qualitatively and quantitatively,<sup>49</sup> its more serious breaches were criminalized,<sup>50</sup> although the processes of normative development in ICL have never been part of a consistent or cohesive international legal policy.<sup>51</sup> Instead, international crimes have evolved by virtue of a haphazard mixture of conventions, customs, general principles, and the writings of scholars.<sup>52</sup> Among these sources of international law, the writings of “the most distinguished publicists” have

<sup>47</sup> See generally M. CHERIF BASSIOUNI, A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS (2000) [hereinafter BASSIOUNI, MANUAL]; FRANÇOIS BUGNION, LA COMITÉ INTERNATIONAL DE LA CROIX-ROUGE ET LA PROTECTION DES VICTIMES DE LA GUERRE (1994); HILAIRE MCCOUBREY, *Humanitarianism in the Laws of Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW 1–21 (1990); Gerald I. A. D. Draper, *The Development of International Humanitarian Law*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 67 (UNESCO 1988); INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW (UNESCO 1988); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); JEAN S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW (1985); KEEGAN BEST, ET AL. ON WARFARE, *supra* note 45.

<sup>48</sup> See generally BASSIOUNI, MANUAL, *supra* note 47; see also Leslie C. Green, *The Contemporary Law of Armed Conflict* (3d. rev. ed., 2008); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT (2002); BEST, *supra* note 45; MERON, *supra* note 47; TIMOTHY MCCORMACK & H. DURHAM, THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW (1999).

<sup>49</sup> Robert Cryer, *The Doctrinal Foundations of International Criminalization*, in BASSIOUNI, 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 107, 109 *et seq.* (3d ed., 2008); BASSIOUNI, MANUAL, *supra* note 47; INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2006) [hereinafter ICRC, CUSTOMARY IHL].

<sup>50</sup> See M. CHERIF BASSIOUNI, 2 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS AND INTEGRATED TEXT 55–94 (3 vols., 2008) [hereinafter BASSIOUNI, LEGISLATIVE HISTORY OF THE ICC]; KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICRC 2003); Cryer, *supra* note 49; Richard B. Lillich, *Can the Criminal Process Be Used to Help Enforce Human Rights Law?*, in INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE (WAR CRIMES, GENOCIDE, APARTHEID, TERRORISM AND TORTURE) 864 (1991); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989); M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193, 196–98 (1982).

<sup>51</sup> M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987). See Richard B. Lillich, *Respect for Human Rights in Armed Conflict, Civil Strife and States of Emergency (Human Rights in Extremes)*, in INTERNATIONAL HUMAN RIGHTS, *supra* note 50, at 766.

<sup>52</sup> See Charter of the United Nations, Statute of the International Court of Justice art. 38, signed at San Francisco, June 26, 1945, 59 Stat. 1031, T.S. No. 993; PCIJ Statute, art. 3 (listing the sources of international law). For an early work on the subject, see generally Frederick Pollock, *The Sources of International Law*, 2 COLUM. L. REV. 511 (1902).

significantly contributed to the shaping and advancement of world community values and expectations.<sup>53</sup> This process was indispensable to the development of positive ICL,

<sup>53</sup> See *inter alia* the following major texts: INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS (M. Cherif Bassiouni ed., 3d rev. ed. 2008); THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI (Michael P. Scharf and Leila Nadya Sadat eds., 2008); ROBERT CRYER WITH ELIZABETH WILMSHURST, HAKAN FRIMAN, AND DARRYL ROBINSON, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2007); M. CHERIF BASSIOUNI, INTRODUCTION AU DROIT PÉNAL INTERNATIONAL (2002); CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONAUX (Antonio Cassese & Mireille Delmas-Marty eds. 2002); JURIDICTIONS NATIONALES ET CRIMES INTERNATIONAUX (Antonio Cassese & Mireille Delmas-Marty eds., 2002); NUREMBERG WARNS: FROM NAZISM TO TERRORISM (in Russian) (A.I. Cukhanova ed., 2002); KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS: ANSÄTZE EINER DOGMATISIERUNG (2002); THE INDIVIDUAL AS SUBJECT OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS (Albin Eser, Otto Lagodny & Christopher Blakesley eds., 2002); LE DROIT PÉNAL À L'ÉPREUVE DE L'INTERNATIONALISATION (Marc Henzelin & Robert Roth eds., 2002); LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENIUM (2002); WANG XIUMEI, INTERNATIONAL CRIMINAL LAW (in Chinese) (2002); GEERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW (2001); FRANCISCO VILLAGRÁN-KRAMER, EL LARGO BRAZO DE LA JUSTICIA PENAL INTERNACIONAL (2001); DROIT PÉNAL INTERNATIONAL (Hervé Ascensio, Emmanuel Decaux, & Alain Pellet, eds., 2000); 1, 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW (Gabrielle Kirk-MacDonald & Olivia Swaak-Goldman eds., 2000); MARC HENZELIN, LE PRINCIPE DE L'UNIVERSALITÉ EN DROIT PÉNAL INTERNATIONAL (2000); NINA H.B. JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES (2000); INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS (Jordan Paust, M. Cherif Bassiouni et al. eds., 2d rev. ed. 2000); SHAPING SHAO, INTERNATIONAL CRIMINAL LAW (in Chinese) (2000); HERWIG ROGGMAN, DIE INTERNATIONALEN STRAFGERICHTSHÖFE (1998); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (2d rev. ed. 1999); M. CHERIF BASSIOUNI, LE FONTE E IL CONTENUTO DEL DIRITTO PENALE INTERNAZIONALE: UN QUADRO TEORICO, (1999); ZHANG ZHIHUI, INTERNATIONAL CRIMINAL LAW (in Chinese) (1999); ALICIA GIL GIL, DERECHO PENAL INTERNACIONAL (1999); INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS (Charlotte Ku & Paul F. Diehl eds., 1998); MEDNARODNO KAZENSKO PRAVO (in Slovenian) (Ljubo Bavcon ed. 1997); GUILLERMO FIERRO, LA LEY PENAL Y EL DERECHO INTERNACIONAL (2d ed. 1997); LYAL S. 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which frequently occurred in spite of the politically oriented authoritative processes of international lawmaking.<sup>54</sup>

One of the categories of international crimes that suffered from the peculiarities of the international legal process is CAH. It originated as an extension of war crimes and by analogy thereto, and subsequently emerged therefrom to become a separate and distinct category of international crimes applicable in time of peace and in time of war, irrespective of any connection to the regulation of armed conflicts. Still, it is not yet the subject of a specialized convention.

A historical review of the regulation of armed conflicts reveals that various civilizations, dating back several thousand years, have either specifically prohibited or at least condemned unnecessary use of force and violence against civilians. This historical process, spanning several millennia, reveals the convergence of basic human values in diverse civilizations, even when there was no evidence that certain ideas migrated from one civilization to another. Thus, the existence of the same basic values in diverse civilizations cannot be attributed to the migration of ideas. Instead, it reflects a commonality of shared values. What is noteworthy, therefore, is that over a span of centuries, diverse civilizations geographically noncontiguous have reached the same principled conclusions. If anything, this similarity in values supports the proposition embodied in the Preamble of the 1907 Hague Convention, namely that these commonly shared values make up the "laws of humanity."

In the course of this historical evolution, certain principles emerged that restricted what a combatant could do during the conduct of war. It was the beginning of what became known as *jus ad bellum*. Following are some references to these values and norms as they evolved in various civilizations.

In the sixth century BCE, the Chinese scholar Sun Tzu asserted that, in war, it is important to "treat captives well, and care for them."<sup>55</sup> In the second century BCE, in India, the LAWS OF MANU upheld the same principles.<sup>56</sup> In ancient Greece, awareness existed that certain acts were contrary "to traditional usages and principles spontaneously enforced by human conscience."<sup>57</sup> Herodotus recounts that as early as the fifth century BCE certain conduct was prohibited:

[T]he slaughter of the Persian envoys by the Athenians and Spartans was confessedly a transgression of the [laws of men], as a law of the human race generally, and not merely as a law applicable exclusively to the barbarians. And Xerxes recognized and submitted

*La Doctrina del Derecho Pénal Internacional*, 2 REVISITA ARGENTINA DE DERECHO INTERNACIONAL 271 (1931); Guiseppe Sagone, *Pour un Droit Pénal International*, 5 REVUE INTERNATIONALE DE DROIT PÉNAL 363 (1928); Quintiliano Saldana, *Projet de Code Pénal International*; 1 CONGRÈS INTERNATIONAL DE DROIT PÉNAL (1926); G. Glover Alexander, *International Criminal Law*, 5 J. COMP. LEGIS. & INT'L L. 90 (1923); G. Glover Alexander, *International Criminal Law*, 3 J. COMP. LEGIS. & INT'L L. 237 (1921).

<sup>54</sup> See generally MYRES MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1960).

<sup>55</sup> SUN T'ZU, *THE ART OF WAR* 76 (Samuel B. Griffith trans., 1971).

<sup>56</sup> See *THE LAWS OF MANU* (Georg Bühler trans., Motilal Banarsidass 1964); *THE BOOK OF MANU: MANUSMURTI*, discussed in detail by Nagendra Singh in *Armed Conflicts and Humanitarian Laws of Ancient India*, in *ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET* (Christophe Swinarski ed., 1984); and *COMMENTARIES: THE LAWS OF MAN* (Georg Bühler trans., 1967).

<sup>57</sup> COLEMAN PHILLIPSON, 1 *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 50, 59 (1911) (stating that many rulers of ancient Greece were conscious of the need to observe "traditional usages and principles spontaneously enforced by human conscience").

to such general law, when he answered on suggestions being made to him that he should resort to similar retaliation, that he would not be like Lacedaemonians, for they had violated the law of all nations, by murdering his heralds, and that he would not do the very thing which he blamed in them.<sup>58</sup>

In Western civilization, the writings of Aristotle, Cicero, St. Augustine, and St. Thomas Aquinas have set forth the philosophical premises for the conditions of legitimate war so as to distinguish between the just and the unjust war.<sup>59</sup> Western civilization also developed principles and norms limiting the means and harmful consequences of the conduct of war. St. Thomas Aquinas, in his *SUMMA THEOLOGICA* frequently quoting St. Augustine, refers to these basic laws of humanity in the treatment of civilian noncombatants, the sick, the wounded, and prisoners of war: “these rules belong to the *jus gentium* which are deduced from natural law as conclusion principles.”<sup>60</sup> He called it “positive human law,” not because it was codified, but because citizens of civilized nations agreed to it.<sup>61</sup> This concept of natural law that Plato and Aristotle posited long before St. Thomas was also the supreme law of the Romans, who divided the *jus positivum* into *jus gentium* and *jus civile*. In this connection, Maurice H. Keen, a scholar on the law of war in the Middle Ages, stated,

[T]he ‘Roman people meant not only the man of the empire but those of the independent *regna* and *civitates* also, and so a law which was common to it, was genuinely a ‘law of nations.’ To the *jus gentium* in its broader sense of the natural law of all men, these two laws added for those within Christendom a further series of positive rules, for ‘beyond doubt the canon and civil laws add something further in the matter of war over and above the dictates of reason.’ Once again there was no question of any conflict of laws, for the equity of the canon and civil laws was just the same as that of the *jus gentium*. They too derived their ultimate authority from natural reason. The canon law was derived from natural law because it was derived from Holy Writ, and ‘The divine laws operate in nature.’ The civil law was founded in natural law, because it was the accepted definition of civil laws that they were derived ‘from the law of nature, by means of specific rulings on particulars.’ For the Roman people these two laws expanded the *jus naturale* and the *jus gentium* with a further series of specific rules, binding on all its members, but on them only. In dealings with *extranei*, as Tartars, Greeks and Saracens, only the rules of the *jus gentium* proper were binding.<sup>62</sup>

<sup>58</sup> *Id.* at 60 (citing HERODOTUS, HISTORY).

<sup>59</sup> The distillation of these writings is found in GROTIUS, *infra* note 77, which is considered to be one of the foundations of Western international law. See also SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* 8, III (1672), in 2 CLASSICS OF INTERNATIONAL LAW (William A. Oldfather trans., 1934); EMMERICH DE Vattel, *LE DROIT DES GENS* (1758), in 2 CLASSICS OF INTERNATIONAL LAW (Charles G. Fenwick trans., 1916); see also, ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1954); Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665 (1939).

<sup>60</sup> *Treatise on Man*, 2 ac, Q. 95 art. 4. For an English translation of ST. THOMAS AQUINAS’, *SUMMA THEOLOGICA*, see the first complete American edition, published by Benziger Bros. Inc. (1947).

<sup>61</sup> *Id.* at conclusion.

<sup>62</sup> MAURICE H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES 14–15* (1965) wherein he relies upon the medieval work of HONORÉ BONET, *TREE OF BATTLES*, *id.* at 21; see also AUGUSTINE FITZGERALD, *PEACE AND WAR IN ANTIQUITY* (1931). For an earlier seminal work see PHILIPPE CONTAMINE, *WAR IN THE MIDDLE AGES* (Michael Jones trans., 1984). Interestingly, the rules of war until well into the 1800s were with respect to Christians applicable only to wars in Christendom.



In the eighteenth century, international law scholar Georg F. Martens echoed these views:

[B]ut our right to wound and kill being founded on self-defence, or on the resistance opposed to us, we can, with justice wound or take the life of none except those who take an active part in the war. So that, children, old men, women, and in general all of those who cannot carry arms, or who ought not to do it, are safe under the protection of the law of nations, unless they have exercised violence against the enemy.<sup>63</sup>

The Islamic civilization, based on the *Qu'ran*, set forth specific rules as to the legitimacy of war and its conduct.<sup>64</sup> In 634 AD, Caliph Abu Bakr charged the Muslim Arab army invading Syria:

Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that which they have devoted their lives.<sup>65</sup>

Caliph Abu Bakr's mandate was based on the *Qu'ran* and the *Summa*, the tradition of the Prophet Muhammad that is a source of the *Shari'a* – the Islamic law. These Muslim principles, rules, and practices also influenced the development of Western legal thought. This occurred during the Middle Ages, first during the Crusades, and then through Islam's contact with Western civilization in Spain, Southern France, and Southern Italy, when these areas were under Muslim control. This influence clearly appears in the writings of that period's most authoritative Canonists.<sup>66</sup>

The three monotheistic faiths of Judaism, Christianity, and Islam join in the affirmation of the same humanitarian principles. The similarity between the admonitions of

<sup>63</sup> GEORG F. MARTENS, SUMMARY OF THE LAW OF NATIONS 282 (1788) (William Cobbett trans., 1795).

<sup>64</sup> The cases and practices of Muslim conduct in war were taught by Al-Shaybani in the eighth century and were written in a digest by el-Shahristani. The first known publication was in Hyderabad in 1335–36, translated by Majid Khadduri in WAR AND PEACE IN THE LAW OF ISLAM. See also Roger C. Algase, *Protection of Civilian Lives in Warfare: A Comparison between Islamic Law and Modern International Law Concerning the Conduct of Hostilities*, 16 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 246 (1977); M. Cherif Bassiouni, *Islam: Concept, Law and World Habeas Corpus*, 1 RUTGERS-CAM. L.J. 160 (1969); SOBHI MAHMASSANI, THE PRINCIPLES OF INTERNATIONAL LAW IN LIGHT OF ISLAMIC DOCTRINE (1966); MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS (1966); SAID RAMADAN, ISLAMIC LAW, ITS SCOPE AND EQUITY (1961); MUHAMMAD HAMIDULLAH, MUSLIM CONDUCT OF STATE (1961); Mohamed Abdallah Draz, *Le Droit International Public de l'Islam*, 5 REV. EGYPTIENNE DE DROIT INT'L 17 (1949); Ahmed Rechid, *L'Islam et le Droit de Gens*, 60 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 371 (1937); NAJIB ARMANAZI, L'ISLAM ET LE DROIT INTERNATIONAL (1929); Syed H.R. Abdul Majid, *The Moslem International Law*, 28 LAW Q. REV. 89 (1912).

<sup>65</sup> Cited in MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 102 (1955); Solf, *supra* note 8; See also MCCOUBREY, *supra* note 47, at 9 (referring to the humanitarian practices of Asu Bakr and Salah el-Din el Ayyubi in the fourth Crusade).

<sup>66</sup> See Franciscus de Vitoria (1483–1617), *De Indis et de Jure Belli*, in CLASSICS OF INTERNATIONAL LAW (James B. Scott ed., 1917); Francisco Suárez (1548–84), *On War*, in 2 CLASSICS OF INTERNATIONAL LAW (James B. Scott ed., 1944); Balthazar Ayala (1548–84), *Three Books on the Law of War*, in 2 CLASSICS OF INTERNATIONAL LAW (John P. Bate trans., 1912); Alberico Gentili (1552–1608), *De Jure Belli Libri Tres*, in CLASSICS OF INTERNATIONAL LAW (James B. Scott ed., 1933). For a recent account of Islamic influence on canonist writers and consequently on Hugo Grotius, who relied on their works, see CHARLES S. RHYNE, INTERNATIONAL LAW 23 (1971). Ayala, Gentili, Suarez, and Grotius all wrote that women and those unable to bear arms should always be spared, though as Ayala reported the practice was seldom followed.

the *Qu'ràn* and those of the Old Testament are best expressed in the second Book of Kings:

the King of Israel [ . . . ] said to Eli'sha, 'My Father shall I slay them?' [ . . . ] He answered, 'You shall not slay them. Would you slay those whom you have taken captive with your sword and bow? Set bread and water before them, that they may eat and drink and go to their master.'<sup>67</sup>

Jews honor the Sabbath and other holy days, like *Yom Kippur*, by prohibiting warlike activities on those days; the same is true in Islam on the various days of the *Eid*. Similarly, in medieval times, the Roman Catholic Church specifically proscribed the conduct of war on particular days. In fact, as the Archbishop of Arles exclaimed in 1035, there was to be a "Truce of God" from "vespers on Wednesday to sunrise on Monday."<sup>68</sup>

The values embodied in these moral and legal positions therefore are not only found in Western civilization; they also existed in other civilizations, such as the Chinese,<sup>69</sup> Hindu,<sup>70</sup> Egyptian, and Assyrian-Babylonian, all of which devised principles of legitimacy for resorting to war and particular rules for its conduct.<sup>71</sup> But after the twelfth century C.E., it was mostly Western civilization that advanced these values and shaped the norms we now call humanitarian law.

As the laws of chivalry developed during the Middle Ages in Western Europe, so did rules limiting the means and manner of conducting war.<sup>72</sup> Heraldic courts developed a code of chivalry that regulated a knight's conduct in battle and that Christian princes enforced in their courts.<sup>73</sup> The goal of all these principles, norms, and rules was to protect noncombatants, innocent civilians, and those who were *hors de combat* from unnecessary harm. As Keen informs us about the siege of Limoges in 1370:

Three French knights, who had defended themselves gallantly, seeing at length no alternative to surrender, threw themselves on the mercy of John of Gaunt and the Earl of Cambridge. 'My Lords,' they cried, 'we are yours: you have vanquished us. Act

<sup>67</sup> 2 Kings 6:21, 22.

<sup>68</sup> See PETER D. TROOBOFF, *INTRODUCTION TO LAW AND RESPONSIBILITY IN WARFARE* 7 (Peter D. Trooboff ed., 1975); see also LESLIE C. GREEN, *International Criminal Law and the Protection of Human Rights*, in *CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW* 116–37 (Bin Cheng & Edward D. Brown eds., 1988) (referring to many valuable historical precedents).

<sup>69</sup> See SUN Tzu, *supra* note 55, at 76.

<sup>70</sup> See *supra* note 60.

<sup>71</sup> For a description of some of the practices of war in these civilizations see generally JOHN KEEGAN, *A HISTORY OF WARFARE* (1993); GEOFFREY BEST, *supra* note 45; MICHAEL GRANT, *ARMY OF THE CAESARS* (1974); ANDRÉ AYMARD & JEANNINE AUBOYER, *1 L'ORIENT ET LA GRÈCE ANTIQUE* 293–99 (1953); PIERRE ROUSSEL ET AL., *LA GRÈCE ET L'ORIENT: DES GUERRES MÉDIQUES À LA CONQUÊTE ROMAINE* (2d. ed. 1938).

<sup>72</sup> See KEEN, *supra* note 62, and FITZGERALD, *supra* note 62; see also Suzanne Bastid, *Le Droit de la Guerre dans des Documents Judiciaires Français du XIV<sup>e</sup> Siècle*, 8 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 181 (1962) (referring to the records of the Hundred Years' War, which lasted from 1337–1469, which reveal the existence of rules of warfare protection of noncombatants and prisoners of war, as well as the prosecution of violators of these rules); HONORÉ BONET, *THE TREE OF BATTLES* (ca. 1387) (G.W. Coupland ed., 1949) (Ernest Nys trans., 1883); PEDRO LOPEZ D'AYALA, *CRONICLES DE LOS REYES DE CASTILLA TOME I* (1779–80) (describing several trials for violations of the laws of war); GIOVANNI DA LEGNANO, *TRACTABUS DE BELLO, DE REPRÆSALIIS ET DE DUELLO* (1477); and MARTENS, *supra* note 63; CHARLES G. FENWICK, *DIGEST OF INTERNATIONAL LAW* 7 (1965); HENRY J.S. MAINE, *INTERNATIONAL LAW* 138–40 (2d ed. 1894).

<sup>73</sup> KEEN, *supra* note 62.



therefore to the law of arms.' John of Gaunt acceded to their request, and they were taken prisoner on the understanding that their lives would be protected.<sup>74</sup>

On the march to Agincourt in 1415, Shakespeare quotes Henry V giving his army the following instructions:

We give express charge that in our marches through the country there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language; For when levity and cruelty play for a kingdom, the gentler gamester is the soonest winner.<sup>75</sup>

Referring to the battle of Agincourt, when King Henry V of England felt compelled to execute his French prisoners held in his besieged base camp, Shakespeare has the King's Captain Fluellen exclaim: "Kill the boys and the luggage! 'tis expressly against the law of arms: 'tis as arrant a piece of knavery [ . . . ] as can be offer'd."<sup>76</sup>

In 1625, the famed Hugo Grotius stated:

[Consider] both those who wage war and on what grounds war may be waged. It follows that we should determine what is permissible in war, also to what extent, and in what ways, it is permissible. What is permissible in war is viewed either absolutely or in relation to a previous premise. It is viewed absolutely, first from the standpoint of the law of nature, and then from that of the law of nations.<sup>77</sup>

After the Middle Ages, additional norms and rules were developed, thereby strengthening these basic principles of humanity on which they were based. This historical phase was also founded upon the emerging shared values of the world community to limit the resort to war and regulate its conduct in order to minimize its harmful human consequences. Thereafter, bilateral and multilateral treaties, particularly after the Treaty of Westphalia in 1648, sought to regulate relations among states for the prevention and conduct of war and were a tangible expression of these values and concerns.<sup>78</sup> Thus, with regard to the care of wounded in the field, Professor Green states:

In 1679 a convention was signed between the Elector of Brandenburg, for the League of Augsburg, and the Count of Asfeld, who commanded the French forces [providing] for a mutual respect towards both hospitals and wounded [ . . . ]. [A] convention [of] 1743 between Lord Stair on behalf of the Pragmatic army and the Marshall Noailles for the French during the Dettingen campaign bound both sides to treat hospitals and wounded with consideration. Noailles, when he thought that his operations might cause alarm to the inmates at the hospitals at Tachenheim, went so far as to send word that they should rest tranquil as they would not be disturbed. A fuller, and more highly developed type of agreement, was that signed at L'Ecluse in 1759 by the Marshal de

<sup>74</sup> *Id.*, citing OEUUVRES DE FROISSART 43 (Kervyn de Leffenhove ed., 1869).

<sup>75</sup> WILLIAM SHAKESPEARE, THE LIFE OF HENRY THE FIFTH, Act 3, Scene 6.

<sup>76</sup> *Id.* at Act 4, Scene 7; see also THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS (1993); and Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1 (1992).

<sup>77</sup> HUGO GROTIUS, DE JURE BELLI AC PACIS (Libri Tres) (1625), reprinted in 3 CLASSICS OF INTERNATIONAL LAW 599 (Francis W. Kelsey trans., 1925).

<sup>78</sup> See MAJOR PEACE TREATIES OF MODERN HISTORY 1698–1967 (Fred L. Israel & Emanuel Chill eds., with an introduction by Arnold Toynbee, 1967). See also Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20 (1948).

Brail, who commanded the French, and Major General Conway the British general officer commanding. The hospital staff, chaplains, doctors, surgeons and apothecaries were not [...] to be taken prisoners; and, if they should happen to be apprehended within the lines of the enemy, they were to be sent back immediately. The wounded of the enemy who should fall into the hands of their opponents were to be cared for, and their food and medicine should in due course be paid for. They were not to be made prisoner and might stay in hospital safely under guard. Surgeons and servants might be sent to them under the general's passports. Finally, on their discharge, they were themselves to travel under the same authority and were to travel by the shortest route.<sup>79</sup>

During the Age of Enlightenment, development continued with emphasis on the pragmatism of regulating the conduct of war. Thus, Jean-Jacques Rousseau argued in his seminal work:

Since the aim of war is to subdue a hostile State, a combatant has the right to kill the defenders of that state while they are armed; but as soon as they lay down their arms and surrender, they cease to be either enemies or instruments of the enemy; they become simply men once more, and no one has any longer the right to take their lives. It is sometimes possible to destroy a state without killing their lives. It is sometimes possible to destroy a state without killing a single one of its members, and war gives no right to inflict any more destruction than is necessary for victory. These principles were not invented by Grotius, nor are they founded on the authority of the poets; they are derived from the nature of things; they are based on reason.<sup>80</sup>

The evolution of humanitarianism in armed conflicts took a new turn after the battle of Solferino in June 1859 where France defeated Austria-Hungary.<sup>81</sup> Henry Dunant, a Swiss businessman who happened to be in the vicinity of the battlefield, was deeply moved by the sight of the many wounded men who were left to suffer and die. Dunant organized medical relief in the field. Thereafter, he published a booklet in which he proposed the establishment of voluntary relief agencies to aid the battlefield wounded and for an international agreement on the humane treatment of the sick and injured of war.<sup>82</sup> Dunant's proposals became a reality on August 22, 1864, with the Geneva Convention for the Amelioration of the Condition of the Wounded of Armies in the Field.

<sup>79</sup> See LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 86 (1985), citing GEOFFREY G. BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 149–50 (1928). PICTET, *supra* note 47, recounts that prior to the battle of Fontenoy in 1747, Louis XV of France declared in advance of the battle that the wounded be treated like his own men because as wounded they were no longer enemies but *hors de combat*.

<sup>80</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 171 (G.D.H. Cole trans., 1973). Rousseau also argued that “war then is not a relation between men, but between states, in war individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers, not as members of their country, but also as its defenders.” *Id.*

<sup>81</sup> See MCCOUBREY, *supra* note 47, at 6, 10–11.

<sup>82</sup> *SOUVENIRS DE SOLFERINO* (1862). Henry Dunant's proposals stirred great interest and received widespread attention. Following the publication of Dunant's booklet, Gustave Moynier, President of the Geneva Public Welfare Society, organized a committee of five (all Swiss, including Dunant) to examine the practical possibilities for implementing the proposal. That committee was the forerunner of the International Committee of the Red Cross (ICRC).

Between 1854 and 1997, fifty-nine international instruments on the regulation of armed conflicts were developed.<sup>83</sup> These instruments set forth principles to humanize armed conflicts by prohibiting the use of certain weapons that inflict unnecessary pain and suffering, and by the protection of noncombatants, prisoners of war, the sick, the wounded, the shipwrecked, cultural monuments, property and heritage, and, more recently, Protocol I of the Geneva Conventions added the protection of the environment.

The notion of protecting combatants from unnecessary pain and suffering was not a product of modern international law. It derived from a doctrine developed by the Second Lateran Council (1139), which prohibited the use of the crossbow. Arguably, this doctrine is the philosophical foundation for the prohibition, *inter alia*, of chemical and biological weapons,<sup>84</sup> and, in the opinion of this writer, it also extends to nuclear weapons.<sup>85</sup> But weapons of mass destruction, which kill and destroy indiscriminately, should be banned irrespective of the actual or comparative pain and suffering they generate. This is the case with chemical and biological weapons, but not so, yet, with nuclear weapons.

Additionally, contemporary weapons deemed conventional have been prohibited by multilateral conventions. They include blinding laser weapons; incendiary weapons; and anti-personnel mines. The modern doctrine for control and prohibition of certain weapons thus reflects certain values and embodies certain policy considerations that are beyond the scope of this book, but they are relevant to the notion of CAH, whose prohibition also reflects certain values and embodies certain policy considerations.

The modern international instruments inspired by these values and policy considerations include: the Declaration of Paris of 1856;<sup>86</sup> the Geneva (Red Cross) Convention of 1864;<sup>87</sup> the St. Petersburg Declaration of 1868;<sup>88</sup> the Declaration of Brussels of 1874;<sup>89</sup>

<sup>83</sup> See M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* 515–600 (M. Cherif Bassiouni (ed.), 1997) [hereinafter, BASSIOUNI, *ICL CONVENTIONS*]. Thirty-four other international instruments exist containing relevant provisions from 1868 to 1997, which are classified under other categories of crimes. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, signed in Oslo, Sept. 18, 1997, available at <http://www.icbl.org/treaty/text.php3>. *Id.* at 285–504; see also M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities*, in 1 *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* (M. Cherif Bassiouni ed., 3d rev. ed. 2008) at 493; *BIBLIOGRAPHY OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS* (2d rev. ed. ICRC and Henry Dunant Institute, Geneva, 1987); Yves Sandoz, *Penal Aspects of International Humanitarian Law*, in BASSIOUNI, 1 *ICL*, *supra* note 49, at 293.

<sup>84</sup> Contemporary experts seek to distinguish between weapons that cause unnecessary pain and suffering and conventionally prohibited weapons, like the CWC and BWC.

<sup>85</sup> The ICJ, in an advisory opinion, did not find that the use of nuclear weapons constitutes a violation of customary international law. *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996 I.C.J. 226 (Jul. 8).

<sup>86</sup> Declaration Respecting Maritime Law, Paris, Apr. 16 1856, 15 Martens 791; 115 Parry's 1; *reprinted in* 1 AM. J. INT'L L. 89 (1907) (Supp.).

<sup>87</sup> Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, Aug. 22, 1864, 18 Martens 440; 22 Stat. 940; T.S. No. 377, 55 Brit. & For. St. Papers 43; *reprinted in* 1 AM. J. INT'L L. 90 (1907) (Supp.).

<sup>88</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration), signed at St. Petersburg, Dec. 11, 1868, 18 Martens 474; 138 Parry's 297; *reprinted in* 1 AM. J. INT'L L. 95 (1907) (Supp.).

<sup>89</sup> Brussels Conference on the Laws and Customs of War, No. 18, *supra* note 4.

the Hague Conventions of 1899<sup>90</sup> and 1907<sup>91</sup> (including the Annex on the Laws and Customs of Land Warfare); the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and Bacteriological Methods of Warfare;<sup>92</sup> the Geneva Convention of 1929;<sup>93</sup> the Four Geneva Conventions of 1949;<sup>94</sup> the two 1977 Protocols to the 1949 Geneva Conventions;<sup>95</sup> the Convention on the Prohibition of Military

<sup>90</sup> Convention for the Peaceful Adjustment of International Disputes (First Hague, I), The Hague, July 29, 1899, 26 Martens (2d) 920, 32 Stat. 1779, T.S. No. 392, *reprinted in* 1 AM. J. INT'L L. 107 (1907); 1899 Hague Convention; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of Aug. 22, 1864 (First Hague, III), signed at The Hague, July 29, 1899, 26 Martens (2d) 979, 32 Stat. 1827, T.S. No. 396, *reprinted in* 1 AM. J. INT'L L. 159 (1907); Declaration Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature (First Hague, IV, 1), signed at The Hague, July 29, 1899, 26 Martens (2d) 994, 32 Stat. 1839, T.S. No. 393, *reprinted in* 1 AM. J. INT'L L. 153 (1907); Declaration Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases (First Hague, IV, 2), signed at The Hague, July 29, 1899, 26 Martens (2d) 998, 187 Parry's 453, *reprinted in* 1 AM. J. INT'L L. 157 (1907); Declaration Concerning the Prohibition of the Use of Expanding Bullets (First Hague, IV, 3), signed at The Hague, July 29, 1899, 26 Martens (2d) 1002, 187 Parry's 459, *reprinted in* 1 AM. J. INT'L L. 155 (1907) (Supp.).

<sup>91</sup> Convention for the Pacific Settlement of International Disputes (Second Hague, I), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 360, 36 Stat. 2199, T.S. No. 536, *reprinted in* 2 AM. J. INT'L L. 43 (1908); Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Second Hague, II), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 414, 36 Stat. 2259, T.S. No. 537, *reprinted in* AM. J. INT'L L. 81 (1908); Convention Relative to the Opening of Hostilities (Second Hague, III), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 437, 36 Stat. 2259, T.S. No. 538, *reprinted in* 2 AM. J. INT'L L. 85 (1908); Convention Respecting the Laws and Customs of War on Land (Second Hague, IV) signed at The Hague, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Second Hague, V) signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 504, 36 Stat. 2310, T.S. No. 540, *reprinted in* 2 AM. J. INT'L L. 117 (1908); Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (Second Hague, VI), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 533, *reprinted in* 2 AM. J. INT'L L. 127 (1908); Convention Relative to the Conversion of Merchant Ships into Warships (Second Hague, VII), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 557, *reprinted in* 2 AM. J. INT'L L. 133 (1908); Convention Relative to the Laying of Automatic Submarine Contact Mines (Second Hague, VIII), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 580, 36 Stat. 2332, T.S. No. 541, *reprinted in* 2 AM. J. INT'L L. 138 (1908); Convention Concerning Bombardment by Naval Forces in Time of War (Second Hague, IX), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 604, 36 Stat. 2351, T.S. No. 542, *reprinted in* 2 AM. J. INT'L L. 146 (1908); Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare (Second Hague, X), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 630, 36 Stat. 2371, T.S. No. 543, *reprinted in* 2 AM. J. INT'L L. 153 (1908); Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (Second Hague, XI), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 663, 36 Stat. 2396, T.S. No. 544, *reprinted in* 2 AM. J. INT'L L. 167 (1908); Convention Relative to the Establishment of an International Prize Court (Second Hague, XII), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 688, *reprinted in* 2 AM. J. INT'L L. 174 (1908); Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Second Hague, XIII), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 713, 36 Stat. 2415, T.S. No. 545, *reprinted in* 2 AM. J. INT'L L. 202 (1908); Declaration Relative to Prohibiting the Discharge of Projectiles and Explosives from Balloons (Second Hague, XIV), signed at The Hague, Oct. 18, 1907, 3 Martens (3d) 745, 36 Stat. 2439, T.S. No. 546, *reprinted in* 2 AM. J. INT'L L. 216 (1908).

<sup>92</sup> 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases and Bacteriological Methods of Warfare, signed at Geneva, June 17, 1925, 94 L.N.T.S. 65, 26 U.S.T. 571, T.I.A.S. No. 8061, *reprinted in* 25 AM. J. INT'L L. 94 (1931).

<sup>93</sup> Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, *in* D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 326–34 (1988).

<sup>94</sup> See JEAN S. PICTET, *COMMENTARIES ON THE FOURTH GENEVA CONVENTION* (1956).

<sup>95</sup> See *COMMENTARY ON THE ADDITIONAL PROTOCOLS* 583–1124 (Yves Sandoz et al. eds., 1987); and *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 273–489 (Michael Bothe et al. eds., 1982); Solf, *supra* note 8; Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205 (1977).

or Any Hostile Use of Environmental Modification Techniques;<sup>96</sup> and the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects.<sup>97</sup> In 1997 the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was developed.<sup>98</sup> This collection of international instruments embodies principles, norms, and rules developed over centuries of tragic human experience.

The evolution of international regulations of armed conflicts was also paralleled in national laws and military regulations.<sup>99</sup> Among these national regulations are those Gustavus Adolphus of Sweden promulgated in 1621 in the Articles of Military Laws to be Observed in the Wars. They provided in the general article that “no Colonel or Captain shall command his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judge.”<sup>100</sup>

In the United States, the first Articles of War, promulgated in 1775, contained explicit provisions for the punishment of officers who failed to keep “good order” among the troops, which included a number of prescriptions for the protection of civilians, prisoners of war, and the sick and injured in the field. This provision was retained and strengthened

<sup>96</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, *opened for signature* at Geneva, May 18, 1977, U.N. G.A. Res. 31/721 (XXXI), 31 U.N. GAOR Supp. (No. 39), at 36, U.N. Doc. A/31/39 (1976), 31 U.S.T. 333, 1108 U.N.T.S. 151, 16 I.L.M. 88.

<sup>97</sup> Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, *concluded at Geneva*, Oct. 10, 1980, U.N. Doc. A/Conf.95/15 (1980), 19 I.L.M. 1523, 1342 U.N.T.S. 7.

<sup>98</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *signed at Oslo*, Sept. 18, 1997, available at <http://www.vvaf.org/landmine/us/updates/events97/treaty9.29.html>.

<sup>99</sup> For the national military regulations see the Lieber Code. Promulgated as *Instruction for the Government of the United States in the Field by Order of the Secretary of War*, in Washington D.C., Apr. 24, 1863 and approved by President Lincoln. For other similar rules of the United States of America, see RULES OF LAND WARFARE, War Dept. Doc. No. 467, Office of the Chief of Staff, approved Apr. 25, 1914 (G.P.O. 1917); Army Field Manual 27–10, RULES OF LAND WARFARE (1956). See also GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (3rd rev. ed. 1918) (tracing the history of the first Articles of War of 1775); WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION, AND PRACTICE OF COURTS MARTIAL (1846); and WILLIAM W. WINTHROP, MILITARY LAW AND PRECEDENTS (1896); THE BRITISH MANUAL OF MILITARY LAW (1929 revised in 1940); GERMAN ARMY REGULATIONS (1902, revised in 1911, revised in 1935) to which the 1907 Hague Convention was appended as Annex II, quoted in Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58 (1944); the 1935 version; and the OXFORD MANUAL ON THE LAWS AND CUSTOMS OF WAR ON LAND (Institute of International Law, 1880). See also *Regolamento di Servizio in Guerra*, in 3 LEGGI E DECRETI DEL REGNO D'ITALIA 3184 (1896).

For commentaries on these laws and regulations by distinguished publicists, see JOHN B. MOORE, 7 DIGEST OF INTERNATIONAL LAW 1109 (1906); CHARLES C. HYDE, 2 INTERNATIONAL LAW 653–54 (1922); LASSA OPPENHEIM, 2 INTERNATIONAL LAW 107 (6th ed. 1940); CARLOS CALVO, 4 LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE 2034–35 (5th ed. 1896); JOHANN K. BLUNTSCHLI, DROIT INTERNATIONAL 531–32 (5th ed. 1895).

<sup>100</sup> GUSTAVUS ADOLPHUS, ARTICLES OF MILITARY LAWS TO BE OBSERVED IN THE WARS (1621), cited in Leo Gross, *The Punishment of War Criminals: The Nuremberg Trial*, 11 NETH. INT'L L. REV. 356 (1955). Adolphus's rules served as a source for the British Articles of War, which in turn served as the source for the first American Articles of War (1775). See Edward F. Sherman, *The Civilization of Military Law*, 22 ME. L. REV. 3 (1970).

in the Articles of War of 1806<sup>101</sup> and served as the basis for prosecutions for conduct against the law of nations.<sup>102</sup>

The most noteworthy national regulations are the United States Lieber Code of 1863,<sup>103</sup> the 1880 Oxford Manual,<sup>104</sup> Great Britain's war office Manual of Military Law of 1929,<sup>105</sup> and the German General Staff *Kriegsbrauch im Landkriege* (Regulations of War) of 1902.<sup>106</sup> These are only some examples of national military regulations protecting, *inter alia*, civilian populations. Consequently, there can be no question that national laws also prohibited the same conduct that was prohibited under international law.

Currently, more than 188 countries have included in their military laws or military regulations provisions on the protection and treatment of civilians during armed conflicts, prisoners of war, the sick, the injured, the shipwrecked, and other limitations.<sup>107</sup> These national laws and regulations are the result of the four Geneva Conventions of August 12, 1949, and Protocols I and II of 1977, which require the introduction of such norms in the national laws of the contracting parties, and which require the dissemination of these rules to military personnel in order to insure compliance and to avoid claims of ignorance of the law.

The cumulative effect of these historical experiences and precedents demonstrates the universality of humanitarian principles governing the conduct of armed conflicts, though many cultures have continued to resort to retaliation in kind, which is contrary to contemporary international humanitarian law. These humanitarian principles, norms, and rules regulating armed conflict developed over several millennia, spanning many civilizations continents apart, and covering a wide range of conduct have evolved in the same direction. In time, each succeeding generation reinforced values and strengthened norms and rules. Much has yet to take place in bringing about greater compliance with existing norms. The articulation of this process is contained in the Preamble of the 1907 Hague Convention, which simply, yet eloquently, refers to the "laws of humanity," implying that law and practice are likely to evolve in the pursuit of these higher values.

This evolution can be seen in its spatial and temporal dimensions as part and parcel of the processes of humankind's history.<sup>108</sup> It is this cumulative historical baggage that constitutes the foundation upon which the prohibitions against CAH are premised. This

<sup>101</sup> Articles of War art. IX (1775); re-enacted with modifications, Articles of War, Art. IX (1776); Articles of War art. 32 (1806). This provision survives in weakened form in the *Uniform Code of Military Justice*, Art. 138, 10 U.S.C. ¶ 1038. See also DAVIS, DE HART and WINTHROP, *supra* note 99.

<sup>102</sup> *Henfield's Case*, 11 F. Cas. 1099 (Case No. 6,360) (C.C. Pa. 1793) (violation of principles of neutrality by civilian).

<sup>103</sup> See Lieber Code, *supra* note 99.

<sup>104</sup> See OXFORD MANUAL, *supra* note 99.

<sup>105</sup> See BRITISH MANUAL OF MILITARY LAW, *supra* note 99. The first manual was developed under the title of LAWEES AND ORDINANCES OF WARRE, see CHARLES M. CLODE, I THE MILITARY FORCES OF THE CROWN, App. VI (1869), quoted in Leslie C. Green, *The Law of Armed Conflict and the Enforcement of International Criminal Law*, *supra* note 40, at 7.

<sup>106</sup> See GERMAN ARMY REGULATIONS, *supra* note 99. These regulations were amended in 1935 but they preserved the same rules referred to *supra* note 99 and accompanying text.

<sup>107</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 83, at 284–85, 515–600.

<sup>108</sup> Arnold Toynbee refers to some thirty-four civilizations between 3500 B.C.E. and our century whose evolution he chronicles in his twelve volumes entitled A STUDY OF HISTORY (1939–62). See also the abridged one-volume version: ARNOLD TOYNBEE, A STUDY OF HISTORY 72 (1972). More specifically in a case involving the law of war *Ex Parte Quirin*, 317 U.S. 1 (1942) the United States Supreme Court held: "The Law of war, like civil law, has a great *lex non scripta*, its own common law. This common law of war is a centuries old body of largely unwritten rules and principles of international law that governs the



historical evolution demonstrates that what became known as CAH existed as part of “general principles” long before the Charter’s formulation in 1945.<sup>109</sup>

### §3. The Law of the London Charter: Crimes Against Humanity Acquires Its Own Identity

The customary and conventional laws of armed conflict have historically overlapped. In the last few decades they have in many respects merged. The four Geneva Conventions are deemed to be part of customary law, and many of the provisions of Protocols I and II are also deemed to reflect customary law.<sup>110</sup> Article 8 of the ICC Statute is also said to embody customary law.<sup>111</sup> They all form, *largo senso*, part of what is called international humanitarian law, and which for some also includes CAH and genocide.<sup>112</sup> The protections and prohibitions reflected in war crimes apply only to conflicts, whether of an international or noninternational character, and the latter two crimes apply at all times. Thus, CAH and genocide are not limited by any legal characterization of the context in which they occur. These developments only occurred after the London Charter, as discussed in [Chapter 4](#).

Regrettably, the regulation of armed conflicts still distinguishes between norms applicable to conflicts of an international character and those applicable to conflicts of a noninternational character, and neither of these norms applies to purely internal conflicts or to most tyrannical regime victimization, which occurs outside these two legal contexts.<sup>113</sup> At the time of the London Charter, however, war crimes only arose in the context of conflicts of an international character.

behavior of both soldiers and civilians during time of war. WINTHROP, *supra* note 99, at 13–14, 17, 41, 42, 773.

<sup>109</sup> Earlier in 1776, Thomas Paine, in his famous book *COMMON SENSE*, urged the new United States of America to follow this principle, stating: “The laying of a country desolate with fire and sword, declaring war against the national rights of all mankind, and extirpating the defenders from the face of the Earth is the concern of every man [ . . . ].” THOMAS PAINE, *COMMON SENSE*, Introduction (Feb. 14, 1776), *reprinted in* THE ESSENTIAL THOMAS PAINE 23–24 (Sidney Hook ed., 1969).

<sup>110</sup> ICRC, *CUSTOMARY IHL*, *supra* note 49.

<sup>111</sup> DÖRMANN, *supra* note 50.

<sup>112</sup> These instruments are reprinted in BASSIOUNI, *MANUAL*, *supra* note 47; THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler & Jiri Toman eds., 2004); ADAM ROBERTS & RICHARD GUEFF, *DOCUMENTS ON THE LAW OF WAR* (3d ed. 2000); 1–2 THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman ed., 1972).

For commentaries and analyses on these documents and customary IHL, see COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Y. Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* (2002); M. SASSOLI & A. A. BOUVIER, *HOW DOES LAW PROTECT IN WAR?* (ICRC 1999); *THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* (Frits Kalshoven & Yves Sandoz eds., 1989); JEAN S. PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1975); GERALD I. A. D. DRAPER, *THE RED CROSS CONVENTIONS OF 1949* (1958); ICRC, *CUSTOMARY IHL*, *supra* note 49; MCCOUBREY, *supra* note 47; JEAN S. PICTET, I-IV COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (ICRC 1952); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 187 (2005); see also MORRIS GREENSPAN, *THE LAW OF LAND WARFARE* (1959).

<sup>113</sup> See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps, and Ambiguities*, in BASSIOUNI, 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS, *supra* note 49.

These legal distinctions were among the reasons that the drafters of the London Charter had to link the new international criminal category of CAH to the established one of war crimes. The latter, being a well-established category of international crimes, did not pose any problems with respect to principles of legality, but the former did.<sup>114</sup> That is why CAH had to be linked to “crimes against peace” or to war crimes. The Charter linked CAH to the initiation or conduct of war, which was one of the crimes within the jurisdiction of the IMT, namely “crimes against peace” of Article 6(a). However, the linkage of CAH to war crimes is self-evident; the one to the initiation of war is not. In fact, it is even incomprehensible, since the initiation of a war, albeit of aggression, was not deemed an international crime at that time, even though the Charter made “crimes against peace” an international crime. Thus, CAH derived legitimacy from its linkage to “war crimes” in Article 6(b), not by being linked to “crimes against peace” in Article 6(a).

The drafters of the Charter also had to develop particular characteristics to this international category of crimes in order to set it apart from what would otherwise be deemed common national crimes performed on a large scale. These characteristics were contained in the war-connecting link and in the state policy requirement.<sup>115</sup>

The legal nature of CAH is still debated since it partakes of international humanitarian law, international human rights law, and ICL. However, distinctions do exist, since the purpose of the CAH prohibition is to protect the civilian population against victimization irrespective of any legal characterization of the context during which it occurs.<sup>116</sup> When the same socially protected interest is addressed by multiple normative legal regimes, the overall protection of that social interest is weakened by the gaps and overlaps that exist in these different legal regimes.<sup>117</sup>

The arena for the birth of this new international crime was the London Conference, which was convened in 1945 by the four major Allies to prepare for the prosecution of what was already predictable, namely the defeat of the Axis Powers. As eloquently expressed by Justice Robert Jackson, the Chief U.S. Prosecutor at the IMT, in his opening statement:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>118</sup>

The formulation of the Charter was therefore the symbolic triumph of law over the unlawful use of power.

<sup>114</sup> See generally *infra* ch. 5.

<sup>115</sup> See *infra* §7 and *infra* ch. 1, §2.

<sup>116</sup> Probably the first contemporary scholar to have argued that the parallelism between these contexts is not helpful in advancing the goals of protection contained in the respective norms applicable to conflicts of an international and non-international character is Professor Theodor Meron when he was a professor at New York University. After that he became a judge at the ICTY and he was president of the ICTY. See MERON, *supra* note 47; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995). For a different approach leading to the same result, see STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* (1997).

<sup>117</sup> See Bassiouni, *supra* note 113.

<sup>118</sup> 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98–9 (1947).



The Allies ratified the London Agreement on August 8, 1945, and appended the Charter to it, which defined the crimes committed in the European theater by certain “major war criminals” that were to be prosecuted. Article 6 identified those crimes as “crimes against peace,” “war crimes,” and CAH, which it defined as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>119</sup>

Although this formulation was the first instance in positive ICL in which the specific term CAH was identified and defined, as previously mentioned, the concept was not new, nor was the notion of protecting civilians in time of war.

Shortly after the Charter’s definition was adopted, two other formulations defining CAH were developed: Article II(c) of the Allied Control Council Law No. 10 (CCL 10) and Article 5(c) of the Tokyo Charter of the IMTFE. Notwithstanding the fact that these two subsequent formulations differed slightly from the London Charter’s Article 6(c), the same legal issues pertaining to Article 6(c) apply to them. More importantly, the London Charter appeared first in time and served as the model and legal basis for these and other subsequent developments. Consequently, the analysis that follows and throughout this book inevitably reverts to the London Charter.

To understand the way in which the Charter was drafted, it is important to know the political/military context from which it emerged. The three major Allies, Great Britain, the U.S., and the U.S.S.R., later joined by France, did not start out with the clear intention of establishing international judicial bodies to prosecute accused offenders, whether at Nuremberg or Tokyo. That process evolved gradually between 1942 and 1945.

Initially, these three Allies broadcast a proclamation on December 17, 1942, followed by a second on January 5, 1943, indicating their intention to hold Germans and Germany accountable for war crimes and atrocities committed during the war. Then, on February 11, 1943, at the Yalta Conference, Roosevelt, Churchill, and Stalin subscribed to a similar declaration. On November 1, 1943, the Moscow Declaration, adopted by these leaders in the name of their respective governments, made explicit the policy and intentions of the Allies to hold postwar trials. After Germany’s unconditional surrender on May 8, 1945, the Potsdam Agreement<sup>120</sup> asserted that war criminals were to be punished by the Allies, but neither the policy nor the precise legal basis for that punishment was spelled out in any of these proclamations or declarations, or in the Potsdam Agreement.

Although these developments were taking place in the European theater, there were no similar counterparts in the Far Eastern theater. The diversity of these two theaters and their different Allies probably necessitated separate, though similar, approaches. Ultimately, these distinctions resulted in the development of two separate institutional frameworks and two separate structures for prosecutions in Europe and in the Far East. This approach resulted in the London Charter and its Tokyo counterpart. The former was in the nature of an agreement signed by the four Major Allies – France, the United

<sup>119</sup> IMT Charter, *supra* note 36.

<sup>120</sup> Report on the Tripartite Conference of Berlin, Aug. 2, 1945, United Kingdom–USSR–United States, 3 Bevans 1224, [1945] 2 FOREIGN RELATIONS OF THE UNITED STATES 1499.

Kingdom, the United States and the USSR – and later acceded to by nineteen others.<sup>121</sup> General Douglas MacArthur proclaimed the latter in his capacity as Supreme Allied Commander for the Far East. No one ever satisfactorily explained why in one case an international agreement was needed and in the other a military proclamation by a theater military commander was deemed sufficient. But as is frequently the case in international affairs, a variety of political considerations, some international and some domestic, brought about an outcome that, upon reflection, was neither good law nor sound policy, but politically useful or expedient.<sup>122</sup>

The political decision of the Allies to provide a legal process for the prosecution and punishment of those who committed crimes in connection with World War II was essentially a principled one. To paraphrase a statement made by Robert Jackson during his opening statement before the IMT, the Allies had decided to stay the hand of vengeance and to provide a judicial process that would establish the truth and hold accountable only those whose criminal acts would be established in accordance with the rule of law. That process would have to be, still paraphrasing Robert Jackson, one that the Allies would one day have to be judged by, and if the occasion arose, they would also have to be subject to the same law that they were setting down for their defeated enemies.<sup>123</sup> These lofty statements notwithstanding, the Allies prosecuted only their defeated enemies at Nuremberg and Tokyo and in the CCL 10 Proceedings.

The London and Tokyo Charters provided for the prosecution of what the Allies considered to be “major war criminals” in the two separate theaters of military operations.<sup>124</sup> The London Charter established the official seat of the IMT at Berlin.<sup>125</sup> The Tokyo Charter established the IMTFE at Tokyo, which was firmly under U.S. control.

In the European theater, the Allies established a joint body to administer Germany, the Control Council. Pursuant to that body’s supreme control over Germany, it passed CCL 10, which was a hybrid between international and national law, and was applied to Germany by the Allied occupying powers. Under that law, the Allies in the European theater were to prosecute, in their respective zones of occupation, Germans and others

<sup>121</sup> The nineteen were Australia; Belgium; Czechoslovakia; Denmark; Ethiopia; Greece; Haiti; Honduras; India; Luxembourg; the Netherlands; New Zealand; Norway; Panama; Paraguay; Poland; Uruguay; Venezuela; and Yugoslavia. See JACKSON’S REPORT, *supra* note 34.

<sup>122</sup> The U.S. was leery of the USSR’s role in the Far East after World War II, particularly because the USSR had only entered the Far East Theater in the last few weeks of the conflict there and evidenced its eagerness to profit from the spoils of war. In addition, General MacArthur was exceedingly suspicious of the USSR and wanted to control the situation without external interference. See generally DOUGLAS MACARTHUR, REMINISCENCES (1964); and WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880–1964 (1978).

<sup>123</sup> JACKSON’S REPORT, *supra* note 34, at 165.

<sup>124</sup> Even though the London Charter was appended to an international treaty, the London Agreement of August 8, 1945, and the Tokyo Charter was appended to a Military Proclamation issued by the Theater Commander, General Douglas MacArthur, both were referred to as Charters probably to create the impression that they were both equal in legal standing. The similarity of the two texts was designed to reinforce that perception – a sort of a separate but equal legal source.

<sup>125</sup> This was at the USSR’s insistence, since Berlin was to be administered by the Four Major Allies and that would have given the USSR greater influence over the IMT. But since Berlin had no facilities capable of sustaining the IMT, due largely to the USSR’s systematic destruction of that city in the last ten days of the war, the actual seat of the IMT was the city of Nuremberg where the Court of Appeals’ building of that city was still intact. Since Nuremberg was in the American Zone of Occupation, it gave the U.S. greater influence over the proceedings. The American CCL 10 Proceedings were also conducted in the same venue, and this same venue for the two proceedings may give rise to confusion.

accused of the crimes specified in CCL 10.<sup>126</sup> There was no such counterpart in Japan, where General Douglas MacArthur exercised *de facto* sovereign authority, subject to the hierarchical command and control system of the U.S. military, and the overall control of the President of the U.S., who is the commander-in-chief.

In Germany and in Asia, the Allies set up their own separate military courts to prosecute war criminals in their separate zones of occupation. In addition, the Allies pursued prosecutions of their former occupiers and of their nationals who collaborated with the occupying forces. These prosecutions were carried out through military tribunals, as well as ordinary criminal courts applying national laws.

No published records of the reasons for these and other decisions were made by the Allies. One can assume that they were made for expediency and political reasons and, given the times, surely in haste. The main published record that exists of the negotiations leading to the London Agreement of August 8, 1945 and its annexed Charter is contained in Robert Jackson's Report to the President of the United States.<sup>127</sup> It consists of the transcription of stenographic notes of the meetings in London made by Justice Robert Jackson's secretary. These notes were not verbatim transcriptions but rather edited summaries that contained selective quotations of some of the drafters' statements.<sup>128</sup> A book published in Moscow in 1944 written by Professor A.N. Trainin, who was the alternate USSR delegate at the London Conference, also provides insight as to the inclusion of aggression in the London Charter.<sup>129</sup> However, these sources are insufficient to assess the reasons for the policies and critical decisions that led to the newly established lawmaking process, the reasons for the legal decisions made by the drafters, and the multiplicity of applicable legal sources and adjudicative bodies that emerged from that process.

A revealing document about the Allies' policies is contained in the American Memorandum presented at San Francisco, April 30, 1945,<sup>130</sup> excerpts from which appear below.

<sup>126</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55 (1946) [hereinafter CCL 10].

<sup>127</sup> JACKSON'S REPORT, *supra* note 34.

<sup>128</sup> *Id.*; see also ROBERT H. JACKSON, THE NÜRNBERG CASE (1947, 2d ed. 1971). Another insightful report of a senior participant is that of Brig. Gen. Telford Taylor, who was Jackson's deputy and then his successor, who also headed the U.S. prosecution team under CCL 10. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 1–32 (1949). See also BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944–1945 (1982); and BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 20–73 (1977). For more recent commentary, see DAVID IRVING, NUREMBERG: THE LAST BATTLE (1996), whose critique of the process that led to the IMT and CCL 10 Proceedings is quite telling. In particular, he reveals how the Allies were uncertain about going the route of fair and impartial judicial proceedings. He credits Robert Jackson for that development. Like other historians, he reveals how the Allies were initially inclined toward summary execution of German detainees. He also emphasizes the one-sided approach of the prosecutors, which ignited similar practices by the Allies.

<sup>129</sup> See AARON N. TRAININ, HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW (Andrew Rothstein trans., 1945 from Moscow ed. 1944). In 1946, Trainin also wrote an article that gave some insight from the USSR's perspective into the IMT and the London Charter. See *Le Tribunal Militaire International et le Procès de Nuremberg*, 17 RIDP 263 (1946). Professor A.N. Trainin was probably the first author whose work on the prosecution of German decision-makers for CAH shaped the position of Stalin on that question and consequently that of Roosevelt and Churchill. Stalin made a speech on November 6, 1943, in which he announced the policy that was later to be adopted in the Moscow Declaration (Moscow Conference). See JOSEPH STALIN, ON THE GREAT PATRIOTIC WAR OF THE SOVIET UNION (1945).

<sup>130</sup> JACKSON'S REPORT, *supra* note 34, at 28.

It shows quite clearly that the United States' views and policies ultimately prevailed in the formulation of the London and Tokyo Charters and in the conduct of the IMT and IMTFE prosecutions, as well as in the formulation of CCL 10 and the CCL 10 Proceedings. What these documents do not reveal is the political considerations that were debated in the various capitols, particularly in Washington, London, and Moscow. There, questions of law and legal process were hardly considered, except as a means of achieving political objectives. In fact, the lofty ideals of a rule of law approach were far from the considerations that Roosevelt, Churchill, and Stalin deemed as priorities. This was a period during which power-interests prevailed, and that included these powers' control over certain parts of the world and its resources. The rule of law was not part of these considerations, nor was it part of the future world order.

Roosevelt was influenced by his Treasury Secretary, Hans Morgenthau, who wanted Germany reduced to farmland and millions of Germans sent to the USSR to work in the rebuilding of that country as reparations. Some in Roosevelt's administration and entourage were shocked by the plans, particularly turning millions of Germans into slave-labor, much as the Nazis had done to others. Among those who opposed such plans were Justice Robert Jackson, Secretary of War Henry Stimson, Secretary of State Cordell Hull, and General George Marshall, Chief of Staff. However, many in the U.S. military opposed prosecutions of German military personnel, though they were strongly in favor of military courts martial, particularly in the Far East. In England, Churchill's view, supported by the military establishment, called for swift military courts martial and execution by fire squads. Stalin was hardly concerned with legal processes enough to become their early champion. He saw trials as a means of rewriting history and cleansing himself of his own crimes, which included, *inter alia*, the great famine in the Ukraine (resulting in the deaths of some 3.3 million persons) and the Great Purge of the 1930s and Vyshinsky show trials of the same period.<sup>131</sup> Against this political backdrop, it is extraordinary that the London Charter and the IMT processes emerged. The one person who could, and did, make the difference was President Harry Truman. He put to rest all thoughts of expedient solutions and embraced the rule of law approach.

The urgency behind the World War II prosecutions did not carry forth beyond the war's fallout. Since the post-World War II prosecutions, the Federal Republic of Germany has prosecuted a large number of persons for genocide,<sup>132</sup> while Canada, France, and Israel have carried out a small number of prosecutions of CAH in the context of World War II.<sup>133</sup> It was not until 1993, when the ICTY was established (followed by the ICTR in 1994), that international prosecutions for CAH were carried out before these *ad hoc* tribunals. The statute of the International Criminal Court (ICC), adopted in Rome,

<sup>131</sup> These trials were the namesake of Stalin's state prosecutor, Andrey Vyshinski. See, e.g., TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* (2010); ROBERT CONQUEST, *THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES* (1968); ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* (1990).

<sup>132</sup> At the time, German law criminalized genocide but not CAH. See *Alleged Nazi War Criminals: Hearings Before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 59 (1977); A. RYAN, *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* (1984) (examining the issue of war criminals who emigrated to the United States and who now must confront their past); John Francis Stephens, Note, *The Denaturalization and Extradition of Ivan the Terrible*, 26 RUTGERS L.J. 821 (1995). Subsequently, however, the U.S. did not pursue a policy of prosecuting former war criminals.

<sup>133</sup> See generally *infra* ch. 9, §3.2, respectively.

July 17, 1998, defines CAH in Article 7. These post-Charter legal developments are discussed in greater detail in [Chapter 4](#).

The legal nature of CAH is still debated, since it partakes of international humanitarian law, international human rights law, and ICL. However, such distinctions should not exist, since the purpose of the prohibition is to protect civilian populations against victimization by state agents in furtherance of or as part of a state policy irrespective of any legal characterization of the context in which it occurs.<sup>134</sup>

#### §4. The Legislative History of the London Charter's Article 6(c)

In London, between June 26 and August 8, 1945, four teams negotiated the contents of the Agreement and the annexed Charter.<sup>135</sup> The participants brought to the negotiations their own legal conceptions and the experiences of their respective legal systems: the common law, as it had evolved differently in the United Kingdom and in the United States; the Marxist conceptions of “legality;” and the French-Civilist tradition. Considering the diversity of these conceptions of law and justice, as well as the different historical experiences of these systems, it can well be assumed that only the joint political decisions of the four respective governments bound the negotiators to produce the intended outcome. In substance, it was the will of Roosevelt, Stalin, and Churchill that the drafters executed, with Robert Jackson being the only one whose role was more significant than that of a negotiator. He was Roosevelt’s advisor, and in those days the weight of the United States was determining.

Justice Jackson, in the *Preface* to his Report to the President of the United States containing a summary of the London Charter’s negotiating history, reported on the legal divergences as follows:

The four nations whose delegates sat down at London to reconcile their conflicting views represented the maximum divergence in legal concepts and traditions likely to be found among occidental nations. Great Britain and the United States, of course, are known as common-law countries but, with differences between their procedures. Together they exemplify the system of law peculiar to English-speaking peoples. On the other hand, France and the Soviet Union both used variations of what generally may be called the Continental system. But the differences between French and Soviet practice were significant. It was to be expected that differences in origin, tradition, and philosophy among these legal systems would beget different approaches to the novel

<sup>134</sup> See *supra* note 116 and accompanying text; see also *infra* ch. 1, §4.

<sup>135</sup> Each country had a team of jurists, whose principals were the following individuals: Justice Robert H. Jackson (United States); Sir David Maxwell Fyfe, who was succeeded by Lord Jowitt (United Kingdom); Judge Robert Falco and Professor André Gros (France); and General I.T. Nikitchenko and Professor A.N. Trainin (Union of Soviet Socialist Republics).

These drafters of the London Charter, its legislators, also acted in different capacities thereafter. Jackson and Fyfe were prosecutors respectively for the United States and the United Kingdom, while Nikitchenko and Falco became judges at the IMT, one representing the USSR, the other serving as the alternate judge representing France. The cumulative roles of legislators turned prosecutors and judges raises questions about the impartiality and fairness of the subsequent legal process. Such a situation would not be tolerated nowadays and indeed the ICTY and ICTR models reveal how carefully the U.N. was to avoid the appearance of impropriety. See M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996) [hereinafter *THE LAW OF THE ICTY*]; see also Larry D. Johnson, *The International Tribunal for Rwanda*, 67 RIDP 211 (1996).

task of dealing with an international criminal prosecution through a newly developed judicial process.<sup>136</sup>

To paraphrase Jackson, a fundamental irritant, which persisted throughout the negotiations, was caused by the difference between the French and Soviet legal practices, under which a judicial inquiry is carried on by a judge (in France, a *juge d'instruction*) and in the USSR by the court and not by the parties. The Soviet jurists rejected the Anglo-American adversary-accusatorial criminal trial system, which the former called the contest trial approach. The Soviets wanted to rely on the diligence of the tribunal rather than on the zeal and self-interest of adversaries to develop the facts. Another fundamental opposition concerned the function of the judiciary. The Soviets viewed a court as one of the organs of government power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests. It is not strange that those trained in that view should find it difficult to accept or to understand the Anglo-American idea of a court as an independent agency responsible only before the law. It is not difficult to trace in the deliberations of the London Conference the influence of these antagonistic concepts. Although the Soviet authorities presumably accepted the reality and binding force of international law in general, they did not submit themselves to the general body of customary law deduced from the practice of Western states. With dissimilar backgrounds in both penal law and international law, it is surprising that more clashes did not develop at the Conference and that differences could be reconciled. Understandably, much of the difficulty in reaching a real meeting of minds was due to the barrier of language and the underlying differences in legal principles and concepts.

That these discords were stubborn and deep, the minutes of conferences adequately disclose. These minutes also do not disclose all the efforts at conciliation, for there were many personal conversations between members of the different delegations, outside the formal meetings, which aimed to gain knowledge of each other's viewpoints and clear up misunderstandings. The London Conference was, after all, a diplomatic meeting, where the government representatives sought to reconcile their differences because they had to produce a result that their governments had already decided on.

The Charter that emerged from these long and difficult negotiations was therefore necessarily a legal compromise, though it was heavily weighted in favor of the common law approach. As such, it departed in many ways from the conceptions of law and justice, as well as the procedures and practices of the other interested parties' legal systems and of Germany's legal system, where the IMT sat and judged German citizens.

The drafters were confronted with many substantive and procedural issues, some inherent to the very legislative process that was being undertaken, others relating to the diversity of the legal conceptions and systems that needed to be reconciled. Justice Jackson described the most notable example in the area of substantive law as follows:

Another point on which there was a significant difference of viewpoint concerned the principles of conspiracy as developed in Anglo-American law, which are not fully followed nor always well regarded by Continental jurists. Continental law recognizes the criminality of aiding and abetting but not all the aspects of the crime of conspiracy as we know it. But the French and Soviet Delegations agreed to its inclusion as appropriate to the kind of offenses the charter was designed to deal with. However, the language which expressed this agreement seems not to have conveyed to the minds of the judges

<sup>136</sup> JACKSON'S REPORT, *supra* note 34, at v–vi.



the intention clearly expressed by the framers of the charter in conference, for, while the legal concept of conspiracy was accepted by the Tribunal, it was given a very limited construction in the judgment.<sup>137</sup>

As to procedural questions, Justice Jackson stated:

The only problem was that a procedure that is acceptable as a fair trial in countries accustomed to the Continental system of law may not be regarded as a fair trial in common-law countries. What is even harder for Americans to recognize is that trials which we regard as fair and just may be regarded in Continental countries as not only inadequate to protect society but also as inadequate to protect the accused individual. However, features of both systems were amalgamated to safeguard both the rights of the defendants and the interests of society.

While it obviously was indispensable to provide for an expeditious hearing of the issues, for prevention of all attempts at unreasonable delay and for elimination of every kind of irrelevancy, these necessary measures were balanced by other provisions which assured to the defendants the fundamentals of procedural “due process of law.” Although this famous phrase of the American Constitution bears an occasionally unfamiliar implication abroad, the Continental countries joined us in enacting its essence – guarantees securing the defendants every reasonable opportunity to make a full and free defense. Thus the charter gives the defendant the right to counsel, to present evidence, and to cross-examine prosecution witnesses. It requires the indictment to include full particulars specifying the charges in detail – more fully than in our own practice. It gives the defendant the right to make any explanation relevant to the charge against him and to have all proceedings conducted in or translated into his own language.<sup>138</sup>

At least one of the procedural divergences among the conferring nations worked to the advantage of defendants. The Anglo-American system gives a defendant the right, which the continental system usually does not grant, to give evidence on his own behalf under oath. However, continental procedure allows a defendant the right, not accorded him under Anglo-American practice, to make a final unsworn statement to the tribunal at the conclusion of all testimony and after summation by lawyers for both sides without subjecting himself to cross-examination. The London Charter resolved these differences by giving defendants both privileges, permitting them not only to testify in their own defense but also to make the final statement to the court.<sup>139</sup>

It should be noted that the IMT’s procedures were as fair as can be expected, and surely much more so than the procedures in many countries of the world at that time. Regrettably, the same cannot be said for the IMTFE and other Far East prosecutions.<sup>140</sup>

The initial methodological question discussed by the drafters of the London Charter was whether to have a generic definition of the crimes; a listing of specific acts constituting international crimes; or a combination of the two. The listing of specific crimes would have been the more precise approach, but it would have risked overlooking certain acts

<sup>137</sup> *Id.* at vii.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at x–xi. See also John F. Murphy, *Crimes Against Peace at the Nuremberg Trial*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 141, 143–49 (George Ginsburgs and Vladimir N. Kudriavtsev eds., 1990).

<sup>140</sup> See *infra* §9.

that might be uncovered later, whereas the choice of a generic definition risked being too broad,<sup>141</sup> thus violating the principles of legality.<sup>142</sup>

The United States revised its original American Draft in a new Proposed Agreement of June 14, 1945, which referred to “Atrocities and Offenses against Persons or Property Constituting Violations of International Law, Including the Laws, Rules and Customs of Land and Naval Warfare.”<sup>143</sup> To some extent, the reference to “Violations of International Law” was broad enough to permit some form of judicial interpretation of what international law was at the time and thus avoid the need for including a specific reference or listing of violations. These words echo the Martens’ clause of the 1907 Hague Convention’s “laws of humanity,”<sup>144</sup> which incorporates what was subsequently included in the formulation of “general principles of law recognized by civilized nations” that was deemed one of the sources of international law.<sup>145</sup>

In response to the amended American proposal, the British amended Article 12 and proposed to declare what the drafters concluded would constitute criminal violations of international law. This categorical approach, they thought, would resolve the divergent views presented. The British proceeded from the assumption that the victorious powers possessed all the authority they needed by virtue of their triumphant position. Consequently, they believed that the drafters should only concern themselves only with declaring what they concluded the law to be. The United States was more concerned with legitimacy and legality and sought a general definition, incorporating by reference international law and leaving broad judicial discretion to the IMT. The USSR and the French sought to focus on specific crimes, as they believed them to suit the facts, but the French had a more pronounced penchant for legal technicality and they sought to link the post-World War I developments to the effort at hand.

The British changes of June 28, 1945 were included in amended Article 12(e), which referred to “[a]trocities and persecutions and deportations on political, racial, or

<sup>141</sup> For example, the San Francisco draft of Article 6 stated some specific crimes and then added: “This declaration shall also include the right to charge and try defendants under this Agreement for violations of law other than those recited above, including but not limited to atrocities and crimes committed in violation of the domestic law of any Axis Power or satellite or any of the United Nations.” JACKSON’S REPORT, *supra* note 34, at 24; SMITH, *supra* note 128, at 214, comments upon that language, stating:

This remarkable statement would, among other things, have empowered the prosecutors to rummage through the law codes of some fifty-odd Allied nations in search of offenses that could be charged against the Nazi leaders. Obviously defendants in any international trial would have stood no chance if handfuls of accusations drawn from the statute books of a group of states could have been thrown onto the scales of justice by the prosecution.

For the formulation of the definition on aggression, *see, e.g.*, M. Cherif Bassiouni, *A Definition of Aggression in International Law: The Crime Against Peace*, 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 159 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973); M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in BASSIOUNI, 1 ICL, *supra* note 49, at 207; Roger S. Clark, *The Crime of Aggression and the International Criminal Court*, in BASSIOUNI, 1 ICL, *supra* note 49, at 243.

<sup>142</sup> *See generally infra* ch. 5.

<sup>143</sup> JACKSON’S REPORT, *supra* note 34, at 55.

<sup>144</sup> *See* BENVENUTI, *supra* note 7.

<sup>145</sup> *See generally* Arnold D. McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT’L L. 1 (1957); Wolfgang Friedmann, *The Uses of ‘General Principles’ in the Development of International Law*, 57 AM. J. INT’L L. 279 (1963); BIN CHENG, *GENERAL PRINCIPLES OF LAW, AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1987); and Bassiouni, *supra* note 8.



religious grounds, in pursuance of the common plan or enterprise referred to in subparagraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated.”<sup>146</sup> The British purpose was essentially to avoid discussions at the trial of what constituted a violation of international law by settling the question at what they deemed to be the legislative stage. But the French delegation sought more. On July 19, 1945, it submitted a draft that would have given the future tribunal jurisdiction over acts constituting “the policy of atrocities and persecutions against civilian populations [ . . . ] [and over those who are] responsible for the violations of international law, the laws of humanity, dictates of the public conscience, committed by the armed forces and civilian authorities in the service of those enemy Powers.”<sup>147</sup>

Clearly, that text revealed its strong attachment to the implied substance of the preamble of the 1907 Hague Convention, as well as the recommendations of the 1919 Commission concerning violations of the “laws of humanity.”<sup>148</sup> France, in 1919, was the principal advocate of reliance on the “laws of humanity” proviso in the Preamble of the 1907 Hague Convention to prosecute Turkish officials, but the United States opposed it.<sup>149</sup> This may be the reason that the proposed French language was not adopted in London, as it was too reminiscent of what the United States had rejected in 1919.<sup>150</sup> Maybe the United States’ and Great Britain’s delegations thought that to incorporate terms that had been previously rejected while paradoxically relying on that tenuous a precedent would have appeared too incongruous.

Atrocities against a civilian population, which were at the heart of the final formulation of Article 6(c), were based on identical factual manifestations of conduct falling within the traditional meaning of war crimes, but they extended to the civilian population of the country that had committed these violations. This explains why CAH as a category of crimes was linked to the other crimes within the jurisdiction of the Tribunal, “crimes against peace” and “war crimes.” That may also explain the debate over the semicolon issue that was the object of the Protocol of October 6, 1945. As signed on August 8, 1945, the English text of Article 6(c) contained a semicolon after the word “war,” separating it from the following words: “or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”<sup>151</sup> The Russians, however, insisted on the removal of the semicolon, replacing it with a comma, ostensibly to have the three languages of the text conform identically. But the legal implications of that seemingly minor change were so significant that it is inconceivable to have made it by virtue of an amending protocol without having taken these implications into consideration. Since no transcript of these discussions exists, it will remain a matter

<sup>146</sup> JACKSON’S REPORT, *supra* note 34, at 87.

<sup>147</sup> *Id.* at 293.

<sup>148</sup> See 1907 Hague Convention, *supra* note 1; *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* 83 (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), *reprinted in* 14 AM. J. INT’L L. 95 (1920).

<sup>149</sup> M. Cherif Bassiouni, *The Discipline of International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 3 (M. Cherif Bassiouni ed., 3d rev ed. 2008). See also *supra* nn. 45, 116 and accompanying text.

<sup>150</sup> See *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, Annex II, Apr. 4, 1919, *reprinted in* 14 AM. J. INT’L L. 127, 144–51 (1920).

<sup>151</sup> IMT Charter art. 6(c), *supra* note 36.

of speculation, but Professor Egon Schwelb, who followed these negotiations closely, stated in 1946:<sup>152</sup>

Under the original English and French texts, which contained the division of paragraph 6(c) by a semicolon, it could be said that this provision applied only to the words following the semicolon, i.e. to persecutions on political, racial, or religious grounds. This interpretation would have led to somewhat absurd results. Through the Berlin Protocol of 6 October 1945, and its replacement of the semicolon by a comma, it seems to be quite clear that the principle of the irrelevancy of the *lex loci* applies to both kinds of crimes against humanity and that it is no defence that the act alleged to be a crime against humanity was lawful under the domestic law of the country where it was perpetrated. This is made particularly clear by the new French text of Article 6(c), which expressly says “if such acts or persecutions, whether they have or have not constituted a violation of the internal law of the country where they were perpetrated, were committed [...]” (*lorsque ces actes ou persécutions, qu’ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés*). The exclusion of this plea is closely connected with the provisions of the Charter (Art. 8) regarding the defence of superior orders. Just as a defendant cannot free himself from responsibility because he acted pursuant to an order of his government or of a superior, in the same way it avails him nothing that the inhumane act was lawful under municipal law. The close connection between these two provisions emerges particularly clearly if one realizes that the persons to be tried under the Charter were members of a very small circle in whom legislative powers were vested under the Nazi régime.

(k) The words “in connection with or in execution of any crime within the jurisdiction of the Tribunal” are of particular importance for the problem here discussed. In the first instance, it is necessary to determine whether these words relate only to the second part of paragraph (c) or to the whole of it, in other words, whether they qualify only “persecutions” or both “persecutions” and what has been called in this article “crimes of the murder type.” The first interpretation would mean that crimes of the murder type, committed against any civilian population at any time, are crimes against humanity subject to the Tribunal’s jurisdiction, irrespective of whether or not they are connected with the crime against peace or a war crime proper, while persecutions on political, racial, or religious grounds come within the definition only if they are so connected. Under this interpretation, “any crime within the jurisdiction of the Tribunal” would mean either a crime against peace, a war crime, or a crime against humanity of the murder type. The second interpretation would amount to the proposition that not only persecutions, but also crimes of the murder type, are outside the notion of crimes against humanity, unless it is established that they were connected with a crime against peace or a war crime. In order to arrive at an opinion on this vital question, it will be useful to recall the wording of the original English text of Article 6(c), as it was quoted *supra*, and to add the original French text which, in the Agreement dated 8 August 1945, reads as follows:

(c) *Les Crimes Contre L’Humanité: c’est-à-dire l’assassinat, l’extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques, raciaux ou religieux, commises à la suite de tout crime rentrant dans la compétence du Tribunal International ou s’y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrées.*

<sup>152</sup> Schwelb, *supra* note 2.

The reader of the English text will, by simple grammatical interpretation, arrive at the conclusion that “in execution of or in connection with any crime within the jurisdiction of the Tribunal” refers to “persecutions” only, and if the English text left any doubt, recourse to the equally authentic French text would show that *commises à la suite de tout crime rentrant dans la compétence du Tribunal International ou s’y rattachant* determines *les persécutions* and that, being the feminine form, it does not refer to the words from *l’assassinat* to *autre acte inhumain*.

By the Berlin Protocol of 6 October 1945 the semicolon dividing Article 6(c) has been replaced by a comma in both the English and French texts. It is submitted that the change of punctuation marks in itself would not bring about a fundamental alteration in the law if regard were not had to the circumstances attending this alteration. If we consider, however, that the four Great Powers went out of their way to negotiate an international protocol and to have it drawn up and signed on behalf of their respective governments, it is quite clear that the intention must have been to alter the law such as it appeared to be laid down in the English and French texts of the Charter in a significant manner. Even quite apart from the obvious grammatical conclusions arising from the original French text, the comma, followed by “or,” would, in normal circumstances, have sufficed to divide the paragraph of the English text into two parts with the consequence that the words “in execution of or in connection with any crime within the jurisdiction of the Tribunal” would have related only to persecutions and not to crimes of the murder type. In view of the Preamble and the operative text of the Protocol, however, it is obvious that it has been the intention of the Contracting Parties to remove a certain barrier that, in the original texts, appeared to exist between the first and second parts of the paragraph. Any possible doubt about the consequence of the Berlin Protocol has, however, been removed by the alteration made in the French text, which, by virtue of the Berlin Protocol, now reads as follows:

(c) *Les Crimes Contre L’Humanité: c’est-à-dire l’assassinat, l’extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes ou persécutions, qu’ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.*

Instead of containing the words *commises à la suite de tout crime rentrant dans la compétence du Tribunal International ou s’y rattachant*, determining *les persécutions* and severed from the preceding part of the paragraph by a semicolon, the new text, in addition to abolishing the semicolon, expressly speaks of *ces actes ou persécutions*, *ces actes* being *l’assassinat, l’extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain*, or, in other words, the crimes against humanity of the murder type. The new French wording of Article 6(c) is the more important and decisive in view of the fact that it is contained not only in the French, but also in the English and Russian, texts of the Berlin Protocol, so that it is clear that all four Contracting parties have agreed that the text, as it is declared in the amended French wording, correctly reproduces the meaning of the Agreement and the intention of all four Parties.<sup>153</sup>

More recently, Professor Clark commented:

The semi-colon following “war” was arguably of great substantive significance. A literal reading of the language prior to the semi-colon would include within the Tribunal’s

<sup>153</sup> *Id.* at 192–95.

jurisdiction such acts as murder of the Jews within Germany, before or during the war, with no requirement that the prosecution show any connection between those acts and a crime against peace, or a war crime as that term was used in the Charter. Only “persecutions” (presumably something short of violent death or deportation when read in context) would require a connection with war crimes or crimes against peace. In short, the semi-colon would permit, even require, an expansive application of the Charter – unless the preparatory work which has just been discussed could be relied upon to reach another result. And, of course, the preparatory work does suggest that the drafters intended to narrow the scope of crimes against humanity within the jurisdiction of the tribunal to those closely associated with an aggressive war. On the other hand, if the semi-colon were replaced by a comma, it would not be necessary to rely on the preparatory work. Now it could be argued that the words “in execution of or in connection with any crime within the jurisdiction of the Tribunal” should be read (as the Tribunal would later read them) so as to modify not only “persecutions” and the words following it, but also the words “murder, extermination” and their following material. This latter course of interpretation – consistent with the apparent general aim of the drafters – was facilitated by a Protocol to the original text, signed on 6 October, in Berlin by the four Chief prosecutors, which in fact replaced the semi-colon punctuation in the English text with a comma and made corresponding alterations to the French text.

The origin of the semi-colon is mysterious. It did not appear in the U.S. revision of Definition of “crimes” which was submitted to the London Conference on 31 July 1945 and which was the re-draft substantially appearing in the final text as agreed upon in London. There is, indeed, no discussion of it in Justice Jackson’s record of the London Conference. This history, and the rest of the drafting history which has just been discussed, would suggest that the usual bunch of incompetents struck – an error was simply made. This at least is consistent with the position asserted in the Protocol. In its second preambular paragraph the document asserts that a discrepancy has been found to exist between the originals of Article 6, paragraph (c), of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, to wit, the semi-colon in Article 6, paragraph (c), of the Charter between the words “war” and “or,” as carried in the English and French texts, is a comma in the Russian text.” The operative paragraph of the Protocol goes on to say that the parties have agreed that “the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended [ . . . ].” I have not been able to locate any information which suggests that this statement should be taken other than at face value. Someone made a mechanical mistake in London which arguably upset the narrow definition of crimes against humanity within the jurisdiction of the Tribunal intended by the drafters; the error was corrected in the October Protocol. Yet the nagging doubt remains that something more substantive was going on and that there had been a change of position.<sup>154</sup>

<sup>154</sup> Roger S. Clark, *Crimes Against Humanity at Nuremberg*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177, 190–92 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990). Even though Professor Clark indicates that he found no reference in the Jackson Report on the semicolon/comma controversy, the following statement by Professor Gros at the July 24, 1945, meeting indicates that a discussion on the separation of persecution from the other crimes may have taken place, though unreported. Gros states:

I have nothing to say on the material. It seems to me everything has been discussed. Now, as to drafting, naturally it is a question of general approach to the problem of drafting for an international conference. I don’t know whether, when you put in for example, “murder and ill-treatment of

The change from the semicolon to the comma was intended to strengthen the link between CAH and crimes against peace, but particularly with war crimes, in order to avoid the criticism that Article 6(c) crimes were entirely new to international law.<sup>155</sup> As a consequence, the phrase in Article 6(c) “in execution of or in connection with any crime within the jurisdiction of the tribunal” applied to the entire definition of CAH, and not only to “persecutions on political, racial or religious grounds.” The result of limiting the scope of Article 6(c) was the exclusion of all Nazi crimes against the Jews before 1939.<sup>156</sup> But that trade-off was intended to strengthen the validity of the crime in light of the requirements of the principles of legality. This conclusion is born out in the IMT judgment, which stated:

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of the Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed

civilians” it helps the difficulty. The fact that you are obliged to say “including *inter alia*” proves that it is only an illustration, and it makes the test a little heavy. But it is only a question of drafting. I do accept it with one or two verbal amendments.

I have one remark on (b), where we appear as wanting to prosecute because of racial or religious treatments only because they were connected with the war. I know it was very clearly explained at the last session by Mr. Justice Jackson that we are in fact prosecuting those crimes only for that reason, but for the last century there have been many interventions for humanitarian reasons. All countries have interfered in affairs of other countries to defend minorities who were being persecuted. Perhaps it is only a question of wording – perhaps if we could avoid to appear as making the principle that those interventions are only justified because of the connection with aggressive war, it would not change your intention, Mr. Justice Jackson, and it would not be so exclusive of the other intervention that has taken place in the last century. (emphasis added).

JACKSON’S REPORT, *supra* note 34, at 360.

<sup>155</sup> See *infra* §4 and accompanying text.

<sup>156</sup> See DAWIDOWICZ, *supra* note 39, which the author documents Nazi crimes against German, Polish, Czech, and Hungarian Jews between 1933 and 1939 that are similar to those committed between 1939 and 1945 (though less in harmful intensity and results), but that, because of the war-connecting element in Article 6(c), were not prosecuted, though they were prosecuted under CCL 10 and under the Criminal Laws of the Federal Republic of Germany after the IMT concluded its proceedings at Nuremberg. In the case of only four individuals (Frick, Goering, Streicher, and Funk) the IMT referred to events prior to 1939 and while the respective individual judgments found that these activities were illegal by Charter standards, they did not make findings of guilt as to these pre-1939 events, nor did they take these events into consideration for purposes of sentencing for post-1939 events. See JUDGMENT at 60–64; see also Clark, *supra* note 154, at 185. Note that Streicher and Van Schirach were charged only with CAH and not war crimes. See also NORA LEVIN, THE HOLOCAUST: THE DESTRUCTION OF EUROPEAN JEWRY, 1933–1945 (1973).

after the beginning of the war, did not constitute War Crimes, they were committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.<sup>157</sup>

During the course of the different drafts' submissions by the four delegations, it is noteworthy that the recorded discussions on the subject of CAH were limited. The debates that Article 6(c) generated in the course of the IMT prosecutions, and subsequently in the legal literature, either did not take place in London or were not reported. In fact, it appears from the scant record of the negotiating process that, between April 30 and August 8, the subject of CAH appeared only as an outgrowth of war crimes, without much debate as to its compliance with the principles of legality. This applies to all legal issues that were subsequently so much debated in the literature on this subject. Surely, these were foreseeable by the drafters, and this gives rise to speculation as to their reasons and motives. This writer's hypothesis is that these debates took place among the drafters but were not recorded for the same reasons that the scant record was not made public until after the IMT rendered its judgment. This was done deliberately so that the defense was neither able to discover the intent of the drafters as to any of the three Article 6 crimes during the course of the proceedings nor use any arguments considered by the drafters that might favor their position. It is logical to assume that an extended record of discussions of the legal problems of Article 6(c) would have been beneficial to the defense, *ergo*, the absence of any record that would have supported the defense's position.<sup>158</sup>

The Allies, however, did not feel compelled by these considerations when they formulated CCL 10, which, as discussed below, removed the connection between CAH

<sup>157</sup> Judgment 22 IMT 498. United States v. Ohlendorf (Case No. 9) (the *Einsatzgruppen* case), VII TRIALS OF THE WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1949–51), and *Altstötter* each contain language supporting the view that not only is the war nexus jurisdictional only, but that even at Nuremberg the adjudication of CAH was not confined to war related acts, i.e., no necessary war nexus. But the *Flick* case and United States v. Von Weizsaecker, XIV TRIALS OF THE WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1947–51), each concluded (and more authoritatively, since they followed the rule laid down by the IMT) that the tribunal had no jurisdiction over alleged CAH occurring before the war. This conclusion by *Flick* and *Von Weizsaecker* reaffirmed the war nexus, but did not resolve the question of whether this lack of jurisdiction came about merely by lack of jurisdiction or by reason of the crime's definition.

<sup>158</sup> Clark, *supra* note 154, reaching the same conclusion, stated:

The Nuremberg Charter and Judgment firmly established the basic concept of a crime against humanity as a crime under international law. Beyond that, however, they left the precise contours of the crime vague and largely overlapping with that of war crimes. This lack of substantive clarity was compounded by the apparent limitations in the jurisdiction of the Nuremberg Tribunal which prevented it from delving deeply into Nazi crimes, especially before September 1939, since those could not be directly connected with the waging of aggressive war.

To my mind, the most significant contribution of the establishment of the doctrine of crimes against humanity was not the creation of that doctrine in itself but that—along with the reiteration of the criminality of and the establishment of the criminality of waging aggressive war—it paved the way for subsequent development of other offenses of international concern. It led directly to the definitions of genocide and the crime of *apartheid* and less directly to the development of a whole package of international crimes. It led also to the so far abortive efforts to devise a code of offenses against the peace and security of mankind.

Clark, *supra* note 154, at 198–99. See also *infra* ch. 3.



and the two other crimes. But that is easily explained by the fact that the Allies deemed themselves, by virtue of the unconditional surrender by the German Head of State, Admiral Karl Dönitz, who succeeded Hitler, as exercising sovereignty over Germany. Thus, CCL 10 was in the nature of a domestic legislative act, and as such, it did not require the international jurisdictional element of being linked to war. Nevertheless, it was still deemed to be a crime of abuse of power requiring state policy carried out by state agents.

Formerly occupied Allied countries also prosecuted German occupation personnel in accordance with their own national military or criminal laws, or other laws specifically enacted for that purpose.<sup>159</sup>

In the Far East, the IMTFE's Charter was patterned after the London Charter. Thus, the legal issues pertaining to the formulation of Article 6(c) crimes arise also with respect to the Tokyo Charter's Article 5(c).

### §5. Law and Policy Considerations in the Making of the Charter

The Allies posited the legitimacy of their powers to carry out their plans on the grounds that they were the sovereign power in Germany, since its government had surrendered unconditionally. On that point, the IMT in its judgment stated:

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations [ . . . ]. The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly.<sup>160</sup>

One of the implications of this postulate could have been for the Charter to become the new German law of the land, and have national legal validity and territorial jurisdictional application, but that was not the case. Instead, the Allies deemed the Charter part of international law. Conversely, however, the Allies developed a legislative system for occupied Germany, the Control Council, which provided in its CCL 10 the basis for the Allies to prosecute for war crimes and CAH in their respective zones of occupation.<sup>161</sup> Thus, the London Charter was neither intended to be national German law, nor was it applied as such. Instead, it was to be part of international law and applied by a specially established international military tribunal that would try only a selected number of accused, while the Allies would try the others under CCL 10. Additionally, some of the Allies used this specially set up military tribunal to prosecute German military personnel in their custody and under their respective laws. The Allies also relied on the position that they could prosecute their enemies for violations of the international regulation of

<sup>159</sup> See *infra* ch. 9, § 3.2.

<sup>160</sup> Judgment 22 IMT 461. However, that conclusion ignores the fact that the authority of an existing German government under the leadership of Grand-Admiral Karl Dönitz existed the unconditional surrender. A German government existed until the Allies arrested its members for the purpose of prosecuting them. See IRVING, *supra* note 128, and *infra* note 268 and accompanying text.

<sup>161</sup> See CCL 10, *supra* note 126. See also *supra* note 40 and accompanying text.



armed conflicts.<sup>162</sup> However, whether then or subsequently, the question was seldom whether the Allies had the right to prosecute violators of the international regulation of armed conflicts; instead the question was whether such prosecutions had the same level of legitimacy in light of the fact that it was limited to the vanquished, while ignoring the violations of the victors. In addition, it was argued that such crimes as crimes against peace and CAH violated the principles of legality.<sup>163</sup>

The making of the London Charter faced many difficulties, as would any novel undertaking involving multiple participants whose goals, interests, and legal systems differed. At times, and with respect to certain questions, the law and policy of the Allies were also at odds with one another.<sup>164</sup> Among the major substantive legal issues that divided the drafters was whether CAH existed under any one of the sources of international law specified in Article 38 of the Statute of the Permanent Court International Justice (PCIJ), namely conventions, customs, and “general principles of law recognized by civilized nations.”<sup>165</sup> The second issue, which was predicated on the first one, involved how to ascertain the legal contents of this category of crimes in accordance with the sources of international law under which they would be deemed to exist. This issue involved not only public international law, but also comparative military law and comparative criminal law.<sup>166</sup> The third was a cluster of legal issues applicable to all three categories of substantive crimes, namely crimes against peace contained in Article 6(a); war crimes contained in Article 6(b); and CAH in Article 6(c). These issues pertained to the general elements of criminal responsibility<sup>167</sup> and the grounds for exoneration.<sup>168</sup> These questions essentially involved comparative military law and comparative criminal law, but they also had international law dimensions.

Existing conventional and customary international law dealt with some of these legal issues, but no conventional text or precedent existed that alone was sufficient or specific enough to be relied upon. The drafters of the Charter thus had to stitch together different elements of pre-existing law and to extrapolate from them new legal elements while satisfying the requirements of the principles of legality.<sup>169</sup> More particularly, in this context the drafters had to resolve the problems of the impermissible retrospective application of

<sup>162</sup> The 1929 Geneva Convention provided for courts martial conducted according to certain procedures to try the military personnel of belligerents who violated the provisions of the Convention. The Convention that governed the Allies and Germany did not allow for the various forms of prosecution pursued by the Allies. To some this was a question of form, but to others it was further evidence that the Allies relied on international law when it suited their purposes and disregarded it when it did not.

<sup>163</sup> See *infra* ch. 5, §2.

<sup>164</sup> For additional insights, see JACKSON’S REPORT, *supra* note 34; TAYLOR, *supra* note 128; EUGENE DAVIDSON, THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG (1997); BRADLEY F. SMITH, *supra* note 128; ROBERT E. CONOT, JUSTICE AT NUREMBERG (1983); ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL (1984); THE NUREMBERG TRIAL AND INTERNATIONAL LAW (George & V.N. Kudriavtsev eds., 1990); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992); JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL (1994); and WHITNEY HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG (2d rev. ed. 1996); IRVING, *supra* note 128. For an insight into all international investigatory and adjudicatory bodies see M. CHERIF BASSIOUNI, THE ‘NUREMBERG LEGACY’: HISTORICAL ASSESSMENT FIFTY YEARS LATER, IN WAR CRIMES: THE LEGACY OF NUREMBERG (Belinda Cooper, ed., 1999).

<sup>165</sup> See *infra* ch. 6, §2.

<sup>166</sup> *Id.*

<sup>167</sup> See *infra* ch. 7, §5.

<sup>168</sup> See generally *infra* ch. 8.

<sup>169</sup> See *infra* ch. 5, §2.

the new codification, while at the same time justifying the removal of the *ex post facto* defense and other legal defenses arising under pre-existing national positive law, including the defense of obedience to superior orders.<sup>170</sup> The latter was then a defense under customary international law.<sup>171</sup> It is important to note that the laws of Nazi Germany either commanded or justified the acts deemed to constitute CAH and that these acts were committed pursuant to the *Führerprinzip* or by command of superior orders. At that time, the latter was deemed to constitute a valid legal defense under customary international law, and was considered by some jurists as an absolute defense, although others viewed it as a qualified one.<sup>172</sup> Having done their homework, the German jurists of that time assumed that those who obeyed the *Führer's* orders bore no criminal responsibility for their actions; only the *Führer* bore responsibility. This explains why clear and direct orders were given through the chain of command, and why Allied investigators found such a clear paper trail.

The “general part” for any of the Article 6 crimes<sup>173</sup> was not, however, fully developed in the London Charter, since only two provisions dealt with that part: Article 7, which subjected all superiors including heads of state to individual criminal responsibility;<sup>174</sup> and Article 8, which removed the defense of obedience to superior orders.<sup>175</sup> Surely, no one can argue with the proposition that the general part of criminal law, consisting of the elements of criminal responsibility and conditions of exoneration, was inadequately dealt with by the Charter.<sup>176</sup> Had the drafters been farsighted enough and less troubled about anything German, they would have simply resolved the problem of the general part by applying the German Penal Code of 1871, which was in keeping with accepted theories of criminal law in the world’s major criminal justice systems. To accomplish their intended result, the drafters would only have had to revoke the *Führerprinzip*, the defense of obedience to superior orders and that of justification or excuse for having acted pursuant to Nazi laws passed after 1935, which they did anyway in Article 8 of the Charter. By adopting such an approach, the drafters would have avoided the claim of breach of the principles of legality with respect to general part issues.<sup>177</sup> This would have also reinforced the territorial application of criminal law with respect to offenses and offenders within German territory.<sup>178</sup>

<sup>170</sup> See *infra* ch. 8, §1. YORAM DINSTEIN, THE DEFENCE OF “OBEDIENCE TO SUPERIOR ORDERS” IN INTERNATIONAL LAW (1965); EKKEHART MÜLLER-RAPPARD, L’ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ PÉNALE DU SUBORDONNÉ (1965); LESLIE C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See *infra* ch. 7, §2.2.2.

<sup>174</sup> *Id.*

<sup>175</sup> See *infra* ch. 8, §1.

<sup>176</sup> See *infra* ch. 7, §2.2.2.

<sup>177</sup> See *infra* ch. 5, §2.

<sup>178</sup> See Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 85 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE 352 (5th rev. ed. 2007); HENRI DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL, *supra* note 53. For a contemporary proposal regarding, *inter alia*, the jurisdiction of the international criminal court, see 1996 Preparatory Committee Report; *The Rome Statute of the International Criminal Court* (ICC), 17 July 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L & COMP. L. REV. 1, 25 (1991).

Such a solution to the problem of the proper applicable law would have also been consonant with generally accepted theories of conflict of laws or private international law.<sup>179</sup> Nevertheless, the drafters ignored that better rule approach.<sup>180</sup> Another approach could have been the one argued by the three dissenting judges at the IMTFE, Judge Röling of the Netherlands, Judge Bernard of France, and Judge Pal of India.<sup>181</sup> They argued that the creation of the Tribunal was valid, but that the Tribunal should have been more consistent with customary international law.

The drafters of the London Charter, however, had rejected that position for different reasons. They did not want anyone, including the Judges, to question the validity of the London Charter, its contents, and its compliance with international law. The principal reason that the IMT's drafters wanted the Charter to be self-legitimizing was to avoid protracted defense arguments on legitimacy and compliance of the Charter's provision with extant international law. Implicit in this consideration is the drafter's concern that existing international law was vague and ambiguous and had many *lacunae*, all of which could be effectively argued at length by the defense and maybe with some success. The trial delays that would have been occasioned by these technical legal questions would have diverted world public opinion from the horrendous crimes committed and given the accused the opportunity to portray themselves as martyrs of victors' vengeance – an argument nonetheless frequently made at that time and still repeated to date. Thus, the London Charter's legitimacy was not to be questioned and its provisions could only be interpreted in light of their plain language and meaning to be supplemented but not contradicted by international law.

The drafters were mindful of the importance of the principles of legality, but their concern was how to avoid its application in a rigid manner that would have precluded the inclusion in the Charter of crimes against peace and would have caused difficulties with CAH. Interestingly enough, the Allies, in another context, passed legislation to uphold the principles of legality. Acting through the Control Council, the Allies provided in Article IV, ordinance No. 7 of the Law No. 1 of the Military Government:

No charge shall be proffered, no sentence imposed or punishment inflicted for an act, unless such act is expressly made punishable by law in force at the time of its commission. Punishment for offences determined by analogy or in accordance with the alleged “sound instincts of the people” (*gesundes Volksempfinden*) is prohibited.<sup>182</sup>

The purpose of this law was to repeal the provision in the Third Reich's Penal Code of 1935, which declared punishable a person who:

<sup>179</sup> See generally GEOFFREY CHEVALIER CHESHIRE, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW (12th ed. 1992); WILLIS L.M. REESE ET AL., CONFLICT OF LAWS 753–77 (9th ed. 1990); FRIEDRICH K. VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS (W.K.C. Guthrie trans., 1869, 2d rev. ed. 1980); OTTO-KAHN FREUND, GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW (1976); ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY (1945); ARTHUR KUHN, COMPARATIVE COMMENTARIES ON PRIVATE INTERNATIONAL LAW OR CONFLICT OF LAWS (1937); JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS (2d ed. 1881).

<sup>180</sup> For a similar view in U.S. conflicts law see Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); see also ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW 279 *et seq.* (4th ed. 1986).

<sup>181</sup> Dissenting opinion of Pal, J., *reprinted in* AHMED M. RIFAAT, INTERNATIONAL AGGRESSION (1979).

<sup>182</sup> Military Government-Germany, United States Zone, Ordinance No. 7, Oct. 18, 1946 (Organization and Powers of Certain Military Tribunals) *reprinted in* 2 FRIEDMAN 913.

commits an act, which either the statute declares punishable, or which deserves punishment according to the basic principles of a criminal statute or *according to the sound instincts of the people*. If no criminal statute can be applied directly to the act, the act will be punished according to that statute, whose underlying principle comes closest to it.<sup>183</sup>

These and other technical problems, not to speak of the political ones,<sup>184</sup> confronted the drafters under the pressing exigencies of circumstances surrounding the end of the war. Furthermore, the drafters did not have the comfort and guidance of a similar precedent to rely upon. Above all, they had to resolve these problems in short order. Thus, the outcome reflected the need to rapidly produce a workable system for a specific

<sup>183</sup> See *infra* ch. 5, §2.2.2 for an extended discussion of this question.

<sup>184</sup> The USSR, for example wanted to use the proceedings to rewrite history with respect to the Non-Aggression pact signed by Von Ribbentrop and Molotov in 1939, which paved the way for Germany's invasion of Poland in 1939 and the USSR's seizure of some of Poland's territories. Under this occupation, the Soviets interned tens of thousands of Polish military personnel, policemen, intellectuals, and civilian prisoners of war in prison camps inside the Soviet Union. After the Nazis invaded the Soviet Union in June 1941, the Polish government-in-exile and the Soviet government agreed to cooperate against the Nazis, and a Polish army on Soviet territory was to be formed. Polish general Władysław Anders began organizing this army, but when he requested that 15,000 Polish prisoners of war whom the Soviets had once held at camps near Smolensk be transferred to his command, the Soviet government reported to him in December 1941 that most of those prisoners had escaped to Manchuria and could not be located. The fate of the missing Polish prisoners remained unknown until April 13, 1943, when the Germans announced that they had discovered mass graves of Polish officers in the Katyn forest near Smolensk. In fact, the mass murders were based on a proposal from Lavrentiy Beria to execute all members of the Polish Officer Corps. The entire Soviet Politburo, including Stalin and Beria, signed the official document on March 5, 1940.

A total of 4,443 corpses were recovered. Apparently, the victims had been shot from behind, piled in stacks, and buried. The Germans accused the Soviet authorities of executing the prisoners, but Stalin's government claimed that the Poles were engaged in construction work outside of Smolensk in 1941 when the invading Nazi army killed them after overtaking that area in August 1941. Both the German and Red Cross investigations of the massacre produced evidence that it took place in early 1940, when the area was still under Soviet control. When the Polish government-in-exile asked the Soviet government to provide official reports on the fates of the remaining missing prisoners, it refused, and on April 25, 1943, the Soviets broke off diplomatic relations. The U.S. congressional inquiry in 1952 concluded that the Soviet Union had been responsible for the massacre, but for decades Soviet leaders insisted that the invading Germans killed the Polish officers found at Katyn in 1941. Successive Polish governments accepted this explanation until the late 1980s, when it officially transferred blame for the massacre from the Germans to the Soviet secret police. In 1992 the Russian government released documents proving that the NKVD were responsible for the massacre and cover-up. An investigation by the Prosecutor's General Office of the Russian Federation confirmed Soviet responsibility for the massacre, but refused to classify the action as a war crime or an act of genocide, which would have necessitated the prosecution of any surviving perpetrators. See generally GEORGE SANFORD, *KATYN AND THE SOVIET MASSACRE OF 1940* (2009); WOJCIECH MATERSKI, *KATYN, A CRIME WITHOUT PUNISHMENT* (Anna M. Cienciala & Natalia S. Lebedeva eds., 2008); ROBERT CONQUEST, *THE GREAT TERROR* (1968); J.K. ZAWODNY, *DEATH IN THE FOREST: THE STORY OF THE KATYN FOREST MASSACRE* (1962).

Notably, Great Britain thought that the major war criminals should be summarily executed and not given the opportunity to use the trials for propaganda and self-justification. Israel sought to do the same in the *Eichmann* case to prove the Holocaust, though in this case it was to prove something truthful and not something false. Luban, *supra* note 3, at 144. For writing on the fairness of political trials, see LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 11 (2001) (contending that even a political trial "must satisfy law's stern requirements"); MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 69 (1999) (contending that liberal governments may stage show trials only if they "adhere to legal rules reflecting liberal principles of procedural fairness and personal culpability as conditions of criminal liability"); JUDITH N. SHKLAR, *LEGALISM* 152 (1964) (contending that "[p]olitical trials are not defensible" if they "circumvent demands of legality").

purpose in light of horrible facts that were being uncovered at the same time that these deliberations were going on in London.

## §6. Post-World War II Formulations Arising out of the London Charter: The IMTFE and Control Council Law No. 10

The text of the Tokyo Charter was substantially the same as the London Charter. A major exception was the exclusion of Emperor Hirohito's personal responsibility. Both of these factors had to do with political and not legal considerations. The first factor was intended to back the USSR away from possibly changing the statute's language from its original model, the London Charter, and a corollary of that was to give to the USSR as little influence as possible in the subsequent proceedings.<sup>185</sup> The differences in political contexts between the Western and Eastern theaters of operations may explain the slight difference in the IMTFE definition of CAH.

The Tokyo Charter states:

Article 5. Jurisdiction over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern War Criminals who as individuals or as members of organizations are charged with offences which include crimes against peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: [ . . . ].

c. Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. *Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.*<sup>186</sup>

The italicized language is not contained in the London Charter's Article 6(c). There is no available record of the deliberations and discussions leading to the promulgation of this text by General Douglas MacArthur, which is similar to Article 6(c) of the London Charter, save for the additional language. However, the Tokyo Charter also differs from its predecessor in two ways. It adds specific categories of persons to be held responsible (italicized in the quoted text), and it does not make "persecution" subject to "religious" grounds. The first variance is only in the drafting of Article 5(c), since the same responsibility basis exists in the London Charter, though not in Article 6(c). The second variance is due to the fact that the Nazi crimes against Jews did not have a counterpart in the Asian conflict. Thus, once again, the law was made to fit the facts.

<sup>185</sup> The USSR had only joined the Allies in the Pacific Theater three weeks before the Empire of Japan surrendered. It also had designs on some Japanese territories and wanted to expand its influence in Asia – all of which the U.S. opposed. As to the second factor, it was based on General MacArthur's belief that he could not rule Japan if the Emperor was tried or vilified. The Secretaries of War and State shared his assessment. See DOUGLAS MACARTHUR, REMINISCENCES 292 (1964).

<sup>186</sup> Charter for the International Military Tribunal for the Far East art. 5(b), *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 BEVANS 27 [hereinafter Tokyo Charter] (emphasis added).

The London and Tokyo Charters were applicable only to major criminals, leaving other criminals to be tried by the Allies.<sup>187</sup> In Germany, the Allies acted pursuant to CCL 10 in their respective zones of occupation, but they also relied on their military and national tribunals where they applied their own laws. There was no counterpart in Japan to CCL 10 where the United States was the sole occupying power of Japan, whereas the four major Allies occupied Germany. The same legal issues pertaining to Article 6(c) also apply to Article 5(c).

Control Council Law No. 10, unlike the London Charter and Tokyo Statute, was made pursuant to the supreme legislative authority of the Allies over Germany, in view of that country's unconditional surrender on May 8, 1945. It was not intended to be an international instrument, but rather national legislation. It defines CAH as follows:

## Article II

Crimes against Humanity: *Atrocities and offences, including but not limited to* murder, extermination, enslavement, deportation, *imprisonment*, torture, *rape*, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.<sup>188</sup>

The obvious differences between Article II(c) and Articles 6(c) and 5(c) respectively of the London and Tokyo Charters are: (1) the heading for Article II(c) defining CAH, as "Atrocities and Offences;" (2) the inclusion of overly broad terms, "included but not limited to;" (3) the addition of the terms "imprisonment" and "rape," even though both are subsumed within the words "or other inhumane acts" contained in all three texts, which provided, however, that the "imprisonment" is unlawful; and, (4) the removal of any connection between the specific crimes listed in Article II(c) and crimes against peace or war crimes. Article II(c) clearly overreaches in its definition of this category of crimes by removing the necessary connection with any of the two other crimes, as do Articles 6(c) and 5(c). Consequently, it strains the principles of legality far more than Articles 6(c) and 5(c).

It could be argued that CCL 10 is distinguishable from Article 6(c) of the London Charter and 5(c) of the Tokyo counterpart on the grounds that it is not an international instrument, but a national one. As stated in its Preamble, CCL 10 was intended to be the Allies' legal basis for criminal prosecutions in Germany.<sup>189</sup> It therefore applied only territorially. Yet, that law incorporated by reference two international instruments, the Moscow Declaration of 1943 and the London Charter, which were deemed to constitute an integral part thereof. The inconsistency is obvious, since it was purported to be a national law applicable only territorially but its source deriving from international law, and its formulation and enactment was by the victorious Allies acting pursuant to their supreme authority over Germany by virtue of that country's unconditional surrender. The American CCL 10 Proceedings dealt with this inconsistency in the *Justice* case as follows:

<sup>187</sup> In Japan, the defendants were divided into class A and class B. The 28 class A defendants were tried at Tokyo and several thousand class B defendants were tried in Yokohama. See CRYER & BOISTER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* (2008).

<sup>188</sup> *Id.* (emphasis added).

<sup>189</sup> See AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* (1959), in particular Part III.

The Nürnberg Tribunals are not German courts. They are not enforcing German Law. The charges are not based on violations by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the IMT Charter and C.C. Law 10, and within the limitations on the power conferred, it enforces international law as superior in authority to any German statute or decree.<sup>190</sup>

Such a legal construction is strained. The reasoning makes the law and the tribunal that applied it a strange hybrid of international and national law, a development that occurred recently in the mixed-model tribunals.<sup>191</sup> The confusion that existed as to the legal status of the CCL 10 Proceedings was compounded by the fact that some of the four major Allies, in their respective zones of occupation, applied their military laws instead of CCL 10 that was to be the uniform legal basis for prosecutions in Germany.<sup>192</sup> Thus, persons who were accused of the same crime could find themselves prosecuted pursuant to CCL 10 or in accordance with the military laws of any of the Allies. That was mostly the case in the USSR zone of occupation. In addition to having separate applicable substantive laws, the procedures of these tribunals were also different.

In the lonely dissenting opinion in the *Justice* case addressing the question of whether CCL 10 derived from or was premised on international law, or if it was deemed German national criminal law because the sole governing authority representing foreign occupiers promulgated it, Judge Blair (of Iowa) stated,

International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of the law. After the manner of the English common law, it has grown to meet the exigencies of changing conditions.<sup>193</sup>

The Judgment recites at another point:

<sup>190</sup> United States of America v. Alstötter et al. (the *Justice* case) III T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

<sup>191</sup> See *infra* ch. 4, Part A.

<sup>192</sup> VON KNIERIEM, *supra* note 189, who states:

English and Australian courts, on the other hand, have applied punishment under their own laws of war regardless of the place where the act was committed and the nationality of the actor or of the person injured. Field Marshall Kesselring and Generals v. Mackensen and Maelzer were sentenced by a British court for acts committed in Italy against Italians. Australian courts sentenced Japanese nationals for acts committed outside of Australia against Indians or Chinese people. Lord Wright stressed the fact that such punishment could be explained only as an application of the principle of world law.

The strong objections that can be raised against extending this principle beyond the special cases to which it has traditionally been applied appeared to be shared by the continental countries, none of which after World War II seems to have punished any foreign national for an act which would not have been punishable under its criminal laws as applied in accordance with the principles of territoriality.

It should be noted that Article 43 of the 1907 Hague Conventions states: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." 1907 Hague Convention, *supra* note 1, at 82–3.

<sup>193</sup> *Justice* case, *supra* note 190.



Since the Charter and CCL 10 are the product of legislative action by an international authority, it follows, of necessity, that there is no national constitution of any one State which could be invoked to invalidate the substantive provisions of such international legislation.

At still another place, the Judgment recites:

In its aspect as a statute defining crime and providing punishment the limited purpose of CC Law 10 is clearly set forth. It is an exercise of supreme legislative power in and for Germany. It does not purport to establish by legislative act any new crimes of international applicability.

Still at another place in the Judgment, it is declared that:

Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a State having a national government presently in the exercise of its sovereign powers.

Thus, in the first quotation, the judgment states that there has never been an international legislature and that, therefore, international law is not the product of statute; whereas, in the second quotation, it is contended that Control Council Law No. 10 is "the product of legislative action by an international authority." The third recitation is that Control Council Law No. 10 "is an exercise of supreme legislative power in and for Germany."

The fourth quotation doubts the legality of our procedure unless the international body in Germany (the Allied Control Council) has assumed and exercised the power to establish judicial machinery for punishment of crimes in violation of international law [...].

*With these conflicting conclusions as to the source of authority of Control Council Law No. 10, I must respectfully disagree.*<sup>194</sup>

Comparing the formulations of the London Charter, the Tokyo Charter and CCL 10, the United Nations War Crimes Commission offered these conclusions:

- (a) There were two types of crimes against humanity, those of the "murder type" (murder, extermination, enslavement, deportation and the like) and those of the "persecution type" committed on racial, political, or religious grounds.
- (b) Crimes against humanity of the murder type were offences committed against the civilian population. Offences committed against members of the armed forces were outside the scope of this type, and probably also outside the scope of the persecution type.
- (c) Isolated offences did not fall within the notion of crimes against humanity. As a rule, systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes that either by their magnitude and savagery or by their large number or by

<sup>194</sup> *Justice case, supra* note 190 (Separate Opinion of Judge Blair) (emphasis added).

the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind warranted intervention by States other than that on whose territory the crimes had been committed or whose subjects had become their victims.

- (d) It was irrelevant whether a crime against humanity had been committed before or during the war.
- (e) The nationality of the victims was likewise irrelevant.
- (f) Not only the ringleaders, but also the actual perpetrators of crimes against humanity were criminally responsible.
- (g) It was irrelevant whether or not a crime against humanity had been committed in violation of the *lex loci*.
- (h) A crime against humanity may be committed by enacting legislation, which orders or permits crimes against humanity, for example unjustified killing, deportations, racial discrimination, suppression of civil liberties, and so forth.<sup>195</sup>

### §7. The War-Connecting Link in the London Charter

The London Charter expanded the traditionally narrow scope of war crimes to include CAH, though placing the latter in a new and separate category as defined in Article 6(c). The manner in which the Charter achieved this was, as discussed previously, to connect CAH to the two other crimes in Article 6, thus establishing a war-connecting link to CAH. This was the international jurisdictional element needed to transform a number of domestic crimes into a category of international crimes. The basis for this expanded jurisdictional scope was the existing conventions and other international instruments, customary international law, and general principles of law. This included, but was not limited to, the 1899 and 1907 Hague Conventions; experiences and practices in the aftermath of World War I; and the Allied declarations during World War II. These precedents were viewed in the context of the historical process of humanization and regulation of armed conflicts and the concomitant efforts of the world community to prohibit conduct in violation of certain conventional and customary law norms and to punish its perpetrators.<sup>196</sup> Therefore, the Charter's Article 6(c) was the final evolutionary stage that declared with some particularity that war crimes punishable under international law and which include "murder," "extermination," "enslavement," and "other inhumane acts," when committed in time of war against civilians also extended to all civilians, in context of war, irrespective of their nationality.<sup>197</sup> As such, the Charter was the final step

<sup>195</sup> United Nations War Crimes Commission (UNWCC) Report, U.N. Doc. E/CN.4/W.20 (May 28, 1948) at 178–79 [hereinafter UNWCC Report].

<sup>196</sup> This is evident by the discussion and authorities cited in this chapter.

<sup>197</sup> See GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 498 (1968); he quotes COMMAND PAPERS 6964 64 (1946) and states, "The Tribunal is, of course, bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, Section (b), of the Charter were already recognized as war crimes under international law.' It would be hard to miss the argument *a contrario* implied in this statement [ . . . ] [a]ctually, the limited and qualified character of the rule on crimes against humanity as formulated in the Charters of the Nuremberg and Tokyo Tribunals militates against the rule being accepted as one declaratory of international customary law." Schwarzenberger also states that, "This view of the matter closely corresponded to that prevalent among the draftsmen of the Charter at the London Four-Power Conference in the Summer of 1945. Lord Kilmuir (Sir David Maxwell Fyfe, as he then was), the Chairman of the London Conference, stated

of a steady, progressive historical legal development of substantive law and the evolution of international criminal accountability for harmful conduct committed against civilian populations irrespective of nationality, but subject to the condition that the violation be linked to the initiation and conduct of war. This connection to war was removed from CCL 10,<sup>198</sup> as well from subsequent historical developments, as discussed in [Chapter 4](#).<sup>199</sup>

It must be emphasized that “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population,” as stated in Article 6(c) of the Charter, if committed during an armed conflict by the belligerent forces of one state against the nationals of another state, constitute war crimes.<sup>200</sup> Similarly, “persecutions on political, racial or religious grounds in execution of or in connection with war”<sup>201</sup> would also constitute war crimes if committed in time of war against the civilian population of another belligerent power.<sup>202</sup>

The prohibitions contained in Article 6(c) were also contained in the regulation of armed conflicts and can be found *inter alia* in the 1863 Lieber Code,<sup>203</sup> the 1899 Hague Convention,<sup>204</sup> the 1907 Hague Convention (acknowledged to be part of customary international law at Nuremberg),<sup>205</sup> and the 1864 and 1929 Geneva Conventions (also acknowledged to be part of customary international law at Nuremberg).<sup>206</sup> Such prohibitions appear in the “List of War Crimes” prepared at the Paris Peace Conference of 1919 by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War.<sup>207</sup> Numerous texts also document the existence of such prohibitions under customary international law.<sup>208</sup> Justice

his view, from which none of those present dissented, in plain words: ‘What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won’t be any discussion on whether it is international law or not. We hope that is in line with Professor Trainin’s book.’” [ARON N. TRAININ, *HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW* (A.Y. Vishinski ed., 1944, Andrew Rothstein trans., 1945).] *Id.* at 479, citing the Jackson Report; see also LORD KILMUIR, *POLITICAL ADVENTURE* 78, 329 *et seq.* (1964), cited by Schwarzenberger. The IMT and IMTFF took this view of their verdicts, “The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal [ . . . ] it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.” *Id.* at 483, quoting *COMMAND PAPERS* 6964 at 38 (1946).

<sup>198</sup> See CCL 10, *supra* note 126.

<sup>199</sup> See *infra* ch. 4, Part A.

<sup>200</sup> See Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 HOUS. J. INT’L L. 337 (1989); Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177 (1945). See also Elliott M. Abramson, *Reflections on the Unthinkable: Standards Relating to the Denaturalization and Deportation of Nazis and Those Who Collaborated with the Nazis During World War II*, 57 U. CIN. L. REV. 1311 (1989); and the discussion of universal jurisdiction *infra* ch. 4 pp. 71–84.

<sup>201</sup> See Schwelb, *supra* note 3.

<sup>202</sup> See Paust, *supra* note 200.

<sup>203</sup> For the national military regulations see Lieber Code, *supra* note 99.

<sup>204</sup> See 1899 Hague Convention, *supra* note 1.

<sup>205</sup> See 1907 Hague Convention, *supra* note 1.

<sup>206</sup> See BASSIOUNI, *ICL CONVENTIONS*, *supra* note 83, and 1929 Geneva Convention.

<sup>207</sup> See 1919 Commission Report, *supra* note 13.

<sup>208</sup> See WINTHROP, *supra* note 99; Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 108–16, 130–33, 143–46 (1972), and references cited; Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT’L L. 283, 283–84, 295–96 (1986); Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: the Bangladesh Experience*, 11 VAND. J. TRANSNAT’L L. 1 (1978), also quoting

Robert Jackson referred to these texts in his 1945 Report to the President of the United States, in which he used the terms of the Preamble of the 1907 Hague Convention. He stated, “[t]hese principles [ . . . ] result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”<sup>209</sup> Thus, the Charter’s definition of CAH did not substantively add to what was well established under war crimes, but only extended its application.

The essential difference between acts deemed war crimes and those deemed CAH is that the former acts are committed in time of war against nationals of another state, whereas the latter acts are committed against nationals of the same state as that of the perpetrators. Thus, the Charter took a step forward in the form of a jurisdictional extension when it provided that the victims of the same types of conduct that constitute war crimes were protected without the requirement that they be of a different nationality than that of the perpetrators.

This concept of a jurisdictional extension from war crimes to CAH, through the linkage to the initiation and conduct of war, developed gradually as the horrors of World War II became known. This gradualism is evident in the drafting process leading to the adoption of the Charter. But the London International Assembly (LIA), an unofficial body composed of distinguished jurists representing – in an unofficial capacity – the views of the European Allies, took the first step toward what was subsequently embodied in Article 6(c). The LIA began its work on the crimes of Nazi Germany in the autumn of 1941<sup>210</sup> and bitterly referred to the lessons of World War I – “[t]he punishment of the war criminals of World War I was a complete failure”<sup>211</sup> – and noted that its primary objective was the trial and conviction of all war criminals. Among the most important of the recommendations submitted by the LIA was that “a comprehensive view should be taken [of war crimes], including not only the customary violations of the laws of war [ . . . ] but any other serious crime against the local law committed in time of war, the perpetrator of which has not been visited by appropriate punishment [ . . . ].”<sup>212</sup>

The LIA, to its credit, paid particular attention to the extermination of the Jews, including German Jews, and stated that “[i]n respect of the extermination of Jews, it was recommended that punishment should be imposed not only when victims were Allied Jews, but even when the crimes had been committed against stateless Jews or any other Jews, in Germany or elsewhere.”<sup>213</sup> In prosecutions of this type, the “criminal policies concern humanity as a whole, and [the] condemnation should be pronounced, not by one individual country, but by the United Nations, in the name of mankind.”<sup>214</sup> This type of prosecution, the LIA believed, would simply be a “matter of recognition of the fundamental principles the upholding of which is the concern of mankind, because they are necessary to the very existence of humanity.”<sup>215</sup>

JOHANN K. BLUNTSCHLI, ON THE LAW OF WAR AND NEUTRALITY, and adding: “[t]here is ample evidence of a customary, inherited expectation that genocide was actually prohibited as a violation of the customary international law of war.” *Id.* at 22.

<sup>209</sup> JACKSON’S REPORT, *supra* note 34, at 51.

<sup>210</sup> See THE PUNISHMENT OF WAR CRIMINALS: RECOMMENDATIONS OF THE LONDON INTERNATIONAL ASSEMBLY (REPORT OF COMMISSION I).

<sup>211</sup> *Id.* at 3.

<sup>212</sup> *Id.* at 7.

<sup>213</sup> *Id.* at 7.

<sup>214</sup> *Id.* at 8.

<sup>215</sup> *Id.* at 9.

After the work of the LIA, the United Nations War Crimes Commission (UNWCC), established in 1943, added its contribution to the evolution of CAH. As set forth in the London and Tokyo Charters, the term CAH was not meant, in the words of the UNWCC, to be limited to war crimes in the “traditional and narrow sense, that is violations of the laws and customs of war perpetrated on Allied territory or against Allied citizens, but that atrocities committed on Axis territory and against persons of other than Allied nationality should also be punished.”<sup>216</sup> The UNWCC went even further when it held that international law sanctions individuals for CAH committed not only during war but also during peace. It held that

[There exists] a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of people and individual persons, that is inhuman acts, constitute international crimes not only in time of war, but also, in certain circumstances, in time of peace.<sup>217</sup>

Notice of this position was given by the Allies in the Allied Declaration of December 17, 1942, denouncing the barbaric treatment of the Jews and emphasizing the Allies’ solemn resolve to visit retribution on the perpetrators of “these crimes,”<sup>218</sup> even though many of the Nazi atrocities were not war crimes in the traditional sense. The Moscow Declaration of 1943 also states as follows:

The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled. The brutalities of Hitlerite domination are no new thing and all the peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are now being redeemed by the advancing armies of the liberating Powers and that in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union, which is being liberated from the Hitlerites, and on French and Italian territory.<sup>219</sup>

Such notice was also subsequently reiterated in 1943 and 1944 by the LIA, which expressed a position favoring the extension of Allied prosecution and punishment beyond the traditional narrow scope of war crimes. The Assembly urged that “[P]unishment should be imposed not only when the victims were Allied Jews, but even where the crimes had been committed against stateless Jews or any other Jews in Germany or elsewhere.”<sup>220</sup>

Additionally, in 1943, the UNWCC recommended that Allied retribution should extend beyond the traditional reach of the laws of war to encompass Nazi crimes committed not only against Allied combatants, but also to the civilian populations of the occupied countries and of the Axis countries themselves. Finally, Article 29 of the Instrument

<sup>216</sup> UNWCC Report, *supra* note 195, at 191.

<sup>217</sup> *Id.* at 192–93.

<sup>218</sup> Quoted in Schwelb, *supra* note 3, at 183.

<sup>219</sup> Reprinted in the Moscow Declaration.

<sup>220</sup> Quoted in Schwelb, *supra* note 3, at 184.

of the Surrender of Italy, signed on September 29, 1943,<sup>221</sup> foreshadowed the Charter's codification of CAH by imposing on Italy the obligation to apprehend and surrender into the hands of the United Nations persons suspected of both traditional war crimes and "analogous offenses," an expression suggesting what the Charter would classify as CAH two years later. Thus the jurisdictional barrier that shielded those who committed crimes against their own civilian population was held inapplicable to that which in 1919 was referred to as "crimes against the laws of humanity" and in 1945 as "crimes against humanity."

Before the London Charter was promulgated in 1945, the pronouncements and declarations of the Allies' between 1942 and 1944<sup>222</sup> revealed a consensus that many Nazi atrocities, including the deportation of civilians to concentration camps and their enslavement, constituted CAH under "general principles of law" and that these crimes were punishable on the same basis as war crimes. The logic of that jurisdictional extension is clear: Conduct that constitutes punishable war crimes when victims and violators do not share the same nationality cannot be deemed lawful only because victims and violators share the same nationality. To claim that such a jurisdictional legal fiction is a bar to criminal responsibility in light of the contrary positions expressed by so many civilizations over such a long period of time would empty international law of its value content.<sup>223</sup>

The analogy between war crimes and CAH is evident in the similarity between types of acts described in Article 6(c), which when committed by a belligerent against the nationals of another state constitute war crimes and when committed by the agents of a given state against its own nationals are deemed CAH. As Professor Schwelb stated:

Crimes against humanity can be committed against a civilian population both of territories to which the provisions of Section 3 of The Hague Regulations annexed to the Fourth Hague Convention of 1907 respecting military authority over the territory of the hostile state apply, and of such territories to which they do not apply. This means that a crime against humanity under Article 6(c) of the Charter may or may not simultaneously be a violation of the laws and customs of war and therefore a war crime in the narrower sense, coming under Article 6(b) of the Charter. It follows that the term "crimes against humanity" on the one hand, and "war crimes" or "violations of the laws and customs of war" on the other, overlap. Many crimes against humanity are also violations of the laws and customs of war; many, though not all, war crimes are simultaneously crimes against humanity. In so far as these crimes (viz. crimes against humanity) constitute violations of the laws of war there is no juristic problem because they are merely the same crimes as those set forth in Count Three [of the *Violations of the Laws and Customs of War*] under a different name, but novel considerations arise when the acts charged cannot be brought within this category.<sup>224</sup>

Professor Goodhart, on the same subject, noted that:

<sup>221</sup> Instrument of Surrender of Italy, Sept. 29, 1943, 61 Stat. 2742, T.I.A.S. No. 1604. DOCUMENTS RELATING TO THE CONDITIONS OF AN ARMISTICE WITH ITALY, COMMAND PAPERS 6693 8. Article 29 referred to the perpetrators of "War Crimes" and also to persons suspected of "Analogous Offences," an expression clearly indicating what subsequently became known as "crimes against humanity."

<sup>222</sup> The Declaration of Saint James and the Moscow Declaration.

<sup>223</sup> The contrary argument, at least until 1945, was twofold: (1) only states are subjects of international law; and (2) states are obligated only by those duties they specifically agree to assume.

<sup>224</sup> See Schwelb, *supra* note 3, at 189.

[W]here “war crimes” and “crimes against humanity” overlap, no independent legal problems arise. It was natural that the notion of crimes against humanity had to be examined by the International Military Tribunal particularly in such cases where it was alleged that facts which did not simultaneously constitute violations of the laws of war constituted “Crimes Against Humanity.”<sup>225</sup>

Sir Hartley Shawcross, as Chief Prosecutor for the United Kingdom, in his closing arguments delivered on the 26th and 27th of July 1946 before the International Military Tribunal at Nuremberg, stated the general theory on which the Nuremberg indictment was based with respect to the charge of CAH:

So the crime against the Jews, insofar as it is a Crime Against Humanity and not a War Crime, is one which we indict because of its association with the Crime Against the Peace. That is, of course, a very important qualification, and is not always appreciated by those who have questioned the exercise of this jurisdiction. But, subject to that qualification, we have thought it right to deal with matters which the Criminal Law of all countries would normally stigmatize as crimes: murder, extermination, enslavement, persecution on political, racial or economic grounds. These things done against belligerent nationals, or, for that matter, done against German nationals in belligerent occupied territory, would be ordinary War Crimes, the prosecution of which would form no novelty. Done against others they would be crimes against Municipal Law except in so far as German law, departing from all the canons of civilized procedure, may have authorized them to be done by the State or by persons acting on behalf of the State. Although to do so does not in any way place those defendants in greater jeopardy than they would otherwise be, the nations adhering to the Charter of this Tribunal have felt it proper and necessary in the interest of civilization to say that those things, even if done in accordance with the laws of the German State, as created and ruled by these men and their ringleader, were, when committed with the intention of affecting the international community – that is in connection with the other crimes charged – not mere matters of domestic concern but crimes against the Laws of Nations. I do not minimize the significance for the future of the political and jurisprudential doctrine which is here implied. Normally International Law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction. And although the Social and Economic Council of the United Nations Organization is seeking to formulate a Charter of the Rights of Man, the Covenant of the League of Nations and the Charter of the United Nations Organization does recognize that general position. Yet International Law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind.<sup>226</sup>

Professor Schwelb, commenting upon Shawcross’ closing argument, stated:

After quoting Grotius, who affirmed, with reference to atrocities committed by tyrants against their subjects, that intervention is justified for “the right of social connection is not cut off in such a case,” and the expression of the same idea by John Westlake, Sir

<sup>225</sup> See Arthur L. Goodhart, *The Legality of the Nuremberg Trials*, 58 JURID. REV. 1, 15 (1946).

<sup>226</sup> See SPEECHES OF THE CHIEF PROSECUTORS AT THE CLOSE OF THE CASE AGAINST THE INDIVIDUAL DEFENDANTS (published under the authority of H.M. Attorney-General by H.M. Stationery Office) (COMMAND PAPERS 6964), 63, cited by Schwelb, *supra* note 3, at 198.



Hartley Shawcross went on to say: “The same view was acted upon by the European Powers which in time past intervened in order to protect the Christian subjects of Turkey against cruel persecution. The fact is that the right of humanitarian intervention by war is not a novelty in international law – can intervention by judicial process then be illegal? The Charter of this Tribunal embodies a beneficent principle – much more limited than some would like it to be – and it gives warning for the future – I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the international law of mankind.”<sup>227</sup>

The conclusion is clear that CAH in their post-World War II formulation is an extension of war crimes and is based on the same moral and legal principles that have long existed and that are the underpinning of principles, norms, and rules of the humanization and regulation of armed conflicts. But, as Georg Schwarzenberger, a sometime critic of certain aspects of the London Charter and prosecutions, noted:

[I]n Article 6(c) of the Charter of the Nuremberg International Military Tribunal, as modified by the Four-Power Protocol of October 6, 1945, crimes against humanity are defined as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civil population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

In the original versions of the United States, United Kingdom and French texts of the London Agreement of August 8, 1945, the two parts of the definition had been separated by a semicolon after the word “war.” Thus, it was possible to argue that any inhumane act against any civilian population amounts to a crime under the Charter, irrespective of its date of commission before or after the outbreak of the Second World War.<sup>228</sup>

Schwarzenberger went on to state:

[A]ccording to Article 7 of the Four-Power Agreement of August 8, 1945, each of the four texts was to have equal authority. With the solemnity of a Protocol, the United States, United Kingdom and French texts were adjusted to the Russian version, and further modifications were introduced in the French version of the clause on crimes against humanity to adjust it to the other three texts. Thus, beyond any shadow of doubt, the Contracting Parties clarified their intention. Unless the qualifications made in Article 6(c) applied, they did not intend crimes against humanity under the Nuremberg Charter to cover inhumane acts against civilian populations in time of peace.<sup>229</sup>

Indeed, the IMT interpreted CAH as meaning crimes committed in connection with war after 1939, in accordance with the adopted version of Article 6(c) of the Charter. The Tribunal also found that Nazi atrocities constituted pre-Charter CAH, but refused

<sup>227</sup> See Schwelb, *supra* note 3, at 198–99. Supporting this proposition see Jescheck, *Development and Future Prospects (of International Criminal Law)*, *supra* note 53. Professor Jescheck is, however, a critic of Nuremberg’s approach with respect to the defense of “obedience to superior orders,” and its *ex post facto* application. See JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAFRECHT, *supra* note 53.

<sup>228</sup> SCHWARZENBERGER, *supra* note 197, at 496.

<sup>229</sup> *Id.* at 497.

to apply that notion to acts that occurred before 1939, when the war began, due to the language of the Charter that was binding upon it.<sup>230</sup> One reason for this cutoff date was the fact that the London Agreement of August 8, 1945 contained some discrepancies in its official languages (English, French, and Russian), whose texts were to have equal weight. The Russian text specifically stated that “inhumane acts fell under the Tribunal’s jurisdiction only if committed in the execution of, or in connection with, war crimes in the strict sense and crimes against peace,”<sup>231</sup> thus including the limiting connection to war. That connection, in the opinion of this writer, was probably motivated by a desire of the Charter’s drafters to strengthen its legality by connecting it to the more established notion of war crimes. Thus, by foregoing prosecution for crimes committed between 1933 and the advent of war in 1939, the framers of the Charter most likely believed that it would strengthen the prosecution’s legal case for post-1939 criminalization.<sup>232</sup> That limitation was, however, removed in CCL 10, which was the basis for Allied prosecutions in their respective zones of occupation.<sup>233</sup>

Recently, Professor Clark explained that the IMT did not provide a concise clarification of the analogy between CAH and war crimes and generally lacked a clear analysis of the distinctions between these two categories of crimes. He stated:

When it came to discussing the offenses as they applied to particular defendants, the Tribunal continued its practice of simply jumbling up the discussion of both war crimes and crimes against humanity – except in the cases of Streicher and von Schirach who were charged with crimes against humanity but not with war crimes and who were both convicted. In its discussion of the deeds of particular individuals, the Tribunal did not make any systematic use of its sub-headings of categories of offenses. Nonetheless, an examination of the Tribunal’s discussion in particular cases suggests an approach which uses the general framework of those headings as a basis of analysis. Depending on the particular facts, the Tribunal discussed in a quite unsystematic fashion:

“offenses against prisoners of war; murder and ill-treatment of civilian populations, including terrorism, shooting hostages, use of economic resources for Germany, concentration camps, deportations, unnecessary damage to homes, Germanization, exterminations – of Jews, of those thought likely to mount opposition, of political commissars, of intellectuals, of the insane and the old – and deciding that the Hague Rules did not apply in the occupied East; pillage of public and private property; the slave labor policy; persecution of the Jews, including the passage of laws aimed at excluding them from economic life and from the protection of the law.”

Fourteen of the defendants were convicted of both types of offense – war crimes and crimes against humanity – after discussions which often seemed applicable mainly to

<sup>230</sup> See also DAWIDOWICZ, *supra* note 39; J. CLAUDE LOMBOIS, *supra* note 53, at 156.

<sup>231</sup> SCHWARZENBERGER, *supra* note 197, at 496–97.

<sup>232</sup> See generally *infra* ch. 5, § §2–4.

<sup>233</sup> See CCL 10, *supra* note 126. Allied courts applying CCL 10 were at odds on the issue of whether they had jurisdiction over CAH committed before 1939. In the *Flick* and *Ministries* cases, the courts, following the IMT, refused to take jurisdiction over pre-1939 CAH, while the courts in the *Einsatzgruppen* and *Justice* cases state in dicta that such jurisdiction would exist. For more on this issue, see Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 INT’L CONCILIATION 241, 342–44 (1949). The latter decisions provided some support for the idea that Germany’s national sovereignty presented no impediment to prosecution. See Kai Ambos & Stefan Wirth, *The Current Law of Crimes Against Humanity*, 13 CRIM. L.F. 1, 3–13 (2002) (arguing that the “war nexus” was always a jurisdictional requirement, not a substantive element of the law of CAH, and as such it has gradually disappeared from the law).

war crimes. Occasionally, there appear to be some distinctions drawn. Seyss-Inquart, for example, was active both in Austria and later in Poland and the Netherlands. The Tribunal regarded his activities in Austria as occurring within Germany and analyzed them as crimes against humanity. His activities in the Netherlands and Poland were treated primarily as war crimes.

The cases of the two defendants charged with crimes against humanity but not war crimes are, perhaps, instructive. The gravamen of the finding of guilt in the case of Streicher, “Jew-Baiter Number One,” lay in his advocacy of “persecution” on political and racial grounds – persecution which included murder and extermination. Von Schirach, as a senior official in Vienna, was involved in the use of forced labor under disgraceful conditions in that city and in continuing the deportation of the Jews therefrom. His activities ran the gamut of the definition of crimes against humanity in the Charter. Again, Austria was treated as part of Germany and von Schirach was duly convicted of crimes against humanity.

All in all, though, it is fair to say that crimes against humanity did not play a prominent part in the analysis of the Tribunal or in its disposition of particular cases. The two officials convicted of crimes against humanity but not war crimes were not at the forefront of the Tribunal’s discussion. That said, one should note that nonetheless one of them was sentenced to death and the other to a lengthy term of imprisonment solely on the basis of the commission of crimes against humanity. Notwithstanding the relative paucity of discussion and its failure always to distinguish the offense carefully from war crimes, the Tribunal obviously took crimes against humanity seriously.<sup>234</sup>

One important post-IMT case that contains a weighty analysis of the origins of CAH is the *Justice* case from the American CCL 10 Proceedings, wherein the Tribunal noted that:

CCL 10 is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.<sup>235</sup>

Based on this rationale, CCL 10 did not contain the same limitation as the London Charter in Article 6(c), that is, that CAH be limited to those acts connected to the “initiation or conduct of war.” Indeed, logic would require that a crime against “common international law” not be limited in its application to a given context, such as war. As previously stated, the war-connecting limitation established by the London Charter should be viewed as a precaution by the drafters to avoid the argument that CAH violated the principles of legality, known in some way to most national legal systems.<sup>236</sup>

Despite the IMT’s lack of clarity, it can be stated that, although CAH overlapped with war crimes in the strict sense, at the time of the Charter, they were intended to constitute an auxiliary category, as long as the required connection between CAH and the other two types of crimes under the Charter, that is, both crimes against peace and war crimes

<sup>234</sup> Clark, *supra* note 154, at 196–98.

<sup>235</sup> *Justice* case, *supra* note 190.

<sup>236</sup> See *infra* ch. 5, §2.

existed. The IMT's jurisdiction regarding CAH thus extended to crimes committed against German nationals, other nationals, and stateless persons under German control, irrespective of whether such acts were lawful under any particular local law, so long as the connection to war existed.<sup>237</sup>

Some writers, like Schwarzenberger, rejected these arguments and hold that the London and Tokyo Charters were not declarative of international law at the time, but were merely meant to punish the atrocious behavior of the Nazi and Japanese regimes, because their deeds could not go unpunished. Thus, he stated:

[The] limited and qualified character of the rule on crimes against humanity as formulated in the Charters of the Nuremberg and Tokyo Tribunals militates against the rule being accepted as one declaratory of international customary law. This rudimentary legal system [of international law] does not know of distinctions as subtle as those between crimes against humanity which are connected with other types of war crime and, therefore, are to be treated as analogous to war crimes in the strict sense and other types of inhumane acts which are not so linked and, therefore, are beyond the pale of international law. The Four-Power Protocol of October 6, 1945, offers even more decisive evidence of the anxiety of the Contracting Parties to avoid any misinterpretation of their intentions as having codified a generally applicable rule of international customary law.<sup>238</sup>

He concluded that what the Four Powers intended to do under the heading of "crimes against humanity" was to deal retrospectively with the particularly "ugly facets of the relapse of two formerly civilized nations into a state of barbarism."<sup>239</sup> However, that position was not generally shared by most of his non-German contemporaries.<sup>240</sup> Indeed,

<sup>237</sup> See SCHWARZENBERGER, *supra* note 191, at 497. The Charter also excluded the applicability of national laws by reason of the fact that such laws provided the national legal basis to justify such acts, in disregard of international conventional, and customary law, and in disregard of "general principles of law." That exclusion of national laws was valid under the existing principles and norms of international regulation of armed conflicts. *Id.* at 498.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 499.

<sup>240</sup> For this writer, it is only logical that if something is recognized as deserving of punishment, it must necessarily rest on a violation of a legal principle. The logic of this legal reasoning also finds support in MATTHEW HALE, PREFACE TO ROLLE'S ABRIDGMENT (1668), cited in EUGENE WAMBAUGH, THE STUDY OF CASES 90–93 (1894), and reprinted in JEROME HALL, READINGS IN JURISPRUDENCE 342 (1938), where Lord Hale states: "The wisdom of laws, especially of England, is to determine general notions of just and honest by particular rules, applications, and constitutions found out and continued by great wisdom, experience and time. . . ." See also, Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622 (1916); John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1924).

Such reasoning is certainly part of the common law. See generally *supra* note 3; see also, JOHN SALMOND, JURISPRUDENCE (1862) (10th ed. 1947); THOMAS E. HOLLAND, THE ELEMENTS OF JURISPRUDENCE (1924); FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE (1929). With respect to authors supporting this view see *inter alia*: Michèle Jacquart, *supra* note 132; Green, *supra* note 132; M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 202 (1979); ARONÉANU, *supra* note 3; PIETER N. DROST, I-II THE CRIME OF STATE (1959); Jean S. Graven, *Les Crimes Contre l'Humanité*, 76 RECUEIL DES COURS 433 (1950); James T. Brand, *Crimes Against Humanity and the Nürnberg Trials*, 28 OR. L. REV. 93 (1949); Eugène Aronéanu, *Responsabilités pénales pour crime contre l'humanité*, REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 144 (1948); Eugène Aronéanu, *Naissance et Application de la Loi Internationale Réprimant le Crime Contre l'Humanité*, REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 876 (1947); André Boissarie, *La Répression des Crimes Nazis Contre l'Humanité et sur la Protection des Libertés Démocratiques (Rapport Général, Présenté au Congrès International du Mouvement National Judiciaire)*, 18 RIDP 11 (1947); Joseph Y. Dautricourt, *La Définition du Crime Contre l'Humanité*,

even the rigid legal positivism expressed in the narrow interpretation expounded by critics of the London Charter<sup>241</sup> stops short of reaching a contrary logical legal conclusion, namely that if a deed is recognized as deserving punishment, from where does that recognition stem from? Would such recognition merely be another form of atavistic or vindictive expression or is it based on the existence of an unarticulated premise that certain “general principles” exist that make such deeds deserving of punishment? If so, how is a principle that recognizes the need for punishability not based, at least implicitly, on some existing prescription? This is essentially a question of legal philosophy,<sup>242</sup> which includes considerations of legality.<sup>243</sup> Considering, however, that the conventional and customary regulations of armed conflicts refer to and rely upon basic “laws of humanity” as specifically stated in the Preamble of Hague Conventions, the conclusion is inescapably that an unarticulated legal premise does exist. In this perspective, the criticism of legal positivists<sup>244</sup> could appear to be more a question of form than one of substance. As aptly stated by Professor D’Amato:

Not only do positivists insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle.<sup>245</sup>

## §8. The London Charter as Declarative of Customary International Law and Subsequent Affirmations Confirming CAH as an International Crime

A custom must necessarily have its origin in some act that reflects the intention of a state to be bound by a certain custom or practice engaged in by other states and to be legally bound to follow the custom or practice.<sup>246</sup> When practices become custom and how

25 REVUE DE DROIT INTERNATIONAL 294 (1947); Jacques-Bernard Herzog, *Contribution à l’Etude de la Définition du Crime Contre l’Humanité*, 18 RIDP 155 (1947); Schwelb, *supra* note 3.

<sup>241</sup> See, e.g., SCHWARZENBERGER, *supra* note 197, at 479, 483.

<sup>242</sup> See *infra* ch. 5, §1.

<sup>243</sup> Particularly, the meaning, content, and application of the principles of legality. See *infra* ch. 5.

<sup>244</sup> *Id.*

<sup>245</sup> Anthony A. D’Amato, *The Moral Dilemma of Positivism*, 20 VAL. U. L. REV. 43 (1985); see also ANTHONY A. D’AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 294–302 (1984); *contra* Herbert L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624–29 (1958); and see generally *infra* ch. 5.

<sup>246</sup> See generally on customary international law ANTHONY D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); Michael Akehurst, *Custom as a Source of International Law*, 1974 BRIT. Y.B. INT’L L. 1; see also MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW (Peter Malanczuk ed., 1997). For an argument that the American constitutional scheme does not and should not permit the new customary international law – that is, the customary international law governing how states treat their own nationals – to override domestic law, mostly because it attempts to bypass domestic political processes that are more legitimate, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 111 HARV. L. REV. 815, 857–58 (1997). Others, like Goldsmith and Eric Posner, note that many critics believe that the new customary international law is “incoherent and illegitimate.” Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 640 (2000) (citing G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY (1993)); J. SHAND WATSON, THEORY AND REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 79–106, 106 (1999); Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449 (2000). Similarly, Bruno Simma and Philip Alston condemn *coutume sauvage* (their term for new customary international law) as “a product grown in the hothouse of parliamentary diplomacy,” a “cultured peal version of customary law” that

custom evolves is matter that legal historians debate. However, legal practitioners focus on when a given custom is identifiable and enforceable, and against whom it may be enforced. This is adduced from *opinio juris* and the practice of the state, both of which indicate recognition of the customary rule and its binding nature.

The case has been made here that CAH arose out of the customary law of armed conflicts and that by 1919 it was an emerging custom, though not yet defined in positive ICL, which occurred in 1945. At the time, however, the problem was whether the Charter's legislative enactment constituted the codification of pre-existing customary law, or whether it was declarative of a new custom that was, until then, in the making. In both cases the Charter raised questions concerning the principles of legality, which the judgment failed to satisfactorily address.<sup>247</sup>

The London Charter's drafters subscribed to the proposition, which was later advocated by the IMT prosecutors and then decided by the judges, that the answers to these questions were that the Charter was declarative of a new custom and that, as such, it did not violate the principles of legality. Like the French philosopher Blaise Pascal, who once posited that every custom has its origin in some single act, the drafters, prosecutors, and judges, who were, however, for all practical purposes, the same persons in different roles and who represented the same four governments, held the view that the Charter was a custom-creating act and that it codified a pre-existing custom in the making. Though it is true that every custom originates in a particular act, it is nonetheless difficult to argue at the inception of a given act that a custom exists from that initial point on, rather than to await its affirmation in subsequent state practice and *opinio juris*. Indeed, the understanding of what constituted customary international law in 1945 required some affirmation in subsequent state practice that a given act, supported by *opinio juris*, represented the expression of a binding legal obligation. The fact that four victorious states signed the Charter and nineteen others subsequently acceded to it evidences those states' *opinio juris*. However, whether the establishment of the IMT is sufficient evidence of the practice of states is another question. It can be argued, however, that it was a practice in that case with respect to the four original signatory states and the nineteen states that ceded to the London Agreement of August 8, 1945, to which the Charter was appended.

The defeated Germany can be said to have implicitly acquiesced to that emerging custom by its unconditional surrender, though the element of compulsion is more than self-evident. The validity of Germany's acquiescence must be evidenced in other ways than by the participation of German defendants at their trial before the IMT and the CCL 10 Proceedings. A more plausible source exists that evidences Germany's voluntary acquiescence to the seldom referred to principle of individual criminal responsibility for war crimes. The German government after Hitler appointed Grand-Admiral Karl Dönitz as Reich President, which the Allies briefly recognized as the legitimate government of Germany, signed the two instruments of unconditional surrender of Germany. Colonel-General Alfred Jodl signed the first such instrument on May 7, 1945, at General

functions "through proclamation, exhortation, repetition, incantation, lament." Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 89 (1992). Their fear is that customary law morphed "from something happening out there in the real world, after the diplomats and delegates have had their say, into paper practice: the words, texts, votes and excuses themselves. The process of customary law-making is thus turned into a self-contained exercise in rhetoric." *Id.*

<sup>247</sup> See *infra* ch. 5, §2.



Dwight D. Eisenhower's headquarters in Reims, France, to come into effect on May 9. It enabled German forces and civilians to escape Soviet advances in East Germany until May 9, when Field Marshall Keitel signed the overall instrument of surrender in the Soviet military headquarters at Berlin-Karlshorst. On May 11, Grand-Admiral Dönitz, as Reich President, sought to confer upon the Reich's Supreme Court (sitting in Leipzig as it was after World War I when it prosecuted those Germans accused of war crimes, as discussed above) jurisdiction to prosecute crimes committed during the Third Reich and so informed General Eisenhower. Dönitz voluntarily wanted to follow the World War I precedent, when that same Court was given jurisdiction to prosecute the German war criminals of that conflict.<sup>248</sup> However, Dönitz's initiative was disregarded by the Allies, who, after having obtained that government's ascent to the instruments of surrender, arrested all its members and took over the government of Germany.<sup>249</sup> Thus, the Allies could say thereafter that there was no government in Germany and that the Control Council, made up of the Four Major Allies, constituted the government of Germany. However, no matter what the Allies did, Germany, at that time, had a legitimate government that was briefly recognized by the Allies when it suited them, namely to sign the Armistice Agreement, only to be dismissed thereafter. But that German government wanted to prosecute German war criminals. The Allies did not accept such a proposition, because it would have legitimized the Dönitz government and precluded the Four Major Allies claiming that there was no legitimate government of Germany and, hence, assuming the role of Germany's government. They ignored the Dönitz proposal and proceeded with their plans. Nevertheless, the Dönitz initiative evidences the German government's intentions to prosecute war criminals; whether that can be deemed consent for the Allies' IMT and CCL 10 prosecutions is a bridge too far.

In addition to the problems discussed above concerning customary international law, there was another more specific problem, relating to the customary law of armed conflicts. At that time, the customary law of armed conflict distinguished between *jus in bello* and *jus ad bellum*. This important distinction also maintained a separation between the belligerents' conduct in time of war against the citizens of another state and the conduct by a belligerent state directed against its own citizens. The former was part of the *jus in bello* but not the latter. No matter how atrocious the conduct of a belligerent state was against its own nationals, the customary law of armed conflict at that time did not permit crossing over these legal distinctions. Thus, to extrapolate from the customary law of armed conflict the existence of a positive norm making criminally punishable certain acts identical or similar to war crimes, but not fulfilling all the legal elements required for war crimes, was a stretch. How much of a legal stretch depends on the philosophical framework of a given legal system<sup>250</sup> and of the interpretation that system gives to the principles of legality.<sup>251</sup>

However, these and other legal arguments of the time paled in the face of the events that took place. Thus the nature and quantum of the horrible acts committed drove the law to the inevitable conclusion that the emerging custom had to be given legal

<sup>248</sup> See WILLIS, *supra* note 10.

<sup>249</sup> In fact, within days of the signing of these instruments, the Allies arrested Dönitz, as well as Keitel, Jodl, and others. For a critical appraisal, see IRVING, *supra* note 128, at 49–50.

<sup>250</sup> See *infra* ch. 5, §1.

<sup>251</sup> *Id.*



justification. It was, therefore, a question of substance being given primacy over legal positivism.<sup>252</sup>

Having established that CAH were an emanation of the customary law of armed conflict, what was left for the drafters of the London Charter was to identify the special characteristics of the newly posited international criminal category in order to distinguish it from its original matrix. The first characteristic was the linkage between CAH and crimes against peace and war crimes referred to here. That link was developed to provide legitimacy to this new category of crimes in respect of the principles of legality.<sup>253</sup> The second characteristic was what this writer refers to as state policy,<sup>254</sup> which is reflected in the state's policy regarding the initiation of an aggressive war and war crimes, and the second argument is found in the use of the policy term "persecution" contained in Article 6(c). That policy clearly sets CAH apart from war crimes insofar as the latter can be committed without state policy, and even in violation thereof, but not the former. The third characteristic is related to the scale of the atrocities committed.<sup>255</sup> This too is an important distinguishing characteristic, because war crimes can be committed on individual bases by individuals acting on their own, whereas CAH are crimes committed on a scale that can only be attributed to state policy.<sup>256</sup>

The prevailing contemporary view is that CAH are those crimes that are committed as part of state policy for state actors and as part of an organizational policy for nonstate actors who have some state characteristics.<sup>257</sup> However, due to the post-World War II transformation of the nature and conduct of armed conflicts, and the increased number of nonstate actors in these conflicts and the harm they commit,<sup>258</sup> it is argued that extending state policy to group policy of nonstate actors would extend CAH to nonstate actors.<sup>259</sup>

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> See generally *infra* ch. 1.

<sup>255</sup> *Justice case*, *supra* note 190, held that "crimes against humanity [ . . . ] must be strictly construed to exclude isolated cases of atrocity or persecution." *Id.* at 982; *United States v. Flick* (the *Flick case*), VI TRIALS OF THE WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (Washington, DC: GPO, 1947-51) excluded discriminatory expropriation of Jewish property as not constituting CAH; *United States v. Krauch*, VIII TRIALS OF THE WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (Washington, DC: GPO, 1947-51) held that plunder and spoliation of properties located in German-occupied countries, while constituting war crimes, were not CAH; *United States v. Weiszäcker*, reprinted in XIV TRIALS OF THE WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (Washington, DC: GPO, 1947-51) held that decrees discriminating against Jews in food rationing showed "rank discrimination" and "callous social sense," but did not produce sufficiently harsh results to constitute CAH. See also *Final Report to the Secretary of the Army on the Nurnberg War Crimes Trials under Control Council Law No. 10* 64, 73 (August 15, 1949), Telford Taylor, Brig. Gen., USA, Chief Counsel for War Crimes.

<sup>256</sup> *Id.*

<sup>257</sup> See generally *infra* ch. 1.

<sup>258</sup> M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L & CRIMINOLOGY 711 (2008); see also MOIR, *supra* note 48.

<sup>259</sup> See *Kunarac et al. v. Prosecutor*, Case No IT-96-23/1-A, Judgment, ¶ 98 n.114 (June 12, 2002). For further discussion of the state policy element see *supra* ch. 1; Guénaél Mettraux, *The Definition of Crimes Against Humanity and the Question of a 'Policy' Element*, in LEILA NADYA SADAT, FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142 (2010); Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L J 237 (2002). Cf. William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L & CRIMINOLOGY 953 (2008); William A. Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, in THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI 347-64 (Leila Nadya Sadat & Michael P. Scharf eds., 2008).

As discussed in [Chapter 1](#), the terms “widespread or systematic,” which are included in recent formulations of CAH,<sup>260</sup> implicitly reflect state policy.

The statutes of the ICTY, ICTR, and ICC affirm CAH as part of customary international law, as does the jurisprudence of the ICTY and ICTR. However, there have been several formulations of CAH in international instruments.<sup>261</sup> It is therefore difficult to state what exactly constitutes customary international law. This will surely cause difficulties to the ICC as its jurisprudence evolves, particularly because its statute’s definition of CAH is so much broader than other definitions.<sup>262</sup>

Among the questions concerning CAH that arise under customary international law are the following:

- (1) Is state policy a required jurisdictional or international element or not?
- (2) Can “widespread or systematic” conduct replace the requirement of state policy?
- (3) Can CAH, which has historically been a manifestation of a state’s power abusing its own civilian population, be converted into an international crime that criminalizes human rights violations?
- (4) Does CAH extend to nonstate actors under all circumstances or only to nonstate actors who have some of the characteristics of state actors?
- (5) To what extent does individual criminal responsibility extend to being part of a group engaging in the prohibited conduct? In other words, does the ICTY’s concept of “joint criminal enterprise” reflect customary international law?

## §9. Post-World War II Prosecutions Pursuant to the London Charter and the Tokyo Statute

World War II was unleashed against all hopes and peaceful efforts of civilized states against people. Eventually, it became apparent, particularly after the tide of war began to favor the Allies and after the first disclosures of unspeakable horrors, that those who had initiated this aggressive war carried it out and committed war crimes and other atrocities – later termed CAH – that demanded prosecution and punishment. After the war, the victors had a choice between summary punishment and the establishment of a legal process by which to advance law and justice.

The first clear indication of the Allies’ decision came in the Moscow Declaration of October 30, 1943, which called for the prosecution and punishment of those responsible for the “atrocities” committed during the war.<sup>263</sup> This was followed by the Agreement

<sup>260</sup> See Statute of the International Criminal Tribunal for Rwanda (ICTR) art. 3, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereinafter ICTR], using the terms “widespread or systematic,”; and the Rome Statute of the International Criminal Court (ICC) art.7, 17 July 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute]; see also 1996 Prep. Com. Report, A/AC.249/1997/L.2, Feb. 21, 1997, at 42–4. For a discussion of post-Charter legal developments, see *infra* ch. 3.

<sup>261</sup> See *infra* ch. 4, Part A.

<sup>262</sup> Suffice it to compare the number of words used in these different formulations to note the quantitative increase expressing additional legal facts. The ICTY used forty-nine words in Article 5, the ICTR used fifty-six in Article 3, the Rome Statute used one hundred sixty-one in Article 7, while IMT Charter 6(c) used fifty-five, the IMTFE 5(c) used ninety-three, and CCL 10 Article II(c) used forty-six.

<sup>263</sup> Declaration on Security (The Moscow Declaration), 9 DEP’T ST. BULL. 308 (1943), *reprinted in* 38 AM. J. INT’L L. 5 (1944); The Cairo Declaration (Conferences at Cairo and Tehran), 1 December 1943, 1943 FOR. REL. 448; Potsdam Proclamation, VII (July 26, 1945), *in* A DECADE OF AMERICAN FOREIGN POLICY: BASIC

for the Prosecution and Punishment of the Major War Criminals of the European Axis, which established at Nuremberg the first of modern history's international military tribunals.<sup>264</sup> The second such tribunal, at Tokyo, was based on a separate statute promulgated as a General Order issued by General Douglas MacArthur in 1946.<sup>265</sup>

The London and Tokyo Charters were potentially effective tools for the enforcement of ICL against individuals of high or low ranks who had committed the crimes contained in the London Charter and the Tokyo Statute. However, their credibility was undermined by the selective enforcement of their provisions to the defeated and by not applying the same provisions to Allied personnel, who had committed the same crimes. The CCL 10 Proceedings<sup>266</sup> stretched to the limit the principles of legality.<sup>267</sup>

The basic premise of the Charters of the IMT and IMTFE and all prosecutions arising out of World War II was that direct individual criminal responsibility existed under international law. Indeed, the Charter makes clear that the three categories of crimes listed in Article 6 "*are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.*"<sup>268</sup> Along with this principle, Article 6 establishes that individual responsibility exists, regardless of national law, all the way up to and including heads of state, and that it precludes the defense of obedience to superior orders.<sup>269</sup> In its judgment, the IMT stated, "The Jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive and binding upon the Tribunal."<sup>270</sup> Also, the Tribunal noted that "individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."<sup>271</sup> The Tribunal

DOCUMENTS, 1941–49 (1950). It should be noted that, in 1943 and 1944, the Soviet Union conducted the first trials involving atrocities committed by the Germans (and their accomplices) during World War II. These prosecutions resulted from Nazi actions in the Western USSR, where an estimated 10,000 people were exterminated during a six-month period. While the organizers and directors of these atrocities (the Nazis themselves) could not be brought to justice, eleven Soviet citizens were convicted for treason because they assisted the Nazis, and some minor Nazi war criminals were prosecuted for engaging in mass executions and employing gas vans to murder inhabitants of the Kharkov region. See Irina A. Lediakh, *The Application of the Nuremberg Principles by Other Military Tribunals and National Courts*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 263–65 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

<sup>264</sup> See Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter].

<sup>265</sup> See Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 BEVANS 20. On the same day General MacArthur issued his proclamation, the IMTFE Charter was adopted. Pursuant to a policy decision by the FEC, MacArthur later amended the Charter by General Order No. 20. See Tokyo Charter, *supra* note 186.

<sup>266</sup> CCL 10, *supra* note 126.

<sup>267</sup> See *infra* ch. 5, §§3, 4.

<sup>268</sup> IMT Charter art. 6, *supra* note 36 (emphasis added). The Tokyo Charter art. 5, *supra* note 186 states that the "Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses [ . . . ]." CCL 10 art II, para. 2, *supra* note 126, provides that "[a]ny person without regard to nationality or capacity in which he acted, is deemed to have committed a crime [ . . . ] if [ . . . ]."

<sup>269</sup> See IMT Charter art. 6, *supra* note 36.

<sup>270</sup> IMT 38, quoted in Richard R. Baxter, *The Effects of Ill-Conceived Codification and Development of International Law*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM 146, 149 (1952).

<sup>271</sup> 22 IMT 466.

further stated: “The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.”<sup>272</sup> Moreover, in the words of the IMT, “[t]hat international law imposes duties and liabilities upon individuals as well as upon states has long been recognized.”<sup>273</sup> Thus, the IMT accepted the view of U.S. Supreme Court Justice Robert H. Jackson, who asserted in his opening statement:

The charter also recognizes individual responsibility on the part of those who commit acts defined as crimes, or who incite others to do so, or who join a common plan with other persons, groups or organizations to bring about their commission. The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under International Law, is old and well established. That is what illegal warfare is. This principle of personal liability is a necessary as well as logical one if International Law is to render real help to the maintenance of peace. An International Law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare [ . . . ]. Only sanctions which reach individuals can peacefully and effectively be enforced. Hence, the principle of the criminality of aggressive war is implemented by the Charter with the principle of personal responsibility.

Of course, the idea that a state, any more than a corporation, commits crimes is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or a corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.<sup>274</sup>

In his report to the President of the United States, Justice Jackson further stated:

The Charter also enacts the principle that individuals rather than states are responsible for criminal violations of international law and applies to such lawbreakers the principle of conspiracy by which one who joins in a common plan to commit crime becomes responsible for the acts of any other conspirator in executing the plan. In prohibiting the plea of “acts of state” as freeing defendants from legal responsibility, the Charter refuses to recognize the immunity once enjoyed by criminal statesmanship.<sup>275</sup>

The purpose of the International Military Tribunal sitting at Nuremberg was to prosecute only the “major” German war criminals.<sup>276</sup> The Tribunal had eight members: a senior and an alternate member from each of the four signatory powers (Francis Biddle

<sup>272</sup> *Id.*

<sup>273</sup> 22 IMT 465. Similarly, Lord Shawcross asserted: “Nor is the principle of individual international responsibility for offenses against the law of nations altogether new. It has been applied not only to pirates. The entire law relating to war crimes, as distinct from the crime of war, is based upon the principle responsibility.” 3 IMT 106; *see also Ex parte Quirin* 317 U.S. 1, 27–8, (1942), which the IMT quoted, at 22 IMT 465, “From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which proscribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals.”

<sup>274</sup> ROBERT H. JACKSON, *THE NÜRNBERG CASE* 88 (1971).

<sup>275</sup> JACKSON’S REPORT, *supra* note 34, at ix.

<sup>276</sup> *See, e.g.,* ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1995); ROBERT E. CONOT, *JUSTICE AT NUREMBERG* (1983); BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* (1977); DAVIDSON, *supra* note 163. Moreover, NORMAN E. TUTOROW, *WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS* 283–342 (1986) (providing a comprehensive bibliography of works that examine Nuremberg); *see also* THE NAZI DOCTORS AND THE NUREMBERG CODE (George J. Annas & Michael A. Grodin eds., 1992).

and Judge John J. Parker of the United States; Lord Justice Geoffrey Lawrence and Justice Norman Birkett of Great Britain; Professor H. Donnendieu de Vabres and Judge R. Falco from France; and Major General I.T. Nikitchenko and Lieutenant Colonel A.F. Volchkov of the Soviet Union). These men would mould together different approaches to criminal law and procedure.

The IMT's work was set in motion in October 1945, when, after much negotiation and compromise,<sup>277</sup> the Committee of Chief Counsels of the four signatories to the London Agreement (Justice Robert H. Jackson of the United States, Sir Hartley Shawcross of Great Britain, General Roman A. Rudenko of the Soviet Union, and François de Menthon and Auguste Champetier de Ribes of France) signed and filed an indictment setting forth the crimes charged against twenty-four high-ranking individuals, as well as against the organizations to which they belonged.<sup>278</sup> The indictment charged the defendants with four counts: (1) "common plan or conspiracy;" (2) "crimes against peace;" (3) "war crimes;" and (4) "crimes against humanity."<sup>279</sup> The IMT conducted its first session at Nuremberg on November 14, 1945, worked 216 days, and ended its final session on August 31, 1946. In all, the Tribunal held 403 open sessions and heard evidence from thirty-three witnesses for the prosecution and eighty for the defense, nineteen of whom were the defendants themselves.

Most of the evidence presented to the Tribunal was documentary and consisted of official German documents. The Germans' meticulous way of recording things was the principal reason for the availability of such a documentary record that all but ensured the success of the prosecution, something that is less likely to occur in other cultures. But the prosecutors ignored the fact that this German practice not only was derived from a meticulous bureaucratic culture but also was a way of enforcing superior orders by providing specific written instructions. In other words, it justified the *Führerprinzip* and the proposition that only the *Führer* bears responsibility. The German defendants repeatedly relied on this defense, which was rejected.

The prosecution also relied heavily upon affidavits, a practice unknown to all legal systems but those of common law origin. However, even in that system, the affidavit is subject to certain defense rights, particularly the right of confrontation and cross-examination of the affiant. These defenses were not always available to the defendants, and they also were seldom requested. Whenever they were requested and the affiant was unavailable, the court did not rule the affidavit inadmissible. Instead, the court relied upon affidavits as valid evidence, contrary to the common law tradition, the origin of this practice. In general, the IMT proceedings were fair and offered the defendants an opportunity to defend themselves, though not in accordance with the full panoply

<sup>277</sup> See generally SMITH, *supra* note 276, at 67–73.

<sup>278</sup> Of the original twenty-four defendants, charges were dropped against Gustav Krupp, Robert Ley committed suicide, and Martin Bormann, who has never been found, was tried *in absentia*. An interesting historical footnote concerning Gustav Krupp: at the trial, the senile old man was found *non compos mentis*. The prosecutors had earlier realized that the Krupp they wanted was Alfried, the son of Gustav, who ran the factories with the Nazis and supplied slave labor. That realization came shortly after the trial began, and the prosecutors tried to substitute Alfried for Gustav. To its credit, the IMT refused. It should be noted further that during the course of the Nuremberg trials, the possibility of a second international military tribunal was considered but the United States felt that the British were not receptive and that the Russians were more interested in the propaganda value of the ongoing proceedings than in their judicial significance. See generally WILLIAM MANCHESTER, *THE ARMS OF KRUP: 1587–1968*, 545–659 (1968).

<sup>279</sup> See Indictment: International Military Tribunal, in *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* (1947) [hereinafter Nuremberg Indictment].

of rights that the common law systems of England and the United States would have offered.<sup>280</sup>

The Tribunal handed down twelve death sentences, seven prison terms (three life sentences, two twenty-year sentences, one fifteen-year sentence, and one ten-year sentence) and three acquittals.<sup>281</sup> More specifically, the Tribunal reached these verdicts for those convicted of CAH – in accordance with Count 4 – after describing the conduct for which they were held responsible.<sup>282</sup>

Of the eighteen defendants who were indicted for CAH, only two were found not guilty, Hess and Fritzsche. Also, of the eighteen, only Julius Streicher (incitement to murder and extermination constituting persecution on political and racial grounds) and Baldur von Schirach (deportation) were charged and convicted of CAH independent of war crimes. As discussed in this Chapter, CAH not only was a newly defined crime, but its conformity with the principles of legality was questionable, as discussed in [Chapter 5](#). Consequently, CAH was linked to crimes against peace and war crimes in Article 6(c), but at the end of the trial it was obvious that CAH could only be linked to war crimes. In all likelihood, the judges found it difficult to deliver a judgment that separated the war crimes from the CAH, and the task proved to be so arduous that the judgments with respect to nearly every defendant convicted on the basis of both crimes.

The IMT Charter has language similar to the London Charter on the subject of individual criminal responsibility. Article 5 states, “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility [ . . . ].”<sup>283</sup> CCL 10 similarly created individual criminal responsibility for war criminals other than those tried before the IMT.

At the IMTFE,<sup>284</sup> Allied prosecutors representing eleven nations (Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines,

<sup>280</sup> Most commentators agree. See Jacob Robinson, *The International Military Tribunal and the Holocaust: Some Legal Reflections*, 7 ISR. L. REV. 1 (1972). But see the position of four of the defense lawyers at Nuremberg: Herbert Kraus (Chief Counsel for Hjalmar Schacht), *The Nuremberg Trials of the Major War Criminals: Reflections after Seventeen Years*, 13 DE PAUL L. REV. 233 (1964); Carl Haensel (Chief Counsel for the SS and SD), *The Nuremberg Trial Revisited*, 13 DE PAUL L. REV. 248 (1964); Otto Kranzbühler (Chief Counsel for Karl Dönitz), *Nuremberg Eighteen Years Afterwards*, 14 DE PAUL L. REV. 333 (1965); Otto Pannenbecker (Chief Counsel for Wilhelm Frick), *The Nuremberg War Crimes Trial*, 14 DE PAUL L. REV. 348 (1965). Another critique of the Nuremberg and Tokyo proceedings and in the Subsequent Proceedings, seldom discussed in the literature, is whether it was valid to prosecute prisoners of war in such fora because of the requirements of Article 63 of the 1929 Geneva Convention, which requires that prisoners of war shall be tried by the same court and according to the same procedure as in the case of persons belonging to the armed forces of the detaining powers. Also, Article 60 required notification to the Protecting Power, which was not given by the Allies. Thus, these proceedings could well have been in violation of the 1929 Geneva Convention whose Article 82 binds its High Contracting Parties to respect and observance. See COMITÉ INTERNATIONAL DE LA CROIX ROUGE: ACTES DE LA CONFÉRENCE DIPLOMATIQUE DE GENÈVE (Paul des Gouttes ed., 1929); GUSTAV RASMUSSEN, CODE DES PRISONNIERS DE GUERRE 70–75 (1931).

<sup>281</sup> The three acquitted were later tried by German denazification courts and were found guilty of war crimes. See DAVIDSON, *supra* note 164, at 29.

<sup>282</sup> The information that follows is included in almost every book on the subject, including those cited above at note 86, but see SMITH, *supra* note 276, at 194–226.

<sup>283</sup> Tokyo Charter art. 5, *supra* note 186.

<sup>284</sup> The literature on the Tokyo trial is small by comparison to that on Nuremberg. See e.g., R. John Pritchard, *The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948*, 7 CRIM. L. F. 41 (1996); R. John Pritchard, *What the Historian Can Find in the Proceedings of the International Military Tribunal for the Far East*, in JAPAN AND THE SECOND WORLD WAR (London School of Economics,



the Soviet Union, and the United States) acted through a single Chief Counsel for the prosecution, as opposed to the IMT, where four co-equal prosecutors acted with respect to each defendant. On April 29, 1946, the Tokyo prosecutors filed a joint indictment against twenty-eight Japanese. The document consisted of fifty-five counts divided into three sections: “crimes against peace” (counts 1–36); “murder” (counts 37–52); and “other conventional war crimes and crimes against humanity” (counts 53–55).<sup>285</sup> Thus, the heading of the charges differed in Tokyo from those of Nuremberg.

The register of defendants included four prime ministers, four foreign ministers, five war ministers, two naval ministers, a Lord Keeper of the Privy Seal, and four ambassadors.<sup>286</sup> However, Emperor Hirohito was not indicted, primarily for political reasons, namely to make the occupation of Japan easier for the Allies, the U.S. in particular.<sup>287</sup> The assumption was that some among the Japanese population would perceive the arrest and prosecution of their Emperor, who is both the head of state and the head of the Shinto religion, as dishonourable, and might have gone into resistance and engaged in guerrilla warfare against the foreign occupiers.

The IMTFE formally convened in Tokyo on May 3, 1946 and announced judgment on November 4, 1948. It heard testimony from 419 witnesses and examined 779 affidavits and depositions that were admitted into evidence, with no cross-examination of the affiants.<sup>288</sup> All the defendants were found guilty, with seven receiving death sentences, sixteen receiving life sentences, one receiving a sentence of twenty years, and one receiving a seven-year sentence.<sup>289</sup>

A comparison of these two post-World War II Tribunals and their respective Charters reveals some differences. The procedural differences are the most striking. For example, while at Nuremberg, each signatory of the London Charter had the right to appoint a Chief Prosecutor, whereas at Tokyo the Supreme Commander of the Allied Powers (General MacArthur) appointed the only Chief of Counsel, who was solely responsible for all prosecutions. Also, although criminal organizations were indicted at Nuremberg, no Japanese organization was indicted. The proceedings at Tokyo left much to be desired

Discussion Paper IS/89/197, 1989); R. John Pritchard, *The Historical Experience of British War Crimes Courts in the Far East*, 6 INT'L REL. 311 (1978); R. John Pritchard, *Lessons from British Proceedings Against Japanese War Criminals*, 3 HUM. RTS. REV. 104 (1978); ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); *THE TOKYO WAR CRIMES TRIAL* (Chihiro Hosoya, Nisuke Ando, Yasuaki Onuma, Richard Minear eds., 1986); *THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR-EAST* (22 vols. and 5 supp. vols., R. John Pritchard & Sonia M. Zaide eds., 1981); PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL* (1979); *THE TOKYO JUDGMENT* (Bernard V.A. Röling & C.F. Rüter eds., 1977); RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971). For a bibliographic listing see also TUTOROW, *supra* note 276, at 259–8.

<sup>285</sup> See PICCIGALLO, *supra* note 284, at 14. Originally, the suspected war criminals were divided into three categories: Class A – those who allegedly had planned, initiated, or waged war “in violation of international treaties;” Class B – those who had violated “the laws and customs of war;” Class C – those who had carried out the tortures and murders ordered by superiors. BRACKMAN, *supra* note 284, at 46.

<sup>286</sup> PICCIGALLO, *supra* note 284, at 14.

<sup>287</sup> However, as Joseph Keenan, the chief prosecutor at Tokyo, conceded, from a strict legal standpoint, the Emperor could have been convicted as a war criminal. *Id.* at 16.

<sup>288</sup> See BRACKMAN, *supra* note 284, at 18, who notes that the witnesses ranged from “buck privates to the last emperor of China.” *Id.*

<sup>289</sup> *Id.* at 378–82. Two defendants died during the trial and one was not able to plead. This information is found in almost every book on the Tokyo Trials, including the authors cited *supra* at note 284. But see BRACKMAN, *supra* note 284, at 406–13.



in terms of fairness, whereas the Nuremberg proceedings, as noted, were substantially fair. Lastly, the verdict (judgment) at Nuremberg was, with few exceptions, substantially fair; whereas the Tokyo verdict (judgment) was substantially unfair to a number of defendants.<sup>290</sup> In the final analysis, both vindicated the principle of individual criminal responsibility for international crimes, rejecting immunities and defenses, such as obedience to superior orders and upholding the mode of criminal responsibility referred to as command responsibility. More importantly for the purposes of this book, they recognized the existence of CAH as pre-Charter crimes on the legal bases discussed elsewhere in this Chapter.

### §10. The Allied Prosecutions of the CCL 10 Proceedings in the European and Far Eastern Theaters

In addition to these internationally constituted military tribunals, a number of other tribunals were formed to conduct war crimes trials.<sup>291</sup> Of particular note, the Allies established military tribunals in their respective zones of occupation under CCL 10 of December 20, 1945, which empowered each occupying nation (consisting of the United States, the United Kingdom, France, and the U.S.S.R.) to try lower-level German officials.<sup>292</sup> These tribunals, especially those of the United States, relied heavily on the London Charter and the IMT's judgment.<sup>293</sup> These and other tribunals picked up where Nuremberg and Tokyo left off and tried the "lesser" war criminals.<sup>294</sup>

There is some terminological confusion about the post-World War II proceedings. We must first distinguish the proceedings in the European theater from those of the Far

<sup>290</sup> See *supra* note 284, particularly THE TOKYO WAR CRIMES TRIAL, R. John Pritchard, *An Overview of the Historical Importance of the Tokyo War Trial*, Nissan Occasional Paper Series No. 8 89 (1987); Judge Bernard V.A. Röling's *Introduction*, at 15; RICHARD MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

<sup>291</sup> See JEAN-PIERRE MAUNOIR, *LA RÉPRESSION DES CRIMES DE GUERRE DEVANT LES TRIBUNAUX FRANÇAIS ET ALLIÉS* (1956); Willard B. Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AM. J. INT'L L. 299 (1948); see also HENRI MEYROWITZ, *LA RÉPRESSION PAR LES TRIBUNAUX ALLEMANDS DES CRIMES CONTRE L'HUMANITÉ ET DE L'APPARTENANCE A LEURS ORGANIZATIONS CRIMINELLES* (1960).

<sup>292</sup> See CCL 10, *supra* note 126. Since this law was passed on the basis that Germany had become *debellatio* and had unconditionally surrendered to the Allies, the legal status of Germany is relevant. See Max Rheinstein, *The Legal Status of Occupied Germany*, 47 MICH. L. REV. 23 (1948). For the United States: the Military Tribunal at Nuremberg; the United States Military Commissions, sitting at various places in Europe and Asia; the General Military Government Court and Intermediate Military Government Court of the American Zone of Germany; the U.S. Court of Appeals and The United States Supreme Court; For the United Kingdom: British Military Courts, sitting at various places in Europe and Asia; For France: the Permanent Military Tribunal; For Australia: the Australian Military Court; For Canada: the Canadian Military Court; For the Netherlands: the Netherlands Court-Martial and Special Courts; For Norway: the Norwegian Court of Appeal and Supreme Court of Norway; For Denmark: the Danish Military Courts and the Danish Appellate and Supreme Court; For China: the Chinese War Crimes Court; For Poland: the Supreme National Tribunal of Poland; For the USSR: Various summary military courts.

<sup>293</sup> See TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NÜRNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10*, (1949); FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955* (1989); see also Adam Basak, *The Influence of the Nuremberg Judgment on the Practice of the Allied Courts in Germany*, 9 POLISH Y.B. INT'L L. 161 (1977–78) (studying the influence of the factual determinations of the Nuremberg Tribunal, and the tribunal's legal views regarding the foundations of jurisdiction and the interpretation of existing law).

<sup>294</sup> WOETZEL, *supra* note 53, at 219.

Eastern theater. The latter always followed national laws of whichever of the Allied Powers was conducting the proceedings, which included Australia,<sup>295</sup> Canada,<sup>296</sup> China,<sup>297</sup> France,<sup>298</sup> Great Britain,<sup>299</sup> and the United States.<sup>300</sup> In most cases domestic military law was the source of law, and prosecutions were based on “violations of laws of war” as established by conventional and customary international regulation of armed conflicts. For instance, the United States established military commissions, and the Great Britain, Australia, New Zealand, and the Netherlands established courts martial. In the European theater, what is often referred to as the “Subsequent Proceedings,” in reality should be referred to as the CCL Proceedings, because the substantive law in all cases was CCL 10 and thus included charges for crimes against peace and CAH.

In the twelve trials of the American CCL 10 Proceedings, a panel of three judges, each a civilian judge, conducted the trial along the lines of American procedures, despite some differences between the states. They also used the same rules of evidence that the judges used in their state courts, although some rules, like the hearsay rule, were not applied with the same rigidity. On the other hand, the British, French, and U.S.S.R. proceedings pursuant to CCL 10 were essentially military in nature, taking the form of courts martial conducted by military judges and prosecutors.

Thus, the American and British proceedings, which relied exclusively on “violations of the Law of War,” did not have problems relating to the principles of legality, as did the CCL 10 Proceedings, which applied CAH and thus encountered many similar arguments from defense counsel as had been made at the IMT, as discussed below. However, the American Dachau Trials were also criticized for unfair prosecutorial conduct.<sup>301</sup> A political uproar developed in the United States over these proceedings, mostly due to the demagogic tactics of Senator Joseph McCarthy.<sup>302</sup>

In addition, several Allied nationals were prosecuted for collaboration with the enemy and for commission of war crimes and CAH in their respective countries.<sup>303</sup>

A second distinction must be drawn with respect to the different formerly Nazi-occupied countries that conducted prosecutions after World War II. They include, *inter alia*, Poland, France, the Netherlands, Norway, Belgium, Hungary, Czechoslovakia, Greece, and Romania. The domestic prosecutions in these countries can generally be divided into two categories. One category, e.g., the prosecutions of France and Greece, were mostly against persons who had collaborated with the Germans and were therefore

<sup>295</sup> See Australian Law Concerning Trials of War Criminals by Military Courts, V L. REPT. TRIALS WAR CRIM. 94 (U.N. War Crimes Comm’n, 1948) (Annex).

<sup>296</sup> See Canadian Law Concerning Trials of War Criminals by Military Courts, IV L. REPT. TRIALS WAR CRIM. 125 (U.N. War Crimes Comm’n, 1948) (Annex).

<sup>297</sup> See Chinese Law Concerning Trials of War Criminals, XIV L. REPT. TRIALS WAR CRIM. 152 (U.N. War Crimes Comm’n, 1949) (Annex).

<sup>298</sup> See French Law Concerning Trials of War Criminals by Military Tribunals and by Military Government Courts in the French Zone of Germany, III L. REPT. TRIALS WAR CRIM. 93 (U.N. War Crimes Comm’n, 1948) (Annex II).

<sup>299</sup> See British Law Concerning Trials of War Criminals by Military Courts, I L. REPT. TRIALS WAR CRIM. 105 (U.N. War Crimes Comm’n, 1947) (Annex I).

<sup>300</sup> See United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Courts, I L. REPT. TRIALS WAR CRIM. 111 (U.N. War Crimes Comm’n, 1947) (Annex II).

<sup>301</sup> See, e.g., JAMES WEINGARTNER, CROSSROAD OF DEATH: THE STORY OF THE MALMEDY MASSACRE AND TRIAL (1979).

<sup>302</sup> See BUSCHER, *supra* note 293, at 89.

<sup>303</sup> See MAUNOIR, *supra* note 291; Cowles, *supra* note 291.

deemed to have committed treason. The second category consists mostly of countries in Eastern Europe. Although their trials also dealt with collaborators, they also included a large number of nationalists, who were wrongly accused and convicted of collaboration with the Nazis as a way for the U.S.S.R. and the local communist parties to eliminate nationalists who form the opposition to the new communist regimes. Both of these categories involved some amount of political motivation, or had some political characteristics, but also in both of these types of trials there were collaborators who committed CAH. The problem was that the Eastern European countries did not criminalize CAH in their respective criminal laws. In some cases, like in Poland and the Netherlands, the courts relied on CCL 10 as the basis for substantive law defining CAH. Alternatively, the France prosecuted persons for CAH on the basis of French criminal law, which specifically penalizes CAH. The Federal Republic of Germany also conducted an estimated 60,000 prosecutions.<sup>304</sup> However, although the German criminal code included genocide, it did not contain a provision on CAH. These prosecutions are discussed in greater detail as part of the survey of domestic prosecutions contained in [Chapter 9](#).

During and after the IMT, it is reported that the United States convicted 1,814 and executed 450 in its occupation zone; Great Britain convicted 1,085 and executed 240; and France convicted 2,107 and executed 109. The USSR tried and executed an unknown number of persons, with estimates reaching 10,000 persons – many were executed.

The U.S. dominated the war crimes trial program in Germany, which was based on the London Charter and CCL 10.<sup>305</sup> Two types of proceedings were established under U.S. Military Government Ordinance No. 7, October 18, 1946, pursuant to CCL 10 and to the inherent powers of the Americans under international humanitarian law to prosecute enemy combatants and civilians. One type of proceedings was the American CCL 10 Proceedings, consisting of twelve trials at Nuremberg after the conclusion of the IMT proceedings. These cases involved 195 persons charged with offenses arising under the three crimes embodied in CCL 10, which derived from the Charter.<sup>306</sup> These proceedings were commonly called the Nuremberg Subsequent Proceedings, because the twelve cases were heard before a U.S. tribunal sitting at the same venue as the IMT.<sup>307</sup> These proceedings targeted high-ranking persons in organizations such as the SS (the *Pohl* case), the German High Command (the *High Command* case), the *Einsatzgruppen* (mobile death squads) case, the Foreign Ministry, the Justice Ministry, industry (for example, *I.G. Farben* and *Krupp*), and others. According to this author's research, 114 defendants were indicted for crimes including CAH at the U.S. CCL 10 Proceedings; of these, 80 were convicted of crimes including CAH.

The American CCL 10 Proceedings were conducted under the guidance of Brigadier Telford Taylor, who followed Justice Robert Jackson as the U.S. Chief of Counsel for War Crimes. Some criticism of these trials emerged, and appeals and petitions for writs

<sup>304</sup> DICK DE MILDT & DIRK W. DE MILDT, IN THE NAME OF THE PEOPLE: PERPETRATORS OF GENOCIDE IN THE REFLECTION OF THEIR POST-WAR PROSECUTION IN WEST GERMANY: THE "EUTHANASIA" AND "AKTION REINHARD" TRIAL CASES 18–19 (1996).

<sup>305</sup> See BUSCHER, *supra* note 293.

<sup>306</sup> See 15 CCL Trials 22–25; TAYLOR, *supra* note 128.

<sup>307</sup> The American CCL 10 proceedings involved twelve trials and 195 defendants: (1) the *Krupp* case, (2) the *Ministries* case, (3) the *Hostage* case, (4) the *Justice* case, (5) the *High Command* case, (6) the *Medical* case, (7) the *Milch* case, (8) the *Rusha* case, (9) the *Flick* case, (10) the *Pohl* case, (11) the *Einsatzgruppen* case, and (12) the *I.G. Farben* case.

of *habeas corpus* were filed with American courts, including the Supreme Court, but none succeeded.<sup>308</sup>

The other U.S. military proceedings involved offenders who perpetrated war crimes against American military personnel. These were conducted at Dachau between 1944 and 1947 where some 1,672 persons were prosecuted by the Deputy Judge Advocate General for War Crimes, European Command, who had opened 3,887 cases, of which 1,416 ended in convictions. The British also conducted trials at Dachau.

By 1951, 50 percent of all war criminals convicted under CCL 10 and receiving prison sentences had been released, and only 659 remained in U.S., French, and U.K. custody. By 1950, two clemency boards were established, one to review the subsequent proceedings (at Nuremberg) and the other to review some 489 of the trials at Dachau. Their recommendations respectively to the High Commissioner for Germany and to the Commander of European Forces resulted in wholesale clemency.<sup>309</sup>

In addition, military trials were established for “violation of the laws of war” under the jurisdiction of the respective U.S. military theater commanders, as discussed above. These trials by U.S. military courts were conducted pursuant to U.S. legal authority under American military law, though also in reliance upon the London Charter and CCL 10.

The London and Tokyo Charters were not only designed to hold individuals criminally responsible for their actions; they also intended that individuals could be held responsible regardless of national law. As was the case before the IMT, the defendants at the CCL 10 Proceedings raised the argument that under Article 4 of the Constitution of Weimar, “[ . . . ] any German statute or any norm similar to a statute took precedence over international law as transformed into national law.”<sup>310</sup>

The *High Command* case of the American CCL 10 Proceedings, in two relevant statements, answered that argument as follows:

International law operates as a restriction and limitation on the sovereignty of nations. It may also limit the obligations which individuals owe to their states, and create for them international obligations which are binding upon them to an extent that they must be carried out even if to do so violates a positive law or directive of the state.<sup>311</sup>

[I]t is undoubtedly true that international common law in case of conflict with state law takes precedence over it.<sup>312</sup>

There was uncertainty in some of the decisions rendered by the IMT and in the CCL 10 Proceedings over whether CAH constituted a pre-existing international crime creating an international legal obligation on all states to prohibit such conduct, or at least

<sup>308</sup> See, e.g., *Milch v. U.S.*, 332 U.S. 789 (1947); *Brandt v. U.S.*, 333 U.S. 836 (1948).

<sup>309</sup> For example, in the *Einsatzgruppen* case, of the twenty-one persons charged with the murder of approximately 2,000,000 persons, fourteen received the death sentence but only four were executed. By 1955, only fifty-five prisoners were left in custody at the Landsberg prison. The last prisoner was released in 1958. For a critical appraisal of this policy, see BUSCHER, *supra* note 293, at 46–68; John Mendelsohn, *War Crimes Trials and Clemency in Germany and Japan*, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944–1952, 226, 259 (Robert Wolfe ed., 1984). Mendelsohn is the editor of the encyclopedic work *THE HOLOCAUST* (18 vols. 1982).

<sup>310</sup> AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* 36–7 (1959).

<sup>311</sup> *United States v. Wilhelm von Leeb et al.* (the *High Command* case), XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 69 (U.N. War Crimes Comm’n, 1950).

<sup>312</sup> *Id.* at 68.

an obligation not to legalize it. There was further uncertainty as to whether individual criminal responsibility for such conduct arose under international law, irrespective of its inclusion in national law.

These statements echo that of Francis Biddle, a member of the Nuremberg Tribunal from the U.S., who stated, “It seems to me that the domestic law cannot be permitted to stand in face of the higher international law just as with us, the State statute which conflicts with the Federal Constitution is invalid. If any other result were achieved, international law, by definition, would become meaningless.”<sup>313</sup> Similarly, Nicholas Doman, a prosecutor at Nuremberg, noted that if national law were supreme, then “instigators of international crimes could fashion their own laws in such a way as to exclude their criminal acts from the applicability of the national penal law. Then there would be no international nor national law under which even the most horrendous crimes and mass murders could be punished.”<sup>314</sup>

The following relevant statements of some of these decisions are indicative of this uncertainty, but they nonetheless reaffirm the principle of individual criminal responsibility and the validity of CAH as pre-existing the London Charter. The judgment may, however, be self-serving. In it, the IMT held:

the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of authority of the state, if the state in authorizing action moves outside its competence under international law.<sup>315</sup>

In the *Justice* case of the American CCL 10 Proceedings, the court stated, “The force of circumstance, the grim fact of world-wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law.”<sup>316</sup>

In the *High Command* case of the CCL 10 Proceedings, the court stated:

For the first time in history individuals are called upon to answer criminally for certain violations of international law. Individual criminal responsibility has been known, accepted, and applied heretofore as to certain offenses against international law, but the Nuremberg trials have extended that individual responsibility beyond those specific and somewhat limited fields.<sup>317</sup>

In the *I.G. Farben* case of the same CCL 10 Proceedings, it was stated

It can no longer be questioned that the criminal sanctions of international law are applicable to private individuals. The judgment of Military Tribunal IV, *United States v. Flick* (Case 5) held:

<sup>313</sup> Reprinted in The Fifth Report on the Draft Code of Offenses Against the Peace and Security of Mankind, 17 March 1987, A/CN.4/404 at 5, para. (3).

<sup>314</sup> Nicholas R. Doman, *The Nuremberg Trials Revisited*, 47 A.B.A. J. 260, 261 (1961); JOHN A. APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 77 (1954).

<sup>315</sup> 22 IMT 466.

<sup>316</sup> Trial of Josef Altstötter and others (the *Justice* or *Ministries* case), VI LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 45 (U.N. War Crimes Comm’n, 1948).

<sup>317</sup> *High Command* case, *supra* note 311, at 509.

The question of the responsibility of individuals for such breaches of international law as constitute crimes has been widely discussed and is settled in part by the Judgment of the IMT. It can not longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals.

Further:

Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty.<sup>318</sup>

In all internationally constituted tribunals discussed here and in [Chapter 4](#), as well as in related or similar national prosecutions discussed in [Chapter 9](#), the basic principle of accountability was that of individual criminal responsibility stemming from international and national legal obligations, but that, with respect to international crimes, national law is subordinated to international law. Moreover, the absolute defence of obedience to superior orders is rejected.<sup>319</sup>

The prosecutions occurring after World War I before the Supreme Court of Germany sitting in Leipzig as a trial court were also based on individual criminal responsibility for “violations of laws and customs of war as established in customary international law and codified in the Hague Conventions.”<sup>320</sup> By contrast, the prosecutions occurring after World War II were both sharpened and expanded. In addition to being based on individual criminal responsibility and command responsibility, they added new crimes and new forms of criminal responsibility. They included crimes against peace and crimes against humanity; and conspiracy, initiation, and waging of aggressive war in violation of customary and conventional international law.

In the World War I and World War II prosecutions, the defendants raised two major arguments: (1) the unenforceability of certain crimes because they violated the principles of legality<sup>321</sup> and (2) obedience to superior orders.<sup>322</sup> As to the first argument, it was advanced that no positive international law existed constituting normative proscriptions of a criminal nature against the initiation of war and CAH. Thus it was argued that such prosecutions and punishment violated the principles of *nulla poena sine lege*, *nullem crimen sine lege*, and *ex post facto*.<sup>323</sup> During the prosecutions stemming from World War II, the arguments of *nulla poena sine lege*, *nullem crimen sine lege*, and *ex post facto*

<sup>318</sup> Trial of Carl Krauch and twenty-two others (the *I.G. Farben* case), X LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 56 (U.N. War Crimes Comm’n, 1949), quoting Trial of Friedrich Flick and five others (the *Flick* case), IX LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (U.N. War Crimes Comm’n, 1948), at 18.

<sup>319</sup> See *infra* ch. 8, §1.4.

<sup>320</sup> See MULLINS, *supra* note 55. “The principle that the individual Soldier who commits acts in violation of the laws of war, when these acts are at the same time offenses against the general criminal law, should be liable to trial and punishment, not only by the courts of his own State, but also by the Courts of the injured adversary in case he falls into the hands of the authorities thereof, has long been maintained [ . . . ].” JAMES W. GARNER, 2 INTERNATIONAL LAW AND THE WORLD WAR (1920); see also Garner, *supra* note 55; Albert G.D. Levy, *Criminal Responsibility of Individuals and International Law*, 12 U. CHI. L. REV. 313 (1945); Stefan Glaser, *Culpabilité en Droit International Pénal*, 99 RECUEIL DES COURS 473 (1960).

<sup>321</sup> See *infra* ch. 5, §3.

<sup>322</sup> See *infra* ch. 8, §1.4.

<sup>323</sup> See *infra* ch. 5, §3.



were consistently raised and were valid from a national criminal law point of view, but were not entirely applicable under international law.<sup>324</sup>

To avoid such difficulties in future prosecutions, there was an effort after World War II to codify the crucial norms and principles that had been challenged at the time. Thus, in 1946, the General Assembly of the United Nations adopted a resolution entitled Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal. It was followed by a report of the ILC in 1950 bearing the same title that summarized the “Nuremberg Principles,” discussed in the [Chapter 4](#). Since World War II, many documents have included individual responsibility for ICL violations, as discussed in [Chapter 7](#).

In the Far Eastern theater, the United States set up special Military Commissions in the Philippines to try Japanese officers for war crimes.<sup>325</sup> The U.S. military tribunals in Japan were located in Yokohama, headquarters of the Eighth Army. These prosecutions convicted 1,229 Japanese, fifty-one of whom were executed. Other Allies also prosecuted Japanese war criminals: Chinese courts convicted 504; the British, convicted 777; the Dutch convicted 969; the French convicted 198; the Philippines convicted 133; and the Australians convicted 844.<sup>326</sup> All these proceedings were before military courts.

A Chinese military tribunal, for example, found Takashi Sakai, a Japanese military commander operating in South China, guilty of war crimes and CAH,<sup>327</sup> and sentenced him to death. The specific basis of this conviction, however, is not clear:

With reference to offences against civilians and members of the armed forces for which the accused was found guilty, the Tribunal said:

In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, he had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity.<sup>328</sup>

Most notable of these trials were those of General Yamashita and General Homma, who respectively commanded Japanese troops at the end and at the beginning of the Japanese occupation of the Philippines. Both were found guilty of war crimes and

<sup>324</sup> Walter J. Ganshof van der Meersch, *Justice et Droit International Pénal*, 76 *REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE* 3, 31 (1961) (Referring to the nature of ICL as to the legality of the Nuremberg Charter and in particular with respect to the issue of *ex post facto* concerning CAH, see Walter J. Ganshof van der Meersch, who holds that ICL is a branch of international law and a customary type of law that evolves even though its basis is in conventional international law). He also cites in support of the proposition that the Nuremberg formulation does not violate the principles of legality in ICL. See also *infra* ch. 5.

<sup>325</sup> See generally PICCIGALLO, *supra* note 284, at 49–67.

<sup>326</sup> BRACKMAN, *supra* note 284, at 52–3; see also R. John Pritchard, *The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1947*, 7 *CRIM. L.F.* 15, 18 (1996); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish an International Criminal Court*, 10 *HARV. HUM. RTS. J.* 11 (1997).

<sup>327</sup> *Trial of Takashi Sakai*, Chinese War Crimes Military Tribunal of the Ministry of National Defense, Nanking (Aug. 29, 1946), reprinted in XIV *L. REPT. TRIALS WAR CRIM.* 1–2, 7 (U.N. War Crimes Comm’n, 1949).

<sup>328</sup> *Id.* at 7.



sentenced to death. The cases were appealed to the U.S. Supreme Court by the defense, petitioning for a writ of *habeas corpus*, but the Supreme Court denied both petitions.<sup>329</sup>

The trial, conviction, and execution of General Yamashita was plagued by misconduct and the misapplication of an improper legal standard of command responsibility.<sup>330</sup> Furthermore, General MacArthur, who as commander of American forces in the Pacific appointed the Military Commission, heavily influenced the trial. Historians record that it was one way that General MacArthur avenged his defeat by the Japanese forces in the Philippines, and his escape from Corregidor Island, from which he last faced the Japanese forces. After his nighttime escape on a submarine heading for Australia, his successor, Major General Jonathan Mayhew Wainwright IV surrendered to the Japanese forces, and some 35,000 American troops were taken as POWs and led through the infamous Bataan death march, during which many American soldiers were brutalized and killed. Subsequent prison mistreatment of Allied POWs resulted in criminal charges before the IMTFE, the Yokohama trials, and other Allied prosecutions of Japanese military before national military courts.

The *Yamashita* case, however, remains a blot on the history of American justice. It resulted in the conviction of someone who did not commit or order the atrocities committed by Japanese soldiers against Filipino civilians, and who had no knowledge of these crimes when they were committed and therefore was unable to prevent or stop them.

## Conclusion

The London Charter was born out of the exigencies of justice facing grim reality. The ability of the victors to impose what they perceived as a proper and necessary step addressing the justice needs of the time was for some an unfettered and unbridled exercise of power. Notwithstanding its legal weaknesses, the process and its outcomes constitute significant progress for legality. As with all such accomplishments, we find one or a few persons most responsible for the achievement. In this case, it was Robert Jackson and others working with him. The intellectual and expert legal impetus on CAH came *inter alia* from Colonel Murray Bernays, Colonel John Amen, Colonel Whitney Harris, Colonel (later Brigadier General) Telford Taylor, and Professors Herbert Wechsler and Quincy Wright. But it was Dr. Jacob Robinson who was not part of the Nuremberg team, who should be credited for remembering the 1919 Treaty of Sèvres<sup>331</sup> and bringing it to the attention of President Truman and Justice Jackson. Even though that treaty never entered into effect, it purported to establish the legal basis for the prosecution of Turkish officials for “crimes against the laws of humanity” as stated in the Preamble of the 1907 Hague Convention.<sup>332</sup>

<sup>329</sup> *In re Yamashita*, 327 U.S. 1 (1946); *Homma v. United States*, 327 U.S. 759 (1946). Both cases were criticized because they established unprecedented criteria for command responsibility, namely that the two commanding generals in question should have known and should have prevented the war crimes committed by soldiers under their command. In the *Yamashita* case, *id.*, Justices Rutledge and Murphy wrote scathing dissents. *Id.* at 26 *et seq.* See A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (1949). Reel, as a JAG captain, defended Yamashita in the Philippines and before the Supreme Court.

<sup>330</sup> See generally *infra* ch. 7, §5.

<sup>331</sup> See Treaty of Sèvres, *supra* note 27; see also WILLIS, *supra* note 10; and MULLINS, *supra* note 25.

<sup>332</sup> 1907 Hague Convention, *supra* note 1.

The quest for legality in the post-World War II prosecutions can be traced to the jurists who took part in the work of the London International Assembly during 1942 and 1943. Throughout history, jurists have not held the power or the sway to impact on international developments. In this case the power vested with President Harry Truman found him favorable to the rule of law. Truman must, therefore, be credited with the outcome of what is undoubtedly the great leap of faith of international politics into international criminal justice.

Strange as it may seem, the legal approach of dealing with the war criminals, as they were called since 1942 and particularly since the 1943 Moscow Declarations, was at first championed by Joseph Stalin, who relied on Professor Trainin's expertise in international law. Stalin's motives and goals had very little to do with the quest for legality. He wanted show trials such as he, and Lenin before him, held in Russia to rewrite history and advance both their ideological and personal positions. Equally anachronistic in 1943 was the British position advanced by Winston Churchill, urging summary executions or at least summary court-martial proceedings followed by swift executions. In the U.S., Treasury Secretary Hans Morgenthau urged much the same as Churchill, and even worse. He was an ardent advocate of turning Germany into pastures and was favorable to having up to five million Germans deported to the USSR to work of hard labor. The rationale was to provide the Soviets with reparations, but it was no different from what the Nazis did. How Morgenthau's ideas could have received credence in high places in Washington is both shocking and astonishing. President Roosevelt was favorable, as well as others in his Cabinet, to the Morgenthau Plan. War Secretary Stimson, as well as others at the War Department and the State Department, was opposed, as was Jackson. Stalin was, as expected, pleased with the Morgenthau Plan. The ultimate credit for avoiding this plan, and for channeling the Allies' retribution on Germany into a valid legal process, goes to President Harry Truman. It was he who put a stop to the so-called Morgenthau Plan and the delivery of Germans to the Russians for work as compensation. Truman is also the one who supported the rule of law approach advocated by Jackson and gave him the necessary authority and material support to make it work.

The path that the justice process was to take was not clear, however, until the London Charter was signed. Earlier at Potsdam, the Allies agreed to bring the "German war criminals" "to swift and certain justice."<sup>333</sup> Thus, even shortly before the negotiations on the Charter began, the notion of a full-fledged trial with due process as it was understood in the Anglo-American systems of justice was hardly contemplated by the Allies. At best, a formality of a trial was envisioned – one that would produce swift and certain convictions in order to give a patina of legitimacy to the executions that would follow. That is why the first effort that followed Potsdam was a search for those who would be selected to be part of the show trial and whose guilt was presupposed because of their positions of authority in the Third Reich, even though no legal evidence of their criminality existed at that time.

The negotiations at London were tedious and often frustrating to those on the American side who wanted to move the process into a legalistic direction, albeit one inspired by the American model of criminal justice. But all four delegations had concerns about the legal, evidentiary, and practical problems facing such an undertaking. There were

<sup>333</sup> Potsdam Proclamation, VII (July 26, 1945), in *A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941–49* (1950).

indeed difficult questions of law concerning “crimes against peace” and CAH. But there were concerns about the success of gathering legal evidence that could be used in a court of law as was understood in the Anglo-American systems of justice. It was also difficult for many to accept the idea of having the pursuit of justice as a priority at a time when Germany and much of Europe was so devastated by the war. Lastly, all four delegations feared that the trials would run out of control, that the persons charged would use the opportunity for propaganda and self-justification, and that instead of recording the atrocities committed by the Nazis during the war, these trials would reveal the retributive purpose of the Allies. How to avoid turning the putative guilty ones into martyrs of the victorious Allies who would judge them was a concern that always loomed large in the minds of the drafters.

The Americans in London, led by Justice Robert Jackson, increased their determination as the negotiating process progressed, and they were able to involve the others in that historic legislative task. As that process developed, the logic and reason of the law prevailed over other considerations, but only because the London Charter guarded against most of the feared contingencies. However, in the final analysis the American perspective prevailed, not because of idealistic reasons, but because of pragmatic ones. The Americans wanted the Charter and the trial to proceed in a certain manner; they were willing to pay its costs and provide most of the work needed to ensure its success. They were also those who had the greater military capabilities on the ground. So, the Americans had their way.

The Charter, the IMT, and the CCL 10 Proceedings ultimately proved that even with their legal weaknesses, a system of international criminal justice could be devised that would withstand the test of time. Above all, it was a system of justice that was perceived to be fair in light of the prevailing practices of the times and, particularly, in consideration of what had occurred. The London Charter, the IMT, and the CCL 10 Proceedings were not the high point of legalism in international criminal justice, but, to paraphrase Robert Jackson, it was the high point of staying the hand of vengeance in favor of the rule of law at a time when the Allies were flush with victory.<sup>334</sup>

The horrendous crimes committed by the Nazi regime against millions of innocent civilians and lawful combatants and the devastation that this regime inflicted on so many countries were not the most propitious context in which to raise legal arguments, no matter how valid. All these arguments paled in comparison to what had happened. Indeed, this was a case in which the facts drove the law; more specifically, they drove the making of the law and its exclusive application to the vanquished, irrespective of what the victors had themselves done. The international law existing at that time did not (and could not) foresee the horrors that had taken place. This was truly a situation so extreme

<sup>334</sup> “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.” ROBERT H. JACKSON, *THE CASE AGAINST THE NAZI WAR CRIMINALS* 3 (1946); see *supra* pp. 30–31 of this chapter. The controversial writer David Irving provided me with a copy of Robert Jackson’s unpublished notes in microfilm form. I had them typed, but they were never published. At first, Jackson’s son, who was also at Nuremberg, was interested in allowing me to publish the notes, but after his death, the Jackson heirs were not. They chose a biographer to write the Jackson story. See EUGENE C. GERHART, *AMERICA’S ADVOCATE: ROBERT H. JACKSON* (2003). Regrettably these notes were not published. Irving’s source of the microfilm is believed to be the late Professor Phillip Kurland of the University of Chicago Law School, whom I know, and who I recall mentioned to me that he drafted Jackson’s will and that he had some of Jackson’s documents.

that no law, however prescient, could have anticipated the horrors that occurred. It was truly a case so maximal that it was beyond legal foreseeability. Since law is not an exercise in fantasy, but an experiment in reality, international law provided a general basis for what the Allies developed in the Charter.<sup>335</sup>

A Roman law maxim holds that *de minimus non curat praetor*, and it can be said, *mutatis mutandis*, that *de maxima non curat lex*. But at the IMT and IMTFE, the law dealt with those who committed the crimes listed in their Charters. It was a triumph for the rule of law, albeit one-sided, since only the defeated were held accountable and not the victorious. Since then, CAH have evolved in bits and pieces, and in fits and bursts, but not in a cohesive, consistent, and comprehensive manner. As yet, there is still no specialized convention on CAH.<sup>336</sup>

The legal reasoning and arguments offered here evidence the historical sources of CAH, but there is no published historical record of the London Charter's making.<sup>337</sup> It is inconceivable that so many bright jurists who worked on the Charter's formulation would not have debated among themselves the questions discussed in this chapter. However, what we do know of the political leaders' intentions is that the making of the London Charter and Tokyo Statute was only secondary to the Allies' desire to punish the defeated. However, what is also particularly evident throughout the making of the Charter is Justice Robert Jackson's abiding commitment to the rule of law, strongly supported by President Harry Truman and with the help of a dedicated staff, which made possible the outcomes we now claim as the foundation of modern international criminal justice.

The weaknesses of the London Charter and the IMT should not be overlooked simply because we need to legitimize the enterprise and to rely upon it as a valid precedent for future developments of international criminal justice. To admit to these weaknesses is probably the best testimony we can give to the validity of the goals of international criminal justice that started at Nuremberg after the failure of similar efforts following World War I.<sup>338</sup>

Justice is always perfectible. It is in the pursuit of improving justice that we must remain cognizant of whatever weaknesses and errors our pursuit of that goal may have encountered. The statutes and the jurisprudence of the ICTY and ICTR attest to the progress made in the last two decades after four decades of stagnation due to the Cold War. These decades also attest to the international community's commitment to substantive and procedural legality, which is evidenced in the Rome Statute.<sup>339</sup> Without the London Charter, the evolution of customary international law that we have witnessed so far would have been impossible.

<sup>335</sup> See, e.g., Ernst J. Cohn, *The Problem of War Crimes Today*, 26 TRANS. GR. SOC'Y 125, 141 (1940); JACKSON'S REPORT, *supra* note 34, at 198–99.

<sup>336</sup> See Bassiouni, *supra* note 38. See also Lila Sadat, ed., *Forging a Convention for Crimes Against Humanity* (2011).

<sup>337</sup> See generally Bassiouni, *supra* note 164.

<sup>338</sup> M. Cherif Bassiouni, *From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

<sup>339</sup> See BASSIOUNI, 1–3 LEGISLATIVE HISTORY OF THE ICC, *supra* note 50.

## 4 Post-Charter Developments

*Mens aequa in ardius*

### Introduction

A number of international legal instruments that contain CAH provisions have been adopted since the London Charter, but so far, no specialized convention on CAH has been developed.<sup>1</sup> Substantive post-Charter legal developments have all been part of the same continuum as the Charter, which remains the matrix for all internationally adopted legal formulations. Thus, to understand what has occurred since the London Charter, it is indispensable to understand what occurred before the Charter, and what occurred as part of the Law of the Charter (discussed in [Chapter 3](#)).

Some of the legal developments in CAH can be directly traced to the London Charter; others are a logical consequence of the development of ICL.<sup>2</sup> These conventional law developments do not have the same legal weight, nor do they establish proscribing norms requiring states to individually and/or collectively enforce CAH.<sup>3</sup> Some developments in the field of international human rights establish enforceable prescriptive norms giving rise to civil and administrative remedies, whereas others fall into the category of what is called “soft law” and are, in essence, standard-setting.

Post-Charter legal developments apply to the substance of CAH as well as to procedural or enforcement aspects related to ICL. There are also other substantive specific conflicts and institutions norms that encompass the same protected interests as CAH, such as: genocide, war crimes, torture, slavery and slave-related practices, and some aspects of terror-violence (terrorism).

<sup>1</sup> M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994). Leila Sadat, ed., *The Fourth Wars* (Cambridge).

<sup>2</sup> See M. Cherif Bassiouni, *The “Nuremberg Legacy:” Historical Assessment Fifty Years Later*, in WAR CRIMES: THE LEGACY OF NUREMBERG (Belinda Cooper ed., 1997) [hereinafter Bassiouni, *The “Nuremberg Legacy”*]; M. Cherif Bassiouni, *Das Vermächtnis von Nürnberg: Eine historische Bewertung fünfzig Jahre danach*, in STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN (Hankel & Stuby eds., 1995); see also M. Cherif Bassiouni, *Nuremberg Forty Years After: An Introduction*, 18 CASE W. RES. J. INT'L L. 261 (1986); *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 56 (Apr. 9–12, 1986), remarks of Jordan Paust, Telford Taylor, Richard Falk, M. Cherif Bassiouni, and Yasuaki Onuma, 56–73.

<sup>3</sup> See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) [hereinafter BASSIOUNI & WISE, *AUT DEDERE AUT JUDICARE*].

In the course of its historical evolution from 1945 to 1998, there have been slight variations in the succeeding formulations of CAH. The International Law Commission (ILC) alone had four different formulations: first when it codified the Nuremberg Principles in 1950; then when it varied from that text in its 1954 Draft Code of Offences against the Peace and Security of Mankind;<sup>4</sup> then again it set aside this formulation in favor of a new text adopted in 1991;<sup>5</sup> and last, that text was abandoned in 1996 in favor of another one.<sup>6</sup>

In 1993 and 1994, respectively, the Security Council established two *ad hoc* international criminal tribunals, the ICTY and ICTR, which contain different definitions of CAH in their respective statutes.<sup>7</sup> In 1998 the Rome Statute was adopted, and it too had a different formulation of CAH than all other preceding definitions.<sup>8</sup>

The ICTY and ICTR statutes follow the matrix of Article 6(c) of the London Charter, but the ICTR's jurisdictional element differs in that it is based on the concept of a "widespread or systematic" attack on a civilian population. Presumably, this jurisdictional element embodies the state policy requirement, which the Rome Statute's Article 7(2) specifically requires. The ICTY, ICTR, and Rome statutes require an "attack upon a civilian population," but only Article 5 of the ICTY contains a linkage to a conflict of an international or noninternational character. The Rome Statute's Article 7 extends the specific acts beyond the Charter's Article 6(c), as do Articles 5 and 3, respectively, of the ICTY and ICTR Statutes. All three of these statutory definitions of CAH overlap with the definitions of genocide and war crimes, and all three crimes protect the same social interest: the life and well-being of persons. War crimes, however, extend protections to other social interests, such as civilian and cultural property. All three crimes are more narrowly defined than human rights protections, which are broader.<sup>9</sup>

The protected civilian population under CAH overlaps with the same protection contained in the Genocide Convention, which is limited, however, to "national, ethnic, and religious" groups.<sup>10</sup> That language excludes all other groups – namely, social and

<sup>4</sup> 1954 *Draft Code of Offenses Against the Peace and Security of Mankind*, U.N. GAOR, 9th Sess., U.N. Doc. A/2693 (1954) [hereinafter 1954 Draft Code].

<sup>5</sup> *Report of the International Law Commission on the Work of Its Forty-Third Session*, UN GAOR, 46th Sess., Supp. No. 10, at 94, UN Doc. A/46/10 (1991) [hereinafter 1991 Draft Code of Crimes].

<sup>6</sup> *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, [1996] 2 Y.B. Int'l L. Comm'n 17, 45, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) [hereinafter 1996 Draft Code of Crimes].

<sup>7</sup> *Compare* Statute of the International Tribunal for the Former Yugoslavia art. 5, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1–2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute] *with* Statute of the International Criminal Tribunal for Rwanda art. 3, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 [hereinafter ICTR Statute].

<sup>8</sup> See M. Cherif Bassiouni, 1–3 *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT*, (M. Cherif Bassiouni ed., 2005) [hereinafter BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE ICC*].

<sup>9</sup> See Faustin Z. Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law* (2007); Andrew Clapham, *Human Rights: A Very Short Introduction* (2007); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006); Stefan Trechsel (Assisted by Sarah Summers), *Human Rights in Criminal Proceedings* (2006); Anne F. Bayefsky, *How to Complain to the U.N. Human Rights Treaty System* (2002); M. Cherif Bassiouni, *Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (1994).

<sup>10</sup> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

political groups. The statutes of the ICTY, ICTR, and ICC use that identical language in Articles 5, 3, and 7, respectively. CAH formulations from the London Charter to date do not have such a limitation on the protected civilian population. This difference emphasizes the demarcation line between CAH and genocide, and war crimes, which applies only to the protection of enemy civilian populations in time of war. Importantly, CAH applies to all populations at all times.

Post-Charter legal developments, as stated by one scholar, “may all be regarded as efforts to solidify and concretize the Nuremberg offenses and at the same time an affirmation of those principles by the world community as a whole rather than the smaller number of states that acted at Nuremberg.”<sup>11</sup> The embodiment of CAH in the ICTY, ICTR, and ICC statutes, and in those of certain mixed-model tribunals of Cambodia, Sierra Leone, East Timor, Kosovo, and the Special Chamber for Bosnia-Herzegovina, have given this crime extended and expanded international scope and validity under customary international law. All of these international formulations and the jurisprudence of the ICTY and ICTR, discussed contextually in this chapter and in ensuing chapters, leave something to be desired with respect to their compliance with the principles of legality as discussed in Chapter 5. Nevertheless, CAH has been solidified both in international law and in public consciousness. There is no refuting that CAH constitutes a well-established category of crimes in conventional and customary international law. But it is equally true that many states, acting through their governments, continue to view CAH as a threat to their policies and to their elites, particularly those in the security apparatus and armed forces. This is probably the reason that many states have not acceded to the Rome Statute, and may also be the reason that many states that have ratified or acceded to the Rome Statute have not enacted national implementing legislation. Recent efforts by African and Arab states to have states that are State Parties to the ICC withdraw are likely a response to the al-Bashir indictment,<sup>12</sup> which has become the rallying cry for states in these regions. Whereas the indictment of a sitting head of state from an Arab-Muslim country raises questions of double standards, it also signals to these states, some who have committed CAH, the time for impunity has come to an end. Whether that end actually occurs in the foreseeable future is another question.

Because the UN system is not a genuine legislative process, but a fluid diplomatic process affected by political considerations, the statutes establishing the *ad hoc* international and mixed-model tribunals are different. Each one of the international (ICC),

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>11</sup> Roger S. Clark, *Codification of the Principles of the Nuremberg Trial and the Subsequent Development of International Law*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 249, 250 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990).

<sup>12</sup> See *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No ICC-02/05-01/09, Warrant of arrest issued by Pre-Trial Chamber (Mar. 4, 2009) [hereinafter *Al Bashir* Warrant of Arrest]. The arrest warrant for Al Bashir lists five counts of CAH, including murder, extermination, forcible transfer, torture, and rape, and two counts of war crimes.



*ad hoc* (ICTY and ICTR), and mixed-model tribunals defines CAH in a different way. Consequently, the jurisprudence of these tribunals tends to be different. This jurisprudence is also largely conditioned by the expertise of the judges, who in most cases are elected by the General Assembly or designated by a political process that has proven not to produce experts in ICL and comparative criminal law and procedure. In fact, most of the judges in all of these tribunals have had no prior judicial experience.

Not only are there different formulations of CAH, the courts in questions have also produced different interpretations. This uncertainty is surely troubling for jurists concerned with certainty in the law, which many positivists consider as part of the principles of legality, and which those in national criminal justice systems would consider fundamental principles of criminal justice. The only presumptive positive aspect of this uncertainty is that it creates the opportunity for scholars and experts to selectively use what they see in these different statutes and what they assess in the diversity of jurisprudence as may be convenient for the advancement of their views. In other words, uncertainty creates an opportunity for doctrinal diversity and the progressive development of CAH. This can be seen in the attempted elimination of the state policy requirement, the evolution toward considering nonstate actors as being capable of developing organizational policy, which is deemed equivalent to state policy, and diversity in interpreting “widespread or systematic” as being the functional counterpart of the state policy requirement or not.<sup>13</sup> The diversity in doctrinal views only adds to the legal uncertainty that exists with respect to CAH.

Whereas this legal uncertainty may contribute to what some might see as a positive, progressive development of CAH, it may also afford states an excuse to avoid prosecution. At the same time, the uncertainty may also have encouraged states to adopt their own national legislation for CAH. Inevitably, these domestic laws have resulted in some national prosecutions for CAH that carry the same potential for the problems that face the international, *ad hoc*, and mixed-model tribunals.<sup>14</sup> From an enforcement perspective, the fact that states are adopting domestic statutory provisions on CAH and carrying out national prosecutions is a major positive development. Probably in a decade or two, the fact that a larger number of states will have adopted national legislation on CAH and enforced it will give rise to a reassessment, at the international level, of its constituent elements and contents. We are witnessing a historic period of diversity, while at the same time witnessing a period of confusion in connection with legal certainty and precision. This is also a period of enhanced enforcement of CAH, which presents an opportunity for the consolidation of CAH as a national crime.

This chapter considers post-Charter developments of CAH and is divided into two parts: Part A considers substantive developments, whereas Part B considers procedural developments.

<sup>13</sup> See, e.g., Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006) (considering the development of the laws of war and its interaction with ICL and observing that the *ad hoc* tribunals “substantially broadened the rules governing civil wars” and “lowered the thresholds for the triggering of the rules on international conflicts,” which states then codified in the Rome Statute.).

<sup>14</sup> See *infra* ch. 9.

## PART A: SUBSTANTIVE DEVELOPMENTS

## §1. The ILC's Codification Efforts: 1947–1996

Efforts to codify CAH in the post-Charter era at first centered on the drafting of what for some 40 years was called the Draft Code of Offences Against the Peace and Security of Mankind, and, as of 1987, the Draft Code of Crimes against the Peace and Security of Mankind. The ILC's work began on November 21, 1947, and culminated with the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which was not, however, adopted by the General Assembly.<sup>15</sup> For all practical purposes, fifty years of efforts were for naught, because it was politically inconvenient for states to have the core of an international criminal code that could have developed into a comprehensive code. The history of this fifty-year process is quite instructive.

In 1947 the General Assembly adopted two resolutions, one creating the ILC, whose objective was to promote “the progressive development of international law and its codification,”<sup>16</sup> and the other directing the ILC to “formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.”<sup>17</sup> Additionally, resolution 177 (II) instructed the ILC to prepare a Draft Code of Offences against the Peace and Security of Mankind. The General Assembly specifically called for the ILC to prepare the Draft Code of Offences “indicating clearly the place to be accorded to the [Nuremberg] principles [ . . . ].”<sup>18</sup>

At the ILC's first session in 1949, the Commission considered several drafts of what were to be called the “Nuremberg Principles.” It became readily apparent that this project was inextricably linked to the preparation of the Draft Code of Offences. The ILC elected to consider the formulation of the “Nuremberg Principles” as a separate undertaking from that of the Draft Code of Offences. This was accomplished in 1950, in the form of an ILC report.<sup>19</sup> Professor Jean Spiropoulos, as Special Rapporteur, prepared the draft of the “Nuremberg Principles” and later prepared a separate first draft of the Draft Code of Offences.<sup>20</sup> In 1950 the ILC presented a report entitled *Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal*

<sup>15</sup> For a historical analysis, see M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, 27 ISR. L. REV. 1 (1993), reprinted in COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, 11 NOUVELLES ETUDES PÉNALES 1 (1993); Leo Gross, *Some Observations on the Draft Code of Offences Against the Peace and Security of Mankind*, 15 ISR. Y.B. HUM. RTS. 224 (1985); Gerhard O.W. Mueller, *The United Nations Draft Code of Offences Against the Peace and Security of Mankind: An American Evolution*, INTERNATIONAL CRIMINAL LAW 597 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

<sup>16</sup> U.N. G.A. Res. 174 (II), Nov. 21, 1947.

<sup>17</sup> U.N. G.A. Res. 177 (II), Nov. 21, 1947.

<sup>18</sup> *Report of the ILC to the General Assembly*, reprinted in [1949] 1 Y.B. INT'L L. COMM'N 282.

<sup>19</sup> The Commission considered a set of draft principles authored by Professor Georges Scelle that supported the view that a formulation of the Nuremberg Principles should also contain a formulation of the underlying general principles of international law. A majority of the Commission opposed Professor Scelle's position and the ILC found it necessary to appoint a sub-committee. The ILC subsequently considered a first and second draft prepared by the sub-committee on the formulation of the Nuremberg Principles. The ILC eventually decided that the Commission's duty was to merely formulate the principles of Nuremberg and not to “express any appreciation” of them.

<sup>20</sup> See Clark, *supra* note 11, at 282–83.

pursuant to a mandate by the General Assembly.<sup>21</sup> It was based solely on the London Charter and the IMT Judgment, excluding the Tokyo Charter and the IMTFE judgment as well as all other CCL 10 Proceedings.

The 1950 ILC formulation of CAH was as follows:

Principle VI. The crimes hereinafter set out are punishable as crimes under international law:

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c. Crimes Against Humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

Principle VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.<sup>22</sup>

This formulation departs from the Charter's Article 6(c) by removing the war connection with respect to the specific crimes of "murder, extermination, enslavement, deportation and other inhumane acts," thus extending such violations to peaceful contexts. The formulation retains the connection to crimes against peace and war crimes for "persecution on political, racial, or religious grounds." Commenting on the Principle VI definition of CAH, the ILC Report states:

120. Article 6(c) of the Charter of the Nürnberg Tribunal distinguished two categories of punishable acts, to wit: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, and second, persecution on political, racial or religious grounds. Acts within these categories, according to the Charter, constituted international crimes only when committed "in execution of or in connexion with any crimes within the jurisdiction of the Tribunal." The crimes referred to as falling within the jurisdiction of the Tribunal were crimes against peace and war crimes.

121. Though it found that "political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty," that "the policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out," and that "the persecution of Jews during the same period is established beyond all doubt," the Tribunal considered that it had not been satisfactorily proved that before the outbreak of war these acts had been committed in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. For this reason the Tribunal declared itself unable to "make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter."

122. The Tribunal did not, however, thereby exclude the possibility that crimes against humanity might be committed also before a war.

<sup>21</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int'l L. Comm'n pt. III, paras. 95-127, U.N. Doc. No. A/1316 (A/5/12) [hereinafter *Nuremberg Principles*].

<sup>22</sup> *Id.* (internal citations omitted).

123. In its definition of crimes against humanity the Commission has omitted the phrase “before or during the war” contained in article 6(c) of the Charter of the Nurnberg Tribunal because this phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace.

124. In accordance with article 6(c) of the Charter, the above formulation characterizes as crimes against humanity murder, extermination, enslavement, etc., committed against “any” civilian population. This means that these acts may be crimes against humanity even if they are committed by the perpetrator against his own population.<sup>23</sup>

Commenting upon Principle VII that complements Principle VI, the ILC Report states:

125. The only provision in the Charter of the Nurnberg Tribunal regarding responsibility for complicity was that of the last paragraph of article 6 which reads as follows: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.”

126. The Tribunal, commenting on this provision in connexion with its discussion of count one of the indictment, which charged certain defendants with conspiracy to commit aggressive war, war crimes and crimes against humanity, said that, in its opinion, the provision did not “add a new and separate crime to those already listed.” In the view of the Tribunal, the provision was designed to “establish the responsibility of persons participating in a common plan” “to prepare, initiate and wage aggressive war.” Interpreted literally, this statement would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action.

127. On the other hand, the Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity. This view is corroborated by expressions used by the Tribunal in assessing the guilt of particular defendants.<sup>24</sup>

The ILC, following the mandate of the General Assembly, simply reformulated the proscriptions contained in the London Charter in a style that could be deemed a “general principle,” and sought to reconcile the sometimes confusing or otherwise unclear opinions in the IMT judgment. In an interesting disclaimer preceding the ILC’s statement of the “principles,” it stated:

Formulation of the Nürnberg Principles by the International Law Commission:

35. The International Law Commission dealt with the question of the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal during its first session at its meetings of 9, 23, 24, 25, 26, 27, 31 May and 1, 3, 7 June 1949. The Commission had before it a memorandum submitted by the Secretary-General entitled “The Charter and Judgment of the Nürnberg Tribunal; History and Analysis.”

<sup>23</sup> See *id.* at 238, 239 (internal citations omitted).

<sup>24</sup> *Id.*

36. The Commission began its work by discussing its task in this matter. One of the main questions in this connexion was whether or not the Commission had to ascertain to what extent the principles contained in the Charter and judgment constitute principles of international law. The conclusion of the Commission was that, since the Nürnberg principles had been affirmed by the General Assembly in its resolution 95 (I) of 11 December 1946, *it was not the task of the Commission to examine whether these principles were or were not principles of international law. The Commission had merely to formulate them.*<sup>25</sup>

The ILC's position led Professor Jescheck, a critic of the Law of the Charter, to comment that such an outcome cannot be considered as part of binding ICL:

The judgment of the International Military Tribunal of 1 October 1946, by virtue of which the majority of the accused were sentenced to death or other severe punishments for crimes against peace, war crimes and crimes against humanity, rested upon the four Allied Powers' London Agreement of 8 August 1945, to which was annexed a Charter establishing the Tribunal. Nineteen other states subsequently acceded to the Agreement. The attempts of the United Nations to incorporate "en bloc" those norms of the Charter and the Nuremberg judgment that relate to criminal responsibility for crimes against peace, war crimes and crimes against humanity as part of generally accepted international law have remained unsuccessful. Admittedly, the General Assembly of the United Nations adopted a Resolution on 11 December 1946 affirming the "principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal." However, this Resolution merely recognized the action taken by the four Allied Powers against the former German leadership as being in harmony with criminal law corresponding to historical justice and whose application was appropriate in the circumstances. Furthermore, the Resolution confirmed the General Assembly's desire to see this criminal law of the victorious powers generally applied in the future. Nevertheless, the criminal law of the Nuremberg Charter did not, by virtue of this Resolution, become generally binding; in accordance with the United Nations Charter, the General Assembly was not a legally competent body to create new international law, even if it so desired, which cannot be inferred from the context and tone of the Resolution itself. The second Resolution of 21 November 1947 did not even embody a reaffirmation of the Nuremberg legal principles; it merely consigned their formulation and also the elaboration of a draft Code of Offenses against the Peace and Security of Mankind to the newly created International Law Commission. In 1950, the Commission submitted its formulation of the law of Nuremberg in the form of seven legal principles.<sup>26</sup>

Contrary to Professor Jescheck's position, which from a purely legal perspective is substantially correct, most writers on the subject give substantial weight to the ILC's 1950 Report and rely upon it as an authoritative statement of "general principles of law" or as evidence of customary international law. One reason is that the major powers and most U.N. Member-States supported the ILC's 1947 Principles and 1950 Report. Because of the political circumstances of the Cold War, no binding legal instrument could be developed.

Consistent with the London Charter, the ILC's 1950 formulation retained the same specific crimes listed in Article 6(c). The ILC made special mention in its report on the

<sup>25</sup> See 2 Y.B. INT'L L. COMM'N 189 (1950) (emphasis added).

<sup>26</sup> Hans-Heinrich Jescheck, *Development and Future Prospects of International Criminal Law*, in INTERNATIONAL CRIMINAL LAW 83 (M. Cherif Bassiouni ed., 2d rev. ed. 1999); HANS-HEINRICH JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAFRECHT (1952).

second session that it preserved the language “any civilian population” from Article 6(c), so that the acts mentioned in both Article 6(c) and Principle VI (c) (murder, extermination, enslavement, deportation, and other inhumane acts) would be considered CAH, regardless of the fact that the perpetrator may be acting against his or her own civilian population.<sup>27</sup> The ILC deemed redundant the language from Article 6(c) “whether or not in violation of the domestic law of the country where perpetrated,” and struck it.

Consistent with the IMT’s intent, but not consistent with the language of Article 6(c), the ILC’s formulation of the Nuremberg Principles listed those crimes that the IMT considered to be within its jurisdiction, though they were not specifically named in the London Charter. In so doing, the ILC replaced “any crime within the jurisdiction of the Tribunal” with “any crime against peace or any war crime.”<sup>28</sup> This apparently slight linguistic change was significant because it decoupled CAH from the specificity of the two other crimes within the jurisdiction of the IMT, namely crimes against peace of Article 6(a) and war crimes of Article 6(b). The decoupling meant that the connection was no longer to these crimes contained in the Charter, but to two international crimes whose definitions and content were subject to the future developments of conventional and customary international law.

Having completed the formulation of the Nuremberg Principles, Special Rapporteur Jean Spiropoulos submitted his initial report on the Draft Code of Offences against the Peace and Security of Mankind. The ILC considered his comments regarding the place for the Nuremberg Principles in the Draft Code of Offences and decided that they did not have to be incorporated in their entirety into the Draft Code of Offences.<sup>29</sup> In fact, “only a general reference to the corresponding Nuremberg principles was deemed practicable.”<sup>30</sup> Surprisingly, the ILC also decided that it was free from the specific terms of the Nuremberg Principles in its Draft Code of Offences formulation of CAH.<sup>31</sup> Thus, the ILC’s formulation of the Nuremberg Principles was not viewed as the definitive or binding definition of CAH by the very body that produced it.

It then took almost half a century for the ILC to agree on the definition and content of CAH, and that was finally arrived at in the 1996 Draft Code of Crimes after many variations were adopted and then abandoned. The final formulation simply borrowed from the formulation of Article 5 of the ICTY statute. Thus, the ILC did not contribute in this respect to the “progressive codification of international law” as it is mandated to do. This process made clear that the ILC was sensitive to political currents, and particularly to the concerns of the five permanent members of the Security Council. Nothing else can explain why it took a half a century to define CAH by simply copying what the Security Council had agreed upon in its promulgation of Article 5 of the ICTY statute.

The ILC in the 1950s, and later between 1982 and 1996, faced two problems that would face any body seeking to codify CAH, or any other international crime. These problems fall in two categories: methodological and substantive. The problems relate to having (1) a generic or general definition of what constitutes such a category of crimes, as opposed to one that defines each and every type of prohibited conduct; and (2) whether to describe

<sup>27</sup> *Report of the ILC to the General Assembly, reprinted in* [1950] 2 Y.B. INT’L L. COMM’N 376.

<sup>28</sup> *Id.* at 377.

<sup>29</sup> *Id.* at 380.

<sup>30</sup> *Report of the ILC to the General Assembly, reprinted in* [1951] 2 Y.B. INT’L L. COMM’N 134.

<sup>31</sup> *Id.*

with specificity the general part (criminal responsibilities and defenses). Because the former approach provides more flexibility, but less specificity, it is more likely to violate the principles of legality.<sup>32</sup> The latter approach risked being too detailed or conflicting with national criminal justice systems. Always present, however, is the question of how extensive are the specific acts deemed to be included within the meaning of CAH. So far, Article 7 of the Rome Statute is the most extensive formulation listing these acts. The ICTY and ICTR statutes remained close to the list of specific acts set forth in Article 6(c) of the London Charter listing, adding “rape” to its list of specifics. The specific acts listed in all formulations from the London Charter to the Rome Statute include as a catchall provision “other inhumane acts.” The extent to which other human rights violations can or should be internationally criminalized and, if so, how that task should be accomplished remains an open question.<sup>33</sup>

In 1954, Spiropoulos submitted a third and final report to the ILC, which was adopted with amendments by the Commission. The CAH provision included the following acts in article 2, paragraph 11: “Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities [ . . . ].”<sup>34</sup>

Article 2(11) of the 1954 Draft Code of Offences incorporated the broad generic definitional approach with some particularities and was the broadest of any prior text,<sup>35</sup> though it clearly contains gaps and insufficiencies.

The 1954 Draft Code Article 2(11) differs from the Charter’s Article 6(c) in the following ways:

- (1) omits the conditional “before or after the war” language of the London Charter; thus, under the Draft Code CAH could occur at any time and not necessarily in a time of war;
- (2) strikes the redundant language of the London Charter, “whether or not in violation of domestic law of the country where perpetrated.” The ILC was of the view that committing CAH against “any civilian population” adequately included states acting in accordance with their own law against their own populations;
- (3) adds a new category of discrimination not found in Article 6(c), namely “cultural grounds;”
- (4) removes the language of the London Charter, “in execution of or in connection with any crime [ . . . ];” and
- (5) requires state involvement, though not in the same detailed or specific manner as outlined in [Chapter 1](#).

<sup>32</sup> See generally *infra* ch. 5.

<sup>33</sup> M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193 (1982); RICHARD B. LILLICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* (2d ed. 1991). For a contemporary perspective see CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS*, *supra* note 9; see also *infra* ch. 6.

<sup>34</sup> *Report of the International Law Commission Covering the Work of its Sixth Session*, U.N. G.A.O.R. Supp. (No. 9) U.N. Doc. A/CN.4/88 (July 28 1954).

<sup>35</sup> *Report of the ILC to the General Assembly*, U.N. Doc. A/2673, reprinted in [1954] 2 Y.B. INT’L L. COMM’N 150.



Daniel Johnson wrote an insightful critical analysis of the 1954 Draft Code of Offences and made two observations about these changes.<sup>36</sup> He noted that “inhumane acts” were linked to a requirement that they be committed on social, cultural, political, racial, and religious grounds, whereas in the London Charter only “persecutions” were required to be committed on “racial or religious grounds.”<sup>37</sup> His concern was that by conditioning “inhumane acts” on the same grounds as “persecutions,” there was a heightened burden of proof for the “inhumane acts.” Johnson also questioned the requirement of state involvement, particularly in light of the Genocide Convention, wherein individuals were responsible under any circumstance. Under the 1954 Draft Code of Offences individuals were only responsible for CAH if a state policy connection existed.<sup>38</sup>

The General Assembly delayed consideration of the 1954 Draft Code of Offences until another special committee completed a definition of aggression, and it tabled the Draft Code of Offences.<sup>39</sup> The 1954 Draft remained in limbo, presumably until the General Assembly’s Special Committee on the Definition of Aggression<sup>40</sup> completed its work. This occurred in 1974, when the General Assembly adopted by consensus a resolution defining aggression.<sup>41</sup> The General Assembly did not act on the 1954 Draft Code, but after a four-year hiatus, it put the matter back on its agenda. Three years later, in 1981, it called upon the ILC to resume work on the Draft Code of Offences.<sup>42</sup> Thus, it took twenty-seven years to get the 1954 Draft Code of Crimes out of its political deep freeze, but that did not mean it was to thaw right away. The next historical phase, also marked by consequences of the Cold War, was subtler in its ways. This was a stage of delaying the outcome.

In 1982 the ILC appointed Doudou Thiam as the Special Rapporteur for the Draft Code. Mr. Thiam dutifully undertook this task, and among his first decisions was to rethink and redraft the Draft Code *ab initio*. Four years later, in 1986, Mr. Thiam submitted article 12, “Acts constituting crimes against humanity.” The proposed article contained four paragraphs. Paragraph one, labeled “genocide,” became a specific crime in the category of CAH, in reliance entirely on the Genocide Convention.<sup>43</sup> Paragraph two offered two alternative definitions of *apartheid* as another specific act within the

<sup>36</sup> Daniel H.N. Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 INT’L & COMP. L.Q. 445 (1955).

<sup>37</sup> See *infra* ch. 3, §3.

<sup>38</sup> See generally *infra* ch. 1.

<sup>39</sup> Report of the ILC, U.N. G.A.O.R. Supp. (No. 10) (A/38/10) 15–17 citing, G.A.O.R. 898 (IX) (Dec. 4, 1954); see also *First Report on the Draft Code of Offences against the Peace and Security of Mankind* by Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/364, reprinted in [1983] Y.B. INT’L L. COMM’N. 2.

For a history of the ILC’s intertwined delay between the Draft Code of Offences and Aggression, and also the Draft Statute for an ICC, see M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish an International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 49–57 (1997).

<sup>40</sup> Question of defining aggression, U.N. G.A.O.R. 688 (VII) (Dec. 20, 1952); see also M. CHERIF BASSIOUNI, *The Definition of Aggression in International Law: The Crime Against Peace*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 159 (M. Cherif Bassiouni & V.P. Nanda eds., 1973) [hereinafter BASSIOUNI, 1 ICL].

<sup>41</sup> M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 207 (M. Cherif Bassiouni ed., 3d rev ed. 2008).

<sup>42</sup> G.A. Res. 36/106, 36 U.N. G.A.O.R., U.N. Doc. A/RES/36/106 (1981)

<sup>43</sup> Fourth Report of Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/398, reprinted in [1986] 2 Y.B. INT’L L. COMM’N. 53; Genocide Convention art. II, *supra* note 10.

category of CAH. Paragraph three contained a third specific crime, “inhumane acts,” that reflected the Charter’s Article 6(c) and article 2(11) of the 1954 Draft Code, but with modifications. Last, paragraph four listed an innovation as a specific act within the category of CAH, namely a breach of an international obligation to safeguard and preserve the human environment. In 1987, the General Assembly changed the title of the code to the Draft Code of Crimes against the Peace and Security of Mankind.<sup>44</sup> Mr. Thiam, along with a small working group, reworked the CAH provision, and he resubmitted the Draft Code of Offences in his seventh report to the ILC in 1989. However, the Commission referred the CAH article back to the working group.<sup>45</sup> Thereafter, new specific crimes were included in the Draft Code, such as severe environmental harm and drug trafficking.<sup>46</sup> In 1991, the ILC issued a report on the work of its 43rd session and the ninth report of the Special Rapporteur including the Crimes against the Peace and Security of Mankind.<sup>47</sup> The draft no longer distinguished between “crimes against peace” and “war crimes” in their connection to CAH. The report states:

That distinction has provided useful guidelines in determining the approach to be taken in relation to each crime but the Commission felt that, at this stage and pending the receipt of the comments of Governments, it could be dispensed with inasmuch as solutions have emerged as regards both the constituent elements and the attribution of each crime.<sup>48</sup>

A sharp contrast exists between Thiam’s 1991 version of CAH and the version contained in the 1954 Draft Code of Offences. Unlike the 1954 Draft Code single paragraph provision, the Thiam formulation included a number of paragraphs with specific categories of crimes. Articles 15 to 26, thus list the crimes of Aggression (Article 15); Threat of aggression (Article 16); Intervention (Article 17); Colonial domination and other forms of alien domination (Article 18); Genocide (Article 19); Apartheid (Article 20); Systematic or mass violations of human rights (Article 21); Exceptionally serious war crimes (Article 22); Recruitment, use, financing and training mercenaries (Article 23); International terrorism (Article 24); Illicit traffic in narcotic drugs (Article 25); and Willful and severe damage to the environment (Article 26). It is very difficult to assess some of the new textual language of the latest ILC formulation because much of it was not based on prior conventional textual language. Thus, the CAH provision became a “mini-code” within the Draft Code of Crimes.

Whereas this 1991 version of CAH was more specific and by far more elaborate than the 1954 Draft Code of Offences,<sup>49</sup> it did not adhere to the ILC’s earlier decisions not to introduce drug trafficking and slavery as crimes against the peace and security of

<sup>44</sup> 1991 Draft Code of Crimes, *supra* note 5, at 199 n.289.

<sup>45</sup> Reprinted in [1989] *Report of the ILC*, U.N. G.A.O.R. Supp. No. 10 (A/44/10) 132; *see also* 1990 and 1991 Reports.

<sup>46</sup> Reprinted in [1985] *Report of the ILC* at 171. Adding international drug trafficking or slavery to the draft code is in direct opposition to the intent of the code as expressed by ILC’s Report in 1951. The ILC specifically stated the draft code would not cover “piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, and damage to submarine cables, etc.” Johnson, *supra* note 36, at 456. The rationale for omitting these offenses was that the offenses against the peace and security of mankind, as an “indivisible concept,” should be “limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security.” *Id.*

<sup>47</sup> 1991 Draft Code of Crimes, *supra* note 5.

<sup>48</sup> *Id.* at 259.

<sup>49</sup> Compare *id.* with 1954 Draft Code, *supra* note 4.

mankind.<sup>50</sup> The 1950 “Nuremberg Principles” were also freely interpreted and enlarged upon, yet it was quite obvious that Mr. Thiam and the Commission were still laboring under the long shadow of Nuremberg.

Genocide was incorporated into CAH, though it was previously viewed by the ILC as a separate and distinct crime.<sup>51</sup> As stated above, the 1954 Draft Code treated genocide and CAH as separate offenses because of their distinct characteristics, which created differing requirements for individual criminal responsibility.<sup>52</sup> Article 2(10) of the Draft Code of Offenses was largely borrowed from Article II of the Genocide Convention, whereas Article 2(11) was borrowed from Article 6(c) of the London Charter. Thus, it can be assumed that the original intent of the 1954 Draft Code of Offenses was that the two crimes should remain separate.<sup>53</sup> The definition of the crime of genocide in the 1991 draft was based entirely on Article II of the Genocide Convention.<sup>54</sup> This provision sets out a list of acts constituting genocide, rather than the nonexhaustive list of the 1954 Draft Code.<sup>55</sup> Because the genocide provision of the Draft Code of Crimes used the same wording of the Genocide Convention, the same problems still remained, including the noncoverage under genocide of mass killings without the requisite intent to eliminate the protected group in “whole or in part.” Additionally, the provision did not include the mass killing of a group on grounds other than national, ethnic, racial, or religious.

The 1991 version of CAH also included the crime of *apartheid*,<sup>56</sup> and the definition was based on that Convention.<sup>57</sup> However, the Draft Code of Crimes, unlike the *Apartheid* Convention and the 1954 Draft Code, did not contain a reference to southern Africa, which limited the scope of application of the *Apartheid* Convention.<sup>58</sup> Though some of the provisions of that crime overlapped with genocide, the 1991 Draft Code of Crimes did not integrate these violations in a sound progressive codification.

Many of the provisions contained in the 1991 version of CAH were in violation of the principles of legality as recognized in most legal systems, by making “systematic or mass violations of human rights” an international crime.<sup>59</sup> The listing of these “violations of human rights,” such as “murder,” “torture,” “slavery,” “persecution,” and “deportation,”<sup>60</sup> did not include legal definitions containing sufficient legal elements in violation of the principles of legality. Furthermore, such a listing without more made it impossible to distinguish between conduct within the national criminal jurisdiction of a given state and conduct subject to ICL. For example, slavery was mentioned, but the specifics of

<sup>50</sup> See Johnson, *supra* note 36.

<sup>51</sup> Reprinted in 2 Y.B. INT'L L. COMM'N. 134.

<sup>52</sup> *Id.*; see also *Fourth Report of Mr. Doudou Thiam*, reprinted in [1986], 2 Y.B. INT'L L. COMM'N. 53. The report of the ILC of 1989 suggests that Thiam departs from the 1954 Draft Code by distinguishing genocide from other inhumane acts by devoting a separate provision to it, “because genocide might be regarded as the prototype of a [CAH].” [1989] *Report of the ILC*, Supp. No. 10 (A/44/10) 154. However, this statement is bewildering because, from the discussion in the text, the 1954 Draft Code did in fact distinguish genocide from other inhumane acts.

<sup>53</sup> Johnson, *supra* note 36, at 456.

<sup>54</sup> 1991 Draft Code of Crimes, *supra* note 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 263.

<sup>57</sup> See M. Cherif Bassiouni & Daniel Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981).

<sup>58</sup> *Id.* at 264.

<sup>59</sup> *Id.* at 265.

<sup>60</sup> *Id.*

its application, such as debt bondage and slave labor, were not defined.<sup>61</sup> Similarly, the crime of “deportation” did not distinguish between conditions under which deportation is legal and those that are not.<sup>62</sup>

Another example is a crime entitled “Exceptionally serious war crimes.”<sup>63</sup> There was no justification for adding this category of crimes, which was covered more specifically under the several instruments regulating armed conflicts. Furthermore, the terminology is facially vague and ambiguous and violates minimum standards of the principles of legality. The same critical comments apply to Article 23, “Recruitment, use, financing and training of mercenaries;” Article 24, “International terrorism;” and Article 25, “Illicit traffic in narcotic drugs.” Furthermore, the addition of international drug trafficking to crimes against the peace and security of mankind was unsupported by international conventions, customs, general principles, or writings of the most distinguished publicists, because these crimes are committed by individuals and small groups that are usually considered part of organized crime, even when they have international ramifications. Such crimes seldom contain the element of state policy that characterizes CAH and distinguishes such acts from crimes within the national criminal jurisdiction of states.<sup>64</sup> Article 26, “Wilful and severe damage to the environment” is probably the worst example of drafting from a criminal law perspective and violates principles of legality. It stated, “An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to . . .].” If there is ever an example of a normative provision that is overly broad and ambiguous, this is the one. It does not take much legal imagination to see the breadth and ambiguity of these terms and how they are fraught with the potential for conflicts between national and international law. Nevertheless, clearly some of the harmful consequences of “wilful and severe damage to the environment” must be cognizable under ICL.<sup>65</sup> The purposes of this provision are indeed laudable, but its formulation leaves too much to be desired.

The confusion between individual and state responsibility was evident in several aspects of the 1991 Draft Code, and the basis for state criminal responsibility was not identified. Furthermore, with respect to those offenses that are the product of state policy, the Draft Code of Crimes failed to identify those elements<sup>66</sup> that are indispensable for distinguishing between conduct that is wholly within the national criminal jurisdiction of a given state and conduct that constitutes an international crime irrespective of national law. The 1991 ILC Report mentioned the establishment of an international criminal court<sup>67</sup> and the recommendations of the Special Rapporteur followed prior models suggested by various scholars.<sup>68</sup>

The ILC’s 1991 formulation of CAH in Article 21 stated:

<sup>61</sup> See M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT’L L. & POL. 445 (1991).

<sup>62</sup> The text reads “deportation of forcible transfer of population [ . . . ].” 1991 Draft Code of Crimes, *supra* note 5, at 247. This is a typographical error, the text should read, “deportation [or] forcible transfer of population [ . . . ].”

<sup>63</sup> *Id.* at 269.

<sup>64</sup> See *infra* ch. 1, §2.

<sup>65</sup> See Stephen C. McCaffrey, *Criminalization of Environmental Protection*, in, 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 1013 (M. Cherif Bassiouni ed., 3d rev ed. 2008).

<sup>66</sup> See *infra* ch. 1, §2.

<sup>67</sup> 1991 Draft Code of Crimes, *supra* note 5, at 201, 214–35.

<sup>68</sup> See, e.g., BASSIOUNI DRAFT CODE, *supra* note 15, and authorities cited.

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
- deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to . . . ]<sup>69</sup>

In short, the ten-year period between 1981 and 1991 was not only wasteful, it set back the efforts of gaining acceptance for the formulation of a Draft Code of certain major international crimes. Mr. Thiam meant well, but was far out of his league. His selection and keeping as Rapporteur of this important subject by the ILC may have been an indication of how publicists then considered ICL as secondary to their interests. It may also have been an astute but cynical way of making sure that the Draft Code would not be completed soon, or of ensuring that any completed version would leave much to be desired and would ultimately be rejected. And so it was.<sup>70</sup>

As the hopes for the 1991 Draft Code faded, the ILC in 1994 focused on a Draft Statute for an International Criminal Court. This was a safe bet because by then the Security Council had established the ICTY and ICTR, and the prospects for a permanent international court were brighter.<sup>71</sup> The Draft Statute for an International Criminal Court changed the formulation of CAH contained in the 1954 Draft Code of Offences and the 1991 Draft Code of Crimes.

The text of draft Article 20–4 states:

1. A person commits crimes against humanity, whether in time of peace or war, when:
  - (a) he is in a position of authority and orders, commands, or fails to prevent the systematic commission of the acts described below, against a given segment of the civilian population;
  - (b) he is in a position of authority and participates in the making of a policy or program designed to systematically carry out the acts described below against a given segment of the civilian population;
  - (c) he is in a senior military or political position and knowingly carries out or orders others to carry out systematically the acts described below against a segment of the civilian population;
  - (d) he knowingly commits the acts described below with the intent to further a policy of systematic persecution against a segment of the civilian population without having a moral choice to do otherwise.

<sup>69</sup> 1991 Draft Code of Crimes, *supra* note 5.

<sup>70</sup> Mr. Thiam's efforts were well intentioned, but the work his group produced was quite deficient from an ICL perspective, and he was simply unable to overcome the hidden political agenda that hampered the successful realization of the work. Mr. Thiam was a former Minister of Foreign Affairs of Senegal, French educated and non-English speaking, who was in his seventies at the time. His generation of publicists was from the pre-World War II period and had not caught up with the developments of the new discipline of ICL. The differences in disciplinary approaches between publicists and penalists are still evident today, and that is one of ICL's problems.

<sup>71</sup> BASSIOUNI, THE LEGISLATIVE HISTORY OF THE ICC, *supra* note 8.

2. The acts constituting “crimes against humanity” when committed systematically against a segment of the civilian population are:
  - (a) extermination;
  - (b) murder, including killings done by knowingly creating conditions likely to cause death;
  - (c) enslavement, including slave-related practices;
  - (d) discriminatory and arbitrary deportation;
  - (e) imprisonment, in violation of international norms on the prohibition of arbitrary arrest and detention;
  - (f) torture;
  - (g) rape and other serious assaults of a sexual nature;
  - (h) persecution, whether based on laws or practices targeting select groups or their members in ways that seriously and adversely affect their ethnic, cultural or religious life, their collective well-being, and welfare, or their ability to group identity;
  - (i) other inhumane acts, including but not limited to serious attacks upon physical integrity, personal safety, and individual dignity, such as physical mutilation, forced impregnation or forced carrying to term fetuses that are the product of forced impregnation, and unlawful human experimentation.<sup>72</sup>

This formulation reflected the London Charter’s matrix, the 1950 ILC Report on the “Nuremberg Principles,” the ICTY and ICTR statutes, and the customary international law developments. The ICC’s Article 7 followed along the same historic path described above. Nevertheless, the ILC’s 1996 Draft Code of Crimes Against the Peace and Security of Mankind in Article 18 once again altered its formulation in the above-quoted Article 20–4 and did not follow the text of the Rome Statute, though once again the 1996 ILC text followed the now traditional historical matrix. The new text stated:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- (a) murder;
- (b) extermination;
- (c) torture;
- (d) enslavement;
- (e) persecution on political, racial, religious or ethnic grounds;
- (f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) arbitrary deportation or forcible transfer of population;
- (h) arbitrary imprisonment;
- (i) forced disappearance of persons;
- (j) rape, enforced prostitution and other forms of sexual abuse;
- (k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.<sup>73</sup>

<sup>72</sup> *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. GAOR, 43rd Sess., Supp. No. 10 U.N. Doc. A/49/10 (1994).

<sup>73</sup> 1996 Draft Code of Crimes, *supra* note 6.

One reason for the change is that the ILC probably took note of the fact that the General Assembly's *Ad Hoc* Committee for the Establishment of an International Criminal Court was not going to adopt its formulation in its 1994 draft statute Article 20–4.<sup>74</sup>

The ILC's changes in 1954, 1991, 1994, and 1996 indicate political uncertainty. But the uncertainty with which the drafters proceeded, and their vacillation, evidences how politically sensitive the ILC has become. Of greater significance is the fact that the main problems with the definition of CAH and the identification of its elements have still not been resolved, while there is still no specialized international convention.<sup>75</sup> The result was a haphazard accumulation of unrelated provisions that, for the most part, would not meet the principles of legality in most major criminal justice systems. Thus, the ILC missed a historic opportunity to progressively codify ICL, or at least a portion of it, in a manner that would withstand legal criticism.

## §2. The Security Council's Codifications: The Statutes of the ICTY and the ICTR

In February 1993 the Security Council requested the Secretary-General to prepare a report embodying the statute of an international criminal tribunal to prosecute violators of international humanitarian law in the former Yugoslavia conflict.<sup>76</sup> Three months later, the Secretary General issued a report containing the ICTY statute.<sup>77</sup> In May 1993 the Security Council approved the report and adopted the proposed statute, and the ICTY became a legal reality.<sup>78</sup> Article 5 of the ICTY (drafted by this writer) provides for individual criminal responsibility for CAH, and defines it consistently with the definition set forth in Article 6(c) of the London Charter. Then, in December 1994, the Security Council established another *ad hoc* international criminal tribunal for the prosecution of individual violators of international humanitarian law in the Rwanda conflict.<sup>79</sup> Article 3 of the ICTR provides for individual criminal responsibility for CAH, and like its ICTY counterpart, its definition is also similar to that of Article 6(c) of the Charter. Both, however, differ from Article 6(c) and from each other.

It is noteworthy that whereas the conflict in the former Yugoslavia was deemed in part to be of an international character and in part of a noninternational character,<sup>80</sup> and the

<sup>74</sup> BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE ICC, *supra* note 8, at 150–52.

<sup>75</sup> However, it should be noted that certain ILC members like Professors James Crawford, Alain Pellet, and others brought a positive influence on that body since 1994. With respect to Professor Crawford, this was evident in the 1994 ILC Draft Statute for an ICC and the 1996 Draft Code of Crimes; *see also* Bassiouni, *supra* note 1.

<sup>76</sup> S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

<sup>77</sup> *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25/94, May 3, 1993; *see also* M. CHERIF BASSIOUNI (WITH PETER MANIKAS), THE LAW OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996) [hereinafter BASSIOUNI, THE LAW OF THE ICTY]; VIRGINIA MORRIS & MICHAEL SCHARF, I–II AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

<sup>78</sup> S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>79</sup> S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994); *see also* Johnson, *supra* note 36; Payam Akrahan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996).

<sup>80</sup> This was the conclusion of the Commission of Experts. *See First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, Annex, U.N. Doc. S/25274 (Feb. 10, 1993), which stated that the establishment of an international criminal tribunal to prosecute violators of international humanitarian law would be “consistent with the direction of its work.” *Id.* at 20.



conflict in Rwanda was deemed to be a purely internal or a noninternational conflict, the Security Council recognized the applicability of CAH to both, thus confirming that this category of international crimes applies to all these contexts. The distinction between the two types of conflicts explains why the Security Council defined CAH differently in the statutes of the ICTY and the ICTR. The ICTY statute provides in Article 5 for a connecting element between CAH and the existence of an “armed conflict,” irrespective of whether it is of an international or noninternational character. This was done explicitly, even though the prior legal developments decoupled CAH from the war-connecting link.<sup>81</sup> Thus, ICTY jurisprudence has clearly established that “the existence of an armed conflict is not a constitutive element of the definition of crimes against humanity, but only a jurisdictional prerequisite.”<sup>82</sup> Article 3 of the ICTR statute did not require such a connection, but it added what may appear to be another requirement to the London Charter’s formulation, namely that the conduct be “widespread” or “systematic.”<sup>83</sup> The

For a description of the Commission’s work, see M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigation of Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. F. 279–340 (1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), 88 AM. J. INT’L L. 784–805 (1994). The Appeals Chamber of the ICTY later validated this in the *Tadić* case. Prosecutor v. Tadić, Case No IT-94-I-AR 72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) [hereinafter *Tadić* Jurisdictional Decision]. But in the judgment of *Tadić* on the merits, the Trial Chamber found that the conflict in the Prijedor was not sufficiently established as having the characteristics of a conflict of an international character. Prosecutor v. Tadić, Case No IT-94-I-T, Opinion and Judgment (May 7, 1997) (MacDonald, J., dissenting) [hereinafter *Tadić* Trial Judgment]; see also MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIBUNAL SINCE NUREMBERG* (1997).

<sup>81</sup> See *infra* Introduction and ch. 1, §5.

<sup>82</sup> See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, ¶ 47 (May 3, 1993); see also Prosecutor v. Šešeljić, Case No. IT-03-67, Decision on Motion for Reconsideration of the “Decision on the Interlocutory Appeal Concerning Jurisdiction” Dated 31 August 2004, ¶ 21 (Jun. 15, 2006); Kunarac et al. v. Prosecutor, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 82–83 (Jun. 12, 2002) [hereinafter *Kunarac et al.* Appeals Judgment] (stating that “[a] crime listed in Article 5 of the Statute constitutes a [CAH] only when ‘committed in armed conflict’” and that this requirement is a “purely jurisdictional prerequisite that is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.”); *Tadić* Jurisdictional Decision, *supra* note 80, ¶ 70; Tadić v. Prosecutor, Case No. IT-94-I-A, Judgment, ¶¶ 249, 251 (Jul. 15, 1999) [hereinafter *Tadić* Appeals Judgment]; Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 59 (Dec. 10, 1998).

<sup>83</sup> “Systematic” refers to the element of coordinated planning, which for some commentators exists even if the attack succeeds in harming only one victim. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 108 n. 84. Cf. Kai Ambos and Steffen Wirth, *The Current Law of Crimes Against Humanity*, 13 CRIM. L.F. 1, 21 (2002).

On the issue of “widespread,” Luban argues that “[a]ny body-count requirement threatens to debase the idea of international human rights and draw us into what I once called ‘charnel house casuistry’ – legalistic arguments about how many victims it takes to make a ‘population.’” Luban, *A Theory of Crimes Against Humanity*, *supra*; see also David Luban, *The Legacies of Nuremberg*, in *LEGAL MODERNISM* 335, 343–44 (1994). Simon Chesterton is also doubtful of what he refers to as “the gruesome calculus of establishing a minimum number of victims necessary to make an attack ‘widespread.’” Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT’L L. 307, 315 (2000).

Note that the “problem of numbers” has lingered for decades in the discussion of the law of genocide because of its requirement of specific intent to destroy a civilian population “in whole or in part.” See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 65–6 (2002); WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000). In ratifying the Genocide Convention, the U.S. Senate included an understanding that “part” means “substantial part,” and the implementing legislation

ICTY statute is therefore closer than to Article 6(c) of the London Charter. The connection made by the ICTY to an “armed conflict,” irrespective of subsequent developments decoupling CAH from the initiation and waging of an aggressive war or war crimes, was necessary at the time.<sup>84</sup> The drafters of the ICTY were concerned about potential

defines “substantial part” as “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such a group is a part.” 18 U.S.C. § 1091(a), § 1093(8) (2000). Luban argues that the debates over the “problem of numbers” for genocide make some sense given genocide’s definition:

the character of the crime as an assault on a group ‘as such’ invariably invites the question of how large a part of the group must be the target of destructive intention for the intention to count as aiming at the group. My point about ‘charnel house casuistry’ is that parallel questions about [CAH] are wrongheaded and even grotesque.

Luban, *A Theory of Crimes Against Humanity*, *supra*, n. 85.

<sup>84</sup> See BASSIOUNI, *THE LAW OF THE ICTY*, *supra* note 77, at 491. Concerning the element, the majority in the *Tadić* case stated:

Article 5 of the Statute, addressing crimes against humanity, grants the International Tribunal jurisdiction over the enumerated acts ‘when committed in armed conflict.’ The requirement of an armed conflict is similar to that of Article 6(c) of the Nürnberg Charter which limited the Nürnberg Tribunal’s jurisdiction to crimes against humanity committed ‘before or during the war,’ although in the case of the Nürnberg Tribunal jurisdiction was further limited by requiring that crimes against humanity be committed ‘in execution of or in connection with’ war crimes or crimes against peace. Despite this precedent, the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: ‘Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.’ In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that acts be committed as part of an attack against a civilian population. The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, ‘the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law,’ having stated earlier that ‘Since customary international law no longer requires any nexus between crimes against humanity and armed conflict [ . . . ] Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal.’ Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict.

The Appeals Chamber, as discussed in greater detail in Section VI.A of this Opinion and Judgment, stated that ‘an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’ Consequently, this is the test which the Trial Chamber has applied and it has concluded that the evidence establishes the existence of an armed conflict.

*Tadić* Trial Judgment, *supra* note 80, ¶¶ 627–28.

Concerning this question, the Trial Chamber continued,

It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian “population,” and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfills this requirement. As explained by the commentary to the I.L.C. Draft Code:

(3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the present Code. The first condition requires that the act was “committed in a systematic manner or on a large scale”. This first condition consists of two alternative requirements. . . . Consequently, an act could constitute a crime against humanity if either of these conditions is met.

The commentary to the I.L.C. Draft Code further explains these requirements and their origins. It states:

challenges to the legality of the statute and therefore opted for an intermediary position between having some connection to any type of armed conflict and no connection at all.<sup>85</sup> Presumably the same concerns should have existed in 1994, but if such a provision would have been used in connection with Rwanda, CAH could not have been applied because of the internal nature of that conflict. Thus, Article 3 of the ICTR statute formally broke the last remaining war-connecting link to CAH.<sup>86</sup>

The first alternative requires that the inhumane acts be committed in a systematic manner meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act that was not committed as part of a broader plan or policy. The Nürnberg Charter did not include such a requirement. None the less the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were “in many cases . . . organized and systematic” in considering whether such acts constituted crimes against humanity.

(4) The second alternative requires that the inhumane acts be committed on a large scale meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim. The Nürnberg Charter did not include this second requirement either. None the less the Nürnberg Tribunal further emphasized that the policy of terror was (certainly carried out on a vast scale” in its consideration of inhumane acts as possible crimes against humanity [ . . . ]. The term (large scale” in the present text [ . . . ] is sufficiently broad to cover various situations involving multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.

A related issue is whether a single act by a perpetrator can constitute a crime against humanity. A tangential issue, not at issue before this Trial Chamber, is whether a single act in and of itself can constitute a crime against humanity. This issue has been the subject of intense debate, with the jurisprudence immediately following the Second World War being mixed. The American tribunals generally supported the proposition that a massive nature was required, while the tribunals in the British Zone came to the opposite conclusion, finding that the mass element was not essential to the definition, in respect of either the number of acts or the number of victims and that “what counted was not the mass aspect, but the link between the act and the cruel and barbarous political system, specifically, the Nazi regime”. Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offenses to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian population and thus even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution”. The decision of the Trial Chamber I of the International Tribunal in the Vukovar Hospital Decision is a recent recognition of the fact that a single act by a perpetrator can constitute a crime against humanity. In that decision the Trial Chamber stated:

30. Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above.

*Tadić* Trial Judgment, *supra* note 80, ¶¶ 648–49.

<sup>85</sup> See *infra* Preface and Introduction.

<sup>86</sup> See generally POWER, *supra* note 83, at 329–89 (considering American policy in Rwanda); LINDA MELVERN, A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA’S GENOCIDE (2000) (considering international inertia in Rwanda, with particular focus on the United Nations); see also PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 147–71 (1998) (discussing the American and French roles in the Rwanda); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 273–305 (1995) (considering the French intervention).

Rwanda's vote in the Security Council in favor of the resolution adopting the statute would be an argument against Rwanda (estoppel) if it raised objections before the ICJ to the removal of any war-connecting link. It would also be an argument against any other government that would object, on behalf of its citizens, to the jurisdiction of the ICTR, because Rwanda as the territorial state had approved the statute.<sup>87</sup>

A side-by-side textual comparison of both statutes reveals the differences in these formulations.<sup>88</sup>

ICTY Statute (1993), Art. 5

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

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

ICTR Statute (1994), Art. 3

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

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

The essential differences between the two formulations are not in the enumeration of the specific acts but in the general elements. The ICTY requires that the crimes be

The conflict in Rwanda also caused less political apprehension to the major Western powers than the conflict in the former Yugoslavia, particularly since the Rwandan government, which was at the time a member of the Security Council, had agreed to it, though reluctantly. But at the time the Rwandan government had been bitterly disappointed with the ICTR's performance, due essentially to bureaucratic delays and mismanagement, which in a report by the United Nations' Inspector General, could be squarely laid on certain U.N. appointees and those in the office of legal affairs responsible for their supervision. Thus, the ICTR's Registrar was changed, as was the resident Deputy Prosecutor. But that is where the responsibility of three years of egregious failure stopped.

<sup>87</sup> See e.g. VIRGINIA MORRIS & MICHAEL P. SCHARF, 1-2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998).

<sup>88</sup> See *supra* note 7.

“committed in armed conflicts, whether international or internal in character,” which has been followed in the mixed-model statutes for Sierra Leone, East Timor, and Cambodia, as well as the definition set forth in Article 7 of the Rome Statute, whereas the ICTR does not contain an required element instead, the ICTR requires that the crimes be “part of a widespread or systematic attack,” which the ICTY does not require. Lastly the ICTY requires that the “attack [be] against any civilian population,” as does the ICC’s Article 7(2), which is also required by ICTR, but adding to it “on national, political, ethnic, racial or religious grounds.” This language, which is not to be found in any other formulation of CAH except the one set forth in the 1991 Draft Code of Crimes,<sup>89</sup> is taken, almost *verbatim*, from a portion of Article II of the Genocide Convention.<sup>90</sup> Why the drafters of the ICTR statute inserted language, which is so intrinsic to the Genocide Convention, is puzzling, to say the least. These differences show that customary international law has not entirely settled on these and other issues pertaining to the formulation of CAH.

The ICTR’s inclusion of the element of “widespread or systematic” is the qualitative addition to the requirement that the attack be against certain protected groups.<sup>91</sup> Article 6(c) of the London Charter required the element that this writer refers to as state policy,<sup>92</sup> which explains the inclusion of an equivalent requirement in the ICTR reflected in conduct directed against a civilian population based on racial, ethnic, or religious grounds committed on a “widespread or systematic” basis. The ICC preserved that element, as discussed in Chapter 1, §5 Chapter 2, §2.

The formulations of the CAH provisions in the statutes of the ICTY and ICTR, like those of their predecessors, were tailored to fit the situations to which they were to apply. Thus, the formulations were tailored to fit the facts. Consequently, these formulations were not necessarily drafted with a view toward future application, nor did they evidence much concern about the principles of legality, discussed in Chapter 1 §5 and Chapter 2, §2.

The ICTY and ICTR definitions of CAH influenced the definition of that category of crimes in the 1996 Code of Crimes<sup>93</sup> and the deliberations of the General Assembly’s 1995 *Ad Hoc* Committee on the Establishment of an International Criminal Court<sup>94</sup> and the 1996–98 Preparatory Committee on the Establishment of an International Criminal Court.<sup>95</sup> Because of the London Charter’s influence on these formulations, when the Rome Statute was adopted, the impact of the Charter’s definition of CAH

<sup>89</sup> 1991 Draft Code of Crimes, *supra* note 5.

<sup>90</sup> The Genocide Convention states: “In the present Convention genocide means any of the following acts committed with intent to destroy, in whole or in part, a *national, ethnical, racial or religious group* [ . . . ].” Genocide Convention art. II, *supra* note 10 (emphasis added).

<sup>91</sup> To prove the existence of a conflict of a noninternational character, it would have been necessary to show the involvement of some foreign government in that internal conflict. This would have also been embarrassing to France, a member of the Security Council, since France had given weapons and training to the Rwandan government forces when the Hutu-dominated government used its army to engage in a genocidal campaign against the Tutsi minority, of whom an estimated 500,000 persons were brutally killed. France subsequently intervened militarily to stop the conflict when the Hutu forces were routing the Tutsis.

<sup>92</sup> See generally *infra* ch. 1.

<sup>93</sup> 1996 Draft Code of Crimes, *supra* note 6.

<sup>94</sup> U.N. Doc. A/50/22 (Sept. 6, 1995).

<sup>95</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II (Compilation of proposals), U.N. GAOR, 51st sess., Supp. No. 22A (A/51/22); BASSIOUNI, 3 LEGISLATIVE HISTORY OF THE ICC, *supra* note 8.

remained visible.<sup>96</sup> But the historic legal journey of affirming the existence of CAH as an international category of crime, which is now deemed part of *jus cogens* and which raises obligations *erga omnes*, still needs a specialized convention.<sup>97</sup> Perhaps more importantly, the journey that commenced in 1919<sup>98</sup> has not brought about sufficient enforcement at the international and national levels.<sup>99</sup>

### §3. The Prosecutions for CAH at the ICTY and the ICTR

As of November 2010, the ICTY has indicted one hundred sixty-one individuals in total, including Serbs, Bosnians, and Croats. The ICTY prosecutor started with the evidence and information obtained by the Security Council Commission chaired by this writer. It was contained in a 3500 page report and Annexes and submitted to the Security Council. An additional 72,000 pages were submitted to the prosecutor along with tapes, photographs, maps and affidavits of witnesses. The ICTR did not have the same benefit. The ICTY has concluded proceedings against one hundred twenty-five individuals in eighty-nine cases. Of these, according to the research of this writer and his researcher, sixty-four individuals were sentenced and twelve were acquitted. Thirty-one individuals have already completed their sentences and have been released from custody. Thirteen persons have had their cases referred to national jurisdictions the judicially created Rule 11bis.<sup>100</sup> This rule allows judges to refer or “transfer lower or mid-level accused to national jurisdictions” prior to the commencement of trial.<sup>101</sup> Two individuals remain at large: Ratko Mladić and Goran Hadzic.

Currently, proceedings are ongoing for thirty-seven accused in fifteen cases. Of these, four cases involving sixteen accused are currently on appeal, and nine cases involving eighteen accused are currently at trial. Of the one hundred nine persons indicted for charges including CAH, the convictions of sixty of these persons included CAH. According to the Tribunal’s website, the average cost per case before is \$12 million.

The ICTR had a slower start than the ICTY, only becoming fully operational in September 1996 after delays caused by logistical, administrative, and financial problems. The ICTR has completed fifty-two cases; thirty persons have been sentenced and eight have been acquitted. According the research of this writer and his researcher, as of November 2010, the indictments of eighty-four defendants contained charges including

<sup>96</sup> See Bassiouni, *The “Nuremberg Legacy,”* *supra* note 2.

<sup>97</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 9 (1998).

<sup>98</sup> See *infra* ch. 3, §2.

<sup>99</sup> See *infra* ch. 9.

<sup>100</sup> ICTY Rules of Evidence and Procedure, Rule 11bis, adopted on 12 November 1997, revised on 30 September 2002, amended on 10 June 2004, 28 July 2004, 11 February 2005. Michael Bohlander, *Referring an Indictment from the ICTY and ICTR to Another Court – Rule 11bis and the Consequences for the Law of Extradition*, 55 INT’L & COMP. L. Q. 219, 220 (2006). The original ICTY Rule 11bis of November 1997 provided for “the suspension of an indictment.” It was redrafted with the current title, “Referral of the Indictment to Another Court,” on September 30, 2002 and has been modified several times since. For example, see the cases versus Pasko Ljubicic, Zeljko Mejakic, and Mitar Rasevic.

<sup>101</sup> Prosecutor v. Radovan Stanković, Case No. IT-96-23/2-AR11bis, Decision on Rule 11bis Referral, ¶ 16 (Sept. 1, 2005) [hereinafter *Stanković* Rule 11bis Decision]. Rule 11bis was first invoked September 7, 2004 in the *Ademi & Norac* Cascase. Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT, Motion by the Prosecutor Under Rule 11bis (Sept. 2, 2004) [hereinafter *Ademi & Norac* Rule 11bis Motion] (questioning whether the case met the seniority criterion of the Rule and whether States were eligible to receive cases. In this case, both were answered in the affirmative thus granting authority to Rule 11 bis).



CAH. Of these, thirty-four persons were convicted of CAH (eight of which are currently on appeal). According to the ICTR's website, the average cost of a case before the ICTR is \$11 million. For the ICTY, the average cost per case has been between \$10-11 million.

Both the *ad hoc* tribunals successfully prosecuted heads of state and other key figures for CAH, genocide, and war crimes. One of them was Jean Kambanda, the former Prime Minister of the Interim Government of Rwanda, controlled the senior public officials and military officers, and incited and encouraged the population to murder Tutsis and moderate Hutus, among other crimes. Kambanda pled guilty to four counts of genocide and two counts of CAH and was sentenced to life imprisonment.<sup>102</sup> As part of the plea agreement, it was admitted that he was aware of the massacres, but took no action to stop them.<sup>103</sup> Kambanda further admitted to supporting the Interahamwe militia, who along with the Impuzamugambi militia perpetrated the majority of the violence,<sup>104</sup> in addition to supporting *Radio Television Libre des Mille Collines* (RTLM), a radio station that incited the killings over the airwaves.<sup>105</sup>

The ICTY relied on Articles 3, 4, and 5 of its statute to prosecute Slobodan Milošević for CAH and war crimes.<sup>106</sup> The charges were contained in three separate indictments for crimes committed in Kosovo, Bosnia, and Croatia. They were consolidated for a single trial that began on February 12, 2002.<sup>107</sup> Given that Milošević was ultimately charged with war crimes and CAH committed as early as 1991 during the wars in the former Yugoslavia, the question for this writer has always been, why was he not indicted sooner? After all, the ICTY was established in 1994. Milošević was not indicted until five years later, and then only for crimes in Kosovo, when he ordered its invasion and the ethnic cleansing of Kosovar Albanians. Even though killings, rapes, ethnic cleansing, and other crimes in Croatia and Bosnia were well documented at the time, the indictments for Croatia and Bosnia would not follow for another two years. On March 11, 2006, Milošević died.

The trial of another key figure, Radovan Karadžić, the former president of Republika Srpska, head of the Serb Democratic Party (SDS), and Supreme Commander of the Bosnian Serb Army (VRS), began on October 26, 2009.<sup>108</sup> Along with Milošević and General Ratko Mladić, the Bosnian military commander who remains at large, Karadžić is one of the highest-ranking officials to be indicted by the ICTY. He is charged with two

<sup>102</sup> Prosecutor v. Kambanda, Case No. ICTR 97-23-T, Judgment and Sentence (September 4, 1998) [hereinafter *Kambanda Trial Judgment*]. His life sentence was upheld on appeal. *Kambanda v. Prosecutor*, Case No. ICTR-97-23-A (Oct. 19, 2000) [hereinafter *Kambanda Appeals Judgment*].

<sup>103</sup> *Kambanda Trial Judgment*, *supra* note 102, ¶ 39.

<sup>104</sup> *Id.*

<sup>105</sup> See ICTY Statute art. 7(2), *supra* note 7.

<sup>106</sup> Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Preliminary Motions, ¶ 25 (November 8, 2001).

<sup>107</sup> Prosecutor v. Milošević, Case No. IT-02-54, Initial Indictment "Kosovo" (May 22, 1998); Prosecutor v. Milošević, Case No. IT-02-54, First Amended Indictment "Kosovo" (Jun. 29, 2001); Prosecutor v. Milošević, Case No. IT-02-54, Second Amended Indictment "Kosovo" (Oct. 16, 2001); Prosecutor v. Milošević, Case No. IT-02-54, Initial Indictment "Croatia" (Sept. 27, 2001); Prosecutor v. Milošević, Case No. IT-02-54, First Amended Indictment "Croatia" (Oct. 23, 2002); Prosecutor v. Milošević, Case No. IT-02-54, Second Amended Indictment "Croatia" (Jul. 28, 2004); Prosecutor v. Milošević, Case No. IT-02-54, Initial Indictment "Bosnia and Herzegovina" (Nov. 22, 2001); Prosecutor v. Milošević, Case No. IT-02-54, Amended Indictment "Bosnia and Herzegovina" (Nov. 22, 2002). For more on the trial of Milošević, see MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *SLOBODAN MILOSEVIC ON TRIAL: A COMPANION* (2002); NORMAN CIGAR, PAUL WILLIAMS, AND IVO BANAC, *INDICTMENT AT THE HAGUE: THE MILOSEVIC REGIME AND CRIMES OF THE BALKAN WARS* (2002); MICHAEL P. SCHARF & PAUL WILLIAMS, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* (2002).

<sup>108</sup> ICTY Press Advisory, Oct. 16, 2009.



counts of genocide, CAH, and various other crimes committed against Bosnian Muslim, Bosnian Croat, and other non-Serb civilians in Bosnia during the war.<sup>109</sup>

It is alleged that Karadžić committed genocide when forces under his command killed non-Serbs during and after attacks on more than a dozen Bosnian towns in the early stages of the war. After the attacks, Bosnian Serb forces rounded up tens of thousands of non-Serbs and transferred them to more than twenty detention camps, where it is alleged that forces under Karadžić's command tortured, mistreated, sexually assaulted, and killed non-Serbs. Karadžić is also charged with genocide for the murder of more than 8,000 Bosnian Muslim men and boys in Srebrenica in July 1995. The indictment also charges him in relation to crimes committed during the protracted campaign of shelling and sniping of civilians in Sarajevo that killed and wounded thousands of civilians, including elderly and children, in a forty-four-month siege. Karadžić is alleged to have committed all of these crimes together with other members of a joint criminal enterprise<sup>110</sup> with the aim to permanently remove Bosnian Muslim and Bosnian Croat inhabitants as part of the campaign of ethnic cleansing.

The mandates of the ICTY and ICTR were limited in space and time. Both are expected to wind down in 2012.<sup>111</sup> These tribunals were meant to last only for a short period of time and to prosecute only those most responsible for grave crimes.<sup>112</sup>

The ICTY's Article 57 requires that CAH *must be committed in armed conflict, whether the conflict is international or internal in character*. The Appeals Chamber has considered this to be a "jurisdictional requirement."<sup>113</sup> An *armed conflict* "exists whenever there is a resort to armed force between states or protracted armed violence between governmental

<sup>109</sup> See Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Motion to Amend the First Indictment (Sept. 22, 2008); Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Third Amended Indictment (Feb. 27, 2009).

<sup>110</sup> For more information on the Srebrenica massacre, see Alwen Schroder, *Dealing with Genocide: A Dutch Peacekeeper Remembers Srebrenica*, SPIEGEL INT'L, July 12, 2005, available at <http://www.spiegel.de/international/o.1518,364902,00.html>; GENOCIDE IN SREBRENICA, UNITED NATIONS "SAFE AREA," IN JULY 1995, BK. 3 (Institute for the Research of Crimes Against Humanity and International Law, Sarajevo, Muharem Kreso ed., 1995); DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA* (1998). For a discussion of joint criminal enterprise see *infra* ch. 7, §6. Other members of the joint criminal enterprise, as alleged in the indictment, include Momcilo Krajisnik, Ratko Mladić, Slobodan Milošević, Biljana Plavsic, Nikola Koljevic, Mico Stanisic, Momcilo Mandic, Jovica Stanisic, Zeljko Ražnatović a.k.a. "Arkan," and Vojislav Šešelj.

<sup>111</sup> For the respective Security Council-mandated Completion Strategies, see S.C. Res. 1053, U.N. Doc. S/RES/1053 (Apr. 23, 1996); S.C. Res. 1534 (Mar. 26, 2004).

<sup>112</sup> S.C. Res. 1503, U.N. Doc. S/RES/1503, at preamble (August 28, 2003); see also WILLIAM A. SCHABAS, *THE UN CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* 604 (2006). The Council subsequently endorsed the completion strategy through resolutions stating that the ICTY focus on: "completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010, [...] concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction [...] [and] transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions."

<sup>113</sup> Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, ¶ 541 (Jan. 17, 2005) [hereinafter *Blagojević & Jokić* Trial Judgment]; see also Prosecutor v. Brđanin, Case No. IT-99-36-T, ¶ 130 (Sept. 1, 2004) [hereinafter *Brđanin* Trial Judgment] (the crime must be "committed in an armed conflict, whether international or internal in character . . ."); Prosecutor v. Galić, Case No. IT-98-29-T, ¶ 139 (Dec. 5, 2003) [hereinafter *Galić* Trial Judgment] ("for a crime to be adjudicated under Article 5 of the Statute, there are two prerequisites: that there was an armed conflict, and that the alleged criminal acts occurred during that armed conflict."); Prosecutor v. Stakić, Case No. IT-97-24-T, ¶ 618 (Jul. 31, 2003) [hereinafter *Stakić* Trial Judgment].

authorities and organized armed groups or between such groups within a state.”<sup>114</sup> In addition, the jurisprudence of the ICTY has affirmed that “[t]o qualify as [CAH] the acts of the accused must be *part of a widespread or systematic attack ‘directed against any civilian population.’*”<sup>115</sup>

The general elements required for CAH at the ICTY are as follows:

- (1) there must be *an attack*;
- (2) the *acts* of the perpetrator must be *part of the attack*;
- (3) the attack must be *directed against any civilian population*;
- (4) the attack must be *widespread or systematic*; and
- (5) the perpetrators must *know* that his or her *acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population, and know that such acts fit into such a pattern.*<sup>116</sup>

An *attack* has been defined “as a course of conduct involving the commission of acts of violence.”<sup>117</sup> Second, the acts of the accused must constitute *part of the attack*, which, according to the tribunal, consists of two elements:

- the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
- knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.<sup>118</sup>

Third, the attack must be *directed against any civilian population*. The ICTY has been called upon to further define the phrases “directed against” and “civilian population.” An attack is “directed against” a civilian population if the civilian population is the “primary object of the attack.”<sup>119</sup> The attack is not required to be directed against the

<sup>114</sup> *Tadić* Jurisdictional Decision, *supra* note 80, ¶ 70.

<sup>115</sup> Prosecutor v. Limaj et al., Case No. IT-03-66-T, ¶ 181 (Nov. 30, 2005) [hereinafter *Limaj et al.* Trial Judgment] (emphasis added).

<sup>116</sup> See the following cases, which set forth these same five elements: *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 181; *Blagojević & Jokić* Trial Judgment, *supra* note 113, ¶ 540; *Brđanin* Trial Judgment, *supra* note 113, ¶ 130; *Stakić* Trial Judgment, *supra* note 113, ¶ 621 (same 5 elements); Prosecutor v. Kunarac et al., Case Nos. IT-96-23-T & IT-96-23/1-T, ¶ 410 (Feb. 22, 2001) [hereinafter *Kunarac et al.* Trial Judgment]; see also similar elements set forth in *Galić* Trial Judgment, *supra* note 113, ¶ 140.

<sup>117</sup> *Blagojević & Jokić* Trial Judgment, *supra* note 113, ¶ 543; see also similar definitions in *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 182; *Brđanin* Trial Judgment, *supra* note 113, ¶ 131; *Galić* Trial Judgment, *supra* note 113, ¶ 141; Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, ¶ 233 (Mar. 31, 2003) [hereinafter *Naletilić & Martinović* Trial Judgment].

<sup>118</sup> *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 99. Several subsequent cases quoted or used similar language to the language of the Appeals Chamber’s language in *Kunarac et al.* case. See, e.g., *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 188; *Blagojević & Jokić* Trial Judgment, *supra* note 113, ¶ 547; and Prosecutor v. Simić et al., Case No. IT-95-9-T, Judgment, ¶ 41 (Oct. 17, 2003) [hereinafter *Simić et al.* Trial Judgment].

<sup>119</sup> *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 91 (“the expression ‘directed against’ is an expression which ‘specifies that in the context of a [CAH] the civilian population is the primary object of the attack.’”). The same language was used in *Blaškić v. Prosecutor*, Case No. IT-95-14-A, ¶ 106 (Jul. 29, 2004) [hereinafter *Blaškić* Appeals Judgment]; *Kordić & Čerkez v. Prosecutor*, Case No. IT-95-14/2-A, ¶ 96 (Dec. 17, 2004) [hereinafter *Kordić & Čerkez* Appeals Judgment]; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 185; *Galić* Trial Judgment, *supra* note 113, ¶ 142 (same). Similar language was used in *Brđanin* Trial Judgment, *supra* note 113, ¶ 134; *Stakić et al.* Trial Judgment, *supra* note 118, ¶ 624; *Naletilić & Martinović* Trial Judgment, *supra* note 117, ¶ 235.

entire population; a sufficient number of persons must be subject to the attack, instead of a limited and randomly selected number of individuals.<sup>120</sup> In making its assessment of whether the attack was “directed against” the civilian population, the ICTY considers, *inter alia*, the means and method used in the course of the attack, the status and number of victims, the discriminatory nature of the attack, the nature of the crimes committed in the course of the attack, the resistance of the assailants at the time, and the extent to which the attacking force complied or attempted to comply with the precautionary requirements of the laws of war.<sup>121</sup> The other pertinent phrase in the third element, *civilian population*, means “persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause,” according to principles of customary international law.<sup>122</sup>

The fourth general element needed to establish CAH requires that the attack must be *widespread or systematic*, a requirement that the tribunal has declared disjunctive, not cumulative.<sup>123</sup> The ICTY has defined *widespread* as referring to the number of victims<sup>124</sup> and *systematic* as referring to the existence of a pattern or plan that negates any possibility

<sup>120</sup> *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 90. The same language was used in *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 95; *Blaškić* Appeals Judgment, *supra* note 119, ¶ 105; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 187. Similar language was used in *Brđanin* Trial Judgment, *supra* note 113, ¶ 134; *Galić* Trial Judgment, *supra* note 113, ¶ 143; *Simić et al.* Trial Judgment, *supra* note 118, ¶ 42; *Naletilić & Martinović* Trial Judgment, *supra* note 117, ¶ 235.

Targeting only a select group of civilians – i.e., the targeted killing of a number of political opponents – will not satisfy this requirement. *Limaj et al.*, Trial Judgment, *supra* note 115, ¶ 187.

<sup>121</sup> *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 90. This language was also used in *Blaškić* Appeals Judgment, *supra* note 119, ¶ 106; *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 96; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 185. Similar language was used in *Brđanin* Trial Judgment, *supra* note 113, ¶ 134; *Galić* Trial Judgment, *supra* note 113, ¶ 142; *Simić et al.* Trial Judgment, *supra* note 118, ¶ 42.

<sup>122</sup> *Blagojević & Jokić* Trial Judgment, *supra* note 113, ¶ 544. But see *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment, ¶¶ 118–22 (Apr. 3, 2008) [hereinafter *Haradinaj* Trial Judgment] (concluding that there was no attack against a civilian population that could be attributed to the Kosovo Liberation Army (KLA)). On July 21, 2010, the Appeals Chamber partially quashed the acquittals of Ramush Haradinaj, a former commander of the KLA in the Dukagjin area of Kosovo, Idriz Balaj, a former member of the KLA and commander of the special unit known as the Black Eagles, and Lahi Brahimaj, the former deputy commander of the KLA Dukagjin Operative Staff, and ordered a partial retrial of the case, after concluding that the Trial Chamber erred in failing to take adequate measures to secure the testimony of certain key prosecution witnesses. *Haradinaj et al. v. Prosecutor*, Case No. IT-04-84-A, Judgment (Jul. 21, 2010) [hereinafter *Haradinaj et al.* Appeals Judgment].

<sup>123</sup> See *Deronjić v. Prosecutor*, Case No. IT-02-61-A, ¶ 109 (Jul. 20, 2005) [hereinafter *Deronjić* Appeals Judgment]; *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 93; *Blaškić* Appeals Judgment, *supra* note 119, ¶ 102; *Galić* Trial Judgment, *supra* note 113, ¶ 146; *Simić et al.* Trial Judgment, *supra* note 118, ¶ 43; *Naletilić & Martinović* Trial Judgment, *supra* note 117, ¶ 236; see also *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 97 (“The Trial Chamber thus correctly found that the attack must be either ‘widespread’ or ‘systematic’, that is, that the requirement is disjunctive rather than cumulative.”); *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 183 (similar); *Brđanin* Trial Judgment, *supra* note 113, ¶ 135.

<sup>124</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 94; *Blaškić* Appeals Judgment, *supra* note 119, ¶ 101; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 183; *Blagojević & Jokić* Trial Judgment, *supra* note 113, ¶ 545; *Brđanin* Trial Judgment, *supra* note 113, ¶ 135; *Galić* Trial Judgment, *supra* note 113, ¶ 146; *Simić et al.* Trial Judgment, *supra* note 118, ¶ 43; *Stakić* Trial Judgment, *supra* note 113, ¶ 625; see also *Blagojević & Jokić* Trial Judgment, *supra* note 113, ¶ 545 (“A crime may be widespread by the ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.’”); *Naletilić & Martinović* Trial Judgment, *supra* note 117, ¶ 236; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, ¶ 179 (Feb. 26, 2001).

of randomness or coincidence.<sup>125</sup> This requirement applies only to the *attack*, and not the acts of the accused.<sup>126</sup> The ICTY assesses *widespread* or *systematic* by identifying “the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain[ing] whether the attack was indeed widespread or systematic.”<sup>127</sup> Curiously, even though the Appeals Chamber in the *Kunarac* case referred to the existence of a “pattern or plan” to define *systematic*, as discussed in greater detail in [Chapter 1](#), a footnote in the judgment questionably dismissed the element of state policy from the elements of CAH at customary international law, and declared that a such a requirement was unnecessary insofar as the statute covered crimes committed on a *widespread* or *systematic* basis.<sup>128</sup>

<sup>125</sup> *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 417; *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 94 (“[T]he phrase ‘systematic’ refers to the organised nature of the acts of violence and the improbability of their random occurrence.”); *Blaškić* Appeals Judgment, *supra* note 119, ¶ 101; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 183; *Simić et al.* Trial Judgment, *supra* note 118, ¶ 43; *Stakić* Trial Judgment, *supra* note 113, ¶ 625; *Naletilić & Martinović* Trial Judgment, *supra* note 117, ¶ 236.

See also *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 94 (“Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.” *Blaškić* Appeals Judgment, *supra* note 119, ¶ 101; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 183; see also *Blagojević & Jokić* Trial Judgment, *supra* note 113, ¶ 545 (“The term ‘systematic’ refers to an ‘organised nature of the acts of violence and the improbability of their random occurrence,’ and is often expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”). Similar language is used in *Brđanin* Trial Judgment, *supra* note 113, ¶ 135; *Galić* Trial Judgment, *supra* note 113, ¶ 146.

See also *Prosecutor v. Blaškić*, Case No. IT-95-14-T, ¶ 203 (Mar. 3, 2000) [hereinafter *Blaškić* Trial Judgment]: “The systematic character refers to four elements which . . . may be expressed as follows: [1] the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; [2] the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; [3] the preparation and use of significant public or private resources, whether military or other; [4] the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.” But see *Blaškić* Appeals Judgment, *supra* note 119, ¶¶ 99–100, 117–120 (which criticizes this formulation on appeal).

<sup>126</sup> *Deronjić* Appeals Judgment, *supra* note 123, ¶ 109; *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 94; *Blaškić* Appeals Judgment, *supra* note 119, ¶ 101; *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 96; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 189; *Brđanin* Trial Judgment, *supra* note 113, ¶ 135; *Simić et al.* Trial Judgment, *supra* note 118, ¶ 43; *Kunarac et al.* Trial Judgment, *supra* note 116, ¶ 431.

<sup>127</sup> *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 95; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 183; *Galić* Trial Judgment, *supra* note 113, ¶ 146; *Simić et al.* Trial Judgment, *supra* note 118, ¶ 43.

This assessment includes factors such as “[t]he consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes [ . . . ].” *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 95; *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 183; *Simić et al.* Trial Judgment, *supra* note 119, ¶ 43; *Stakić* Trial Judgment, *supra* note 113, ¶ 625.

See also *Prosecutor v. Jelisić*, Case No. IT-95-10-T, ¶ 53 (Dec. 14, 1999): “The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.” However, as discussed in [chapter 1](#), there is no plan or policy requirement at the ICTY, although, as stated by the Trial Chamber in *Jelisić*, such a plan or policy may be useful to show the attack was widespread or systematic.

<sup>128</sup> *Id.* at ¶ 98 n. 114. For a more detailed discussion of the *Kunarac* case, the state policy requirement for CAH, as well as relevant citations on the topic, see *infra* ch. 1.

The fifth general element of CAH at the ICTY is the *mens rea*, which is satisfied “*when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack.*”<sup>129</sup>

Although there has been much variation in the formulations used by the ICTR to define CAH, the general elements required under Article 3 consist of the following:

- (1) the act must be committed as part of a *widespread or systematic attack*;
- (2) the attack must be *directed against a civilian population*;
- (3) the attack must be *committed on national, political, ethnic, racial, or religious grounds*; and
- (4) the accused must have acted *with knowledge of the broader context of the attack and with knowledge that his act(s) formed part of that attack.*<sup>130</sup>

<sup>129</sup> Kordić & Čerkez Appeals Judgment, *supra* note 119, ¶ 99 (emphasis added); Blaškić Appeals Judgment, *supra* note 119, ¶ 124. See also the similar definitions set forth in Blagojević & Jokić Trial Judgment, *supra* note 113, ¶ 548; Brđanin Trial Judgment, *supra* note 113, ¶ 138; Galić Trial Judgment, *supra* note 113, ¶ 148; see also Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, ¶ 556 (Jan. 14, 2000) (“the requisite *mens rea* for [CAH] appears to be comprised by (1) the *intent* to commit the underlying offence, combined with (2) *knowledge* of the broader context in which that offence occurs.”).

Notably, a discriminatory intent is only required for the CAH of persecution. See *infra* ch. 6.

<sup>130</sup> Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, ¶ 698 (Feb. 25, 2004) [hereinafter *Ntagerura* Trial Judgment] (emphasis added); see also Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, ¶ 2165 (Dec. 18, 2008) [hereinafter *Bagosora* Trial Judgment] (“For an enumerated crime under Article 3 to qualify as a [CAH], the Prosecution must prove that there was a widespread or systematic attack against the civilian population on national, political, ethnic, racial, or religious grounds.”). Similar language was used in Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T, ¶ 430 (Dec. 18, 2008) [hereinafter *Zigiranyirazo* Trial Judgment]; Prosecutor v. Bikindi, Case No. ICTR-01-72-T, ¶ 428 (Dec. 2, 2008) [hereinafter *Bikindi* Trial Judgment]; Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-T, ¶ 20 (Feb. 23, 2007) [hereinafter *Nzabirinda* Trial Judgment]; Prosecutor v. Rwamakuba, Case No. ICTR-98-44-C-T, ¶ 1 (Sept. 20, 2006) [hereinafter *Rwamakuba* Trial Judgment]; Prosecutor v. Bisengimana, Case No. ICTR-00-60-T, ¶ 41 (Apr. 13, 2006) [hereinafter *Bisengimana* Trial Judgment]; Prosecutor v. Simba, Case No. ICTR-01-76-T, ¶ 421 (Dec. 13, 2005) [hereinafter *Simba* Trial Judgment].

Also consider Prosecutor v. Seromba, Case No. ICTR-2001-66-I, ¶ 354 (Dec. 13, 2006) [hereinafter *Seromba* Trial Judgment]: “Article 3 of the Statute . . . contains a general element that is applicable to all the acts listed therein: perpetration of any of those acts by an accused will constitute a [CAH] only if it was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Similar language was used in Prosecutor v. Nchamihigo, Case No. ICTR-01-63-T, ¶ 340 (Nov. 12, 2008) [hereinafter *Nchamihigo* Trial Judgment]; Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, ¶ 525 (Apr. 28, 2005) [hereinafter *Muhimana* Trial Judgment]; Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, ¶ 48 (Mar. 14, 2005) [hereinafter *Rutaganira* Trial Judgment]; Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, ¶ 297 (Jun. 17, 2004) [hereinafter *Gacumbitsi* Trial Judgment]; and Prosecutor v. Mpambara, Case No. ICTR-01-65-T, ¶ 11 (Sept. 11, 2006) [hereinafter *Mpambara* Trial Judgment] (“First, the crime must have been committed as part of a widespread or systematic attack [ . . . ]. Second, the attack must be carried out against a civilian population on ‘national, political, ethnic, racial or religious grounds.’”). Similar language to that of *Mpambara* was used in Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, ¶ 657 (Jan. 22, 2004) [hereinafter *Kamuhanda* Trial Judgment]; and Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, ¶ 864 (Dec. 1, 2003) [hereinafter *Kajelijeli* Trial Judgment].

See also Prosecutor v. Muvunyi, Case No. ICTR-2000-55 A-T, ¶ 511 (Sept. 12, 2006) [hereinafter *Muvunyi* Trial Judgment]: “[u]nder Article 3 of the Statute, the definition of [CAH] consists of two layers. The first layer, (‘General Elements’) is to the effect that a [CAH] must be committed as part of a ‘widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds.’ The second layer lists six specific (‘underlying’) crimes, plus one residual category of ‘other



The ICTR's Article 3 requires as its basic element that the act must be committed as part of a *widespread or systematic attack*.<sup>131</sup> An *attack* means "a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of the Article," which set forth the specific acts.<sup>132</sup> The phrase *widespread or systematic* is intended as two disjunctive elements.<sup>133</sup> *Widespread* means "the large-scale nature of the attack and the number of victims [ . . . ]."<sup>134</sup> According to the Appeals Chamber in the *Nahimana* case, "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence." Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.<sup>135</sup>

As is the case in the jurisprudence of the ICTY, and in reliance on the mistaken Appellate judgment in the *Kunarac* case, a policy or plan has been deemed relevant to this determination instead of a requirement.<sup>136</sup>

Second, to establish CAH, the attack must be *directed against a civilian population*.<sup>137</sup> *Civilian population* has consistently been defined as "people who are not taking any

inhumane acts' which qualify as [CAH] when committed in the context of a widespread or systematic attack on a civilian population on any of the enumerated discriminatory grounds."

*But see* Prosecutor v. Akayesu, ICTR-96-4-T, ¶ 578 (Sept. 2, 1998) [hereinafter *Akayesu* Trial Judgment]:

[CAH] must be broken down into four essential elements, namely: "(i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (ii) the act must be committed as part of a wide spread [*sic*] or systematic attack; (iii) the act must be committed against members of the civilian population; (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds." This language was affirmed in *Semanza* v. Prosecutor, Case No. ICTR-97-20-A, ¶ 268 (May 20, 2005) [hereinafter *Semanza* Appeals Judgment].

<sup>131</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-T, ¶ 326 (May 15, 2003) [hereinafter *Semanza* Trial Judgment].

<sup>132</sup> *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, ¶ 918 (Nov. 28, 2007) [hereinafter *Nahimana et al.* Appeals Judgment]; *see also* *Bagosora et al.* Trial Judgment, *supra* note 130, ¶ 2165.

<sup>133</sup> *Nahimana et al.* Appeals Judgment, *supra* note 132, ¶ 920. ("It is well established that the attack must be widespread or systematic. In particular, the Appeals Chamber has held that the conjunction 'et' in the French version of Article 3 of the Statute is a translation error." (emphasis in original). Similar language was used in *Kahumanda* Trial Judgment, *supra* note 130, ¶¶ 662–63 (similar language); *see also* *Kajelijeli* Trial Judgment, *supra* note 130, ¶¶ 869–70.

<sup>134</sup> *Nahimana et al.* Appeals Judgment, *supra* note 132, ¶ 920; *Bagosora et al.* Trial Judgment, *supra* note 130, ¶ 2165.

<sup>135</sup> *Nahimana et al.* Appeals Judgment, *supra* note 132, ¶ 920; *Bagosora et al.* Trial Judgment, *supra* note 130, ¶ 2165.

<sup>136</sup> *Semanza* Appeals Judgment, *supra* note 130, ¶ 149 ("while the existence of a plan can be evidentially relevant, it is not a separate legal element" of a CAH). Similar language was used in *Nahimana et al.* Appeals Judgment, *supra* note 132, ¶ 922; *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, ¶ 84 (Jul. 7, 2006) [hereinafter *Gacumbitsi* Appeals Judgment]; *Seromba* Trial Judgment, *supra* note 130, ¶ 356; *Muhimana* Trial Judgment, *supra* note 130, ¶ 527; *Semanza* Trial Judgment, *supra* note 131, ¶ 329.

*But see* *Akayesu* Trial Judgment, *supra* note 130, ¶ 580: "There must however be some kind of preconceived plan or policy." *See also* Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, ¶ 77 (Jun. 7, 2001) [hereinafter *Bagilishema* Trial Judgment]; Prosecutor v. Musema, Case No. ICTR-96-13-T, ¶ 204 (Jan. 27, 2000) [hereinafter *Musema* Trial Judgment]; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, ¶ 69 (Dec. 6, 1999) [hereinafter *Rutaganda* Trial Judgment]; Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, ¶¶ 123–24, 581 (May 21, 1999) [hereinafter *Kayishema & Ruzindana* Trial Judgment].

<sup>137</sup> *Nzabirinda* Trial Judgment, *supra* note 130, ¶ 22. The same language was used in *Seromba* Trial Judgment, *supra* note 130, ¶ 358; *Muhimana* Trial Judgment, *supra* note 130, ¶ 528; *Gacumbitsi* Trial Judgment, *supra* note 130, ¶ 300.

active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.”<sup>138</sup>

The third element of CAH requires the attack to be *committed on discriminatory grounds*. The ICTR concluded the element *discriminatory grounds* was considered to be “jurisdictional in nature, limiting the jurisdiction of the Tribunal to crimes committed on ‘national, political, ethnic, racial or religious grounds.’”<sup>139</sup> This requirement describes the nature of the attack rather than the *mens rea* of the accused or perpetrator.<sup>140</sup>

The fourth general element of CAH at the ICTR is the *mens rea*, which requires “the accused must have *acted with knowledge of the broader context of the attack, and with knowledge that his act formed part of the widespread and systematic attack against the civilian population.*”<sup>141</sup>

Thus, both the ICTY and ICTR have ignored the state policy requirement for CAH. Instead, state policy has been relegated to merely evidence of “systematicity.” Unfortunately, in a number of decisions, the ICTY, ICTR, and subsequently the Special Court for Sierra Leone have recycled one another’s jurisprudence as authoritative on this issue. As a result, the view has that state policy is not a required element to establish CAH has gained support for its cause. However, this view misunderstands the nature of the crime, which requires the state policy element as discussed in [Chapter 1](#) and the various citations contained therein.

CAH prosecutions of the ICTY and ICTR are, as of November 2010,

## ICTY

**Indicted for CAH:** 109 (out of 161 individuals)

*Specific Acts*

*Murder:* 97

*Other inhuman acts:* 91

*Forced transfer:* 45

*Conditions of confinement:* 12

*Harassment:* 8

*Beatings:* 7

*“Serious physical and mental injury”:* 5

*Sexual assault and rape:* 5

*Cruel treatment:* 4

*Abduction:* 3

*Forced labor:* 3

*Imprisonment:* 3

<sup>138</sup> *Akayesu* Trial Judgment, *supra* note 130, ¶ 582; *Bisengimana* Trial Judgment, *supra* note 130, ¶ 48; *Seromba* Trial Judgment, *supra* note 130, ¶ 358; *Muvunyi* Trial Judgment, *supra* note 130, ¶ 513; *Kahumanda* Trial Judgment, *supra* note 130, ¶ 667; *Kajelijeli* Trial Judgment, *supra* note 130, ¶¶ 873–74; *Musema* Trial Judgment, *supra* note 130, ¶ 207; *Rutaganda* Trial Judgment, *supra* note 136, ¶ 72.

<sup>139</sup> *Nzabirinda* Trial Judgment, *supra* note 130, ¶ 23; *Bisengimana* Trial Judgment, *supra* note 130, ¶ 54; *Gacumbitsi* Trial Judgment, *supra* note 130, ¶ 301.

<sup>140</sup> *Bagosora et al.* Trial Judgment, *supra* note 130, ¶ 2166; *Seromba* Trial Judgment, *supra* note 130, ¶ 359.

<sup>141</sup> *Gacumbitsi* Appeals Judgment, *supra* note 136, ¶ 86 (emphasis added); *Nzabirinda* Trial Judgment, *supra* note 130, ¶ 24; *Seromba* Trial Judgment, *supra* note 130, ¶ 360; *Bisengimana* Trial Judgment, *supra* note 130, ¶ 57; *Gacumbitsi* Trial Judgment, *supra* note 130, ¶ 302; *Kahumanda* Trial Judgment, *supra* note 130, ¶ 675–76; *Kajelijeli* Trial Judgment, *supra* note 130, ¶¶ 880–81.



*Attempted murder:* 1  
*Indiscriminate fire:* 1  
*Injuring and wounding civilians:* 1  
*Sniping/shelling:* 1

*Persecution:* 85  
*Deportation:* 45  
*Torture:* 35  
*Extermination:* 31  
*Rape:* 21  
*Imprisonment:* 18  
*Enslavement:* 6

**Ongoing:** 26 (37 including appeals)  
**Deceased:** 8  
**At Large (and charged with CAH):** 2  
**Transferred (and charged with CAH):** 12

**Convicted of CAH:** 60

*Specific Acts*

*Persecution:* 42  
*Other inhumane acts:* 23  
*Forcible transfer:* 13  
*Beatings:* 2  
*Cruel treatment:* 2  
*Attempted murder:* 1

*Murder:* 21  
*Deportation:* 8  
*Torture:* 8  
*Extermination:* 7  
*Rape:* 5  
*Imprisonment:* 3  
*Enslavement:* 2

**Sentences (years)**

1–5: 5  
 6–10: 9  
 11–15: 13  
 16–20: 14  
 21–25: 5  
 26–30: 4  
 31–35: 3  
 36–40: 2  
*Life:* 4

**ICTR**

**Indicted for CAH:** 84 (out of 90 persons)

*Specific Acts*

*Extermination:* 72  
*Rape:* 56

*Murder*: 49

*Other inhumane acts*: 33

*Persecution*: 20

*Torture*: 4

*Imprisonment*: 2

**Ongoing**: 22 (29 including appeals)

**Deceased**: 1

**At Large**: 9

**Transferred (but charged with CAH)**: 2

**Convicted of CAH**: 34 (including 8 on appeal)

*Specific Acts*

*Extermination*: 27

*Murder*: 19

*Other inhumane acts*: 6

*Persecution*: 6

*Rape*: 6

*Torture*: 4

*Imprisonment*: 1

**Sentences (years)**

1–5: 0

6–10: 4

11–15: 7

16–20: 0

21–25: 6

26–30: 1

31–35: 2

36–40: 1

41–45: 1

*Life*: 16

#### §4. The Rome Statute of the ICC

By 1998, the discussions of both the 1995 *Ad Hoc* Committee on the Establishment of an International Criminal Court and the 1996 and 1997–98 Preparatory Committee reduced the options for a definition of CAH to the following text with optional brackets.<sup>142</sup> The Final Report of the PrepCom in Article 5 – Crimes against humanity states:

1. For the purpose of the present Statute, a crime against humanity means any of the following acts when committed [as part of a widespread [and] [or] systematic commission of such acts against any population]: [as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale]

<sup>142</sup> See generally WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* (2010); OTTO TRIFFTERER, *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVERS’ NOTES, ARTICLE BY ARTICLE* (2d ed., 2008); BASSIOUNI, 1–3 *THE LEGISLATIVE HISTORY OF THE ICC*, *supra* note 8.

[in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]:**N.B. In case the second alternative is retained, its relationship with paragraph 1(h) should be considered.**

- (a) murder;
  - (b) extermination;
  - (c) enslavement;
  - (d) deportation or forcible transfer of population;
  - (e) [detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];
  - (f) torture;
  - (g) rape or other sexual abuse [of comparable gravity,] or enforced prostitution;
  - (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds [and in connection with other crimes within the jurisdiction of the Court];
  - (i) enforced disappearance of persons;
  - (j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
- (a) extermination includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population;
  - (b) “deportation or forcible transfer of population” means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification];
  - (c) [“torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]] [“torture” as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984];
  - (d) persecution means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds];
  - (e) [“enforced disappearance of persons” means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the 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, thereby placing them outside the protection of the law]<sup>143</sup>

<sup>143</sup> *Final Report of the Preparatory Committee on the Establishment of an International Criminal Court* art. 5, U.N. Doc. A/CONF.183/2 (April 14, 1998); see also INTERNATIONAL CRIMINAL COURT: COMPILATION OF UNITED NATIONS DOCUMENTS AND DRAFT ICC STATUTE BEFORE THE DIPLOMATIC CONFERENCE (M. Cherif Bassiouni ed., 1998).

The adopted statute at the Diplomatic Conference states in Article 7,

### Article 7

#### *Crimes against humanity*

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
  - (a) Murder;
  - (b) Extermination;
  - (c) Enslavement;
  - (d) Deportation or forcible transfer of population;
  - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
  - (f) Torture;
  - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
  - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
  - (i) Enforced disappearance of persons;
  - (j) The crime of apartheid;
  - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
  - (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
  - (b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
  - (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
  - (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
  - (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody 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;
  - (f) “Forced pregnancy” means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any

population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

- (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
  - (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, 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;
  - (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.<sup>144</sup>

Article 7 is expansive regarding the specific crimes that constitute CAH and adds some much needed specificity. Almost all of these specific crimes in Article 7 (a) through (k) are contained in the domestic criminal laws of all legal systems, with possible exceptions, namely (e), (h), (i), (k), and parts of (g). These acts referred to in (e), (h), (i), (k) and (g) are prohibited under different international law norms, though not necessarily criminalized in these norms, and also not included in many domestic criminal laws in the manner in which they are discussed in these subparagraphs. However, because the Rome Statute applies to its State Parties by virtue of a treaty, these provisions are the law applicable to the contracting parties. But this does not mean that everything about Article 7 reflects customary international law, nor does the fact that there are 113 States Parties mean the definition of CAH set forth in Article 7 has been converted into customary international law. More important is the negative inference that can be drawn from the fact that less than fifteen of the State Parties have developed national implementing legislation.<sup>145</sup> It is estimated that fifty-five countries have national legislation criminalizing CAH, and these provisions do not all follow the same formulation as Article 7; there is some variance in elements even among those countries that have used Article 7 as a foundation.<sup>146</sup> Most states are reluctant to include CAH as a specific crime in their criminal laws because of political considerations, namely that the crime essentially concerns the abuse of power by state actors.<sup>147</sup>

<sup>144</sup> Rome Statute of the International Criminal Court (ICC) art. 7, 17 July 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 [hereinafter ICC Statute].

<sup>145</sup> According to the Coalition for the ICC, approximately fifty-six states have adopted partial or full implementation legislation on cooperation and/or complementarity with the Court, and a further forty-three have advanced drafts in circulation, with a number of others likely to produce drafts in the near future. However, that list may be inaccurate in view of different national legislative standards.

<sup>146</sup> See *infra* ch. 9.

<sup>147</sup> See *infra* ch. 1, §§1, 2, and ch. 2.

The additions in the expansive definition of CAH contained in Article 7 are welcome and represent the unfortunate experiences of the last fifty years in the course of conflicts of an international and noninternational character, internal conflicts, and tyrannical regime victimization. The specific crimes listed from (a) through (k) are subject to interpretation and application in accordance with certain norms on responsibility and defenses, which are absent from Article 7. Moreover, the jurisprudence of the ICTY and ICTR, as discussed in Chapters 6 through 8, has been inconsistent and confusing with respect to the “general part” of criminal law.

Some issues concerning Article 7:<sup>148</sup>

Paragraphs 1 and 2 have to be read together because the jurisdictional elements are contained in both. They consist in the combination of:

- (1) An attack upon a civilian population, the attack being either widespread or systematic, representing state policy, or the policy of an organization within the state. By implication, this includes non-state actors;
- (2) The conduct by those individuals engaged in it must reflect “knowledge,” though of what is unspecified. Presumably, it means knowledge of the overall nature of the plan or policy to engage in “widespread or systematic” conduct against a civilian population. The latter is unspecified as to the size of group;
- (3) By implication, the “widespread or systematic” attack is not limited to a singular attack, but includes the plural. Moreover, by implication, the requirement of “widespread or systematic” includes an element of substantiality of the harm produced;
- (4) The specific acts listed in paragraph 2 are not exhaustive since subparagraph (k) refers to “other inhumane acts,” which permits analogy based on the Roman Law rule of interpretation *ejusdem generis*. The use of analogy in the interpretation of criminal provisions is deemed violative of the principles of legality in many legal systems, particularly in positivistic legal systems, as discussed in Chapter 5;
- (5) There is nothing in Article 7 that refers to what penalists call the “general part,” but the Rome Statute contains such a part in Article 22 to 33. Admittedly, the contents of the Rome Statute on principles and forms of criminal responsibility are not as comprehensive as those contained in most modern criminal codes. The statute also provides for defenses and exonerations.

Because of some similarities between Article 7 and Articles 5 and 3 of the ICTY and ICTR statutes, the ICC may opt to rely upon the jurisprudence of these two tribunals in its future decisions. But because of the differences in these statutes’ normative provisions and the uncertainty of customary international law as to some of the legal issues pertaining to CAH, reliance by the ICC on the jurisprudence of the *ad hoc* should proceed with caution. Moreover, because the Rome Statute is a treaty, the jurisprudence of the ICC should account for the intent of the parties as reflected in the legislative history.<sup>149</sup>

<sup>148</sup> Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 A.J.I.L. 43 (1999); TRIFFTERER, *supra* note 142, at 159–273; ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* (2001); ROY S. LEE, *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations and Results* (1999); Mary McAuliffe de Guzman, *The Roam from Rome: The Developing Law of Crimes Against Humanity*, 22 HUMAN RIGHTS QUARTERLY 335 (2000).

<sup>149</sup> BASSIOUNI, 1–3 THE LEGISLATIVE HISTORY OF THE ICC, *supra* note 8.

As stated in the Introduction, the Diplomatic Conference's Drafting Committee did not draft Article 7.<sup>150</sup> Instead, it was the product of diplomatic negotiations based on the text presented to the Diplomatic Conference by the Preparatory Committee.<sup>151</sup> By definition, diplomatic negotiations in Rome aimed at reaching a consensus text are seldom in full compliance with legal techniques and legal requirements. The result was what this writer referred to at the Diplomatic Conference's Drafting Committee (which he chaired) as the "diplomatic mule."

This may help explain why Article 7, and for that matter other provisions of the Rome Statute, are somewhat troublesome to sound legal drafting and judgment. But diplomats who negotiate these treaties rely on subsequent corrective mechanisms, whether legislative or judicial. Thus, where the provision of an international treaty needs to be incorporated in domestic legislation, the international drafters assume that the national legislators will conform the internationally drafted text to what national legislation requires. Similarly, whenever the internationally drafted text is to be interpreted by judges of an international tribunal, it is assumed that their judicial skills will do that what is necessary to give the text the clarity and specificity required. However, this approach requires international judges to possess the knowledge and skills required from the complex discipline of ICL, and that is not necessarily the case when international judges are selected through a political process, namely election by the General Assembly based on nominations by governments. The ICC judicial elections have demonstrated that few of the judges have the knowledge and skills required of ICL. Thus, as the common saying in the United States goes: the jury is still out on how the ICC judges will deal with Article 7.

The Elements of Crimes, adopted in 2002, assist the Court in interpreting the statute and further developed the definition of CAH in the Rome Statute of the ICC.<sup>152</sup> The Elements "clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population."<sup>153</sup> The Elements further support the requirement of state policy. The Elements state, "It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population."<sup>154</sup> The Elements then goes on to describe the elements necessary for the specifically enumerated crimes in Article 7 of the ICC Statute. However, it does not provide much further guidance on the *chapeau* elements of CAH.

## §5. The Status of CAH Prosecutions before the ICC

At the time of the publication of this book, the ICC has not yet completed its first trial. However, each of the situations before the Court involves the alleged commission of CAH. Thus, future decisions will no doubt lead to the consideration of CAH.

The Situation in the Democratic Republic of Congo (DR Congo), where, for years, armies and militias from several African countries fought over its mineral wealth and for political control, was referred to the ICC in January 2004.<sup>155</sup> The ICC's first trial

<sup>150</sup> BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE ICC, *supra* note 8, at 150–52.

<sup>151</sup> *Id.*

<sup>152</sup> Elements of Crimes, ICC-ASP/1/3(part II-B) (September 9, 2002).

<sup>153</sup> *Id.* at 5.

<sup>154</sup> *Id.*

<sup>155</sup> Office of the Prosecutor, Prosecutor receives referral of the situation in the Democratic Republic of Congo, ICC-OTP-20040419-50 (Apr. 19, 2004).



commenced from this situation against Thomas Lubanga Dyilo on January 26, 2009. Charges were confirmed against Lubanga, the Congolese warlord who is the alleged founder of *Union des Patriotes Congolais* (UPC) and the *Forces patriotiques pour la libération du Congo* (FPLC), including several counts of war crimes, including enlisting and conscripting child soldiers and using them to participate actively in hostilities.<sup>156</sup> He is not charged with CAH. The trial of two other Congolese warlords, Germain Katanga (a.k.a. Simba) and Mathieu Ngudjolo Chui, began in November 2009, and is ongoing. Katanga and Chui are charged with CAH including murder, rape, and sexual slavery.<sup>157</sup> A warrant of arrest has also been issued for Bosco Ntaganda, the alleged Deputy Chief of the General Staff of the FPLC and *Chief of Staff of the Congrès national pour la défense du peuple* (CNDP), who remains at large.<sup>158</sup> On September 28, 2010, another warrant for arrest was issued under seal for Callixte Mbarushimana, the alleged Executive Secretary of the Rwandan rebel group *Forces Démocratiques pour la Libération du Rwanda* (FDLR), who is charged with CAH in the form of murder, torture, rape, persecution, and other inhumane acts<sup>159</sup> against civilians, in particular large-scale sexual violence. These crimes allegedly took place as the FDLR fought to gain power in Rwanda from its base in Congo. It is further alleged that the FDLR attacked civilians in the Kivu region with the goal of blackmailing the international community in order to gain power.<sup>160</sup> Mbarushimana, a Hutu, was in charge of the FDLR's campaign for recognition by foreign governments as a legitimate Rwandan political group.

A third case against a Congolese warlord arose from the Situation in the Central African Republic, which was referred by that country in December 2004. Jean-Pierre Bemba Gombo, the alleged President and Commander-in-Chief of the *Mouvement de libération du Congo* (MLB),<sup>161</sup> faces charges including two counts of CAH, including rape and murder committed between 2002 and 2003.<sup>162</sup> On June 15, 2009, the Pre-Trial Chamber confirmed charges and referred the case to the Trial Chamber, which has not yet set a trial date.

All of those charged in the Situation in Uganda remain at large. It is alleged that since early 2008, the Lord's Resistance Army (LRA) has killed more than 1,500, abducted more than 2,250, and displaced more than 300,000 in the DR Congo. In 2009, more than 80,000 individuals were displaced, and an estimated 250 were killed by the LRA in Southern

<sup>156</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803, Decision on the confirmation of charges (Jan. 29, 2007).

<sup>157</sup> Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the confirmation of charges (Sept. 30, 2008). Katanga and Chui are also charged with war crimes, including using child soldiers, directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities, wilful killings, destruction of property, pillaging, and sexual slavery and rape.

<sup>158</sup> Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2, Warrant of arrest issued by Pre-Trial Chamber I (Aug. 22, 2006).

<sup>159</sup> Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Warrant for Arrest (Sept. 28, 2010).

<sup>160</sup> *France Arrests Rwandan over Atrocities in Congo*, N.Y. TIMES (Oct. 11, 2010), <http://www.nytimes.com/2010/10/12/world/africa/12congo.html>.

<sup>161</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Warrant of arrest for Jean-Pierre Bemba Gombo replacing the warrant of arrest issued on 23 March 2008 (Jun. 10, 2008).

<sup>162</sup> Gombo also faces three counts of war crimes under Article 8, including murder, rape, and pillaging. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the confirmation of charges (Jun. 15, 2009).

Sudan and the Central African Republic. Joseph Kony, the alleged Commander-in-Chief of the LRA, is charged with committing CAH, including sexual enslavement, rape, enslavement, murder, and inhumane acts.<sup>163</sup> Vincent Otti, alleged Vice-Chairman and Second-in-Command of the LRA, is charged with CAH, including sexual enslavement, enslavement, murder, and inhumane acts.<sup>164</sup> Okot Odhiambo, alleged Deputy Army Commander and Brigade Commander of the Trinkle and Stockree Brigades of the LRA, is charged with CAH, including murder and enslavement.<sup>165</sup> Dominic Ongwen, alleged Brigade Commander of the Sinia Brigade of the LRA, is charged with CAH, including murder and enslavement.<sup>166</sup> The proceedings against Raska Lukwiya, the alleged Deputy Army Commander of the LRA, terminated when the accused died on August 12, 2006.<sup>167</sup>

Three of the six accused from the Situation in Darfur, Sudan remain at large. The UN Security Council referred the Situation in March 2005, and the Office of the Prosecutor opened its investigation the following June. Ahmad Muhammad Harun ("Ahmad Harun"), former Minister of State for the Interior of the Government of Sudan and Minister of State for Humanitarian Affairs for Sudan, and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), the alleged leader of the Janjaweed militia, remain at large.<sup>168</sup> Both are charged with CAH, including persecution, murder, forcible transfer, rape, inhumane acts, imprisonment as a severe deprivation of liberty, and torture.<sup>169</sup>

The ICC also issued a warrant of arrest for Sudanese President Omar Hassan Ahmad Al Bashir on March 4, 2009.<sup>170</sup> President Al Bashir is charged with CAH, including murder, forcible transfer, torture, and rape.<sup>171</sup> On February 3, 2010, the Appeals Chamber ruled that it was a legal error to reject the charge for genocide.<sup>172</sup> As a result, on July 12, 2010, Pre-Trial Chamber I issued a second warrant of arrest against Al Bashir for three counts of genocide committed against the Fur, Masalit, and Zaghawa ethnic groups.<sup>173</sup>

<sup>163</sup> Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Case No. ICC-02/04-01/05-53, Warrant of arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005 (Sept. 27, 2005) [hereinafter *Kony Arrest Warrant*].

<sup>164</sup> Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Case No. ICC-02/04-01/05-54, Warrant of arrest for Vincent Otti (Jul. 8, 2005) [hereinafter *Otti Arrest Warrant*]. Otti was allegedly killed in 2007 on Kony's order.

<sup>165</sup> Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Case No. ICC-02/04-01/05-56, Warrant of arrest for Okot Odhiambo (Jul. 8, 2005) [hereinafter *Odhiambo Arrest Warrant*].

<sup>166</sup> Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Case No. ICC-02/04-01/05-57, Warrant of arrest for Dominic Ongwen (Jul. 8, 2005).

<sup>167</sup> Prosecutor v. Kony, Otti, Odhiambo and Ongwen, Decision of the Pre-Trial Chamber II, Case No. ICC-02/04-01/05-248 (Jul. 11, 2007).

<sup>168</sup> Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07 [hereinafter *The Ahmad Harun and Ali Kushayb case*].

<sup>169</sup> Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. 02/05-01/07-2, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007); and Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07-3, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007).

<sup>170</sup> Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (March 4, 2009) [hereinafter *Al Bashir Arrest Warrant*].

<sup>171</sup> *Id.*

<sup>172</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-73, Judgment on the Appeal of the Prosecutor against the Decision on the Prosecutor's Appeal for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Feb. 3, 2010).

<sup>173</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Jul. 12, 2010); Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No.

Bahr Idriss Abu Garda, Chairman and General Coordinator of Military Operations of the United Resistance Front, is charged with war crimes relating to a 2007 attack that killed twelve African Union peacekeepers.<sup>174</sup> He is the first person to appear voluntarily before the ICC, and the first individual prosecution in connection with the war in Darfur. He initially appeared on May 18, 2009 and was allowed to leave the Netherlands. Thus far, charges have not been confirmed against him. Two other defendants, Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jarmus, appeared before the ICC for war crimes committed in the 2007 attack against African Union peacekeepers in Haskanita.<sup>175</sup> Neither is charged with CAH.

On March 31, 2010, the Pre-Trial Chamber authorized the Prosecutor to begin an investigation of the alleged CAH committed during the events taking place in Kenya between June 1, 2005 and November 26, 2009.<sup>176</sup> It is estimated that 1,220 persons were killed; nearly 1,000 were raped, with thousands of unreported rapes; 350,000 people forcibly displaced; and 3,561 injured as part of a widespread and systematic attack against civilians by gangs that operated with support from the main political parties.<sup>177</sup> As pointed out by other scholars, these nonstate actors groups were not “state-like” entities or entities within the state apparatus, such as the military, police, or intelligence services.<sup>178</sup> Nevertheless, the Pre-Trial Chamber ruled that the groups behind the post-election violence in Kenya were still within the meaning of CAH set forth in Article 7 of the Rome Statute.<sup>179</sup> The Chamber set forth its broad interpretation of organization as follows:

Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values.

[ . . . ]

In the view of the Chamber, the determination of whether a given group qualifies as an organization under the Statute must be made on a case-by-case basis. In making this determination, the Chamber may take into account a number of considerations, inter alia: (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

ICC-02/05-01/09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest (Jul. 12, 2010).

<sup>174</sup> Prosecutor v. Bahr Idriss Abu Garda, ICC Case No. ICC-02/05-02/09.

<sup>175</sup> Prosecutor v. Abdallah Banda Abaker Nourain and Saleh Mohammed Jerbo Jarmus, Case No. ICC-02/05-03/09.

<sup>176</sup> See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010); Office of the Prosecutor, Request for Authorisation of an Investigation Pursuant to Article 15 (Nov. 26, 2009).

<sup>177</sup> Request for Authorisation of Investigation Pursuant to Article 15, *supra* note 176, ¶¶ 56, 67–68.

<sup>178</sup> See Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 LEIDEN J. INT’L L. 855 (2010).

<sup>179</sup> Kenya Decision, *supra* note 178, ¶¶ 115–128. But see *ibid.*, Dissenting Opinion of Judge Hans-Peter Kaul.

or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfills some or all of the aforementioned 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.<sup>180</sup>

This decision is a cause for concern for the development of CAH at the ICC. What troubles this writer is the fact that the perceived (and very real) need to address nonstate actors groups who commit CAH-type crimes has distorted the intention of the policy requirement by broadening the scope of the state or organizational policy requirement. Despite the good intentions of those who seek to broaden the scope of CAH, it is the opinion of this writer that the better way to achieve the desired result is for the Assembly of State Parties to adopt a resolution declaring that the parties intended to interpret this provision in the manner set forth by the Pre-Trial Chamber in the *Kenya* Decision. At the very least, this approach would not offend the Vienna Convention on the Law of Treaties. It would also be the preferable approach as opposed to relying on judicial opinions or the writings of experts to achieve this goal. The status of CAH prosecution before the ICC is as follows:

#### **As of November 2010**

**Indicted for CAH:** 12 (of 17 persons)

*Specific Acts*

*Murder:* 11

*Rape:* 8

*Other inhumane acts:* 6

“*Serious bodily injury or suffering*”: 5

*Enslavement:* 5

*Sexual slavery:* 4

*Torture:* 4

*Forcible transfer:* 3

*Persecution:* 3

*Imprisonment/severe deprivation of liberty:* 2

*Extermination:* 1

**Ongoing:** 2

**Deceased:** 2

**At Large (and charged with CAH):** 7

**Convicted of CAH:** 0

### **§6. Other Normative Proscriptions Applicable to the Same Protected Human Interests**

There are two types of normative prosecutions and proscriptions that protect human interests included in CAH. These norms are part of two distinct legal regimes. The first is ICL and the second is IHRL. The essential distinction between these two regimes is that ICL is proscriptive, whereas IHRL is prescriptive. In other words, ICL criminalizes,

<sup>180</sup> *Kenya* Decision, *supra* note 178, at ¶¶ 90, 93 (internal citations omitted).

whereas IHRL does not. One of the consequences of this essential distinction is that ICL is at least theoretically bound by principles of legality,<sup>181</sup> which require its terminology to be more specific, whereas international human rights law, which is not bound by such a requirement, tends to be more general. Following is a description of these partially overlapping norms.

### §6.1 1948 *Genocide Convention*

The Genocide Convention of 1948 also covers certain manifestations of CAH as defined in the London Charter, but only with respect to certain specific acts accompanied with a specific intent and against specifically designated groups.<sup>182</sup> Thus, it excludes all other acts and groups not specified in the Convention.

Article II of that convention states:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group, conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>183</sup>

The definition of genocide in Article II clearly excludes situations where the required specific intent does not exist. It also excludes other groups from the protected categories not specifically identified, such as social or political groups. Thus, these groups are not protected by the Convention. One must ask if it is logical to have a legal scheme whereby the intentional killing of a single person can be genocide and the killing of millions of persons without intent to destroy the protected group in whole or in part is not covered by the same convention, or at least by another one. Furthermore, the Genocide Convention covers only “national, ethnical or religious” groups to the exclusion of all other groups, like social or political ones. Thus, the Genocide Convention does not protect all civilian populations. Consequently, the Genocide Convention cannot be said to have replaced CAH because it does not provide the same inclusive definition of protected persons and prohibited acts provided under Article 6(c) of the London Charter and other post-Charter formulations.

<sup>181</sup> See *infra* ch. 5, §1.

<sup>182</sup> See generally Matthew Lippman, *Genocide*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 403 (M. Cherif Bassiouni ed., 3d rev ed. 2008); see also Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B. U. INT’L L.J. 1 (1985); Raphaël Lemkin, *Le Genocide*, 17 RIDP 25 (1956); CENTURY OF GENOCIDE (Samuel Totten et al. eds., 1997); LEO KUPER, GENOCIDE (1981). For the overlap between genocide and CAH, see M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 493 (M. Cherif Bassiouni ed., 3d rev ed. 2008); and SCHABAS, *supra* note 83.

<sup>183</sup> Genocide Convention art. II, *supra* note 10.

### §6.2. *The 1949 Geneva Conventions and 1977 Protocols*

The 1949 Geneva Conventions, which form a part of customary international law<sup>184</sup> and therefore also bind non-State Parties, extend their prohibitions to acts that are also covered by CAH.<sup>185</sup> The 1949 Geneva Conventions and the two 1977 Additional Protocols incorporate certain components of CAH among the prohibited activities of combatants in the context of a conflict, whether of an international or noninternational character. For example, they do not fully include the protection of all civilians within the national jurisdiction of a state that is not engaged in an armed conflict, nor do they apply to tyrannical regime victimization.

As stated above, the provisions of the four Geneva Conventions and Protocols I and II apply only to certain contexts and to certain protected persons. They do not extend to all civilian populations under all circumstances. Thus, purely internal conflicts and tyrannical regime victimization are not covered by these instruments or by the customary law of armed conflicts, whereas, CAH extends to war and peace, to combatants and noncombatants, and to any situation in which the victimization satisfies the elements of the applicable definition.

### §6.3. *1973 Apartheid Convention*

The *Apartheid* Convention of 1973, in its Preamble and in Article I, refers to the practices defined in Article II of the Convention as a CAH:

The States parties to the present Convention, [ . . . ]

Observing that, in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, inhuman acts resulting from the policy of *apartheid* are qualified as crimes against humanity,

Observing that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of *apartheid* are condemned as a crime against humanity,<sup>186</sup>

and in Article I, the Convention provides:

The States parties to the present Convention declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.<sup>187</sup>

The Advisory Opinion of the ICJ in the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding*

<sup>184</sup> As of 2010, 194 states ratified them. See INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 416–45 (M. Cherif Bassiouni ed., 1997) [hereinafter BASSIOUNI, ICL CONVENTIONS].

<sup>185</sup> See Bassiouni, Legislative History of the ICC, *supra* note 8.

<sup>186</sup> International Convention on the Suppression and Punishment of the Crime of *Apartheid* pmbl, November 30, 1973, U.N. G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973) [hereinafter *Apartheid* Convention].

<sup>187</sup> *Id.* at art. I.

Security Council Resolution 276 (1970)<sup>188</sup> referred to CAH in the context of *Apartheid* as such:

[*Apartheid* violates] the fundamental laws of equality and liberty, and nearly all other human rights, to war crimes and *crimes against humanity* when, in the International Convention of 26 November 1968, it declared them liable to prosecution without statutory limitation. Thus, in the eyes of the international community, violations of human rights by the practice of *apartheid*, itself a violation of equality and of the rights which are its corollaries, are no less punishable than the *crimes against humanity* and war crimes upon which the Charter of the Nuremberg Tribunal visited sanctions. General Assembly resolution 2074 (XX) even condemned *apartheid* as constituting “a crime against humanity.”<sup>189</sup>

But the specifics of the crime of *apartheid*, as stated in Article II of the *Apartheid* Convention are stated as follows:

For the purpose of the present Convention, the term “the crime of *apartheid*,” which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts 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:

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:
  - (i) By murder of members of a racial group or groups;
  - (ii) By the infliction upon the member of a racial group or groups of serious bodily or mental harm, by infringement of their freedom or dignity, or by subjecting them to torture or to cruel inhuman or degrading treatment or punishment.
  - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to educate, the right to leave and return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association;
- (d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

<sup>188</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

<sup>189</sup> *Id.* at 79 (separate opinion of Judge Ammoun) (emphasis added).



- (f) Persecution of organization and persons by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.<sup>190</sup>

These specific prohibitions apply to situations where the policies and practices derive from a premise of racial discrimination for the purpose of maintaining the political supremacy of a given racial group. Thus, what Article 6(c) of the London Charter refers to as “murder, extermination, enslavement, deportation and other inhumane acts” that are not committed for the purpose of political supremacy by a given racial group against another one are not covered under the *Apartheid* Convention.<sup>191</sup> The same reasoning applies to all other post-Charter formulations of CAH.

#### §6.4. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The convention has made torture an international crime, whether in time of peace or in time of war.<sup>192</sup> In the latter context it overlaps with the “grave breaches” provisions of the Geneva Conventions and the Additional Protocols.<sup>193</sup> The 1984 Torture Convention applies to States Parties and Non-State Parties because it is also prohibited under customary international law and under the peremptory norms of *jus cogens*.<sup>194</sup> Torture, as defined in the convention, applies in a more limited way than “other inhumane acts” in the various formulations of CAH.

<sup>190</sup> *Apartheid* Convention, *supra* note 186.

<sup>191</sup> Regrettably, it should be noted that criticism of *apartheid* seemed to be directed exclusively at the Republic of South Africa, without regard to the universality of application of the prohibited practices. See Bassiouni & Derby, *supra* note 57; see *Study on Ways and Means of Ensuring the Implementation of International Instruments Such as the International Convention on the Suppression of Apartheid, Including the Establishment of the International Jurisdiction Envisioned by Said Convention*, E/CN.4/AC.22/Crp. 19, 25 July 1980.

<sup>192</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, *opened for signature* 4 February 1985, 23 I.L.M. 1027, (Dec. 10, 1984), which contains the substantive changes from the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 [hereinafter Torture Convention]; *Draft Convention for the Prevention and Suppression of Torture*, U.N. ECOSOC Doc. E/CN.4/NGO213 (1978) (submitted by the International Association of Penal Law to the 1978 meeting of the U.N. Commission on Human Rights); see also JOSÉ LUIS DE LA CUESTA ARZAMENDI, *EL DELITO DE TORTURA* (1990); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (1988); NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987); Daniel Derby, *The International Prohibition of Torture*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* 621 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); M. Cherif Bassiouni, *The Need for an International Convention for the Prevention and Suppression of Torture*, 48 RIDP 17 (1977); *Draft Convention for the Prevention and Suppression of Torture*, 48 RIDP 265 (1977).

<sup>193</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 75 U.N.T.S. 31, 6 U.S.T. 3114; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85, 6 U.S.T. 3217; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135, 6 U.S.T. 3316; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>194</sup> For an assertion that torture is proscribed by customary international law under a U.S. legal interpretation, see *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see also Bassiouni, *supra* note 96.

### §6.5. *International Convention for the Protection of All Persons from Enforced Disappearance*

A 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances preceded the treaty on enforced disappearances.<sup>195</sup> Article 18(1) of that declaration provides, “Persons who have or are alleged to have committed [the offense of enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.” The first draft of the International Convention on the Protection of All Persons from Enforced Disappearance was prepared by a working group of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities’ Sub-Commission on the Administration of Justice in 1998. It included a similar provision:

The perpetrators or suspected perpetrators of and other participants in the offense of forced disappearance [...] shall not benefit from any amnesty measure or similar measures prior to their trial and, where applicable, conviction that would have the effect of exempting them from any criminal action or penalty.<sup>196</sup>

As the drafting process progressed, it was impossible to secure agreement about the issue of amnesties.<sup>197</sup> The International Convention for the Protection of All Persons from Enforced Disappearance,<sup>198</sup> which was adopted in 2006 but is not yet in force, does not include a provision corresponding to Article 18(1) of the 1992 declaration.

Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance provides that enforced disappearance amounts to a CAH:

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.<sup>199</sup>

### §6.6. *The International Human Rights Law Regime*

In the area of human rights several instruments seek to protect the same human interest but apply in different contexts and to different subjects (persons). These instruments have different legal requirements and vary as to their proscriptive norms. In turn, some of the prescriptions of the international human rights regime overlap with the specific acts that constitute CAH. As noted by Professor Schabas, CAH might also be seen as “an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by a State against its own population, crimes against humanity are focused on prosecuting the individuals

<sup>195</sup> Adopted Dec. 16, 1992, G.A. Res. 133; UN Doc. A/RES/47/133.

<sup>196</sup> *Report of the sessional working group on the administration of justice*, UN Doc. E/CN.4/Sub.2/1998/19, Annex, draft art. 17(1) (Aug. 19, 1998).

<sup>197</sup> See, e.g., *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2004/59, ¶¶ 73–80 (Feb. 23, 2004). As stated by this report, “[s]ome delegations considered that the existence of amnesties could not be ignored, [and] that they were sometimes necessary elements of processes of national reconciliation [...]” *Id.* ¶ 76.

<sup>198</sup> International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, 61st sess., U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

<sup>199</sup> *Id.*

who commit such violations.”<sup>200</sup> The following section serves as a survey of some of these instruments and these overlapping prescriptions.

The international protective scheme of human rights embodied in the Universal Declaration of Human Rights<sup>201</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>202</sup> declares and protects against the commission of all the acts defined in the London Charter, but these instruments do not criminalize any violations of these prescriptions. Furthermore, there is some question as to the binding nature of the Universal Declaration, because it is only a General Assembly Resolution, unless one argues that it is part of “general principles of international law.”<sup>203</sup> In that case the argument would be subject to all the difficulties inherent in the application of this source of international law to ICL.<sup>204</sup> Also, the ICCPR applies only to its High Contracting Parties and is subject to whichever limitations these parties may have elected to establish through their reservations and declarations.<sup>205</sup> But international human rights law does not criminalize its violations.<sup>206</sup>

In the ICJ’s Advisory Opinion in the *Wall* case, Israel maintained that the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not apply to areas that are not subject to its sovereign territory and jurisdiction.<sup>207</sup> This position, Israel continued, is “based on the well-established distinction between human rights and humanitarian law under international law.”<sup>208</sup> Furthermore, it added, “the Committee [on Economic, Social and Cultural Rights]’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights.”<sup>209</sup>

The ICJ recalled its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, wherein it stated that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ that they are ‘to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.’”<sup>210</sup> In the court’s view, these rules incorporate obligations that are “essentially of an *erga omnes* character.”<sup>211</sup>

<sup>200</sup> WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 139 (2010).

<sup>201</sup> Universal Declaration of Human Rights, G.A. Res. 217(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948).

<sup>202</sup> International Covenant on Civil and Political Rights art. 8, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

<sup>203</sup> See Statute of the Permanent Court of International Justice art. 38 § 1(c), Dec. 13, 1920, Art. 38 § I(3), 1926 PCIJ (ser. D) No. 1; Statute of the International Court of Justice, 26 June 1945, 33 U.N.T.S. 993; see generally BIN CHENG, *GENERAL PRINCIPLES OF LAW, AS APPLIED BY INTERNATIONAL TRIBUNALS* (1987); M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768 (1990).

<sup>204</sup> See *infra* ch. 5, § 1.

<sup>205</sup> See HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS 25–89 (United Nations Publication, 1987).

<sup>206</sup> See M. Cherif Bassiouni, *International Criminal Law and Human Rights*, 9 YALE J. WORLD PUB. ORD. 193 (1982).

<sup>207</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 180–81 (July 9) [hereinafter *The Wall Case*].

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Legality of the Threat on Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

<sup>211</sup> *The Wall Case*, *supra* note 207, at 199.

The court further opined that international humanitarian law and international human rights law are two distinct regimes of law that may be applicable in the same context depending on the circumstances of the case:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both of these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis* international humanitarian law.<sup>212</sup>

As discussed above, Article 7 of the Rome Statute criminalizes several violations of international human rights law that have never before been criminalized in an international instrument. They are:

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (g) Enforced disappearance of persons;
- (h) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health [ . . . ].<sup>213</sup>

and parts of (g), such as “forced pregnancy, enforced sterilization, or other forms of sexual violence of comparable gravity.”<sup>214</sup>

Several treaty bodies have determined that amnesties pertaining to gross violations of human rights, such as torture, extrajudicial executions, and enforced disappearances, are incompatible with States Parties’ obligations under the relevant treaty, even though it does not explicitly require prosecution.

The Universal Declaration of Human Rights<sup>215</sup> prohibits “slavery or servitude; slavery and the slave trade” (Article 4), “torture” and “cruel, inhuman or degrading treatment” (Article 5), and “arbitrary arrest, detention or exile” (Article 9), which are criminalized by Rome Statute Articles 7(c), (f), and (e), respectively.

The Human Rights Committee has found that States Parties to the ICCPR “may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties,” for

violations recognized as criminal under either domestic or international law, such as torture, and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence

<sup>212</sup> *Id.* at 178.

<sup>213</sup> ICC Statute art. 7, *supra* note 144.

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

<sup>215</sup> Universal Declaration of Human Rights, *supra* note 201.

of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).<sup>216</sup>

The Rome Statute likewise prohibits torture and enforced disappearance.<sup>217</sup> The ICCPR also prohibits slavery and the slave trade and “arbitrary arrest and detention,” which are prohibited by the Rome Statute.<sup>218</sup>

The European Court of Human Rights has not yet ruled on the compatibility of amnesty with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.<sup>219</sup> However, the court has consistently ruled that when certain violations occur, State Parties must thoroughly and effectively carry out investigations capable of leading to the identification and punishment of those responsible.<sup>220</sup> The Convention prohibits torture, slavery and forced labor, and unlawful imprisonment, which are similarly prohibited by the Rome Statute.<sup>221</sup> Several cases before the European Court have involved questions arising from domestic CAH prosecutions and legislation.<sup>222</sup>

The Inter-American Commission and Court of Human Rights have repeatedly ruled against amnesties preventing the prosecution of gross violations of the rights protected by the American Convention on Human Rights.<sup>223</sup> Article 5 protects the Right to Humane Treatment, including the prohibition against torture, whereas Article 6 protects Freedom from Slavery. The Rome Statute contains these prohibitions in Article 7(f) and (c). The convention does not explicitly impose an obligation to prosecute certain offenses.<sup>224</sup> However, recent jurisprudence from the Inter-American Court has especially emphasized the duty to combat impunity for CAH.<sup>225</sup>

From the mid-1990s to the mid-2000s, the Inter-American Court found that Peru (in the form of the Fujimori government) had breached its international obligations in twenty-two cases, eighteen of which involved murder, forced disappearance, torture,

<sup>216</sup> General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/055/2004, UN Doc. CCPR/C/21/Rev.1/Add.13, ¶ 18.

<sup>217</sup> ICC Statute arts. 7(f), 7(i), *supra* note 144.

<sup>218</sup> ICC Statute arts. 7(c), 7(e), *supra* note 144; ICCPR art. 8, *supra* note 202.

<sup>219</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), art. 7(1), Nov. 4, 1950, EUR. TS. Nos. 5, 213 U.N.T.S. 221.

<sup>220</sup> See, e.g., *Musayev et al. v. Russia*, Application Nos. 57941/00, 58699/00 and 60403/00, Eur. Ct. H.R., ¶¶ 85–86, 116 (July 26, 2007), <http://www.echr.coe.int>.

<sup>221</sup> ICC Statute arts. 7(f), 7(c), 7(i), *supra* note 144; European Convention arts. 3–5, *supra* note 219.

<sup>222</sup> Early cases before the Court related to CAH prosecutions arising from World War II-era crimes. See, e.g., *X. v. Belgique*, App. No. 268/57, in Y.B. EUR. CONV. ON H.R. 239, at 239–41 (European Comm’n H.R.); *Touvier v. France*, App. No. 2942/95 (1997), available at <http://www.echr.coe.int>; *Papon v. France* (No. 2), 2001–XII Eur. Ct. H.R. 235. The Estonian cases involved crimes committed during peacetime in 1949. *Kolk & Kislyiy v. Estonia*, App. Nos. 23052/04 & 24018/04 (2006), available at <http://www.echr.coe.int>. Antonio Cassese, *Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case Before the ECHR*, 4 J. INT’ CRIM. JUST. 410, 411 (2006). See also *Korbely v. Hungary*, App. No. 9174/02, ¶ 84 (2008), available at <http://www.echr.coe.int> (ruling that Hungary had violated Article 7 of the Convention by failing to account for the constitutive elements of CAH at customary international law in 1956, namely it did not account for a State policy requirement). These cases are also discussed *infra* ch. 9.

<sup>223</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. A/16.

<sup>224</sup> See, e.g., *Barrios Altos Case* (Chumbipuma Aguirre et al. v. Peru), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 39–41 (Mar. 14, 2001).

<sup>225</sup> See *Almonacid-Arellano et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 114 (Sept. 26, 2006); *Goiburú et al. v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 128 (Sept. 22, 2006).

imprisonment and severe deprivation of liberty, and violations of the right to a fair trial.<sup>226</sup> In the *Barrios Altos* and *La Cantuta* cases, the Court catalyzed efforts in Peru to overcome amnesty laws that covered the CAH and serious human rights abuses committed by President Alberto Fujimori's security forces against insurgents and political opponents during the 1990s by affirming the duty to investigate and punish those responsible for CAH and other serious human rights abuses.<sup>227</sup>

Article 5 of the African Charter on Human and Peoples' Rights protects from "[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhumane or degrading punishment and treatment," which are likewise prohibited by the Rome Statute.<sup>228</sup>

Article 11 of the Cairo Declaration on Human Rights in Islam prohibits enslavement, whereas Article 20 prohibits unlawful imprisonment, each of which is prohibited by Articles 7(c) and 7(i) of the Rome Statute.<sup>229</sup>

The Arab Charter on Human Rights of 2004 prohibits torture (Article 8), enslavement (Article 10), unlawful imprisonment (Article 14), which are prohibited by Articles 7(f), (c), and (i) of the Rome Statute.<sup>230</sup>

Imprisonment, persecution, and enforced disappearance are also part of other international conventions. As mentioned above, enforced disappearance under Article 7(i) is covered by a specialized convention criminalizing the practice.<sup>231</sup> Unlawful imprisonment under Article 7(e) incorporates the provisions of the ICCPR, as does persecution under Article 7(h).<sup>232</sup> Moreover, both the International Convention Against All Forms of Racial Discrimination<sup>233</sup> and the *Apartheid* Convention prohibit persecution on a racial basis.<sup>234</sup> The Convention on the Elimination of All Forms of Discrimination Against Women prohibits gender-based discrimination.<sup>235</sup> Article 26 of the ICCPR prohibits religious, cultural, and ethnic discrimination.<sup>236</sup>

This survey demonstrates how CAH has been expanding as a catchall international crime that criminalizes certain human rights violations, whether the specific acts are

<sup>226</sup> Kai Ambos, *The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus*, J. INT'L CRIM. JUST. (2010), at 4, available at <http://jicj.oxfordjournals.org/content/early/2010/10/05/jicj.mqqo59.abstract> (last visited Dec. 9, 2010). See also *infra* ch. 9, § 3.3.

<sup>227</sup> *Barrios Altos Case* (Chumbipuma Aguirre et al. v. Peru), Judgment of Mar. 14, 2001, §§ 41-42, Inter-Am. Ct. H.R. (Ser. C) No. 75; *La Cantuta v. Peru*, Judgment of 19 Nov. 2006, § 152, Inter-Am. Ct. H.R. (Ser. C) No. 162 (2006).

<sup>228</sup> African Charter on Human and Peoples' Rights art. 5, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1981), reprinted in 21 I.L.M. 58 (1982); ICC Statute arts. 7(c), 7(f), *supra* note 144.

<sup>229</sup> Cairo Declaration on Human Rights in Islam arts. 11, 20, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993); ICC Statute arts. 7(c), 7(i), *supra* note 144.

<sup>230</sup> League of Arab States, Arab Charter on Human Rights arts. 8, 10, and 14, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force March 15, 2008; ICC Statute arts. 7(f), 7(c), and 7(i), *supra* note 144.

<sup>231</sup> International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 198.

<sup>232</sup> ICCPR art. 8, *supra* note 202.

<sup>233</sup> International Convention Against All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965).

<sup>234</sup> *Apartheid* Convention, *supra* note 186.

<sup>235</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/36 (Dec. 18, 1979).

<sup>236</sup> ICCPR art. 26, *supra* note 202.

criminalized under their respective human rights treaties or whether they are the subject of specialized conventions that may or may not criminalize them. Thus, for example, racial discrimination and discrimination against women are prohibited under specialized human rights conventions following their prohibition under the more general ICCPR. But these two specialized conventions are supplemented by the *Apartheid* Convention, which specifically criminalizes certain aspects of discrimination. In a similar way, we see the prohibition against unlawful or unjust imprisonment contained in the ICCPR, some aspects of which are then criminalized in the International Convention for the Protection of All Persons from Enforced Disappearance.

This process of evolution from enunciated human rights protections to their criminalization is a well-established pattern in the evolution of ICL. The problem with the Rome Statute's definition of CAH is that it criminalizes certain human rights violations that have not been criminalized in other conventions. This means that with regard to some of the enumerated acts of Article 7, we have a brand new criminalization of human rights as CAH, and with regard to other enumerated acts we have an overlapping criminalization as CAH of acts that have been criminalized in other conventions under another label.

Regarding the first of these categories, the question arises as to what constitutes the elements of these acts deemed CAH. Reference can of course be made to the Elements of Crimes, but in examining them with regard to these enumerated crimes, there is no basis in customary international law. It is simply an expression of the State Parties agreement to what they believe the elements of these enumerated acts should be. With regard to the second category, which is also covered by the Elements of Crimes, a more difficult issue arises, namely how to reconcile these elements with the more detailed provisions of the specialized conventions in question, such as the International Convention for the Protection of All Persons from Enforced Disappearance and the *Apartheid* Convention. All of this simply indicates that CAH is still in a gestation period, though clearly with a tendency to be expanded as a catchall category of international crime, which for all intents and purposes is being moved in the direction of criminalizing as many human rights violations as possible. While this is a laudable purpose from a human rights perspective, it is not a sound way to advance ICL because it lacks method, consistency, and coherence.

## §7. The Mixed Model Tribunals<sup>237</sup>

The Security Council's establishment of the Commission of Experts to Investigate Violations of International Humanitarian Law in the former Yugoslavia in October 1992 broke the international community's silence on international criminal justice that began after

<sup>237</sup> Because the scope of this book is limited to CAH, a section pertaining to the Special Tribunal for Lebanon is not included. Efforts to incorporate jurisdiction for CAH into the statute failed, and subject matter jurisdiction was limited to the crimes contained in the Lebanese Criminal Code. See INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d ed. 2010) [hereinafter INTRO TO ICL], at ch. 8, § 7. Patrick Fitzgerald, *Report of the Fact-finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Hariri, Delivered to the Security Council*, U.N. Doc. S/2005/203 (Mar. 24, 2005); The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, U.N. Doc. S/2006/893 (Nov. 15, 2006); see also Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1129 (2007).



the completion of the post-World War II prosecutions.<sup>238</sup> In the relatively short period between 1993 and 1994, the Security Council established both the ICTY and the ICTR. International criminal justice was now not only recognized, but officially sanctioned by the Security Council. Some officials in governments and international civil society saw these developments as a sign that the international community was finally committed to a permanent system of international criminal justice, whose main supporting pillar would be the ICC.<sup>239</sup> Others were hoping to continue the practice of *ad hoc* institutions, either as a way of frustrating or supplementing the work of the ICC.<sup>240</sup>

The Security Council was then confronted with many difficult choices in addressing issues of postconflict justice, especially concerning a number of conflicts that caused a high level of victimization.<sup>241</sup> For political reasons, the Security Council has been selective in addressing only a certain number of these issues. Although the Security Council addressed postconflict justice issues in Sierra Leone,<sup>242</sup> it only dealt with the restoration of peace with respect to Liberia.<sup>243</sup> In Cambodia, the Security Council addressed the issue of peace and established a tribunal to attempt to address the justice issues arising out of that conflict.<sup>244</sup> In the conflict in Kosovo it addressed both peacekeeping and

<sup>238</sup> See M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigation of Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279–340 (1994); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), 88 AM. J. INT'L L. 784–805 (1994) (translated into French and reprinted with modifications in 66 REVUE INTERNATIONALE DE DROIT PENAL 1–2 (1995)); M. Cherif Bassiouni, *Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 25 SECURITY DIALOGUE 409 (1994) [hereinafter *Establishing the ICTY*].

<sup>239</sup> See M. Cherif Bassiouni, *The Making of the International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 117 (M. Cherif Bassiouni ed., 3d. ed., 2008).

<sup>240</sup> This is another manifestation of complementarity. *Id.*

<sup>241</sup> See, e.g., *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* (2 vols., M. Cherif Bassiouni ed. 2010); JANE STROMSETH, *ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES* (Jane E. Stromseth ed., 2003); *POST-CONFLICT JUSTICE* (M. Cherif Bassiouni ed., 2002).

<sup>242</sup> See David Crane, *The Special Court for Sierra Leone*, in 3 INTERNATIONAL CRIMINAL LAW 195 (M. Cherif Bassiouni ed., 3d ed., 2008); David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT'L L. 1 (2007); Vincent O. Nmechielle & Charles Chernor Jalloh, *The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107 (2006); Jennifer L. Poole, *Post-Conflict Justice in Sierra Leone*, in POST-CONFLICT JUSTICE, *supra* note 230, at 563; Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST-CONFLICT JUSTICE, *supra* note 241, at 55.

<sup>243</sup> See Kathleen M. Jennings, *The Struggle to Satisfy: DDR Through the Eyes of Ex-Combatants in Liberia*, 14 INT'L PEACEKEEPING 204 (April 2007); *Rebuilding Liberia: Prospects and Perils*, Africa Report No. 75 (International Crisis Group, Jan. 30, 2004) (observing that following the establishment of the United Nations Mission in Liberia that the state Liberia is a “collapsed state that has become in effect a UN protectorate”); *Liberia and Sierra Leone: Rebuilding Failed States*, Africa Report No. 87 (International Crisis Group, Dec. 8, 2004).

<sup>244</sup> See David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, in 3 INTERNATIONAL CRIMINAL LAW 399 (M. Cherif Bassiouni ed., 3d ed., 2008); Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, XI SINGAPORE Y.B. INT'L LAW 195 (2007); Steven R. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, in POST-CONFLICT JUSTICE, *supra* note 230, at 613; Aaron J. Buckley, *The Conflict in Cambodia and Post-Conflict Justice*, in POST-CONFLICT JUSTICE, *supra* note 241, at 637; Kritz, *supra* note 242, at 55.

post-conflict justice issues, as it did in Timor-Leste.<sup>245</sup> By addressing a very specific attack within the context of a broader conflict, the Security Council seeks justice regarding localized attacks in Lebanon.

The Security Council's approach lacked consistency, which can only be explained from a political perspective. This perspective also explains the lack of uniformity with respect to the postconflict justice mechanisms established by the UN. For example, in the case of Cambodia, while initial efforts to develop a national tribunal with international participants were frustrated for many years and delayed by difficult negotiations between the UN and the Cambodian government,<sup>246</sup> these issues have largely been settled and prosecutions began nearly four years after the formal establishment of the tribunal.<sup>247</sup> In the case of Sierra Leone, despite the Lomé peace accord that provided amnesty to the perpetrators of the atrocities and crimes committed during the civil war, the UN insisted on some prosecutions through a national justice mechanism with international participation, similar to the proposed court in Cambodia, but adding a truth and reconciliation commission also of mixed composition.<sup>248</sup> In Timor-Leste, the UN Transitional Administration established hybrid Special Panels for Serious Crimes situated within the local justice system, as well as a Serious Crimes Investigation Unit to prosecute persons charged with genocide, war crimes, and CAH, murder, sexual offenses, and torture.<sup>249</sup> In Kosovo, the UN, which placed that region under its administration, activated a domestic judicial system (with the option of a hybrid panel if approved by the Special Representative of the Secretary-General) supported by UN personnel and resources to administer civil and criminal justice.<sup>250</sup>

<sup>245</sup> See Suzannah Linton, *Indonesia and Accountability for Serious Crimes in East Timor*, in 3 INTERNATIONAL CRIMINAL LAW 399 (M. Cherif Bassiouni ed., 3d ed., 2008); DAVID COHEN, INDIFFERENCE AND ACCOUNTABILITY: THE UNITED NATIONS AND THE POLITICS OF INTERNATIONAL JUSTICE IN EAST TIMOR (June 2006); Michael J. Matheson, *United Nations Governance of Post-Conflict Societies: East Timor and Kosovo*, in POST-CONFLICT JUSTICE, *supra* note 241, at 523; KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION (Albrecht Schnabel & Ramesh Thakur eds., 2000).

<sup>246</sup> See Craig Etcheson, A "Fair and Public Trial": A Political History of the Extraordinary Chambers, in JUST. INITIATIVE, 7 (Open Society Justice Initiative, 2006) (recounting the tortured history of negotiations with the Cambodian government). See also Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934 (2001); Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137 (2000); David Stoelting, *Enforcement of International Criminal Law*, 34 INT'L LAW 669 (2000).

<sup>247</sup> Excerpts from Remarks to the Ninth Meeting of the Friends of the ECCC by Sean Visoth, Director of the Office of Administration (Nov. 30, 2007), available at [http://www.eccc.gov.kh/english/cabinet/fileUpload/14/Excerpts\\_from\\_the\\_DOA\\_Report.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/14/Excerpts_from_the_DOA_Report.pdf).

<sup>248</sup> See *supra* note 241; see also THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE (Alice H. Henkin ed., 2002); Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237 (2001); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185 (2001); Crane, *supra* note 242.

<sup>249</sup> The Judicial System Monitoring Programme provides an extensive source of information on Timor-Leste, available at <http://www.jsmp.minihub.org>. The Serious Crimes Panel is the first court to apply substantive provisions of the Rome Statute. See Kai Ambos & Steffen Wirth, *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L.F. 1 (2002).

<sup>250</sup> See Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001); Michael Steiner, *For Example Kosovo: Seven Principles for Building Peace*, Address at the London School of Economics (Jan. 27, 2003), available at <http://www.unmikonline.org/srsg/speeches/srsg270103.htm> (last visited Oct. 13, 2009); *Finding the Balance: The Scales of Justice in Kosovo*, Europe Report No. 134 (International Crisis Group, Sept. 12, 2002); KOSOVO: CONTENDING VOICES ON BALKAN INTERVENTIONS (William Joseph Buckley ed., 2000); WESLEY K. CLARK,

The last of these UN initiative linked to governments was about Afghanistan.<sup>251</sup> The 2006 Berlin Accords provided for a justice component that Italy has agreed to oversee, with Germany assuming the security aspects. The former did not start until April 2003, and was limited to judicial training, leaving the more important task of legislative reform to an Afghan Judicial Commission.<sup>252</sup> As for security, which is to be provided by Germany, it is limited to certain parts of Kabul. The lack of a comprehensive strategic plan will result in few improvements that are doubtful to yield a lasting systemic effect. Nothing, however, was done to bring justice to “Warlords” who are believed to have caused the deaths of over 30,000 civilians during the late 1980s and 1990s.

The latest challenge was Iraq. Due to the unique and contentious circumstances surrounding the invasion and subsequent occupation by the U.S., the role of the UN has been symbolic. The international community played no role in the creation of the Iraqi Higher Criminal Court, which was not created as an international hybrid tribunal; it is quite the opposite.<sup>253</sup> First and foremost, the Court was not established by a UN Security Council Resolution but rather by a national Iraqi statute. Moreover, the Prosecutor is Iraqi, the judges are Iraqi, its seat is in Iraq.<sup>254</sup> The Court has jurisdiction over crimes of an international character (genocide, war crimes, and CAH) but as national crimes. The abuse of position and the pursuit of policies that the use of the armed forces of Iraq against an Arab country.<sup>255</sup> The task of prosecuting Saddam Hussein and other accused and perpetrators of genocide, CAH, and war crimes is subject to the Iraqi Special Tribunal.<sup>256</sup>

Recently, strides have been made toward establishing a mixed tribunal to prosecute those bearing the greatest responsibility for genocide, CAH and war crimes committed since the independence of Burundi in 1962 but nothing came of it.<sup>257</sup> Although endorsed by the UN in 2005, the tribunal, to be established in connection with a truth commission,

WAGING MODERN WAR (2001); KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION, *supra* note 234.

<sup>251</sup> The United Nations Assistance Mission in Afghanistan (UNAMA) is directed and supported by the Department of Peacekeeping Operations.

<sup>252</sup> See *Afghanistan: Judicial Reform and Transitional Justice*, Asia Report No. 45 (International Crisis Group, Jan. 28, 2003); see also Neil Kritz, *Reluctant Nation Building: Securing the Rule of Law in Post-Taliban Afghanistan: Questions, Answers & Comments*, 17 CONN. J. INT'L L. 261 (2002); M. Cherif Bassiouni & Daniel Rothenberg, *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan* (Istituto Superiore Internazionale di Scienze Criminali, Siracusa, Italy, 2005), available at <http://www.isisc.org/public/AfghanStrategyISISC.pdf>.

<sup>253</sup> M. Cherif Bassiouni and Michael Hanna, *Ceding the High Ground. The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 case W. Res. J. Int'l. L. 21 (2007).

<sup>254</sup> While the judges are Iraqi, the Statute establishing the tribunal does allow for the appointment and participation of international judges. Al-Waqa'l Al-Iraiya [The Official Gazette of the Republic of Iraq], Iraqi High Criminal Court Law art. 3, Oct. 18, 2005 No. 4006; see also M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327 (2005).

<sup>255</sup> *Id.* at arts. 2, 14. The crimes themselves are later defined in arts. 11–14.

<sup>256</sup> See *infra* ch. 9, §3.4.2.

<sup>257</sup> S.C. Res. 1606, U.N. Doc. S/RES/1606 (June 20, 2005). As part of the Arusha Accords in 2000, the parties requested a UN-conducted investigation into crimes committed in Burundi. Since 1962, control of Burundi has passed from one military dictator to another. The assassination of nine leaders and the 1972 massacre of 100,000 Hutu and moderate Tutsi were the worst violence the country saw until the 1993 assassination of the Hutu President Melchior Ndadaye. This assassination sparked violence and over the next years a range of 50,000 to 100,000 people died as a result. Extreme ethnic violence between the Tutsi and Hutu continues despite several ceasefire agreements, the latest occurring in November 2007.

made little headway. Whether the tribunal and truth commission will ever become a reality remains to be seen.<sup>258</sup>

The following is a brief description of these tribunals' efforts to address CAH in selected conflicts since the establishment of the ICTY and ICTR.<sup>259</sup> Essentially, these tribunals combine features of an international institution with those of a national tribunal. It is difficult to assess the future impact of these *sui generis* tribunals and their jurisprudence. It could be that they will be viewed in their most limited perspective and thus have no impact on the overall fabric of ICL, or that they will be recognized selectively, in light of the persuasiveness of their jurisprudence.<sup>260</sup>

### §7.1. Kosovo

The 1999 conflict in Kosovo was one of the most extraordinary conflicts of modern times. On March 24, 2009, the North Atlantic Treaty Organization (NATO) began a bombing campaign in Yugoslavia and Operation Allied Force was underway.<sup>261</sup> In 78 days, with exclusive reliance on air power, enormous damage was done to the Serbian nation's military forces and infrastructure, while NATO forces suffered virtually no damage.<sup>262</sup> On June 10, 1999, the conflict was over, and the UN Security Council placed Kosovo under international and civil administration and military protection, marking the end of a humanitarian tragedy.<sup>263</sup> Serb forces killed an estimated 10,000 Kosovar Albanians during a systematic campaign of ethnic cleansing. Tens of thousands more were subjected to arbitrary arrest, torture, and rape. Out of a total population of approximately 1.7 million persons, more than 800,000 Kosovars were forced out of Kosovo in search of refuge and as many as 500,000 were displaced within Kosovo.<sup>264</sup>

<sup>258</sup> For a general description of the conflict in Burundi and various post-conflict mechanisms that were or were not used, see Romana Schweiger, *Late Justice for Burundi*, 55 INT'L & COMP. L.Q. 6531 (2006).

<sup>259</sup> For more detailed information on these tribunals, see INTRO TO ICL, *supra* note 237, at ch. 8.

<sup>260</sup> See e.g., WILLIAM A. SCHABAS, *THE UN CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* (2006).

<sup>261</sup> NATO later argued it was relying on S.C. Resolution 1199 and 1203, which both speak of "impending humanitarian catastrophe" and assert that the situation in Kosovo "constitutes a threat to peace and security in the region." The Security Council adopted resolutions (1160, 1199, and 1203) in 1998 that legally bound the Federal Republic of Yugoslavia to cease all action by its security forces affecting the civilian population of Kosovo, to withdraw all security units used for civilian repression, and to implement, in full, all agreements with NATO and the OSCE. These resolutions, analyzed together with statements following the Račak massacre in January 1999, show that Milošević's government in Belgrade had created a humanitarian emergency in Kosovo that constituted a threat to peace and security in the Balkans. See KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION, *supra* note 245, at 417; KOSOVO: CONTENTING VOICES ON BALKAN INTERVENTIONS, *supra* note 250.

<sup>262</sup> General Wesley K. Clark, the former Supreme Allied Commander, Europe, stated that Allied Command Europe's mission was to halt, disrupt, and ultimately reverse a systematic campaign of ethnic cleansing. See KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION, *supra* note 245, at 261.

<sup>263</sup> Security Council Resolution 1244 (1999) of June 10, 1999 authorized the Secretary-General to establish the United Nations Interim Administration in Kosovo (UNMIK).

<sup>264</sup> After the conclusion of the NATO bombardment, the withdrawal of Yugoslav forces, and the installation of UNMIK, there was a mass return of Kosovar refugees at a scale and speed that is historically unprecedented. See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N. Doc. S/1999/779, ¶ 8 (July 12, 1999). See UNHCR figures, as reported in *Under Orders: War Crimes in Kosovo* (Human Rights Watch, Oct. 2001).

Security Council Resolution 1244 established “international, civil and security presences” in Kosovo by creating the United Nations Interim Administration Mission in Kosovo (UNMIK).<sup>265</sup> UNMIK, similar to UNTAET in Timor-Leste,<sup>266</sup> was empowered to exercise all legislative, executive, and judicial authority in Kosovo.<sup>267</sup> When UNMIK began operations in Pristina, it found that the previous law enforcement and judicial structure had collapsed.<sup>268</sup> Essentially, the mission in Kosovo was a nation-building mission.

Following the revocation of Kosovo’s autonomy in 1989, ethnic Albanians were for the most part excluded from serving in the justice system, the sole exception being that of employment as advocates.<sup>269</sup> The Serbian government-sanctioned discrimination had crystallized a profound public distrust for the judicial system. Kosovo was left with a handful of experienced legal professionals and a general climate of hostility toward the judicial system. The Special Representative of the Secretary-General in Kosovo, under the mandate of Resolution 1244, sought to establish an inclusive, multiethnic administration.<sup>270</sup> In addition to administrative authority, the Special Representative was granted the executive and legislative power to run the territory.<sup>271</sup> This was the first time that a UN official had full legal authority to establish and run a government.

On June 28, 1999, the Special Representative promulgated UNMIK Emergency Decree No. 1999/1. This decree established an Emergency Judicial System to conduct pre-trial hearings of detained defendants that were arrested by the NATO-led Kosovo Force. The Joint Advisory Judicial Council on Provisional Judicial Appointments,<sup>272</sup> later succeeded by the Advisory Judicial Commission (AJC),<sup>273</sup> was set up two weeks after the arrival of the first UNMIK staff members. It recommends jurists to the Special Representative of the Secretary-General, and through this procedure, on June 30, 1999, nine judges and prosecutors (five Albanians, three Serbs, and one ethnic Turk) were

<sup>265</sup> S.C. Res. 1244, U.N. SCOR, 54th Sess. 4011th mtg., U.N. Doc. S/RES/1244, ¶ 5 (1999), 38 I.L.M. 1451 (1999). For further analysis, see Strohmeyer, *supra* note 250; and *Finding the Balance*, *supra* note 250.

<sup>266</sup> See Linton, *supra* note 245.

<sup>267</sup> UNMIK Regulation 1999/1, on the Authority of the Interim Administration in Kosovo (July 25, 1999).

<sup>268</sup> Both law enforcement and the judiciary lacked the physical infrastructure (buildings, libraries, equipment, etc.) to function. Moreover, what little justice system did exist failed to function independently or effectively. See Wendy S. Betts, Scott N. Carlson & Gregory Grisvold, *The Post-Conflict Justice Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law*, 22 MICH. J. INT’L L. 371 (2001).

<sup>269</sup> The university did not allow Albanian students to attend law school in their own language. The bar examination site in Pristina was closed, and Albanians were required to travel to Belgrade to take the exam. Thus, the justice system in Kosovo had 756 judges and prosecutors and only thirty of them were Albanian. See Strohmeyer, *supra* note 250, at 49–50.

<sup>270</sup> The SRSG, under the Constitutional Framework, was given all authority over the justice sector, with the exception of the administration of the courts.

<sup>271</sup> Frederick M. Lorenz, *Civil-Military Cooperation in Restoring the Rule of Law: Case Studies from Mogadishu to Mitrovica*, in BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 241, at 840.

<sup>272</sup> The Advisory Judicial Council included seven lawyers, two Kosovar Albanians, one Bosniak (Muslim Slav), one Serb, all with expertise in the administration of justice in Kosovo, and three internationals from different international organizations.

<sup>273</sup> See UNMIK Regulation 1999/7 (September 7, 1999). According to § 2.1, the composition of the commission was changed to eight local and three international lawyers, of different ethnicity and reflecting varied legal expertise.

appointed to serve as a mobile justice unit, hearing cases throughout the five districts of Kosovo.<sup>274</sup>

As a former province of the defunct state, Kosovo, although at this time legally remaining part of the former Yugoslavia, was without a legislative basis for establishing an independent and effective judiciary.<sup>275</sup> Nevertheless, UNMIK Regulation No. 1999/24 provided that the law in force in Kosovo prior to March 22, 1989, would serve as the applicable law for the duration of the UN administration.<sup>276</sup> In addition, to counter the perceived and actual bias of the judiciary and the inexperience of judicial officials, a series of regulations were passed dealing with legal institutions, including the judiciary and prosecution services; the appointment of international judges and prosecutors; the law applicable to Kosovo; procedural and sentencing matters; and the creation of new criminal offenses.<sup>277</sup> Moreover, new criminal codes were added to substantively expand Kosovo law, making it more efficient and up to date with international norms.<sup>278</sup>

UNMIK also created a Technical Advisory Commission on Judiciary and Prosecution Service by Regulation No. 1999/6. This commission, in its final report to the Special Representative to the Secretary-General, urged the establishment of a special court, to be known as the Kosovo War and Ethnic Crimes Court (hereinafter KWECC), to hear cases involving breaches of international humanitarian law or ethnically related crimes.<sup>279</sup> KWECC would have functioned as an intermediary between local courts

<sup>274</sup> See *Finding the Balance*, *supra* note 250, at 4. However, these early appointments were contentious as some of the members of the unit were accused of collaborating with the old regime. *Id.*

<sup>275</sup> On February 17, 2008, Kosovo's parliament endorsed a declaration of independence from Serbia. Both the Prime Minister and the parliament confirmed that the new state would be established in accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement; Hashim Thaçi, Prime Minister of Kosovo, Independence Day Speech (Feb. 17, 2008). See *Kosovo: No Good Alternatives to the Ahtisaari Plan*, Europe Report No. 182 (International Crisis Group, May 14, 2007). For further background on the broader issues, see also *Kosovo Final Status: Options and Cross-Border Requirements*, Special Report 91 (United States Institute of Peace, July, 2002) (encouraging the commencement of negotiations and discussion about Kosovo's final status as well as addressing cross-border arrangements); *Kosovo's First Month*, Europe Briefing No. 47 (International Crisis Group, March 18, 2008) (regarding the implementation of the Ahtisaari plan, the role of the UN, NATO and the EU, and the international response to Kosovo's independence).

<sup>276</sup> According to § 1.1, UNMIK Regulation No. 1999/24 (December 12, 1999), "[t]he law applicable in Kosovo shall be: a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and b) The law in force in Kosovo on 22 March 1989." According to section 3, [t]he present regulation shall be deemed to have entered into force as of 10 June 1999." Initially, UNMIK, with little local consultation, agreed upon a Regulation setting the date of March 24, 1999, when Kosovo was under Slobodan Milošević rule, as the applicable law. This decision was met with condemnation by Kosovar Albanians including judges who refused to apply the law. This led to the adoption of UNMIK Regulation No. 1999/24. See Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1063 (2003).

<sup>277</sup> See UNMIK Regulations 1999/1, 1999/2 (Aug. 12, 1999); 1999/5 On the Establishment of an *Ad Hoc* Court of Final Appeal and an *Ad Hoc* Office of the Public Prosecutor (Sept. 4, 1999); 1999/6 On Recommendations for Structure and Administration of the Judiciary and Prosecution Service (Sept. 7, 1999); 1999/7 (Sept. 7, 1999) (replacing UNMIK Emergency Decree 1999/1); 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors (Feb. 15, 1999); 2000/15, On the Establishment of the Administrative Department of Justice (June 6, 1999).

<sup>278</sup> See Jean-Christian Cady & Nicholad Booth, *Internationalized Courts in Kosovo: An UNMIK Perspective*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 59, 70 (Cesare P.R. Romana et al. eds., 2004) (adding new sexual offences and international crimes).

<sup>279</sup> See Organization for Security and Co-operation in Europe (OSCE), Department of Human Rights and Rule of Law Legal Systems Monitoring Section of UNMIK Pillar III, *Review of the Criminal Justice System*,



and the ICTY, which by virtue of Security Council Resolution 827 (1993)<sup>280</sup> would have given the tribunal jurisdiction over all territories that were once part of the former Yugoslavia.<sup>281</sup> However, due to political conflicts the project was officially abandoned on September 11, 2000,<sup>282</sup> which left the domestic courts in Kosovo to hear those cases that would have been brought before the proposed special court, pursuant to the applicable UNMIK regulations. Thus, two bodies were given responsibility for the investigation and prosecution of war crimes in Kosovo: the ICTY<sup>283</sup> and UNMIK (including both the Department of Justice and the UNMIK police).

In December 2000, UNMIK responded to the initial ineffectiveness of the international judges by adopting a hybrid approach within Kosovo's criminal justice system. Accordingly, any party to a prosecution, at any stage in the proceedings, may petition the newly created Department of Justice for appointment of an international prosecutor or investigating judge or assignment of the case to a special panel of judges. The Special Representative of the Secretary-General in Kosovo, the supreme civilian authority in the

February 1, 2000 to July 31, 2000, at 71, available at [http://www.osce.org/documents/mik/2000/08/970\\_en.pdf](http://www.osce.org/documents/mik/2000/08/970_en.pdf); *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/2000/538, ¶ 60 (2000); Advisory Committee on the Administrative and Budgetary Questions, *Financing of the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. A/55/624, ¶¶ 32–33 (2000).

<sup>280</sup> S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

<sup>281</sup> See BASSIOUNI, *LAW OF THE ICTY*, *supra* note 77; *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigation of Violations of International Humanitarian Law in the Former Yugoslavia*, *supra* note 80, at 279–340; Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), *supra* note 80, at 784–805; Bassiouni, *Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, *supra* note 80, at 409.

<sup>282</sup> UNMIK had budgetary concerns because the KWECC was viewed as being a smaller version of the ICTY and would have had many international salaries and high start-up with administrative costs. Also, the KWECC was seen as redundant because, beginning in February 2000, international judges and attorneys were incorporated into the judicial system.

<sup>283</sup> To date, while ICTY has focused primarily on the crimes and atrocities committed in connection with the disintegration of Yugoslavia in the early to mid 1990s, the Tribunal has also prosecuted crimes committed during the war in Kosovo. The first such indictment was made public in May of 1999 at the height of the NATO campaign and included President Slobodan Milošević (Prosecuter v. Milošević, Case No. IT-99-37, Indictment and Decision on Review of Indictment and Application for Consequential Orders (24 May 1999)), and four other high-ranking Serb government and military officials: Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, and Vlatko Stojiljković. Milošević was later indicted for other crimes and atrocities committed in Bosnia and Croatia. While Milošević died in March 2006 prior to a judgment being rendered in his case, his trial began with prosecution of the crimes committed in Kosovo. *See Weighing the Evidence: Lessons from the Slobodan Milošević Trial* (Human Rights Watch, Dec. 13, 2006). While Stojiljković committed suicide prior to trial, Milošević's other three co-defendants are currently on trial. While the ICTY has also prosecuted members of the Kosovo Liberation Army (*Limaj et al.* Trial Judgment, *supra* note 105) the most controversial such prosecution resulted in the acquittal of Ramush Haradinaj, a former prime minister of Kosovo who was a KLA commander during the war, on April 3, 2008. *Haradinaj* Trial Judgment, *supra* note 121. Many diplomats from the UN and the West see Haradinaj as a pivotal figure in Kosovo who has promoted reconciliation. His indictment indicated a sharp divide among the prosecutors at the ICTY and the many in the diplomatic community. Haradinaj's acquittal was met with such contempt in Serbia that Serbian officials have stated that "[u]nfortunately, after this, Radovan Karadžić and Ratko Mladić will never end up in the Hague." Oliver Ivanovic, moderate Serb leader from Kosovo, in *Serb Outrage at Kosovo War Crimes Ruling*, CNN, Apr. 4, 2008; *see also* Nicholas Wood, *Kosovo War Crimes Trial Splits West and Prosecutors*, INT. HERALD TRIB., Apr. 8, 2007. On July 21, 2010, the Appeals Chamber partially quashed the acquittals of Haradinaj and others, and ordered a partial retrial of the case. *Haradinaj et al.* Appeals Judgment, *supra* note 121.



territory, after a recommendation by the Department of Justice, makes the final decision as to whether or not the case warrants such special treatment. The special panel would consist of one local and two international judges, with one of the international judges designated as presiding judge for the case.<sup>284</sup> Although the appointment of a number of unqualified international judges proved problematic during the early stages,<sup>285</sup> the establishment of the panels helped enhance the perception of the independence and legitimacy of the judiciary.<sup>286</sup> The legitimacy and validity of the tribunal has increased significantly amongst the Serb population, who now view the mixed judiciary with more approval and are more accepting of its decisions.<sup>287</sup>

On February 17, 2008, the Assembly of Kosovo, by Speaker Jakup Krasniqi, Prime Minister Hashim Thaci and President Fatmir Sejdiu, adopted a declaration of independence from Serbia.<sup>288</sup> The legitimacy of Kosovo's independence remains highly controversial. Although 62 of the 109 UN member states recognize the Republic of Kosovo, the UN General Assembly requested an advisory opinion from the International Court of Justice, at Serbia's request, regarding the legality of Kosovo's independence.<sup>289</sup> Despite the independence of Kosovo, Resolution 1244 remains in force and UNMIK's Special Representative retains administrative control over Kosovo. However, a reconfiguration of UNMIK has led to the handing over of many functions to the European Union Rule of Law Mission in Kosovo (hereinafter EULEX).<sup>290</sup> EULEX assumed the responsibility for strengthening rule of law institutions within Kosovo as well as the support through monitoring, mentoring, and advising local police, judiciary, and customs.<sup>291</sup> In furtherance of

<sup>284</sup> See UNMIK Regulation 2000/64 on Assignment of International Judges/Prosecutors and/or Change in Venue (December 15, 2000).

<sup>285</sup> The tribunal had difficulty in hiring qualified international judges in terms of international law knowledge. Moreover, not only did the judges lack legal qualifications, many were lacking English skills, were culturally insensitive, and failed to show a requisite amount of respect for their Kosovar colleagues. See *Finding the Balance*, *supra* note 250, at 8–10.

<sup>286</sup> See Organization for Security and Co-operation in Europe (OSCE), Department of Human Rights and Rule of Law, Legal Systems Monitoring Section of UNMIK Pillar III, *Kosovo's War Crimes Trials: A Review* (Sept. 2002) at 12, available at <http://www.osce.org/documents/mik/2002/09/857-en.pdf> (last visited Oct. 13, 2009); Laura Dickinson, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade: The Relationship between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059 (2003).

<sup>287</sup> Dickinson, *supra* note 276, at 1066.

<sup>288</sup> See *supra* note 264. Kosovo Declaration of Independence (Feb. 17, 2008). This marked the second declaration for independence by Kosovo, the first in 1990. Kosovo's declaration was a little less than one year following UN Special Envoy Martti Ahtisaari's delivery of his proposal recommending the independence of Kosovo following an undefined period of international supervision and a "new period of engagement in Kosovo" as declared by UN Secretary General Ban Ki-moon. Press Release, Secretary General, Secretary General Welcomes Agreement on New Kosovo Initiative, U.N. Doc. SG/SM/1111 (1 Aug. 2007).

<sup>289</sup> G.A. Res. 63/3, 63rd Sess., U.N. Doc. A/Res/63/3 (Oct. 8, 2008). The UNGA sent the direct question of "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" to the ICJ and the case is currently pending. Hearings in the matter are currently scheduled for December 2009. On July 22, 2010, in a ten to four decision, the ICJ said that Kosovo's declaration of independence did not violate international law. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion (Jul. 22, 2010), available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

<sup>290</sup> Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/2009/300 (June 10, 2009) [hereinafter *SG Report on Kosovo*].

<sup>291</sup> See EULEX Programme Strategy for Kosovo, available at <http://www.eulex-kosovo.eu/strategy/EULEX%20Programmatic%20Approach.pdf> (last visited Oct. 13, 2009).

EULEX's mission, UNMIK has delivered active criminal case files and full responsibility for criminal cases to EULEX.<sup>292</sup>

Although EULEX continues to assist Kosovo in strengthening the rule of law and maintaining a functioning judiciary, it remains frail.<sup>293</sup> Concerns are numerous, including: the institutional independence of the judiciary, the role of international judges and prosecutors, the integration of Serb and other minority judges into the system,<sup>294</sup> the existence of a parallel Serbian court system,<sup>295</sup> and a general shortage of judicial personnel and judicial training programs.<sup>296</sup> Yet, the Kosovo intervention has strengthened the general principle that the development of international law has primarily involved the deepening, in scope and in detail, of consideration of human rights.<sup>297</sup> Although slow, the Security Council has addressed both peacekeeping and postconflict justice issues surrounding the Kosovo conflict. Accordingly, in addition to maintaining peace and security in the region, the Security Council understands that an independent, effective, and transparent justice system will be the cornerstone of a stable and democratic society in Kosovo. However, this understanding does not mitigate the severe challenges facing the domestic criminal justice system and its inability to prosecute the vast majority of war crimes committed nearly a decade earlier in Kosovo during the 1998 to 1999 conflict between the Kosovo Liberation Army (KLA) and Yugoslav and Serb forces.<sup>298</sup>

<sup>292</sup> All case files have been transferred except for four proceedings and one ongoing case whose transfer would have adversely affected the proceedings. See *SG Report on Kosovo*, *supra* note 290, ¶ 21.

<sup>293</sup> The current judicial system has a Supreme Court, a Commercial Court, Five District Courts, twenty-two municipal courts, and twenty-two municipal courts of minor offences. The High Court of Minor Offences hears appeals from these minor offence courts. However, as of September 2006, the backlog of civil cases had increased to 45,053 cases. See Secretary-General, *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo*, U.N. Doc. S/2006/707 (Sept. 1, 2006).

<sup>294</sup> As of September 2006, minority community members accounted for 9.6 percent of judges and 8.1 percent of prosecutors, figures below their proportionate representation in the greater population of Kosovo. See *id.* Active recruitment campaigns are ongoing to address the under-representation of certain communities in the judicial system in the hope of creating a more inclusive multiethnic administration and bolstering the confidence of minorities in the judicial system.

<sup>295</sup> Despite the efforts of UNMIK to establish a cohesive judicial system, in many areas of Kosovo a parallel Serbian court system still functions outside of the administrative oversight of UNMIK. The Serbian court system applies the current laws of Serbia; the Supreme Court of Serbia makes final appeal of judgments. The Serb population of Kosovo has often relied on these courts due to a lack of trust in the impartiality and independence of the properly authorized judicial system. See OSCE, Department of Human Rights and Rule of Law, *Parallel Structures in Kosovo 2006–2007* (2007), at 16–17, available at [http://www.osce.org/documents/mik/2007/04/23925\\_en.pdf](http://www.osce.org/documents/mik/2007/04/23925_en.pdf) (last visited Oct. 13, 2009).

<sup>296</sup> See *Finding the Balance*, *supra* note 239, at 11 (noting that such shortages could be the result of “poor salaries and working conditions, combined with the previous reluctance of Serb judges to participate in the system. . . .”) (footnotes omitted).

<sup>297</sup> See Kofi Annan, *The Effectiveness of the International Rule of Law, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION*, *supra* note 245, at 222–23. Annan states:

This is the core challenge of the Security Council and the UN as a whole in the next century: to unite behind the principle that massive and systematic violations of human rights conducted against an entire people cannot be allowed to stand. . . . The choice, in other words, must not be between Council unity and inaction in the face of genocide – as in the case in Rwanda, on the one hand, or Council division and regional action, as in the case of Kosovo, on the other. In both cases, the member states of the UN should have been able to find common ground in upholding the principles of the Charter, and to find unity in defense of our common humanity.

*Id.* at 223.

<sup>298</sup> See *A Human Rights Agenda for a New Kosovo* (Human Rights Watch, Feb. 14, 2008); *Under Orders: War Crimes in Kosovo* (Human Rights Watch, Oct. 2001). Human Rights Watch has documented abuses by

Article 116 of UNMIK Regulation 2003/25 defines CAH as follows:

- (1) Whoever commits one of the following offences knowing that they are part of a widespread or systematic attack directed against any civilian population:
  - 1) Murder;
  - 2) Extermination;
  - 3) Enslavement;
  - 4) Deportation or forcible transfer of population;
  - 5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
  - 6) Torture;
  - 7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
  - 8) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with the offences provided for in the present article [ . . . ];
  - 9) Enforced disappearance of persons;
  - 10) The crime of apartheid; or
  - 11) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>299</sup>

Unfortunately, the prosecutions of international crimes in Kosovo have failed to meet expectations and hundreds of cases involving CAH and war crimes remain unresolved with little progress on the horizon. The UN program in Kosovo should not serve as the basis for any future mixed model tribunals.

## §7.2. *Bosnia and Herzegovina*

After the breakup of the former Yugoslavia beginning in 1991, the Republic of Bosnia and Herzegovina found itself amidst a conflict rife with widespread human rights violations.<sup>300</sup> Armed conflict between the three main ethnic groups – the Serbs, the Croats, and Muslims – resulted in the deaths of an estimated 150,000 to 250,000 individuals, in addition to widespread sexual violence and mass population displacement.<sup>301</sup> By 1992, the war in Croatia and Bosnia was in full swing; Bosnian Serbs had besieged Sarajevo and had conquered nearly 60 percent of Bosnia. Bosnian Serb nationalists and the Yugoslav

KLA as well as by Serb forces. *Compare, e.g., Humanitarian Law Violations in Kosovo* (Human Rights Watch, Oct. 1998), with *Federal Republic of Yugoslavia: Abuses Against Serbs and Roma in the New Kosovo* (Human Rights Watch, Aug. 1999). Additionally, widespread ethnic violence targeting Serbs and other minority communities broke out throughout Kosovo in March 2004, and the criminal justice system has come under criticism for its inability to deal with a significant number of these cases; see *Kosovo Criminal Justice Scorecard* (Human Rights Watch, Mar. 2008); *Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004* (Human Rights Watch, May 2006).

<sup>299</sup> UNMIK Regulation 2003/25 (July 6, 2003).

<sup>300</sup> MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (1992) (for a detailed description of the wars surrounding the breakup of Yugoslavia).

<sup>301</sup> *Compare After Milošević: A Practical Agenda for Lasting Balkans Peace*, Balkans Report No. 108 (International Crisis Group, Apr. 2, 2001), at 3 (stating more than 200,000 casualties), with *Research Shows Estimates of Bosnian War Death Toll Were Inflated*, ASSOCIATED PRESS, June 21, 2007 (claiming that casualty estimates are severely inflated).

Nationalist Army, operating under Slobodan Milošević, marched through Bosnia exercising ethnic cleansing in an effort to create a Greater Serbia.<sup>302</sup> The United Nations, operating as a protection force in Bosnia, felt that its presence alone would act as a deterrent from committing serious crimes. However, security concerns lead to many UN forces being pulled out and the remaining peacekeepers were forced to “deal” with the Serbs to minimize attacks.<sup>303</sup>

The war did not slow down until 1995, when NATO began bombing key Serb positions. Unfortunately, the bombing raids forced Serb nationalists into UN guarded “safe areas” where the murder and sexual violence continued not only against the displaced population but also against UN peacekeepers.<sup>304</sup> In 1995, the United States brokered peace talks in Dayton between the three warring parties, calling for the partitioning of Bosnia into a Muslim-Croat Federation and a Bosnian Serb Republic. In December 1995, Presidents Milošević, Tuđman, and Izetbegović ended the war by signing the final peace agreement in Paris.<sup>305</sup> In 1996, more than 60,000 NATO soldiers would be deployed to help preserve the cease-fire and enforce the treaty provisions.

The UN was never able to provide protection for civilians, nor was it able to perform any semblance of its peacekeeping functions, but it was seriously committed to its obligation of investigating the serious crimes committed during what U.S. Assistant Secretary of State Richard Holbrooke described as “the greatest failure of the West since the 1930s.”<sup>306</sup> The first step taken by the international community was the establishment of a Commission of Experts to investigate and collect evidence pertaining to “grave breaches of the Geneva Conventions and other violations of international humanitarian law.”<sup>307</sup> The Commission performed investigations resulting in three reports that ultimately led to the adoption of Security Council Resolution 808 in February 1993 affirming the Commission’s suggestion that an international tribunal be established.<sup>308</sup> The ICTY began operation in mid-November of 1993 and became the first war crimes court since the Nuremberg trials following World War II. The ICTY’s mandate necessarily was accompanied by limited existence;<sup>309</sup> it was intended to exist only for a short period of time and to prosecute only those most responsible for grave crimes.<sup>310</sup>

<sup>302</sup> Covenant on Civil and Political Rights [CCPR] Human Rights Committee, Bosnia and Herzegovina, U.N. Doc. CCPR/C/89 (Apr. 27, 1993).

<sup>303</sup> The UN was only allowed to use the Sarajevo airport with express Serbian approval. The UN not only failed to provide protection for its employees and aid workers at the airport but also for VIP’s there that the UN was responsible for transporting. Such was the case when Serb nationalists shot the Bosnian Deputy Prime Minister while in he was in a UN armored personnel car.

<sup>304</sup> Prosecutor v. Radislav Krstić, Case No. ICTY 98–33-T, Judgment (Aug. 2, 2001).

<sup>305</sup> Dayton Peace Accords, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75.

<sup>306</sup> Roger Cohen, *Taming the Bullies of Bosnia*, N.Y. TIMES MAG., Dec. 17, 1995; see also PAUL R. WILLIAMS & MICHAEL SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 63–87 (2002) (international response and political factors motivating that response).

<sup>307</sup> S.C. Res 780, ¶ 2, U.N. Doc. S/RES/780 (Oct. 6, 1992).

<sup>308</sup> See S.C. Res 808, ¶ 1, U.N. Doc. S/Inf/49 (Feb. 22, 1993) stating “that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”

<sup>309</sup> This is the result of the financial and logistical realities of operating such a tribunal indefinitely. Thus, the UN Security Council has stated that the ICTY must close its doors and cease functioning by 2010, which will not happen as cases continue at the time of the publication of this book.

<sup>310</sup> S.C. Res. 1503, U.N. Doc. S/RES/1503, at preamble (Aug. 28, 2003); see also SCHABAS, *supra* note 260, at 604. The Council subsequently endorsed the completion strategy through resolutions stating that the ICTY focus on: “completing investigations by the end of 2004, all trial activities at first instance by the end

The war and atrocities in the former Yugoslavia continued for more than two years after the ICTY was established, and after its inception, actual charges remained few. To prevent impunity, with the endorsement of the ICTY, the parliament of Bosnia and Herzegovina adopted the Law on the Court of Bosnia and Herzegovina (Court of BiH) in July 2002.<sup>311</sup> The establishment of a permanent judicial body in Bosnia created a mechanism to provide judicial protection for the rights of Bosnian citizens. The Court of BiH is composed of three Divisions: Criminal, Administrative, and Appellate. Within the Criminal Division there are three sections: the War Crimes Chamber (WCC), a chamber devoted to Organized Crime, Economic Crime, and Corruption, and a General Crime Chamber. Unlike the ICTY mandate, the WCC of the Court of BiH (Section I) is limited neither to a fixed completion date or to prosecution of the most serious violations. Moreover, for better or worse, the WCC is not subject to the oversight of the UN Security Council.

The establishment of the WCC followed several years of discussion and planning including a clear exit strategy for the international personnel.<sup>312</sup> The court was created to be a national court with roots in local law but with a strong international presence. The court itself is carved out of the domestic national court system, located in Sarajevo and operates in accordance to the laws of BiH.<sup>313</sup> The WCC is composed of various panels, each containing two international judges and one Bosnian Presiding Judge.<sup>314</sup> As part of the transition strategy, the configuration of the panels changed to two Bosnian judges and one international judge from 2006 through 2007. The court will completely phase out international personnel, and will be operating solely on a national basis by the beginning of 2010.<sup>315</sup>

As part of the initiative to assist in the completion strategy of the ICTY as well as to further justice and accountability in Bosnia, the Office of the Prosecutor of the State Court of BiH includes a Special Department for War Crimes. Within the Special Department for War Crimes, five regional prosecution teams and a sixth prosecution team for the Srebrenica massacre will conduct investigations. All teams are based in Sarajevo.

In addition, the Registry of the Court was established by an international agreement in 2004 by the Presidency of Bosnia and Herzegovina and the Office of the High Representative. The objectives of the Registry are to support and strengthen the capacities of the

of 2008, and all of its work in 2010, . . . concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction . . . ; [and] transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions."

<sup>311</sup> Letter from Fausto Pocar, *President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 to the President of the Security Council*, U.N. Doc. S/2006/898 (Nov. 16, 2006) (formal endorsement from the War Crimes Chamber in BiH); see also Param-Preet Singh, *Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber* (Human Rights Watch, Feb. 2007).

<sup>312</sup> The WCC's creation began in 2003 at the Peace Implementation Council Steering Board Meeting, and underwent extensive negotiations until being adopted on January 6, 2005.

<sup>313</sup> The court is subject to the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia rather than the new criminal and procedural codes of BiH. The court also applies the European Charter on Human Rights, ratified by BiH in 2002.

<sup>314</sup> There are 36 national and 17 international judges in the Court of BiH.

<sup>315</sup> *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina* (Human Rights Watch, Feb. 7, 2006).

WCC and the Organized Crime Chamber (Section II), as well as the Special Department for War Crimes. The Registry's mandate, among others, is to provide support to international judges and prosecutors in their work, as well as to strengthen the capacity of the state judicial system in trying cases of war crimes and organized crime. The Registry's staff is being integrated gradually into the respective national justice institutions of the country, including the Ministry of Justice, the Court of BiH, and the Office of the Prosecutor.

As stated, the WCC will try perpetrators using original jurisdiction while simultaneously assisting in the ICTY and overseeing "Rules of the Road" cases. The Court may hear new war crimes cases that have been initiated locally. A coordinating committee has been established to prioritize cases that arise locally; however, there are nowhere near enough resources to try all of these cases expeditiously. The WCC's current record stands up in contrast to the ICTY for taking more trials to verdict with far less resources.

The WCC has the ability to prosecute ICTY cases referred to it through the judicially created Rule 11bis.<sup>316</sup> This rule allows judges to refer or "transfer lower or mid-level accused to national jurisdictions"<sup>317</sup> prior to the commencement of trial. Rule 11bis was first invoked September 7, 2004 in the *Ademi & Norac* case.<sup>318</sup> After a motion by the Prosecutor, former ICTY President Meron established a separate trial chamber to determine the legality of this new use of Rule 11bis.<sup>319</sup> Without hesitation, the Rule became a legitimate and widely used tool to achieve the completion strategy goals of transferring cases to national courts. Radovan Stanković became the first accused to substantially question the newly amended rule. Stanković argued that the ICTY judges had exceeded their power in adopting Rule 11bis without an explicit UNSC amendment to the Statute.<sup>320</sup> The ICTY Appellate Chamber dismissed this argument and held that "the tribunal Judges amended Rule 11bis to allow for the transfer of lower or mid-level accused to national jurisdictions pursuant to the Security Council's recognition that the tribunal has implicit authority to do so under the Statute."<sup>321</sup> Thus, the ICTY confirmed that the WCC was capable of conducting fair trials and solidified the national courts' role in domestic and international law.

Additionally, the WCC also has jurisdiction over "Rules of the Road" cases. These cases arise out of a unique policy wherein every war crimes investigation was submitted to the ICTY's Prosecutor for a determination regarding whether the evidence met international standards justifying an arrest.<sup>322</sup> These cases are dealt with by the Prosecutor in the Special Department for War Crimes who, after finding sufficient evidence for prosecution, will either return the case to a district court or retain the highly sensitive cases for prosecution

<sup>316</sup> ICTY Rules of Evidence and Procedure, Rule 11bis, adopted on 12 November 1997, revised on 30 September 2002, amended on 10 June 2004, 28 July 2004, 11 February 2005. Michael Bohlander, *Referring an Indictment from the ICTY and ICTR to Another Court – Rule 11bis and the Consequences for the Law of Extradition*, 55 INT'L & COMP. L. Q. 219 at 220 (2006). The original ICTY Rule 11bis of November 1997 provided for "the suspension of an indictment." It was re-drafted with the current title "Referral of the Indictment to Another Court" on September 30, 2002 and has been modified several times since.

<sup>317</sup> *Stanković* Rule 11bis Decision, *supra* note 101, ¶ 16.

<sup>318</sup> *Ademi & Norac* Rule 11bis Motion, *supra* note 101. This case questioned whether the case met the seniority criterion of the Rule and whether states were eligible to receive cases. In this case, both were answered in the affirmative thus granting authority to Rule 11bis.

<sup>319</sup> *Id.*

<sup>320</sup> *Stanković* Rule 11bis, *supra* note 101, ¶ 26.

<sup>321</sup> *Id.*

<sup>322</sup> Book of Rules on the Review of War Crimes Cases art. 2, KTA-RZ 47/04-1 (Dec. 28, 2004).



in the WCC. Thus, the operation of not only the WCC but the effective functioning of district courts will prove vital in assessing the success of domestic prosecutions.<sup>323</sup>

From its inception through 2009, the WCC and the Organized Crime Chamber has completed over 3,300 cases, with 407 cases pending and six cases that have been transferred from the ICTY.<sup>324</sup> The Court of BiH's unique international *and* domestic composition and jurisdiction place this hybrid tribunal, more so than any other, in an excellent position to enhance local judicial capacity. Capacity building continues to occur as the international staffs help prepare national prosecutors and judges for future functioning of the WCC. The inclusion of a transition strategy from international to purely domestic prosecutions makes the Court of BiH the only mixed tribunal to be established with a clear plan wherein international actors are removed and domestic personnel have been adequately trained for ongoing prosecutions.

Article 172 of the defines CAH as:

- (1) Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:
  - a) Depriving another person of his life (murder);
  - b) Extermination;
  - c) Enslavement;
  - d) Deportation or forcible transfer of population;
  - e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
  - f) Torture;
  - g) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
  - h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;
  - i) Enforced disappearance of persons;
  - j) The crime of apartheid;
  - k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health.<sup>325</sup>

Although precise statistics on the prosecutions of the WCC and the Court of BiH are difficult to find, the substantial number cases has resulted in a backlog. Those

<sup>323</sup> See OSCE, Mission to Bosnia and Herzegovina, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles* 10 (Mar. 2005); Ethel Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, at 409.

<sup>324</sup> Number of Cases before the Sections I & II of the Criminal Division of the Court of Bosnia and Herzegovina as of 31 August 2009, available at [http://www.sudbih.gov.ba/files/docs/statistika/2009-08-31/Number\\_of\\_cases\\_before\\_Section\\_I\\_and\\_II\\_-\\_August\\_2009.pdf](http://www.sudbih.gov.ba/files/docs/statistika/2009-08-31/Number_of_cases_before_Section_I_and_II_-_August_2009.pdf) (last visited Aug. 14, 2010).

<sup>325</sup> Criminal Code of Bosnia and Herzegovina art. 172 (January 24, 2003).



prosecutions that have taken place have focused on war crimes. According to the research of this writer and his researcher, the CAH prosecutions before the WCC have resulted in the following statistics (which are approximate):

**CAH Prosecutions (as of November 2010)**

***Indicted for CAH:*** 74

*Specific Acts*

Persecution: 67

Murder: 66

Imprisonment/severe deprivation of liberty: 59

Other inhumane acts: 58

Deportation/forcible transfer: 42

Torture: 40

Rape (and other sexual violence): 26

Enforced disappearance of persons: 22

Enslavement: 8

Extermination: 7

***Acquittals:*** 5

***Convicted of CAH:*** 38

*Specific Acts*

Persecution\*: 32

Imprisonment/severe deprivation of liberty: 28

Murder: 27

Other inhumane acts: 22

Rape (and other sexual violence): 19

Torture: 19

Deportation/forcible transfer: 14

Enforced disappearance: 11

Enslavement: 4

*\* the great majority of convictions for persecution incorporate other convicted specific acts, thus the other specific acts that served as a basis for the crime of persecution are also accounted for in the statistics*

### §7.3. Sierra Leone

On March 23, 1991, a devastating ten-year civil war began in Sierra Leone.<sup>326</sup> The conflict was replete with extreme brutality and widespread human rights abuses against civilians as rebel forces primarily of the Revolutionary United Front (RUF) sought control over Sierra Leone's diamond mines. These diamonds were seized by the rebels and smuggled to Western Europe, where major diamond companies bought them illegally. The funds were then recycled illegally and the proceeds were used to buy weapons from the Russian and Ukrainian mafias, illegally smuggled into Sierra Leone through other African

<sup>326</sup> See Jennifer L. Poole, *Post-Conflict Justice in Sierra Leone*, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 230, at 563; see also Int'l Crisis Group, *SIERRA LEONE: TIME FOR A NEW MILITARY AND POLITICAL STRATEGY*, Africa Report No. 28, April 11, 2001; Int'l Crisis Group, *SIERRA LEONE: MANAGING UNCERTAINTY*, Africa Report No. 35, Oct. 24, 2001; Sylvia de Bertodano, *Current Developments in Internationalized Courts*, 1 J. INT'L CRIM. JUST. 226, 242 (April 2003); Higonnet, *supra* note 323, at 384.

countries, including Liberia. The latter went through the same brutal experience, and its rebels became the country's leaders through U.S. support.<sup>327</sup> Estimates are that more than 75,000 people were killed.<sup>328</sup> Thousands more were defenseless victims of "terror tactics," including kidnapping, rape, and amputation of hands and feet.<sup>329</sup> An estimated two-thirds of Sierra Leone's population, more than 60 percent of them children, were internally displaced or forced to take refuge in neighboring Guinea.

On July 7, 1999, President Ahmed Tejan Kabbah signed the Lomé Peace Accord.<sup>330</sup> It established an untenable power-sharing arrangement with RUF leader Foday Sankoh, but the fighting was only temporarily suspended. Sankoh was put in charge of the diamond mines and, "in order to bring lasting peace to Sierra Leone," a sweeping general amnesty granted "absolute and free pardon to all combatants and collaborators in respect of anything done by them in pursuit of their objectives."<sup>331</sup>

In October 1999, the Security Council established the United Nations Mission in Sierra Leone (hereinafter UNAMSIL).<sup>332</sup> Initially established with a maximum force of

<sup>327</sup> See DOUGLAS FARAH, *MERCHANT OF DEATH: MONEY, GUNS, PLANES, AND THE MAN WHO MAKES WAR POSSIBLE* (2007); GREG CAMPBELL, *BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD'S MOST PRECIOUS STONES* (2002); JOHN L. HIRSCH, *SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY* (2001); see also Ian Smillie, Lansana Gbere & Ralph Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds & Human Security* (Partnership Africa Canada, Jan. 2000) (discussing the significance of the conflict and its connection to the broader context of other countries, namely diamond importing countries outside the African continent); Lucinda Saunders, *Rich & Rare are the Gems They War: Holding DeBeers Accountable for Trading Conflict Diamonds*, 24 *FORDHAM INT'L L.J.* 1402 (2001) (arguing that the DeBeers group of companies, which participates in mining the majority of the world's diamonds, should be held accountable for its part in the conflict diamond trade under the Alien Tort Claims Act, 28 U.S.C. §1350). In the wake of September 11, it has also come to light that the illegal diamond trade funds terrorist organizations such as Al Qaeda. See DOUGLAS FARAH, *BLOOD FROM STONES: THE SECRET FINANCIAL NETWORK OF TERROR* (2004); see also Douglas Farah, *Al Qaeda Cash Tied to Diamond Trade; Sale of Gems From Sierra Leone Rebels Raised Millions, Sources Say*, *WASH. POST*, Nov. 2, 2001, at 25; Editorial, *Sell Diamonds for Love, Not War*, *CHI. TRIB.*, Dec. 15, 2001, at Z6.

<sup>328</sup> See *The Special Court for Sierra Leone: The First Eighteen Months* 1 (International Center for Transitional Justice, March 2004); see also Paul B. Spiegel et al., *Prevalence of HIV infection in conflict-affected and displaced people in seven sub-Saharan African countries: A systematic review*, 369 *LANCET* 2187 (2007) (dispelling the belief that conflicts lead to the spread of HIV/AIDS in areas of conflict); Will Dunham, *Wars Don't Fuel African HIV Crisis – Study*, *REUTERS*, June 28, 2007, available at <http://www.reuters.com/article/worldNews/idUSN2730879520070628>.

<sup>329</sup> See Int'l Ctr for Transitional Justice, *The Special Court for Sierra Leone: The First Eighteen Months* 1 (2004); see also Paul B. Spiegel et al., *Prevalence of HIV infection in conflict-affected and displaced people in seven sub-Saharan African countries: A systematic review*, 369 *LANCET* 2187 (2007) (dispelling the belief that conflicts lead to the spread of HIV/AIDS in areas of conflict); *Wars Don't Fuel African HIV Crisis – Study*, *supra* note 317.

<sup>330</sup> Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), U.N. Doc. S/1999/777 (July 7, 1999) [hereinafter Lomé Agreement].

<sup>331</sup> *Id.* art. IX, ¶ 2. The government of Sierra Leone granted "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing" of the agreement.

<sup>332</sup> U.N. Doc. S/Res/1270 (Oct. 22, 1999). UNAMSIL was initially established with 6,000 military personnel. As the peace accord fell apart, peacekeepers were being killed or captured by the RUF, causing the UN to commit more military personnel to the Mission. See Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, 30 *DENV. J. INT'L L. & POL'Y*, 325, 358 (2002); J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court of Sierra Leone*, 19 *N.Y. INT'L L. REV.* 37, 60 (2006). When the UNAMSIL closed in 2005, it had a maximum deployment strength of: military (17,368); UN Police (87); international civilian (322); local civilian (552), and total expenditures amounting to \$2.8 billion. For

6,000 military personnel, its size swelled to 17,500.<sup>333</sup> UNAMSIL established two complementary postconflict justice mechanisms: the Truth and Reconciliation Commission and the Special Court for Sierra Leone.<sup>334</sup>

On January 16, 2002, the UN and Sierra Leone signed an agreement that created the legal framework for the Special Court,<sup>335</sup> which is based in Freetown. It is technically not a UN body or a court within the judicial system of Sierra Leone, but has a status that sets it somewhat apart from both.<sup>336</sup> Unlike the ICTY and the ICTR, which were established under Security Council Resolutions pursuant to Chapter VII of the United Nations Charter and hold jurisdiction only over international offenses, the Special Court is a “treaty-based *sui generis* court of mixed jurisdiction and composition.”<sup>337</sup>

The Special Court’s much negotiated mandate is “to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”<sup>338</sup> Although the Lomé Peace Accord granted amnesty to all participants in the civil war, the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone stripped the legal effect of the amnesty provision by stating that the “United Nations has consistently maintained the position that amnesty cannot be granted in respect to international crimes, such as

background on UNAMSIL and a list of related United Nations documents, *see* current peacekeeping operations, available at <http://www.un.org/Depts/dpko/missions/unamsil/index.html>.

<sup>333</sup> The Security Council revised UNAMSIL’s mandate to allow for the increase in personnel, making it, at the time of writing, its largest mission. *See* U.N. Doc. S/Res/1346 (Mar. 30, 2001); The Secretary-General, *Twelfth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, U.N. Doc. S/2001/1195, at ¶ 11 (Dec. 13, 2001).

<sup>334</sup> The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter *Establishment Report*]. The annex contains the Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone and the draft Statute for the Special Court for Sierra Leone. There is an informative website run by the U.C. Berkeley War Crimes Studies Center covering all aspects of the Sierra Leone Special Court including copies of the Sierra Leone Statute, the Sierra Leone Special Court Agreement, and weekly monitoring reports at <http://socrates.berkeley.edu/~warcrime/SL.htm>. This was the third *ad hoc* international criminal court created by the UN in the last decade. War crimes tribunals were created for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994.

<sup>335</sup> In contrast to the Commission, which was contemplated during negotiations for the Lomé Agreement, the creation of the Special Court was contemplated later, following RUF breaches of the Lomé Agreement. *See* Letter dated April 25, 2002 from Allieu I. Kanu, Ambassador, Deputy Permanent Representative (Legal Affairs) of Sierra Leone to M. Cherif Bassiouni (on file with author).

<sup>336</sup> *See* Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 230, at 72. Kritz states: “The Sierra Leone hybrid model is similar to the hybrid court proposal which was considered for Cambodia; both were negotiated by the United Nations Office of Legal Affairs.” Additionally, this would set the stage for the later Lebanon tribunal to be established by bilateral agreement between the United Nations and the Government of Lebanon.

<sup>337</sup> The Special Court was authorized by the Security Council and then elaborated in a formal agreement between the UN and the government of Sierra Leone. The court has an international prosecutor, and the government of Sierra Leone has designated the deputy prosecutor. The trial chamber consists of two international judges and one local judge, and the appeals chamber has three internationals and two locals.

<sup>338</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [hereinafter Statute of the Special Court], available at <http://www.sc-sl.org/Documents/scsl-agreement.html>. The Statute was endorsed through S.C. Res. 1400, U.N. Doc. S/RES/1400, ¶ 9 (Mar. 28, 2002).

genocide, crimes against humanity or other serious violations of international humanitarian law.”<sup>339</sup> Consequently, Article 10 of the Statute of the Special Court states that a grant of amnesty is *not* a bar to Special Court prosecution of international crimes.<sup>340</sup> International law, with increasing clarity, adopts the position that a blanket amnesty for these types of crimes is impermissible.<sup>341</sup>

According to Resolution 1315, the Special Court has subject matter jurisdiction over CAH, violations of common Article 3 to the 1949 Geneva Conventions on the Protection of Victims of War and the Additional Protocol II of those Conventions, other serious violations of international humanitarian law, and certain enumerated offenses under Sierra Leonean law. The provisions in the Statute of the Special Court relating to CAH, offenses under common Article 3, and other serious violations of international humanitarian law, are generally consistent with similar statutory provisions for the ICTY, ICTR, and ICC.<sup>342</sup>

The Special Court may prosecute persons who, “as part of a widespread or systematic attack against any civilian population,” have committed murder; extermination; enslavement; deportation; imprisonment; torture; rape; sexual slavery; enforced prostitution; forced pregnancy and any other form of sexual violence; persecution on political, racial, ethnic or religious grounds; and other inhumane acts.<sup>343</sup> The Statute of the Special Court, in contrast to the statutes of the ICTY and ICTR, does not include the crime of genocide.<sup>344</sup> The Special Court may prosecute persons for commission of serious

<sup>339</sup> *Establishment Report*, *supra* note 334, ¶ 22. Cf. Craig Timberg, *Sierra Leone Special Court's Narrow Focus*, WASH. POST, Mar. 26, 2008 (noting that some Sierra Leoneans believe that massive funds spent on the Special Court would have been better spent on education, health care or developing a national functioning judicial system); *The Jury Is Still Out: A Human Rights Watch Briefing Paper on Sierra Leone* (Human Rights Watch, July 11, 2002) (urging Sierra Leone to repeal the Lomé Peace Agreement amnesty for national courts, so that the domestic judicial system can also try offenders of war crimes and CAH). One of the largest criticisms of the Special Court from Sierra Leoneans is that the lower level offenders are living in the same neighborhoods as their victims with impunity, causing some to regard the court as having too ‘narrow’ of a focus. The court has responded with an extensive outreach program that aims to explain command responsibility. Meanwhile, the lead prosecutor, Stephen Rapp, has encouraged Sierra Leoneans to urge local judicial prosecution of lower level offenders. However, there has been little effort by local governments to push prosecutions. See Jane Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 302 (2007).

<sup>340</sup> Statute of the Special Court art. 10, *supra* note 336 (stating that “[a]n amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”).

<sup>341</sup> See M. Cherif Bassiouni, *Proposed Guiding Principles for Combating Impunity for International Crimes*, in POST-CONFLICT JUSTICE, *supra* note 241, at 255.

<sup>342</sup> Mundis, *supra* note 246, at 3. Mundis has an informative footnote that reports the following “With respect to crimes against humanity, compare Sierra Leone Statute art. 2, with ICTY Statute art. 5, ICTR Statute art. 3, and Rome Statute art. 7. Concerning common Article 3 offenses, compare Sierra Leone Statute art. 3, with ICTY Statute art. 3, as interpreted by the appeals chamber in *Tadić* Jurisdictional Decision, *supra* note 80, ¶ 94, ICTR Statute art. 4 and Rome Statute art. 8(2)(c). Concerning the three enunciated offenses under Sierra Leone Statute art. 4, compare Rome Statute art. 8(2)(b)(i) (‘intentionally directing attacks against the civilian population’), Rome Statute art. 8(2)(b)(iii) (attacks against humanitarian workers) and art. 8(2)(b)(xxvi) (making it unlawful to conscript or enlist children under the age of fifteen years or to use them to participate actively in hostilities).” See *id.* at 3, note 25.

<sup>343</sup> Statute of the Special Court art. 2, *supra* note 338.

<sup>344</sup> See *Establishment Report*, *supra* note 334, at ¶ 13 (including the crime of genocide was viewed by both the Security Council and Secretary-General as inappropriate).

violations of common Article 3 of the August 12, 1949 Geneva Conventions on the Protection of Victims of War and the Additional Protocol II of June 8, 1977.<sup>345</sup> Included in these violations are violence to life, health and physical or mental well-being of persons; collective punishment; taking of hostages; acts of terrorism; outrages upon personal dignity; pillage; the passing of sentences and carrying out of executions absent judgment by a regularly constituted court; and threats to commit any of the foregoing.<sup>346</sup>

The Special Court may prosecute persons for other serious violations of international humanitarian law, such as intentional attacks against civilian populations; intentional attacks against personnel, installations, materials or equipment of peacekeeping or humanitarian missions; and conscription or enlistment of children under age fifteen.<sup>347</sup>

Finally, the Special Court may prosecute persons for various offenses under Sierra Leonean law. These offenses include abuse of girls; abduction of a girl for immoral purposes; wanton destruction of property; and setting fire to a dwelling.<sup>348</sup>

The Special Court has concurrent jurisdiction with the courts of Sierra Leone when prosecuting crimes under either international or national law.<sup>349</sup> However, like the ICTY and the ICTR, the Special Court has primacy over the domestic courts of Sierra Leone and may issue binding orders to the government of Sierra Leone. Similar to the UN-sponsored courts in Timor-Leste, and unlike the ICTY and the ICTR, the Special Court cannot assert primacy over the national courts of other states or order the surrender of an accused located in another state. Fortunately, this restraint has not compromised the Court's operation because most suspects are in custody within Sierra Leone.

The Special Court may retry a defendant after trial for violations of international law (but not national law)<sup>350</sup> at the national level, if the crime for which he was tried in the national court was characterized as an ordinary crime, or the national court proceedings were not impartial or independent.<sup>351</sup> Accordingly, trial by the national courts has not been a means of manipulating justice and ensuring impunity for violations of international law.

Article 6 of the Sierra Leone Statute governs individual criminal responsibility. It is consistent with similar provisions found in the ad hoc Tribunals and the ICC. The official position of an accused, even if a governmental official, will neither relieve the person of criminal responsibility nor mitigate punishment.<sup>352</sup> Acts committed by a subordinate will not relieve the superior of criminal responsibility when the superior knew or had reason to know that the subordinate was about to commit the acts or had done so, yet the superior failed to implement appropriate punishment or means preventing repetition of the acts.<sup>353</sup> The Special Court has the discretion to mitigate the punishment of perpetrators who acted pursuant to an order of the government or a superior.<sup>354</sup> Article 6(5)

<sup>345</sup> Statute of the Special Court art. 3, *supra* note 338.

<sup>346</sup> *Id.* at art. 3.

<sup>347</sup> *Id.* at art. 4.

<sup>348</sup> *Id.* at art. 5.

<sup>349</sup> *Id.* at art. 8.

<sup>350</sup> Thus, it may retry a defendant for crimes under articles 2 through 4, but not article 5.

<sup>351</sup> Statute of the Special Court art. 9, § 3, *supra* note 338.

<sup>352</sup> *Id.* at art. 6, § 2.

<sup>353</sup> *Id.* at art. 6, § 3.

<sup>354</sup> *Id.* at art. 6, § 4.

states that Sierra Leonean law will still govern violations of the domestic offenses found in Article 5.

Perhaps the most controversial article of the Sierra Leone Statute was Article 7, which governs jurisdiction over persons as young as fifteen years old. Over 5,000 children under the age of eighteen participated in the war.<sup>355</sup> They were recruited by the RUF, the Sierra Leone Army, and government allied forces.<sup>356</sup> The government of Sierra Leone was adamant about the need to hold child combatants, many of whom were the most brutal perpetrators during the conflict, accountable for their crimes. Nonetheless, several nongovernmental organizations and human rights groups stressed the importance of rehabilitation for these children and opposed trial. Thus, a compromise was agreed upon. The Special Court does not have jurisdiction over combatants who were under the age of fifteen when they allegedly committed crimes.<sup>357</sup> However, the Special Court has jurisdiction over combatants between the ages of fifteen and eighteen but must ensure that the accused is treated in accordance with international human rights standards, and in particular, with the rights of the child.<sup>358</sup> Upon conviction, the Special Court may not sentence juvenile offenders to prison terms.<sup>359</sup> Accordingly, the Special Court may pursue special remedies against child combatants, including care guidance and supervision orders; community service orders; counseling; foster care; correctional, educational, and vocational training programs; and, where necessary, any programs of disarmament, demobilization, and reintegration or programs of child protection agencies.<sup>360</sup>

Structurally, the Special Court consists of three organs: the trial and appellate chambers, the office of the prosecutor, and the registry.<sup>361</sup> The Special Court's two trial chambers consist of a three-judge panel, one of whom is appointed by the government

<sup>355</sup> See *Post-Conflict Reintegration Initiative for Development & Empowerment, Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court for Sierra Leone* 13 (International Center for Transitional Justice, Sept. 12, 2002) (international and local NGO perform a study estimating that up to 70 percent of the combatants were children). A Human Rights Watch report cited child recruitment by the RUF who were forced to commit crimes under the threat of death or caused by drug inducement. The report notes that most child soldiers were either injected with drugs at gunpoint or ingested drugs in their food that sent them into a haze that facilitated the commission of killings, massacres, rapes and beatings. See *Coercion and Intimidation of Child Soldiers to Participate in Violence* (Human Rights Watch, Apr. 2008).

<sup>356</sup> *Id.*; see also J. PETER PAHM, CHILD SOLDIERS, ADULT INTERESTS: THE GLOBAL DIMENSIONS OF THE SIERRA LEONEAN TRAGEDY (2005); *Sierra Leone Human Rights Developments*, in *WORLD REPORT 2002* (Human Rights Watch, Jan. 17, 2002); *Children's Rights: Child Soldiers*, in *WORLD REPORT 2002* (Human Rights Watch, 2002) (this report states that between May and November 2001, over 2,903 children under the age of eighteen, including 1,506 from the RUF and 1,303 from pro-government militias were released and/or disarmed in Sierra Leone at various demobilization centers); *Sierra Leone: Action Needed to End Use of Child Combatants*, AFR 51/075/2000 (Amnesty International, Aug. 8, 2000).

<sup>357</sup> Statute of the Special Court ¶ 35, *supra* note 338.

<sup>358</sup> *Id.* at art. 7, § 1, states:

Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with the international human rights standards, in particular the rights of the child.

<sup>359</sup> *Id.* at art. 7, § 2 and art. 19, § 1.

<sup>360</sup> *Id.* at art. 7, § 2.

<sup>361</sup> For provisions concerning the trial and appellate chambers, see *id.* at art. 2, § 1. For provisions concerning the prosecutor, see *id.* at art. 14. For provisions concerning the registry, see *id.* at art. 15.



of Sierra Leone<sup>362</sup> and two appointed by the Secretary-General upon nominations by states, particularly the members of the Economic Community of West African States (ECOWAS) and the Commonwealth of Nations.<sup>363</sup> The appeals chamber consists of five judges, two appointed by the government and three appointed by the Secretary-General upon nominations by states, particularly members of the ECOWAS and the Commonwealth. The prosecutors are all international, however, the defense teams are mixed and the Office of the Registrar is mostly composed of Sierra Leoneans.<sup>364</sup>

An accused person appearing before the Special Court, in accordance with established international human rights norms, has a variety of due process rights, including a fair and public hearing (subject to measures ordered to protect victims and witnesses, as with the ad hoc Tribunals); the presumption of innocence; prompt and full information about charges in his/her language; adequate time and facilities for preparing his/her case; speedy trial; right to counsel; right to examine witnesses; assistance of an interpreter; privilege against self-incrimination; and right to be present at trial (thus no trial *in absentia*).<sup>365</sup>

The Special Court follows the rules of procedure and evidence of the ICTR, *mutatis mutandis*, which were taken from the rules of procedure and evidence of the ICTY, *mutatis mutandis*.<sup>366</sup> Special Court judges are empowered to amend any ICTR rules that do not adequately address a specific situation during the Sierra Leone trials. This is to be done by relying on the 1965 Sierra Leonean Criminal Procedure Act for guidance.<sup>367</sup>

The judgments of both the Trial and Appeals Chambers are delivered in public and accompanied by a written opinion.<sup>368</sup> Upon conviction, the Special Court may impose imprisonment for a specified number of years.<sup>369</sup> In addition, the Special Court may also order the “forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct,” and return them to their rightful owners or the State of Sierra Leone.<sup>370</sup> To determine an appropriate sentence, the Special Court has recourse to the sentencing practices of the ICTY, ICTR, and the Sierra Leone domestic courts.<sup>371</sup>

<sup>362</sup> The judge appointed by the government of Sierra Leone is not required to be a Sierra Leonean. In fact, there is only one Sierra Leonean serving in the trial chambers, Justice Rosolu John Bankole Thompson, and one serving in the Appeals Chamber, Justice King. Cohen, *supra* note 245, at 12.

<sup>363</sup> Statute of the Special Court art. 13, *supra* note 339.

<sup>364</sup> Cohen, *supra* note 242, at 12. On April 19, 2002, UN Secretary-General Kofi Annan appointed a senior attorney of the US Department of Defense, David Crane, as the Chief Prosecutor of the SCSL, and Briton Robin Vincent, as the tribunal’s Registrar. Crane was succeeded by Desmond de Silva, QC, a British criminal lawyer who previously served as the Deputy Prosecutor. He served as Prosecutor until June 2006, and was succeeded by Stephen J. Rapp, a former United States Attorney, who was appointed to the post in December 2006, and who had also previously served as Chief of Prosecutions at the ICTR from May 2005. Deputy Prosecutor Joseph Kamara, a national of Sierra Leone, has been Acting Prosecutor since September 8, 2009. Vincent was succeeded in October 2005 by Lovemore G. Munlo, SC who was succeeded by Herman von Hebel, SC, in July 2006. Mr. von Hebel has taken up the position of Deputy Register with the Special Tribunal for Lebanon but a replacement within the Special Court of Sierra Leone has not been announced. See Press Release, Special Tribunal for Lebanon, Registrar and Deputy Registrar of the Special Tribunal for Lebanon sworn in today, (Sept. 15, 2009) available at <http://www.stl-tsl.org/sid/134> (last visited Sept. 30, 2009).

<sup>365</sup> *Id.* at art. 17.

<sup>366</sup> *Id.* at art. 14; ICTR Statute art. 14, *supra* note 7; ICTY Statute art. 15, *supra* note 7.

<sup>367</sup> Statute of the Special Court art. 14(2), *supra* note 338.

<sup>368</sup> *Id.* at art. 18. (a majority is required to reach a judgment)

<sup>369</sup> *Id.* at art. 19, § 1. See *id.* at art. 22 (stating that imprisonment may be served in Sierra Leone or another state); *id.* at art. 23 (regarding pardon or commutation of sentences).

<sup>370</sup> Statute of the Special Court art. 19, § 3, *supra* note 338.

<sup>371</sup> *Id.* at art. 19 § 1.



The Special Court's three-year mandate was technically completed in June 2005; however, due to the fact that trials were ongoing at that time, the mandate was necessarily extended.<sup>372</sup> The Special Court was dealt a series of setbacks in the deaths of Foday Sankoh, the leader of the RUF, who died while in custody in Freetown, Sam Bokarie, a top RUF general, who was killed in Liberia, and Johnny Paul Koroma, a military commander who successfully led a coup d'état in 1997, who was reportedly killed in Liberia.

The Special Court received a major boost in March 2006,<sup>373</sup> when Nigerian authorities captured Charles G. Taylor, the warlord who later became Liberia's president, and turned him over to the government of Sierra Leone to face eleven counts of CAH, war crimes, and other serious violations of international humanitarian law.<sup>374</sup> The charges stem from Taylor's role in stimulating Sierra Leone's civil war. Taylor had fled Liberia and was granted asylum by Nigeria, where he remained despite widespread demands that Nigeria surrender him to the Special Court. Following his capture and transfer to the custody of Sierra Leone, the government requested that the ICC provide a venue for the trial of Taylor due to concerns that his presence would jeopardize the fragile peace in Sierra Leone. The Security Council unanimously approved a resolution authorizing a chamber of the Special Court to sit outside its jurisdiction in The Hague.<sup>375</sup>

Taylor's trial commenced in June 2007 with Taylor himself boycotting the proceedings after firing his first defense attorney.<sup>376</sup> The trial resumed hearings on January 7, 2008, opening with the prosecution's case.<sup>377</sup> The prosecution has indicated that it intends to call a total of seventy-two witnesses (including expert, crime-based, and linkage witnesses) while presenting written testimony from an additional seventy crime-based witnesses.<sup>378</sup> Thus far, the prosecution witnesses have shown particularly violent and horrific video clips from a documentary regarding blood diamonds,<sup>379</sup> have testified that

<sup>372</sup> Cohen, *supra* note 242, at 12.

<sup>373</sup> Press Release, *Special Court for Sierra Leone Office of the Prosecutor, Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court* (Mar. 29, 2006).

<sup>374</sup> *Prosecutor v. Taylor*, Case No. SCSL-2003-01-PT, Second Amended Indictment (May 29, 2007). Charles Taylor has been accused of terrorizing the civilian population, committing unlawful killings, sexual violence and mass rape, mutilation and physical violence, use of child soldiers, abductions and forced labor, and looting under the doctrines of superior responsibility. The trial centers not on whether these crimes were committed, as the defense agrees that serious crimes did occur in Sierra Leone, but rather, whether Charles Taylor was responsible for them. According to Chief Prosecutor Stephen Rapp, Taylor was in effective control of the RUF in Sierra Leone by enabling them to march to Freetown, committing atrocities along the way. Barrett Sheridan, *Trials Without Borders*, NEWSWEEK, Jan. 10, 2008; *Always get your man*, ECONOMIST, Oct. 22, 2009.

<sup>375</sup> S.C. Res. 1688, U.N. Doc. S/RES/1688 (June 16, 2006).

<sup>376</sup> Through a letter read by his attorney, Charles Taylor expressed that he "[a]t one time [he] had hoped and had confidence in the court's ability to dispense justice in a fair and impartial manner . . . [but that] at this time it has become clear that such confidence was misplaced." Alexandra Hudson, *Taylor absent as trial gets under way*, REUTERS, June 4, 2007; see also Jason McClurg, *New Defense Counsel Appointed for Charles Taylor*, 23 INT'L ENFORCEMENT L. REP. 366 (Sept. 2007).

<sup>377</sup> Jason McClurg, *Witnesses Begin Testifying as Charles Taylor's War Crimes Trial Resumes*, 24 INT'L ENFORCEMENT L. REP. (Mar. 2008).

<sup>378</sup> Revised from the original total of around 150 witnesses. Some of the decline in prosecution witnesses is due to death threats some individuals testifying have received based on their appearance at the trial. See Alexandra Hudson, *"Death Threats" to witnesses against Liberia's Taylor*, REUTERS, Mar. 20, 2008.

<sup>379</sup> *Shocking Footage at Taylor Trial*, BBC NEWS (Jan. 7, 2008). The video included images of a woman who had been sexually assaulted by a stick who then watched her husband stumble out of the jungle after having his arms cut off, a handless man who stated rebels had burned down his house with his family inside, and a child who had been kidnapped to work as forced labor in the diamond mines. *Charles Taylor war crimes trial resumes with blood diamond expert's testimony*, ASSOCIATED PRESS, Jan. 7, 2008.

they assisted in the transportation of weapons from Liberia to RUF soldiers in Sierra Leone,<sup>380</sup> and that Charles Taylor had ordered acts of cannibalism and ate human hearts himself.<sup>381</sup> The trial itself is expected to last around eighteen months with a verdict not being rendered until 2011.<sup>382</sup>

Other than the ongoing Charles Taylor trial, the Special Court began slowly, but in June 2007 delivered its first verdicts by convicting the former AFRC rebel leaders Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu of war crimes and CAH in the *Armed Forces Revolutionary Council (AFRC)* case.<sup>383</sup> Subsequently, in August 2007, the two surviving CDF defendants, Moinina Fofana and Allieu Kondewa were convicted of war crimes, CAH, and other violations of international law.<sup>384</sup> In February 2009, three RUF defendants were convicted of war crimes as well as forced marriage, the first conviction of its kind for an international tribunal.<sup>385</sup> The SCSL is nearing its end; it has issued judgments in all cases pending before it<sup>386</sup> aside from the Charles Taylor case.<sup>387</sup>

Additionally, Sierra Leone's Truth and Reconciliation Commission began public hearings in Freetown on April 14, 2003. The public hearings phase of the Commission's work follows the collection of over 7,100 statements from victims, perpetrators, and witnesses to atrocities committed during the war. Efforts to establish the Truth and Reconciliation Commission were spearheaded by UNAMSIL and the Office of the United Nations High Commissioner for Human Rights.<sup>388</sup> On July 5, 2002, President Kabbah formally swore in the three international and four Sierra Leonean commissioners.<sup>389</sup> The Commission was mandated to produce a report on human rights violations since the beginning of the conflict in 1991 and issue recommendations to facilitate reconciliation and to prevent

<sup>380</sup> This included testimony from Alex Tamba Teh, a Sierra Leonean pastor. See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-T, Transcript of Record at 680–791 (2007). Varmuyan Sherif, a former member of Charles Taylor's personal security force also testified that he was one of the RUF leaders and observed weapons being transported through Sam Bockarie from Liberia to Sierra Leone. See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-T, Transcript of Record at 792–973 (2007). Dennis Koker testified regarding an incident where stolen money and diamonds were being transferred from the RUF to Charles Taylor in Liberia. See *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-T, Transcript of Record at 1210–1207 (2007).

<sup>381</sup> See *Prosecutor v. Taylor*, Case No. SCSL-2003-01-T, Transcript of Record at 5489–6087 (2007); see also *Top aide testifies Taylor ordered soldiers to eat victims*, CNN (Mar. 13, 2008).

<sup>382</sup> *Charles Taylor Trial*, THE ECONOMIST, Jan. 9, 2008.

<sup>383</sup> *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgment (June 20, 2007) [hereinafter *AFRC Trial Judgment*]. Each of the defendants was found guilty of 11 counts of war crimes and crimes against humanity. The judgment marked the first time that an international or hybrid tribunal had ruled on the charge of recruitment of child soldiers into an armed force or the crime of forced marriage in an armed conflict. The Trial Chamber originally dropped the charges of forced marriage. The decision was reversed on appeal.

<sup>384</sup> *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment (Aug. 2, 2007) (Civil Defense Forces (CDF)) [hereinafter *CDF Trial Judgment*].

<sup>385</sup> *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Judgment (March 2, 2009) [hereinafter *RUF Trial Judgment*]; see also the discussion of “forced marriage” *infra* ch. 6, §3.3.5.

<sup>386</sup> See, e.g., *Brima v. Prosecutor*, Case No. SCSL-2004-16-A, Judgment (Feb. 22, 2008) [hereinafter *AFRC Appeals Judgment*]; *Fofana v. Prosecutor*, Case No. SCSL-04-14-A, Judgment (May 28, 2008) [hereinafter *CDF Appeals Judgment*]; *RUF Trial Judgment*, *supra* note 385.

<sup>387</sup> In February 2009, the Prosecution rested its case. On April 6, 2009 the Defense made its motion for acquittal.

<sup>388</sup> On February 22, 2000, the Sierra Leone legislature established the Commission according to the Truth and Reconciliation Commission Act.

<sup>389</sup> The commissioners were: Rt. Rev. Dr. Joseph Christian Humper, Hon. Justice Laura Augusta Ebunolorum Marcus-Jones, Professor John A. Kamara, Mr. Sylvanus Torto, Ms. Yasmin Louise Sooka, Madam Ajaaratou Satang Jow, and Professor William Schabas.

repetition of past violence. The Commission was also asked to “address impunity” and provide a forum for both victims and perpetrators of past abuses. Unlike the Special Court, which only has jurisdiction over crimes committed after November 30, 1996, the Commission was tasked with investigating violations from the “beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement.”<sup>390</sup> The Commission was authorized to issue subpoenas; however, it did not have the power to enforce these provisions and accusations of contempt had to be referred to the Sierra Leone High Court.<sup>391</sup> The Commission began its public hearings in April 2003 and issued its final report in October 2004.<sup>392</sup> Notable among the Commission’s recommendations was its call for the government to pay reparations to victims of the civil war.<sup>393</sup>

The Special Court and the Truth and Reconciliation Commission strive to achieve justice, reconciliation, and peace by strengthening the rule of law.<sup>394</sup> By operating in a mutually supportive way, the limited resources available to each can be maximized, while respecting each institution’s own mandate. If the use of complementary mechanisms employing both traditional judicial accountability methods and truth commissions prove to be a success in Sierra Leone, it undoubtedly has already been and will continue to be a valuable lesson for future UN post-conflict justice missions.

Article 2 of the Statute of the Special Court for Sierra Leone defines CAH as follows:

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation;
- e. Imprisonment;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- h. Persecution on political, racial, ethnic or religious grounds;
- i. Other inhumane acts.<sup>395</sup>

<sup>390</sup> Truth and Reconciliation Commission Act § 6(1) (Feb. 10, 2000).

<sup>391</sup> See Office of the Attorney General and Ministry of Justice Special Court Task Force, *Briefing Paper on the Relationship Between the Special Court and the Truth And Reconciliation Commission* (Jan. 7–18, 2002).

<sup>392</sup> Following a three-month preparatory phase, the TRC operated for an initial period of one year with a possible six-month extension, winding up administratively on December 31, 2003. It had a budget of \$9.9 million, but faced difficulties finding donors forcing the Commission to realign their budget as less than half of the funds pledged were dispersed to the Commission.

<sup>393</sup> The Commission recommended that the government focus on the needs of victims in “health, housing, pensions, education, skills training and micro-credit, community reparations and symbolic reparations.” See *Sierra Leone Truth And Reconciliation Commission Calls for Reparations*, UN NEWS SERVICE, Oct. 28, 2004.

<sup>394</sup> See *The Jury is Still Out*, *supra* note 339 (highlighting the importance of the two transitional justice mechanisms established with international assistance, the Special Court for Sierra Leone and the Truth and Reconciliation Commission). Using the traditional justice system, dozens of ex-combatants gathered in early April 2008 for “healing ceremonies” wherein perpetrators are surrounded before village elders asking for forgiveness. A US-based foundation, Catalyst for Peace, is funding similar ceremonies to take place until 2013 to help victims make peace after the civil war. See *Sierra Leone ex-combatants make peace with victims*, AGENCE FRANCE-PRESSE, Apr. 5, 2008.

<sup>395</sup> Statute of the Special Court art. 2, *supra* note 338.

To prove the commission of a CAH, the Special Court has required the following elements: (1) there must be *an attack*; (2) the attack must be *widespread or systematic*; (3) the attack must be *directed against any civilian population*; (4) the *acts* of the accused *must be part of the attack*; and (5) the accused *knew or had reason to know* that his or her *acts constitute part of a widespread or systematic attack directed against any civilian population*.<sup>396</sup>

The Special Court defined *attack* as meaning a “campaign, operation or course of conduct”<sup>397</sup> and the distinction between an attack and an armed conflict reflects the position in customary international law that CAH may be committed both in time of peace and independent of armed conflict.<sup>398</sup>

In the *RUF* case, the Tribunal followed the *Kunarac* case before the ICTY on several points regarding CAH. First, it followed *Kunarac et al.* concerning the definition of *widespread or systematic*, and rejected a state policy requirement.<sup>399</sup> The Special Court provided:

It is now settled law that the requirement that the attack must be either widespread or systematic is disjunctive and not cumulative. The term “widespread” refers to the large-scale nature of the attack and the number of victims, whereas the term “systematic” refers to the organized nature of the acts of violence and the improbability of their random occurrence. The Chamber adopts the view that “[p]atterns of crime – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence” and further concurs with the ICTY Appeals Chamber in the *Kunarac et al.* case that:

[T]he assessment of what constitutes a ‘widespread’ or ‘systematic’ attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. A Trial Chamber must therefore ‘first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic’. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ vis-à-vis this civilian population.

The existence of a policy or plan, or that the crimes were supported by a policy or plan to carry them out, may be evidentially relevant to establish the widespread or systematic nature of the attack and that it was directed against a civilian population, but it is not a separate legal requirement of crimes against humanity. Furthermore, the Chamber is of the view that customary international law does not presuppose a discriminatory or persecutory intent for all crimes against humanity.<sup>400</sup>

<sup>396</sup> *RUF* Trial Judgment, *supra* note 385, ¶ 76 (emphasis added).

<sup>397</sup> *Id.* at ¶ 77; *see also* CDF Trial Judgment, *supra* note 384, ¶ 111, citing Prosecutor v. Brima, Kanu and Kamara, SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98 ¶ 42 (Mar. 31, 2006) [hereinafter *AFRC Rule 98 Decision*]; Prosecutor v. Naletilić & Martinović Trial Judgment, *supra* note 117, ¶ 233; *Akayesu* Trial Judgment, *supra* note 130, ¶ 581.

<sup>398</sup> *RUF* Trial Judgment, *supra* note 385, ¶ 77; *see also* CDF Trial Judgment, *supra* note 384, ¶ 111, citing *Tadić* Appeals Judgment, *supra* note 82, ¶ 251; *Tadić* Jurisdictional Decision, *supra* note 80, at ¶ 141; *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 86.

<sup>399</sup> *See infra* ch. 1 and authorities cited therein.

<sup>400</sup> *See RUF* Trial Judgment, *supra* note 385, ¶¶ 78–9 and accompanying footnotes. For the jurisprudence the Tribunal cites in support of its conclusion that “widespread or systematic” is disjunctive, not cumulative

Second, the SCSL has also followed the *Kunarac* case with regard to the phrase *directed against any civilian population*. This approach holds that the civilian population must “be the primary rather than an incidental target of the attack.”<sup>401</sup> In the CDF case, the Trial Chamber further articulated that although there was a widespread attack in the region in question, it had not been demonstrated beyond a reasonable doubt that “the civilian population was the primary object of the attack” because the evidence suggested that the “attacks were directed against the rebels or juntas that controlled” the area.<sup>402</sup> It further held:

[T]he targeting of a select group of civilians – for example, the targeted killing of a number of political opponents – cannot [constitute CAH as] the attack [must be] directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals.<sup>403</sup>

The Appeals Chamber concluded that the Trial Chamber had confused the purpose of the attack with the object or target of the attack, and confirmed that the attack on the civilian population need not be based on a specific discriminatory ground.<sup>404</sup> Additionally, it accepted the Prosecution’s argument that an attack against a civilian population can still amount to CAH even where “the ultimate objective of the fighting force was legitimate and/or aimed at responding to aggressors.”<sup>405</sup> The Appeals Judgment also upheld that perceived collaborators and police officers form part of the civilian population as long as they do not fight alongside or under the direction of the military.<sup>406</sup> Furthermore, the evidence established that some locations became the object of the attacks after the rebels had withdrawn, so that the court determined civilian victims were not incidental or collateral targets of a legitimate military attack.<sup>407</sup> Accordingly, the acquittals for the CAH counts were returned in these instances and the defendants were found guilty.<sup>408</sup>

Third, the Tribunal followed *Kunarac* by requiring that the *acts of the accused must be part of the attack*. This requirement is satisfied by the “commission of an act which, by its nature or consequences, is objectively part of the attack.”<sup>409</sup> The Prosecutor can

see *Limaj et al.* Trial Judgment, *supra* note 115, ¶ 183; *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 97; *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 93.

The *Kunarac et al.* Appeals Judgment also holds that: “neither the attack nor the acts of the accused needs to be supported by any form of ‘policy’ or ‘plan’ [ . . . ] It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters.” *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 98; see also *supra* ch. 1 pp. 28–9 and accompanying notes.

<sup>401</sup> See *RUF* Trial Judgment, *supra* note 385, ¶ 80, citing *CDF* Trial Judgment, *supra* note 384, ¶ 114; and *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 92.

<sup>402</sup> *CDF* Trial Judgment, *supra* note 384, ¶ 693.

<sup>403</sup> *Id.* ¶ 119.

<sup>404</sup> *CDF* Appeals Judgment, *supra* note 386, ¶¶ 262–63, 299–300.

<sup>405</sup> *Id.* ¶ 247.

<sup>406</sup> *Id.* ¶¶ 261, 264.

<sup>407</sup> *Id.* ¶¶ 303–6.

<sup>408</sup> *Id.* ¶ 322. But see *Fofana v. Prosecutor*, Case No. SCSL-04-14-A, Partially Dissenting Opinion of Honourable Justice George Gelaga King, ¶¶ 32–58 (May 28, 2008) (arguing that the Trial Chamber was correct to reject the charge of CAH under the circumstances of the case).

<sup>409</sup> *Id.*

establish that the alleged crimes were related to the attack on a civilian population, but need not establish that they have been committed in the course of that attack:

A crime which is committed before or after the main attack or away from it could still, if sufficiently connected, be part of that attack. However, it must not be an isolated act [ . . . ] Only the attack, not the individual acts, must be widespread or systematic.<sup>410</sup>

Finally, the Tribunal followed *Kunarac* in its definition of the *mens rea* requirement for CAH. The Prosecution must show that the accused either knew or had reason to know that his or her acts formed part of the attack:

Evidence of knowledge depends on the facts of a particular case and thus the manner in which this legal element may be proved may therefore vary from case to case. The Accused needs to understand the overall context in which his acts took place, but need not know the details of the attack or share the purpose or goal behind the attack. The motives for the Accused's participation in the attack are irrelevant. It is also irrelevant whether the Accused intended his acts to be directed against the targeted population or merely against his victim, as it is the attack, and not the acts of the Accused, which must be directed against the targeted population.<sup>411</sup>

All cases before the Special Court include war crimes and CAH, not national crimes and not genocide, which is not included in the statute. In all, the Special Court has indicted thirteen individuals on charges including CAH; eight of these individuals have been convicted of CAH.

#### **CAH Prosecutions (as of November 2010)**

***Indicted for CAH:*** 13

*Specific Acts*

Inhumane acts: 13

“physical violence and mental suffering”: 13

sexual slavery and other forms of sexual violence\*: 4

forced marriage: 8

Murder: 13

Enslavement: 10

Rape: 10

Extermination: 9

Sexual slavery: 6

***Ongoing:*** 1

***Deceased:*** 3

***At Large (and charged with CAH):*** 1

***Convicted of CAH:*** 8

<sup>410</sup> RUF Trial Judgment, *supra* note 385, ¶ 89, citing *Kordić & Čerkez* Appeals Judgment, *supra* note 119, ¶ 94, referring to *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶ 96; *Blaškić* Trial Judgment, *supra* note 125, ¶ 101.

<sup>411</sup> RUF Trial Judgment, *supra* note 385, ¶ 90, citing *Blaškić* Trial Judgment, *supra* note 125, ¶ 126; *Limaaj et al.* Trial Judgment, *supra* note 115, ¶ 190; Prosecutor v. Kordić & Čerkez, IT-95-14/2-T, Judgment, ¶ 185 [hereinafter *Kordić & Čerkez* Trial Judgment]; *Kunarac et al.* Appeals Judgment, *supra* note 82, ¶¶ 102–3 (The ICTY Appeals Chamber held that “[a]t most, evidence that [acts were committed] for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.”); *Tadić* Appeals Judgment, *supra* note 82, ¶¶ 248, 252.

*Specific Acts*

Enslavement: 6

Extermination: 6

Rape: 6

Inhumane acts: 5

“physical violence and mental suffering”: 5

forced marriage: 3

Murder: 5

Sexual slavery: 3

*Sentences (years)*

1 – 5: 0

6 – 10: 0

11 – 15: 1

16 – 20: 1

21 – 25: 1

26 – 30: 0

31 – 35: 0

36 – 40: 1

41 – 45: 1

46 – 50: 2

51 – 55: 1

§7.4. *Timor-Leste*

On May 20, 2002, East Timor, now known as Timor-Leste, became the first new country of the millennium.<sup>412</sup> The UN took an unprecedented role in Timor-Leste’s rise to statehood by ending the violence there and transitioning the region into independence from Indonesia.<sup>413</sup>

On August 30, 1999, in an UN-sponsored referendum, some 98 percent of East Timorese voters went to the polls and 78 percent rejected limited autonomy in favor of a transition to independence. In retaliation, the Indonesian National Army and East Timorese militias pillaged the country. Approximately 2,000 East Timorese

<sup>412</sup> Timor-Leste is located in the eastern part of Timor. Timor is an island in the Indonesian archipelago between the South China Sea and the Indian Ocean. Australia is 400 miles to the south. Timor-Leste is one of the world’s poorest countries. Its citizens survive mainly through subsistence farming and fishing. However, there are hopes of offshore gas and oil reserves in the Timor Gap. This could be a marvelous bolster to the Timor-Leste economy. Currently, the country continues to rebuild its meager infrastructure. A parliament was elected in 2001, and a constitution assembled. Charismatic rebel leader José Alexandre Gusmão, who was imprisoned by Indonesia between 1992 and 1999, was overwhelmingly elected as the nation’s first president on April 14, 2002. The president has a largely symbolic role and real power rests with the parliament. In April–May 2006, Timor-Leste was badly shaken by civil unrest resulting from internal political disputes. Nevertheless, successful presidential elections were held in May 2007, and José Ramos-Horta, Nobel Peace Prize laureate, former Foreign Minister, and Prime Minister since July 2006, was elected president in a run-off. He sustained injuries in a February 2008 attempted assassination but remains in power.

<sup>413</sup> See Michael J. Matheson, *United Nations Governance of Post-Conflict Societies: East Timor and Kosovo*, in BASSIOUNI, *POST-CONFLICT JUSTICE*, *supra* note 230, at 523; see also Suzannah Linton, *East Timor and Accountability for Serious Crimes*, in 3 *INTERNATIONAL CRIMINAL LAW* 257 (M. Cherif Bassiouni ed., 3d rev ed. 2008).



were killed.<sup>414</sup> Eighty percent of the country's infrastructure was burned and looted, and as many as 500,000 people out of a population of 800,000 were displaced.

The Timor-Leste judicial system was virtually nonexistent when the United Nations Transitional Administration in East Timor (hereinafter UNTAET) was established in 1999.<sup>415</sup> There were less than ten lawyers in the country, the court buildings were burned and looted, and prospects were dismal. Yet UNTAET was authorized to exercise all legislative and executive authority, including the administration of justice, and it eagerly began rebuilding. A UN investigative group of human rights experts recommended the convening of an international tribunal.<sup>416</sup> However, an *ad hoc* tribunal, like those for the former Yugoslavia and Rwanda, was opposed by Indonesia with U.S. support, and it was agreed that the investigation and prosecution of the 1999 crimes would occur in two domestic jurisdictions. Indonesia would prosecute its own security forces before a specially constituted human rights court in Jakarta, even though there was much doubt that this would occur.<sup>417</sup> Meanwhile, in Timor-Leste, the UN would operate hybrid tribunals with both international and domestic judges, situated within the local justice system, and partially funded and staffed by the national government.

On March 6, 2000, UNTAET Regulation No. 2000/11 was promulgated to regulate the functioning and organization of courts in Timor-Leste during the transitional administration.<sup>418</sup> Part II of this regulation established four District Courts spread throughout Timor-Leste,<sup>419</sup> and part III created an appellate court in Dili.<sup>420</sup> A Transitional Judicial Service Commission composed of three East Timorese and two

<sup>414</sup> More than 120,000 East Timorese out of a population of 650,000 were killed between 1975 and 1999 during Indonesia's invasion and occupation of the country. Food and medical shortages led to starvation and disease resulting in the additional deaths of thousands. See Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, in PROSECUTION CASE STUDIES SERIES (International Center for Transitional Justice, March 2006); see also Ben Kiernan, *Cover-Up and Denial of Genocide: Australia, the USA, East Timor, and the Aborigines*, 34 CRITICAL ASIAN STUDIES 2, 163–92 (2002). Kiernan argues that the East Timorese perished in CAH that meet most definitions of genocide, “and, arguably, the United Nations legal definition of genocide of a ‘national group’.” *Id.* at 164; see also Ben Saul, *Was the Conflict in East Timor ‘Genocide’ and Why Does It Matter?*, 2 MELB. J. INT’L L. 477–522 (2001).

<sup>415</sup> The Security Council established the UNTAET as a peacekeeping mission in Resolution 1272 54 U.N. SCOR (4057th mtg), U.N. Doc. S/Res/1272 (1999) [1], 39 I.L.M. 240. It is the successor to the United Nations Mission to East Timor (UNAMET), which organized and oversaw the August 30, 1999 referendum that paved the way for Timor-Leste's independence. See IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION (2001) (background details regarding consultation and involvement of the UN).

<sup>416</sup> *Report on the Joint Mission to East Timor Undertaken by the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur of the Commission on the Question of Torture and the Special Rapporteur of the Commission on Violence Against Women, Its Causes, Consequences, in Accordance with Commission Resolution 1999/S-4-1 of September 1999*, ¶ 73, U.N. Doc. A/54/660 (Dec. 10, 1999).

<sup>417</sup> See *infra* ch. 9, § 3.4.2.

<sup>418</sup> Regulation 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (entered into force March 6, 2000) as amended by Regulation 2000/14 UNTAET/REG/2000/11 (entered into force May 10, 2000). Of its \$6.3 million budget for 2002, \$6 million went to the prosecution and the majority of the remainder was used to pay the salaries of the international judges.

<sup>419</sup> Originally, UNTAET Regulation 2000/11 designated the location and territorial jurisdiction of eight district courts. However, UNTAET Regulation 2000/14, amended 2000/11, and called for only four district courts. See UNTAET Regulation 2000/14, § 2.

<sup>420</sup> Part III of UNTAET Regulation 2000/11, subsections 14–15.

international experts was established to screen judicial and prosecutorial candidates prior to appointment.<sup>421</sup>

UNTAET established Special Panels in the District Court in Dili, which held exclusive jurisdiction over murder and sexual offences committed in Timor-Leste between January 1, 1999 and October 25, 1999, and universal jurisdiction over genocide, war crimes, CAH,<sup>422</sup> and torture.<sup>423</sup> Pursuant to UNTAET Regulation 1272 (1999), a “Serious Crimes Unit” was established under the Office of the Prosecutor of Timor-Leste to investigate and prosecute these six categories of crimes. An international deputy general prosecutor with a mixed international and local staff ran this unit. In an effort to ensure that all basic elements of justice and fairness were being adhered to a Defence Lawyers Unit was established in September 2002 within the United Nations Mission of Support in East Timor (hereinafter *UNMISSET*).<sup>424</sup>

The Special Panel for Serious Crimes, made up of three judges, heard cases at the Dili District Court.<sup>425</sup> Unlike the regular three judge panels that heard other offences in Timor-Leste,<sup>426</sup> the Special Panel had two international judges and one East Timorese judge.<sup>427</sup> Appeals were heard by the Timorese Court of Appeal, which was also composed of two international judges and one Timorese judge; however, in cases of special importance or gravity, a panel of five judges (three international and two Timorese) could be created.<sup>428</sup>

Regarding jurisdictional issues, Regulation No. 2000/15 is structurally quite similar to the Statutes for the ad hoc Tribunals for Rwanda and Yugoslavia. It provides for universal jurisdiction,<sup>429</sup> temporal jurisdiction,<sup>430</sup> and territorial jurisdiction.<sup>431</sup> The panels

<sup>421</sup> UNTAET Regulation 1999/3, arts. 1–2.

<sup>422</sup> For an analysis of Regulation 15/2000 and its substantive parts dealing with CAH see Ambos, *supra* note 249 (noting that Section 5 of Regulation 15/2000 dealing with CAH are adopted almost literally from the Rome Statute and, therefore, the Serious Crimes Panel was the first court to apply substantive provisions of the Rome Statute and its case law may influence future prosecutions of the ICC).

<sup>423</sup> UNTAET Regulation 2000/11, § 10. It is noteworthy that section 10.4 of UNTAET Regulation 2000/11, promulgated on March 6, 2000, explicitly stated that the establishment of these special panels with exclusive jurisdiction over Serious Crimes “shall not preclude the jurisdiction of an international tribunal for East Timor over these offences, once such a tribunal is established.” However, on June 6, 2000, UNTAET Regulation 2000/15 was promulgated and it deals in great detail with the Special Panels for Serious Crimes, but it makes no reference to an international tribunal for Timor-Leste.

<sup>424</sup> Cohen, *supra* note 242, at 9.

<sup>425</sup> UNTAET Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (June 6, 2000). United Nations officials intended to establish two Special Panels for Serious Crimes. However, because of delays in recruitment, only one Special Panel was convened.

<sup>426</sup> In section 9.2 of UNTAET Regulation 2000/11, it states that trials were to be held by a panel of three judges, but in certain circumstances, a single judge could hear the cases. See UNTAET Regulation 2000/11, § 11; UNTAET Regulation 2000/14, § 3.

<sup>427</sup> UNTAET Regulation 2000/15, § 22.1; see also UNTAET Regulation 2000/11, §§ 9, 10.3. Like the East Timorese judges, the international judges were required to successfully pass through the Transitional Judicial Service Commission. UNTAET Regulation 2000/11, § 10.3.

<sup>428</sup> UNTAET Regulation 2000/15, § 22.2.

<sup>429</sup> *Id.* § 2.1. Section 2.2 of UNTAET Regulation 2000/15 defines “universal jurisdiction” to include cases where a) the offense was committed within the territory of East Timor; b) the offense was committed by and East Timorese citizen; or c) the victim of the crime was an East Timorese citizen.

<sup>430</sup> *Id.* § 2.3. The panels had jurisdiction over crimes committed between January 1, 1999, and October 25, 1999.

<sup>431</sup> *Id.* § 2.5. The special panels had jurisdiction throughout the territory of Timor-Leste.

are required to apply the law of Timor-Leste as set out by UNTAET, and “where appropriate,” the recognized laws and principles of international law.<sup>432</sup> With respect to its articles on genocide, war crimes, and CAH, the provisions in Regulation No. 2000/15 are substantially similar to what is contained in articles 6, 7, and 8 of the Rome Statute.

Essential to UNTAET’s efforts to effectively prosecute suspected perpetrators was the Memorandum of Understanding (hereinafter MOU) between Indonesia and UNTAET.<sup>433</sup> The MOU sets forth a number of provisions that were designed to encourage cooperation between UNTAET and Indonesia to expedite the investigation, prosecution, and trial of suspects within their jurisdictions.<sup>434</sup> Indonesia subsequently declared that the provisions of the MOU were nonbinding because they violate Indonesian sovereignty and refused to “transfer” any suspects for whom the Special Panel issued arrest warrants.

The work of the Special Panel was prematurely ended when the Security Council resolved in 2004 to complete the work of the United Nations Mission of Support in East Timor, the successor mission to UNTAET, by May 20, 2005.<sup>435</sup> The Mission closed with 514 investigated cases and 50 noninvestigated cases outstanding.<sup>436</sup> In light of the high number of outstanding cases, the UN was advised that international judges and personnel would remain in Dili to continue to operate albeit without UN funding.<sup>437</sup> Moreover, the UNTAET Regulations allow for the hiring of future international judges to assist the court without further amendments.<sup>438</sup>

The Special Panel was plagued throughout its existence by a lack of support from the UN and the Timorese government.<sup>439</sup> Indicative of this neglect was the fate of the arrest warrant issued for Indonesian General Wiranto, the Commander-in-Chief of the Indonesian Armed Forces during the widespread violence of 1999. Once the arrest warrant was issued following an extended delay, neither the UN nor the Timorese government took any discernible action to attempt to enforce the warrant.<sup>440</sup> This unwillingness on the part of the UN and the Timorese government to fully support the efforts of the Special Panel resulted in the Special Panel’s inability to prosecute “high level perpetrators

<sup>432</sup> *Id.* § 3.1.

<sup>433</sup> See Memorandum of Understanding Between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial, and Human Rights Related Matters, (April 6, 2000) [hereinafter MOU].

<sup>434</sup> The MOU contains provisions for Mutual Assistance between Indonesia and Timor-Leste regarding judicial matters; forensic matters; participation in the proceedings; notification of arrest, indictment, and verdict; access to information; cross-border crime; witness protection; transfer of persons and relevant procedures; requests, practical arrangements; costs of legal assistance; and enforcement.

<sup>435</sup> S.C. Res. 1543, U.N. Doc. S/RES/1543 (May 14, 2004). UNMISET began its operations on May 20, 2002, and assisted Timor-Leste until all operational responsibilities were transferred to the Timor-Leste authorities. UNMISET provided government advisers, several hundred policemen, and about 2,500 peacekeeping troops to Timor-Leste.

<sup>436</sup> Among these unindicted cases there are 828 cases of alleged murder, sixty cases of alleged rape or gender-based crimes, and hundreds of cases of torture or other acts of violence. See *Summary of the Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, 38 ¶ 107, U.N. Doc. S/2005/458 (July 15, 2005).

<sup>437</sup> *Id.* at 43, ¶ 136.

<sup>438</sup> *Id.*

<sup>439</sup> See Cohen, *supra* note 242, at 10; see also Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 272 (1993); Stromseth, *supra* note 239, at 290.

<sup>440</sup> See Cohen, *supra* note 242, at 10.

located in Indonesia,” and ensured that the convictions it did obtain were for low-level East Timorese soldiers in the Indonesian military and militia commanders.

The lack of serious attention on the part of both the UN and the Timorese government also manifested itself in the severe personnel issues faced by the Special Panel. The most acute example was the inability of the UN and the Timorese government to staff the Court of Appeal. As a result, beginning in December 2001 and continuing for twenty-one months thereafter, the Special Panels functioned without appellate review, denying suspects the ability to challenge their verdicts and sentences.<sup>441</sup>

On July 13, 2001, UNTAET established the Commission for Reception, Truth and Reconciliation, known by its Portuguese acronym CAVR, to promote national reconciliation and healing following the “years of political conflict,”<sup>442</sup> and the atrocities committed during the twenty-five years of occupation by Indonesian forces.<sup>443</sup> Regulation 2001/10 pursuant to Security Council Resolution 1272 created the Commission.<sup>444</sup> The Commission started work on January 21, 2002 when the National Commissioners were sworn in.<sup>445</sup> The objectives of the Commission were to establish the truth about the human rights violations committed when Timor-Leste was under Indonesian rule<sup>446</sup> and facilitate the acceptance and reintegration into East Timorese society of persons accused of having committed less serious crimes in the context of the political conflicts in the territory between April 25, 1974, and October 25, 1999.<sup>447</sup> The Commission presented its final

<sup>441</sup> See United Nations High Commissioner for Human Rights, *Report on the Situation of Human Rights in Timor-Leste* (March 4, 2003).

<sup>442</sup> The phrase “political conflicts in East Timor” refers to “armed and non-armed struggles and discord related to the sovereignty and political status of East Timor, the organization or governance of East Timor, the illegal Indonesian invasion and occupation of East Timor, or any combination of the foregoing.” See UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor § 1 (j) (July 13, 2001).

<sup>443</sup> For an astute analysis of the CAVR, see Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT’L. L. 952 (2001); see also Hansjoerg Strohmeyer, *Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor*, U. NEW SOUTH WALES L.J. 16 (2001). Strohmeyer states:

Ultimately, however, the challenge for UNTAET and the East Timorese in this area will be to find the right balance between justice and reconciliation in a society that holds the principle of forgiveness at the core of its culture. The prosecution and trial of serious violations of international humanitarian and human rights law must be accompanied by a comprehensive discussion on truth and reconciliation, and even amnesty for the perpetrators of less serious offences. The current efforts of UNTAET and East Timorese civil society to establish an East Timorese Return and Reconciliation Commission is an important step in this direction.

<sup>444</sup> UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor § 1(j) (July 13, 2001).

<sup>445</sup> There are seven national commissioners and 28 regional commissioners. See President Xanana Gusmão, *Speech at Reconciliation Commission Office Opening* (February 17, 2003). Gusmão stated:

This is the first time that there is such a Commission in the whole Asia Region – this shows that Timor-Leste is making a contribution to development of human rights in the world. The Commission is an East Timorese institution, with a staff of 240, and staffed mainly by East Timorese with a small amount of foreign support. The Commission is working in each district, in all sub-districts and in the villages. So far 2,500 statements have been given by East Timorese people. More than 200 people who have harmed their communities have come forward voluntarily to participate in reconciliation hearings to make peace with their communities.

<sup>446</sup> See UNTAET Regulation 2001/10, pt. III.

<sup>447</sup> See UNTAET Regulation 2001/10, pt. IV.

report to the national parliament on November 28, 2005.<sup>448</sup> The 2,500-page report documents widespread and systematic violations of human rights perpetrated by all parties in Timor-Leste between 1974 and 1999.

During its mandate, the CAVR conducted confidential inquiries and research as well as public hearings, and enjoyed powers of subpoena and search and seizure. Unlike the commission in South Africa, the CAVR did not offer an amnesty to those who admitted committing serious crimes like murder or rape.<sup>449</sup> Those cases were to be passed on for prosecution in the normal court system. Consequently, the greatest weakness of the CAVR was the fact that perpetrators of serious crimes did not voluntarily participate in the CAVR due to the threat of future prosecution. In addition, the CAVR had no legal authority to order Indonesia to extradite suspects to Timor-Leste. While such cooperation with the Indonesian government would have greatly enhanced the success of the Commission, such cooperation was not forthcoming.

In spite of these challenges, the work of the CAVR has been positively received and has been deemed a success by many observers.<sup>450</sup> Alternatively, some critics claim that the CAVR sought to quash attempts at justice in favor of creating a “friendship” between Indonesia and Timor-Leste.<sup>451</sup> Although the combination of criminal prosecution and community-based reconciliation procedures reflects a sophisticated approach to addressing past human rights tragedies while meeting the practical realities of a transitional process, the disappointing results of the criminal justice component have undermined the success of these efforts.<sup>452</sup>

With respect to the Tribunal’s article on CAH, Section 5.1 of Regulation No. 2000/15 replicates the definition provided in Article 7 of the Rome Statute:

For the purposes of the present regulation, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

<sup>448</sup> Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR) (28 November 28, 2005).

<sup>449</sup> The statutes of the two international criminal tribunals also provide for the discretionary use of pardons “on the basis of the interests of justice and the general principles of the law.” ICTR Statute art. 27, *supra* note 7; ICTY Statute art. 28, *supra* note 7.

<sup>450</sup> See *Country Summary: East Timor* (Human Rights Watch, Jan. 2006). Unfortunately, the CAVR final report has yet to be disseminated amongst the East Timorese population despite efforts by the UN and Secretary-General to make the report available on various websites after its submission to President Gusmao in 2006. See Stromseth, *supra* note 339, at 296.

<sup>451</sup> These critics claim the truth commission acted as a soapbox to help mend the public perception of the accused rather than help the victims. Compare *id.* with *Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste* (International Center for Transitional Justice, Jan. 2008) (arguing the truth commission did not focus on victim restoration).

<sup>452</sup> For further analysis of the interplay between accountability and political pressure, see M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik*, 12 PACE INT’L L. REV. 213 (2000); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000); M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, (1996); Buckley, *supra* note 234, at 637.

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>453</sup>

The prosecution of serious crimes in Timor-Leste proceeded slowly. Since the Serious Crimes Unit commenced operations from 2000 until 2005, the Special Panel for Serious Crimes at the Dili District Court completed 55 trials involving 87 defendants. The Special Panel convicted 84 and acquitted three, although the Court of Appeal later convicted one of the acquitted individuals.<sup>454</sup> The first trial to include charges of CAH, the *Los Palos* case, began on July 9, 2001, and a verdict of guilty was pronounced against ten defendants on December 11, 2001. The second major CAH case to be tried at the Special Panel for Serious Crimes was the *Lolotoe* trial. It began on February 8, 2001, and on April 5, 2003, the Special Panel sentenced former KMMP militia commander Jose Cardoso Fereira (alias Mousinho), the third and final defendant of those accused who was present in Timor-Leste.<sup>455</sup> Cardoso was sentenced to twelve years imprisonment for CAH including murder and rape.<sup>456</sup>

As reflected in the statistics below, although many indictments included charges for CAH, often it has proven easier for prosecutors to pursue national crimes, particularly murder.<sup>457</sup> This has attracted criticism from those who believe international crimes should be prioritized as a matter of prosecutorial policy.<sup>458</sup> Arguably, prosecutions for CAH should be prioritized because of the principle *aut dedere aut judicare*, and, more

<sup>453</sup> UNTAET Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses (June 6, 2000), available at <http://www.un.org/peace/etimor/untactR/Reg0015E.pdf>.

<sup>454</sup> See Cohen, *supra* note 242, at 9.

<sup>455</sup> See Press Release, *Special Panel Judges In East Timor Sentence Lolotoe Militia Commander to 12 Years for Crimes Against Humanity* (Judicial System Monitoring Programme, Apr. 6, 2003).

<sup>456</sup> According to the JSMP, this is the first time rape was tried and convicted as a CAH by the Special Panel. Cardoso was convicted of seven counts of CAH, including two counts of murder, one count of rape, one count of torture, three counts of imprisonment/severe deprivation of physical liberty, and one count of inhumane treatment. The conviction was a result of a number of incidents including the murder of two pro-independence supporters and the rape of three Lolotoe women, which occurred in Lolotoe between April and September 1999.

<sup>457</sup> For instance, Judge Pereira voiced her disagreement from the bench: “the facts in this case indicate that the defendant should have been charged with [CAH]. A judge cannot decide on more than what is submitted in the indictment if the Prosecutor does not change the indictment.” *Prosecutor v. João Fernandes*, Case No. 1/2000, SPSC (Jan. 25, 2001) (unofficial translation) (dissenting judgment of Judge Maria Natércia Gusmão Pereira Regarding the Facts and the Sentencing for Serious Crimes).

<sup>458</sup> See, e.g., Linton, *supra* note 413; Katzenstein, *supra* note 439; Cohen, *supra* note 242; David Cohen, ‘Justice on the Cheap’ Revisited: The Failure of the Serious Crimes Trials in East Timor, 80 ANALYSIS FROM THE EAST-WEST CENTER (East-West Center, May 2006). For further analysis and a collection of the case law of the Special Panels, see 13 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS (André Klip and Göran Sluiter eds., 2008).

generally, because international crimes form the foundation of the involvement of the international community and the creation of the Special Panels for Serious Crimes as a hybrid court.<sup>459</sup>

**CAH Prosecutions (approximate as of November 2010)**

***Indicted for CAH:*** 336

*Specific Acts*

Murder: 267

Persecution\*: 178

Deportation/forcible transfer: 106

Torture: 101

Other inhumane acts: 80

Extermination: 51

Attempted murder: 27

Enforced disappearance: 24

Rape: 19

Imprisonment: 17

*\* charged in the form of torture, murder, enforced disappearance, imprisonment (abduction or severe deprivation of liberty), destruction of property, attempted murder, other inhumane acts, forcible transfer, denial of the right to shelter, and the denial of the right to free association or freedom of choice*

***Convicted of CAH:*** 46

*Specific Acts*

Murder: 33

Torture: 16

Persecution\*\*: 15

Other inhumane acts\*\*\*: 9

Deportation/forcible transfer: 8

Attempted murder: 5

Imprisonment: 4

Rape: 1

*\*\* convicted persecution included imprisonment (abduction and severe deprivation of liberty)*

*\*\*\* convicted other inhumane acts included attempted murder*

***Sentences (years)***

1 – 5: 11

6 – 10: 12

11 – 15: 8

16 – 20: 3

<sup>459</sup> Thus, there is a notable difference between the jurisprudences of the Special Panels for Serious Crimes and the Special Court for Sierra Leone, which, despite its jurisdiction over national crimes, evidences an almost exclusive prosecutorial on international crimes. This difference is also significant with respect to universal jurisdiction, which applies to international crimes and limits or altogether prohibits certain defenses, such as the defense of obedience to superior orders. In many judgments of the Special Panels, the defense of superior orders has been invoked. At the same time, however, it may be the judgment of the prosecutor that the events that took place in East Timor in 1999 do not provide the contextual elements necessary to establish war crimes or CAH, or that there is insufficient proof to convict an accused of such crimes.



21 – 25: 1

26 – 30: 0

31 – 35: 3

### §7.5. Cambodia

The UN's first major involvement in the governance of a postconflict society was in Cambodia. It was concerned with the restoration of peace in Cambodia, but for three decades remained unable to address the postconflict justice issues arising out of the atrocities committed by the Khmer Rouge.<sup>460</sup> Finally, in November of 2007, the Extraordinary Chambers in the Courts of Cambodia (ECCC) held its first public hearings.<sup>461</sup>

The conflict in Cambodia took place between April 17, 1975 and January 7, 1979. It was primarily an internal conflict led by a Maoist insurrectional group named the Khmer Rouge, led by Pol Pot, against the U.S.-supported Lon Nol government.<sup>462</sup> Under the Khmer Rouge regime, policies of slave labor, torture, and forced evacuations were forcefully put into practice.<sup>463</sup> During their first week in power, 2.5 million citizens of the capital, Phnom Penh, were displaced into nearby countryside in the Khmer Rouge's pursuit of a perfect Maoist society.<sup>464</sup> Additionally, more than 1.5 million persons were killed by the regime. However, because the Khmer Rouge and its victims shared the same ethnicity, these atrocities were not technically deemed genocide.<sup>465</sup> The Khmer Rouge were overthrown by Vietnam in late 1978 and sought refuge in the Cambodian jungle. They continued fighting a guerrilla war with significant foreign support against the new government for another decade.

The 1991 Paris Accords ended Cambodia's civil war.<sup>466</sup> Yet over a decade and a half later, not a single member of the Khmer Rouge had been prosecuted for their acts in the 1970s. It was not until the 1990s, twenty years or so after the atrocities, that the UN became

<sup>460</sup> See Steven A. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, in BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 241, at 613; see also Nema Milaninia, *Appeasing the International Conscience or Providing Post-Conflict Justice: Expanding the Khmer Rouge Tribunal's Restorative Role*, Apr. 18, 2006, bepress Legal Series, Working Paper 1274, available at <http://www.bepress.com/expresso/eps.274>; YVES BEIGBEDER, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES, 113 (2005); Tessa V. Capeloto, *Reconciliation in the Wake of Tragedy: Cambodia's Extraordinary Chambers Undermines the Cambodian Constitution*, 17 PAC. RIM L. & POL'Y J. 103, 103 (2008).

<sup>461</sup> See Excerpts, *supra* note 247.

<sup>462</sup> Capeloto, *supra* note 460, at 106.

<sup>463</sup> *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, U.N. Doc. A/53/851, S/1999/231, 19–45 (1999) [hereinafter *Group Experts Report*].

<sup>464</sup> *Id.* at 19.

<sup>465</sup> The 1948 Genocide Convention, *supra* note 10, in Article II refers only to ethnic, religious, or national groups, thus excluding some groups from the scope of the prohibition such as social and political groups. See SCHABAS, *supra* note 83; Lippman, *Genocide*, *supra* note 182, at 403; Patricia M. Wald, *Challenges Judging Genocide*, in JUST. INITIATIVES 85 (Open Society Initiative 2006). Article 6 of the Rome Statute follows Article II of the 1948 Genocide Convention, and therefore retains its weaknesses. This writer tried several times to have the ICC correct these deficiencies at the 1995 *Ad Hoc* Committee and the 1996–98 Preparatory Committee, but was unsuccessful in obtaining states to support such amendments.

<sup>466</sup> It should be noted that the Khmer Rouge resumed fighting in 1992. Cambodia continued to experience political strife until 1999, when the surviving leaders of the Khmer Rouge surrendered and the party dissolved itself.

actively engaged in post-conflict justice activities within Cambodia.<sup>467</sup> During the years of the guerrilla movement, accountability was impossible because China and the United States saw potential opportunities for the use of the Khmer Rouge as an instrument to pressure Vietnam and the Soviet Union.<sup>468</sup> After eleven rounds of negotiation, the Paris Agreements, signed on October 23, 1991, put a peace plan into place that involved the government Vietnam helped to create, the People's Republic of Kampuchea, and Cambodia's rival factions, including the dominant Khmer Rouge. The participation of Khmers Rouges in these negotiations was considered so valuable that no outside state was willing to demand of it any form of accountability.

The Paris Agreements called for the creation of the United Nations Transitional Authority in Cambodia (UNTAC).<sup>469</sup> Its mission was to organize and conduct elections while maintaining peace and political neutrality. Even after Cambodia's 1993 UN-administered elections had occurred, the new government refused to proceed with any Khmer Rouge prosecutions.<sup>470</sup> It was not until 1997 that the United Nations Special Representative for Human Rights in Cambodia, Thomas Hammarberg, brought the question of impunity to the forefront of Cambodia-UN interactions.<sup>471</sup>

The result was that in the spring of 1998, UN Secretary-General Kofi Annan appointed a Group of Experts to investigate and critique the potential for a Cambodian tribunal.<sup>472</sup> In March 1999, after nine months of work, the Group of Experts issued a report detailing the evidence of the crimes committed, evaluating that evidence under existing international and Cambodian criminal law, assessing the prospects of bringing the Khmer Rouge to justice, and more importantly, evaluating the options for accountability.<sup>473</sup>

<sup>467</sup> The UN was previously unable to act effectively in Cambodia because of Cold War politics and the Security Council veto. A United Nations Resolution in 1997 expressed support for holding the Khmer Rouge leaders accountable for their crimes. G.A. Res. 52/135, U.N. Doc. A/RES/52/135 (Dec. 12, 1997).

<sup>468</sup> See Ratner, *supra* note 244, at 613.

<sup>469</sup> See Agreement on a Comprehensive Political Settlement of the Cambodia Conflict art. 6 & annex 1, Oct. 23, 1991, 31 I.L.M. 183, 184; *see also* S.C. Res. 745, U.N. Doc. S/RES/745 (Feb. 28, 1992).

<sup>470</sup> The new government was a coalition between Norodom Ranariddh, the son of King Sihanouk, as First Prime Minister, and Hun Sen, the prime minister from the Vietnamese installed regime, as Second Prime Minister. In reality, Hun Sen dominated the government and became sole prime minister after a coup in 1997. He was also a former Khmer Rouge regional official who fled to Vietnam when the group split in the late 1970s.

<sup>471</sup> See Thomas Hammarberg, *Efforts to Establish a Tribunal Against the Khmer Rouge Leaders: Discussions Between the Cambodian Government and the UN*, Paper presented at a seminar organized by the Swedish Institute of International Affairs and the Swedish Committee for Vietnam, Laos, and Cambodia, Stockholm (May 29, 2001). The appointment of the group of experts was prompted by a letter from then Second Prime Minister Hun Sen to the U.N. asking for assistance in preventing impunity. See BEIGBEDER, *supra* note 460, at 132; Capeloto, *supra* note 460, at 107.

<sup>472</sup> The Group of Experts for Cambodia was established pursuant to General Assembly Resolution 52/135 in 1998–99. The Group's report is found in identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/53/850-S/1999/231 (Mar. 16, 1999). (The Group of Experts Report is found in the Annex). Steven R. Ratner was a member of the Group of Experts and gives a comprehensive account in Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT'L L. 948 (1999).

<sup>473</sup> The Group of Experts concluded that the existing evidence justified investigations and prosecutions for CAH, genocide, war crimes, forced labor, torture, crimes against internationally protected persons, and violations of pre-1975 Cambodian criminal law. It also found that the Cambodian government, with possible help from Thailand, could apprehend any suspects. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001). It should be noted that the documentation of the Khmer Rouge's crimes was carried out by a Yale University project first directed by Craig Etcheson. See POL POT PLANS THE FUTURE:

The Group of Experts concluded that existing evidence justified investigations and prosecutions for CAH, genocide, war crimes, forced labor, crimes against internationally protected persons, and violations of pre-1975 Cambodian criminal law.<sup>474</sup> Furthermore, the Group of Experts believed that with the help of neighboring Thailand, all suspects could be apprehended.

The Group of Experts considered five options for an accountability mechanism including: fully domestic trials under Cambodian law, a tribunal established by the UN, a mixed tribunal under UN administration, an international tribunal established by treaty, and trials in states other than Cambodia under their domestic laws.<sup>475</sup> The Group of Experts steadfastly advised the UN that the tribunal should be international in nature because Cambodia's courts lack the capacity and the independence to try the remaining Khmer Rouge leaders.<sup>476</sup> The Group of Experts also felt that Cambodians would perceive purely domestic courts as biased because few Cambodians had faith in their judiciary.<sup>477</sup> The Cambodian government rejected the Group's findings and opposed the establishment of a wholly international tribunal modeled on the ICTY and ICTR.<sup>478</sup>

In August 1999, however, Security-General Kofi Annan dispatched a team under the direction of Hans Corell, the UN's Legal Counsel, to Phnom Penh to negotiate a mixed UN-Cambodian tribunal, even though as already noted, the Group of Experts had categorically and unequivocally rejected this option.<sup>479</sup> Then in January 2001, after years of frustrating negotiations, and despite continued disagreements on key points, the Cambodian government pushed through its National Assembly a weak law setting up the proposed tribunal.<sup>480</sup>

In February 2002, the UN ended five years of negotiations with the Cambodian government.<sup>481</sup> It believed that the trials as planned would not guarantee the independence, objectivity, and impartiality that a court established with the support of the

CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA 1976–1977 (David P. Chandler et al. trans. & eds., 1988); GENOCIDE AND DEMOCRACY IN CAMBODIA (Ben Kiernan ed., 1993); THE U.N. AND CAMBODIA 1991–1995 (The U.N. Blue Book Series, Volume II, 1995); GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT & IENG SARY (Howard J. DeNike et al. eds., 2000); Craig Etcheson, *Accountability Beckons During a Year of Worries for the Khmer Rouge Leadership*, 6 ILSA J. INT'L & COMP. L. 507 (2000); Ben Kiernan, *Bringing the Khmer Rouge to Justice*, 1 HUM. RTS. REV. 3 (2000).

<sup>474</sup> See *Group Experts Report*, *supra* note 472, ¶ 150.

<sup>475</sup> See Ratner, *supra* note 244, at 613, 614.

<sup>476</sup> *Group Experts Report*, *supra* note 472, ¶¶ 139, 178–84.

<sup>477</sup> *Id.* at 134.

<sup>478</sup> Then Second Prime Minister Hun Sen felt that the Khmer Rouge should face prosecution, however, he noted that should an international tribunal be mishandled in the slightest, former Khmer Rouge officers would resume guerilla warfare in the Cambodian jungle.

<sup>479</sup> See *Group Experts Report*, *supra* note 472, ¶ 190 (“The disadvantages of such a proposal . . . seem to the Group to outweigh any advantages.”).

<sup>480</sup> The law entitled the “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea,” was adopted in January 2001 and amended in October 2004. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, NS/RKM/1004/006 (with inclusion of amendments as promulgated on 27 October 2004) [hereinafter ECCC Law].

<sup>481</sup> Craig Etcheson, A “Fair and Public Trial”: A Political History of the Extraordinary Chambers, in Just. Initiative 7, 16–18 (Open Society Justice Initiative 2006) (recounting tortured history of negotiations with the Cambodian government); see also William Orme, *UN Ends Efforts to Try Khmer Rouge*, CHI. TRIB., Feb. 9, 2001; Seth Mydans, *Khmer Rouge Trials Won't Be Fair, Critics Say*, N.Y. TIMES, Feb. 10, 2001.

UN must inherently possess and that the Cambodian position – that any agreement between the UN and Cambodia would not regulate the operation of the tribunal – was unacceptable.<sup>482</sup> These problems arose due to the fact that the Cambodian government presented the law to its National Assembly before first reaching an agreement with the UN. In August 2002, after months of silence, a UN spokesman for Secretary-General Kofi Annan said the world body was “prepared to engage in further talks” with Cambodia to establish a missed national and international tribunal to try the Khmer Rouge leadership.<sup>483</sup> On March 14, 2003, representatives from the UN and Cambodia resumed intensive talks in Phnom Penh on a draft agreement for a special court. On March 18, 2003, the UN and Cambodia concluded a draft framework<sup>484</sup> concerning the prosecution of Khmer Rouge leaders.<sup>485</sup> The agreement was approved by the Cambodian Parliament later that same month and was subsequently approved by the UN on May 2, 2003.<sup>486</sup> The Cambodian domestic law was strengthened in October 2004 with several amendments concerning personal and substantive jurisdiction, the composition and appointment of judges, investigative and prosecutorial procedures, and logistics such as location of the tribunal, expenses and working languages as agreed upon by the UN.<sup>487</sup> However, the ECCC would face both compositional and procedural legal challenges as well as significant substantive limitations that would decrease the effectiveness of the court in holding the Khmer Rouge accountable. The ECCC deserves to be lauded for the role granted to victims of the Khmer Rouge. The victims’ rights include the right to be present during the hearings, the right to counsel, the right to testify, and the right to make motions before the court.

The judicial composition of the court as stated in the amended Cambodian domestic law does not ensure judicial independence nor establish impartiality of the ECCC. Instead of a majority of UN-appointed judges and an UN-appointed prosecutor, a compromise was negotiated between the UN Representative and the Cambodian Government. Rather than follow the suggestions of the UN Group of Experts and establish a tribunal

Perhaps the Secretary-General took this action as a bargaining tool to promote future negotiations between the United Nations and the Cambodian government.

<sup>482</sup> UN Legal Counsel Hans Corell stated that the UN “is especially concerned at the lack of urgency” shown by the Cambodian government during the negotiations and that the UN feared that “this lack of urgency could continue and affect the work” of the Tribunal. *See Negotiations between the U.N. and Cambodia Regarding the Establishment of the Court to Try Khmer Rouge Leaders: Statement by U.N. Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, Feb. 8, 2002, available at <http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm>.*

<sup>483</sup> *See Bill Myers, Impasse Thaws on Khmer Rouge*, CHI. TRIB., Aug. 23, 2002.

<sup>484</sup> General Assembly Approves Draft Agreement Between UN, Cambodia on Khmer Rouge Trials, G.A. Res. 10135, U.N. Doc. GA/RES/10135 (May 13, 2003). UN Legal Counsel Hans Corell, elaborating on the differences between the draft agreement and the situation in February 2002, stated that an important difference was that the parties had agreed that the provisions in the agreement would govern the assistance operation. Also, the structure of the tribunal was altered so that the court would only consist of two chambers, the Trial Chamber and the Supreme Court Chamber. *See Press Release, Hans Corell, Press Briefing on Cambodia by UN Legal Counsel, Mar. 18, 2003.*

<sup>485</sup> Asked how the question of the judges and the prosecutor had been resolved, Mr. Corell said the solution was the same as in February 2002. Thus, there will be three Cambodian and two international judges. The second Chamber will be composed of four Cambodian and three international judges. Decisions in the two Chambers would be taken by a “super majority” – at least one international would have to concur with local judges. *See Press Release, Id.*, March 18, 2003.

<sup>486</sup> G.A. Res. 10135, *supra* note 484; Etcheson, *supra* note 481, at 13.

<sup>487</sup> *See Etcheson, supra* note 481, at 13. *See also* ECCC Law at amendments to arts. 2, 3, 9, 10, 11, 14, 17, 18, 20, 21, 22, 23, 24, 27, 29, 31, 33, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46, and 47, *supra* note 480.

with a majority of international judges, the National Assembly created a mixed tribunal within the official domestic court system of Cambodia where the court would have a majority of Cambodian judges. Although three out of five judges at the trial court level would be Cambodian, all trial court decisions are to be decided by a supermajority (four out of five).<sup>488</sup> Moreover, the accused will be tried by two prosecutors, one Cambodian and one appointed by the UN, who are assisted by a staff of both foreign and Cambodian officials.<sup>489</sup> If the two prosecutors disagree, the prosecution is to proceed unless one prosecutor requests that a special chamber of five judges resolves differences (three Cambodian, two UN appointed). This chamber is also to rule on any interprosecutorial disputes by supermajority.<sup>490</sup> Matters are further complicated by the fact that the ECCC uses three languages: Khmer, French, and English. This has resulted in persistent problems with translation and interpretation.

The majorities of Cambodian judges in both the trial and appellate courts undermines the legitimacy of the courts, whereas the existence of two prosecutors and the unclear supermajority concept further complicate the already muddy procedural waters of the ECCC.<sup>491</sup> Additionally, the inclusion of victims in the proceedings as civil parties without clearly defining their status or role creates further problems.<sup>492</sup> Moreover, the tribunal's procedural challenges are exacerbated by Cambodia's history of noncompliance with international legal standards and norms.<sup>493</sup> Even more difficult considering the court itself is located within the domestic legal system of Cambodia where the judiciary has long since been criticized as being weak and highly susceptible to political and institutional biases.<sup>494</sup>

Following the establishment of the administrative organs of the tribunal and the appointment of judges and staff, progress toward the establishment of the tribunal's procedural framework continued to delay the start of judicial proceedings. The national and international judicial officers of the tribunal finally reached an agreement on the tribunal's procedural framework on June 13, 2007.<sup>495</sup>

The delays in the process of establishing the tribunal have foreclosed the possibility of bringing some of the most senior Khmer Rouge leaders to trial. In 1997, Pol Pot surfaced, while the U.S. and the UN lacked the political will to bring him to justice. Eventually, Pol Pot returned to the jungle without being prosecuted and died in a Khmer Rouge

<sup>488</sup> ECCC Law art. 9, *supra* note 480.

<sup>489</sup> *Id.* at art. 16.

<sup>490</sup> As Ratner notes, "[o]f course, the idea of a double-headed prosecutor is bizarre, if not a recipe for disaster."

The chances are that the Cambodian judges and prosecutors will not be insulated from political pressure and act accordingly. The law also provides for two investigatory judges, one Cambodian and one foreign, whose disagreements would be decided by a chamber of five judges. This adds yet another layer of bureaucracy.

<sup>491</sup> Sylvia de Bartodano, *Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 285, 290 (2006); See Cohen, *supra* note 242, at 28.

<sup>492</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules, R.12 and 23 (June 12, 2007); see also Kathleen Claussen, *Up to the Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia*, 33 YALE J. INT'L L. 253, 256 (2008).

<sup>493</sup> See Kathryn Klein, *Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia*, 4 NW. U. J. INT'L HUM. RTS. 549, 28 (2006).

<sup>494</sup> An Sok, *The Khmer Rouge Tribunal: What It Means for Cambodia*, in JUST. INITIATIVES, 25 (Open Society Justice Initiative, 2006); see also Barbara Crossette, *A tortuous road to nation-building*, INT'L HERALD TRIB. Mar. 20, 2008 (regarding the corrupt Cambodian judicial system mixing with distinguished international lawyers).

<sup>495</sup> See Excerpts, *supra* note 247.

zone on the Thai border on April 15, 1998. The Khmer Rouge General Ke Pauk, who was allegedly involved in large-scale killing, also evaded prosecution and has died. Ta Mok, alias the “Butcher,” the Khmer Rouge army chief, died in July 2006 while in detention pending trial by the Cambodian tribunal.

Although the most senior and culpable leaders escaped with impunity, in July 2007, the Co-Prosecutors, with assistance from the Cambodian national police, filed the first Introductory Submission of the ECCC.<sup>496</sup> The Co-Prosecutors’ preliminary investigations identified five suspects and twenty-five situations concerning possible violations of international humanitarian law and Cambodian law.<sup>497</sup> Over the next four months, all of those identified were apprehended. Those in custody are charged with genocide, CAH (including murder, torture, imprisonment, persecution, and other inhumane acts), grave breaches of the Geneva Conventions, and homicide, torture, and religious persecution under the 1956 Cambodian Penal Code. They are Nuon Chea (“Brother Number Two”), the movement’s chief ideologue and former Deputy Secretary of the Communist Party of Kampuchea;<sup>498</sup> Khieu Samphan, successor of Pol Pot as the head of state (Chairman of the State Presidium) of Democratic Kampuchea;<sup>499</sup> Ieng Sary, the former Deputy Prime Minister and Minister of Foreign Affairs of Democratic Kampuchea;<sup>500</sup> Ieng Thirith, the former Minister of Social Affairs and Action;<sup>501</sup> and Kaing Guek Eav (alias Duch), the commander of the notorious S-21 prison (known as “Tuol Sleng”), where “enemies of the party” were interrogated, often tortured, and executed during its operation from 1975 to 1979.<sup>502</sup> Duch and his subordinates also operated the S-24 facility, which was used as a re-education camp, and where another 1,300 persons were detained.

Duch, the first person charged and taken into custody by the ECCC, and the first to be formally indicted, was a math teacher before joining the Khmer Rouge in the 1960s. Sihanouk’s police arrested him in 1968. When Sihanouk was overthrown by Lon Nol’s coup in 1970, Duch was set free as part of a general amnesty. The Khmer Rouge took power in April 1975 and Duch helped establish prisons in Phnom Penh. He would eventually become chief of the secret police of the Khmer Rouge, known as the Santebal, and the commander of S-21. The trial mainly focused on his role as a commander at S-21, which was established along with other similar facilities to further the Khmer Rouge regime’s goal of creating a new society.<sup>503</sup> These facilities were designed to execute and torture “enemies of the party,” which included all prisoners whether transferred there by

<sup>496</sup> *Id.*; see also Statement of the Co-Prosecutors of the ECCC, July 18, 2007 *available at* [http://www.eccc.gov.kh/english/cabinet/press/33/Statement\\_of\\_Co-Prosecutors\\_18-July-2007\\_.pdf](http://www.eccc.gov.kh/english/cabinet/press/33/Statement_of_Co-Prosecutors_18-July-2007_.pdf).

<sup>497</sup> *Id.*

<sup>498</sup> Prosecutor v. Nuon Chea, Case File No. 002/19-09-2007/ECCC-PTC.

<sup>499</sup> Prosecutor v. Khieu Samphan, Case File No. 002/19-09-2007/ECCC-PTC. Khieu Samphan has argued that he had no effective power despite his position as the Head of State of Democratic Kampuchea.

<sup>500</sup> Prosecutor v. Ieng Sary, Case File No. 002/19-09-2007/ECCC-PTC. After the Khmer Rouge regime fell from power, Ieng Sary fled to Thailand and was convicted of genocide and sentenced to death *in absentia* by the People’s Revolutionary Tribunal of Phnom Penh. In 1994, King Norodom Sihanouk granted him amnesty from prosecution under a 1994 law that outlawed the Khmer Rouge and a royal pardon for the 1979 conviction.

<sup>501</sup> Prosecutor v. Ieng Thirith, Case File No. 002/19-09-2007/ECCC-PTC.

<sup>502</sup> Prosecutor v. Kaing Guek Eav alias Duch, Case File No. 001/18-07-2007/ECCC-TC, Indictment of Kaing Guek Eav (July 17, 2007).

<sup>503</sup> OCIJ, Closing Order Indicting Kaing Guek Eav alias Duch, ¶ 13 (Aug. 8, 2008) [hereinafter Closing Order].



intention or mistake.<sup>504</sup> In the later years, the Khmer Rouge even conducted an internal purge that included members who were suspected to be disloyal.<sup>505</sup> Duch fled Phnom Penh in 1979 and later converted to Christianity. In 1999, he was arrested and imprisoned by Cambodian authorities when journalists discovered his identity. The Khmer Rouge left behind documents indicating that an estimated 12,380 prisoners were imprisoned at S-21, including males and females of all ages.<sup>506</sup> Nearly all of them died.

On August 8, 2008, the Office of the Co-Investigating Judges issued a Closing Order indicting Duch for CAH (murder, torture, rape, extermination, persecution, imprisonment, enslavement, and other inhumane acts) and grave breaches of the Geneva Conventions.<sup>507</sup> He was accused of committing, ordering, planning, instigating, and aiding and abetting these crimes, and was also charged with liability under command responsibility.<sup>508</sup> The Office of the Co-Investigating Judges denied the request of the Co-Prosecutors to investigate Duch for the domestic Cambodian crimes of homicide and torture<sup>509</sup> and omitted those crimes from the Closing Order.<sup>510</sup> The Judges reasoned that the domestic crimes were subsumed by the higher international crimes with which Duch was charged.<sup>511</sup> The Co-Prosecutors appealed the Closing Order, which was heard by five judges of the Pre-Trial Chamber. The first ground of appeal concerned the omission of domestic crimes. The second ground concerned the failure to indict Duch as a co-perpetrator under the mode of liability of joint criminal enterprise. Concerning the former, the Pre-Trial Chamber held that the national crimes of premeditated murder and torture should be added to the Closing Order because those crimes contain elements that are not present in the definitions of the international crimes contained in the Closing Order, and because ICL permits the application of more than one legal offense to the same underlying facts.<sup>512</sup> As for the second ground of appeal, the Pre-Trial Chamber held only that joint criminal enterprise doctrine could not apply to Duch because he was not adequately informed of the allegation prior to the Co-Prosecutors' Final Submission pursuant to Internal Rule 21(1)(d).<sup>513</sup>

Trial hearings against Duch began in February 2009. The trial began on March 30, 2009 and lasted seventy-two days, which saw the testimony of twenty-four witnesses, twenty-two Civil Parties, and nine experts. On the second day of the trial, Duch formally accepted responsibility and apologized for torturing and murdering an estimated 12,000 Cambodians. On July 26, 2010, the sixty-seven-year-old Duch became the first person convicted by the ECCC, and the first Khmer Rouge official to be brought to justice in connection with the Khmer Rouge regime.<sup>514</sup> He was found guilty of grave breaches of the Geneva Conventions of 1949 and CAH, including murder, extermination, enslavement,

<sup>504</sup> *Id.* ¶ 31.

<sup>505</sup> *Id.* ¶¶ 35–9.

<sup>506</sup> *Id.* ¶ 47.

<sup>507</sup> *Id.* ¶¶ 129–51.

<sup>508</sup> *Id.* ¶¶ 153–61.

<sup>509</sup> OCIJ, Order Concerning (Co-Prosecutors') Requests for Investigative Action (June 4, 2008).

<sup>510</sup> Closing Order, *supra* note 503, ¶ 152.

<sup>511</sup> *Id.*

<sup>512</sup> PTC, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch," ¶¶ 55–107 (Dec. 8, 2008) [hereinafter Decision on Closing Order Appeal].

<sup>513</sup> *Id.* ¶¶ 113–42.

<sup>514</sup> Prosecutor v. Kaing Guek Eav alias "Duch," Case No. 001/18-07-2007/ECCC/TC, Judgment (Jul. 26, 2010) [hereinafter *Duch* Trial Judgment].



imprisonment, persecution on political grounds, and other inhumane acts,<sup>515</sup> and sentenced to thirty-five years imprisonment, which was shortened to nineteen years because of time served and in compensation for a period of illegal detention by a military court. Some view the sentence as too lenient, but the result was never in doubt, as Duch had confessed to the charges and showed remorse in court.

Other observations worthy of note, the ECCC's utilization of joint criminal enterprise is subject to the same criticisms of that theory of individual criminal responsibility already voiced in reference to its usage before other international criminal tribunals.<sup>516</sup> Also of some significance, pursuant to Article 3 of the ECCC Law, Duch was also charged with crimes under the 1956 Penal Code of Cambodia, including premeditated murder and torture. However, the Trial Chamber lacked a majority to exercise jurisdiction over those domestic crimes.<sup>517</sup>

For Cambodia, the road to justice remains little more than a foot-worn forest path in need of substantial and immediate paving.<sup>518</sup> It is likely that the tribunal will produce only a few symbolic trials. The ECCC remains the international criminal court at the greatest risk of institutional collapse. It remains plagued by translation and interpretation difficulties, including the statutory language of the offenses.

The prosecution of genocide before the ECCC is problematic because the alleged crimes were not committed with the intent to destroy one of the four groups enumerated in the statute, and because the 1949 Convention had gone into desuetude by 1979. Duch was not charged with genocide. Thus, while for over three decades talk has persisted over the "Cambodian genocide," in this historic conviction, the word "genocide" was absent. Even though there is evidence that victims of the Khmer Rouge included Cambodia's ethnic Vietnamese population, Buddhists, and Cham Muslims, few dispute that the Khmer Rouge campaign sought to annihilate groups of people whom it deemed to be incompatible with its aims of revolution. However, the indictment in Case Number 2 against the four most senior surviving Khmer Rouge leaders contains a charge for genocide, in addition to charges for war crimes and CAH.<sup>519</sup> Four of those awaiting trial are the highest-ranking leaders of the Khmer Rouge; however, they are old and ill.

Thus, with respect to the prosecutions of Khmers Rouges, CAH are more a more suitable characterization of their crimes. Still, the principles of legality cast doubts on the appropriateness of its use. Specifically, the definition of CAH provided in the ECCC

<sup>515</sup> *Id.* ¶ 516.

<sup>516</sup> *Id.* ¶¶ 487–519.

<sup>517</sup> Prosecutor v. Kaing Guek Eav alias "Duch", Case No. 001, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, E187 (Jul. 26, 2010).

<sup>518</sup> While the establishment of the tribunal has been greeted by many observers as an important step in establishing the rule of law in Cambodia, some commentators have criticized the tribunal and pointed to its perceived weaknesses, such as the inadequacy of the judiciary in Cambodia, potential government interference with investigations and judicial proceedings, the lack of respect for the rule of law and objections to the substantive provisions and coherence of Cambodian law. See Higonnet, *supra* note 312, at 395–397 (outlining various critiques of the Cambodian tribunal). Additionally, one of the attorneys representing Khieu Samphan is Jacques Vergès, infamous for his representation of Klaus Barbie and President Slobodan Milošević to name a few. Vergès is known for his unique defense techniques and extravagant style may prove to delay the trials even further. See *Former Khmer Rouge leader in court*, ASSOCIATED PRESS, Apr. 23, 2008; Ker Munhit, *French lawyer's outburst at Cambodia tribunal triggers delay*, ASSOCIATED PRESS, Apr. 23, 2008.

<sup>519</sup> Further information about Case No. 2 can be found at the website of the ECCC, available at <http://www.eccc.gov.kh/english/case002.aspx>.

Law is vexing because its language raises concerns about the principle of *nullum crimen sine lege*. A major hurdle in prosecuting CAH is that the ECCC is required to apply the law as it existed in 1976, whether the source is Cambodian or customary international law. Whereas the crime of genocide was codified in 1948, CAH has never been codified in an international convention and most case law comes from the ad hoc tribunals of the past two decades and with their inherent deficiencies.<sup>520</sup> One question that arises is whether the existence of an armed conflict was one of the *chapeau* elements of CAH in 1975. As discussed in [Chapter 3](#), in 1945 the existence of an armed conflict was required, but by 1998 this was no longer the case.

While the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (hereinafter “the Agreement”) states<sup>521</sup> that CAH will be defined according to the Rome Statute, Article 5 of the ECCC provides the following definition of CAH:

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity *during the period 17 April 1975 to 6 January 1979*.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, *such as*:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts<sup>522</sup>

Thus, the definition of CAH set forth in Article 5 of the Law of the ECCC differs from the Rome Statute because it lacks the requirement of a connection with a state plan or policy,<sup>523</sup> and it leaves open the grounds for discrimination. The definition from the Agreement should be disregarded insofar as it violates the principle *nullum crimen sine lege* because the Rome Statute was nonexistent from 1975 to 1979, and because the Rome Statute’s definition in Article 7 is not a reflection of customary international law during the aforementioned period.

#### **CAH Prosecutions (as of November 2010)**

***Indicted for CAH:*** 5 (out of 5)

***Specific Acts***

Enslavement: 5

Extermination: 5

<sup>520</sup> See *infra* §3.

<sup>521</sup> Article 9, Crimes Falling within the Jurisdiction of the Court.

<sup>522</sup> The law entitled the “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea,” was adopted in January 2001 and amended in October 2004. ECCC Law art. 5, *supra* note 480 (emphasis added).

<sup>523</sup> See *infra* ch. 1.

Imprisonment: 5  
 Murder: 5  
 Persecution: 5  
 Rape: 5  
 Torture: 5  
 Other Inhumane Acts: 5  
     “Attacks upon human dignity”: 4  
     Enforced disappearance: 4  
     Forced marriage: 4  
     Forced transfer: 4

**Ongoing:** 4

**Convicted of CAH:** 1

*Specific Acts*

Persecution: 1

**Sentence:** 35 years (Duch)

## §8. Crimes Against Humanity as Part of *Jus Cogens*<sup>524</sup>

Under customary international law, general principles of law, the universal condemnation of the acts first contained in Article 6(c) of the London Charter rise to the level of *jus cogens*. Post-Charter legal development confirm that CAH are part of *jus cogens*.

The term *jus cogens* means “the compelling law,” and the hierarchical position of such a rule is presumably above all other principles, norms, and rules of both international law and national law. Some scholars see *jus cogens* and customary international law as similar,<sup>525</sup> while others distinguish between custom and “peremptory norms,”<sup>526</sup> and still others question whether *jus cogens* is simply not another way of semantically describing certain “general principles” that, for a variety of reasons, rise above other “general principles.”<sup>527</sup> No matter how it is described, this scholarly debate is essentially one of hierarchy of applicable law. *Jus cogens* is referred to as a “peremptory norm” by the Vienna Convention on the Law of Treaties.<sup>528</sup> It is also referred to in the legal literature as “compelling,” “inherent,” “inalienable,” “essential,” “fundamental,” and “overriding.” It is perhaps as Alfred Verdross stated: “no definition is necessary because the idea of *jus cogens* is clear in itself.”<sup>529</sup>

<sup>524</sup> This section is partially based on Bassiouni, *supra* note 8, and reprinted with the permission of the J. LAW & CONTEMP. PROBS.

<sup>525</sup> ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 (1971).

<sup>526</sup> Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988). *But see* Anthony A. D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990).

<sup>527</sup> Mark W. Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 CONN. INT'L L.J. 370 (1988).

<sup>528</sup> Vienna Convention on the Law of Treaties art. 53, with annex, May 23, 1969, U.N. Doc. A/CONF. 39/27.

<sup>529</sup> Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55, 57 (1966); 1 Y.B. INT'L L. COMM'N. 63, 66–67 (1963). The ICJ in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), did not define *jus cogens* though it relied on it. *See generally Appraisals of the ICJ's Decision: Nicaragua v. United States*, 81 AM. J. INT'L L. 77 *et. seq.* (1987).

This writer's understanding of *jus cogens* is that it is essentially a label placed on a principle whose perceived importance, based on certain values and interests, rises to a level that is acknowledged to be superior to another principle, norm, or rule and thus overrides it.

The operative terms used in describing *jus cogens* are value-laden and susceptible of multiple definitions based on different philosophical and jurisprudential conceptions.<sup>530</sup> Nevertheless, the scholarly debate can be characterized as being both methodological and substantive. The range of views among adherents to the positivist school of thought is almost as wide as among adherents to the naturalist one, not to speak of other philosophical and jurisprudential schools.<sup>531</sup> The legal existence and validity of CAH is acknowledged in the naturalist school, but not by strict positivists, except where there is a normative text, as in the case of the statutes of the *ad hoc* tribunals, the ICC, and the mixed models, described above.<sup>532</sup> But positivists still argue with these texts' compliance with principles of legality.<sup>533</sup>

In addition to the concept of crimes "against the laws of humanity" embodied in the preamble of the 1907 Hague Convention,<sup>534</sup> proponents of *jus cogens* advance that the legal values protecting life and prohibiting the depredations contained in the various statutes establishing international and mixed model tribunals are of a higher legal order than any international or national norm that may otherwise permit their violation. In addition, the human protection contained in these provisions is well established in "general principles of law" recognized by civilized nations under both international and national legal sources.<sup>535</sup> But such arguments may not be sufficiently convincing to rigid positivists and to those who deem that the requirements of the principles of legality, particularly *nullum crimen sine lege*, *nulla poena sine lege*, are mandatory in ICL.<sup>536</sup>

Assuming that CAH rise to the level of *jus cogens*, this recognition does not override the principles of legality, which are also deemed to be *jus cogens*. We are therefore confronted with a conflict between two coequal *jus cogens* norms without having a clear basis for making appropriate choices between them.

The *erga omnes* and *jus cogens* doctrines are often presented as the two sides of the same coin. The term *erga omnes* means "flowing to all." Presumably, obligations deriving from *jus cogens* are *erga omnes*. Indeed, legal logic supports the proposition that what is "compelling law" must necessarily engender obligation "flowing to all."<sup>537</sup> Genocide is universally deemed a *jus cogens* violation and its prohibition imposes on states certain duties and obligations *erga omnes*.<sup>538</sup> On the basis of the *erga omnes* rationale for genocide,

<sup>530</sup> See, e.g., Myres McDougal et al., *The World Constitutive Process of Authoritative Decision Making*, in CYRIL E. BLACK & RICHARD A. FALK, 1 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (1969).

<sup>531</sup> See generally JEROME HALL, *READINGS IN JURISPRUDENCE* (1938); CARL J. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (1958).

<sup>532</sup> See *infra* Part A.

<sup>533</sup> See *infra* ch. 5, which contains a detailed analysis of the principles of legality.

<sup>534</sup> See *infra* ch. 3, §1.

<sup>535</sup> See *infra* ch. 6, §2.

<sup>536</sup> See *infra* ch. 5, §1.

<sup>537</sup> Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 *TEX. L. REV.* 785, 829–30 (1988).

<sup>538</sup> In the September 1993 provisional measures ruling in *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Judge Elihu Lauterpacht stated "the prohibition of genocide . . . has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina

which some deem to be a species of CAH, this category of crimes as a whole also rises to that level.

The ICJ in the *Barcelona Traction* case held:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>539</sup>

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, the “obligations of a state towards the International Community as a whole [ . . . ].”<sup>540</sup> The ICJ goes on in Paragraph 34 to give examples,<sup>541</sup> but it does not define or list all that could be deemed “obligations of a State towards the International Community as a whole”<sup>542</sup> for the obvious reason that such a listing would be impossible. But clearly a state policy aimed at committing CAH creates state responsibility for its violation of a *jus cogens* norm. In addition, because there is an international duty to prosecute or extradite such violators, a state that fails to do so would also breach its international legal duty and be in further violation of the principles of state responsibility.<sup>543</sup> Thus, if conduct creates state responsibility because it constitutes the violation of a *jus cogens* norm, then it should follow that those individuals who carry out the state policy are also in breach of the same *jus cogens* norm.

In an important study bearing on the *erga omnes* and *jus cogens* relationship, particularly as applied to certain international crimes such as genocide, Professor Randall states “traditionally international law functionally has distinguished the *erga omnes* and

v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures, 1993 I.C.J. 325, 440 (Sept. 13); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28); see also *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935* (1994), UN Doc. S/1994/1405 (1994), annex; *United States v. Matta-Ballesteros*, 71 F.3d 754, 764, n. 5 (9th Cir. 1996); *Princez v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (DC Cir. 1994) (Wald J. dissenting); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *Hirsch v. State of Israel*, 962 F. Supp. 377, 381 (SDNY 1997).

See also Lippman, *supra* note 175; Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2272–74 (1997); M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L. J. 202 (1978); SCHABAS, *supra* note 83, at 444–45.

<sup>539</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, 1970 I.C.J. 1 (Feb. 5); see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Preliminary Objections, 1996 I.C.J. 595, ¶ 31 (July 11).

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*, wherein the Court stated:

1. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention and punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, 23); others are conferred by international instruments of a universal or quasi-universal charter.

<sup>542</sup> *Id.* at 32.

<sup>543</sup> See the work of IAN BROWNLIE, 1 SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (1983); see also FARHAD MALEKIAN, INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES (1985).

*jus cogens* doctrines [ . . . ].”<sup>544</sup> But he recognizes the *sine qua non* relationship of the two with respect to genocide.<sup>545</sup>

Both the PCIJ and ICJ have recognized the higher law background of *jus cogens* as part of “general principles” of international law.<sup>546</sup> Furthermore, it is well established that *jus cogens* can derive from principles of *ordre publique*.<sup>547</sup> The international and national law prohibitions against CAH, as evidenced under both international and national legal sources of “general principles,” whose prohibition is universally condemned, also clearly embody principles of *ordre publique*. This added dimension further reinforces the conclusion that CAH violate a *jus cogens* norm.

The essential characteristic of *jus cogens* as a higher rule is its nonderogability.<sup>548</sup> The nonderogability of international rules of *ordre publique*, as these may be established in *jus cogens*, also supersedes the principle of national sovereignty. The PCIJ declared in its very first judgment, the *S.S. Wimbledon* case,<sup>549</sup> that sovereignty is not inalienable. Indeed sovereignty cannot be claimed as a barrier to the binding nature of *jus cogens* obligations. Professor Schwarzenberger states, “In other words, none of the rules of international customary law governing the principle of sovereignty constitute international *jus cogens*.”<sup>550</sup> This means that if *jus cogens* is nonderogable and supersedes national

<sup>544</sup> Randall, *supra* note 536, at 830.

<sup>545</sup> *Id.* More specifically on the subject, Randall states:

*Jus Cogens* means compelling law. The *jus cogens* concept refers to “peremptory principles or norms from which no derogatory is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms.”

While authoritative lists of obligations *erga omnes* and *jus cogens* norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, *apartheid*, and torture. Traditionally, international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines, which address violations of individual responsibility. Those doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders. One might argue that “when committed by individuals,” violations of *erga omnes* obligations and peremptory norms “may be punishable by any State under the universality principle.” *Id.*  
<sup>546</sup> See *Right of Passage over Indian Territory (Portugal v. India)*, Merits, 1960 I.C.J. 123, 135 (Apr. 12) (dissenting opinion of Judge Fernandes):

It is true that, in principle, special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general rule is to beg the question. Moreover, there are exceptions to this principle. Several rules *cogestes* prevail over any special rules. And the general principles to which I shall refer later constitute true rule of *jus cogens* over which no special practice can prevail.

See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 66 (June 21) (separate opinion of Vice-President Ammoun).

<sup>547</sup> Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946, 949 (1967).

<sup>548</sup> HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 408–38 (1952). In modern international law the principle of nonderogability applies to fundamental human rights and is embodied in relevant conventions, such as the U.N. Covenant and Torture Convention. De Vattel referred to the concept as the “immutable Law of Nations” See EMMERICH DE VATTEL, *THE LAW OF NATIONS* 54–55 (Joseph Chitty ed., 1855). Also neither general nor special customary international law can derogate to *jus cogens*. See Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1 (1974).

<sup>549</sup> The *S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17); see also *Jurisdiction of the European Commission of the Danube*, 1927 P.C.I.J. (ser. B) No. 14, at 6 (Dec. 8).

<sup>550</sup> Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455, 655, n. 3 (1965) highlights the following opinions of the Court of International Justice on the evidentiary source of *jus cogens*:

positive law, it cannot be opposed on the grounds of national sovereignty because the latter is neither inalienable nor nonderogable. This hierarchical standing of *jus cogens* makes it controlling over positive law whether international or national.

Thus, the doctrine that higher international legal obligations prevail over national legal norms existed before World War II.<sup>551</sup> Subsequently, the ICJ in its Advisory Opinion *Concerning Reservations to the Genocide Convention* held that any reservation to that Convention made by a state by virtue of its sovereignty was illegal, stating that genocide “is contrary to moral law and to the spirit and aims of the United Nations.”<sup>552</sup> The Court added conclusively that “principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation,”<sup>553</sup> thus as a *jus cogens* norm.

The ICJ also recognized that international law imposes certain obligations upon states, *erga omnes*.<sup>554</sup> Professor Whiteman, in reliance thereon, specifically found the *jus cogens* and *erga omnes* doctrines applicable to genocide, slavery, and racial discrimination, all of which embody CAH. She states:

In the Case Concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., ser A, No. 14, at 46 (1929), in France, P.C.I.J., ser A, No. 15, at 125 (1929), . . . See also the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden) (1958) I.C.J. Rep. 55, 122–3 (Spencer, J. Separate opinion).

See Stefan A. Riesenfeld, *Editorial Comment: Jus Dispositivum and Jus Cogens in Light of the Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT’L L. 511 (1966). A contrary position to Schwarzenberger that is more supportive of *jus cogens* is that of Professor Verdross, a member of the International Law Commission: writing in 1966, he said:

[I]n the field of general international law, there are rules having the character of *jus cogens*. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states by the higher interest of the whole international community. Hence these rules are absolute. The others are relative, concerning only individual states *inter se*.

Verdross, *supra* note 528, at 58. He points out that the two categories of general international law were also recognized by the International Court of Justice in its Advisory Opinion concerning Reservations to the Genocide Convention (*Bosnia and Herzegovina v. Serbia and Montenegro*), *supra* note 538, where the Court stated: “The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . [I]n such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d’être* of the Convention. Verdross stated that he prepared the article cited for reasons that he “felt obliged to defend article 37 of the International Law Commission’s then-existing draft (on the Law of Treaties)” against “criticism directed against it by Professor Schwarzenberger,” *citing* Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1965); Verdross, *supra* note 528, at 55. In the French and Latin American literature on private international law, the term “international public policy” is used to denote considerations of national public policy that rule out the application of foreign law otherwise relevant under *lex fori*. See, e.g., Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands v. Sweden*), 1958 I.C.J. 55, 121–22 (Nov. 28) (separate opinion of Sir Percy Spender).

<sup>551</sup> See Luzius Wildhaber & Stephan Breitenmoser, *The Relationship between Customary International Law and Municipal Law in Western European Countries*, 48 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 163 (1988).

<sup>552</sup> *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 527, at 23–24; see also SCHABAS, *supra* note 83, at 522–525.

<sup>553</sup> *Id.*

<sup>554</sup> See, e.g., *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands), 1969 I.C.J. 4 (Feb. 20).



obligations owed to the international community as a whole, stating that such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of *genocide*, as also from the principles and rules concerning *the basic rights of the human person, including protection from slavery and racial discrimination*.<sup>555</sup>

The position that certain international crimes are *jus cogens* and that they rise not only above treaties but above all sources of law is best expressed by Lord McNair and Sir Gerald Fitzmaurice.<sup>556</sup> Lord McNair states:

There are, however, many rules of customary international law which stand in a higher category and which cannot be set aside or modified by contracting States; it is easier to illustrate these rules than to define them. They are rules which have been accepted whether expressly by treaty or tacitly by custom, as being necessary to protect the public interests of the society of States or to maintain the standards of public morality recognized by them [...]. For instance, piracy is stigmatized by customary international law as a crime, in the sense that a pirate is regarded as *hostis humani generis* and can lawfully be punished by any State into whose hands he may fall. Can there be any doubt that a treaty whereby two States agree to permit piracy in a certain area, or against the merchant ships of a certain State, with impunity, would be null and void? Or a treaty whereby two allies agree to wage war by methods which violated the customary rules of warfare, such as the duty to give quarter.<sup>557</sup>

Judge Fitzmaurice states:

There are certain forms of illegal action that can never be justified by or put beyond the range of legitimate complaint by the prior illegal action of another State, even when intended as a reply to such action. These are acts which are not merely illegal, but *malum in se*, such as certain violations of human rights, certain breach of the laws of war, and other rules in the nature of *jus cogens* – that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal *vis major*. In the conventional field, may be instanced such things as the obligations to maintain certain standards of safety of life at sea. No amount of noncompliance with the conventions concerned, on the part of other States, could justify a failure to observe their provisions.<sup>558</sup>

In a decisive and rather definitive manner, the Vienna Convention on the Law of Treaties consecrates the notion of peremptory norms of international law as superseding national law and other sources of international law. In Article 53, it establishes:

A treaty is void if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of international law is a norm accepted and recognized by the community of States

<sup>555</sup> Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GEO. J. INT'L L. & COMP. L. 609, 610 (1977) (emphasis added); see also Randall, *supra* note 536, at 829–32.

<sup>556</sup> Both cited by Whiteman, *supra* note 554, at 610–11.

<sup>557</sup> ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* (2d. ed. 2007); ARNOLD D. MCNAIR, *THE LAW OF TREATIES* 213–24 (1951).

<sup>558</sup> Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 1 (1957).

as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>559</sup>

Of great note is the fact that the ILC, which drafted the Vienna Convention on the Law of Treaties, deemed it to be the embodiment of customary international law.<sup>560</sup>

Since World War II, a number of international and regional instruments on the protection of human rights have been elaborated and entered into effect.<sup>561</sup> These instruments, along with numerous United Nations Resolutions, reaffirm and provide support for the assertion that the protected human interests, whose violations are criminalized in CAH, have become *jus cogens*.

The connection between international protection of human rights and the international criminalization of its most serious breaches is evident, in that all international crimes embody what is found in international human rights law as protected human interests.

## PART B: PROCEDURAL DEVELOPMENT

### §1. *Aut Dedere aut Judicare*

The essential purpose of criminalizing harmful conduct, whether at the national or international level, is to prevent such conduct by means of general deterrence. But general deterrence is only as effective as the likelihood of prosecution and punishment. The latter depends upon the existence of a forum for prosecution and an enforcing authority to carry out the eventual sanctions meted out to convicted offenders, and that means an international criminal jurisdiction, and extended extraterritorial jurisdiction, including universal jurisdiction, to be exercised by national criminal justice systems. In addition, time limitations should not bar prosecution and punishment of international crime.<sup>562</sup> Thus, prosecution and eventual punishment, no matter where or when, are indispensable to the effectiveness of general deterrence, which enhances compliance with the mandates of the law and prevents violations.

<sup>559</sup> Vienna Convention art. 53, *supra* note 527.

<sup>560</sup> See TASLIM O. ELIAS, THE VARIOUS REPORTS OF THE INTERNATIONAL LAW COMMISSIONS BETWEEN 1957–1969. See the various reports of the ILC between 1957–1969, Sir Humphrey Waldock, Special Reporter in the Law of Treaties in [1966] 27 Y.B. INT'L L. COMM'N 23 *et seq.* The unanimous acceptance of *jus cogens* is evidenced in *United Nations Conference on the Law of Treaties*, 1st Sess., Vienna, Mar. 26 – May 29, 1968, U.N. Doc. A/Conf. 39/11 and for the second session, May 22, 1969, *see* A/Conf. 39/11 Add. For insight into the *jus cogens* question *see* Schwebel, *supra* note 546; Richard R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE 24 (1970); Anthony A. D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970); *see also* Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90 (1989).

<sup>561</sup> *See United Nations Action in the Field of Human Rights*, ST/HR/2/Rev. 2, U.N. Sales No. E.83 XIV.2 (1983); HUMAN RIGHTS IN INTERNATIONAL LAW (1985) (providing the texts of many of these instruments); ANDRÉ DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 91–127 (1996).

<sup>562</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968); European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, ETS no. 082, Strasbourg, 25.I.1974 (1974). *See infra* Part B, §3.

In 1973, this writer reworded the maxim *aut dedere aut judicare*<sup>563</sup> from Hugo Grotius' *aut dedere aut punire*<sup>564</sup> because it appropriately mandates prosecution and not punishment, in keeping with the presumption of innocence, which is a "general principle of law." Punishment is only a consequence of guilt, and its application will depend on a variety of factors, such as the nature of the act, its harmful result, the personality of the actor, and various factors bearing on aggravation and mitigation of sentences. Each of these factors reflects a different philosophical approach to punishment that is beyond the scope of this discussion.<sup>565</sup>

Because CAH is a category of international crimes, a general duty exists to prosecute or extradite. This duty, in the opinion of this writer and other scholars, has become

<sup>563</sup> See M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (M. Cherif Bassiouni ed., 1975); see also BASSIOUNI & WISE, AUT DEDERE AUT JUDICARE, *supra* note 3; M. Cherif Bassiouni, *The Discipline of International Criminal Law*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 3 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE ch. 1 (5th rev. ed. 2007); CHRISTINE VAN DEN WYNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER 8, 132–40 (1980). For an excellent review of the question, see Edward M. Wise, *Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare*, 62 RIDP 109 (1991); see also M. Cherif Bassiouni, *General Report on the Juridical Status of the Requested State Denying Extradition*, 30 AM. J. COMP. L. 610 (1982); Daniel Derby, *Duties and Powers Respecting Foreign Crimes*, 30 AM. J. COMP. L. 530, 537 n.40 (Supp. 1982); Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477 (1982); Edward M. Wise, *Book Review*, 30 AM. J. COMP. L. 362, 370 n.64 (1982); Declan Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. INT'L L. & ECON. 483 (1975); M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 RIDP 405, 430 (1974); M. Cherif Bassiouni, *World Public Order and Extradition: A Conceptual Evolution*, in AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS 10 (Dietrich Oehler & Paul-Günter Pötz eds., 1970); Edward M. Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 720–23 (1968); see also Edward M. Wise, *International Crimes and Domestic Criminal Law*, 38 DEPAUL L. REV. 923, 932–34 nn.39 and 42 (1989). For expressions of these positions in the 1600s see CESARE BECCARIA, DEI DELITTI E DELLE POENE § 13 (1764) (Gian D. Pisapia, trans. & ed., 1973); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1780) (J.H. Burns & Herbert L.A. Hart eds., 1970).

<sup>564</sup> HUGO GROTIUS, DE JURE BELLI AC PACIS, Bk. 2, ch. XXI, §§ 3, 4, 5(1) and 5(3) (1624); see also EMMERICH DE Vattel, LE DROIT DES GENS, Bk. II, ch. 6, §§ 76–7 (1758); and SAMUEL PUFENDORF, THE ELEMENTS OF UNIVERSAL JURISPRUDENCE (1672), Bk. VII, ch. 3, §§ 23–4 (William A. Oldfather trans., 1931).

<sup>565</sup> Helvetius, Beccaria and Bentham were advocates of utilitarianism as a basis for punishment. See, e.g., HELVETIUS, DE L'ESPRIT (1759), whose influence on Beccaria and Bentham was noticeable; CESARE BECCARIA, ON CRIMES AND PUNISHMENT (David Young trans., 1986); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, at ch. 1, § 1–2, and ch. 2, pp. 17–33. Conversely, Kant and Hegel rejected utilitarianism and saw punishment as the natural consequence of social harm. Thus punishment would vary depending upon the time, place, and perception of the significance of the harm. See IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE – PART I METAPHYSICS OF MORALS (John Ladd ed. & trans., 1965); GEORG HEGEL'S PHILOSOPHY OF RIGHT (Thomas M. Knox ed. & trans., 1967). Voltaire, Montesquieu, and Rousseau expressed another approach that stresses the legitimacy of the law through the legitimacy of the lawmaker. In his DU CONTRAT SOCIAL, Jean-Jacques Rousseau expresses the view that laws are the province of society acting through its legislator because the making of laws is a fundamental condition of the social contract. See also CHARLES DE SECONDAT MONTESQUIEU, DE L'ESPRIT DES LOIS, OEUVRES COMPLÈTES (Roger Caillois ed., vol. 2, 1951). Locke, however, differs from Rousseau in that he sees the sovereign as the fiduciary of the people to whom the people surrender only that necessary portion of power needed to govern. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., 1952). These and other philosophical perspectives on criminal punishment are discussed in Philip Jenkins, *Varieties of Enlightenment Criminology*, 24 BRIT. J. OF CRIMINOLOGY 112 (1984).

a *civitas maxima* and a rule of customary ICL.<sup>566</sup> De Vattel argued that international law imposed a definite legal duty on the state to extradite persons accused of serious crimes.<sup>567</sup> In contrast, Pufendorf argued that the duty to extradite was an imperfect obligation that required an explicit agreement to become binding under international law, thereby securing the reciprocal rights and duties of the contracting states.<sup>568</sup> The modern practice follows the latter view of requiring agreements or treaties, but this view is more valid for common criminality proscribed by individual states than for international crimes that clearly reflect within the scope of *aut dedere aut judicare*.<sup>569</sup> Support for the validity of the *aut dedere aut judicare* customary international duty for international crimes is found in conventional ICL, as evidenced by the treaty provisions containing obligations to prosecute or extradite.

The duty to prosecute or extradite has not been expressed with sufficient specificity to indicate whether prosecution and extradition are alternative or coexistent duties. Whatever little doctrine exists on the subject, it is unclear as to whether it is disjunctive or coexistent. As stated by this writer:

This doctrine is unclear as to the meaning of “alternative” or “disjunctive” and “coexistent” obligations to extradite. The following distinction is suggested. If the duty to extradite or prosecute is an alternative or disjunctive one, then there is a primary obligation to extradite if relevant conditions are satisfied, and a secondary obligation to prosecute under national laws if extradition cannot be granted. Thus, the duty to prosecute when it arises under national law leaves the requesting state with no alternative recourse.

If the duty to extradite or prosecute is co-existent rather than alternative or disjunctive, then the requested state can choose between extradition or prosecution at its discretion. As a result, the state may refuse to extradite the relator to one state, but later agree to extradite him or her to another state or to prosecute. In any event, when a state elects to prosecute then discretion plays a broader role, and can be invoked without a breach of treaty or other international obligations.

The doctrine usually expressed is that the international obligation to extradite or prosecute if it exists would be construed as a co-existent duty provided that national law permits it.<sup>570</sup>

Because, as discussed below, CAH are international crimes for which there is universal jurisdiction, any and all states have the alternative duty to prosecute or extradite. Prosecution is premised not only on a state’s willingness, but also on its ability to prosecute fairly and effectively. In the absence of these premises, the duty arises to extradite to a state willing and capable of prosecuting fairly and effectively. However, a question exists as to whether the duty to extradite supersedes that of prosecution when the national law

<sup>566</sup> Gerhard O.W. Mueller, *International Criminal Law: Civitas Maxima: An Overview*, 15 CASE W. RES. J. INT’L L. 1 (1983).

<sup>567</sup> DE VATTEL, *supra* note 563; GROTIUS, *supra* note 563.

<sup>568</sup> PUFENDORF, *supra* note 563.

<sup>569</sup> See *supra* note 562 and text for an explanation of why *aut dedere aut judicare* is the more correct statement.

<sup>570</sup> M. CHIEF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (3d rev. ed. 2008), at ch. 3; M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT’L L. 27 (1983).

of the requested state prohibits extradition (e.g., of its nationals), when that state cannot fairly and effectively prosecute. ICL has yet to resolve this question.<sup>571</sup>

The goals of *judicare* include:

- (1) upholding the principle of fairness through equal application of the law in an impartial legal process;
- (2) vindicating victim's rights;
- (3) permitting the accused to atone for his crime and possibly to remove or alleviate the sense of guilt resulting from the secrecy of the crime and the absence of its public vindication;
- (4) reinforcing public values;
- (5) increasing public knowledge and awareness of the crime;
- (6) strengthening general prevention and general deterrence; and
- (7) consolidating the *civitas maxima* that all nations must cooperate in the prevention, prosecution, and punishment of international crimes as a means for upholding the international rule of law.

These goals combine moral and ethical values with the utilitarian functions of prosecution and punishment. They are therefore indispensable to the effective deterrence of CAH.

The relevant post-Charter procedural instruments are:

- (1) General Assembly Resolution on War Criminals of December 15, 1970;
- (2) United Nations Principles of International Penal Co-operation and Extradition;
- (3) United Nations Convention on the Non-Applicability of Statutory Limitations on War Crimes; and
- (4) European Convention on the Non-Applicability of Statutory Limitations.

Of these four instruments, two are recommendatory General Assembly resolutions, one is a regional convention, and one is an international convention whose binding nature extends only to its parties. But it could be argued that these instruments, irrespective of their specific binding effect, have become part of customary international law and also constitute a "general principle of law." This can be evidenced by their recurrence in a number of other international instruments. The Geneva Convention of August 12, 1949 and Protocol I also contain provisions on the duty to prosecute, extradite, and to provide mutual assistance to the High Contracting Parties.<sup>572</sup> However, these provisions apply to "grave breaches" of the Conventions and the Protocols and do not apply to civilian population under the national jurisdiction of states that are not within the meaning of "protected persons" under the Conventions and the Protocols.

<sup>571</sup> This situation is exemplified by the case of *Libya v. United States*, where Libya charged that the duty to prosecute under the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of the Civilian Aircraft, 974 U.N.T.S. 177, Sept. 23, 1971, specifically arts. 6, 7, and 8, supersedes the duty to extradite. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Preliminary Objections, 1998 I.C.J. (Feb. 27).

<sup>572</sup> Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117 (1986); Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205 (1977).

## §2. The Post-Charter Duty to Prosecute or Extradite

To underscore the duty to prosecute or extradite persons believed to have committed CAH, the General Assembly called on States to do so in a 1973 resolution entitled “Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity.”<sup>573</sup> Its relevant parts state:

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment [ . . . ].
3. States shall co-operate with each other on a bi-lateral and multi-lateral basis with a view to halting and preventing war crimes and crimes against humanity, and take the domestic and international measures necessary for that purpose.
4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them [ . . . ].
7. States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.<sup>574</sup>

The duty to prosecute or extradite is well established in the modern regulation of armed conflicts. The Four Geneva Conventions of August 12, 1949, in their Common Articles on repression of “Grave Breaches”, state:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts; it may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned [ . . . ].<sup>575</sup>

Furthermore, Protocol I to the Geneva Conventions states:

Article 88 – Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

<sup>573</sup> *Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030, Dec. 3, 1973; see also G.A. Res. 2840, (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971) affirming that a State’s refusal “to cooperate in the arrest, extradition, trial and punishment” of persons accused or convicted of war crimes and CAH is “contrary to the United Nations Charter and to generally recognized norms of international law.”

<sup>574</sup> *Id.*

<sup>575</sup> See also Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 85(1), opened for signature Dec. 12, 1977, Article 4(2)(e), 1124 U.N.T.S. 609, 16 I.L.M. 1442 [hereinafter 1977 Additional Protocols]; and Jean De Breuker, *La Répression des Infractions Graves aux Dispositions du Premier Protocole Additionnel aux Quatres Conventions de Genève du 12 août 1949*, 16 REVUE DE PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 498 (1977).

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.<sup>576</sup>

Similarly, the Genocide Convention specifies in Article I, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to *punish*.”<sup>577</sup>

The *Apartheid* Convention also specifies in Article IV:

The State Parties to the present Convention undertake:

- (a) To adopt any legislative or other measures necessary to *suppress* as well as to prevent any encouragement of the crime of *Apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime;
- (b) To adopt legislative, judicial and administrative measures to *prosecute, bring to trial and punish* in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other state or are stateless persons.<sup>578</sup>

It is to be noted that the *Apartheid* Convention in Article V, and the Genocide Convention in Article VI, provide for jurisdiction of an international criminal tribunal<sup>579</sup> and for universal jurisdiction,<sup>580</sup> thus adding two additional means for the effectiveness of prosecution.

The 1984 U.N. Torture Convention also contains a number of provisions on jurisdiction, prosecution, and extradition.<sup>581</sup> These provisions are:

<sup>576</sup> 1977 Additional Protocols art. 88, *supra* note 575.

<sup>577</sup> Genocide Convention art. I, *supra* note 10 (emphasis added); see also arts. V, VI, VII and VIII dealing respectively with jurisdiction, extradition, and duty to suppress.

<sup>578</sup> *Apartheid* Convention art. IV, *supra* note 186 (emphasis added).

<sup>579</sup> This writer was commissioned in 1979 by the United Nations to prepare a draft statute for the establishment of an international criminal tribunal in accordance with Article V of the *Apartheid* Convention. The Report is entitled *Final Report on the Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of Apartheid*, Jan. 19, 1980, U.N. Doc/E/CN/4/1426 (1981).

<sup>580</sup> See discussion on universal jurisdiction *infra* § 4; and Randall, *supra* note 537.

<sup>581</sup> Torture Convention, *supra* note 192 (containing the substantive changes from the *Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23 I.L.M. 1027 (1984)); see also Daniel Derby, *The International Prohibition of Torture*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 621 (M. Cherif Bassiouni ed., 3d rev. ed. 2008). This writer served as co-chair, along with Niall MacDermot, Secretary General of the International Commission of Jurists, of the *Ad Hoc* Committee of experts meeting at the International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy) that prepared the Draft Convention, submitted first by the International Association of Penal Law to the United Nations as U.N. ECOSOC Doc. E/CN/4/NGO-213 (1978); see 48 RIDP (1977) devoted to this draft. The official Swedish text submitted to the United Nations was modeled on the IAPL text. See U.N. ECOSOC Doc. E/CN.4/1285 (1978). The IAPL text had a provision



Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

Article 5

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Article 7

1. The State Party in the territory under whose jurisdiction a person is alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Article 8

1. The offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between the States Parties. States Parties undertake to include such offences in every extradition treaty to be concluded between them.<sup>582</sup>

The International Convention for the Protection of All Persons from Enforced Disappearance, which was adopted in 2006 and which is not yet in force, contains the following provisions on jurisdiction, prosecution, and extradition:

2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.<sup>583</sup>

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.<sup>584</sup>

concerning the nonapplicability of statutes of limitations in Art. VIII. *See also* DE LA CUESTA ARZAMENDI, *supra* note 192; BURGERS & DANIELIUS, *supra* note 192.

<sup>582</sup> Torture Convention, *supra* note 192.

<sup>583</sup> International Convention for the Protection of All Persons from Enforced Disappearance art. 9(2), *supra* note 198. As of the time of the publication of this book, eighty-three states have signed and nineteen have ratified, leaving the Convention one ratification short of entry into force.

<sup>584</sup> *Id.* at art. 11(1).

The international human rights law regime has helped establish this duty at the state level. For example, in the *Velásquez-Rodríguez v. Honduras* case, the Inter-American Court of Human Rights provided,

the state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>585</sup>

The duty to prosecute or extradite, whether alternative or coexistent, is clearly established in conventional and customary ICL and state practice with respect to CAH.<sup>586</sup> The inclusion of CAH in the national laws of fifty-five states clearly evidences that the international obligation finds a concomitant application in the internal law and practice of a large number of states.

### §3. Nonapplicability of Statutes of Limitation

The duty to prosecute or extradite is dependent upon the ability of States to do so, and that requires the removal of any impediments that can arise to prevent it. One such impediment is the barring of the criminal action by a statute of limitations. To avoid that, in 1968, the United Nations sponsored an international convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity.<sup>587</sup> Subsequently, the Council of Europe elaborated a similar convention, the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes.<sup>588</sup> However, the U.N. Convention has only fifty-one member states as of December 2010, and the European Convention has not entered into force.

<sup>585</sup> *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, ¶ 174, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988). See also Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 7(2), 213 U.N.T.S. 222, entered into force Sept. 3, 1953; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

<sup>586</sup> See Payam Akhavan, *The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute*, in LEILA NADYA SADAT, FORGING A CONVENTION ON CRIMES AGAINST HUMANITY 28 (2010).

<sup>587</sup> U.N. Convention on the Non-applicability of Statutory Limitations to War Crimes at 165. The International Association of Penal Law significantly contributed to the adoption of this Convention by publishing a symposium issue of the 37 RIDP 383 *et seq.* (1966), which was widely circulated among U.N. permanent observers, government officials and scholars all over the world. See also Stefan Glaser, *L'Imprescriptibilité des Crimes de Guerre et des Crimes Contre l'Humanité et l'Extradition de leurs Auteurs à la Lumière du Droit International*, 90 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 24 (1974); Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476 (1971); Pierre Mertens, *L'Imprescriptibilité des Crimes de Guerre et des Crimes Contre l'Humanité*, 51 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 204 (1970); Natan Lerner, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes*, 4 ISR. L. REV. 512 (1969); Antoine Sottile, *La Prescription des Crimes Contre L'Humanité et le Droit Pénal International*, 43 REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 5 (1965). See also U.N. Doc. E/CN. 4/906 of Feb. 15, 1966; Leon Szpak, *Le Rôle Normatif de la Pratique de l'Extradition de Criminels Nazis*, 13 POLISH Y.B. OF INT'L L. 153 (1984). See *Contra*, *Lithuania Exonerating People Accused As Nazis*, CHICAGO TRIB., Sept. 5, 1991, Sec. 1, at 4, 1.

<sup>588</sup> European Convention on the Nonapplicability of Statutory Limitations to Crimes Against Humanity and War Crimes, EUROP.T.S. No. 82, Jan. 25, 1974, reprinted in 13 I.L.M. 540; see also Reports of the

National developments have also occurred that removed any statutory limitations, whether in reliance upon the 1968 Convention or independently of that convention's obligations.<sup>589</sup> In the national context, the issue of nonapplicability of statutes of limitation arose in the *Barbie* case.<sup>590</sup> The French *Cour de Cassation* upheld the post-1968 conventional ICL norm that statutes of limitations do not apply in war crimes and CAH. The Italian *Corte di Cassazione* held in a number of cases that the nonapplicability of statutes of limitations is operative with respect to war crimes and CAH because this is part of *jus cogens*.<sup>591</sup> The national prosecutions of Latin America have also affirmed this principle.<sup>592</sup>

Consultative Assembly of the Council of Europe on the applicability of statutes of limitation to war crimes and "crimes against humanity" (Doc. 1868 of Jan. 27, 1965 and Doc. 2506 of Jan. 15, 1969).

<sup>589</sup> See *infra* ch. 9. For national legislation subsequent to the London Charter, see Jacques-Bernard Herzog, *Etudes des Lois Concernant la Prescription des Crimes Contre l'Humanité*, 20 REVUE DE SCIENCE CRIMINELLE ET DE DROIT COMPARÉ 337 (1965); authors in 37 RIDP 383 *et seq.* (1966); see also Pierre-Henri Bolle, *La Suisse et L'Imprescriptibilité des Crimes de Guerre et des Crimes Contre l'Humanité*, 93 REVUE PÉNALE SUISSE 308 (1977).

<sup>590</sup> Matter of Barbie, Gaz. Pal. Jur 710 (France, Cass. Crim. Oct. 6, 1983); see also *infra* ch. 9, § 3.2; Nicholas Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 COLO. L. REV. 449 (1989). Leila Nadya Sadat, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

<sup>591</sup> See *infra* ch. 9, § 3.2. The first of these is the *Priebke Case*. See Rome Military Tribunal, *Hass and Priebke*, Judgment of 22 July 1997; Military Court of Appeal, *Hass and Priebke*, Judgment of 7 March 1998; Cass., *Priebke*, Judgment of 16 November 1998. The defendants in this case, Karl Hass and Erich Priebke, were charged based on "*concorso in violenza con omicidio aggravato e continuato in danno di cittadine italiani*" (Articles 13 and 185 of the military code as they relate to Articles 81, 110, 575, and 577, as well as Article 61). The facts of the case involved what is known as the Ardeatine Cave massacre of March 24, 1944, which occurred during a period of time in which a state of war existed between Italy and Germany. The court found that the interpretation of Italian law pursuant to Article 10, paragraph 1 of the Italian Constitution is in conformity with general principles of international law. The court concluded that statutes of limitations do not apply based on the principle of nonapplicability of statutes of limitations because it is *jus cogens* in international law. The court referred to the 1968 United Nations Convention. The court also found that the interpretation of the Italian military code was to be in conformity with the international law *jus cogens* norm. See, e.g., M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in BASSIOUNI, POST-CONFLICT JUSTICE, *supra* note 241, at 3, 14–27.

The second decision was issued by the *Corte di Cassazione*, *en banc* No. 5044/04 on March 11, 2004, and published March 16, 2004. The case is generally known as the *Ferrini Case*, which also rose in connection with actions by representatives of the German military with respect to forced labor and homicide. The court held that the action for damages brought against the Federal Republic of Germany was not barred by prescription because war crimes and CAH are not subject to statutes of limitations according to "general principles" of international law. The court cited Articles 2 and 5 of the ICTY Statute, Article 3 of the ICTR Statute, and the Rome Statute. The *Ferrini* decision also cited the jurisprudence of the ICTR, 1968 United Nations Convention, and the 1974 European Convention, as well as other international cases and jurisprudence of different states affirming both the nonapplicability of statutes of limitations for war crimes and the *jus cogens* status of CAH. *Id.*

The *Corte di Cassazione*, first section, No. 1072, on October 21, 2008, rendered the third decision, which was an appeal from a decision of the military tribunal of Spezia pursuant to Article 185 of the military code. The decision is similar to the *Ferrini Case* mentioned above, affirming the nonapplicability of immunities and statutes of limitations for *jus cogens* international crimes.

These cases confirm not only the existence but the applicability of the principle of nonapplicability of statutory limitations to war crimes and CAH with respect to criminal prosecutions and with respect to the rights of the victim to proceed in accordance with the applicable civil cause of action brought before Italian courts.

<sup>592</sup> See *infra* ch. 9, § 3.3.

Supporting the nonapplicability of statutes of limitations, as early as the 1600s, Cesare Beccaria noted that impunity is tantamount to a betrayal of the nation.<sup>593</sup> In his moral-ethical conception, he could not accept that the public good could benefit from giving a premium to villainy. Adding a utilitarian note, he concluded that such a practice would lead to the reduction of general deterrence and that other villains would be comforted in the belief or expectation that their crimes would also benefit from impunity.<sup>594</sup>

CAH are not crimes against a single victim in an isolated context, whereby forgiveness may be the prerogative of the victim. All of humanity is affected by these crimes because all of humanity is affected by the victimization of a given human group.<sup>595</sup>

The issue in this type of crime is not hatred, but retributive and symbolic justice. The first is well established in criminal law doctrine; the second has seldom been argued because most authors dealing with this question have approached it from the perspective of the traditional victim of domestic crime: the individual. None has dealt with those international crimes that rise to the level of victimizing a large segment of a given society that is part of the international community. The punishability of the actor, irrespective of time and place, is a necessary ingredient of international criminal responsibility. This is particularly true because the only supranational enforcement mechanism capable of consistent application of the law applies only to States Parties to the Rome Statute.

The virtue of forgiving an individual is a “generosity of judgment”<sup>596</sup> that can be applied in individual cases, but it is no virtue to forgive an entire category of offenders who committed the worst crimes against an entire category of victims. Thus, it is right “to insist that there are occasions when it is not morally appropriate [to forgive] – in particular, when too much of the person is morally dead.”<sup>597</sup> To provide for a statute of limitations is forgiveness by foreswearing justice, retribution, and future general deterrence, but it also means accepting the potentiality of future question on moral grounds.

Mercy is a gift that a community grants to a wrongdoer, but only to vindicate the victim’s moral value or because it found a morally redeeming value in the perpetrator. It cannot be an abstract decision applicable to an entire category of perpetrators on behalf of a category of victims. To withhold the grant of mercy in these cases is not to uphold hatred or vengeance, but to express the most basic sense of justice and fairness. In these cases, to insist on prosecution is a moral, ethical, legal, and pragmatic duty that no amount of passing time should erase.

However, statutes of limitations exist in all legal systems, and their removal finds obstacles in many of these systems for a variety of reasons, some of which raise such a

<sup>593</sup> See BECCARIA, *supra* notes 553, 555; see also Giuliano Vassalli, *Spunti di Politica Criminale in Cesare Beccaria*, in CESARE BECCARIA AND MODERN CRIMINAL POLICY 23 (1990).

<sup>594</sup> In FORGIVENESS AND MERCY (1988), authors Jeffrie G. Murphy and Jean Hampton debate the moral and ethical foundations of punishment and the merits of forgiveness and mercy. Reviewed by Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990); see also Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989); North, *Wrongdoing and Forgiveness*, 62 PHIL. 499 (1987); JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE AND THERAPY* (1979) (espousing a Kantian reciprocity of benefits and burdens theory of criminal punishment).

<sup>595</sup> See Joshua Dressler, *Reflections on Executing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671 (1988); HERBERT L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 3–13 (1968); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, LAW & CONTEMP. PROBS. 47–9 (1986).

<sup>596</sup> MURPHY & HAMPTON, *supra* note 594, at 84.

<sup>597</sup> *Id.* at 83.

bar to the level of a principle of fundamental justice. Thus, a conflict exists between the development at the international level of nonapplicability of statutes of limitations to CAH and the existence of such a bar in national criminal justice systems as evidenced by the limited number of ratifications of both the U.N. Convention (51)<sup>598</sup> and the European Convention (5).<sup>599</sup> In addition, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law affirms this principle, but it is also soft law.

The removal of statutory limitations is probably the most effective way of enhancing national and international prosecutions.<sup>600</sup> However, in practice, states continue to use statutes of limitations as a shield from criminal responsibility.

The Rome Statute contains two provisions on nonretroactivity: Articles 7 and 24. But the drafters were careful to also include a specific provision in Article 29 on “Non-applicability of Statute of Limitations,” which states, “The crimes within the jurisdiction of the Court shall not be subject to any Statute of Limitations.” This provision reinforces the position that CAH, as well as war crimes and genocide, are not subject to statute of limitations because they are *jus cogens* crimes.

#### §4. Universal Jurisdiction

Jurisdiction may be defined as “the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially.”<sup>601</sup> There are five basic theories of jurisdiction recognized by international law as giving rise to a state’s rulemaking and rule-enforcing power. These theories are: (1) Territorial, which is based on the place where the offense was committed; (2) Active Personality or Nationality, which is based on the nationality of the accused; (3) Passive Personality, which is based on the nationality of the victim; (4)

<sup>598</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 118, at 451–52.

<sup>599</sup> See *id.* at 455. The U.N. Convention had fifty-one member states as of December 2010. The European Convention has not yet entered into force. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391(XXIII), U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970; European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, 13 I.L.M. 540, Jun. 25, 1974, *not in force*.

<sup>600</sup> See *infra* ch. 9, § 3.2 *et seq.*

<sup>601</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1)(a) and comment c (1987); see also LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 81–219 (2003) (providing an overview of universal jurisdiction statutes and jurisprudence). Regarding universal criminal jurisdiction); Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals By National Courts*, 21 BERKELEY J. INT’L L. 111 (2003); Mark A. Summers, *The International Court of Justice’s Decision in Congo v. Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT’L L.J. 63 (2003); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81 (2002); Luis Benavides, *The Universal Jurisdiction Principle: Nature and Scope*, 1 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 19 (2001); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, U. CHI. LEGAL F. 323 (2001); Symposium, *Universal Jurisdiction*, 35 NEW ENG. L. REV. 241 (2001); Gilbert Guillaume, *La compétence universelle, formes anciennes et nouvelles*, in MÉLANGES OFFERTS À GEORGES LEVASSEUR: DROIT PENAL, DROIT EUROPÉEN 23 (1992); Randall, *supra* note 537; PRINCETON PROJECT ON UNIVERSAL JURISDICTION: THE EUROPEAN PRINCIPLES ON UNIVERSAL JURISDICTION (2001), available at <http://www.princeton.edu/~lapa/univ-jur.pdf>; Harvard Research Project on Criminal Justice, 29 AM. J. INT’L L. 435, 563–92 (Supp. 1935).

Protective, which is based on the national interest affected; and (5) Universality, which is based on the international character of the offense.

Whereas the first four jurisdictional theories require some connection or nexus between the state desiring to assert jurisdiction and the offense, the universality theory rests upon different ground. As stated by Carnegie, "A State claiming to act under this [universality] principle claims to exercise jurisdiction over any offender irrespective of any question of nationality or place of commission of the offence, or of any link between the prosecuting State and the offender."<sup>602</sup>

The rationale for universal jurisdiction, in general or with regard to specific statutes referred to herein, is that certain offenses exist which, due to their very nature, affect the interests of all states, even when committed in another state or against another state, victim, or interest.<sup>603</sup> As previously stated by this author, the "gravamen of such an offense is that it constitutes a violation against mankind."<sup>604</sup> Thus, the principle of universal jurisdiction assumes that each state has an interest in exercising jurisdiction to combat offenses that all nations have condemned.<sup>605</sup> Although during the Middle Ages, towns in northern Italy prosecuted certain types of criminals called *banditi*, *vagabundi*, and *assassini*, who were within their jurisdiction, regardless of where they committed their criminal acts,<sup>606</sup> the history of universal jurisdiction stems from the customary international practices regarding pirates and brigands in the 1600s. Even "[b]efore International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a *hostis humani generis*."<sup>607</sup> Since then, the concept of a universal right to

<sup>602</sup> A.R. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L L. 402, 405 (1963).

<sup>603</sup> See MARTIN'S ANNUAL CRIMINAL CODE 1990 (Edward L. Greenspan ed., 1989) § 7 (3-71); see also Michèle Jacquart, *La notion de crime contre l'humanité en droit international contemporain et en droit Canadien*, 21 REVUE GÉNÉRALE DE DROIT 607 (1990); Leslie C. Green, *Canadian Law, War Crimes and Crimes Against Humanity*, 49 BRIT. Y.B. INT'L L. 217 (1988); Sharon A. Williams, *The Criminal Law Amendment Act 1985: Implications for International Criminal Law*, 23 CAN. Y.B. INT'L L. 226 (1985); Leslie C. Green, *Canadian Law and The Punishment Of War Crimes*, 28 CHITTY'S L.J. 249 (1980); see also R. v. Finta, [1989] 61 D.L.R. 85 (4th); and *infra* ch. 9, § 3.2. See also *Report of the War Crimes Inquiry of the Parliament of the United Kingdom*, CM 744 (1989), which was the basis of the War Crime Bill adopted by the House of Commons, May 2, 1991; and Australian Crimes Amendment Act of 1988, which was approved by the Senate and the House of Representatives of the Commonwealth of Australia, Jan. 25, 1989.

<sup>604</sup> BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 563.

<sup>605</sup> See Randall, *supra* note 537; see also LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW 823 (2d ed. 1987), at § 404, *Universal Jurisdiction to Define and Punish Certain Offenses*, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 601, states that, "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism [...]."

<sup>606</sup> HENRI DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL 136 (1928).

<sup>607</sup> LASSA OPPENHEIM, 1 INTERNATIONAL LAW 609 (Hersch Lauterpacht ed., 8th ed. 1995). Many authors from Hugo Grotius to contemporary ones have amply documented these practices of states exercising jurisdiction over pirates, even when the pirate and his victim were not nationals of the prosecuting state; see also GROTIUS, *supra* note 564; ALBERICO GENTILI, DE IURE BELLI LIBRE TRES, Bk. I, Ch. XXV, in CLASSICS OF INTERNATIONAL LAW (James B. Scott ed., 1933); CHARLES MOLLOY, DE JURE MARITIMO ET NAVALI (1676) Bk. I Ch. IV § iv (1682), at 54 (referring to pirates as *hostis humani generis*, cited by Leslie C. Green, *Terrorism and the Law of the Sea*, INTERNATIONAL LAW AT A TIME OF PERPLEXITY, 249, 252-53 (Yoram Dinstein ed., 1989)); Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L.REV. 177, 188-89 (1945); Ben A. Wortley, *Pirata Non Mutat Dominium*, 24 BRIT. Y.B. INT'L L. 258 (1947); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 30-31 (1954); Alfred P. Rubin, *The Law of Piracy*, 15 DENV. J. INT'L L. & PO'Y. 173 (1987); see also ALFRED P. RUBIN, THE LAW OF PIRACY (1988).



prosecute and a universal right to punish has been recognized grudgingly and utilized sparingly. This has been the case, notwithstanding Grotius' approval of the right of states to try crimes committed outside of their territorial jurisdiction if these crimes violated the law of nature or the law of nations. As he states:

Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have an Authority over others, but as they are in Subjection to none. For [ . . . ] it is so much more honourable, to revenge other Peoples Injuries rather than their own [ . . . ]. Kings, besides the Charge of their particular Dominions, have upon them the care of human Society in general.<sup>608</sup>

To some scholars of ICL, it is clear that a crime *delicti juris gentium*, committed by a *hostes humani generis*, can indeed be prosecuted by any state and the perpetrator punished by any state. Professor S.Z. Feller writes:

Sometimes the criminal law is applied by virtue of a principle which reflects the special quality of the class of offenses known as *delicta juris gentium*, crimes under international law. These crimes threaten to undermine the very foundations of the enlightened international community as a whole; and it is this quality that gives each one of the members of that community the right to extend the incidence of its criminal law to them, even though they are committed outside the state's boundaries and the offender has no special connection with the state [ . . . ]. Hence, too, the name "universality principle."<sup>609</sup>

And, as Professor Jordan Paust states, "[U]niversal enforcement has been recognized over 'crimes against mankind,' 'crimes against the whole world' and the 'enemies of the whole human family,' or those persons who become *hostis humani generis* by the commission of international crimes."<sup>610</sup>

It should be noted that while the seventeenth century is generally considered as the time when pirates were universally considered *hostis humani generis*, COLEMAN PHILLIPSON, 2 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE 375 (1911) (claiming that the writings of Justinian and Demosthenes assert that in both ancient Rome and Greece, "pirates, no matter how large their bans, and how organized they were, were not regarded as 'regular enemies,' *iusti hostes*, but as enemies of mankind generally; so that the usual formalities relating to the commencement of war, and the mitigations conceded in the case of other belligerents, were held not to be applicable to them").

<sup>608</sup> GROTIUS, *supra* note 564, at bk. II, ch. XX.

<sup>609</sup> Shneur-Zalman Feller, *Jurisdiction over Offenses with a Foreign Element*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5, 32–3 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

<sup>610</sup> Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 HOUS. J. INT'L L. 337, 340 (1989); John F. Murphy, *Protected Persons and Diplomatic Facilities*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 277, 285 (Alona E. Evans & John F. Murphy eds., 1978) (stating that universal jurisdiction applies "to crimes that affect the international community and are against international law"); *see also* BASSIOUNI, *supra* note 563, at 298 ("Such crimes are appropriately called *delicti jus gentium*").



It should be noted that in the “Draft Convention on Jurisdiction with Respect to Crime” (prepared by the Harvard Research in International Law),<sup>611</sup> universal jurisdiction over certain crimes is contemplated. With carefully chosen language, Article 10 provides:

A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6 [“Persons Assimilated to Nationals”], 7 [“Protection-Security of the State”], 8 [“Protection-Counterfeiting”] and 9 [“Piracy”], as follows:

(a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any State and the alien is not a national of any State.<sup>612</sup>

Conventional international law on the subject is not so clear; at best, it is inconsistent. Since 1815, there have been sixty-four ICL conventions that contain reference to one or more of the recognized theories of jurisdiction. Among those, only a few contain a provision that could be interpreted as providing universal jurisdiction. Among those conventions providing for universal jurisdiction are the Four Geneva Conventions of 1949, which maintain, in common articles, that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such

<sup>611</sup> As reprinted in 29 AM. J. INT'L L. 439 (Supp. 1935).

<sup>612</sup> *Id.* at 440–41. As the language indicates, this article is “distinctly subsidiary and one which will be rarely invoked . . . [still, because of] its utility in occasional cases as a subsidiary principle, it seems clear that it should have a place in the present Convention.” *Id.* at 573–74; see also *id.* at 573–92.

persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>613</sup>

Thus, the language of the Conventions supports universal jurisdiction.<sup>614</sup>

Another convention that is clear on the principle of universality is the *Apartheid* Convention, which in Article IV provides:

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or some other State or are stateless persons.<sup>615</sup>

Also, Article V provides that:

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction.<sup>616</sup>

Taken together, these two articles show that under this Convention a state may assert either territorial or universal jurisdiction.

As noted above, universal jurisdiction over piracy has been recognized under customary law for centuries, and is also recognized under conventional law. The 1982 United Nations Convention on the Law of the Sea at Article 105,<sup>617</sup> which is identical to Article 19 of the 1958 Convention on the High Seas, provides:

<sup>613</sup> See *supra* note 575; COMMENTARY ON THE ADDITIONAL PROTOCOLS 583–1124 (Yves Sandoz et al., eds., 1987); and NEW RULES FOR VICTIMS OF ARMED CONFLICTS 273–489 (Michael Bothe et al., eds., 1982); see also Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities under Customary International Law and under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117 (1986); Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT'L L. 205 (1977).

<sup>614</sup> Not all commentators are in agreement with this statement. Bernard V.A. Röling, *The Law of War and the National Jurisdiction since 1945*, 100 RECUEIL DES COURS 329, 362 (1960), argues that the conventions do not contain the universality principle but only the principle of extended protection, which “means that neutrals do not have the obligation to search for alleged war criminals, and that they do not have the obligation to try war criminals, in cases where extradition does not take place.”

<sup>615</sup> *Apartheid* Convention art. IV, *supra* note 186.

<sup>616</sup> *Id.* at art. V.

<sup>617</sup> United Nations Convention on the Law of the Sea (Dec. 10, 1982), *reprinted in* THE LAW OF THE SEA, U.N. Doc. A/CONF. 62/122.

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The Courts, of the State which carried out the seizure may decide upon penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith.<sup>618</sup>

The Law of the Sea Convention also implicitly recognizes universal jurisdiction for slave trading, as provided in Article 110, which states that “a warship which encounters on the high seas a foreign ship [ . . . ] is not justified in boarding it unless there is reasonable ground for suspecting that [ . . . ] the ship is engaged in the slave trade [ . . . ].”<sup>619</sup>

Several other treaties can be interpreted as conferring universal jurisdiction for certain international crimes. These offenses include torture, hostage taking, hijacking and sabotage of aircraft, and crimes against internationally protected persons. All of these conventions contain a provision similar, with minor variation, to the following one from the 1979 Hostages Convention:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of the State.<sup>620</sup>

The greater number of ICL conventions do not provide for universal jurisdiction.<sup>621</sup> The Genocide Convention in Article 6 provides that: “[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction.” Thus, the Convention requires the parties to exercise jurisdiction based on the territoriality principle, which is concurrent to the jurisdiction of the ICC. Although genocide is not subject to the universality principle under conventional law, universal jurisdiction may

<sup>618</sup> *Id.* at art. 105.

<sup>619</sup> *Id.* at art. 110. This author has taken the position that the widespread attempts to abolish slavery and slave trading permit the use of universal jurisdiction over slave trading, either under customary law or under “General Principles of International Law.” M. Cherif Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 CAL. W. INT’L L.J. 1, 54 (1974). For an examination of the international movement against slavery, see Ved P. Nanda & M. Cherif Bassiouni, *Slavery and Slave Trade: Steps Toward Eradication*, 12 SANTA CLARA L. REV. 424 (1972).

<sup>620</sup> International Convention Against the Taking of Hostages art. 8(1), Dec. 4, 1979, U.N. G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/C.6/34 L.23, reprinted in 18 I.L.M. 1456. Very similar provisions are found in Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague art. 7, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105, reprinted in 10 I.L.M. 133; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 7, Montreal, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177, reprinted in 10 I.L.M. 1151 (1971); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents art. 7, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167, G.A. Res. 3166, 27 U.N. GAOR Supp. (No. 10), U.N. Doc. A/Res/3166 (1974); Torture Convention art. 7(1), *supra* note 192.

<sup>621</sup> See Roger S. Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 NORDIC J. INT’L L. 49, 51–63 (1988), which delineates and examines post-Nuremberg “treaties on the basis of whether they contemplate universal jurisdiction, or negative on universal jurisdiction, are obscure on universal jurisdiction, or treaties which contemplate ‘fallback’ jurisdiction.”

be applied to the crime under customary international law.<sup>622</sup> This application under customary law is proper as stated by the district court in the *Eichmann* case, “[T]he reference in Article 6 to territorial jurisdiction is not exhaustive. Every sovereign State may exercise its existing powers within the limits of customary international law [ . . . ].”<sup>623</sup> Specific support for applying the universality principle to genocide under customary international law is found in the Restatement (Third) of the Foreign Relations Law of the United States, which considers genocide an offense for which a state has universal jurisdiction to prescribe punishment because genocide is an offense “recognized by the community of nations as of universal concern.”<sup>624</sup>

War crimes are also among the limited number of offenses subject to universal jurisdiction under customary international law. The BRITISH MANUAL OF MILITARY LAW declares the existence of this jurisdictional basis:

War crimes are crimes *ex jure gentium* and are thus triable by the Courts of all States [ . . . ]. British Military Courts have jurisdiction outside the United Kingdom over war crimes committed not only by members of the enemy armed forces, but also by enemy civilians and other persons of any nationality, including those of British nationality or the nationals of allied and neutral powers.<sup>625</sup>

The foundation for the application of the universality principal to war crimes, as well as CAH, stems from the proceedings before the IMT and the CCL 10 Proceedings.<sup>626</sup> The IMT makes one indistinct reference to the universality principal in its judgment:

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.<sup>627</sup>

It may be inferred from this statement that “any nation” would have jurisdiction to prosecute the war criminals, whether or not the nation had a nexus with the offenses at issue. A memorandum supporting this conclusion, prepared by the United Nations Secretary General, states:

<sup>622</sup> For those who espouse this view, see, e.g., Randall, *supra* note 537, at 834 *et seq.*

<sup>623</sup> *CrimC(Jer) 40/61 Attorney General of the Government of Israel v. Eichmann*, *IsrDC* 45, 3 (1961) (Isr.), *aff'd* *CrimA 336/61 Eichmann v. Attorney General* 17 *IsrSC* 2033 [1962] (Isr.); Hans W. Baade, *The Eichmann Trial: Some Legal Aspects*, 1961 *DUKE L.J.* 400, 418; D. Lasok, *The Eichmann Trial*, 11 *INT'L L. & COMP. L. Q.* 355, 364 (1962). But see J.E.S. Fawcett, *The Eichmann Case*, 38 *BRIT. Y.B. INT'L L.* 181, 205–07 (1962); see also *infra* ch. 9, § 3.2.

<sup>624</sup> FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 601, at § 404.

<sup>625</sup> 3 *BRITISH MANUAL OF MILITARY LAW* (637 (1958)).

<sup>626</sup> It should be noted that in 1919 the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties declared that:

Every belligerent has, according to international law the power and authority to try the individuals alleged to be guilty of . . . violations of the Laws and Customs of War, if such persons have been taken prisoner or have otherwise fallen into its power. Each belligerent has, or has power to set up . . . an appropriate tribunal, military or civil, for the trial of such cases.

Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919), *reprinted in* 14 *AM. J. INT'L L.* 95, 121 (1920). The United States, which dissented from the majority report concurred on this point. See Carnegie, *supra* note 602.

<sup>627</sup> 22 *TRIAL OF THE MAJOR WAR CRIMINALS*, Judgment 461 (1948), *reprinted in* 41 *AM. J. INT'L L.* 172, 216 (1947).

[I]t is . . . possible and perhaps . . . probable, that the [Nuremberg Tribunal] considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the Tribunal had made use of a right belonging to any nation.<sup>628</sup>

The CCL 10 Proceedings conducted by the Allied Powers in the territories under their administration also relied on the universality principle. In the *Hostages* case of the American CCL 10 Proceedings, the defendant German officers were charged with the execution of hundreds of thousands of civilian hostages.<sup>629</sup> The tribunal explained that “An international crime is . . . an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.”<sup>630</sup>

In the *Almelo* case,<sup>631</sup> a British military court sitting in the Netherlands declared, “every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offense was committed.”<sup>632</sup> In yet another case, *In re Eisentrager*,<sup>633</sup> the United States Military Commission, sitting in Shanghai, also declared its reliance upon the universality principle:

A war crime . . . is not a crime against the law or criminal code of any individual nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation.<sup>634</sup>

Two other important judicial proceedings, which occurred many years after the post-war trials but still involve crimes committed during World War II, also bear upon the use of the universality principle as to war crimes and CAH. In the *Eichmann* case,<sup>635</sup> the Israeli

<sup>628</sup> *The Charter and Judgment of the Nürnberg Tribunal*, U.N. Doc. A/CN.4/5 (1949) (memorandum submitted by the Secretary General).

<sup>629</sup> *In re List* (The Hostage Case), 11 CCL TRIALS 1239 (1948).

<sup>630</sup> *Id.* at 1241. The court further asserts that a state that captures a war criminal may either “surrender the alleged criminal to the state where the offense was committed, or . . . retain the alleged criminal for trial under its own legal processes.” *Id.* at 1242.

<sup>631</sup> 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (1949).

<sup>632</sup> *Id.* at 42.

<sup>633</sup> 14 LAW REPORTS OF TRIALS OF WAR CRIMINALS 8 (1949).

<sup>634</sup> *Id.* at 15 (footnote omitted).

<sup>635</sup> *Eichmann*, *supra* note 623; 56 AM. J. INT’L L. 805 (1962) for an unofficial translation of the district court opinion; see also *infra* ch. 9 § 3.2. For criticism of the courts reliance on universal jurisdiction, see ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW, WITH A POSTLUDE ON THE EICHMANN CASE* 245–72 (1962), arguing that an extension of the universality principle to CAH could not be considered as generally accepted in international law at the time of the *Eichmann* case. As he states in more detail, at 271:

The basis for jurisdiction of the court in the *Eichmann* case may be criticised mainly from the point of view of the territoriality and nationality principles: the crimes did not take place in the territory of Israel nor were nationals of Israel in the accepted legal sense involved, since the state of Israel did not exist at the time the actions charged were committed. The trial has been justified on the grounds of an extension of the universal principle of jurisdiction to crimes against humanity involving genocide. The enlargement of the scope of this principle, however, could not at the time of the holding of the

courts relied in part upon universal jurisdiction to prosecute the defendant, who was accused, *inter alia*, of war crimes and CAH. The District Court of Jerusalem explained how:

The State of Israel's "right to punish" the accused derives [...] from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific national source, which gives the victim nation the right to try any who assault their existence."<sup>636</sup>

Along the same lines, Israel's Supreme Court concluded:

[T]here is full justification for applying here the principal of universal jurisdiction since the international character of "crimes against humanity" . . . dealt with in this instant case is no longer in doubt [...] [T]he basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offenses – notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence . . . and the offender is a national of another State or is stateless – applies with even greater force to the above-mentioned crimes."<sup>637</sup>

With respect to the fact that Eichmann's alleged crimes occurred during World War II, and thus before Israel came into existence, the Supreme Court explained:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offenses were committed.<sup>638</sup>

Several states, including Australia, Canada, the United Kingdom, Belgium, and France, enacted enabling statutes to prosecute war criminals based on a modified version of universal jurisdiction couched in terms of extended and retrospective national criminal jurisdiction.<sup>639</sup> The Australian War Crimes Amendment Act of 1988 allows the

trial be considered as generally accepted in international law. It was not reflected in the Genocide Convention, *supra* note 10, or international practice and agreement since the Nuremberg trials. In these respects the legal basis of the Eichmann trial can be considered controversial.

<sup>636</sup> *Eichmann*, *supra* note 623, 36 I.L.R. 18, at 50.

<sup>637</sup> *Eichmann*, *supra* note 623, 36 I.L.R. 277, at 299.

<sup>638</sup> *Id.* at 304.

<sup>639</sup> See generally J. Martin Wagner, Note: *U.S. Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience*, 29 VA. J. INT'L L. 887 (1989) (calling for the United States to enact legislation asserting universal jurisdiction over war criminals. An enactment of law giving a court jurisdiction over war criminals occurred in May 1991, in the United Kingdom, which allows British courts to try Nazi war criminals. The law came into being despite the rejection by the House of Lords. Ironically, Lord Shawcross, Britain's chief prosecutor at Nuremberg, argued against the law on the ground that it was not possible to conduct fair trials in Britain nearly 50 years after the alleged crimes were committed in central Europe. CHICAGO TRIB., May 2, 1991, Sec. 1, at 18. Nevertheless, the first prosecution began in April 1996, when 85-year-old Belarus refugee Szymon Serafinowicz, a long-time British resident, appeared at the Old Bailey to face charges he murdered three people in the former Belorussia during the winter of 1941–42. Hugh Muir, THE [LONDON] DAILY TELEGRAPH, Apr. 16, 1996, at 5.

prosecution in national courts of war criminals whose crimes were committed between September 1, 1939, and May 8, 1945.<sup>640</sup> Although limited in time, the statute is based upon an application of universal jurisdiction, because it applies to crimes committed outside of Australia and by and against individuals with whom Australia had only a tenuous connection at the time of the crime. To date, only three cases have arisen pursuant to the Act, only one of which went to trial.<sup>641</sup>

The Canadian legislation, on the other hand, is not temporally limited in this respect. The 1987 Act provides that any person who commits a war crime or CAH “shall be deemed to [have] committ[ed] that [crime] in Canada at the time of the act or omission, if the crime, if committed in Canada would constitute an offence against the laws of Canada in force at [that] time.”<sup>642</sup> Canadian prosecutorial policy has shifted since the *Finta* case to administrative courts, namely the denial of refugee status where there are reasonable grounds to believe that the applicant has committed CAH or other international crimes.<sup>643</sup>

In 1985, a United States Circuit Court of Appeals ruled in *Demjanjuk v. Petrovsky*<sup>644</sup> that the United States could extradite an alleged Nazi concentration camp guard to Israel based on Israel’s right to exercise universal jurisdiction over the accused.<sup>645</sup> The court recognized that the acts committed by Nazis and Nazi collaborators are “crimes

<sup>640</sup> War Crimes Amendment Act 1988, § 9, 1989 Aust. Acts 926; 119 Parl. Deb., S. 497 (1987); 157 Parl. Deb., H.R. 1613 (1987).

<sup>641</sup> *Commonwealth v. Polyukovich* (1991) 172 Commonwealth Law Reports 501 (upholding the constitutionality of the Act). Polyukovich was later acquitted by a jury.

<sup>642</sup> Act to amend the Criminal Code, Ch. 37, 1987 Can. Stat. 1107. § 1.96 of the Act defines the crimes as follows:

Crime against humanity means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons . . . and that, at that time and in that place constitutes a contravention of customary international law or is criminal according to general principles recognized by the community of nations;

War crimes means an act or omission that is committed during an international armed conflict . . . and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

<sup>643</sup> See *infra* ch. 9 § 3.4.1.

<sup>644</sup> *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). For the opinion at the district court level, which the sixth circuit affirmed, see *Matter of Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985). The court determined that Israel’s jurisdiction to prosecute the alleged concentration camp guard “conforms with the international law principle of ‘universal jurisdiction.’” *Id.* at 555; see also *infra* ch. 9, § 3.2.

<sup>645</sup> For other cases in the United States that have relied upon the universality principle, see *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal.) (recognizing universal jurisdiction to define and prosecute terrorist acts against internationally protected persons), *appeal dismissed*, 645 F.2d 681 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1955) (referring to the “concept of extraordinary judicial jurisdiction over acts in violation of significant international standards . . . embodied in the principle of ‘universal’ violations of international law”); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (exclaiming that “the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind”); see also *U.S. v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988), where a federal district court held that it had jurisdiction over a defendant prosecuted for his alleged involvement in the hijacking and destruction of a civilian aircraft under, *inter alia*, the universal principle of international law that conferred jurisdiction on any forum that obtained the physical custody of a perpetrator of certain offenses considered particularly heinous and harmful to humanity.



universally recognized and condemned by the community of nations,”<sup>646</sup> and that these “crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations.”<sup>647</sup> It concluded, “This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.”<sup>648</sup>

Belgium provides for the extensive exercise of universal jurisdiction over human rights crimes. Belgian courts can try cases of war crimes, CAH, and genocide committed by non-Belgian citizens outside of Belgium against non-Belgians citizen victims, without a presence requirement for the accused.<sup>649</sup> The first application of involved two Benedictine sisters, a former professor and a former businessman and Minister. All four were tried and convicted, but all four were physically present in Belgium at the time they were charged with these crimes.

This was not the case, however, when on April 11, 2000, Belgium issued an international arrest warrant against Mr. Abdoulaye Yerodia Ndombasi, acting Minister of Foreign Affairs of the D.R. Congo.<sup>650</sup> The warrant sought his extradition for alleged grave violations of international humanitarian law.<sup>651</sup> D.R. Congo filed an application with the ICJ requesting that the Court annul Belgium’s arrest warrant, and challenged Belgium’s assertion of extraterritorial jurisdiction, as well as the Belgian law that nullifies an official immunity.<sup>652</sup>

In late 2000, the ICJ issued an order denying the Congo’s request for provisional measures because, as a result of Mr. Yerodia’s reassignment from his former position as Minister of Foreign Affairs, the Congo was unable to demonstrate the requirement of an irreparable injury.<sup>653</sup> The case before the ICJ considered two related in particular: (1) whether universal jurisdiction under these facts, without any connection to the state, is a valid exercise of extraterritorial jurisdiction; and (2) whether its exercise contravenes the 1969 Vienna Convention on Diplomatic Relations. The ICJ answered both questions in the negative, and ordered Belgium to cancel the warrant. It first found that the arrest warrant failed to respect the immunity from criminal jurisdiction enjoyed by the Minister for Foreign Affairs of the Congo under international law.<sup>654</sup>

<sup>646</sup> *Demjanjuk*, *supra* note 644, at 582.

<sup>647</sup> *Id.* at 583.

<sup>648</sup> *Id.*

<sup>649</sup> Act Concerning the Punishment of Serious Violations of International Humanitarian Law 7 (Belgium).

<sup>650</sup> See generally HUMAN RIGHTS WATCH, *THE PINOCHET PRECEDENT: HOW VICTIMS CAN PURSUE HUMAN RIGHTS CRIMINALS ABROAD*, HUMAN RIGHTS WATCH UPDATE, Sept. 2000).

<sup>651</sup> Press Release, *Congo v. Belgium* (Oct. 17, 2000).

<sup>652</sup> Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Request for the Indication of Provision Measures, 2000 I.C.J. 182, at 187–88 (Dec. 8).

<sup>653</sup> *Id.*

<sup>654</sup> Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 2002 I.C.J. 3, at 22, 31–32 (Feb. 14). The Court was careful to distinguish immunity from impunity:

It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

Prior to the 1990s, the French penal code criminalized genocide, war crimes, and CAH committed during World War II.<sup>655</sup> In 1992, France adopted a new CAH law, as well as legislation that implemented the statutes of the ICTY and ICTR in French law, which granted French tribunals jurisdiction over similar crimes contained in these statutes.<sup>656</sup> The French code of criminal procedure provides for universal jurisdiction if it is required by treaty and the treaty is integrated into French law.<sup>657</sup> It also leaves open the possibility of prosecution for genocide, CAH, and crimes included in the Rome Statute.<sup>658</sup> Under French law, universal jurisdiction is optional and conditional. French exercise of universal jurisdiction is conditioned on the presence of the accused in France, as demonstrated in two cases, the *Javor* case and the *Munyeshyaka* case.

In the *Javor* case,<sup>659</sup> Elvir Javor and four other Bosnian citizens residing as refugees in France filed a civil action under universal jurisdiction against nondisclosed parties for war crimes, torture, genocide, and CAH. The plaintiffs claimed they were victims of crimes committed by Serb forces as part of the ethnic cleansing of Kozarac and the surrounding villages and the detention camps.<sup>660</sup>

On May 6, 1994, the investigating judge issued an order that accepted only two of the proposed jurisdictional bases invoked by the plaintiffs: (1) the Geneva Conventions and (2) the Convention against Torture. Thus, although at the time of the complaint there was no evidence that the alleged perpetrators were present in France, the investigating magistrate ruled that there were grounds for French jurisdiction.<sup>661</sup> The view of the

The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

*Id.* ¶¶ 59–60.

<sup>655</sup> See William Bourdon, *Prosecuting the Perpetrators of International Crimes: What Role May Defence Counsel Play?*, 3 J. INT'L CRIM. J. 434, 434–35 (2005).

<sup>656</sup> Law of July 22, 1992. The new law's text is provided in Annex IV of Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, *supra* note 600, at 379–80. The new law took effect on March 1, 1994 and applies to crimes committed after that date. Law No. 92–1336 of Dec. 16, 1992, art. 373, modified by Law No. 93–913 of July 19, 1993; *see also* Leila Nadya Sadat, *The French Experience*, 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 353 (M. Cherif Bassiouni ed., 3d ed., 2008).

*See* Law No. 95–1 of January 2, 1995, Journal Officiel de la République Française [J.O.] [Official Gazette of France], January 3, 1995, at 71; *see also* Law No. 96–432 of May 22, 1996, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 23, 1996, at 7695.

<sup>657</sup> C. PR. PEN. art. 689, 689–10.

<sup>658</sup> *See* Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 60, at 139.

<sup>659</sup> Tribunal grande instance [TGI] [ordinary court of original jurisdiction] Paris, May, 6, 1994, Ordonnance, N. Parquet 94052 2002/7; Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Nov. 24, 1994, Arrêt, No. A94/02071; Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Mar. 26, 1996, Arrêt de Rejet, No. 95–81527.

<sup>660</sup> *See also* Rafaëlle Maison, *Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes*, 6 EUR. J. INT'L L. 260, 261 (1995).

<sup>661</sup> Tribunal grande instance [TGI] [ordinary court of original jurisdiction] Paris, May, 6, 1994, Ordonnance, N. Parquet 94052 2002/7 (Fr.). *See also* Brigitte Stern, *Universal Jurisdiction Over Crimes Against Humanity Under French Law – Grave Breaches of the Geneva Conventions of 1949 – Genocide – Torture – Human Rights Violations in Bosnia and Rwanda*, 93 AM. J. INT'L L. 525, 526 (1999) [hereinafter Stern, *Grave Breaches*].

investigating judge supported judicial powers implied by universal jurisdiction to permit preliminary acts of inquiry<sup>662</sup> even absent a prior confirmation of the presence of the accused in France.<sup>663</sup>

On November 24, 1994, the *Chambre d'accusation* in Paris utilized a narrower interpretation of judicial power, concluding that French jurisdiction, as defined by Articles 689-1 and 689-2 of the code of criminal procedure, was precipitated by an objective element and a material element of connection to France, which required that the presence of the accused on French territory in order for a French tribunal to have jurisdiction to prosecute.<sup>664</sup> Furthermore, the appellate court concluded that French tribunals could not apply the Convention against Torture or the Geneva Conventions, because neither was self-executing, and thus both were required to be incorporated into domestic law.<sup>665</sup> The *Cour de cassation* affirmed this approach.<sup>666</sup> Thus, the *Javor* case affirmed the idea that French courts can exercise universal jurisdiction as long as the accused is in French territory.<sup>667</sup>

In contrast to the *Javor* case, the exercise of universal jurisdiction was upheld in the *Munyeshyaka* case, wherein Wenceslas Munyeshyaka stood accused of crimes committed during the Rwandan genocide.<sup>668</sup> Munyeshyaka was found on French territory at the time of the filing of the initial complaint against him.<sup>669</sup> He had fled Rwanda and moved to France. It was alleged that Munyeshyaka contributed to the Rwandan genocide by depriving Tutsi refugees of food and water, surrendering the refugees to Hutu militias, participating in the selection of Tutsi refugees to be murdered, and coercing women into sex in exchange for their lives while he was acting as a priest at the Sainte-Famille parish in Kilgali.<sup>670</sup>

The *Tribunal de Grande Instance* of Paris exercised universal jurisdiction on the basis of the Convention against Torture and Articles 689-1 and 689-2 of the French code of criminal procedure, and restricted proceedings to the alleged acts of torture.<sup>671</sup> The *Chambre d'Accusation* of the Nîmes overruled, however, holding that jurisdiction

<sup>662</sup> Those preliminary acts included identification of the suspect and determination of appropriate charges so the alleged perpetrators could be arrested if present in France or extradited to face charges. Sadat, *The French Experience*, *supra* note 656, at 353.

<sup>663</sup> *Id.*; see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 288 (2003).

<sup>664</sup> Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Nov. 24, 1994, Arrêt, No. A94/02071; see also Sadat, *The French Experience*, *supra* note 656, at 353.

<sup>665</sup> Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., Nov. 24, 1994, Arrêt, No. A94/02071; but see Stern, *Grave Breaches*, *supra* note 645 (arguing that the court misinterpreted the distinction identified in Articles 689 and 689-1 between self-executing treaties and those that are not self-executing; while in the *Touvier* and *Papon Cases*, the presence of the accused on French territory was not required for jurisdiction under self-executing treaties, while for non-self-executing treaties (i.e., the Convention against Torture, *supra* note 185), the accused's presence on French territory is necessary). See *infra* ch. 9, §3.2.

<sup>666</sup> Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Mar. 26, 1996, Arrêt de Rejet, No. 95-81527.

<sup>667</sup> *Id.*; see also, Sadat, *The French Experience*, *supra* note 656, at 353. The French Parliament adopted a law authorizing universal jurisdiction over crimes within the jurisdiction of the ICTY in 1995, but this occurred after the *Javor* case. See Law No. 95-1 of Jan. 2, 1995, Journal Officiel de la République Française [J.O.] [Official Gazette of France], 3 January 1995, at 71. See also Law No. 96-432 of May 22, 1996, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 23, 1996, at 7695.

<sup>668</sup> Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Jan. 6, 1998, Bull. crim., No. 2, at 3 [hereinafter *In re Munyeshyaka*].

<sup>669</sup> Stern, *Grave Breaches*, *supra* note 661, at 527.

<sup>670</sup> *Id.*; see also Sadat, *The French Experience*, *supra* note 656, at 353.

<sup>671</sup> Stern, *Grave Breaches*, *supra* note 661, at 528.

must be established only based on the most serious offense, which in this case was genocide.<sup>672</sup> Essentially, the court held that genocide was not subject to universal jurisdiction under French law, so that French courts lacked jurisdiction over the Rwandan atrocities.<sup>673</sup>

Two days after the appeals decision, the French parliament adopted a new law implementing the ICTR Statute into French law.<sup>674</sup> Relying on this new legislation, the *Cour de cassation* reversed the appellate court,<sup>675</sup> and the *Cour de Cassation* reopened proceedings.<sup>676</sup> One plaintiff eventually brought the nine-year investigation to the attention of the European Court of Human Rights, which unanimously decided that France violated the plaintiff's right to be heard promptly and the right to compensation.<sup>677</sup>

On June 21, 2007, the ICTR unsealed its arrest warrant against Munyeshyaka, and he was arrested in France the following month, only to be released when the arrest warrant was found to be invalid.<sup>678</sup> Five months later, the ICTR granted the Prosecutor's Rule 11bis motion to refer the case to the French authorities.<sup>679</sup> On June 23, 1999, the Paris Court of Appeals extended the scope of the action to include genocide and CAH.<sup>680</sup> Despite these developments, the European Court of Human Rights has condemned France for its handling of the *Munyeshyaka* case.<sup>681</sup>

Both the *Javor* case and the *Munyeshyaka* case demonstrate that French judges exercise caution in their exercise of universal jurisdiction.<sup>682</sup> Writers have criticized both cases for imposing the presence requirement on the exercise of jurisdiction, because in their view it prevents prosecutors and investigating judges from investigating crimes abroad unless, as in *Munyeshyaka*, the suspect is living openly in French territory.<sup>683</sup>

<sup>672</sup> *Id.* at 525, 528.

<sup>673</sup> *Id.*

<sup>674</sup> See Law No. 95-1 of 2 January 1995, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 3, 1995, at 71; see also Law No. 96-432 of 22 May 1996, at 7695.

<sup>675</sup> *In re Munyeshyaka*, *supra* note 668.

<sup>676</sup> *Id.* at 3 (ruling that the Trial Chamber had erred by taking into account only the charge of genocide when the acts committed could also amount to the crime of torture, which is subject to French universal jurisdiction under Article 689-2 of the French Code of Criminal Procedure.)

<sup>677</sup> Mutimura v. France, App. No. 46621/99 (2004), available at <http://www.echr.coe.int>.

<sup>678</sup> Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Indictment (Jul. 24, 2005).

<sup>679</sup> Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Rule 11bis Request for the Referral of Wenceslas Munyeshyaka's Indictment to France (Nov. 20, 2007). At the same time, the French judiciary also agreed to prosecute Laurent Bucyibaruta, the former prefect of Gikongoro, for genocide and CAH. Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Decision on the Prosecutor's Rule 11bis Request for the Referral of Laurent Bucyibaruta's Indictment to France (Nov. 20, 2007). At the time of this book's publication the French trials of Munyeshyaka and Bucyibaruta have made little progress.

<sup>680</sup> Nadia Bernaz and Rémy Prouvèze, *International and Domestic Prosecutions*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 269, 394 (2 vols., M. Cherif Bassiouni ed. 2010).

<sup>681</sup> One of the plaintiffs, Ms. Yvonne Mutimura, brought the case to the Strasbourg Court, which concluded that France had violated Article 6(1) of the European Convention on Human Rights, which provides that "everyone is entitled to a fair and public hearing within a reasonable time." Mutimura v. France, *supra* note 677, § 74.

<sup>682</sup> See Stern, *supra* note 661, at 529.

<sup>683</sup> See, e.g., Claude Lombois, *De la compassion territoriale*, REV. SC. CRIM. 399 (1995); Brigitte Stern, *La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda*, 40 GER. Y.B. INT'L L. 280 (1997); Michael Massé, *Ex-Yougoslavie, Rwanda: Une compétence 'virtuelle' des juridictions françaises?* REV. SC. CRIM 893 (1997); Maison, *supra* note 660.

In sum, it is appropriate to say that universal jurisdiction for all international crimes is a position supported by some of the “most distinguished publicists,” even if the universality principal has been evidenced in only some conventions on ICL. Conversely, however, the customary practice of states has recognized universal jurisdiction in a limited fashion. Sir Hersch Lauterpacht stated more than thirty years ago:

There is an implied recognition of the protection, by International Law, of the fundamental rights of the individual in so far as it prohibits and penalizes crimes against humanity, conceived as offences of the gravest character against the life and liberty of the individual, irrespective of whether acts of that nature have been perpetrated in obedience to the law of the State [ . . . ].

While no general rule of positive International Law can as yet be asserted which gives to States the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of International Law to that effect. That principle consists both in the adoption of the rule of universality of jurisdiction and in the recognition of the supremacy of the law of humanity over the law of the sovereign State when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind.<sup>684</sup>

Lauterpacht’s statement is given further credence by the 1973 United Nations Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, which declares:

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment [ . . . ].
3. States shall co-operate with each other on a bilateral and multi-lateral basis with a view to halting and preventing war crimes and crimes against humanity, and take the domestic and international measures necessary for that purpose.
4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them [ . . . ].
7. States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.<sup>685</sup>

Based on the discussion above, one may correctly conclude that the London Charter, post-Charter legal developments, the 1949 Geneva Conventions, the *Apartheid* Convention, and the Torture Convention, as well as other international instruments, recent national legislation and judicial decisions, and the writings of the most distinguished publicists support the assertion that CAH is subject to universal jurisdiction.

The Rome Statute is not premised on universal jurisdiction. Article 12 states:

Preconditions to the exercise of jurisdiction

<sup>684</sup> LASSA OPPENHEIM, 1 INTERNATIONAL LAW 752–53 (Hersch Lauterpacht ed., 8th ed. 1995); *see also* United Nations War Crimes Commission Report, U.N. Doc. E/CN.4/W.20 (May 28, 1948) at 191–220.

<sup>685</sup> G.A. Res. 3074, 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973).

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
  - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
  - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

But Article 12 must be read in conjunction with Article 13(b), which states that the Court may exercise its jurisdiction over the crimes contained in the Statute in “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations [ . . . ].” Thus, the ICC can exercise universal jurisdiction when the Security Council refers a situation to it, but it can only exercise jurisdiction in other instances if (1) the crime occurred in the territory of a State Party, including a vessel or aircraft of that state, or (2) a person who is a national of a State Party committed the crime. There is also another jurisdictional basis provided in Article 12, paragraph 3, according to which it seems that a non-State Party can accept the jurisdiction of the ICC. This could be interpreted as meaning that such a state could accept the Court’s jurisdiction with respect to any of its nationals or with respect to a nonnational, if that person committed a crime (within the jurisdiction of the Court) on the territory of the accepting state. This jurisdiction by consent of a non-State Party enlarges the jurisdiction of the ICC. Thus, even though universal jurisdiction is established only with respect to situations referred to the Court by the Security Council, the jurisdictional bases of the Court for situations referred to it by State Parties and consenting states that are not State Parties is quasi-universal.

## Conclusion

The significance of these substantive and procedural post-Charter developments lies in their cumulative effect, which reinforces the conventional and customary ICL aspects of CAH. These developments demonstrate the continued concern and interest of the international community in sustaining the Law of the London Charter and give continued expression to the fact that the Charter and statutes of the IMT and IMTFE, the Nuremberg and Tokyo prosecutions, their sequels, and other national trials<sup>686</sup> were a continuing, albeit imperfect, historical manifestation of international condemnation of CAH.

The progressive development of international instruments subsequent to the London Charter supports the proposition that even in the absence of a conventional codification the legal viability of CAH has been consistently reinforced. Although these

<sup>686</sup> See *infra* ch. 9, §3.

post-Charter developments discussed above have addressed some of the issues concerning principles of legality, obedience to superior orders, the duties to prosecute or extradite, universality of jurisdiction, and the nonapplicability of statutory limitation, there are still some ambiguities and uncertainties that only a specialized convention on CAH can eliminate.<sup>687</sup>

As discussed herein, there are more than twelve formulations of CAH in international instruments, which vary somewhat as to their legal elements and contents. The piecemeal, uncoordinated developments outlined above resulted in

- (1) a diversity of legal instruments with differing legal effects, applicable to different and sometimes overlapping contexts and legal subjects
- (2) gaps in the overall victim protective scheme; and
- (3) some of the provisions of these instruments having been drafted without sufficient specificity, thus offending the principles of legality.

However, all of these formulations do not address the critical distinction between policymakers and senior executors, followed by midlevel escalators and facilitators who should be the primary goal of the deterrent policy of the crime. This is essentially a policy question that should somehow be reflected in the formulation of this category of crimes. Otherwise, the important distinction, between these categories of perpetrations and lower-level actors becomes lost. These distinctions have implications with respect to the policy of deterrence.

<sup>687</sup> See *infra* ch. 7, §2. Sadat, *supra* note 1.



## 5 The Principles of Legality in the London Charter and Post-Charter Developments

*Autoritas, non Veritas facit Legem.*

– THOMAS HOBBS, *LIVIATHAN: SIVE DE MATERIA, FORMA, ET POESTATE CIVITATIS ECCLESIASTICAE ET CIVILIS* III (1841)

### Introduction

The principles of legality have been recognized in some form or another in all the world's criminal justice systems. This recognition ranges from the rigid positivistic approach of the Germanic and other Roman-Civilist legal systems to the more flexible common law system. The latter recognizes the principle of analogy in statutory interpretation, while the former systems reject analogy as a violation of the principles of legality. Some legal systems, like the *Shari'a* (Islamic legal system), apply the principles to certain crimes (*hudud* crimes) as rigidly as the positivistic legal systems, but recognize the application of judicially made law for other crimes, like *qisas* and *ta'azir* crimes.<sup>1</sup> The *ex post facto* clause of the U.S. Constitution prohibits the legislative branches of the federal and state governments from passing retroactive legislation.<sup>2</sup>

<sup>1</sup> M. CHERIF BASSIOUNI, *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* (1981).

<sup>2</sup> U.S. Const. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* § 10 (“No State shall . . . pass any Bill of Attainder, ex post facto Law. . . .”). The *ex post facto* clauses include prohibitions against legislative acts that (1) make criminal an innocent action completed before the enacting of the law; (2) aggravate a crime; (3) inflict a greater punishment than the law stated at the time the crime was committed; or (4) alter the legal rules of evidence to allow less, or different, testimony than the law required at the time of the commission of the offence to convict the offender. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

The Framers of the U.S. Constitution recalled the historical tyrannies of Great Britain and France in establishing the prohibitions against *ex post facto* laws and bills of attainder. See Beth Van Schaack, *Crimen sine lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119 (2008), at 122, citing Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 462 (2001) (noting Framers' concerns with Great Britain's passage of *ex post facto* laws and bills of attainder to attack unpopular groups of individuals).

In its infancy, U.S. courts' jurisprudence was not viewed as a threat to the principle *nullum crimen sine lege*, because, since courts can only construe existing law in actual litigation, their opportunity to discriminate is more constrained than the legislature's opportunity to do likewise. *James v. United States*, 366 U.S. 213, 247 n.3 (1961).

The U.S. Supreme Court has held the *ex post facto* provision “is directed against legislative, but not judicial, acts,” while adjudicative retroactivity has been addressed largely through the “fair warning requirement” implied in the Due Process Clauses. See *Rogers v. Tennessee*, 532 U.S. 451, 467 (2001) (upholding lower court's action as a “routine exercise of common law decision making in which the court

The principles of legality are not deemed by many systems to apply to procedural and evidentiary norms and standards, and there is diversity in legal systems as to judicial interpretation by analogy, and how far it can go.

Due to the history and evolution of ICL, the principles of legality as they emerged from the world's major legal systems have always been treated with a degree of relativism.<sup>3</sup>

The London Charter's validity was challenged by the principles of legality, as will be discussed here. The ICTY and ICTR statutes were deemed to have complied with the principles of legality insofar as the respective statutes reflected customary international law. But that presupposes the recognition of customary international law as being in compliance with the principles of legality, which is not the case with respect to positivistic legal systems. Moreover, whether some or all issues of the legality principle all relevant to a given aspect of ICL is questionable because of the nature of customary international law. More, since there have been several diverse national prosecutions for CAH, as discussed in [Chapter 9](#), any affirmation of what aspect of that international category of crimes falls within the meaning of an established international custom or general principle of law is questionable. This state of uncertainty is also underscored by the fact that to date there are twelve definitions of CAH contained in international instruments, which itself evidences diversity.<sup>4</sup> The basic framework remains that of the Charter; nevertheless, there are differences between these twelve formulations, particularly if one interprets the principles of legality in a positivistic manner.<sup>5</sup>

The legacy of these diverse definitions and the jurisprudence of the ICTY and ICTR leave some uncertainty as to the specific contents of CAH,<sup>6</sup> the elements of that crime,<sup>7</sup> as well as several aspects of the general part, namely responsibility and defenses.<sup>8</sup> In this

brought the law into conformity with reason and common sense"); see also U.S. CONST. amends. X, XIV, § 1; see *U.S. v. Lanier*, 520 U.S. 259, 265 (1997). All legal systems, however, recognize the principle of nonapplicability of criminal law *ex post facto*.

<sup>3</sup> See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW ch. 3, § 9 (2008) (discussing the principles of legality) [hereinafter BASSIOUNI, INTRO TO ICL]; M. Cherif Bassiouni, *Principles of Legality in International and Comparative Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 73 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Van Schaack, *supra* note 2; Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007 (2004); Susan Lamb, *Nullum crimen, nulla poena sine lege*, in *International Criminal Law*, in A. CASSESE, P. GAETA & J. JONES, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT 733–34, 756 (2002), 733–34; MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2002); William A. Schabas, *Article 23 Nulla poena sine lege*, in OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 463 (1999) [hereinafter TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE ICC]; Jordan Paust, *It's No Defense: Nullum crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657 (1997); Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 392, 396–97 (1988); John Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); STANISLAW POMORSKI, AMERICAN COMMON LAW AND THE PRINCIPLE OF NULLUM CRIMEN SINE LEGE (2d. ed. 1975); Leslie Green, *The Maxim Nullum crimen sine lege and the Eichmann Trial*, 38 BRIT. Y.B. INT'L L. 457 (1962).

<sup>4</sup> See *infra* note 252. For these definitions, see *infra* chs. 3, 4, Part A.

<sup>5</sup> The Rome Statute of the ICC is a negotiated treaty and therefore the States Parties are free to give CAH the definition they deem appropriate.

<sup>6</sup> See *infra* ch. 6, § 3.

<sup>7</sup> See *infra* ch. 4, § 3.

<sup>8</sup> See *infra* chs. 7, § 4, and ch. 8, §§ 1.5.

respect, one can see the differences in methodology between penalists and publicists, the former being more legalistically rigorous than the latter. Thus, the fact that ICL is a complex discipline that has elements, *inter alia*, of public international law, comparative criminal law and procedure, as well as other disciplines, makes it difficult to achieve a consensus among the scholarly community and in the jurisprudence of international tribunals as to the requirements of the principles of legality and their application to different aspects of that international category of crimes.

Lastly, it should be noted that no international instrument pertaining to ICL includes a penalties component that conforms with the principles of legality in a manner that satisfies the positivism of penalists.<sup>9</sup> None of the statutes promulgated, starting with the London Charter and ending with the Rome Statute, contain specific provisions establishing penalties. Instead, they allow the penalties to be determined by judge-made rules. In the cases of the IMT, the IMTFE, and the CCL 10, the judges simply meted out penalties as they deemed fit. In the ICTY and ICTR, the Security Council designated the enactment of penalties to the judges.<sup>10</sup> The Rome Statute followed suit.

Thus, the ICTY, ICTR, and Rome Statutes violate the principles of legality with respect to penalties in connection with the total absence of specifically legislated penalties, unless it is deemed that legislative delegations to the judiciary and prior judicial enactment of the penalties does not constitute a breach of this aspect of the principles of legality. However, the breach was complete at the IMT, IMTFE, and in the CCL 10 Proceedings in that penalties were simply made up by the judges after the fact and without specific delegation and prior enunciation. Because Article 6(c) of the London Charter is the matrix for all twelve subsequent formulations,<sup>11</sup> some of the problems that existed then remained in the subsequent formulations made between 1993 and 1998.

Probably the most significant and least addressed issue concerns what exactly customary international law includes as part of CAH that is deemed so well settled that it constitutes binding international law. The answer to this question is outcome-determinative with respect to the principles of legality. In other words, if normative clarity and precision exist, there is notice to the prospective offender and a binding obligation on the judge in the application of the norm to a person charged with the violation of the norm. If these conditions exist, the principles of legality are satisfied. Otherwise, they are not.

The discipline of international law is essentially fluid, in contrast with criminal law and procedure, which is essentially rigid. For international law publicists, the problem with multiple legal formulations of CAH does not arise, whereas for penalists it is a major problem.<sup>12</sup> Judges sitting in international tribunals from the IMT to the ICC have

<sup>9</sup> Bassiouni, Principles of Legality in International and Comparative Criminal Law, *supra* note 3, at 76 *et. seq.*

<sup>10</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), arts. 77, 78 [hereinafter ICC Statute].

<sup>11</sup> See *infra* ch. 4, Part A.

<sup>12</sup> Though the principles of legality can be found in several legal systems, their modern European origin is attributed to German jurist Paul Anselm von Feuerbach, who first articulated them in his 1801 *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS*. This period was the height of intellectual liberalism and revolutionary liberalism in Europe, which also coincided with the highest point of modern Western classicism. However, the concept is far older than the maxim. For instance, the maxim exists in ancient Roman and Greek law and is a fundamental component of St. Thomas Aquinas's *SUMMA THEOLOGICA*, *infra* note 49. *Nullum crimen sine lege* experienced a reemergence in the Enlightenment, when the prevailing political ideology was one of reaction against oppressive government and judicial arbitrariness.

been predominantly from an international law background, as opposed to criminal law, and they have not applied legal norms in a manner that is consonant with principles of legality and the limitations of the use of analogy in the criminal laws of many legal systems.<sup>13</sup>

For a survey of these principles of legality, see Giuliano Vassalli, *Nullum Crimen Sine Lege*, 5 APPENDICE DEL NUOVISSIMO DIGESTO ITALIANO 292 (1984); Stefan Glaser, *Le Principe de la Légalité en Matière Pénale, Notamment en Droit Codifié et en Droit Coutumier*, 46 REVUE DE DROIT PÉNAL et de Criminologie 889 (1966); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165–70 (1937); Giuliano Vassalli, *Nullum Crimen Sine Lege*, 8 NUOVO DIGESTO ITALIANO 1173 (1939); and LÉON F. JULLIOT DE LA MORANDIÈRE, DE LA RÉGLE NULLA POENA SINE LEGE (1910); and Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 Statute L. Rev. 41, 41–7 (2005).

For national approaches, see ROGER MERLE AND ANDRÉ VITU, *TRAITÉ DE DROIT CRIMINEL* 108 *et seq.* (1967) (documenting the historical right of the judge in the French criminal justice system to interpret principles of law and acknowledging, at 113, the decline in the twentieth century of the rigid positivist approach to principles of legality); Pietro Nuvolone, *Le principe de légalité, et les principes de la défense sociale*, in REVUE DE SCIENCE CRIMINELLE ET DE DROIT COMPARÉ 231 (1956); Jean-Claude Soyer, *La Formulation actuelle du principe nullum crimen*, REVUE DE SCIENCE CRIMINELLE 11 *et seq.* (1952); Marc Ancel, *La règle nulla poena sine lege, dans les législations modernes*, in ANNALES DE L'INSTITUT DE DROIT COMPARÉ 245 (1936); KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* (2009).

<sup>13</sup> Legal systems differ as to their treatment of analogy in judicial interpretation. See, e.g., FERRANDO MANTOVANI, *DIRITTO PENALE* 105 (1988); Juan Jiménez de Asúa, *L'Analogie en Droit Pénal*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL 187, 189 (1949); JUAN JIMÉNEZ DE ASÚA, *TRATADO DE DERECHO PENAL* 477 *et seq.* (2d ed. 1949); NORBERTO BOBBIO, *L'ANALOGIA NELLA LOGICA DEL DIRITTO* (1938); G. Alfred O. Palazzo, *L'Analogie en Droit Pénal*, 14 RIDP 308 (1937); GIROLAMO BELLAVISTA, *L'INTERPRETAZIONE DELLA LEGGE PENALE* (1936). For a classical German perspective, see BARBARA ACKERMANN, *DAS ANALOGIE-VERBOT IM GELTENDEN UND ZUKÜNFTIGEN STRAFRECHT* (1934); Hans Schem, *Die Analogie im Strafrecht in ihrer geschichtlichen Entwicklung und Heutigen Bedeutung*, STRAFRECHT ABDHANLUNGEN (Fasc. 369, 1936); WALTER SAX, *DAS STRAFRECHTLICHE ANALOGIEVERBOT* (1953). For the Austrian approach, see FRANZ VON LISZT, *LEHRBUCH DES STRAFRECHT* 110 (1891). For a classical French approach, see RENÉ GARRAUD, *TRAITÉ THÉORIQUE ET PRATIQUE DU DROIT PÉNAL FRANÇAIS* (3d ed. 1913); VICTOR MOLINIER, *1 TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT PÉNAL* (1893); ALBERT NORMAND, *TRAITÉ ÉLÉMENTAIRE DE DROIT CRIMINEL* (1896); HENRI DONNEDIEU DE VABRES, *TRAITÉ ÉLÉMENTAIRE DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE* 433 *et seq.* (1937).

For the history of the common law of crimes and judicially created crimes, see JAMES F. STEPHEN, *A DIGEST OF CRIMINAL LAW* 160 (1877); FRANCIS WHARTON, *A TREATISE ON CRIMINAL LAW* (8th ed. 1880); JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 359 *et seq.* (1883); LEON RADZINOWICZ, *5 A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION* (1948); see also JEREMY BENTHAM, 1 *THE WORKS OF JEREMY BENTHAM* pt. 3, ch. 20, 576 (John Bowring ed., 1843) (urging strict adherence to statutory interpretation “principles of penal law”). In *Midland Railway Co. v. Pye*, 142 Eng. Rep. 419, 424 (1861) (Chief Justice Erle saying, “It manifestly shocks one’s sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law.”). *Director of Public Prosecutions v. Lamb*, 2 K.B. 89 (holding in 1941 that a law can be interpreted retroactively if that is the intention of Parliament). Almost one hundred years earlier in *Ex parte Clinton*, 6 State Trials, N.S. 1107 (1845) (holding, “It cannot be said that to give *ex post facto* operation to an enactment is hostile to the spirit of English law”). *Phillips v. Eyre*, 6 Q.B. 1, 23 (1870) (holding, “A retrospective law is *prima facie* questionable but not contrary to natural justice”); *Joyce v. Director of Public Prosecutions* [1946] all E.R. 186, 189 (holding, “It is not an extension of a penal law to apply its principles to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language”). Lord Jowitt, who wrote the opinion in this case, was also the British representative at the London Conference who succeeded Sir David Maxwell Fyfe. Later for analogy in misdemeanors, see *Shaw v. Director of Public Prosecutions* [1962] A.C. 220 (1960). For an insightful comment upon the common law’s interpretation by analogy in misdemeanors, see R.M. Jackson, *Common Law Misdemeanors*, 6 CAMBRIDGE L. J. 193 (1937); W. T. S. Stallybrass, *Public Mischief*, 49 LAW Q. REV. 183 (1933) (commenting on *Rex v. Manley* [1933] K.B. 529 (1932)); RAYMOND B. STRINGHAM, *MAGNA CARTA: FOUNTAINHEAD OF*

The purposes of the principles of legality are to enhance the certainty of the law, provide justice and fairness for the accused, achieve the effective fulfillment of the deterrent function of the criminal sanction, prevent abuse of power, and strengthen the application of the rule of law. For some, these goals can be attained only by a rigid formalistic approach inspired by legal positivism, whereas for others the substantive purposes of these principles should not be defeated by adherence to rigid formal requirements. With respect to the London Charter, Professor Hans Kelsen expresses the latter view as follows:

The principle forbidding the enactment of norms with retroactive force as a rule of positive national law is not without many exceptions. Its basis is the moral idea that it is not just to make an individual responsible for an act if he, when performing the act, did not and could not know that his act constituted a wrong. If, however, the act was at the moment of its performance morally, although not legally wrong, a law attaching *ex post facto* a sanction to the act is retroactive only from a legal, not from a moral point of view. Such a law is not contrary to the moral idea which is at the basis of the principle in question. This is in particular true of an international treaty by which individuals are made responsible for having violated, in their capacity as organs of a State, international law. Morally they were responsible for the violation of international law at the moment when they performed the acts constituting a wrong not only from a moral but also from a legal point of view. The treaty only transforms their moral into a legal responsibility. The principle forbidding *ex post facto* laws is – in all reason – not applicable to such a treaty.<sup>14</sup>

Although Kelsen is a relative positivist, in this case, he took a position that combines elements of the naturalist and utilitarian legal philosophies. Naturalists consider principles of legality as procedural, not substantive, because the substance derives from a higher source of law. Therefore, they would not uphold the principles of legality over what they would deem to be the higher substance of the law. Positivists, at the other end of the spectrum, consider these principles as substantive and, thus, nonderogable. Utilitarians would look at the goals sought to be accomplished, and would therefore have more flexible views of how to interpret and apply principles of legality. These different views evidence the fact that the recognition and application of the principles of legality and

FREEDOM 235 (1966). See, however, the Constitution of Clarendon (1164), reprinted in W. STUBBS, SELECT CHARTERS 165 (9th ed. 1913), where the principle first appeared.

In the United States on the prohibition of *ex post facto*, see U.S. CONST. art. 1, secs. 9, 10; see also *Calder v. Bull*, (3 Dall) 3 U.S. 386 (1878); Note, *Ex Post Facto Limitations on Legislative Power*, 73 MICH L. REV. 1491 (1975); William W. Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 558–66 (1947). However, the prohibition against *ex post facto* laws was not held to apply to the lessening of statutory penalties, to statutory changes in rules of evidence, or to procedural changes. See M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 31 (1978); see also Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1344 (Melville M. Bigelow ed., 1891). The three landmark cases on this question are: *Fletcher v. Peck*, 6 Cranch 87, 136 (1810); *U.S. v. Lovett*, 328 U.S. 303 (1946); *Groppie v. Leslie*, 404 U.S. 496 (1972); see also Francis D. Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603 (1951); Comment, *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial*, 63 YALE L. J. 844 (1954).

<sup>14</sup> Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 544 (1943).

their corollary prohibition of analogy are dependent upon the choice of a given theory of legal philosophy.<sup>15</sup>

The questions of whether and in what ways principles of legality apply to international criminal legislation never arose before the London Charter. Since then, regrettably, these questions have not been sufficiently dealt with in ICL, other than by reference to post-World War II crimes and their prosecutions, as if they were the applicable legal standard. The reason may well be that ICL had thus far developed with a view to its indirect application (through national legislation), as opposed to the direct application that was the case with respect to the London and Tokyo Charters and CCL 10, even though the Allies deemed such a law to be domestic.<sup>16</sup> In contrast, the ICC, as will be discussed, directly addresses the issue of principles of legality in its statute.<sup>17</sup>

ICL relies, for its enforcement, largely on the indirect approach, pursuant to which states embody international proscriptions in their national laws and enforce them through their national criminal justice system. This is evident from the provisions contained in the ICL conventions.<sup>18</sup> Consequently, the applicable principles of legality are those of the enforcing state. However, in the case of direct enforcement by international institutions, the question of legality arises with respect to the general and special parts of the applicable law.<sup>19</sup>

One approach to principles of legality is to adduce these principles from the various national legal systems in accordance with the methodology established for ascertaining the “general principles of law.”<sup>20</sup> Thus, an examination of the world’s major criminal justice systems is necessary to ascertain the standards of legality that are to be applied to CAH, as formulated in Article 6(c) of the London Charter and in subsequent formulations. An analysis of the world’s major criminal justice systems also requires an appraisal of the international customary practices of states with respect to international tribunals.

## §1. Principles of Legality in International Criminal Law

In addition to reconciling the diversity among the world’s major criminal justice systems in their recognition and application of the principles of legality, it is necessary to explore whether similar principles have also emerged from international legal practice, separate

<sup>15</sup> See generally the first half of this chapter.

<sup>16</sup> See *infra* ch. 3, §7.

<sup>17</sup> ICC Statute, *supra* note 10. See also M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998) [hereinafter BASSIOUNI, STATUTE OF THE ICC].

<sup>18</sup> M. CHERIF BASSIOUNI AND EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

<sup>19</sup> See, e.g., the work of the ILC since 1947 in its efforts to develop a Code of Offences Against the Peace and Security of Mankind; and see YEARBOOK OF THE ILC for annual reports on this question between 1950–1954 and 1978–91. The Draft Code of Crimes Against the Peace and Security of Mankind was adopted in 1996, May 6–July 26, 1996, *Report of the ILC*, GAOR Supp. No. 10, U.N. Doc. A/51/10. See also Robert Cryer, *The Doctrinal Foundations of International Criminalization*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 107 (M. Cherif Bassiouni ed., 3d rev ed. 2008); Leo Gross, *Some Observations on the United Nations Draft Code of Offences Against the Peace and Security of Mankind*, 15 ISR. Y.B. HUM. RTS. 224 (1985); M. Cherif Bassiouni, *Principles of Legality in International and Comparative Criminal Law*, *supra* note 3.

<sup>20</sup> M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768 (1990); BIN CHENG, GENERAL PRINCIPLES OF LAW, AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987); see also *infra* ch. 7 (describing the methodology of ascertaining “general principles of law”).



and apart from the existence of said principles in national legal systems. In this respect, it is noteworthy that the evolution of international law resembles that of the common law more than that of the Romanist-Civilist-Germanic systems. In Roman law, *jus gentium*, a term that evolved into what has become international law, allowed for and incorporated customary law and recognized analogy as a rule of interpretation.<sup>21</sup>

International law originated as a product of the customs and practices of states, but it also derived from certain basic national principles,<sup>22</sup> and these, in time, became a separate source of international law known as “general principles.”<sup>23</sup> Thus, it would be more consonant with the nature of international law to reconcile the principles of legality as they emerge from national legal systems with the customary practices of states in international law. In this case, it would be the customary practices of states with respect to ICL, noting that such customary practices are strongly evidenced by conventional law.<sup>24</sup>

Distinguishing between national and international principles of legality, Professor Stefan Glaser states:

*Or, en ce qui concerne le droit international pénal, il faut constater que l'interprétation du principe de la légalité des délits ainsi que des manifestations qu'il entraîne, s'écarte de l'interprétation qu'on admet en droit pénal interne.*

*Il est évident que le principe de la légalité des délits qui enseigne qu'il «n'y a pas d'infraction sans loi», ne peut pas être appliqué, au sens strict de ces termes, en droit international pénal, car celui-ci en tant droit coutumier, est dépourvu de «lois».*

*En effet, on sait que le droit international pénal, de même que le droit international public en général, n'est pas jusqu'à présent un droit écrit, c'est-à-dire codifié.*

*Comme le droit international, de même le droit international pénal trouve son origine dans la conscience universelle du droit et de la justice. Il est fondé sur la conviction que ses règles sont conformes à l'idée de justice et de morale et qu'elles s'imposent pour la sauvegarde de l'ordre social international, en d'autres termes, des intérêts fondamentaux*

<sup>21</sup> See THEODOR MOMMSEN, I RÖMISCHES STRAFRECHT 35 *et seq.* (1899) (referring to Ulpiano whose commentaries in the first book of the DIGEST are “*Multa guidem ex arbitrio eim venit qui multam dicit, poena non irrogatur nisi quae quaque lege velquo alio iure specialites huic delicto imposita est*”), quoted in UGO BRASIELLO, LA REPRESSIONE PENALE IN DIRITTO ROMANO 142 (2d. ed. 1937). Another DIGEST statement is “*Poena non irrogatur, nisi quae quaque lege vel quo alio jure specialiter huic delicto imposita est.*” D. 50.16.131 quoted in SAMUEL P. SCOTT, 12 THE CIVIL LAW 278 (1932) (“a penalty is not inflicted unless it is expressly imposed by law, or by some other authority”); see also D.50.16.244 (“[A]n appeal cannot be taken from a penalty, for where anyone is convicted of an offense, the penalty for it is fixed, and must be paid at once”). See also, PIETRO BONFANTE, ISTITUZIONI DI DIRITTO ROMANO (10th ed. 1946); PAUL COLLINET AND ANDRÉ GIFFARD, PRÉCIS DE DROIT ROMAIN (1927), on *delicts* at 130–65. The Codification of Roman Law started with Augustus’ JULIAN LAWS followed by Hadrian’s reform, JULIAN’S DIGESTA of 90 volumes containing a systematic arrangement of civil and praetorian law followed by Justinian’s INSTITUTES and Justinian’s CODES. See also, RENÉ WORMSER, THE STORY OF THE LAW AND THE MEN WHO MADE IT 113–49 (1962).

<sup>22</sup> See, e.g., LOUIS L. LE FUR, PRÉCIS DE DROIT INTERNATIONAL PUBLIC 204 *et seq.* (4th ed. 1939); ALFRED VERDROSS, VÖLKERRECHT 84 *et seq.* (4th ed. 1954) ; GEORGES SCELLE, PRÉCIS DU DROIT DES GENS: PRINCIPES ET SYSTEMATIQUE (1st ed. 1932).

<sup>23</sup> See Bassiouni, *supra* note 20.

<sup>24</sup> See Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1 (1974); ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); M. Stelio Sefériadès, *Aperçus sur la Coutume Internationale*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC (No. 2) 129 (1936) ; see also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT’L L. 59 (1990).



*de la communauté internationale* (“*opinio juris vel necessitatis*”). C’est ainsi qu’on dit parfois que le droit international en général n’est «qu’une expression graduelle, cas après cas, des jugements moraux du monde civilisé».

Il en résulte que le droit international pénal, contrairement au droit pénal interne, n’est pas un «*Tatbestandsrecht*», c’est-à-dire un droit des «*états de fait*» précis et codifiés. Provenant de la coutume – qui constitue aussi sa source principale – il n’est pas une oeuvre ou une création juridico-technique. Il en est ainsi également dans le cas où ses règles ou ses notions se trouvent incorporées dans le droit conventionnel (conventions, traités), donc où elles sont formulées par écrit.

Le droit conventionnel a donc, dans une certaine mesure, un caractère dérivatif: son bien-fondé et sa force obligatoire dépendent de sa conformité avec la coutume.

Or, il résulte forcément de ce fait, à savoir que le droit international pénal est un droit coutumier et non pas un droit codifié, qu’en matière d’infractions internationales on ne peut pas exiger que ces infractions soient incriminées au moment de leur accomplissement par une loi. D’ailleurs, on sait que même en droit interne là, où ce droit repose sur la coutume, comme c’est encore le cas en partie dans le pays anglo-saxons, le principe «*Nullum crimen sine lege*» au sens strict de ces termes, n’est pas valable.<sup>25</sup>

Glaser concludes that the principle *nullum crimen sine lege*, which exists in some national legal systems, is not applicable in the same strict sense in ICL due to the peculiarities of the discipline. Further narrowing the distinction in ICL, Professor Henri Donnedieu de Vabres, quoting Samuel Pufendorf, asserted that when “*hostis humani generi* [commit acts of brigandage and piracy] it is permissible to everyone to extract some vengeance [but that] the law of war which is different, permits the infliction of penalties (author’s translation).”<sup>26</sup>

This proposition highlights the importance of distinguishing the various international crimes, presumably because their goals are different. But there is also another distinction to be made, and that is between the techniques of ICL and national criminalization processes. ICL, with the exception of piracy and certain aspects of the regulation of armed conflicts, is conventional, as evidenced by the 322 instruments elaborated between 1815 and 1998.<sup>27</sup> Most of these instruments were developed by international organizations. All of them were the product of political circumstances. This process has been devoid of a consistent policy or a uniform drafting technique. As a result, most of these conventions do not meet the test of legality under contemporary standards of Western European legal systems. The reason for this may be the lack of attention given by those entrusted with the drafting of international conventions to the requirements of the principles of legality in the formulation of these instruments. This situation may be due to the fact that the drafters

<sup>25</sup> See Stefan Glaser, *La Méthode d’Interpretation en Droit International Pénal*, 9 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 757, 762–64 (1966) ; see also Stefan Glaser, *Nullum Crimen Sine Lege*, 24 J. COMP. LEGIS. & INT’L L. 29 (1942).

<sup>26</sup> HENRI DONNEDIEU DE VABRES, INTRODUCTION À L’ETUDE DU DROIT PÉNAL INTERNATIONAL 345 (1922), citing SAMUEL PUFENDORF, II LE DROIT DE LA NATURE DES GENS, Bk. III, Ch. III, 465 (trans., 1771); see also ALFRED P. RUBIN, THE LAW OF PIRACY (1988). For the evolutionary history of piracy in England, see CONSTANTINE J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 406 (5th ed. 1962). The first statute on piracy is reported as dating 1535, see Jacob W.F. Sundberg, *The Crime of Piracy*, in BASSIOUNI, 1 *infra* to ICL, *supra* note 3, at 799.

<sup>27</sup> See INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (M. Cherif Bassiouni ed., 1997) [hereinafter BASSIOUNI, ICL CONVENTIONS] (referring to 322 instruments between 1815 and 1996).

of these instruments were mostly diplomats who were seldom experts in ICL and, for that matter, are seldom experts in comparative criminal law and procedure. Perhaps the more significant reason is that the international legislative process relies on the assumption that its textual formulations (except for the statutes establishing international judicial institutions) are not intended to apply directly to individuals through an international judicial body, but rather that the enacted norms are intended as obligations upon states to embody them as norms that conform to the requirements of their respective national legal systems. Thus, each state should presumably reformulate international proscriptions in accordance with its own standards of legality. Consequently, to expect the same technical legal rigor from the international process as from national legislative bodies may have been deemed unnecessary. Thus, the results of this international legislative process have regrettably been imprecise with respect to the positivistic requirements of legality.

International crimes have frequently been defined in broad, general terms without regard for the enunciation of the elements of the international crime and without the inclusion of specific provisions on elements of responsibility and exoneration that are found in the general part of national criminal laws. Furthermore, none of the 322 ICL instruments include penalties.<sup>28</sup> Consequently, customary international law practice does not include the principle *nulla poena sine lege*, which is found in most national legal systems, except for the legislative delegation to the judges of the ICTY, ICTR, and ICC.<sup>29</sup> Insofar as ICL legislative practice is concerned, penalties are left to national legal systems, which are expected to promulgate them in accordance with their respective national practices. In addition, ICL permits a state, having jurisdiction, to enforce international proscriptions by analogy to similar offenses in that state's national laws. This is evidenced by the practice of states in international criminal prosecutions for war crimes and piracy.<sup>30</sup>

It is obvious from this brief discussion that the principles of legality in ICL are different from their counterparts in the national legal systems with respect to their standards and application. They are necessarily *sui generis*, because they must balance between the preservation of justice and fairness for the accused and the preservation of world order, taking into account the nature of international law, the absence of international legislative policies and standards, the *ad hoc* processes of technical drafting, and the basic assumption that ICL norms will be embodied into the national criminal law of the

<sup>28</sup> *Id.*

<sup>29</sup> The ILC in the 1954 Draft Code of Offences provided in Article 5:

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

This article provides for the punishment of the offences defined in the Code. Such a provision is considered desirable in view of the generally accepted principle *nulla poena sine lege*. However, as it is not deemed practicable to prescribe a definite penalty for each offence, it is left to the competent tribunal to determine the penalty, taking into consideration the gravity of the offence committed.

Article 5 was first incorporated into the Draft Code of Offences in 1951. See 2 Y.B. INT'L L. COMM'N 137 (1951). It has been maintained since. Earlier, however, the 1919 Commission had recommended, "it is desirable for the future that penal sanctions should be provided for such grave outrages against the elementary principles of international law"; see 14 AM. J. INT'L L. 95, 127 (1920). But that advice was never heeded, and international criminal law still suffers from the absence of an international criminal code that would satisfy the requirements of the principles of legality, including that of *nulla poena sine lege*.

<sup>30</sup> See *infra* ch. 3, §1.

various states. As stated by one author, post-Cold War, international and domestic courts have been called upon to develop and modernize the Law of the London Charter:

courts are actively engaged in applying new ICL norms to past conduct. This is not the demure application of a judicial gloss to established doctrine. Rather, these tribunals are engaging in a full-scale refashioning of ICL through jurisprudence addressed to their own jurisdiction, the elements of international crimes, and applicable forms of responsibility. Along the way, courts are updating and expanding historical treaties and customary prohibitions, upsetting arrangements carefully negotiated between states, rejecting political compromises made by states during multilateral drafting conferences, and adding content to vaguely worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement. All told, in the wake of cataclysmic events, judges have expanded the reach of ICL, even at the expense of fealty to treaty drafters' original intentions and in the absence of positive law that might ensure formal advance notice of proscribed conduct. As a result, the invocation of [*nulla crimen sine lege*] has been practically ubiquitous in the ICL context as criminal defendants attempt to stem this jurisprudential tide. And yet, the defense has proven to be a rather porous barrier to prosecution. Given that the principle of [*nullum crimen sine lege*] is an integral part of the human rights canon, this adjudicative trend raises acute concerns about whether the rights of defendants are adequately protected in ICL. This, in turn, raises important questions about the legitimacy of ICL as a field of criminal law.<sup>31</sup>

In the absence of the codification of ICL, as this writer and others have advocated for years,<sup>32</sup> the most appropriate articulation of ICL's counterpart to *nullum crimen sine lege* is *nullum crimen sine iure*<sup>33</sup> in that there cannot be a crime without a law previously promulgated and an enactment of penalties prior to their application. This is evidenced by conventional ICL, which is also the clearest manifestation of states' customary practices.

Along these lines, Professor Van Schaack further states:

One of the most fundamental defenses to a criminal prosecution is that of *nullum crimen sine lege*, *nulla poena sine lege* . . . Notwithstanding that respect for [this defense] is a hallmark of modern national legal systems and a recurrent refrain in the omnibus human rights instruments, international criminal law [ . . . ] fails to fully implement this principle. The absence of a rigorous manifestation of [*nullum crimen sine lege*, *nulla poena sine lege*] within ICL can be traced to the dawn of the field with the innovations employed by the architects of the Nuremberg and Tokyo Tribunals. In the face of [these] defenses, the judges of the Nuremberg Tribunal, in reasoning that was later echoed by their brethren on the Tokyo Tribunal, rejected the defenses through a complex interplay of arguments about immorality, illegality, and criminality.

These core arguments have been adapted to the modern ICL jurisprudence. Where states failed to enact comprehensive ICL in the postwar period, ICL judges have engaged in a full-scale – if unacknowledged – refashioning of ICL through jurisprudence addressed to their own jurisdiction, the elements of international crimes, and applicable forms of responsibility. Along the way, courts have updated and expanded historical treaties and customary rules, upset arrangements carefully negotiated between

<sup>31</sup> Van Schaack, *supra* note 2, at 123–24.

<sup>32</sup> See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 3 (1987).

<sup>33</sup> See Glaser, *La Méthode d'Interpretation en Droit International Pénal*, *supra* note 25, at 766.

states, rejected political compromises made by states during multilateral drafting conferences, and added content to vaguely worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement. A taxonomy of these analytical claims reveals the varied ways that today's ICL defendants have been made subject to new or expanded criminal law rules.<sup>34</sup>

ICL as it is now, and certainly as it was in 1945, requires the existence of a legal prohibition arising under conventional or customary international law, which is deemed to have primacy over national law and which defines certain conduct as criminal, punishable or prosecutable, or violative of international law. This minimum standard of legality has permitted the resort to the rule *ejusdem generis* with respect to analogous conduct, as well as permits the application of penalties by analogy to similar crimes and penalties in the national criminal laws of the prosecuting state having proper jurisdiction.

Depending upon one's legal philosophical premise, the difference between this ICL approach and national approaches may be one of degree and not of substance. Of greater significance, though, is the question of knowledge of ICL that can be attributed to the world's population and to persons belonging to specific categories or groups.<sup>35</sup> It is a well-established truism in international law that, if given conduct is permitted by general or particular international law, that permissibility deprives the conduct of its criminal character under ICL.<sup>36</sup> If a given conduct is prohibited by general or particular international law, however, it does not mean that it is criminal *ipso iure*. The problem thus lies in distinguishing between prohibited conduct that falls within the legally defined criminal category and that which does not. This is particularly evidenced by international human rights law, which provides for rights, limitations on state power, and prohibitions. But that does not mean that the transgression of these norms and standards are criminalized. Furthermore, there are many types of conduct that are neither permitted nor prohibited under general or particular international law, and the question arises as to what, why, and when such conduct can be deemed internationally criminal. The last two questions can be answered rather simply: It is whenever a nonprohibited conduct is analogous to that which is deemed an international crime or when injurious conduct produces the same harm as that of an international crime. But this, of course, leaves open the following questions:

- (1) From what sources of law will the analogy be made?
- (2) To what extent can analogy be applied?
- (3) What legal standards and tests should be used?

It is, therefore, inevitable that we must turn to "general principles" to answer these questions, positivism notwithstanding. This exigency is, indeed, part of the nature and consequence of international law. Nevertheless, one thing is certain, and that is the existence of a basic rule of international law prohibiting retroactivity. As Professor Charles

<sup>34</sup> Van Schaack, *supra* note 2, at 119.

<sup>35</sup> See *infra* ch. 7, §3.

<sup>36</sup> A distinction exists between different violations of international law. As Kelsen puts it, "not every act which constitutes a violation of law is a punishable crime." HANS KELSEN, *PEACE THROUGH LAW* 116 (1944); GEORG DAHM, *ZUR PROBLEMATIK DES VÖLKERSTRAFRECHTS* 49 (1956). The punishability of international crimes rests on the fact that such acts injure the international community in whole or in part and its prevention, control and repression are not based on the individual victim but on the international community as a whole. See also LASSA OPPENHEIM, 1 *INTERNATIONAL LAW* 192 (Hersch Lauterpacht ed., 7th ed. 1955).

Rousseau stated, “International Law appears to be determined by the principle of non-retroactivity. This principle is the result of both the treaties and the diplomatic and judicial practice.”<sup>37</sup> This explains why the question of *ex post facto* was so pervasive in connection with the London Charter and why it was so difficult to address for the Charter’s drafters and the judges at the various post-World War II judicial proceedings. The outcome was far from satisfactory. One reason may well be that, with respect to CAH, the conduct was so abhorrent that technical legal rigor was swept aside by emotional reactions. But even so, one would have thought that such distinguished jurists as the London Charter’s drafters and the Judges at Nuremberg, Tokyo, and at the CCL 10 Proceedings could have, and should have addressed this question in a more scholarly way or at least in a more convincing one. Instead, as is discussed below, they seem to have brushed these arguments aside and relied on their inner sense of justice and, for some, on their unbridled power to decide the outcome irrespective of the fundamental techniques of the criminal law. Their unarticulated premise must have been reliance on a higher law. In so doing, they reinforced the point frequently made by positivists’ arguments that reliance on an unarticulated higher law is *per se* arbitrary, because one man’s higher law is another’s crime. Indeed, as argued by many defendants before the IMT and CCL 10 Proceedings, their “higher law” was obedience to the *Führer* and, for them, that could never be a crime. Their conduct, however, was deemed criminal by reference to other legal standards.<sup>38</sup>

## §2. The London Charter’s Approach

The London Charter gave international law an impetus that one can fairly be labeled as progressive development, which Justice Jackson referred to as “declarative.”<sup>39</sup> Like other progressive or declarative aspects of international law, the London Charter was probably more solidly grounded in the international legal doctrine of the time, whose future development was clearly not foreseeable.<sup>40</sup> However, there is a difference between foreseeable developments of the legal philosophical premise of international law’s supremacy over national law and the direct applicability of international law by means of its penetration into national law in a monistic sense, which was the unarticulated premise of the Charter.<sup>41</sup>

<sup>37</sup> CHARLES ROUSSEAU, 1 *PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC* 486 (1944).

<sup>38</sup> See *infra* chs. 3, §§9, 10, and ch. 8, §1.4.

<sup>39</sup> This declarative aspect is the consequence of a legal discipline based on custom and which, as such, is necessarily evolutionary. As Donnedieu de Vabres recognized, the essence of international law is customary as he stated in his incisive analysis of the Nuremberg Trial: “*Il est de l’essence du droit international d’être, en fait, un droit coutumier.*” See HENRI DONNEDIEU DE VABRES, *Le Procès de Nuremberg devant les Principes du Droit Pénal International*, 70 *RECUEIL DES COURS* 481, 575 (1947).

Thus, every evolutionary stage necessarily results in some recognition of the refined customary rule and at times it is done by declarative methods. The issue is not whether international law recognizes the declarative method of its otherwise emerging norms, but whether these declared norms satisfy the requirements of legality under international criminal law.

<sup>40</sup> NICOLAS-SOCRATE POLITIS, *LES NOUVELLES TENDANCES DU DROIT INTERNATIONAL* (1927) (discussing how between World War I and the date of the book, the individual has become both an active and passive subject of ICL); see also GEORGES SCHELLE, *MANUEL ÉLÉMENTAIRE DE DROIT INTERNATIONAL* 430 *et seq.* (1943).

<sup>41</sup> A further distinction exists between the doctrine of international law’s direct penetration of national law and two other basic questions, namely what specific aspects of the international law so apply, and how? Even today these questions are unsettled, even after the establishment of the ICC, which entered into

Assuming, however, that the principle of supremacy of international law over national law is accepted in ICL, there nevertheless remains the question of what specific obligations international law creates that individuals must be deemed knowledgeable of the existence of certain crimes, their specific contents, and their punishability.<sup>42</sup>

For different reasons, naturalists, pragmatists, utilitarians, and some relative positivists find invalid the post-1935 Nazi laws under which Article 6(c) crimes were committed. They hold the perpetrators of such conduct criminally accountable, but the question that they answer differently is: Under what law?

One approach that the drafters of the London Charter and the legislators of CCL 10 could have followed was to apply the pre-existing German Criminal Code of 1871 without the subsequent changes made to it after 1935.<sup>43</sup> However, the Allies, after adopting the Charter, passed an ordinance declaring all such Nazi laws null and void.<sup>44</sup> Therefore, the question was whether it was proper to apply the London Charter instead of the original version of the 1871 German Criminal Code. The latter would have provided natural legality to the Germans accused, whether tried before a special tribunal, as was the case with the IMT and CCL 10 Proceedings, or before ordinary criminal courts, as was the case in Germany after 1950.

One should also recall that Section 2 of the German Criminal Code of 1871 provides: “No punishment can be inflicted unless such punishment was legally defined before the act was committed. If the law is changed between the time at which the act was committed and the sentence is pronounced, the milder of the laws should be applied.”<sup>45</sup> This norm derived from a principle contained in the Weimar Constitution, which provided in Article 116: “Punishment can be inflicted for only such acts as the law had declared punishable before the act was committed.”<sup>46</sup> Whether or not that provision may have deterred the drafters from resorting to pre-1935 German criminal law is purely speculative. In this writer’s judgment, a new law was needed to express the wrath and anger of the world at the Nazi regime that caused so much pain and suffering to so many for so long. Like any adjudication process, the one to be devised<sup>47</sup> had to strike a delicate balance between just retribution and a fair legal process. However, the latter presented no particular difficulties, and both the Charter and the IMT are evidence of a substantially fair process. The basic moral dilemma in 1945 was whether the extension of international

force July 1, 2002. As of June 1, 2008, 111 countries are State Parties. The State Parties are required to pass national implementing legislation, however, only 20 percent of states have fully adopted implementing legislation. Thirty percent have partially adopted implementing legislation, leaving 50 percent of state parties without any ICC implementing legislation whatsoever. If it is valid to ask the question today concerning what portion of international law directly applies to individuals irrespective of national law and how it is to be enforced, then it was surely a more valid question in 1945.

<sup>42</sup> See *infra* ch. 7, §1.

<sup>43</sup> The same approach could have been with respect to the conflicts in the former Yugoslavia and Rwanda. The ICTY and ICTR statutes could have simply stated that in the case of the former Yugoslavia, the Federal Criminal Code and Code of Criminal Procedure would apply, and in the case of Rwanda, the Criminal Code and Code of Criminal Procedure.

<sup>44</sup> Control Council Law Ordinance 7, in *TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10* (1946–49).

<sup>45</sup> Cited in AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* (Elizabeth D. Schmitt trans. 1959).

<sup>46</sup> *Id.* See also the 1919 Weimar Constitution reprinted in RENÉ BRUNET, *THE NEW GERMAN CONSTITUTION* (Joseph Gollomb trans., 1922).

<sup>47</sup> See *infra* ch. 3, §5.



criminal responsibility to perpetrators of Article 6(c) CAH – which constituted a breach of strict legal positivism – was a greater or lesser breach than to allow such perpetrators to go unpunished. To uphold the first would be to give greater weight to a given legal theory over the substantive harmful outcome deriving from an undeniable gross abuse of power, which, even according to positivists, begot neither good nor order. However, the Charter violated the principles of legality as applied under the then existing French Civilist and Germanic legal traditions, though not necessarily under the views of some common law exponents.<sup>48</sup> To deny legitimacy to the Charter, however, would enable the perpetrators to escape criminal accountability for their misdeeds.

Interestingly, Grotius addressed this very dilemma 300 years earlier, when he asserted *crimen grave non potest non essere punibile*.<sup>49</sup> Without reference to Grotius, but certainly moved by the same philosophical conception, the Nuremberg Tribunal, in its Judgment with respect to one of the defendants, concluded as follows: “[S]o far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished.”<sup>50</sup> Certain basic truths thus remain immutable throughout the course of time and spring naturally to the minds of rational and thoughtful persons.

It is noteworthy, that such an articulation calls into question justice in accordance with certain values, but it also implicitly relies on what could be deemed an equity principle to reach this outcome. In fact, many of the protagonists and antagonists of the London Charter resort to equity principles without specifically referring to them in order to reach their legal conclusions. Those of the common law tradition, including positivists, could easily rely on equity principles, but to transcend the common law’s distinction between cases at law and matters of equity and their respective processes by freely merging them, as was the case in the previously quoted portion of the judgment, is a big leap.<sup>51</sup>

<sup>48</sup> See generally the second half of this chapter.

<sup>49</sup> HUGO GROTIUS, *DE JURE BELLI AC PACIS* (Libri Tres) (1625), reprinted in 3 CLASSICS OF INTERNATIONAL LAW 599 (Francis W. Kelsey trans., 1925), at ch. XXII, 3. Grotius defines natural law as the “dictate of right reasons which points out that a given act, because of its opposition to or conformity with man’s rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the author of nature.” *Id.* That definition is similar to that of Aquinas and Aristotle. See ST. THOMAS AQUINAS, *Treatise on Man*, 2 ac, Q. 95 art. 4. For an English translation of ST. THOMAS AQUINAS’ *SUMMA THEOLOGICA*, see the first complete American edition, published by Benziger Bros. Inc. (1947). See generally ETHICS, I and POLITICS, I (Gateway ed. 1954); see also ERIK WOLF, GROTIUS, PUFENDORF, THOMAS (1927) (retracing the links between the three and their approaches to natural law. But see HANS Kelsen, *PURE THEORY OF LAW* 214 (1967), where he states:

If we replace the concept of reality (as effectiveness of the legal order) by the concept of power, then the problem of the relation between validity and effectiveness of the legal order coincides with the more familiar problem of the relationship between law and power or right and might. And then, the solution attempted here is merely the scientifically exact formulation of the old truism that right cannot exist without might and yet is not identical with might. Right, (the law), according to the theory here developed, is a certain order (or organization) of might.

Kelsen, however, held that the principle of *ex post facto* would not apply to war crimes where the morality of punishment supercedes the legal formality of positivism. See PERCY E. CORBETT, *MORALS, LAWS & POWER IN INTERNATIONAL RELATIONS* (1956); HANS Kelsen, *supra* note 36, at 87–8; see also HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 128 *et seq.* (1959).

<sup>50</sup> See 22 IMT 444.

<sup>51</sup> See generally ZECHARIAH CHAFEE JR., *SOME PROBLEMS OF EQUITY* (1950); Walter W. Cook, *The Powers of Courts of Equity*, 15 COLUM. L. REV. 37 (1915). On English approaches to equity, see 1 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 395–476 (7th ed. 1956); and Oliver Wendell Holmes, *Early English Equity*, 1 LAW Q. REV. 162 (1885).



The equity principle reflected in the formulation of the London Charter derives in part from the Roman law maxim of *ex injuria ius non oritur*. The rationale of this equity principle is that one who participated in the subversion of the law should not benefit from it, or, as the equity maxim would have it, those with unclean hands cannot seek the benefits of equity.

Principles of equity existed in Roman law and were absorbed into the common law,<sup>52</sup> but they did not quite find their way in the French Civilist and Germanic legal systems, because their codified systems reflected a positivistic approach and their techniques of legal interpretation were also positivist. But once again, the common law as espoused by Justice Jackson prevailed.

In his opening statement at Nuremberg, Justice Jackson indirectly refers to this principle when he exclaims about the defendants in the dock:

It may be said that this is new law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of the law has taken them by surprise.

I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their program ignored and defied all law.

German law, any law at all was to these men simply a propaganda device to be invoked when it helped and to be ignored when it would condemn what they wanted to do. That men may be protected in relying upon the law at the time they act is the reason we find laws of retrospective operation unjust. But these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws. They cannot show that they ever relied upon International Law in any state or paid it the slightest regard.<sup>53</sup>

A corollary to that position is another equity maxim, that those who seek equity must do equity. Those who shaped the laws that permitted them to do their misdeeds should not be able to claim the protection of the legal defenses that they established for their own benefit prior to the commission of their misdeeds.

Equity, as stated above, is not a stranger to international law. Indeed, it is recognized as an alternative source of international law under Articles 38 of the Statute of the PCIJ and of the ICJ.<sup>54</sup> Consequently, the drafters of the London Charter and the IMT judges could have specifically relied on equity doctrine in support of certain propositions, but they did not. The common law drafters of the Charter and the IMT judges who applied it did not articulate their legal arguments in equitable terms, though they surely relied on them, probably because they would have been so alien to the other legal systems represented in the process. Instead, they reflected a laicized naturalist philosophy in the Grotian tradition, which they developed with more concern for pragmatism than

<sup>52</sup> See Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 477–84 (1961). Equity derives from the Roman Law's *aequitas* which was applied by the *praetor peregrinus* when outside the scope of the *ius civile*. It has its origins in the Aristotelian concept of *epieikeia*. St. Thomas also recognized the need for law to be tempered by reasoned equity. See *id.* at 480–81, particularly notes 158–60; see also Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

<sup>53</sup> ROBERT H. JACKSON, *THE NÜRNBERG CASE* 81–92 (1947, 2d printing 1971).

<sup>54</sup> Ruth Lapidoth, *Equity in International Law*, 22 ISR. L. REV. 159, 161 (1987); Statute of the International Court of Justice, 26 June 1945, 33 U.N.T.S. 993.

doctrinal purity. The architect of this approach in the drafting of the Charter was Justice Robert Jackson, who best reflected American legal realism in this episode.<sup>55</sup>

Naturalists, relative positivists, pragmatists, and utilitarians all found common ground, albeit from different vantage points, in upholding the legitimacy of the London Charter, even though most acknowledged its technical legal deficiencies. The enormity of the human harm had helped to overcome concerns about legal imperfections.<sup>56</sup> Thus, the facts shaped the outcome of the law.

For some pragmatists and utilitarians, the fundamental tenets of natural law, which assert the existence of a higher and immutable law, do not hold true. In their view, law is mutable, dynamic, and progressive. Thus, legal pragmatists and utilitarians support the Law of the London Charter, as do naturalists, but for different reasons. The former rely on relativism, empiricism, and realism, whereas the latter rely on metaphysical essences and transcendental beliefs.<sup>57</sup>

<sup>55</sup> Oliver Wendell Holmes best expressed it when he stated, "The Life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881). Experience, as he meant it, is the ability of the common law judge to interpret the law as he applies it to new and different contexts. See also Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (stating "The rational study of law is still to a large extent the study of history"); H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984). Another influential American jurist was Benjamin Cardozo. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>56</sup> von KNIERIEM, *infra* note 45, took a critical view of the entire legal process on the basis of legal positivism. See also Whitney R. Harris, *Book Review of The Nuremberg Trials by August von Knieriem*, 54 AM. J. INT'L L. 443 (1960). Other critical views are found in WILBOURN E. BENTON and GEORG GRIMM, *NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS* (1955); HANS-HEINRICH JESCHECK, *DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAFRECHT* (1952). Four of the defense lawyers at Nuremberg expressed such sentiments: Herbert Kraus (Chief Counsel for Hjalmar Schacht), *The Nuremberg Trial of the Major War Criminals: Reflections After Seventeen Years*, 13 DEPAUL L. REV. 233 (1964); Carl Haensel (Chief Counsel for the SS and SD), *The Nuremberg Trial Revisited*, 13 DEPAUL L. REV. 298 (1964); Otto Kranzbühler (Chief Counsel for Karl Dönitz), *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1965); Otto Pannenbecker (Chief Counsel for Wilhelm Frick), *The Nuremberg War-Crimes Trial*, 14 DEPAUL L. REV. 348 (1965). See also M. Cherif Bassiouni and Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in 1 INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 207 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Alfred M. de Zayas, *Der Nürnberger Prozess vor dem Internationalen Militär Tribunal (1945–1954)*, in *MACHT UND RECHT* 249 (H. von Alexander ed., 1990); Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 832–34 (2006) (recounting criticism).

See also H.O. Pappe, *On the Validity of Judicial Decisions in the Nazi Era*, 23 MOD. L. REV. 260 (1960); Edgar Bodenheimer, *Significant Developments in German Legal Philosophy since 1945*, 3 AM. J. COMP. L. 379 (1954); and Robert H. Jackson, *OPENING STATEMENT FOR THE UNITED STATES OF AMERICA, ON THE SUBJECT OF INTERNATIONAL MILITARY TRIBUNAL NO. I* (Nov. 21, 1945), *reprinted in* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 98, 99.

<sup>57</sup> For these different perspectives, see Kelsen, *supra* note 36; Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L L. 58 (1944); Sheldon Glueck, *WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT* (1944); Arthur L. Goodhart, *The Legality of the Nuremberg Trials*, 58 JURID. REV. 1 (1946); George A. Finch, *The Nuremberg Trial in International Law*, 41 AM. J. INT'L L. 20, 22 (1947); Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329 (1947); Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 42 AM. J. INT'L L. 405 (1948); JOSEPH B. KEENAN and BRENDAN F. BROWN, *CRIMES AGAINST INTERNATIONAL LAW* (1950); ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1960); GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1968); ANN TUSA and JOHN TUSA, *THE NUREMBERG TRIAL* (1995); M. Cherif Bassiouni, *Das Vermächtnis von Nürnberg: eine historische Bewertung fünfzig Jahre danach*, in *STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN* (Hankel & Stuby eds., 1995); *STRAFGERICHTE GEGEN MENSCHHEITSVERBRECHEN* (Hankel & Stuby eds., 1995).

Some relative legal positivists rejoin these two schools of thought because the premises of legitimacy of the positive law under which these acts were committed were absent. As Radbruch states in his famous FÜNF MINUTEN RECHTSPHILOSOPHIE:

“An order is an order,” the soldier is told. “A law is a law,” says the jurist. The soldier, however, is required neither by duty nor by law to obey an order that he knows to have been issued with a felony or misdemeanor in mind, while the jurists, since the last of the natural law theorists among them disappeared a hundred years ago, have recognized no such exceptions to the validity of a law or to the requirement of obedience by those subject to it. A law is valid because it is a law, and it is a law if in the general run of cases it has the power to prevail.

This view of the nature of a law and of its validity (we call it the positivistic theory) has rendered the jurist as well as the people defenseless against laws, however arbitrary, cruel, or criminal they may be. In the end, the positivistic theory equates the law with power; there is law only where there is power [ . . . ].

If laws consciously deny the will to justice, if, for example, they grant and deny human rights arbitrarily, then these laws lack validity, the people owe them no obedience, and even the jurists must find the courage to deny their legal character [ . . . ].

There are, therefore, principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles the natural law or the law of reason. To be sure, their details remain somewhat doubtful, but the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate skeptic can still entertain doubts about some of them.

In religious language the same thoughts have been recorded in two biblical passages. On the one hand it is written that you are to obey the authorities who have power over you. But then on the other, it is also written that you are to obey God before man – and this is not simply a pious wish, but a valid proposition of law. The tension between these two directives cannot, however, be relieved by appealing to a third – say, to the maxim: Render unto Caesar the things that are Caesar’s and unto God the things that are God’s. For this directive too, leaves the boundary in doubt. Rather, it leaves the solution to the voice of God, which speaks to the conscience of the individual only in the exceptional case.<sup>58</sup>

Thus, although naturalists and some pragmatists and utilitarians could agree – for different reasons – that the Law of the London Charter was justified, rigid positivists could not share this position.<sup>59</sup> Pragmatists and utilitarians saw in the Law of the Charter the triumph of social policy, which holds that empiricism produces the law that better serves humankind.<sup>60</sup> Naturalists saw in it the application of a higher metaphysical

<sup>58</sup> GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 327–29 (Erik Wolf and Hans-Pieter Schneider eds., 1973).

<sup>59</sup> See WILLIAM J. BOSCH, *JUDGMENT ON NUREMBERG* 40–66 (1970). In an incisive comment, Professor Wright states, “The favorable or unfavorable character of comments upon events related to international law often depends less upon the nature of the events than upon the theory of international law assumed by the commentator.” Wright, *supra* note 57, at 405.

For a contemporary policy-oriented approach, see generally MYRES MCDUGAL AND FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961).

<sup>60</sup> See generally PERCY E. CORBETT, *THE STUDY OF INTERNATIONAL LAW* (1955); and ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS*, 114 (rev. ed. 1954). For a contemporary view see, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

law that supercedes positive law, the triumph of good over evil, which is always distinguishable, positive law notwithstanding.<sup>61</sup> Moreover, positivists, who do not accept the Kantian-Hegelian-Austinian power concept from which positive law derives its absolute legitimacy, saw an opportunity to reassert the prerequisite of legitimacy of the legal order and of the legal process before the positive law can be held to apply more or less absolutely.

Paradoxically, Kantian-Hegelian-Austinian positivists might find validity in the London Charter on the same grounds they found validity for those who obeyed prior laws, because for them “law is law.” However, they would then argue that to prosecute and punish such persons still would be unjust due to their opposition to the retroactivity of criminal laws as violating one of the principles of legality, namely, the prohibition against *ex post facto* laws.

The two opposing views of naturalism and strict positivism rely on opposing morality arguments in their respective support and criticism of the London Charter’s legal validity – the naturalists arguing morality as an end, and the strict positivists advancing morality as a means. For the naturalists, society must prosecute and punish CAH for moral reasons. For the positivists, to prosecute and punish those who acted pursuant to the then existing national positive law, which was not explicitly prohibited by positive international law, would be immoral, as well as an illegal violation. Obviously, a judgment was necessary, and in this case, the facts were certainly as significant in the choice as were the competing values. Thus, the facts were the inexorable driving force behind the logic leading to that choice.<sup>62</sup> In this context, the words of Saint Thomas Aquinas, echoing those of Saint Augustine, have a powerful appeal:

As Augustine says, *that which is not just seems to be no law at all*: wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above. Consequently, every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law but a perversion of law.<sup>63</sup>

There is something perverse in rejecting the validity of the Law of the London Charter, because such rejection would legitimize the legal order under which CAH were

<sup>61</sup> See Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660 (1958). Fuller asserts:

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws, they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, to escape even those scant restraints imposed by the pretence of legality, when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law. *Id.*

See also Anthony A. D’Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS. 202 (1981); PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

<sup>62</sup> See generally GIDON GOTTLIEB, *THE LOGIC OF CHOICE* (1968); PETER COFFEY, *THE SCIENCE OF LOGIC* (1912).

<sup>63</sup> See ST. THOMAS AQUINAS, *supra* note 45, at 78 (emphasis added).

committed and would sanction the notion that might makes right.<sup>64</sup> This is exactly what naturalists of all tendencies reject the most, and in this case, so do many relative positivists, pragmatists, and utilitarians.

However, the Charter can also be described as the embodiment of might makes right because it enacted a new law based on the power derived from victory. Thus, conflicting legal approaches are not only a consequence of different legal techniques, but of different philosophical perspectives embodying different values.

Professor Friedmann summarizes these issues as follows:

The first possible approach is that of transcendental or “supernatural” ethics, which corresponds to the orthodox natural law approach in legal philosophy. This approach would regard the type of decrees that led to Auschwitz and Belsen as contrary to a natural law of respect for human dignity, as an emanation either of the law of God or of universal reason. It would conclude that a law clearly offending against these elementary principles was void and therefore not binding. From this premise flows the right to punish those who offended the higher law by obeying the positive law. In technical terms, this means that a subsequent legal order such as that expressed by the Nuremberg Charter or by postwar German legislation is made applicable retroactively.

A second approach would be that of the intuitionist ethics. The rightness or wrongness of a conduct would be determined by an objectively but intuitively known feeling of right or wrong, a *Rechtsgefühl* or a *sentimento giuridico*. The difficulty with this approach is that an intuitive evaluation can lead the individual concerned to very different decisions. He may intuitively feel the wrongness of an extermination decree, and derive from this his duty to disobey it, or he may on the contrary accept the injunction of the Nazi law of 1935 which empowered judges to inflict punishment “in accordance with the sound instincts of the people,” interpreting such sound instincts as dictating the persecution and even extermination of Jews, Slavs, and other inferior races. Or he may be inspired by the feeling: “Right or wrong, my Country.” Intuition may help to inspire marginal decisions in the sense indicated by Gény, but if asked to guide in the basic choice of values it yields nothing.

Third, there are various relativistic approaches. One of these, that of Dewey, would be based on a pragmatic “logic of enquiry, directed to the exploration of a given value.” Such an approach would tentatively appraise the Nazi laws that “legalized” racial oppression, degradation of the human personality, and mass murder, as evil. It would, however, study the question of subsequent punishment of those who obeyed the Nazi laws in the light of feasibility. Such a study might show that a complete implementation of the goal of punishing everybody who participated in the making and execution of such laws was simply not feasible. The result of such a pragmatic enquiry might be that a more modest

<sup>64</sup> Léon Duguit, *The Law and the State*, 31 HARV. L. REV. 1, 8 (Frederick J. de Sloovere trans., 1917). Duguit asserts:

There is no will of the State; there are only individual wills of those governing. When they act they are not the mandatories or the subordinate parts of a supposed collective person, or an assumed personality, the State, whose will they express and execute. They express and carry out their own wills; there is no other. Any other conception of the State is fantastic.

See also Léon Duguit, *Objective Law*, 20 COLUM. L. REV. 817 (1920), 21 COLUM. L. REV. 17 (1921). Without reference to Duguit, and probably for most of the London Charter’s drafters without even knowledge of his thoughts, the concept of individual criminal responsibility was established and the artificial shield of state sovereignty was removed. This stripped those accused of the traditional defense of “act of state.” See *infra* ch. 7.

goal, *i.e.*, the selection for punishment or other sanctions of those prominently associated with the Nazi regime through their high position or known deeds, would implement more adequately the objective of disapproval of the Nazi values, and of treating equals equally.

While pragmatic ethics are compatible with a relativistic approach, the basic attitude of relativistic ethics would be that whether to obey or disobey the Nazi laws was essentially a question of choice between the religious, humanistic, hedonistic, and other values relevant to the problem. One possible value – which indeed was chosen by the great majority of Germans – was that of obeying the positive authority of the State, at the expense of the principles of human dignity, compassion, and charity. The rationalistic ethics that are usually combined with the relativistic approach would demand a careful study of the means by which the different values would have to be implemented. It would show, for example, that the necessary implication of legal discrimination between “Aryans” and Jews would lead not only to the undermining of the family but also to a profound modification of the principles of equality, in contract, in criminal law, and in other fields. Such clarification of the goals might at least articulate and underline the severity of the choice between values.

“Noncognitivist” ethics would dismiss the entire problem as beyond the reach of rational discussion. It would regard the punishment of Nazi criminals, or their non-punishment, as expressions of conflicting emotions, be they the retribution imposed by an outraged humanity, a sophisticated version of the traditional exercise of the rights of victors over the vanquished, or on the other hand a skeptical or even cynical acquiescence in the man’s cowardice.

The solution suggested later in this book for these problems is predicated on the belief that no legally compelling solution can be found for this type of problem. Whatever the technical device, a subsequent and differing set of values has to be substituted for the values governing the offensive action.<sup>65</sup>

Many viewed the London Charter as the product of a historical legal ripening process, even though positivists, opposing that view, pointed to the absence of specific norms pre-existing the facts. Naturalists, on the other hand, viewed the Charter as the legally valid embodiment of a compelling higher law. Some pragmatists and utilitarians, recognizing the evolutionary nature of international law, saw the Charter as the enunciation of a positive norm that was grounded in a variety of historical legal precedents whose evolution was justified by moral-ethical considerations and by legal policy.

The question of whether, at the time the London Charter was enacted, this ripening process had reached the appropriate level of legal sufficiency under some legal theory remained to be legally demonstrated. Therefore the basic line drawn between supporters and critics of the Charter is whether it is grounded in prior law, and thus declarative, or whether it is essentially innovative. For strict positivists, the absence of specific pre-existing positive law remained an insurmountable obstacle to the legality of the Charter. Justice Jackson best expresses these divergent positions as follows:

The principles of the charter, no less than its wide acceptance, establish its significance as a step in the evolution of a law-governed society of nations. The charter is something of a landmark, both as a substantive code defining crimes against the international

<sup>65</sup> WOLFGANG G. FRIEDMANN, *LEGAL THEORY*, 40–42 (5th ed. 1967); *see also* *PHILOSOPHY OF LAW* (Joel Feinberg & Hyman Gross eds., 4th ed. 1991).



community and also as an instrument establishing a procedure for prosecution and trial of such crimes before an international court. It carries the conception of crime against the society of nations far beyond its former state and to a point which probably will be exceeded, either through revision in principle or through restatement, in the foreseeable future. There is debate as to whether its provisions introduce innovations or whether they merely make explicit and unambiguous what was previously implicit in international law. But whether the London Conference merely codified existing but inchoate principles of law, or whether it originated new doctrine, the charter, followed by the international trial, conviction, and punishment of the German leaders at Nürnberg, marks a transition in international law which calls for a full exposition of the negotiations which brought it forth.<sup>66</sup>

Proponents and opponents of the Law of the London Charter claimed moral, ethical, and equitable considerations, but few of them dealt systematically with the variety of legal issues arising under international law.<sup>67</sup> Keenan and Brown note:

It is the authors' contention that the Tokyo and Nürnberg war crimes trials were a manifestation of an intellectual and moral revolution which will have a profound and far-reaching influence upon the future of world society. . . . They maintain that the international moral order must be regarded as the cause, not the effect, of positive law; that such law does not derive its essence from physical power, and that any attempt to isolate such law from morals is a symptom of juridical schizophrenia caused by the separation of the brain of the lawyer from that of the human being.<sup>68</sup>

Corbett also espoused these views by stating:

Even if such justification is of moral rather than strictly legal significance, it is of great importance; for, in the last analysis, international morality is the soil which fosters the growth of international law. It is international morality which determines the general direction of the development of international law. Whatever is considered "just" in the sense of international morality has at least a tendency of becoming international "law."<sup>69</sup>

Last, Quincy Wright maintains:

[R]egularly enforced world criminal law applicable to individuals necessarily makes inroads upon national sovereignty and tends to change the foundations of the international community from a balance of power among sovereign states to a universal federation directly controlling individuals in all countries on matters covered by international law.<sup>70</sup>

The fact that criminal law has been held to apply territorially is nothing more than that discipline's reflection of the concept of sovereignty.<sup>71</sup> As sovereignty erodes and states partake more in extraterritorial interests and are affected more by extraterritorial activity, they share more common interests that need to be safeguarded irrespective of territorial

<sup>66</sup> REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS viii (U.S. Gov't Print. Off. 1945) [hereinafter JACKSON'S REPORT].

<sup>67</sup> Two works are notable exceptions, those of VON KNIERIEM, *supra* note 45; WOETZEL, *supra* note 57.

<sup>68</sup> KEENAN AND BROWN, *supra* note 57, at v–vi.

<sup>69</sup> CORBETT, *supra* note 60, at 16; *see also* HANS Kelsen, LAW AND PEACE IN INTERNATIONAL RELATIONS 37–38 (1948).

<sup>70</sup> Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 47 (1947).

<sup>71</sup> HENRI DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL 11–13 (1928).



limitations. Thus, the territoriality of criminal law loses some of its relevance and, at times, becomes a burden and a limitation on the needs and interests of states.<sup>72</sup>

Principles of justice are necessarily unbound by space and time, even though, for reasons of policy or opportunity, territorial and time limitations are placed on most criminal laws.<sup>73</sup> In practice, it is the policy or opportunity that brings about the outcome of that choice, not the substance of the right or the duty. Crimes do not disappear merely in time or through a lack of prosecution – these are prosecutorial and punishment policy decisions that arise after the criminal fact. Above all, they have no bearing on the harmful results and victimization produced by the crime, even when for policy reasons they may no longer be prosecutable or punishable.

The emergence of individual responsibility under ICL<sup>74</sup> and of individual rights under international protection of human rights has evidenced a breakdown in the shield of national sovereignty.<sup>75</sup> Thus, one notes the current trend towards establishing the universality of individual rights and duties. This entitlement necessarily results in individual responsibility for those who breach international rules irrespective of national law.

### §2.1. Pragmatism Prevails

Only rigid positivists would uphold the validity of the Nazi German laws according to which CAH had been committed. All other philosophical views would invalidate the national laws of Nazi Germany that mandated or permitted the commission of those acts falling within the meaning of Article 6(c). However, the logical conclusion to reject such post-1935 Nazi laws would have been to apply German criminal law as it existed before the Nazi changes, instead of the London Charter, which enacted an alternative normative basis for the accountability of those charged with CAH. The drafters of the Charter, however, did not pursue this arduous path. Instead, they simply relied on their powers delegated by the respective Allies to engage in their legislative exercise. In a sense, their premise was equivalent to that of the rigid positivists who viewed law as the outcome of power. Yet the drafters believed that theirs was not a pure exercise in power, but the redress of a legal imbalance produced by prior abuse of power. Mindful of these considerations, Jackson says in his opening statement, “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power ever has paid to reason.”<sup>76</sup>

On the other hand, some authors, like Schwarzenberger, believed that the London and Tokyo Charters were not declarative of international law at the time, but were merely meant to punish the atrocious behavior of the Nazi and Japanese regimes, because their deeds could not go unpunished. Thus, he states:

[the] limited and qualified character of the rule on crimes against humanity as formulated in the Charters of the Nuremberg and Tokyo Tribunals militates against the

<sup>72</sup> For the nonapplicability of statutes of limitations to war crimes and CAH, see *infra* ch. 4, Part B, §3.

<sup>73</sup> *Id.*

<sup>74</sup> See *infra* ch. 7, §1.

<sup>75</sup> See, e.g., M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193 (1982).

<sup>76</sup> JACKSON, *supra* note 53, at 31.

rule being accepted as one declaratory of international customary law. This rudimentary legal system [of international law] does not know of distinctions as subtle as those between crimes against humanity which are connected with other types of war crime and, therefore, are to be treated as analogous to war crimes in the strict sense and other types of inhumane acts which are not so linked and, therefore, are beyond the pale of international law. The Four-Power Protocol of October 6, 1945, offers even more decisive evidence of the anxiety of the Contracting Parties to avoid any misinterpretation of their intentions as having codified a generally applicable rule of international customary law.<sup>77</sup>

Schwarzenberger concludes that what the Four Powers intended to do, under the heading of “crimes against humanity,” was to deal retrospectively with the particularly “ugly facets of the relapse of two formerly civilized nations into a state of barbarism,”<sup>78</sup> but that position was not generally shared by most of his contemporaries.<sup>79</sup> Indeed, even the rigid legal positivism expressed in the narrow interpretation expounded by critics of the London Charter<sup>80</sup> stops short of reaching a contrary logical legal conclusion: If a deed is recognized as deserving punishment, where does that recognition stem from? Would such recognition merely be another form of atavistic and vindictive expression, or is it based on the existence of an unarticulated premise that certain “general principles” exist, making such deeds deserving of punishment? If so, then how can a principle that recognizes the need for punishability not be based, at least implicitly, on some existing prescription? This is essentially a question that regards the meaning, content, and application of the principles of legality as they arise in the different national legal systems.<sup>81</sup> However, considering that the conventional and customary regulations of armed conflicts refer to and rely upon basic “laws of humanity,” as specifically expressed in the Preamble of 1907 Hague Convention, the conclusion is inescapable that an unarticulated legal premise does exist. In this perspective, the criticism of legal positivists appears to be more a question of form than one of substance. As Professor D’Amato aptly states:

Not only do positivists insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle.<sup>82</sup>

The observations made in this chapter denote the everlasting tension between the law as it exists, as it is changed, how it is changed, and how it is applied. This tension is reflected in Jackson’s prescient opening statement: “We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.”<sup>83</sup> That is why it should be remembered that the post-World War II prosecutions suffered from a moral flaw: They applied only to the vanquished. This uneven application of the law to all those who breach it tainted the IMT and IMTFE trials, the CCL 10 Proceedings,

<sup>77</sup> SCHWARZENBERGER, *supra* note 57, at 499.

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

<sup>79</sup> See *infra* ch. 3, §4.

<sup>80</sup> See, e.g., SCHWARZENBERGER, *supra* note 57, at 479, 483; Lauterpacht, *supra* note 57.

<sup>81</sup> See *infra* the second half of this chapter.

<sup>82</sup> Anthony A. D’Amato, *The Moral Dilemma of Positivism*, 20 VAL. U. L. REV. 43 (1985); see also ANTHONY A. D’AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 294–302 (1984); *contra* Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624–29 (1958).

<sup>83</sup> See JACKSON, *supra* note 53, at 33–4.

and other post-World War II trials with the one-sidedness of victor's justice.<sup>84</sup> The very moral-ethical premises of the legality of these proceedings were compelling on all of those who violated the same law to stand trial equally for their deeds, but that did not occur.<sup>85</sup> In fact, even among the Axis powers, the same principles did not apply equally to all accused. The United Nations War Crimes Commission (UNWCC) listed some 750 Italians as accused war criminals,<sup>86</sup> but the requests for surrender of some of these offenders by Yugoslavia and Ethiopia were never granted by neither the Allies occupying Italy, nor by the subsequent provisional Italian government, despite the clear mandate of the Italian Armistice Agreement.<sup>87</sup> Political and pragmatic considerations guided the decisions and choices of the London Charter's drafters,<sup>88</sup> but the legacy they left remained affected by certain imperfections. Curiously, some of the same imperfections appeared in the statutes and jurisprudence of the ICTY, ICTR, and ICC, namely, the

<sup>84</sup> See H. MONTGOMERY BELGION, EPITAPH ON NUREMBERG (1947). German philosopher Karl Jaspers noted:

[T]he might of the victors is not law. Success in war does not imply a tribunal for law and truth. Such a tribunal could not possibly objectively investigate and judge war guilt and war crimes. Such a court must necessarily be partisan. Also a court even of neutrals would be partial, since the neutrals are powerless and, in fact, in the party of the victors. Only a court backed by a power able to enforce the decision on both contending parties could judge impartially.

The objection to this trial as pseudo-justice continues: after every war the guilt of it is laid to the loser. He is forced to the admission of his guilt. The economic exploitation following the war is disguised as a reparation for guilt. Pillaging is falsely put forth as an act of justice. If there can be no impartial justice, then there might better be open force. That would be at least honest and also easier to bear.

Karl Jaspers, *The Significance of the Nurnberg Trials for Germany and the World*, 22 NOTRE DAME LAW 150, 155 (1946). He went on to state:

The pseudo-justice of the court, according to this objection, shows itself finally in the fact that the acts declared criminal are judged by the court only when they have been committed by the vanquished nations. These same acts committed by sovereign or victorious nations are passed over in silence and are not even discussed, let alone punished.

Against all this it should be said that might and brutal force are, as a matter of fact, a decisive reality in the world of men. However, they are not the sole decisive reality. The predominance of this reality abolishes every reliable relationship between men. As long as it predominates no agreement is possible. As Hitler has stated it: 'Treaties last only as long as they correspond to self interest.' And he has acted accordingly. But over against this stands the will, which despite the admission of the reality of might and that nihilistic concept, considers it something which should not exist and which must therefore be by all means opposed.

For in human affairs reality does not necessarily mean truth. To this reality a rather different reality is to be opposed. And whether this other reality is to be effected depends upon the will of men. Each one must honestly know where he stands and what he wishes.

From this point of view, it must then be said that the trial, as a new attempt to promote order in the world, does not lose its meaning even if it cannot yet base itself upon a legal world order, but is still necessarily handicapped by political considerations. It does not yet take place as does a court trial within an orderly state. *Id.* at 156.

<sup>85</sup> *Id.* and also ALFRED M. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU 1939–1945* (1989) (revealing German documentation of Allied war crimes).

<sup>86</sup> Only a few trials were held in Italy by British war crimes trials for crimes committed by Italians against troops fighting as part of the British armed forces. See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 30 (1997).

<sup>87</sup> See *infra* ch. 3, §4.

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

lack of specificity in the definition of the crime, the uncertainty as to the required legal elements pertaining to the general part, the absence of a normative statement as to the applicable penalties, the absence of normative limitations on the power of the judges in meeting out cumulative sentences and what constitutes mitigating and aggravating factors, the absence of a normative source (ICTY and ICTR) for rules of procedure and evidence (leaving it to the judges), and the broad and discretionary power of judges to stray from strict interpretation and application of the norm to far-reaching reasoning by analogy and discovery of law.

The framing of the London Charter, its value bases, and the articulation of its norms were based on classical legal structuralism, but the drafters were selective. When consistency stood in the way of their intended purpose, they disregarded the very structuralism they relied upon without the slightest concern for their deviations. However, in this respect they exercised what contemporary critical legal studies commentators call the reversibility of legal arguments and the determinacy of application whose ultimate goals are self-validation. The end seemed to justify the means, and if the sacrifice to be made was legal consistency and coherence, it was probably felt to be minor in exchange for the larger gains of advancing the international rule of law.

The drafters of the London Charter, who in their representative capacity were also the judges and prosecutors, employed the same technique as all legal systems throughout history – they separated rules of conduct from rules of decision. The Charter was essentially a set of decision rules that, in Professor Dan Cohen's terms, maintained a legitimized "acoustical separation" from the pre-existing conduct rules.<sup>89</sup>

## §2.2. *The German Legal System*

If one way of legitimizing the London Charter is to rely implicitly on the German legal system, an examination of that legal system is foundational. The drafters of the Charter and the judges of the IMT did not, however, address the German legal system. There are three reasons for that omission. First, those who represented the victorious Allied Powers did not want to give any color of legitimacy to German law. Second, if they did so, they would not have been able to circumvent that system's rigid positivistic approach. Third, they did not want to give the defendants an opportunity to argue the *Führerprinzip* as a way of overcoming the elimination of the defense of obedience to superior orders. The German legal system has the oldest and most consistent tradition of recognizing and applying the principles of legality, though not without exceptions. It is reported that the Teutonic tribes (919–1493) included in their laws the principle of nonretroactivity of penal laws and that of no punishment without law. This historical background and the inspiration of Roman law were the basis of the Germanic legal system's adherence to the principles of legality until 1935, when Nazi Germany briefly interrupted this long-standing legal tradition.

The history of German codified criminal law finds its best expression in the *Constitutio Criminalis* of 1532, promulgated by Charles V. The model for this codification was the earlier Bambergensis Code of 1507, whose Articles 104 and 105 included the principle of *nullum crimen sine lege*, but also recognized the validity of analogy. The *Constitutio Criminalis* contained the same provisions in Articles 125 and 126, which used almost the

<sup>89</sup> Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

same language as the Bambergensis Code. Likewise, the principle of judicial analogy in interpreting the laws was recognized. Prior to the unification of Germany in 1870, however, newer codifications did not prohibit analogy. The Prussian Code of 1721 provided that, with respect to offenses or other matters not contained in the respective codes, the judge could resort to *ex acquo aliquo et bono*, whereas the Bavarian Code of 1751 allowed resort to *ex acquitate et analogia juris*.<sup>90</sup>

In 1794, the Prussian Criminal Code, which borrowed from the Austrian Code of 1787, was the first to establish the prohibition against analogy. Franz Von Liszt, who was one of the major influences on Austrian criminal law, proclaimed that the principle “*nullum crimen* [was the], *Magna Charta Libertatum* [of the offender].”<sup>91</sup> However, it should be noted that the preceding Austrian Code of 1769 permitted resort to analogy, though it limited analogy to its application in accordance with the principles laid down in the Code.

The German Criminal Code of 1871, however, contained in Article 2 a rigid norm on the principles of legality that prohibited the application of legislative and judicial analogy. It states “No Punishment can be inflicted unless such punishment was legally defined before the act was committed. If the law is changed between the time at which the act was committed and the sentence is pronounced, the milder of the laws should be applied.”<sup>92</sup> Later, the 1919 Weimar Constitution enshrined these principles in Article 116 that states “Punishment can be inflicted for only such acts as the law had declared punishable before the act was committed.”<sup>93</sup>

The drafters of the Nazi law of June 28, 1935, which repealed Article 2 of the 1871 Code, were mindful of Germany’s legal attachment to the principles of legality and, thus, sought to articulate their law, repealing the principles in terms of an extension of the rule of analogy by stating:

Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished. If no determinable penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best.<sup>94</sup>

<sup>90</sup> For a German historical perspective, see BENEDICT CARPZOV, *PRACTICAE NOVAE IMPERIALIS SAXONICAE RERUM CRIMINALIUM* Pt. III, quest. 133 (*de arbitrariis sen extraordinariis poenis*) (Frankfurt ed. 1758). For a post-1800 perspective, see PAUL J.A. VON FEUERBACH, *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS* (Carl J.A. Mittermaier ed., 14th ed. 1847); KARL SIEGERT, *GRUNDZÜGE DES STRAFRECHTS IN NEUEM STAAT* (1934); HEINRICH HENKEL, *STRAFRICHTER UND GESETZ IM NEUEM STAAT* (1934); Richard Goetzeler, *Der Grundsatz nulla poena sine lege*, 104 *GERICHTSSAAL* 343 (1934); FRANZ GÜRTNER AND ROLAND FREISLER, *DAS NEUE STRAFRECHT* (1936); Erich Schinnerer, *Analogie und Rechtsschäpfreng*, 55 *ZSTW* 75 (1936); ACKERMANN, *supra* note 13.

<sup>91</sup> VON LISZT, *supra* note 13, at 110; *Die Deterministischen Gegner des Zweckstrafen*, 13 *ZSTW* (1893).

<sup>92</sup> German Criminal Code of 1871, *Translated and reprinted in* VON KNIERIEM, *supra* note 45, at 7. The full text of the German Criminal Code can be found in GEOFFREY DRAGE, *THE CRIMINAL CODE OF THE GERMAN EMPIRE* (1885).

<sup>93</sup> See also 1919 Weimar Constitution, Art. 116 *reprinted in* RENÉ BRUNET, *THE GERMAN CONSTITUTION* 324 (Joseph Gollomb trans., 1922).

<sup>94</sup> See Lawrence Preuss, *Punishment by Analogy in National Socialist Penal Law*, 26 *J. CRIM. L. & CRIMINOLOGY* 847 (1936); James V. Bennett, *Notes on the German Legal and Penal System*, 37 *J. CRIM. L. & CRIMINOLOGY* 368, 372–73 (1946); see also FRITZ M. MARX, *GOVERNMENT IN THE THIRD REICH* (2d ed. 1937); FRITZ ERMARTH, *THE NEW GERMANY: NATIONAL SOCIALIST GOVERNMENT IN THEORY AND PRACTICE* (1936); INGO MÜLLER, *HITLER’S JUSTICE* (1991); and e.g., H. Arthur Steiner, *The Fascist Conception of Law*, 36 *CAL. L. REV.* 1267 (1936); Frederick Hoefel, *The Nazi Penal System B I*, 35 *J. CRIM. L. & CRIMINOLOGY* 385

Thus, analogy was permissible if the judicially created crime was within the scope of the penal law and foreseeable based on the “sound perception of the people.”<sup>95</sup> German criminal law literature between 1932 and 1936 extensively debated the nature of the new legal order, that is, *Regierungsrecht* or *Staatsrecht*, *Führerrecht*, *Völkstaatsrecht*,<sup>96</sup> and, inevitably, the division of opinion reflected different philosophical perceptions of the law and the state, thus highlighting the political implications of the principles of legality and its corollary prohibition in whole or in part of judicial analogy.

The London Charter implicitly relied on what was concluded above, but there is little evidence in the drafting history of the Charter<sup>97</sup> that such research was undertaken. It can be assumed, however, that such learned jurists relied on their personal knowledge and beliefs in their determination of the issue. There is no question in this writer’s mind that they all knew that this was the weakness of the entire undertaking. Indeed, the IMT and IMTFE judgments and the CCL 10 Proceedings indicate that this question was consistently raised, but these judgments dealt with it only superficially, except for the dissents of Judges Pal and Röling, as discussed below.

Before Nuremberg and Tokyo, the question of legality arose only once in the history of the PCIJ, in the *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, December 4, 1935*.<sup>98</sup> It never came before the ICJ.

### §3. The Prosecution’s Treatment of the Question under the London Charter, the IMTFE, and Control Council No. 10

The drafters of the London Charter, in this writer’s opinion, purposely sidestepped the question of the principles of legality<sup>99</sup> in order to avoid providing an opportunity for the defense to challenge the Charter’s validity. During the deliberations on the formulation of the Charter,<sup>100</sup> the participants were particularly concerned with defining the unprecedented “crimes against peace,” which presented the most difficult challenge from the perspective of the principles of legality. The legislative approach they developed for that crime was also in part applied to the other two categories of crimes, and that

(1945); A.H. Campbell, *Fascism and Legality*, 62 LAW Q. REV. 141 (1946); Graham Hughes, *Book Review*, 24 VAND. J. OF TRANSNAT’L L. 845 (1991) (reviewing INGO MÜLLER, *HITLER’S JUSTICE* (1991)).

<sup>95</sup> The approach is no different than what the drafters of the London Charter did in extending, by analogy, conduct prohibited as war crimes to CAH in reliance upon the higher “principles of humanity.” See generally *infra* ch. 3.

<sup>96</sup> See, e.g., *supra* notes 90, 94.

<sup>97</sup> See *infra* ch. 3, §4.

<sup>98</sup> *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, December 4, 1935*, 3 PCIJ Series A/B No. 65 (Dec. 4, 1935), at 514.

<sup>99</sup> See *infra* §2.

<sup>100</sup> See Herbert Wechsler, in BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD* 86 (1982):

It may be [suggested] that any treaty definition which goes beyond the laws of war would have retroactive application in violation of the principle *nullum crimen sine lege*, a principle that the Nazis rejected in Germany but that would ordinarily weigh with us. I think it a sufficient answer that the crime charged involves so many elements of criminality under the accepted laws of war and the penal laws of all civilized states that the incorporation of the additional factors in question does not offer the type of threat to innocence which the prohibition of *ex post facto* laws is designed to prevent.

approach was simply to establish that what the drafters had agreed upon would be deemed to constitute an international crime. In short, they relied on their power to legislate. That position is illustrated by a comment of one of the drafters at the London Conference, Sir David Maxwell Fyfe, who stated:

I think that my points are largely points of clarification. But there is one fundamental point that I want to see whether we are agreed on. I think we are. *I want to make clear in this document what are the things for which the Tribunal can punish the defendants. I don't want it to be left to the Tribunal to interpret what are the principles of international law that it should apply.* I should like to know where there is general agreement on that, clearly stated – for what things the Tribunal can punish the defendants. *It should not be left to the Tribunal to say what is or is not a violation of international law.* That is why I wanted in the English draft the words “convict and sentence after trial” – that is, the Tribunal should have the power to “try, convict and sentence.” Developing the same point, I am a little worried by the inclusion in a) of “in violation of the principles of international law and treaties,” because I would be afraid that that would start a discussion before the Tribunal as to what were the principles of international law. I should prefer it to be simply “in violation of treaties, agreements, and assurances.” Now b) and c) – paragraph b) deals with the civilian population and c) deals with the actual waging of war. I'm not clear why the draft includes at the end of b) “and other violations of the laws and customs of warfare,” because the draft seems to cover that so explicitly in c). But I should have preferred to leave it “ill-treatment of civilians” – stop at “slave labour.” “And other violations of the laws and customs of warfare” seems to limit it.<sup>101</sup>

He further stated:

I should like, greatly daring, to try to achieve a compromise between Mr. Justice Jackson and Professor Trainin, because on a first hearing there is nothing in what Professor Trainin has said with which I disagree at all. It seems to me that this is the first point: Mr. Justice Jackson says, “I want these acts defined as crimes;” Professor Trainin has said, “It is quite true that the American draft is quite precise in that it states these are the violations.” It seems to me that on that point in the introductory paragraph there is really substantial agreement except for the argument against “ex post facto” legislation which Professor Gros put forward.

I put this point to Professor Gros: The drafting committee's draft says that “The following acts shall be considered criminal violations of International Law [ . . . ].” Our usual word in English statutes is “deemed,” but there is no difference. It is a common word with us. Doesn't that meet Professor Gros' point that *we are not declaring the law as it was but the law as we agree on it for this purpose?*<sup>102</sup>

Responding to the *ex post facto* debate, Justice Jackson argues: “I think it is entirely proper that these four powers, in view of the disputed state of the law of nations, should settle by agreement what the law is as the basis of this proceeding [ . . . ].”<sup>103</sup> The position of Sir David Maxwell Fyfe prevailed: “*What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the*

<sup>101</sup> See JACKSON'S REPORT, *supra* note 66, at 328–29 (emphasis added).

<sup>102</sup> *Id.* at 334 (emphasis added).

<sup>103</sup> *Id.* at 329.



*international law is so that there won't be any discussion on whether it is international law or not [...]*.”<sup>104</sup>

Later in his opening statement at the IMT, Jackson affirmed:

The validity of the provisions of the Charter is conclusive upon us all whether we have accepted the duty of judging or of prosecuting under it, as well as upon the defendants, who can point to no other law which gives them a right to be heard at all. My able and experienced colleagues believe, as do I, that it will contribute to the expedition and clarity of this trial if I expound briefly the application of the legal philosophy of the Charter to the facts I have recited.

While this declaration of the law by the Charter is final, it may be contended that the prisoners on trial are entitled to have it applied to their conduct only most charitably if at all. *It may be said that this is new law, not authoritatively declared at the time they did the acts it condemns, and that this declaration of the law has taken them by surprise.*

I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their program ignored and defied all law. That this is so will appear from many acts and statements, of which I cite but a few. In the Führer's speech to all military commanders on November 23, 1939, he reminded them that at the moment Germany had a pact with Russia, but declared, “Agreements are to be kept only as long as they serve a certain purpose.”<sup>105</sup>

Since some of the drafters were also the prosecutors and judges at the IMT, however, they were subsequently able to control the judicial outcome of the issue of legality, which is the advantage of being both lawmaker and interpreter of that very law.<sup>106</sup>

The Nuremberg defendants attacked the crimes against the peace charge most vehemently,<sup>107</sup> contending “no sovereign power has made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.”<sup>108</sup> In its final judgment, the Tribunal avoided the defense, concluding that the Law of the London Charter was “decisive” and “binding,” because it was the manifestation of the sovereign legislative power of the Allies.<sup>109</sup> The Tribunal declared further that the Charter was the “expression of international law existing at the time of [the Charter's] creation,”<sup>110</sup> even though two of the three crimes prosecuted at Nuremberg were novel. Thus, with regard to crimes against the peace, the

<sup>104</sup> *Id.* at 99 (emphasis added).

<sup>105</sup> 2 IMT 143, 144; see also JACKSON, *supra* note 53, at 81 (emphasis added).

<sup>106</sup> Professor Henri Donnedieu de Vabres, an IMT judge, only one year after the judgment, said: “*Le statut, s'il exprime, en principe, la valente des Etats contractants est en fait l'oeuvre de quelques techniciens dont plusieurs se sont retrouvés parmi les membres du Tribunal Militaire International.*” Donnedieu de Vabres, *supra* note 41, at 481, 556 (1947). See also n.1, at 556 (noting the involvement of three of the London Charter's members, two were judges (Nikitchenko for the USSR, Falco as alternate judge for France), and one, Robert Jackson, was Chief Prosecutor for the United States).

<sup>107</sup> The defendants' motion did not address the unconventionality of CAH at all. See Motion Adopted by All Defense Counsel on 19 November 1945, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 168–70 (1947).

<sup>108</sup> Judgment, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 462 (1948) [hereinafter Nuremberg Judgment].

<sup>109</sup> Nuremberg Judgment, *supra* note 108, at 461.

<sup>110</sup> *Id.*

Tribunal concluded that it was not “strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement.”<sup>111</sup>

The answers, though unsatisfactory, to the problems raised by the principles of legality are found in the IMT and IMTFE proceedings and judgments and in the Subsequent Proceedings. These answers were essentially based on four arguments:

- (1) The Tribunal was bound by its law and could not inquire into its own validity or the legality of its law;
- (2) CAH was an extension of war crimes, and as such Article 6(c) did not violate the principle of legality;
- (3) The London Charter was declarative of international law, and international law prohibited that conduct; and
- (4) Principles of legality are nonbinding principles of national criminal justice.

The first of these arguments, that the Tribunal was bound by its law and could not inquire into its own validity or the legality of its law, is clearly tautological and self-serving. The second, CAH were an extension of war crimes and as such Article 6(c) did not violate the principles of legality, and the third, that the Charter was declarative of international law, have substantial validity.<sup>112</sup> The fourth, that principles of legality are nonbinding principles of national criminal justice, is not entirely well founded, though as previously discussed, it has some validity.

The first argument, advanced in Britain’s opening statement by the alternate prosecutor for Britain, Mr. Alderman, stated:

The International Military Tribunal was established for the trial and punishment of major war criminals on the basis of the London Agreement, dated 8 August 1945, signed by the four countries acting in the interests of all freedom-loving nations. Being an integral part of this agreement, the Charter of the International Military Tribunal is to be considered an unquestionable and sufficient legislative act, defining and determining the basis and the procedure for the trial and punishment of major war criminals. Provoked by fear of responsibility or, at best, by insufficient knowledge of the organic nature of international justice, the references to the principle *nullum crimen sine lege*, or to the principle that “a statute cannot have retroactive power,” are not applicable because of the following fundamental, decisive fact: The Charter of the Tribunal is in force and in operation and all its provisions possess absolute and binding force.<sup>113</sup>

General Rudenko, Chief Prosecutor for the USSR, stated the same position, though more vigorously, when he said in his closing statement:

In the speeches of the Defense a number of legal questions were again raised on the importance of the principle *Nullum crimen sine lege*; [ . . . ]

I therefore consider it necessary to return again to some legal questions in order to answer the attempts of the Defense to confuse clear and simple statements and to change the legal argumentation into a kind of “smoke screen” in an effort to conceal from the Tribunal the gruesome reality of the fascist crimes.

- a) Principle *Nullum crimen sine lege*.

<sup>111</sup> *Id.*

<sup>112</sup> See *infra* ch. 3, §5.

<sup>113</sup> 3 IMT 148.

The Defense attempted to deny the accusation by proving that at the time the defendants were perpetrating the offenses with which they were charged, the latter had not been foreseen by existing laws, and that therefore the defendants cannot bear criminal responsibility for them.

I could simply pass over the principle *Nullum crimen sine lege*, as the Charter of the International Military Tribunal, which is an immutable law and is unconditionally to be carried out, provides that this Tribunal “shall have the power to try and punish all persons, who acting in the interest of an European Axis countries, whether as individuals or as members of organization or group,” committed any of the crimes enumerated in Article 6 of the Charter.

Therefore, from the legal point of view, sentences can be pronounced and carried out without requiring that the deeds which incriminate the defendants be foreseen by the criminal law at the time of their perpetration. Nevertheless, there is no doubt that the deeds of the defendants, at the time when they were being committed, were actual criminal acts from the standpoint of the then existing criminal law.

The principles of criminal law contained in the Charter of the International Military Tribunal are the expression of the principles contained in a number of international agreements, enumerated in my opening statement of 8 February 1946 and in the criminal law of all civilized countries. The law of all civilized countries provides criminal responsibility for murder, torture, violence, plunder, *et cetera*. The fact that those crimes have been initiated by the defendants on a scale surpassing all human imagination and bear the marks of unheard-of sadistic cruelty does not, of course, exclude but rather increases the responsibility of the defendants. If the defendants had committed the crimes on the territory and against the citizens of any one country, then in accordance with the declaration of the heads of the governments of the USSR, of Great Britain and the United States of America, published on 2 November 1943, and in full agreement with the universally accepted principles of criminal law, they would be tried in that country and according to that country’s laws.<sup>114</sup>

The argument that Article 6 of the London Charter – which was “decisive and binding upon the Tribunal”<sup>115</sup> – makes it clear that individuals are responsible for acts defined as criminal in the Charter. Thus, the IMT concluded:

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done

<sup>114</sup> 19 IMT 575–76.

<sup>115</sup> 1 IMT 218.

together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.<sup>116</sup>

Such a postulate also seems to rely on the doctrine of *la compétence de la compétence*, whereby the international tribunal can determine its own authority.<sup>117</sup> But, whereas this doctrine applies with respect to jurisdiction, it can hardly be applied to the judicial creation of ICL.

The argument that CAH did not violate the standards of legality in ICL because it is merely a jurisdictional extension of war crimes may be valid for many, except to strict positivists. As discussed in [Chapter 3](#), CAH were an outgrowth of war crimes, and international law prohibited such crimes; therefore, the ICL standard of legality, *nullum crimen sine iure*, was satisfied. That, of course, required a connection between CAH and war or war crimes, as required by Article 6(c) of the London Charter and Article 5(c) of the Tokyo Charter.<sup>118</sup> This was not, however, the case with respect to CCL 10 Article II(c), which departed from that connecting requirement.<sup>119</sup> However, strict adherents of the principles of legality, who are usually positivists, maintain that Articles 6(c), 5(c), and II(c) nonetheless violated the “principle of legality” prohibiting *ex post facto* criminal legislation, as discussed earlier in this chapter.

The London Charter’s drafters and the IMT Judgment added another justification, namely that the specific crimes contained in Article 6(c), which are substantially the same in 5(c) of the Tokyo Charter and II(c) of CCL 10,<sup>120</sup> are also crimes in “general principles of law.” There are two problems with this rationalization. The first is that not all the specific crimes listed in Articles 6(c), 5(c), and II(c) are universally or substantially found in the world’s major criminal justice systems.<sup>121</sup> The second is that ICL has never relied on “general principles” as a source for international criminalization. If it had, simple murder would be an international crime, because it is included in the criminal law of all national legal systems. However, to rely on “general principles” may also be a way of begging the whole question of legality, since “general principles” are more likely to produce generality than specificity. Consequently, “general principles,” as used in this context, is a tenuous argument without adding more to it. However, it is valid insofar as it can be used to interpret international law and to fill gaps in the application of existing law.<sup>122</sup>

The third argument, namely that the London Charter was declarative of international law, is conclusive but has substantial validity for the reasons discussed in [Chapter 3](#). The fourth argument is that principles of legality are nonbinding principles of national criminal justice. This argument is only partially valid for the reasons discussed here, that principles of legality existed in part in the world’s major legal systems, though they

<sup>116</sup> 22 IMT 461.

<sup>117</sup> See IBRAHIM SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPÉTENCE DE LA COMPÉTENCE* (1965).

<sup>118</sup> See *infra* ch. 3, §7.

<sup>119</sup> *Id.*

<sup>120</sup> See *infra* ch. 3, §6.

<sup>121</sup> See *infra* ch. 6, §2.1.

<sup>122</sup> *Id.*

varied in their degree of recognition and manner of application. The IMT, however, peremptorily concluded,

It was urged on behalf of the defendants that a fundamental principle of all law – international and domestic – is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.<sup>123</sup>

One author supporting the Tribunal's conclusion found it necessary to show how, even though these principles existed in the world's major legal systems, they were applied in a way that did not make them binding principles:

The advocates of this point of view base themselves on the famous maxim *nullum crimen sine lege, nulla poena sine lege praevia*, which means that there is no crime without pre-existing law. This rule was already recognized in ancient Roman times, and it has been affirmed at various times in history. It was not until the seventeenth and eighteenth centuries, however, that it was introduced as a fundamental principle of justice into the continental European system of law. The modern formulation of the rule is attributed to Anselm Feuerbach. In England, too, great jurists like Blackstone demanded protection against retroactive legislation.

But the *nulla poena* rule was never adopted there as a binding general principle. British courts decided that laws should not be applied retroactively unless there was special provision to that effect.

This opinion has been severely criticized on various grounds. Some writers maintain that the maxim *nullum crimen sine lege, nulla poena sine lege* is a procedural safeguard against injustice, an accepted moral principle, and an ideal of lawyers and judges. But it is not a rule of law. Since it is an ethical principle rather than a rule of law, it may be set aside if considerations of justice demand it. The principle of *Rechtssicherheit* must yield to *Gerechtigkeit*.<sup>124</sup>

<sup>123</sup> 22 IMT 461–62.

<sup>124</sup> WOETZEL, *supra* note 57, at 111–12; Francis Biddle, *The Nuremberg Trial*, 33 Va. L. Rev. 679 (1947). *Contra* Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT'L L. 223 (1949); A. Frederick Mignone, *After Nuremberg*, Tokyo, 25 TEX. L. REV. 475–90 (1947); Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMP. L. Q. 27 (1947); Jaspers, *supra* note 84. Professor Georg Schwarzenberger also raised similar concerns in *The Judgment of Nuremberg*, *supra* note 57.

Such a position is questionable, since principles of legality existed in the European criminal justice systems, as previously discussed, and thus may be said to be a regionally binding principle of law. However, the question is not the existence of the principle; rather, it is the contents and applications of the principles that are at issue. The existence, meaning, contents, and applications of these principles in the world's major criminal justice systems vary, and their counterparts in ICL are also different. To dismiss them as nonbinding *desiderata* is unfounded.

The London Charter and the IMT Judgment considered CAH an extension of war crimes and, as such, the prosecution for CAH did not violate the principles of legality in spirit and, certainly, not according to those legal systems that permit analogy to similar foreseeable crimes. The IMT notes that:

Many of these prohibitions have been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.<sup>125</sup>

A valid legal foundation to support this position therefore pre-existed the London Charter.<sup>126</sup> Furthermore, the specific conduct deemed violative under Article 6(c) constituted a crime in the world's major criminal justice systems, except for "persecution."<sup>127</sup> And even though the position of this writer differs from that of the Charter's drafters and the IMT Judgment that "general principles" cannot create international crimes because the lack of specificity in "general principles of law" would violate minimum standards of legality, "general principles of law" are nonetheless relevant in defining the content of legal terms, such as the term "laws of humanity" embodied in the 1899 and 1907 Hague Conventions.<sup>128</sup>

With respect to the issue of retroactivity, Lord Hartley Shawcross, as British chief prosecutor, stated in his opening statement at the IMT:

There is thus no substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators. It fills a gap in international criminal procedure. There is all the difference between saying to a man, "You will now be punished for what was not a crime at all at the time you committed it," and in saying to him, "You will now pay the penalty for conduct which was contrary to law and a crime when you executed it, although, owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgment against you." It is that latter course which we adopt, and if that be retroactivity, we proclaim it to be most fully consistent with that higher justice which, in the practice of civilized states, has set a definite limit to the retroactive operation of laws. Let the defendants and their protagonists complain that the Charter

<sup>125</sup> Nuremberg Judgment, *supra* note 108, at 463, 465. As support, the Tribunal referred to the *Quirin* case before the U.S. Supreme Court, which held that "[f]rom the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals." *Ex parte Quirin*, 317 U.S. 1, 27–8 (1942).

<sup>126</sup> See *infra* ch. 3, §2.

<sup>127</sup> See generally *infra* ch. 6, §3.4.

<sup>128</sup> See *infra* ch. 3, §2.

is in this matter an *ex parte fiat* of the victors. These victors, composing, as they do, the overwhelming majority of the nations of the world, represent also the world's sense of justice, which would be outraged if the crime of war, after this second world conflict, were to remain unpunished. In thus interpreting, declaring, and supplementing the existing law, these states are content to be judged by the verdict of history. *Securus judicat orbis terrarum*. Insofar as the Charter of this Tribunal introduces new law, its authors have established when the Charter was adopted. It is only by way of corruption of language that it can be described as a retroactive law.<sup>129</sup>

In the CCL 10 Proceedings, defendants also raised the issue of *ex post facto* and *nulla crimen sine lege*, and in this writer's opinion with much more validity, because CCL 10 removed the war-connecting link from CAH, as discussed here and in [Chapter 3](#). In these judgments, the rationale for concluding that principles of legality did not apply was conflicting and weak. In the *Justice* case,<sup>130</sup> the judgment concluded that *ex post facto* is not specifically prohibited in international law, particularly where the law is said to develop by cases, as opposed to being exclusively statutory:

International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.<sup>131</sup>

But that judgment went on to add another reason, namely that the actors in this case were bound to know that what they were doing was wrong. Presumably, what the Tribunal was trying to articulate was that interpretation by analogy of similar foreseeable crimes is permissible, particularly when the accused knew of the wrongful nature or potential wrongful nature of the conduct.

In the *Einsatzgruppen* case,<sup>132</sup> the American tribunal instead relied on the argument set forth by the IMT that the Charter was not an arbitrary exercise of power of the victorious nations, but was the embodiment of international law as it existed at the time (though never posited in written law).<sup>133</sup> In the *Krupp* case,<sup>134</sup> the American tribunal simply concluded that it did not adjudge as criminal an act that was not criminal when it was committed. As self-serving as that statement was, the Tribunal made no effort to advance any specific reason to support its conclusion. To a large extent, the *I.G. Farben*

<sup>129</sup> 3 IMT 106; see also Gordon W. Forbes, *Some Legal Aspects of the Nuremberg Trial*, 24 Can. B. Rev. 584, 596 (1946); Arthur L. Goodhart, *The Legality of the Nuremberg Trials*, 58 JURID. REV. 1, 17 (1946).

<sup>130</sup> Trial of Josef Altstötter and others (the *Justice* case), reprinted in VI LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (U.N. War Crimes Comm'n, 1948).

<sup>131</sup> *Id.* at 34.

<sup>132</sup> United States v. Ohlendorf et al. (the *Einsatzgruppen* case), reprinted in IV TRIALS OF WAR CRIMINALS (Washington D.C.: GPO, 1949).

<sup>133</sup> See *infra* the first half of this chapter.

<sup>134</sup> Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven others (the *Krupp* case), reprinted in X LAW REPORTS TRIALS OF WAR CRIMINALS 69 (U.N. War Crimes Comm'n, 1949), states:

The Tribunal has not given and does not give any *ex post facto* application to Control Council Law No. 10. It is administered as a statement of international law which previously was at least partly uncoded. This Tribunal adjudges no act criminal which was not criminal under international law as it existed when the act was committed.

*Id.* at 131.



case<sup>135</sup> took the same approach by concluding that CCL 10, under which the prosecution was conducted, made punishable only what was punishable before. In the *Flick* case,<sup>136</sup> the Tribunal relied on the declaratory and binding effect of CCL 10 and on the linkage between CAH and other crimes.<sup>137</sup>

All of the cases from the American CCL 10 Proceedings ultimately relied on the argument that the sovereign legislative power previously exercised by the Third Reich had become vested in the four Allied Powers by virtue of the unconditional surrender of Germany, and, therefore, the applicable law of these cases, CCL 10, was valid.<sup>138</sup> Some cases, as previously stated here, sought to articulate other reasons, but none of them can be said to have been legally satisfactory, even though they could have made a valid argument that CAH are an outgrowth of war crimes and that, by applying a narrowly construed rule of analogy based on *ejusdem generis*, their conclusion would have been valid under a number of legal philosophies, except for positivism.

At the IMTFE trials for CAH under Article 5(c), the defendants also raised the principles of legality, and in this judgment, save for the dissenting opinion of Judges Pal and Röling, the Tribunal concluded along the same lines as the IMT judgment, even though it also held that it was not bound by the IMT judgment as a precedent.

The IMTFE, which had dismissed the defense motions that the principles of legality were violated, basically relied on the IMT's judgment that:

The maxim *nullum crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue

<sup>135</sup> Trial of Carl Krauch and Twenty-two Others (the *IG Farben* case) X LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (U.N. War Crimes Comm'n, 1949) states:

The acts and conduct of the defendants set forth in this count were committed unlawfully, willfully, and knowingly, and constitute violations of international conventions, particularly of Articles 3, 4, 5, 6, 7, 14, 18, 23, 43, 46 and 52 of the Hague Regulations, 1907, and of Articles 2, 3, 4, 6, 9–15, 23, 27–34, 46–48, 50, 51, 54, 56, 57, 60, 63, 65–68, and 76 of the Prisoner-of-War Convention (Geneva, 1929), of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10.

*Id.* at 75.

<sup>136</sup> Trial of Friedrich Flick and Five Others (the *Flick* case), reprinted in IX LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 24–8 (U.N. War Crimes Comm'n, 1949).

<sup>137</sup> *Id.* For a discussion of the linkage, see *infra* chs. 3, 7. Flick appealed the CCL 10 Tribunal decision to the U.S. Court of Appeals for the District of Columbia, *United States v. Flick*, 174 F.2d 983 (D.C. Cir.), cert. denied, 338 U.S. 879 (1949), which affirmed on the basis that Germany had surrendered unconditionally to the Allies and that the Allies, having acquired sovereignty over Germany, could exercise their supreme governing authority through the Control Council.

<sup>138</sup> Military tribunals under CCL 10 generally adopted the same reasoning used by the IMT and IMTFE when faced with claims that CCL 10 constituted *ex post facto* legislation. the *Einsatzgruppen* case, *supra* note 135, at 459 (“[CCL 10] is but the codification and systemization of already existing legal principles, rules, and customs [. . .]. Certainly no one can claim with the slightest pretense at reasoning that there is any taint of *ex post factoism* in the law of murder.”) Likewise, in the *Justice* case, *supra* note 133, the court concluded: “The *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field.” *Id.* at 41.

*Nullum crimen sine lege* was raised in vain as a defense in several subsequent domestic proceedings, as in the *Eichmann* case, but these opinions predominantly followed the Nuremberg reasoning, and did not produce any new arguments of note. See Lamb, *supra* note 1, at 739; see *Att’y Gen. of Isr. v. Eichmann*, reprinted in 36 I.L.R. 277 (S. Ct. 1962) (Isr.).

for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.<sup>139</sup>

The IMTFE relied upon and quoted that portion of the IMT judgment and further added that “With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord.”<sup>140</sup>

Judge Röling (of the Netherlands), in his separate opinion in the IMTFE judgment, surmised that aggressive war was not a crime prior to the enactment of the London and Tokyo Charters. Nevertheless, he dismissed the *ex post facto* argument, reasoning that the victorious Allies were entitled to ignore the principle *nullum crimen sine lege* as a matter of policy:

If the principle of *nullum crimen sine praevia lege* were a principle of justice, [...] the Tribunal would be bound to exclude for that very reason every crime created in the Charter *ex post facto*, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts [...] as well as the arbitrariness of legislators [...] [t]he prohibition of *ex post facto* law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom.<sup>141</sup>

In Röling’s view, the victorious states were entitled to neutralize threats to international peace, and to ensure that such conduct would never again be repeated.<sup>142</sup> Furthermore, Röling believed that the Allies could subvert law with raw power to achieve these desired ends: “That the judicial way is chosen [...] is a novelty which cannot be regarded as a violation of international law in that it affords the vanquished more guarantees than mere political action could do.”<sup>143</sup> Thus, necessary and security were paramount to any resistance from the principle *nullum crimen sine lege*.

Judge Pal (of India), in his dissent, concluded that the IMTFE was free, even obligated, to disregard the provisions of the Charter if they diverged from pre-existing international law. If not, in his opinion, the Tribunal would have been merely a tool for the demonstration of power:<sup>144</sup>

The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus proscribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice.<sup>145</sup>

<sup>139</sup> BENJAMIN B. FERENCZ, 1 *DEFINING INTERNATIONAL AGGRESSION* 539, 546 (2 vols. 1975).

<sup>140</sup> 2 *THE TOKYO JUDGMENTS: THE INTERNATIONAL TRIBUNAL FOR THE FAR EAST (IMTFE)* 530 (Bernard V.A. Röling & C.F. Rüter eds., 1977) (Judgment of the Member from India, Opinion of the Member from the Netherlands); see also BRENDAN F. BROWN, *THE CRIMINAL CONSPIRACY IN THE JAPANESE WAR CRIME TRIALS* (1948) (discussing legality on the basis of a higher law).

<sup>141</sup> *United States v. Araki et al.*, Separate Opinion of Judge Röling, in 21 *THE TOKYO MAJOR WAR CRIMES TRIAL* 44–45A (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

<sup>142</sup> *Id.* at 46.

<sup>143</sup> *Id.* at 47.

<sup>144</sup> *United States v. Araki et al.*, Dissenting Opinion of Justice Pal, in 21 *THE TOKYO MAJOR WAR CRIMES TRIAL* 36–7 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981) [hereinafter Pal Dissent].

<sup>145</sup> *Id.* at 37.

Thus, Judge Pal opined that a victor's legislating new law for the vanquished was both at odds with the rule against retroactivity of law and also a usurpation of power.<sup>146</sup>

Judge Pal also disagreed with the majority's resort to customary international law to expiate the lack of more comprehensive treaty law, noting that state conduct often violated the majority's rule, and that "[c]ustomary law does not develop only by pronouncements."<sup>147</sup> Thus, he concludes that "[w]hen the conduct of nations is taken into account the law will perhaps be found to be that only a lost war is a crime."<sup>148</sup> Judge Pal suggested that the only custom that may have been developing was aimed at sovereign states and not individual defendants.<sup>149</sup> He further questioned the system of individual responsibility that, in his view, applied only to the victorious, arguing that such a reprimand would fail to promote deterrence.<sup>150</sup>

Judge Pal further considered three specific questions of law. The second question asks,

2. (a) Whether wars of the alleged character became criminal in international law during the period in question in the indictment.

If not, (b) Whether any *ex post facto* law could be and was enacted making such war criminal so as to affect the legal character of the acts alleged in the indictment.<sup>151</sup>

He answers the second material question in this manner:

Before proceeding to examine the provisions of the Charter in relation to the question now under consideration, I would like to dispose of one branch of the arguments of the defense in this connection, based, I am inclined to believe, on a misconception of a well-recognized rule of construction of statutes arising from the principle of non-retroactivity of law. The defense wanted to say that the definitions, if any, in the Charter would be void on this principle.

The rule denying retroactivity to a law is not that law cannot be made retroactive by its promulgator, but that it should not ordinarily be made so and that if such retroactive operation can be avoided courts should always do that.

The Charter here is clearly intended to provide a court for the trial of offenses, if any, in respect of past acts. There cannot be any doubt as to this scope of the Charter and consequently it is difficult for us to read into its provisions any non-retroactivity.

Nor can it be denied that if the promulgator of the Charter was at all invested with any authority to promulgate a law, his authority was in respect of act which are all matters of the past and already completed.<sup>152</sup>

He went on to rephrase the issue:

<sup>146</sup> Van Schaack, *supra* note 2, at 132.

<sup>147</sup> See Pal Dissent, note 144, at 123–26.

<sup>148</sup> *Id.* at 128.

<sup>149</sup> *Id.* at 180.

<sup>150</sup> *Id.* at 214; *see also, id.* at 215: "Fear of being punished by the future possible victor for violating a rule which that victor may be pleased then to formulate would hardly elicit any appreciation of the values behind that norm."

<sup>151</sup> 2 THE TOKYO JUDGMENTS: THE INTERNATIONAL TRIBUNAL FOR THE FAR EAST (IMTFE) 530 (Bernard V.A. Röling & C.F. Rüter eds., 1977) (Judgment of the Member from India, Opinion of the Member from the Netherlands); *see also* BRENDAN F. BROWN, THE CRIMINAL CONSPIRACY IN THE JAPANESE WAR CRIME TRIALS (1948) (discussing legality on the basis of a higher law).

<sup>152</sup> *Id.* at 538.

The real questions that arise for our consideration are

1. Whether the Charter has defined the crime in question; if so,
2. Whether it was in the competence of its author so to define the crime; and
3. Whether it is within our competence to question his authority in this respect.<sup>153</sup>

Last, it should be recalled that there were many prosecutions before military and other national tribunals of the Allies after World War II.<sup>154</sup> These prosecutions were conducted pursuant to the jurisdiction of that particular country, whether exercised by its military authorities, by special tribunals, or by its ordinary criminal courts. Numerically, the largest number of cases were prosecuted by military tribunals set up by the Allies in their respective zones of occupation.<sup>155</sup> The charges were mostly in the nature of war crimes in accordance with the military laws of the prosecuting country, including CAH as defined by the London and Tokyo Charters' Articles 6(c) and 5(c), though in some cases they followed the CCL 10 formulation that removed the war-connecting link from CAH. As such, the same issues discussed above with respect to Nuremberg, Tokyo, and CCL 10 Proceedings apply to all other legal proceedings on their respective definitions of CAH.

#### §4. Assessment of Legality Issues in Post-World War II Prosecutions

By using the rule *ejusdem generis*, it can be shown that pre-existing prohibitions under the international regulation of armed conflicts are analogous to Article 6(c) of the London Charter.<sup>156</sup> Consequently, there was no violation under the ICL of the principle of legality *nullum crimen sine iure*. Under the principle *nullum crimen sine lege*, as interpreted by positivism, however, Articles 6(c) of the Charter and 5(c) of the Tokyo Charter are new positive law, and therefore, violate the principle prohibiting *ex post facto* laws, as applied in the Western European legal systems. It must be noted, though, that these principles of legality were not recognized and applied in Japan and other Asian legal systems before 1945.

The absence of specific penalties in the London Charter, Tokyo Statute, and CCL 10 does not, however, *ipso iure*, violate ICL legality, since it has not, so far, been included in any ICL instrument. Thus, its absence confirms a customary rule of international law practice that penalties by analogy are valid.

It is evident that ICL legality relies more heavily on analogy, unlike many national criminal justice systems. In the national criminal law of most legal systems, opposition to analogy stems essentially from the fears of abuse of power, though the arguments relied

<sup>153</sup> *Id.* at 539.

<sup>154</sup> See HENRI MEYROWITZ, *LES CRIMINELS DE GUERRE DEVANT LES TRIBUNAUX ALLIÉS* (1960).

<sup>155</sup> See *infra* ch. 3, §9, 10.

<sup>156</sup> See *infra* ch. 3, §1. In the *Hostages* case, the court held:

It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognised customs, and usages of war, or the general principles of criminal justice common to civilised nations generally.

U.S. v. Wilhelm von Leeb et al. (the *Hostages* case), reprinted in XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1239 (Washington, D.C.: GPO, 1949); see also WOETZEL, *supra* note 57, at 116.

upon are frequently of a criminological nature. The resort to analogy in some instances can be unfair, particularly where there is no reasonable expectation of the applicable analogy. Notice also that an element of deterrence is an important component of fairness, though some, like Professor Glanville Williams, maintain that limitations on punishment through a rigid application of *nulla poena sine lege* not only is superfluous but does not necessarily advance individual protections.<sup>157</sup>

Others emphasize deterrence – the expectation of what the law proclaims – as notice of the consequences of its violation. One author, commenting on the deterrence element of the Charter, states, “The Nazis certainly would not have been checked by the precedent of legal sanctions if such a trial as Nuremberg had occurred before their advent to power. German and Japanese leaders knew that failure most likely would mean death, but they accepted this possibility.”<sup>158</sup> This is certainly true of the policymakers and principal executors of Nazi and Japanese war crimes and their extension by analogy to CAH. That certainty, however, diminishes as the accused perpetrator is far removed from decision-making capability. If the legal notions of fairness and foreseeability are accepted as a basis for the validity of analogy in ICL legality, then clearly its application should be based on the reasonableness test so as to preclude unfair results. It is, perhaps, in this connection that one has to consider the defense of obedience to superior orders<sup>159</sup> and the significance of its removal by Article 8 of the London Charter and Article 6 of the Tokyo Charter for the principles of legality under ICL. The complete removal of this defense, which existed in the German and Japanese national legal systems before 1945 and in international law, is probably the more serious violation of legality due to its *ex post facto* nature. It should be noted, though, that German military law after 1935 excluded the defense if the order was unlawful. Thus, the question exists as to whether the orders that lead to the commission of CAH were unlawful under the reasonableness test.

The notion of fairness should be the proper guide in determining the appropriateness of analogy in a given case of legal interpretation, and it should be based on the objective standard of reasonable expectation that a court, in resorting to analogy, would reach a predictable outcome. Surely, if that outcome were to be favorable to the accused, no one would argue against it. As one author stated, there had to be a reasonable expectation of punishment, including death, for the major war criminals at Nuremberg and Tokyo.<sup>160</sup>

Critics charge that Articles 6(c), 5(c), and II(c) retroactively applied newly developed law for which there were no pre-established penalties; that the IMT and IMTFE were engaging in an unreasonable application of analogy; and that CCL 10 Article II(c) was definitely in violation of international standards of legality because it removed the connection to war and war crimes from CAH. But nowhere in the proceedings of the Nuremberg and post-Nuremberg trials is there any convincing evidence presented by the defense that the European national systems did not in some way apply analogy in judicial interpretation of broad legislative textual language. Nor was there a convincing argument to explain why Article 6(c) of the London Charter and CCL 10 Article II(c)

<sup>157</sup> GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 464 (1953).

<sup>158</sup> BOSCH, *supra* note 59, at 48.

<sup>159</sup> See *infra* ch. 8, §1.

<sup>160</sup> See BOSCH, *supra* note 59; Corbett, *supra* note 60, at 34–6; BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 48 (1977).

were different from what the German legal system under the Third Reich recognized and applied.<sup>161</sup>

It is noteworthy, as stated earlier, that a Third Reich law, promulgated June 28, 1935, specifically abrogated Section 2 of the German Penal Code of 1871, which provided for the principle *nullum crimen sine lege* and substituted the 1871 code provision with a new Section 2 and added subsections 2a and 2b (with entry into effect September 1, 1935), which repudiated the principle and established, instead, the principle of legislative and judicial analogy.<sup>162</sup> The 1935 law was abrogated by a decree of the Control Council in 1945, which restored Germany's prior standard of legality.<sup>163</sup> The same argument applies to the Tokyo Charter's Article 5(c) since the Japanese system permitted analogy.<sup>164</sup> Thus, the defense arguments that Nuremberg and Tokyo prosecutions violated the principles of legality were technically correct from a positivist perspective. Such arguments could not, however, be reconciled with the subversion of German law by the operators of the regime who manipulated the law in order to "legitimize" their otherwise criminal conduct. This regime violated the very principles with which its perpetrators were trying to shield themselves. This is what essentially happens when state policy subverts the law and the legal process,<sup>165</sup> and this is why such a situation requires international criminalization.<sup>166</sup>

<sup>161</sup> See *supra* note 140; G. AVERNA, IL PROGETTO DEL CODICE PENALE DELLA GERMANIA SOCIAL-NAZIONALISTA 9 (1936).

<sup>162</sup> German Act of June 28, 1935, *quoted in* Boštjan M. Zupancic, *On Legal Formalism: The Principle of Legality in Criminal Law*, 27 LOY. L. REV. 369, 411 n.99 (1981); and Preuss, *supra* note 94.

<sup>163</sup> CCL No. 7, Art. IV. See also Paul K. Ryu and Helen Silving, *International Criminal Law – A Search for Meaning*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 22, 29 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) stating at n. 23:

Prosecution of National Socialist criminals in Germany simply charged crimes as defined in the GERMAN PENAL CODE, which was never formally amended to authorize or condone the atrocities of the National Socialist era. Thus, *e.g.*, one of the most celebrated cases decided by the Bundesgerichtshof, 2 BGH ST. 234 (1952) (I. Strafsenat, Jan. 29, 1952, g. K. u.a.), involved charges within the terms of § 239 of the Penal Code, defining "wrongful deprivation of liberty." The defense argued that the deportations of Jews in which defendants participated were ordered by the authorities in power and were thus not known by the defendants to have been "wrongful" or "illegal." The Supreme Court reversed acceptance of this defense by the Court below, stating that an authorization or condonation of such nature conflicted with basic principles recognized by all civilized nations. Said the Supreme Court with reference to the "retroactivity" argument (*infra* at 239):

This does not mean that the conduct of the defendants is being measured by standards which did not acquire general validity until after the events, and it is not being claimed that defendants should have answered the question of right or wrong according to principles which were not or which were no longer in force at the time. That they should have ignored the few principles which are essential to men's life in a community and which belong to the inviolable essence and fundamental core of law, as is alive in the legal consciousness of all civilized nations, or that they should have failed to realize the binding force of these principles independently of any recognition by the state, cannot be accepted, particularly in the light of the fact that they had received the impressions in which such persuasions are formed at a time before National Socialism could spread its confusing and poisonous propaganda.

<sup>164</sup> Shigemitsu Dando, *Basic Concepts in and Temporal and Territorial Limits on the Applicability of the Penal Law of Japan*, 9 N.Y.L. SCH. J. INT'L COMP. L. 237 (1988). Justice Dando focuses on the "principle of legality" in post-World War II Japan, but refers also to the previous period under the Meiji Constitution that allowed broad statutory and administrative penalties to be promulgated by the cabinet, *id.* at 238. The Meiji Constitution did not forbid the retroactivity of penal legislation, *id.* at 249.

<sup>165</sup> See *infra* ch. 1, §7.

<sup>166</sup> *Id.* See also *infra* ch. 2, §2.

Equity compelled the rejection of the perpetrators' claims at Nuremberg, Tokyo, and CCL 10 Proceedings arising out of the World War II tragedy,<sup>167</sup> even though rigid positivistic application of the principles of legality as understood in the post-1800 Continental European positivist legal tradition gave validity to this argument.<sup>168</sup> Indeed, until 1945, CAH had not been promulgated under positive ICL. The failed efforts to include this type of conduct in the post-World War I peace treaties were also a factor.<sup>169</sup> Thus, the omissions of past failures came to haunt the post-World War II proceedings.

The London Charter viewed CAH as within the context of the law of war and not as part of the law of peace. That distinction was meaningful at the time, and it explains the reluctance of the Charters' drafters to extend Articles 6(c) and 5(c) of the Tokyo Charter beyond its war-related context.<sup>170</sup> The opposition to an expanded meaning of CAH to the same type of criminal conduct unrelated to war was also reflected in the earlier position of the United States after World War I.<sup>171</sup> At that time, the United States objected to the prosecution of Turkish citizens for a separate crime against "the laws of humanity" since, as the United States believed then, there was little recognition of this offense in conventional or customary international law.<sup>172</sup> As one author states the obvious: "The diplomats' past reluctance to codify international law resulted in Nuremberg's applying retroactive law."<sup>173</sup>

Regarding the question of legality, the views of the IMT and its critics diverge as to the sources and functions of international law. International positivists hold that the treaties are the principle source of international law, and therefore, that which is not agreed upon by a given state cannot bind it. Similarly, for positivists, if acquiescence in a general custom is not evidenced by consistent practice, then that given custom is also not binding upon that state. International positivists also exclude "general principles of law" as a binding source of ICL, in the absence of some explicit agreement to it and some specific definitional content of the purported violation. Assuming the validity of this positivist perspective, then the criticism of the London Charter's CAH is valid. But as discussed in this chapter, this is not the exclusive perspective on international law.

An argument that has resonated in opposition to the defense of *nullum crimen sine lege* is that the principle is inapplicable in ICL, or at least not applicable with equivalent force and effect as in domestic criminal legal systems.<sup>174</sup> At first, this tactic arose as defenses of the legality of the Nuremberg and Tokyo proceedings and their postwar family. Regarding this postwar period, Judge Cassese maintains "[t]he strict legal prohibition of

<sup>167</sup> For the equitable argument, see *infra* ch. 5, §3. In 1946, Justice Jackson, who was a proponent of this argument stated, "That men may be protected in relying upon the law at the time they act is the reason we find laws of retroactive operation unjust. But these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws." Cited in Forbes, *supra* note 129, at 596.

<sup>168</sup> See Franz von Liszt, *Die Deterministischen Gegner der Zweckstrafe*, 13 ZSTW 356, 357 (1893); FRANZ VON LISZT, *LEHRBUCH DES STRAFRECHTS* § 18 (1890).

<sup>169</sup> See *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* 83 (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), reprinted in 14 AM. J. INT'L L. 95 (1920) [hereinafter 1919 Commission Report] and discussion thereof, *supra* ch. 3.

<sup>170</sup> See discussion of semicolon, *infra* ch. 3, §4.

<sup>171</sup> *Id.*

<sup>172</sup> See *id.*; 1919 Commission Report, *supra* note 169, Annex II, dissent of the American members.

<sup>173</sup> See BOSCH, *supra* note 59, at 49.

<sup>174</sup> See Van Schaack, *supra* note 2, at 134.



*ex post facto* law had not yet found expression in international law.”<sup>175</sup> Over half a century later, one ICTY Tribunal held that “[i]t is not certain to what extent [the principle of legality and its components] have been admitted as part of international legal practice, separate and apart from the existence of the national legal system.”<sup>176</sup> As regards the construction of its Statute, the ICTY concluded:

Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards.<sup>177</sup>

If the assertion of this writer is accepted, that principles of legality under ICL are embodied in the maxim *nullum crimen sine iure* and that *nulla poena sine lege* does not apply except by analogy, then it follows that the London and Tokyo Charters’ formulation of Article 6(c) and 5(c) are substantially valid, because they are premised on the analogy to the norms, rules, and principles of international regulation of armed conflicts viewed in the totality of their historical development and in the context of the values they embody and the protections they seek to achieve.<sup>178</sup>

There can be no doubt that, at the very least, some law existed prior to the London Charter and that such law prohibited the conduct described as CAH. Furthermore, there can be no question that the conduct described in Article 6(c) of the London Charter and 5(c) of the Tokyo Charter was clearly *mala in se* and was criminal in the world’s major criminal justice systems in 1945, as evidenced in the comparative research presented in Chapter 7. What was missing, according to a strict positivist approach, is a pre-existing law that specifically provided what the London and Tokyo Charters stated in Articles 6(c) and 5(c). However, considering that the goals and values of the principles of legality are, *inter alia*, to provide notice, maximize compliance, avoid individual injustice, curtail arbitrary powers, and enhance social justice, then these values and goals are not violated by the London Charter’s formulation, but only with respect to those offenders who knew or could reasonably have foreseen that their conduct constituted a violation of ICL if it were not for the special national legislation that purported to legalize it. In short, we are looking to the postulate of whether the substantive law or the form of the law prevails.

It should be said that the question of knowledge of the law<sup>179</sup> may be deemed a premise upon which principles of legality are founded and that the absence of promulgation with

<sup>175</sup> ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 72 (2003); see also Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT’L L.Q. 153, 164 (1970) (“[T]his rule [in opposition to *ex post facto* legislation] is not valid at all within international law, and is valid within national law only with important exceptions.”).

<sup>176</sup> Prosecutor v. Mucić et al., Case No. IT-96-21-T, Judgment, ¶ 403 (Nov. 16, 1998) [hereinafter *Celebici Trial Judgment*]. The same reasoning was applied in Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Decision on Defense’s Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, ¶ 43 (May 11, 2004) (stating: “The Chamber holds that, given the specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems.”).

<sup>177</sup> *Celebici Trial Judgment*, *supra* note 176, ¶ 403.

<sup>178</sup> See *infra* ch. 3, §8.

<sup>179</sup> As discussed earlier in this chapter and *infra* ch. 7, §3.

some degree of specificity by international law of the London and Tokyo Charters' Articles 6(c) and 5(c) crimes prior to their commission denies the assumption of knowledge and, thus, deprives the applicable law of an important component of legality. Furthermore, the fact that the London Charter overrode other aspects of German criminal law also raises a question about legality. However, the genuine issues of legality, which are distinguishable from whether CAH existed in ICL, are those issues relating to the basis of imputability and culpability under ICL,<sup>180</sup> including, but not limited to, such factors as conditions of criminal responsibility; exonerating defenses; excusable circumstances, such as obedience to superior orders; and necessity and coercion.<sup>181</sup> All of these and other factors, known in almost every national system of criminal justice, are nonetheless perceived, applied, and interpreted differently. Thus, necessarily, principles of legality in ICL are a composite of what emerges from national legal systems but adapted to the context and exigencies of ICL. The combined effect of the London Charter and subsequent legal developments surely establishes that CAH is an international crime, *delicto jus gentium*, whose commission is by *hosti humani generi* that must be prosecuted<sup>182</sup> without statutory limitations<sup>183</sup> in whatever jurisdiction.<sup>184</sup>

Highlighting the conflict between law and morality, Professor Hans Kelsen states:

The objection most frequently put forward – although not the weightiest one – is that the law applied by the judgment of Nuremberg is an *ex post facto* law. There can be little doubt that the London Agreement provides individual punishment for acts which, at the time they were performed were not punishable, either under international or under any national law. The rule against retroactive legislation has certainly not been respected by the London Agreement. However, this rule is not valid within national law only with important exceptions. The rule excluding retroactive legislation is based on the more general principle that no law should be applied to a person who did not know the law at the moment he behaved contrarily to it. But there is another generally accepted principle, opposite to the former, that ignorance of the law is no excuse. If knowledge of a non-retroactive law is actually impossible – which is sometimes the case since the assumption that everybody knows the existing law is a fiction – then there is, psychologically, no difference between the application of this non-retroactive law and the application of a retroactive law which is considered to be objectionable because it applies to persons who did not and could not know it. In such a case the law applied to the delinquent has actually retroactive effect although it was legally in force at the time the delict has been committed.

The rule excluding retroactive legislation is restricted to penal law and does not apply if the new law is in favour of the accused person. It does not apply to customary law and to

<sup>180</sup> See Giuliano Vassalli, *Colpevolezza*, in 1 ENCICLOPEDIA GIURIDICA TRECCANI, 1–24 (vol. 6, 1988) (containing a comparative survey of national legal systems and reflecting the different meanings of culpability and imputability in various continental legal systems); Stefan Glaser, *Infraction Internationale*, SES ÉLÉMENTS CONSTITUTIFS ET SES ASPECTS JURIDIQUES (1957) (for elements of international crimes and the basis of responsibility).

<sup>181</sup> See generally *infra* ch. 8; and YORAM DINSTEIN, THE DEFENCE OF “OBEDIENCE TO SUPERIOR ORDERS” IN INTERNATIONAL LAW (1965); EKKEHART MÜLLER-RAPPARD, L’ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ PÉNALE DU SUBORDONNÉ (1965); LESLIE C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976); NICO KEIJZER, MILITARY OBEDIENCE (1978). *Contra* Theo Vogler, *The Defense of “Superior Orders” in International Criminal Law*, 1 BASSIOUNI AND NANDA TREATISE 619.

<sup>182</sup> See *infra* ch. 3, §8.

<sup>183</sup> See *infra* ch. 4, Part B, §3.

<sup>184</sup> See *infra* ch. 4, Part B, §2.

law created by a precedent, for such law is necessarily retroactive in respect to the first case to which it is applied.

A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against *ex post facto* laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.<sup>185</sup>

In a foretelling comment that admits to the innovative aspects of the London Charter's law, the British Chief Prosecutor, Lord Hartley Shawcross, said in a statement before the IMT, "Insofar as the Charter of this Tribunal introduces new law, its authors have established a precedent for the future – a precedent operative against all, including themselves [ . . . ]."<sup>186</sup> In contrast, Professor Kelsen stated:

The judgment rendered by the International Military Tribunal in the Nuremberg Trial cannot constitute a true precedent because it did not establish a new rule of law, but merely applied preexisting rules of law laid down by the International Agreement concluded on August 8, 1945, in London for the Prosecution of European Axis War Criminals by the Government of Great Britain, the United States of America, France, and the Soviet Union. The rules created by this Treaty and applied by the Nuremberg Trial, but not created by it, represent certainly a new law [ . . . ].<sup>187</sup>

The same conclusions were never reached as to whether (1) the London and Tokyo Charters are new or old law, (2) the self-declarative nature of these Charters are just that or more, and (3) the principles of legality existed or not, and if so, whether they were wholly, substantially, or only partially satisfied.

Jackson, who admitted to the validity of *nulla poena sine lege*, presented an equitable argument to counter it: "But these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws. They cannot show that they ever relied upon international law in any state or paid it the slightest

<sup>185</sup> Hans Kelsen, *supra* note 175, at 153, 164–65; see also Hans Kelsen, *The Rule Against Ex Post Facto Law and the Prosecution of the Axis War Criminals*, 2 THE JUDGE ADVOCATE JOURNAL 8 (1945); *contra* Ehard, *supra* note 124; Mignone, *supra* note 124; Ireland, *supra* note 124; and VON KNIERIEM, *supra* note 92.

<sup>186</sup> 3 IMT 124.

<sup>187</sup> See Kelsen, *supra* note 175, at 154.

regard.”<sup>188</sup> Following upon this equitable approach to the principles of legality, but adding to it a moral dimension, Kelsen stated:

Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.<sup>189</sup>

Another author concluded:

It would not be a violation of the *nullum crimen, nulla poena* rule, therefore, if a legal principle was applied to an act unforeseen, so long as the act was clearly of the kind affected by the principle.

It seems clear that in international law the maxim *nullum crimen, nulla poena* has much the same significance as it does in common law countries rather than in those states which operate only by statutory law, since international law develops more like common law, *i.e.*, from case to case on the customary as well as judicial level, than like statutory law. It, therefore, cannot be considered a limitation upon the sovereignty of a prosecuting state, but a general principle of justice. It is intended to guard against abuses of justice through retroactive legislation. But if no injustice is worked, then there is no violation of the principle.<sup>190</sup>

Every act of punishment involves the exercise of power, whether by a legitimate or illegitimate authority. But the legitimacy of the punishing authority is insufficient by itself to make the punishment legal. What is needed is a legitimate law that places people on notice of the prohibition and the due process of law to determine individual responsibility. As Lord Aldersen Wright, Chairman of the UNWCC, said:

To punish without law is to exercise an act of power divorced from law [ . . . ] but if it is not based on law it may be morally just, but it is not a manifestation of justice according to law, though some seem to think that if the justice and morality are incontrovertible, it may serve as a precedent for similar acts in the future and thus establish a rule of International Law.<sup>191</sup>

Similarly, writers and commentators on the post-World War II prosecution differed as to these questions.

The crimes committed during World War II that fall within the meaning of CAH were unprecedented in history, not because the violations were unknown, but because

<sup>188</sup> 2 IMT 70. The French prosecutor François de Menthon stated at the IMT, “Has not the juridical doctrine of National-Socialism admitted that in domestic criminal law even the judge can and must supplement the law? The written law no longer constituted the Magna Carta of the delinquent. The Judge could punish when, in the absence of a provision for punishment, the National-Socialist sense was gravely offended,”

5 IMT 372. The conclusion was therefore that because National-Socialist Germany had abandoned the principles of legality, the accused could not claim these principles as a defense. This argument was in the nature of an equitable estoppel, but it was also in the nature of *tu quoque*, namely that since the Nazi law set aside legality, so could the Allies. Interestingly, when the accused raised the defense of *tu quoque* in connection with the charges of war crimes, the Tribunal rejected it out of hand.

<sup>189</sup> Kelsen, *supra* note 175, at 165.

<sup>190</sup> See WOETZEL, *supra* note 57, at 115. The same argument was also made in the *Eichmann* case; see *infra* ch. 9, §3.2; see also Leslie C. Green, *Legal Issues of the Eichmann Trial*, 37 TUL. L. REV. 641 (1962).

<sup>191</sup> Lord Wright, *War Crimes under International Law*, 62 LAW Q. REV. 40, 49–50 (1946).

the scale and manner of their perpetration was until then unknown to humankind. To that extent, they are the first of a kind. The absence of positive law foreseeing such crimes was, therefore, inevitable, just as the killing of Cain by Abel was inevitably a first. From that point on, however, it became a crime based on that precedent. The custom grew out of the practice, the practice developed from an initial case, and that initial case became the precedent.

## §5. The Principles of Legality in Post-Charter Developments

### §5.1. *The ICTY and the ICTR*

The statute of the ICTY was the first international legal instrument since the London Charter to incorporate CAH in the framework of international prosecutions. Mindful of the legality issues that arose in the Charter and IMT prosecutions, the Security Council in its Resolution 827 mandated that the Secretary-General prepare a draft statute to be adopted by the said Council that reflected customary international law.<sup>192</sup> The Secretary-General prepared such a statute and submitted it to the Council, which adopted it in Resolution 808.<sup>193</sup>

As discussed in [Chapter 4](#), Article 5 of the ICTY Statute, which defines CAH, was submitted by this author to the Secretary-General's Drafting Committee, which adopted it, as did the Council in promulgating the statute. The formulation of CAH linked that international category of crimes to a conflict of an international or non-international character because of the drafters' concern that the 1950 ILC Report<sup>194</sup> (removing the war correction) may not constitute sufficient evidence of customary international law. Another change in the definition of CAH that may have raised legality issues is the inclusion of rape (subcategory) in the specific listed offenses; however, this writer believed that customary international law had evolved since 1945 to recognize rape, specifically, and not to merely incorporate it as "other inhumane acts," as first formulated in the London Charter's Article 6(c) and then carried out in the IMTFE's Article 5(c) and CCL 10 Art. II(c). ICTY Article 5(i) preserved the generic category of "other inhumane acts" on the grounds that an interpretation based on analogy (*ejusdem generis*) does not violate the principles of legality in the world's major criminal justice systems.<sup>195</sup>

The Report of the Secretary-General emphasizes the importance of the Tribunal's adherence to the requirements of the principles of legality:

[T]he application of the principle *nullum crimen sine lege* requires that the international tribunal should apply all rules of international law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.<sup>196</sup>

<sup>192</sup> S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>193</sup> S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

<sup>194</sup> See *infra* ch. 4, §1.

<sup>195</sup> In addition to what is stated in this chapter, see also BASSIOUNI, *INTRO TO ICL*, *supra* note 1, at ch. 3, § 9 (discussing the principles of legality); see also *infra* ch. 6, §3.

<sup>196</sup> *Report of the Secretary-General*, *infra* note 246, at ¶ 34.

The Security Council did not intend to legislate *ex post facto* ICL for which individuals would be held accountable before an *ad hoc* international criminal tribunal. The law that the tribunal will apply must then come from existing ICL or the national criminal law of the *situs* of the conduct alleged to be criminal. These sources of law can satisfy the requirements of the principles of legality. In any event, the ICTY Statute must be interpreted in light of the requirement of these principles.<sup>197</sup> This applies to substantive law,<sup>198</sup> sanctions,<sup>199</sup> and certain aspects of procedural law insofar as procedural norms have a direct bearing on the outcome of guilt or innocence.

As stated by Morris and Scharf:

A tribunal established by the Security Council, acting on behalf of the international community, to try and punish persons responsible for crimes under international law should do so on the basis of international rules and standards. This is consistent with the character of the International Tribunal as an international judicial body and its subject matter jurisdiction which is limited to international humanitarian law. This approach to applicable law underscores international law as the source of the criminal responsibility incurred by perpetrators of war crimes and crimes against humanity as well as the interest of the international community in ensuring respect for fundamental norms of international law. Furthermore, it avoids any misunderstanding concerning the necessity of corresponding national legislation which might not be present if the international community is faced with a similar situation in the future.

An international tribunal which is to decide the cases brought before it on the basis of international law would normally have recourse to the various sources of international law listed in Article 38 of the Statute of the International Court of Justice, namely, international conventions, customary law, and general principles of law. Additionally, the tribunal could refer to judicial decisions and learned writings as subsidiary means for determining the relevant rules of law. However, the unusual character of this particular tribunal (an *ad hoc* tribunal established by an unprecedented resolution of the Security Council to judge persons responsible for violations of international humanitarian law in only one of the armed conflicts in which such violations are presently occurring) required the application of international standards which were beyond question at the time the violations occurred, which were widely recognized and accepted by States, and which were binding on States as a matter of customary law. Limiting the applicable law to rules of customary law obviates the need to address the often complex question of State succession with respect to treaties. Thus, the question of whether one of the new States emerging from the former Yugoslavia was a party to a specific convention for purposes of the applicable law at a particular point in time would not arise.

[ . . . ]

Since those rules of law were clearly in existence long before the beginning of the conflict in the former Yugoslavia, there would be no danger of a person being tried for a criminal act which was not clearly prohibited as such at the time it occurred.

<sup>197</sup> See BIN CHENG, *supra* note 22; Bassiouni, *supra* note 15.

<sup>198</sup> With respect to substantive law, the Statute's Articles 2 through 5 will be applied by the Tribunal in light of other relevant sources of applicable law and in light of the principles of legality. See M. CHERIF BASSIOUNI (WITH PETER MANIKAS), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996) [hereinafter BASSIOUNI, *THE LAW OF THE ICTY*], at ch. 13.

<sup>199</sup> Neither the ICTY Statute nor the Rules of the Tribunal contain specific penalties or a general part, both of which are necessary to fulfill the requirements of the principles of legality. See BASSIOUNI, *THE LAW OF THE ICTY*, *supra* note 198, chs. 4, 9 (discussing respectively the "general part" and penalties).

Thus, the prosecution of persons responsible for such crimes would be consistent with the fundamental principle of criminal law *nullum crimen sine lege*. (This maxim was characterized as a principle of justice rather than a limitation of sovereignty by the Nuremberg Tribunal. See Nuremberg Judgment, at 49. It is reflected in Article 15 of the International Covenant on Civil and Political Rights, as follows: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed [ . . . ]. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” It is also recognized in Article 99 of the Geneva Convention III which states: “No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.”) [ . . . ].

The relevant rules of international law to be applied by the International Tribunal are those relating to serious violations of international humanitarian law that give rise to individual criminal responsibility. The Commission of Experts (The Commission of Experts considered the rules of international law applicable to the armed conflicts in the territory of the former Yugoslavia to include: (1) Treaties, namely the 1907 Hague Convention IV and the Regulations on the Laws and Customs of War on Land; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with annexed Protocols); (2) relevant rules of customary law on crimes against Humanity and the protection of civilian populations in armed conflicts, including the latter rules reflected in General Assembly Resolutions 2444 (XXIII) and 2675 (XXV) entitled “Respect for human rights in armed conflict” and “Basic principles for the protection of civilian populations in armed conflicts”, respectively; and (3) fundamental norms of human rights law embodied in treaties to which the former Yugoslavia was a party but also as peremptory norms of international law. See U.N. Doc. S/25274, at 13–15.) interpreted the phrase “international humanitarian law” in Resolution 780 to mean the “rules of international law applicable in armed conflict.” This term refers to “the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict,” according to Article 2(b) of Additional Protocol I to the Geneva Conventions.<sup>200</sup>

Notwithstanding these manifested concerns with the principles of legality, the ICTY Statute did not contain penalties, leaving them instead to be promulgated by the judges.

The ICTY Statute deals with penalties only to a very limited extent in Articles 24 and 27. The Tribunal’s Rules 99 through 106 and 123 through 25 expand upon the Statute, but still do not meet the needs of the subject in light of the principles of legality.<sup>201</sup> Some of the Statute provisions and Rules relate to substantive matters concerning sanctions, whereas others relate to their enforcement and consequences. They are dealt with together due to their similar subject matter.

<sup>200</sup> 1 VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 50–54 (1995) (internal citations omitted).

<sup>201</sup> See BASSIOUNI, THE LAW OF THE ICTY, *supra* note 198, ch. 9.



The Statute is vague on the substance of penalties and, on its face, does not satisfy the principle of legality, *nulla poene sine lege*, because there is no mention of the specific penalties applicable to each crime.<sup>202</sup> The applicable substantive law provisions, Articles 2 through 5, do not contain penalties, nor do their original sources. In fact, ICL conventions, though they require penalties, never specify what these penalties are because these conventions are enforced through national legislation, which provides for specific penalties pursuant to each state's legal requirements. Because of this scheme of "indirect enforcement," each state's laws concerning sanctions are presumed to apply to such crimes as they become part of national legislation. Accordingly, though the grave breaches provisions of the 1949 Geneva Conventions, the customary international law of armed conflicts, the Genocide Convention, and CAH do not specify penalties for such international crimes, the Socialist Federal Republic of Yugoslavia (SFRY) military regulations, the Federal Criminal Code of the SFRY, and the criminal codes of the former republics do, as well as for crimes such as murder, manslaughter, rape, battery, assault, robbery, theft, destruction of private property, and other common crimes, which form the integral parts of international crimes.<sup>203</sup>

Thus, the ICTY should use analogy to pre-existing law to apply specific sanctions to individuals convicted of crimes.<sup>204</sup> This approach is consonant with the state of the law in the SFRY before the conflict began.

As stated by Professor Miroslav Djordjevic:

*En ce qui concerne l'application des sanctions pénales pour les actes criminels internationaux, la position prise par le droit pénal yougoslave est que le système des sanctions pénales actuellement en vigueur et qui s'applique aux autres actes criminels, s'applique également à ces actes. On appliqué aussi les memes règles en ce qui concerne la fixation et la prononciation des peines prévues par la loi pénale. Le type et le et montant ou la durée des peines prescrites sont conformes dans tous cas à la gravité de l'acte en question. On peut constater que les sanctions pour les actes criminels les plus graves de ce type sont très sévères. Il s'agit en règle générale de peine de prison (qui est le seul type de peine de privation de liberté prévu par le droit pénal en Yougoslavie) don't la durée pour les actes criminels les plus graves peut être de 15 ans au maximum; une peine de prison de 20 ans peut être prononcée dans certains cas exceptionnels. Dans les forms les plus graves de genocide et de crimes de guerre, on peut également prononcer la peine de mort (qui est prescrite toujours alternativement à la peine de prison de 15 ans, avec la possibilité aussi de prononcer une peine de prison de 20 ans pour les actes criminels pour lesquels la peine*

<sup>202</sup> *Id.*

<sup>203</sup> See Human Rights Watch/Helsinki, *Former Yugoslavia: War Crimes Trials in the Former Yugoslavia* (June 1995); Lawyers Committee for Human Rights, *Prosecuting War Crimes in the Former Yugoslavia: The International Tribunal, National Courts and Concurrent Jurisdiction – A Guide to Applicable International Law, National Legislation and Its Relation to International Human Rights Standards* (May 1995). Both of these reports contain references to the SFRY military regulations, the Federal Criminal Code of the SFRY, and the criminal codes of the republics of Croatia and Serbia both before and after the dissolution of the SFRY. Bosnia and Herzegovina has not enacted a new criminal code and, according to the Lawyers Committee for Human Rights, therefore is governed by the criminal code of the former SFRY.

<sup>204</sup> In its simplest translation, *nullum crimen sine lege* asserts the *ex post facto* prohibition, but, more broadly, the maxim is also invoked in connection with corollary legislative and interpretive principles that compel criminal statutes to be drafted with precision, to be strictly construed without extension by analogy, and to have ambiguities resolved in favor of the accused. See, e.g., *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, ¶ 93 (Dec. 5, 2003) (noting that *nullum crimen sine lege* encompasses principles of specificity and strict construction).

*de mort est prescrite). Pour ces actes, il est exceptionnellement possible de prononcer une peine de mort aux jeunes adultes (âges entre 18 et 21 ans au moment de l'exécution de l'acte criminel) contre lesquels cette peine ne peut être prononcée, bien qu'elle soit prescrite par la loi pour l'acte criminel exécuté, sauf dans les cas exceptionnels explicitement prévus parmi lesquels figurant aussi les actes criminels cités ci-dessus. En outre, une peine accessoire de confiscation des biens peut être prononcée à l'encontre de l'auteur de ces actes criminels. Elle peut être prononcée uniquement si elle est explicitement prescrite pour l'acte criminel en question et cela uniquement dans le cas où une peine de prison de trois ans ou plus a été prononcée comme peine principale.*<sup>205</sup>

As phrased by the International Law Commission (ILC) in 1995 in another context:

As regards penalties, the view was expressed that the [draft code of crimes against the peace and security of mankind] would be an effective and complete legal instrument only if it included the three elements of crimes, penalties, and jurisdiction. Several members noted that Governments, in their comments, had declined to specify penalties for each crime, which demonstrated the need for the Commission to be circumspect in prescribing them; shared the Special Rapporteur's view concerning the difficulty of the exercise; and endorsed his suggestion that a scale of penalties should be established, leaving it up to the courts to determine the applicable penalty in each case. This method, it was noted, had been followed in the statutes of international criminal courts adopted since 1945. In this regard, the statutes of the ad hoc tribunals were suggested as possible models for the provision to be included in the Code. However, there was also a suggestion to consider following the language of the 1948 Genocide Convention by requiring States to provide "effective penalties for persons guilty of" crimes against the peace and security of mankind.

The view was expressed that it would be sufficient to incorporate one article setting out the minimum and maximum limits for all the crimes in the Code, with the severity of the penalties corresponding to the seriousness of the crimes and the court being left to exercise its discretion within those limits. It was suggested that in substance the applicable penalties should be established in accordance with the maximum penalties applicable in the State in which the crime had been committed or on the basis of such maximum penalties. However, it was also suggested that it would be impossible to establish rigid maximum and minimum sentences, given the numerous and varied types of war crimes and crimes against humanity, as compared to authorizing the imposition of exemplary punishments, including life imprisonment, for such serious crimes.

Some members emphasized that any provision on penalties should be made consistent with the corresponding provision in the draft Statute for an international Criminal Court. It was suggested that it would be sufficient to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case, following article 47 of the draft Statute which precluded the death penalty. Support was expressed for stipulating a maximum penalty of life imprisonment considering the gravity of the crimes encompassed by the Code, subject to the discretion of the court to specify such other terms as the particular circumstances of a case might require. However, questions were raised regarding the legal basis for the absence of the death penalty from more recent instruments, whether that absence denoted significant progress in the human rights field, and the fate of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. In this regard,

<sup>205</sup> Miroslav Djordjevic, *Yougoslavie: Rapport National*, 60 REVUE INTERNATIONALE DE DROIT PÉNAL 549, 554–55 (1989).

attention was drawn to the discrepancy regarding the inclusion of the death penalty between the statutes of the ad hoc tribunals and the national legislation applicable in the former Yugoslavia and of Rwanda.

The view was expressed that further consideration should be given not only to including general provision on penalties, but also to addressing the aggravating or mitigating circumstances to be taken into consideration in determining an appropriate penalty in a particular case under article 14.<sup>206</sup>

The ICTY could not have argued by analogy to the criminal laws of the SFRY and the republics, rules to specify the penalties for each of the crimes enumerated in Articles 2 through 5. These rules should clearly identify their respective sources as either the SFRY military regulations, the Federal Criminal Code of the SFRY, or the criminal codes of the different republics. This application by analogy would not violate the principles of legality because, in substance, the rules would apply pre-existing penalties for which there is notice and specificity with respect to substantive crimes prohibited by pre-existing criminal law where they occurred. This is essentially what Article 24 presupposes.

The principle *nulla poena sine lege* extends also to the execution of the sentence. Thus, any conditions that bear upon the manner in which the sanction is executed and terminated, or the legal consequences of the sentence beyond its completion, are included in the scope of the principle. As stated, one way to safeguard this principle is for the ICTY to apply the sanctions as they existed in national laws. Similarly, since sentences are to be executed in states that have agreements with the Tribunal for that purpose, the Tribunal should adopt rules embodying the relevant provisions of the pre-existing applicable national laws so that the detaining state cannot worsen the conditions of execution, termination, or legal consequences of the sentence. The lightening of the conditions of execution, termination, or legal consequences of the sentence that favor the sentenced person are, in accordance with the principle *favor reo*, within the principle of *nulla poena sine lege*. These considerations apply also to pardon and commutation of sentences. Articles 24 and 27 of the Statute and Rules 101, 103, 105–06, and 123–25, do not address these questions.

It should also be noted that, although Article 2 incorporates the grave breaches provisions of the Geneva Conventions, Article 3 incorporates, by reference, the 1903 Hague Convention, as well as other conventions and customary international law practices. Thus, Article 3 is much less in conformity to the requirements of the principles of legality as reflected in the world's major criminal justice systems.<sup>207</sup> The assumption that customary international law with respect to the prohibitions in the law of armed conflicts satisfies the principle of legality in legal positivism is highly questionable.

In the *Kupreškić et al* case, the Trial Chamber acknowledged that it could be construed that the expression “other inhumane acts” “lacks the precision and is too general to provide a safe yardstick for the work of the Tribunal and, hence, that it is contrary to the principle of the ‘specificity’ of criminal law.”<sup>208</sup> However, in the *Stakić* case, another Trial

<sup>206</sup> Report of the International Law Commission on the Work of its Forty-Seventh Session, 2 May–21 July 1995, U.N. GAOR, 50th Sess., Supp. No. 10, at 67–8, U.N. Doc. A/50/10 (1995).

<sup>207</sup> See BASSIOUNI, *supra* note 15.

<sup>208</sup> Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶ 563 (Jan. 14, 2000); see also Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 625 (Jan. 17, 2005) (noting “the principle of legality requires that a trier of fact exercise great caution in finding that an alleged act, not regulated elsewhere in

Chamber disagreed with this approach and dismissed charges for forcible transfer of persons. It reasoned that “other inhumane acts” “subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity, precision and definiteness” that could violate the principles of *nullum crimen sine lege*.<sup>209</sup>

An exception to this trend is the *Vasiljević* case, wherein the defendant was acquitted of the war crime charge for “violence to life and person,” as provided by Common Article 3 of the Geneva Conventions, reasoning that the offense was insufficiently specific to form a basis for criminal prosecution under international law.<sup>210</sup>

Along these lines of a diminished application of *nullum crimen sine lege* in ICL is the characterization of this principle as a “flexible principle of justice or a policy choice that can yield to competing imperatives rather than as a rigid rule that applies in all circumstances.”<sup>211</sup> As asserted by Professor Van Schaack, “[b]y subordinating [*nullum crime sine lege*] [...] to a vision of substantive justice, tribunals have determined that the former injustice is less problematic than the latter.”<sup>212</sup>

The ICTY has also invoked the “object and purpose” of international law as an interpretive tool, as was the case in *Hadžihasanović & Kubura*, wherein the defendants invoked *nullum crimen sine lege* to avoid prosecutions based on contested forms of responsibility, namely command responsibility in the realm of conflicts of a noninternational character.<sup>213</sup> Similarly, in the *Tadić* case, the Appeals Chamber established that the doctrine of joint criminal enterprise was a form of complicity liability according to the Tribunal’s object and purpose, which did not violate *nullum crimen sine lege*.<sup>214</sup>

Within less than a year from the adoption of the Statute of the ICTY by the Security Council, the Council adopted the Statute of the ICTR, which does not include a provision on principles of legality, but in practice, the ICTR judges have followed the approach of the ICTY.

Notwithstanding that provision, ICTR Article 3 on CAH, unlike the ICTY’s Article 5, removes the connection between CAH and a conflict of international or noninternational character. There is no evidence that customary international law changed between the

Article 5 of the Statute, forms part of this crime [of “other inhumane acts”]: norms of criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not”).

<sup>209</sup> Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 719 (2003) (internal quotation marks omitted).

<sup>210</sup> Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 201 (Nov. 29, 2002) (“Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.”) (emphasis added).

<sup>211</sup> Van Schaack, *supra* note 2, at 140. See Prosecutor v. Šainović et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, ¶ 37 (May 21, 2003).

<sup>212</sup> Van Schaack, *supra* note 2, at 140; see also Kelsen, *supra* note 175, at 165 (“In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions”). Kelsen also contended that Nazi defendants should not benefit from the principle of legality, because they never allowed their victims such protections. See Kelsen, *supra* note 185, at 46; see also Cassese, *supra* note 175, at 139 (discussing the substantive justice approach).

<sup>213</sup> Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 36 (Jul. 25, 2003).

<sup>214</sup> Tadić v. Prosecutor, Case No. IT-94-I-A, Judgment, ¶¶ 190–91 (July 15, 1999).

adoption of the ICTY Statute in 1993 and the ICTR's adoption in 1994. The argument, however, could be made that the 1950 ILC Report, discussed above,<sup>215</sup> removing the war-connecting link between war crimes and CAH was indeed sufficient evidence of customary international law.

The ICTR Statute follows very closely to the ICTY's and the same observations made about the ICTY extend to the ICTR. Article 23 of the ICTR Statute allows penalties to be established by the judges, and although the statute lacks a provision that incorporates by reference the customary international law of armed conflict, the ICTR judges have followed the same approach as the ICTY.

### §5.2. *The ICC*

The ICC addresses the principles of legality in Articles 22, 23, and 24.<sup>216</sup> Considering that the Rome Statute is supplemented by the Elements of Crimes,<sup>217</sup> as well as the Rules of Procedure and Evidence,<sup>218</sup> there is no doubt that the principles of legality, as enunciated in Article 22, are satisfied; and that the statute, the Elements of Crimes, and the Rules of Procedure and Evidence, all of which were adopted before the court commenced its operations and which are applicable prospectively in accordance with Article 24, satisfy the requirements of legality under positivistic legal systems.<sup>219</sup> This

<sup>215</sup> See *infra* ch. 3, §7, and ch. 4, §1.

<sup>216</sup> ICC Statute, *supra* note 10, arts. 22–24. See also M. Cherif Bassiouni, 1–3 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT (M. Cherif Bassiouni ed., 2005).

<sup>217</sup> Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

<sup>218</sup> Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

<sup>219</sup> TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE ICC, *supra* note 3; BASSIOUNI, THE LAW OF THE ICTY, *supra* note 198; VIRGINIA MORRIS/MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (2 Vols. 1995); VIRGINIA MORRIS/MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998). For further commentary concerning Article 22, see see Jonas Nilsson, *The Principle nullum crimen sine lege*, in Olaoluwa Olusanya (ed.), RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART 37 (2007); Antonio Cassese, *Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case Before the ECHR*, 4 J. INT'L CRIM. JUST. 410 (2006); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817 (2005); William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2nd ed. 2004); Kai Ambos, *Current Issues in International Criminal Law*, 14 CRIM. L.F. 225 (2003); Bruce Broomhall, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW (2003); Bruce Broomhall, *Article 22: Nullum Crimen Sine Lege*, in TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE ICC, *supra* note 1, at 447, 452–53; Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1 (1999); Mauro Catenacci, *The Principle of Legality*, in Flavia Lattanzi/William A. Schabas (eds.), ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1999); Andrew Ashworth, PRINCIPLES OF CRIMINAL LAW (1991); M. Cherif Bassiouni (ed.), INTERNATIONAL CRIMINAL COURT: COMPILATION OF UNITED NATIONS DOCUMENTS AND DRAFT ICC STATUTE BEFORE THE DIPLOMATIC CONFERENCE (1998); Stefan Glaser, *Nullum crimen sine lege*; *supra* note 25; M. Cherif Bassiouni, 3 volumes on Legislative History of the ICC. William A. Schabas, *The International Criminal Court: A Commentary on the rome* (Oxford University Press, 2010).

For further commentary concerning Article 23, see Lamb, *supra* note 3.

For further commentary concerning Article 24, see BASSIOUNI, STATUTE OF THE ICC, *supra* note 17; Olympia Bekou/Robert Cryer, THE INTERNATIONAL CRIMINAL COURT (2004); John R.W.D. Jones/Steven Powles, INTERNATIONAL CRIMINAL PRACTICE (2003).

specifically applies to CAH under Article 7, even though it could be argued that some of the prohibited acts contained therein may not be part of customary international law; the reason being that the Rome Statute applies prospectively and that it is adopted as part of an international treaty binding upon its States Parties, who are obligated under the Statute to incorporate its provisions into their national laws.<sup>220</sup> However, even in the absence of national implementing legislation, since the ICC is an extension of national jurisdiction, insofar as it is in the complementary relationship with national jurisdictions (as provided for in Article 17), it can be said that the principles of legality are satisfied. This assertion is also founded on the assumption that three crimes within the court's jurisdiction, namely, genocide in Article 6, CAH in Article 7, and war crimes in Article 8, are all sufficiently known throughout the world community to constitute notice to anyone of the prohibited conduct contained in these three provisions.<sup>221</sup>

Thus, as Professor Van Schaack summarizes:

[t]he precise framing of the overarching object and purpose of [international criminal law] has contributed to the tribunals' more relaxed approach to the dictates of the strict version of [*nullum crimen sine lege*]. A fundamental assumption underpinning the principle of legality is that it will deter crime by ensuring fair notice of proscribed conduct. This assumes known, or knowable, law and rational actors who will structure their conduct to avoid anticipated censure. To date, the deterrence of individuals within their personal jurisdiction has not been a primary motivation of existing [international criminal law] tribunals. Many modern [of these] tribunals – such as the [ICTR], the East Timor Special Panels, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia – were established (or have asserted jurisdiction) after the horrific events in question; the ICTY (for the latter part of its existence) and ICC are exceptions. Being *ex post*, these tribunals were unable to exert any meaningful deterrent effect on defendants within their personal jurisdiction and had to settle for contributing to the deterrence of future perpetrators. Even scholars devoted to the field doubt whether [international criminal law] can yet exert a meaningful deterrent effect under contemporary circumstances where international justice remains sporadic and random. Until legal censure is more certain, the narratives that explain why seemingly ordinary people do evil things in the context of war or state-sponsored repression – because they are beset by prejudices, intoxicated by power, manipulated by elites, terrified into submission by superior orders or threats of retaliation for their inaction, or caught up in a maelstrom of violence – likely still overwhelm any cost-benefit analysis in which individual perpetrators may engage.<sup>222</sup>

<sup>220</sup> According to the Coalition for the ICC, approximately 56 states have adopted partial or full implementation legislation on cooperation and/or complementarity with the Court, and a further 43 have advanced drafts in circulation, with a number of others likely to produce drafts in the near future. However, that list may be inaccurate in view of different national legislative standards. Moreover, this writer has been able to identify only 55 states which have legislation on CAH, and that means that this crime is not duly covered in the list of purported national implementing legislation.

<sup>221</sup> In addition, the four Geneva Conventions of August 12, 1949 have been ratified by all but two states in the world, and have been incorporated in most of the military laws of these states. The Genocide Convention and CAH are deemed *jus cogens* and are therefore binding upon States and upon individuals. See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 9 (1998); ANDRÉ DE HOOGH, OBLIGATION ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 91–127 (1996).

<sup>222</sup> Van Schaack, *supra* note 2, at 146 (internal citations omitted).



**Article 22**

*Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

**Article 23**

*Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

**Article 24**

*Non-retroactivity ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

**Article 11**

*Jurisdiction ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.<sup>223</sup>

However, it should be noted that Article 21 provides:

**Article 21**

*Applicable law*

1. The Court shall apply:
  - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - (c) Failing that, “general principles of law” derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

<sup>223</sup> ICC Statute, *supra* note 10.



2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.<sup>224</sup>

and Article 10:

#### Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.<sup>225</sup>

Thus, in light of Articles 21, 10, and 9,<sup>226</sup> the Rome Statute's approach to the principles of legality is closer to the common law than to the Romanist-Civilist, and certainly distinguishable from the Germanic.

It is now established that ICL recognizes the existence and application of the principles of legality to substantive legal norms and to penalties, although with some flexibility characteristic of the common law approach. The problem does not so much arise with substantive crimes<sup>227</sup> as with penalties. The 1993 ICTY Statute, the 1994 ICTR Statute,

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See *id.* at art. 9, which states:

#### Article 9

##### Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
  - (a) Any State Party;
  - (b) The judges acting by an absolute majority;
  - (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

<sup>227</sup> Fortunately, the Rome Statute establishes that principle in Article 23 quoted above and also contains several norms on penalties in Articles 77 and 78. With respect to the definition of crimes the ICTY, ICTR and the 1996 Draft Code of Crimes refer to the concept of crimes against "the laws and customs of war." (See respectively Statute of the International Tribunal for the Former Yugoslavia art. 3, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159; Statute of the International Criminal Tribunal for Rwanda art. 4, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994); 1996 Draft Code of Crimes, *supra* note 6, at art. 20). But, is the label "laws and customs of war" sufficient to identify all of the prohibitions contained therein? Can customary international law be incorporated by reference in ICL and still satisfy the principle of legality of *nullum crimen sine lege*? The ICTY, ICTR Statutes and the 1996 Draft Code of Crimes define CAH in more or less the same terms as Article 6(c). These contemporary definitions may give rise to the same questions that existed at the time of the Charter's formulation. These formulations maintain the words "murder, extermination, deportation, enslavement, and other inhumane acts" and also the word "persecution." Giving substance and content to these words and identifying the legal elements that make them criminal was problematic in 1946. Not to have cured these problems fifty years later is even more troublesome. But maybe this is another manifestation of where publicists and penalists follow different methods and techniques. For the publicist, the fact that these words have withstood the test of time and are reaffirmed in succeeding documents strengthens them. For the penalist,

and the 1996 Draft Code of Crimes do not provide for specific penalties for the categories of crimes they define – thus, raising the questions with respect to the principle *nulla poena sine lege*.

### §5.3. Principles of Legality in Other Post-Charter Legal Developments

In its summary of the “Nuremberg Principles,” the ILC, in 1950, concluded:

Another question of equally general importance arose at the beginning of the proceedings. It concerns the doubt of the defense as to whether certain provisions of the Charter were consistent with international law. The court dismissed a motion of the defence expressing doubts as to the consistency with international law of certain provisions of the Charter and requesting that an opinion regarding the legal basis of the trial should be obtained from recognized authorities on international law. “The law of the Charter,” said the Court, “is decisive and binding upon the Tribunal.” The same view is expressed in another passage of the findings in connexion with the question of the validity of Article 6 of the Charter. “These provisions” said the Court, “are binding upon the Tribunal as the law to be applied to the case.” However, the above motion of the defence was disallowed only in so far as it constituted a plea to the jurisdiction of the Court. The Court declared itself ready to hear any argument of the parties as to the compatibility of the Charter with international law. It is characteristic of the attitude of the Court that the Court itself on various occasions examined this problem when discussing the interpretation and application of provisions of the Charter. Thus, for instance, the Court, commenting on the plea of the defence that Article 6 of the Charter, which enumerates the crimes for which the major war criminals were to be punished, constitutes an *ex post facto* law, conflicting with the principle *nullum crimen sine lege, nulla poena sine lege*, said:

It is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

As already stated, a considerable part of the findings consists of comments on the interpretation and application of Articles 6 to 8 of the Charter, which contain the substantive principles of international law of the Charter. The ideas expressed in the comments which have particular importance for the formulation of the principles of international law recognized by the Charter and the judgment, are mentioned in

the absence of specificity is neither cured by time nor by repetition. The Rome Statute however avoided these problems by carefully defining the crimes within its jurisdiction: Article 6 “Genocide”; Article 7 “Crimes Against Humanity”; and Article 8 “War Crimes.”

Part IV of the present report since they may serve as an analysis of the principles enumerated therein.<sup>228</sup>

The ILC did not add anything in its summary restatement of the IMT's judgment. Even so, by its shortness, the ILC was misleading, particularly because it failed to state the inconsistencies and weaknesses in the opinions expressed by the London Charter's drafters, the prosecutors, and judges at the IMT, IMTFE, and those of the CCL 10 Proceedings. Thus, it must be regrettably concluded that the ILC's formulation is of little scholarly value.

Principles of legality in ICL progressed inferentially through the new substantive instruments developed after 1946, which contained more specificity.<sup>229</sup> However, nothing was added to CAH, which were left in a legal limbo, hanging between the problematic precedents of Nuremberg, Tokyo, the CCL 10 Proceedings, and the sketchy summary that the ILC made in the form of the Nuremberg Principles, whose legally binding nature is highly questionable. But the principles of legality gained independent recognition in a number of other international instruments. The first of these was the Universal Declaration of Human Rights of 1948, which states in Article II, paragraph 2:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.<sup>230</sup>

The principles of legality were later reaffirmed in the International Covenant on Civil and Political Rights, which states in Article 15:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the Offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.<sup>231</sup>

In this formulation, however, the Covenant recognized "general principles of law" as susceptible of creating crimes, a postulate that, in the opinion of this writer, is contrary to the principles of legality, because "general principles of law" can seldom satisfy the minimum standards of specificity that legality requires.

In the area of the international regulation of armed conflicts, the Third Geneva Convention of August 12, 1949, states in Article 99, "No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by

<sup>228</sup> 2 Y.B. INT'L L. COMM'N. 187-88 (1950) (internal citations omitted).

<sup>229</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 27.

<sup>230</sup> Universal Declaration of Human Rights art. 11, G.A. Res. 217(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948).

<sup>231</sup> International Covenant on Civil and Political Rights art. 19, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

International Law, in force at the time the said act was committed.”<sup>232</sup> In the Protocols additional to the Geneva Conventions of August 12, 1949, Protocol I, Article 2(c) states that:

No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.<sup>233</sup>

Protocol II, Article 6(c) – Penal Prosecutions further prohibits prosecution under an *ex post facto* or retroactive law:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.<sup>234</sup>

Since the Nuremberg, Tokyo, CCL 10 Proceedings, and other prosecutions by the victorious Allies in their respective zones of occupation and before national tribunals,<sup>235</sup> a few states have passed national criminal legislation to prosecute CAH.<sup>236</sup> Israel prosecuted Adolf Eichmann in 1960,<sup>237</sup> France prosecuted Klaus Barbie in 1988,<sup>238</sup> Paul Touvier in 1994,<sup>239</sup> and Maurice Papon in 1998,<sup>240</sup> and Canada prosecuted Imre Finta in

<sup>232</sup> See Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) art. 99, 75 U.N.T.S. 135, 6 U.S.T. 3316.

<sup>233</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, Article 4(2)(e), 1124 U.N.T.S. 609, 16 I.L.M. 1442 (1977), Protocol I (Art. 2(c)).

<sup>234</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, Article 4(2)(e), 1124 U.N.T.S. 609, 16 I.L.M. 1442, Protocol II (Art. 6(c)).

<sup>235</sup> Based on this writer's research, 55 states have criminalized CAH.

<sup>236</sup> See *infra* ch. 9, §3.2.

<sup>237</sup> *Id.*

<sup>238</sup> For the citations to the *Barbie* judgments, see *infra* ch. 9, §3.2. For information on the *Barbie* case see generally LADISLAS DE HOYAS, *KLAUS BARBIE* (Nicholas Courtin trans., 1985); BRENDAN MURPHY, *THE BUTCHER OF LYON* (1983).

<sup>239</sup> For the citations to the *Touvier* case, see *infra* ch. 9, §3.2. For information on the *Touvier* case see generally ÉRIC CONAN AND HENRY ROUSSO, *VICHY, UN PASSÉ QUI NE PASSE PAS* (1994); ALAIN JAKUBOWICZ AND RENÉ RAFFIN, *TOUVIER HISTOIRE DU PROCÈS* (1995); ARNO KLARSFELD, *TOUVIER UN CRIME FRANCAIS* (1994); JACQUES TRÉMOLET DE VILLERS, *L'AFFAIRE TOUVIER, CHRONIQUE D'UN PROCÈS EN IDÉOLOGIE* (1994).

<sup>240</sup> For the *Papon* judgments, see *infra* ch. 9, §3.2. For information on the *Papon* case see generally Laurent Greilsamer, *Maurice Papon, la vie masquée*, *LE MONDE*, Dec. 19, 1995, available in LEXIS, Nexis Library, Monde File; Barry James, *The Final Trial for Vichy? A Model French Bureaucrat Accused*, *INT'L HERALD TRIB.*, Jan. 6–7, 1996, at 2.

For additional information on the *Barbie*, *Touvier*, and *Papon* cases, and French prosecution of war criminals in general see generally Anthony D'Amato, *National Prosecutions for International Crimes*, in *INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT* 285 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, in *ASIL PROCEEDINGS* 270–76 (1997); Leila Sadat Wexler, *The Interpretation*

1989.<sup>241</sup> In these and other similar cases, the plea of violation of the principles of legality was rejected in reliance upon the Law of the London Charter, and no new arguments were presented in support of that conclusion. In a more recent case, the issue of *ex post facto*, as it relates to the Law of the Charter, arose in connection with Israel's request for the extradition of John Demjanjuk from the United States.<sup>242</sup> The Court in that case, rejecting the argument, held:

The Israeli statute merely provides Israeli courts with jurisdiction to try persons accused of certain crimes committed extraterritorially and establishes judicial procedures and applicable penalties. Similarly, the Nuremberg International Military Tribunal provided a new forum in which to prosecute persons accused of war crimes committed during World War II pursuant to an agreement of the wartime Allies. That tribunal consistently rejected defendants' claims that they were being tried under *ex post facto* laws. The statute is not retroactive because it is jurisdictional and does not create a new crime. Thus, Israel has not violated any prohibition against the *ex post facto* applications of criminal laws which may exist in international law.<sup>243</sup>

Thus, the question of *ex post facto* was simply dealt with in reliance on the IMT's judgment that the London Charter was declarative of international law and was not new law, nor *ex post facto* law.<sup>244</sup> In fact, all national prosecutions undertaken after 1946 took the same position, and none reopened the question, as if the accumulation of time and precedents relying on the IMT's judgments had cured all possible legal defects. This leads to the legally incongruous conclusion that reiteration of the same argument confirms its validity. Such an approach would surely be valid for facts occurring after

*of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994); Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 J. L. & SOC. INQUIRY 191 (1995); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications* (Working Paper No. 97-43, Washington University School of Law, 1997); Jacques Francillon, *Crimes de guerre, Crimes contra l'humanité*, JURIS-CLASSEUR, DROIT INT'L, FASCICULE 410 (1993); Mireille Delmas-Marty, *Le crime contra l'humanité, les droits de l'homme, et l'irréductible humain*, 3 REV. SC. CRIM. 477 (1994); Catherine Grynfolgel, *Le crime contre l'humanité: notion et régime juridique*, TOULOUSE-I 727 (1991); Michel Masse, *Les crimes contre l'humanité dans le nouveau code pénal français*, 2 REV. SC. CRIM. 376 (1994); Claude Lombois, *Un crime international en droit positif français: l'appât de l'affaire Barbie à la théorie française du crime contre l'humanité*, MÉLANGES VITU, CUJAS 367 (1989); Pierre Truche, *La notion de crime contre l'humanité: bilan et propositions*, 181 REV. ESPRIT 67 (1992); Elizabeth Zoller, *La définition des crimes contre l'humanité*, J.D.I. 549 (1993); P. Truche and P. Biriretz, *Crimes de guerre – crimes contra l'humanité*, 2 ENCYCLOPÉDIE DALLOZ, DROIT PÉNAL (1993).

<sup>241</sup> See *infra* ch. 9, §3.2.

<sup>242</sup> See *Matter of Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985); and *infra* ch. 9, §3.2.

"Respondent's argument that the Israeli statute violates the United States Constitution's prohibition against *ex post facto* law is misplaced. This Court does not have jurisdiction to determine whether Israeli criminal procedure extends to respondent all of the constitutional rights of a defendant in an American court. Due process rights in extradition proceedings cannot be extended extraterritorially." *Neely v. Henkel*, 180 U.S. 109 (1901); *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984), *cert. denied*, 469 U.S. 817 (1984). This Court is "bound by the existence of an extradition treaty to assume that the trial will be fair." *Glucksman v. Henkel*, 221 U.S. 508 (1911) (J. Holmes). *Rosado v. Civiletti*, 621 F.2d 1179, 1193 (2d Cir. 1980) (holding "Even where the treaty fails to secure to those who are extradited to another country the same constitutional safeguards they would enjoy in an American criminal trial, it does not run afoul of the Constitution").

<sup>243</sup> See *Matter of Extradition of Demjanjuk*, *supra* note 239, at 567–68 (internal citations omitted); see also *infra* ch. 9, §3.2.

<sup>244</sup> See *id.*

1945, but it can hardly be said, from a jurisprudential point of view, that a precedent like the IMT's judgment on the question of *ex post facto* can be validated with respect to itself only by the subsequent reaffirmation of others. Surely a better legal case could have been made by the IMT, and subsequent decisions could have at least attempted to cure its defects by buttressing the arguments in support of legality with stronger and more convincing arguments.

The principles of legality have been reaffirmed by the Post-Charter developments. First, the Security Council established two *ad hoc* international criminal tribunals in 1993 and 1994: the ICTY and ICTR. The statutes of both contain provisions on CAH, respectively in Articles 5 and 3.<sup>245</sup> The ICTY's statute was embodied in a report by the U.N. Secretary General, which states:

[T]he application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.<sup>246</sup>

Since then there have been several reaffirmations of the principles of legality:

- (1) The International Law Commission in its 1996 Draft Code of Crimes states:

The fundamental purpose of criminal law is to prohibit, to punish and to deter conduct which is considered to be of a sufficiently serious nature to justify the characterization of an act or omission as a crime. This law provides a standard of conduct to guide the subsequent behaviour of individuals. It would clearly be unreasonable to determine the lawfulness of the conduct of an individual based on a standard that was not in existence at the time the individual decided to pursue a particular course of action or to refrain from taking any action. The prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust. The prohibition of the retroactive application of criminal law is reflected in the principle *nullem crimen sine lege*.<sup>247</sup>

- (2) The General Assembly's Preparatory Committee on the Establishment of an International Criminal Court states in its 1996 report:

The principle of non-retroactivity was considered fundamental to any criminal legal system. A number of delegations recognized the substantive link between this concept and article 39 of the Statute (*nullem crimen sine lege*) and suggested that the principle should be clearly and concisely set out in the Statute, even though some of the crimes referred to in the Statute were recognized as crimes under customary international law. It was further noted that the principle *nulla poena sine lege* also required that the principle of non-retroactivity be clearly

<sup>245</sup> See *infra* ch. 4, Part A, §2.

<sup>246</sup> The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN SCOR, 48th Sess., Supp. April, May and June 1993, UN Doc. S/25704, 117 at para. 34.

<sup>247</sup> *Report of the International Law Commission on the Work of Its Forty-eighth Session*, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. A/51/10 (1996) at 72.

spelled out in the Statute and that the temporal jurisdiction of the Court should be limited to those crimes committed after the entry into force of the Statute.<sup>248</sup>

- (3) The Rome Statute provides for the principles of legality in several articles, as described in the preceding section.

## Conclusion

Some questions arose concerning the principles of legality in connection with the London Charter's Article 6(c), and for the same reasons these questions also arose in the Tokyo Charter's Article 5(c) and CCL 10 Article II(c). The arguments favoring the recognition that these provisions satisfied the principles of legality have been made throughout this chapter and in [Chapter 3](#).

Issues of legality with regard to the ICTY, the ICTR, and the ICC have also been addressed in this chapter. The ICTY Statute raises only some questions of legality that can be said to be more technical than substantive, except by strict legal positivistic standards. The same could be said of the ICTR, with this writer's additional reservation as to the removal in Article 3 of any war-connecting link, which is a departure from the practice that existed until that time.

The Rome Statute, as supplemented with the Elements of Crimes and the Rules of Procedure and Evidence, fully address the requirements of legality, with reservations concerning the provision concerning penalties, as discussed above in light of the requirements of legal positivism.

<sup>248</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Vol. 1, Supp. No. 22, PP153–78, U.N. Doc. A/51/22 (1996) at Vol. I, 43–4.



## 6 Specific Contents

The life of the law has not been logic; it has been experience.

– JUSTICE OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

### §1. Introduction

As discussed in [Chapter 5](#), ICL is not as rigorous as some national legal systems with respect to the specificity required in the definition of international crimes. Nonetheless, there is a minimum standard of specificity that must be met in order to satisfy the principles of legality. This standard must be sufficient to provide notice of the prohibited conduct to the population whose conduct is expected to conform to the requirements of the law. This specificity is also needed to determine the elements of a specific crime that need to be proven by the prosecution, as well as the general elements of individual criminal responsibility and exoneration according to which an individual who is accused of a given international crime is to be prosecuted.

The various formulations of CAH described in [Chapter 4](#) reveal that the Charter's Article 6(c) matrix has influenced all subsequent formulations, even the Rome Statute's formulation of Article 7, though it departs somewhat from that earlier model. However, it should be noted that all formulations subsequent to Article 6(c) of the Charter are somewhat different, particularly the ICTR's Article 3. Therefore, an analysis of the contents of Article 6(c) of the Charter is relevant, in some respects, to all other subsequent formulations. With the exception of the Rome Statute's Article 7, which is supplemented by the Elements of Crimes,<sup>1</sup> and which is quoted below, all other formulations require interpretation on the basis of their respective statutes. The jurisprudence of the IMT, IMTFE, and the CCL 10 Proceedings on the specific contents of CAH failed to produce a consistent legal method underlying these decisions. The same is true with respect to the jurisprudence of the ICTY and ICTR, which has served as a foundational source for the subsequent mixed-model tribunals in Sierra Leone, Cambodia, and East Timor. Thus, a proposed methodology based on "general principles of law" is useful for assessing past experiences and also to guide the ICC in the future.

Because almost identical language was used in Article 5(c) of the Tokyo Statute and Article II(c) of CCL 10 as that of the London Charter's Article 6(c), the analysis that follows will focus on that earlier formulation. The principal difference in Article 5(c) of the Tokyo Charter is the elimination of persecution on "religious" bases. The principal

<sup>1</sup> International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

difference in Article II(c) of CCL 10 is the elimination of the war-connecting element, which is referred to in the London Charter's Articles 6(c) and the Tokyo Statute's Article 5(c) as "in connection with any crime within the jurisdiction of the Tribunal." The analysis of the specific contents of Article 6(c) of the London Charter applies to Article 5(c) of the Tokyo Statute and II(c) of CCL 10. All of the contents of Article 6(c) of the London Charter are also found in the subsequent formulations discussed in Chapter 4.<sup>2</sup>

Substantial similarities exist between the specific crimes contained in the various CAH formulations and their counterparts in the national criminal laws of the world's major legal systems. But it is also well established that national legal systems differ, *inter alia*, as to their conceptual approaches to criminal responsibility, their elements, and their conditions of exoneration, as discussed in Chapters 7 and 8.

Some of the specific acts constituting CAH under Article 6(c) of the London Charter, which are also found in subsequent formulations, can be identified by analogy to war crimes under the conventional and customary law of armed conflicts, or by analogy to national crimes, provided that they rise to the level of "general principles of law." Interpretation by analogy, though presenting problems of legality, is reflected in the Roman law maxim *ejusdem generis*. But it is important to bear in mind that "general principles of law" are not capable of creating international crimes unless they rise to the level of *jus cogens*. To hold otherwise would violate the principles of legality.<sup>3</sup> Nevertheless, "general principles" is a source of international law established under the provisions of Article 38 of the Statute of the International Court of Justice,<sup>4</sup> the 1948 Universal Declaration of Human Rights,<sup>5</sup> the 1966 International Covenant on Civil and Political Rights,<sup>6</sup> the 1949 Geneva Conventions,<sup>7</sup> the 1977 Protocols, and the Rome Statute's Article 21.<sup>8</sup> These "general principles" remain subject to the requirements of the principles of legality,<sup>9</sup> which are also part of "general principles of law." The function of "general principles" in interpreting the specific contents of CAH derives from the method employed to arrive at a given conclusion.

The jurisprudence of the IMT, IMTFE, and the CCL 10 Proceedings reveals very little about the methodology employed to arrive at the conclusion that any one of the specific acts described in the applicable instrument was interpreted in conformity with one of the sources of international law, particularly "general principles." At the IMT, Article 6(c) linked crimes against peace and war crimes to CAH, which involved a newly defined

<sup>2</sup> See *infra* chs. 3, §3, and 4, §2.

<sup>3</sup> *Id.*

<sup>4</sup> Article 38 of the Statute of the International Court of Justice.

<sup>5</sup> Universal Declaration of Human Rights, G.A. Res. 217(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948).

<sup>6</sup> International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

<sup>7</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 75 U.N.T.S. 31, 6 U.S.T. 3114; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85, 6 U.S.T. 3217; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135, 6 U.S.T. 3316; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>8</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1124 U.N.T.S. 609, 16 I.L.M. 1442; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1124 U.N.T.S. 609, 16 I.L.M. 1442.

<sup>9</sup> See *infra* ch. 5, §1.

crime with questionable status under the principles of legality, as discussed in [Chapter 5](#). For purposes of the IMT judgment, it was obvious that CAH could only be linked to war crimes. Thus, the judges probably confronted the difficulty of narrating a judgment that specifically separated war crimes from CAH, and that proved to be such an arduous task that all of the judgments against every defendant but two, von Schirach (deportation) and Streicher (incitement to murder and extermination constituting persecution on political and racial grounds), convicted them on the basis of both war crimes and CAH.

However, at the time of the London Charter, it was necessary to link the specific crimes listed in Article 6(c) to a source of law. Then, the most appropriate source was “general principles of law,” because it was listed as a source of international law in Article 38 of the Statute of the PCIJ and subsequently in Article 38 of the Statute of the ICJ. It is also listed in Article 22 of the Rome Statute. The problem, which existed at the time of the Charter, was the selection of a method of identification of the contents of the Charter that would satisfy the principles of legality. Obviously, with respect to the *ad hoc* tribunals and the mixed-model tribunals, where the law is well settled, this is less of a concern because the law is statutorily established. But these judges still have to establish the legal elements of each specific crime within the definition of CAH. The problem is that the only way they can do this is to look at “general principles of law” in order to derive the common elements of the crimes in all of the world’s legal systems. As discussed herein, this requires a methodology, which in turn requires consistent and clear application. Thus far, the judges at the ICTY, ICTR, and the mixed-model tribunals have failed in both respects.

In order not to disrupt the flow of what follows, namely a review of the various definitions of the specific crimes that constitute CAH as set forth in the statutes and jurisprudence of the IMT, IMTFE, CCL 10 Proceedings, the *ad hoc* and mixed-model tribunals, and the ICC, the discussion of the methodology used to identify a “general principle of law” is placed at the end of the chapter.

## **§2. Identifying the Specific Crimes Contained in the Four Primary Formulations of Crimes Against Humanity: Article 6(c) of the London Charter, Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the ICC Statute**

The four primary formulations of CAH are Article 6(c) of the London Charter,<sup>10</sup> Article 5 of the ICTY Statute,<sup>11</sup> Article 3 of the ICTR Statute,<sup>12</sup> and Article 7 of the Rome Statute.<sup>13</sup> The analysis that follows traces the evolution of CAH through three “phases”: (1) the “Nuremberg phase” (Article 6(c) of the London Charter); (2) the “Security Council phase” (Article 5 of the ICTY Statute and Article 3 of the ICTR Statute); and (3) the “universally negotiated phase” (Article 7 of the Rome Statute).

With respect to the Nuremberg phase, the specific crimes of Article 6(c) of the London Charter are analyzed in light of two separate issues of legality. The first issue centers on

<sup>10</sup> Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter].

<sup>11</sup> Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1–2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute].

<sup>12</sup> Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

<sup>13</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9 [hereinafter ICC Statute].

the principle of legality prohibiting *ex post facto* applications of the criminal law. Here, the analysis focuses on whether or not the specific crimes in Article 6(c) existed in national and international law at the time of the Charter in order to obviate concerns that this category of crimes was *ex post facto*. The second issue centers on the principle of legality requiring that prohibitions be defined with specificity. Here, the analysis focuses on whether or not the specific crimes in Article 6(c) were sufficiently defined so as to put potential perpetrators on notice as to precisely what conduct was prohibited as CAH.

The specific definitions of Article 5 of the ICTY and Article 3 of the ICTR Statutes of the Security Council phase are discussed contextually with Article 6(c) of the London Charter because of the similarity of their contents, except for where they differ from Article 6(c), in which case these specific crimes are discussed separately. However, Articles 5 and 3 of the ICTY and the ICTR Statutes do not raise the same problems of *ex post facto* applications as Article 6(c) of the Charter, because the prior existence of Article 6(c) and other developments between 1945 and 1993 and 1994 established the *jus cogens* nature of CAH.

With respect to the universally negotiated phase, the *ex post facto* issue does not arise under the Rome Statute because of its status as a treaty, for which Article 24 provides prohibitions and jurisdiction. The specific crimes in Article 7 that are the same as those contained in Article 6(c) are examined contextually with these crimes, but are examined separately where they differ from the three prior formulations of the Nuremberg phase and the Security Council phase. The specific contents of the four normative formulations of CAH follow.

Article 6(c) of the London Charter defines the specific contents of CAH as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial or religious grounds [ . . . ].<sup>14</sup>

The specific contents within the definition of CAH in Article 5 of the ICTY Statute are

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”<sup>15</sup>

The specific contents within the definition of CAH provided by Article 3 of the ICTR Statute are

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;

<sup>14</sup> London Charter art. 6(c), *supra* note 10.

<sup>15</sup> ICTY Statute art. 5, *supra* note 11.

- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”<sup>16</sup>

The ICTY and ICTR formulations vary from Article 6(c) because they add “imprisonment,” “torture,” and “rape.” But it should be noted that all three specific crimes are subsumed in the term “other inhumane acts” contained in Article 6(c) of the London Charter. Both Article 5 of the ICTY and Article 3 of the ICTR are identical and also contain “other inhumane acts.”

The specific contents within the definition of CAH in Article 7 of the Rome Statute, Paragraph 1, are

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) enforced disappearance of persons;
- (j) the crime of *apartheid*;
- (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>17</sup>

Article 7 of the Rome Statute is identical to the other formulations cited but it adds (d) forcible transfer; (e) imprisonment; (g) rape and sexual violence; (h) persecution; and each of (i), (j), and (k) are new additions to prior formulations. To a large extent the additions of Article 7 are enlargements of prior formulations, but they also add new specific contents as evidenced from the text quoted below. But unlike the three prior formulations, Paragraphs 2 and 3 of Article 7 contain some definitions of the specific contents:

2. For the purpose of paragraph 1:

- (a) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

<sup>16</sup> ICTR Statute art. 3, *supra* note 12.

<sup>17</sup> ICC Statute art. 7, *supra* note 13.

- (b) “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;
  - (c) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
  - (d) “Torture” means 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;
  - (e) “Forced pregnancy” means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
  - (f) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
  - (g) “The crime of 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;
  - (h) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.<sup>18</sup>

Article 7 of the Rome Statute is amplified by the Elements of Crimes, which states,

#### ARTICLE 7 *Crimes Against Humanity*

1. For the purpose of this Statute, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

##### *Elements*

Introduction to Article 7: 1. Because Article 7 pertains to international criminal law, its provisions, consistent with Article 22, must be strictly construed, taking into account that crimes against humanity as defined in Article 7 are among the most serious crimes

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

of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.
3. “Attack directed against a civilian population” in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in Article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population [footnote 6: A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.]<sup>19</sup>

### §2.1. *Murder and Extermination*

The conventional and customary regulation of armed conflicts prohibits murder of civilian populations in time of war by a foreign occupier. Extermination is murder on a large scale. While the 1899 and 1907 Hague Conventions, which embody customary law, protect the “lives” of civilian populations,<sup>20</sup> they do not provide specific definitions as to the crime or crimes of taking the life of a civilian under occupation. The Fourth Geneva Convention and Protocol I also fail to define murder and the meaning of protection of life. Therefore, one must first resort to customary practices of states in time of war to ascertain the types of life-taking that would constitute a violation of the provision protecting the “lives” of the civilian population, and thereafter to “general principles of law.”

The customary practice of states, evidenced in international and national military prosecutions, reveals that murder is intentional killing without lawful justification. Lawful justification refers to those legal justifications, excuses, and defenses known to the world’s major criminal justice systems, such as self-defense, coercion, necessity, and reasonable mistake of law or fact. But state practice also shows that under certain circumstances,

<sup>19</sup> *Id.*

<sup>20</sup> Convention Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 3 MARTENS NOUVEAU RECUEIL (ser.3) 461, *reprinted in* 2 AM. J. INT’L L. 90 (1908)(Supp.), 1 FRIEDMAN 308, 1 BEVANS 631, 632 [hereinafter 1907 Hague Convention].



the doctrines of military necessity and obedience to superior orders are exonerating or mitigating factors.<sup>21</sup>

The protection of life is a “general principle of law” because it is specifically enunciated in a variety of international instruments and in national legal instruments. It includes a prohibition against unjustified killing. Indeed, all the world’s major criminal justice systems have crimes such as murder and manslaughter, no matter how they are defined or graded in the various national legal systems. But the fact that every legal system in the world criminalizes murder does not make murder an international crime. Thus, it is necessary to show the nexus between murder, as understood in the world’s major criminal justice systems, and the international crime of murder and extermination under Article 6(c) of the Charter. Such a nexus can be established by the war-connecting element that the Charter required<sup>22</sup> or by the fact that the conduct was part of state policy.<sup>23</sup> The same nexus or international element is required for all other Article 6(c) crimes.

The customary practice of states, evidenced by international and national military prosecutions, reveals that murder is not intended to mean only specific intentional killings without lawful justification. Instead, state practice views murder in its *largo senso* meaning as including the creation of life-endangering conditions likely to result in death according to reasonable human experience. This standard was used in war-related cases involving mistreatment of prisoners of war and civilians.

The label, definition, and elements of homicide differ among national criminal justice systems. This difference raises a problem with respect to defining murder as an Article 6(c) crime by analogy to the definition of murder in the world’s major criminal justice systems. Combining the practice of states in national military prosecutions and the *in extenso* definition of murder in major systems, one can conclude that murder as intended under Article 6(c) of the Charter includes a closely related form of unintentional but foreseeable death that the common law labels manslaughter. But that does not mean that all forms of unintentional killings can be included in the extended meaning of “murder” under Article 6(c). Otherwise, under certain conditions, a traffic accident resulting in death could become an international crime.

The extension of murder to include unintentional killing is particularly relevant to “extermination.” The plain language and ordinary meaning of the word “extermination” implies both intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not necessarily perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim. All of these are necessary elements of murder or its counterpart in the world’s major criminal justice systems. Thus, the individual responsibility of each actor (whether direct, indirect, or vicarious) for a given killing cannot be predicated on the element of specific knowledge of the identity of the victim or personal knowledge of the specific act that was the direct cause of death of a given victim. Therefore, it is necessary in that type of group killing to extend the definitions of “murder” – and particularly that of “extermination” – to include other forms of intentional and unintentional killing.

<sup>21</sup> See *infra* ch. 8, §1.

<sup>22</sup> See *supra* ch. 3, §7.

<sup>23</sup> See *supra* ch. 1.

Notwithstanding the technical differences in the definitions of various forms of intentional and unintentional killing in the world's major criminal justice systems, the widespread common understanding of the meaning of murder includes life-endangering conditions likely to result in death according to the known or foreseeable expectations of a reasonable person in the same circumstances. Admittedly, this definition includes what the common law considers to be voluntary and involuntary manslaughter, and what the Romanist-Civilist-Germanic systems consider homicide with *dolus* and homicide with *culpa*. However, the latter systems allow consideration of motive, while the former does not. But in this case, motive, or an extensive interpretation of intent to include the ultimate purpose, is particularly relevant because a link has to be established with the prerequisite legal elements.<sup>24</sup> A state policy must be linked to the intent (or motive) of the perpetrator of "murder" and "extermination" as CAH.

Since the promulgation of the Charter, other sources of specificity for certain types of "murder" and "extermination" as a CAH are found in several international instruments.

Common articles to the four 1949 Geneva Conventions state, "[g]rave breaches [ . . . ] shall be those involving any of the following acts, if committed against persons or property protected by the Convention: *wilful killing* [ . . . ]."<sup>25</sup>

The Genocide Convention provides in Article II:

[I]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- (a) [k]illing members of the group;
- (b) [c]ausing serious bodily or mental harm to members of the group;
- (c) [d]eliberately inflicting on the group, conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) [i]mposing measures intended to prevent births within the group;
- (e) [f]orcibly transferring children of the group to another group.<sup>26</sup>

The application of this broad definition of condition causing or leading to death is, however, limited, as it excludes (a) situations where the required intent does not exist, and (b) other groups not specifically identified for protection (e.g., social or political groups). But this definition expands the meaning of "murder" and "extermination" as species of international crimes. The ICJ affirmed the importance of the prohibition and its nonderogability in its Advisory Opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>27</sup>

As Raphaël Lemkin said nearly a half century ago, the word "genocide" is:

[I]ntended to signify a coordinated plan of different actions aiming at the destruction of essential foundations of life of national groups [ . . . ]. The objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence of national groups, and the

<sup>24</sup> *Id.*

<sup>25</sup> 1949 Geneva Conventions, *supra* note 7; Geneva I, art. 50; Geneva II, art. 51; Geneva III, art. 130; and Geneva IV, art. 147 (emphasis added).

<sup>26</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>27</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion 1951 I.C.J. 15 (May 28); *see also* 45 AM. J. INT'L L. 13 (Supp. 1951).

destruction of personal security, liberty, health, dignity, and even lives of the individuals belonging to such groups.<sup>28</sup>

A number of post-World War II international human rights instruments assert a right to life,<sup>29</sup> and they explicitly or implicitly prohibit the unlawful taking of life. However, the generality of such rights does not allow their *ipso jure* conversion to criminal violations. As “general principles of law,” these instruments stand for the protection of life, the same interest that is protected by the criminalization of “murder” and “extermination” as CAH.

“Murder” and “extermination” are included in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute. The ICTY and ICTR have stated that the elements of “murder” reflect the elements of the war crime of unlawful killing, while extermination has been defined as mass scale killing, to be determined in light of the totality of the circumstances as opposed to a numerical minimum.

Article 5 of the ICTY states that “[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) *murder*; (b) *extermination* [ . . . ].”<sup>30</sup>

Article 3 of the ICTR states that “[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds: (a) *murder*; (b) *extermination* [ . . . ].”<sup>31</sup>

Thus, the above two formulations found in the ICTY and ICTR Statutes replicate in exact fashion what is provided in London Charter Article 6(c) with respect to “murder” and “extermination.” In other words, the two formulations above simply provide that “murder” and “extermination” are specific crimes contained within the meaning of CAH, but they fail to provide the needed specificity, namely, they fail to define what “murder” and “extermination” mean. As a result, after these formulations, the same questions remained with respect to the meaning and scope of “murder” and “extermination” as existed at the time of the Charter and in subsequent years. The two formulations above failed to address all the issues that arise concerning “intentional killings without lawful justification.” For instance, they neglected to specifically state that intentional killings included those situations in which the perpetrator knew or should have known that death would be the result of a given conduct. Further, they neglected to state what “lawful justifications” excused otherwise impermissible “intentional killings.” Again, as stated above, although the answers to these questions can be derived from the inductive method analyzing “general principles of law,” it nonetheless remains that legal instruments with specifically defined contents beneficially serve the endeavor of ICL. The ICTY and ICTR

<sup>28</sup> RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944); Matthew Lippman, *Genocide*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* 403 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 *B. U. INT'L L. J.* 1 (1985); LEO KUPER, *GENOCIDE* (1981).

<sup>29</sup> See, e.g., Universal Declaration of Human Rights, *supra* note 5; International Covenant on Civil and Political Rights, *supra* note 6; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(1), Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter European Convention on Human Rights]; American Convention on Human Rights art. 4: Nov. 22, 1969, 1144 U.N.T.S. 123, 145; African Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (entered into force Oct. 21, 1986).

<sup>30</sup> ICTY Statute art. 5, *supra* note 11 (emphasis added).

<sup>31</sup> ICTR Statute art. 3, *supra* note 12 (emphasis added).

Statutes did not specifically define “murder” and “extermination” and thus they added nothing to Article 6(c) of the Charter with respect to these two specifically enumerated crimes.

The ICTY and ICTR have consistently defined the crime of murder as requiring that the death of the victim result from an act or omission of the accused committed with the intent to kill, or with the intent to cause serious bodily harm, which the perpetrator should reasonably have known might lead to death.<sup>32</sup>

Both the ICTY and ICTR have held that the crime of “extermination” is the act of killing on a large scale.<sup>33</sup> The *actus reus* of extermination consists of any act, omission, or combination thereof which contributes directly or indirectly to the killing of a large number of individuals.<sup>34</sup> The *mens rea* of “extermination” is that the accused committed the act or omission with the intent to kill persons on a large-scale or with knowledge that the deaths of a large number of people were a probable consequence of the act or omission.<sup>35</sup>

<sup>32</sup> For the ICTY, *see generally* Prosecutor v. Mucić et al., Case No IT-96-21-T, Judgment, ¶ 439 (Nov. 16, 1998) [hereinafter *Čelebići* Trial Judgment]; Prosecutor v. Blaškić, Case No IT-95-14-T, Judgment, ¶¶ 153, 181, 217 [hereinafter *Blaškić* Trial Judgment]; Prosecutor v. Krstić, Case No IT-98-33-T, Judgment, ¶ 485 (Aug. 2, 2001) [hereinafter *Krstić* Trial Judgment]; Prosecutor v. Martić, Case No IT-95-11-T, Judgment, ¶¶ 58–60 (Jun. 12, 2007) [hereinafter *Martić* Trial Judgment]; Prosecutor v. Blagojević & Jokić, Case No IT-02-60-T, Judgment, ¶ 556 (Jan. 17, 2005); Prosecutor v. Šainović et al., Case No IT-05-87-T, Judgment, ¶¶ 137–139 (Feb. 26, 2009) [hereinafter *Šainović et al.* Trial Judgment]; Prosecutor v. Lukić & Lukić, Case No IT-98-32/1-T, Judgment, ¶ 903 (Jul. 20, 2009) [hereinafter *Lukić & Lukić* Trial Judgment].

For the ICTR, *see generally* Prosecutor v. Akayesu, Case No ICTR-96-4-T, Judgment, ¶ 589 (Sept. 2, 1998) [hereinafter *Akayesu* Trial Judgment]; Prosecutor v. Bagosora et al., Case No ICTR-98-41-T (Dec. 18, 2008) [hereinafter *Bagosora et al.* Trial Judgment], *citing* Prosecutor v. Bagosora et al., ICTR-98-41-T, Decision on Motion for Judgment of Acquittal (TC), ¶ 25 (Feb. 2, 2005); Prosecutor v. Karera, ICTR-01-74-T, Judgment (Dec. 7, 2007); Prosecutor v. Renzaho, Case No ICTR-97-31-T, Judgment, ¶ 786 (Jul. 14, 2009).

Some ICTR Trial Chambers have held that murder requires an element of premeditation and not intent alone. *See, e.g.*, Prosecutor v. Bagilishema, Case No ICTR-95-1A, ¶ 86 (Jun. 7, 2001); Prosecutor v. Ntagerura et al., ICTR-96-10A, Judgment, ¶ 700 (Feb. 24, 2004); Prosecutor v. Semanza, Case No ICTR-97-20-T, Judgment, ¶ 339 (May 15, 2002).

<sup>33</sup> *See Martić* Trial Judgment, *supra* note 32, at ¶ 62; Stakić v. Prosecutor, IT-97-24, Appeals Judgment, ¶ 259 (Mar. 22, 2006); *see also Akayesu* Trial Judgment, *supra* note 32, ¶ 591 (holding that “[e]xtermination differs from murder in that it requires an element of mass destruction which is not required for murder”); Seromba v. Prosecutor, Case No ICTR-2001-66-I-A, Judgment, ¶ 189 (Mar. 12, 2008) [hereinafter *Seromba* Appeals Judgment]; Ntakirutimana v. Prosecutor, Case No ICTR-96-10 and ICTR-96-17-T, Judgment, ¶ 812 (Feb. 21, 2003); Prosecutor v. Ntakirutimana, Case No ICTR-96-10-A and ICTR-96-17-A, Judgment, ¶ 516 (Dec. 13, 2004); *Bagosora et al.* Trial Judgment, *supra* note 88, at ¶ 2191.

<sup>34</sup> *See Seromba* Appeals Judgment, *supra* note 33, ¶ 189, *citing* Prosecutor v. Brđanin, IT-99-36-T, Judgment, ¶ 389 (Sept. 4, 2004). *See also Bagosora et al.* Trial Judgment, *supra* note 32, at ¶ 2191; Ndindabahizi v. Prosecutor, ICTR-01-71-I-A, Judgment, ¶ 516 (Jan. 16, 2007); Prosecutor v. Vasiljević, IT-98-32-T, ¶ 229 (Nov. 29, 2002); *Martić* Trial Judgment, *supra* note 32, ¶ 63; *Lukić & Lukić* Trial Judgment, *supra* note 32, ¶ 938.

<sup>35</sup> *See Stakić* Appeals Judgment, *supra* note 33, at ¶¶ 259, 260 (providing that “[t]he mens rea of extermination clearly requires the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths. This intent is a clear reflection of the actus reus of the crime”); Ntakirutimana Appeals Judgment, *supra* note 33, ¶ 522; *see also Bagosora et al.* Trial Judgment, *supra* note 32, ¶ 2191 (stating that “[t]he mens rea of extermination requires that the accused intended to kill persons on a massive scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner”); Brđanin Trial Judgment, *supra* note 34, ¶ 395 (stating that “[t]he Prosecution is thus required to prove beyond reasonable doubt that the accused had the intention to kill persons on a massive scale or create the conditions of life that led to the deaths of a large number of people”), *aff’d* Brđanin v. Prosecutor, IT-99-36-A, Judgment, ¶ 476 (Apr. 3, 2007).

The ICTY Trial Chamber in the *Krstić* case, wherein the Chamber determined that extermination was committed at the United Nations “safe haven” of Srebrenica after finding that approximately 7,000 to 8,000 Bosnian Muslim men and boys were systematically murdered during the Bosnian Serb takeover of the city,<sup>36</sup> stated that for the crime of extermination to be established, in addition to the general requirements for a CAH, “there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.”<sup>37</sup> In the *Brđanin* case, the Appeals Chamber acknowledged that five incidents of mass killing, each of which resulted in the deaths of between sixty-eight and 300 victims, were of such a scale as to meet the required threshold for the purposes of extermination.<sup>38</sup>

In the *Lukić & Lukić* case, a majority of the Trial Chamber found Milan Lukić guilty of two counts of extermination as a CAH for having killed fifty-nine persons in Pionirska and at least sixty persons in Bikavac, respectively. One factor, in the view of the majority, was the population density of the particular area: “while there may be a higher threshold for a finding of extermination in a densely-populated area, it would not be inappropriate to find extermination in a less densely-populated area on the basis of a lower threshold, that is, fewer victims.”<sup>39</sup> In her dissenting opinion, Judge van den Wyngaert distinguished her view of the standard of gravity of “massiveness” for the crime of extermination from the view of the majority as follows:

In my opinion, the massive scale reflects the unique gravity of the crime of extermination. This gravity must be preserved by retaining a high standard for the requirement of massiveness. To lower the threshold by which we measure massiveness necessarily lowers the threshold by which exterminations are defined, to the detriment of the standards of gravity the Appeals Chamber has set for the crime of murder and for the crime of extermination.

I recognise that the Appeals Chamber has not set a numerical minimum for the crime and has rejected the submission that the threshold must be at least thousands of deaths. Notably, the Appeals Chamber has held that an extermination can be found when the required scale of killings arises in a single incident of mass killing or in the aggregation of a series of killing incidents. However, in my opinion, the sheer scale of killings continues to be the most relevant factor in determining whether a mass killing incident has reached the “required threshold of massiveness” for the crime of extermination. The circumstances may be a factor in a determination of massiveness, but it cannot replace this requirement.

<sup>36</sup> *Krstić* Trial Judgment, *supra* note 33, ¶¶ 79, 84, 426, 505. For more on the Srebrenica massacre see DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA* (1998); Alwen Schroder, *Dealing with Genocide: A Dutch Peacekeeper Remembers Srebrenica*, SPIEGEL INT’L, July 12, 2005, available at <http://www.spiegel.de/international/o.1518,druck-364902,00.html> (last visited Dec. 17, 2010).

<sup>37</sup> *Krstić* Trial Judgment, *supra* note 33, ¶ 503.

<sup>38</sup> See the *Stakić* and *Krajišnik* cases, wherein the Trial Chamber also held that several specific incidents of mass killings individually fulfilled the requisite level of massiveness. *Stakić* Trial Judgment, *supra* note 89, ¶¶ 653–54; *Prosecutor v. Krajišnik*, Case No IT-00-39-T, Judgment, ¶ 720 (Sept. 27, 2006). Neither finding was brought up on appeal. The Appeals Chamber in *Stakić* relied on the entire series of incidents (in which 1,500 were killed) when it upheld *Stakić*’s conviction of extermination. *Stakić* Appeals Judgment, *supra* note 33, ¶¶ 90, 229, 242; see also *Martić* Trial Judgment, *supra* note 32, ¶ 404; *Brđanin* Trial Judgment, *supra* note 34, ¶ 391; *Brđanin* Appeal Judgment, *supra* note 34, ¶¶ 471–72.

<sup>39</sup> *Lukić & Lukić* Trial Judgment, *supra* note 32, ¶ 938.

In making its findings of extermination, the majority of this Trial Chamber also relied on the population density of the particular area from which the victims came. In determining the correct threshold for a finding of extermination, the majority found that there may be a higher threshold with regard to the number of persons killed in a very densely populated area and that it would not be inappropriate to find extermination in a less densely populated area on a lower threshold. In my opinion, this introduces a new and highly subjective element into the crime of extermination. An analysis of population density is dependent upon how one defines the relevant reference area. Including this element into the crime grants the Prosecution enormous discretion to determine the relevant reference area by the way in which it formulates the indictment, or requires the Chamber to assess the subjective boundaries of the community in question. I cannot concur with the inclusion of such relativity and uncertainty in the law of extermination.

This reflects the Appeals Chamber's conception of the crime, the only material element of which is that killing must be on a large scale. An area's population density should not bear on the absolute massiveness of a killing event that occurs in that area. To suggest otherwise may lead to the legally untenable result in which the killing of twenty people in a small village is found to constitute extermination, but the killing of thousands of people in a large city does not. Further, the killing incidents involving victims who did not all come from the same area would require an assessment of the population density of a number of reference areas. Depending on the respective population density of each area, this may lead to the odd result that a killing incident may be qualified as extermination only in relation to some of the victims.

[...]

The multiple killings at Pionirska street and at Bikavac were brutal and cruel. The fact that I do not believe they reach the threshold of extermination does not reflect my belief that they are not extremely grave offences. Rather, my decision reflects the very high level of gravity that has been ascribed to the crime of murder. Indeed, I am concerned that if we find that mass killings of increasingly low scale to be extermination, then this inadvertently may suggest that the charge of murder is not significant enough to convey the seriousness of the crimes. Murder charges, particularly given the weight judges may give to the circumstances of the killing in sentencing, are appropriate for individual and multiple killings. To hold extermination to a lower standard because a multiple killing is considered to be particularly vicious would, I fear, have the unintended result of trivialising both the crime of murder and the crime of extermination.<sup>40</sup>

The ICTR has distinguished extermination from murder because it is directed against a population rather than against individuals; thus, responsibility for a single or limited number of killings cannot form the material element of extermination.<sup>41</sup> However, there is no numerical minimum of victims that must have been killed, and an assessment of

<sup>40</sup> *Lukić & Lukić Trial Judgment*, *supra* note 32, ¶¶ 1115–1120 (dissenting opinion of J. van den Wyngaert).

<sup>41</sup> *See Semanza Trial Judgment*, *supra* note 32, at ¶ 340; *Ntagerura et al. Trial Judgment*, *supra* note 33, ¶ 701. Some scholars have criticized the proposition that an act of extermination must destroy a numerically significant part of the population. *See, e.g.*, Guénaél Mettraux, *Crimes against Humanity in the Jurisprudence of*, 43 HARV. INT'L L.J. 237, 285 (2002) (arguing that there is no requirement under customary international law that in committing extermination one must bring about the destruction of a specified proportion of the targeted population).



whether this element is met is made on a case-by-case basis, taking account of all relevant factors.<sup>42</sup>

The Rome Statute in Article 7 states, “[a] ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) *murder*; (b) *extermination* [ . . . ].”<sup>43</sup> The Rome Statute further provides in Article 7 that “[e]xtermination includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population [ . . . ].”<sup>44</sup> Thus, this formulation adds specificity to “extermination.” It states that “extermination” does not merely occur when a perpetrator executes the material act of, for instance, firing a rifle or wielding a knife which directly results in the killing of another, but “extermination” also occurs when a perpetrator creates “conditions of life” amenable to mass killing. However, this specificity does not address the issue of imputed intent as the result of foreseeability, or imputed intent as the result of what should have been foreseeable. Nor does this specificity address the issue of “lawful justifications” for such “conditions of life.” With respect to “murder” there is no added specificity. Thus, the questions that were raised above concerning the ICTY and ICTR Statute still remain.

Murder as a CAH within the meaning of article 7(1)(a) of the Rome Statute is not defined in the Statute, and the Elements of Crimes offer only limited guidance as to the *actus reus*, providing that “the perpetrator killed one or more persons.”<sup>45</sup> The ICC has recognized the following: for the act of murder to be committed the victim has to be dead and the death must result from the act of murder;<sup>46</sup> the act itself may be committed by action or omission;<sup>47</sup> the death of the victim can be inferred from the facts of the case;<sup>48</sup> and the Prosecutor must prove the causal link between the act of murder and the death of the victim.<sup>49</sup> Because no *mens rea* is specified in article 7(1)(a) of the Rome Statute, the ICC has applied article 30 of the Statute to require proof of “intent and knowledge.”<sup>50</sup>

Murder is listed as a count in the arrest warrants for Germain Katanga (a.k.a. “Simba”) and Mathieu Ngudjolo Chui (*Situation in D.R. Congo*); Jean-Pierre Bemba Gombo (*Situation in Central African Republic*); Joseph Kony, Vincent Otti, Okot Odhiambo,

<sup>42</sup> See *Stakić Appeals Judgment*, *supra* note 33, ¶ 260; *Krstić*, *supra* note 32, at ¶ 501; *Blagojević and Jokić*, *supra* note 32, ¶ 573; *Brđanin Appeals Judgment*, *supra* note 34, at ¶¶ 471–72. The relevant factors include “the time and place of the killings, the selection of the victims, and the manner in which they were targeted.” *Krajišnik Trial Judgment*, ¶ 716 (Sept. 27, 2006); see also *Ntakirutimana Appeals Judgment*, *supra* note 33, ¶ 516; *Prosecutor v. Nahimana et al.*, Case No ICTR-01-74, Trial Judgment, ¶ 1061 (Dec. 3, 2003).

<sup>43</sup> ICC Statute art. 7, *supra* note 13 (emphasis added).

<sup>44</sup> *Id.*

<sup>45</sup> The Elements of Crimes clarify in fn 7 to article 7(1)(a) of the Rome Statute that the term “killed” is interchangeable with the term “caused death.”

<sup>46</sup> See *Prosecutor v. Katanga & Chui*, Case No ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 421 (Sept. 30, 2008) [hereinafter *Katanga & Chui Decision Confirming Charges*]; *Prosecutor v. Bemba Gombo*, Case No ICC-01/05-01/08-15, Decision on the confirmation of charges, ¶ 132 (Jun. 15, 2009) [hereinafter *Bemba Gombo Decision Confirming Charges*].

<sup>47</sup> See *Katanga & Chui Decision Confirming Charges*, *supra* note 46, ¶ 287; *Bemba Gombo Decision Confirming Charges*, *supra* note 46, ¶ 132.

<sup>48</sup> *Bemba Gombo Decision Confirming Charges*, *supra* note 46, ¶ 132.

<sup>49</sup> *Id.*; see also *Prosecutor v. Krnojelac*, Case No IT-97-25, Judgment, ¶ 329 (Mar. 15, 2002).

<sup>50</sup> See *Katanga & Chui Decision Confirming Charges*, *supra* note 46, at ¶ 423; *Bemba Gombo Decision Confirming Charges*, *supra* note 46, ¶ 183.



and Dominic Ongwen (*Situation in Uganda*); Ahmad Harun and Ali Kushayb,<sup>51</sup> while both murder and extermination are included as counts in the arrest warrant for President Al-Bashir (*Situation in Darfur, Sudan*).<sup>52</sup>

### Elements of Murder

1. The perpetrator killed one or more persons [footnote 7: The term “killed” is interchangeable with the term “caused death”. This footnote applies to all elements which use either of these concepts].
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

### Elements of Extermination

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population [footnote 8: The conduct could be committed by different methods of killing, either directly or indirectly. Footnote 9: The infliction of such conditions could include the deprivation of access to food and medicine].
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population [footnote 10: The term “as part of” would include the initial conduct in a mass killing].
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population [See Introduction to Art. 7].
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

The crime of “murder” exists in all of the world’s criminal law systems with little variance as to the material element and some variation as to the mental element. Thus, murder does not present particular legality problems, and states without CAH legislation could use their domestic criminal laws. A review of the prosecutions for the CAH of murder reveals seldom problems with the identification of elements of the crime or the evidence required to prove the crime.

“Extermination” is presumably large-scale killing, which includes “murder” and the death of persons arising out of conditions constituting the proximate cause of death of such victims, which is a form of criminal homicide akin to “murder” in every legal system of the world.

<sup>51</sup> Prosecutor v. Ahmed Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), Case No ICC-02/05-01/07, Warrant of arrest issued for Ahmad Harun (Apr. 27, 2007) [hereinafter *Ahmad Harun Arrest Warrant*]. Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), Case No. ICC-02/05-01/07-3, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007) [hereinafter *Ali Kushayb Arrest Warrant*].

<sup>52</sup> Prosecutor v. Omar Hassan Al Bashir, Case No 02/05-01/09, Warrant of arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) [hereinafter *Al Bashir Arrest Warrant*].

**CAH Statistics (as of November 2010)**

**ICTY:** 97 indicted / 21 convicted (murder); 31 indicted / 7 convicted (extermination)

**ICTR:** 49 indicted / 19 convicted (murder); 72 indicted; 27 convicted (extermination)

**Special Court for Sierra Leone (SCSL):** 13 indicted / 5 convicted (murder); 9 indicted / 6 convicted (extermination)

**Special Panels for Serious Crimes in East Timor (SPSC ET):** approx. 267 indicted / 33 convicted (murder); 51 indicted (extermination)

**Extraordinary Chambers in the Courts of Cambodia (ECCC):** 5 indicted (murder); 5 indicted (extermination)

**War Crimes Court of Bosnia and Herzegovina (WCC BiH):** approx. 66 indicted / 27 convicted (murder); 7 indicted (extermination)

**ICC:** 11 indicted (murder); 1 indicted (extermination)

## §2.2. *Enslavement*

The international criminalization of certain types of “murder” and “extermination” in particular contexts began almost one century ago with the 1899 and 1907 Hague Conventions. However, the legal prohibition of slavery and slave-related practices started earlier. In 1815, the Congress of Vienna Declaration stated that slavery is “repugnant” to the values of the civilized international community. Since then, a succession of international instruments prohibited these practices and several criminalized some of its manifestations. Also, between 1820 and 1945, a number of countries criminalized slavery, slave trade, and slave-related practices.<sup>53</sup> Thus, slavery was clearly a violation of “general principles of law” under the national law source of “general principles of law” and under its international law source before the London Charter. Since then, as discussed below, international legal instruments have expanded the scope of the criminal violation, and all national laws prohibit it explicitly or implicitly. Thus, the prohibition is universal, but some of its specific contents, i.e., certain manifestations of slave-related practices, are not yet well established or well defined.

The Geneva Conventions deem slavery, slave-related practices, and slave labor a war crime, as does the customary regulation of international armed conflicts when the practice is performed by the armed forces or occupying forces of one country against the civilian population or armed forces of another country in time of war. However, pre-World War I use of forced labor in time of war was not uncommon and was narrowly permitted by the 1899 and 1907 Hague Conventions.<sup>54</sup> But after World War I, it was prohibited for prisoners of war under the 1929 Geneva Convention, and it was prohibited

<sup>53</sup> See *infra* note 66 for the various representative countries of the world’s major legal systems.

<sup>54</sup> Both the Hague Convention of 1899 and the 1907 Convention, respecting the laws and customs of war, incorporated protections for both civilians and belligerents from enslavement and forced labor into the international regulation of armed conflict. Similar to that of the 1899 Convention, the preamble to the 1907 Convention asserts that: “[T]he inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.” Also, Article 52 of the 1907 Convention, *supra* note 20 provides:

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country,

under customary international law, as evidenced by the 1919 Commission Report and subsequent declarations and actions by the then-Allies. The 1926 Slavery Convention also prohibited the slave trade and forced labor in time of war, as discussed below.

The practice of using belligerent civilians and prisoners of war in forced labor began to a large extent during World War I. The need for increases in wide-based industrial support, coupled with the need to free millions of men for fighting, necessitated the utilization of the lucrative labor of belligerents, both civilians and prisoners of war. Frequently, the utilization of this free labor source required the transporting of civilian populations from their homes to the workplace, thus also constituting “deportation.” As one author notes, the “[d]eportation of civilian populations except in cases of extreme military necessity constitutes a war crime.”<sup>55</sup> Furthermore, “[e]mployment of civilians as slave labor is also criminal.”<sup>56</sup> Thus, he stated:

[L]ines of distinction must be carefully drawn. It is not illegal for an occupying power to require civilians to work in order to maintain their own existence of their internal economy. It is, however, improper to transport them from their own land, to place them in hazardous employment, to require them to work to aid the efforts of the aggressor in its belligerencies, or to require them to do any act demeaning disloyalty toward their own nation. If such persons are employed, they must receive adequate remuneration, and adequate housing, food, and clothing must be provided. It was not until clear violations of all of these requirements were shown that the term “slave labor” came into general use by these tribunals.<sup>57</sup>

As Oppenheim states far more succinctly, “there is no right to deport inhabitants to the country of the occupant for the purpose of compelling them to work there.”<sup>58</sup>

and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Similarly, Article 52 of the 1899 Convention provides:

Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged. Convention for the Peaceful Adjustment of International Disputes (First Hague, I), The Hague, July 29, 1899, 26 Martens (2d) 920, 32 Stat. 1779, T.S. No. 392, *reprinted in* 1 AM. J. INT’L L. 107 (1907).

See also M. Cherif Bassiouni, *The Proscribing Function of the International Criminal Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193 (1982); M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT’L. L. & POL. 445 (1991); Ved P. Nanda & M. Cherif Bassiouni, *Slavery and Slave Trade: Steps Toward Eradication*, 12 SANTA CLARA L. REV. 424 (1972).

<sup>55</sup> See JOHN A. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 298 (1954).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> LASSA OPPENHEIM, 2 *INTERNATIONAL LAW* 441 (Hersch Lauterpacht ed., 7th ed. 1952).

One example was Germany's forced deportation of thousands of Belgian men to Germany to work in factories during World War I:

Beginning [on] October 26, 1916, occupation authorities in Belgium began deporting civilians to Germany to use in a forced-labor program. During the next month, some 66,000 Belgians were arbitrarily conscripted and transported to Germany under the harshest conditions; as a result, 1,250 of the workers lost their lives [. . .]. There were worldwide protests [. . .] [and] only the [K]aiser's insistence kept Governor General von Bissing, who thought the actions violated Hague [C]onventions, from resigning.<sup>59</sup>

In a memorandum sent to the Secretary of State of the United States following the occupation of Belgium, the Belgian government noted that the Germans put into effect a plan that called for the exploitation of the economic resources of the occupied countries to the benefit of Germany's war effort.<sup>60</sup> Germany deported Belgian men between the ages of seventeen and fifty-five. Working conditions apparently were atrocious. The deportees were required to work on trench construction and thus indirectly aided the German war effort by freeing German men for fighting.<sup>61</sup> With regard to the deportation of Belgians to Germany, Oppenheim notes, "the whole civilized world stigmatized this practice as an outrage."<sup>62</sup>

However, nothing in the history of humankind approaches the magnitude and terrible hardship of Nazi Germany's World War II use of slavery, slave-related practices, and forced labor. In what this writer considers an understatement, Schwarzenberger notes that:

Germany developed questionable practices in earlier wars regarding the requisition of labor in occupied territories into a system, branded in the Nuremberg Judgment as "slave labor policy." The International Military Tribunal found that Germany had conceived this policy as an integral part of her war economy and planned and organized "this particular war crime" down to the last detail.

"Blocked industries," that is, industries in the occupied territories which were employed exclusively for export to Germany, were one of the refinements of this policy. If workers liable to be dispatched to Germany consented to work in such industries, they escaped deportation. Yet, as the Nuremberg Tribunal observed, while this system was less inhumane than deportation to Germany, it was illegal.<sup>63</sup>

<sup>59</sup> JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 34–5 (1982).

<sup>60</sup> See *Violations of the Laws and Customs of War, Report of the Majority, and Dissenting Reports of American and Japanese Members of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, Conference of Paris, 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32; 21, 23, 24–6, 64, and Annex I, reprinted in 14 AM. J. INT'L L. 95, 112 (1920).

<sup>61</sup> See *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* 83 (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), reprinted in 14 AM. J. INT'L L. 95 (1920) [hereinafter 1919 Commission Report] (citing the deportation of civilians and forced labor of civilians in connection with the military operations of the enemy as offenses deserving of punishment).

<sup>62</sup> OPPENHEIM, *supra* note 58, at 441.

<sup>63</sup> See GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 225 (1968).

Attempts were made to recruit foreigners voluntarily for German labor. However, these attempts were mostly unsuccessful and Germany began to implement a program to use the concentration camps as a source for slave labor. As Schwarzenberger notes:

As the German campaign for voluntary recruitment proved unsuccessful in obtaining anything like the number of workers required, pressure was exercised by withdrawing ration cards from workers who refused to go to Germany, discharging them from their jobs and denying them unemployment benefits or opportunities to work elsewhere. Workers and their families were also threatened with police action if they persisted in their refusal, “man-hunts took place in the streets, at motion picture houses, even at churches and at night in private houses. Houses were sometimes burnt down, and the families taken as hostages,” practices which were described [ . . . ] as having their origin “in the blackest periods of the slave trade.”<sup>64</sup>

The 1926 Slavery Convention clearly prohibits the practices of forced labor engaged in by Nazi Germany. But as Benjamin Ferencz so aptly states,

The Jewish concentration camp workers were less than slaves. Slave masters care for their human property and try to preserve it; it was the Nazi plan and intention that the Jews would be used up and then burned. The term “slave” is used in this narrative only because our vocabulary has no precise word to describe the lowly status of unpaid workers who are earmarked for destruction.<sup>65</sup>

The Nazi techniques in the area of slave-related practices and forced labor constituted violations of conventional and customary regulation of armed conflict when its subjects were POWs and civilians of another belligerent or occupied power. Furthermore, the Nazi practices violated conventional and customary international law when its subjects were the very citizens of the country engaging in such practices (and while there are some arguable loopholes in the 1926 Slavery Convention on the question of forced labor,<sup>66</sup> it nonetheless clearly applies in the conditions that Schwarzenberger and Ferencz describe above, and which the IMT and the Subsequent Proceedings so graphically illustrated).

In addition to the prohibition of slavery, slave-related conditions, and forced labor under conventional and customary regulation of armed conflicts, the same type of prohibition, though for wider application, developed through a number of international instruments. Like other internationally prohibited conduct, it has evolved gradually.<sup>67</sup> At first, the prohibition appeared in the nature of general condemnatory statements, followed by a succession of international instruments – some dealing with particular or particularized aspects of these practices. Finally, specific criminal proscriptions were embodied in conventions.<sup>68</sup> This evolution of human rights protections through ICL is also evidenced in other areas of international human rights.<sup>69</sup>

The combination of national and international law sources of “general principles of law” confirms the prohibition of slavery and slave-related practices, including forced

<sup>64</sup> *Id.* at 230.

<sup>65</sup> BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* xvii (1979).

<sup>66</sup> See M. Cherif Bassiouni, *Enslavement as an International Crime*, *supra* note 54.

<sup>67</sup> See INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (M. Cherif Bassiouni ed., 1997) [hereinafter BASSIOUNI, ICL CONVENTIONS].

<sup>68</sup> See Bassiouni, *The Proscribing Function of International Law in the Processes of International Protection of Human Rights*, *supra* note 54.

<sup>69</sup> *Id.*

labor. Before 1945, twenty-six international instruments prohibited slavery and slave-related practices including forced labor.<sup>70</sup> Therefore, even before 1945, no one could doubt that submitting a person to slavery or slave-related practices, including forced labor, constituted a violation of “general principles of law.”

The cumulative effect of these instruments establishes that slavery, slave-related practices, and forced labor were prohibited before 1945 under conventional international law, and that the prohibition has been expanding ever since. These instruments also establish the customary international law basis for the prohibition of these practices and for their inclusion as part of CAH.

Slavery is “the status or condition of a person over whom any of the powers attaching to the right of ownership are exercised.”<sup>71</sup> Examples of slave-related institutions include debt bondage, serfdom, marital bondage, slave labor and sexual bondage, or exploitation and traffic and exploitation of children.<sup>72</sup> Various acts of slavery occur when a person knowingly performs acts such as (1) placing a person in a condition of slavery, (2) exercising control over a person in a condition of slavery, and (3) any other conduct that facilitates the continuation of slavery.<sup>73</sup> Though these prohibitions are covered in a number of international instruments, their definitions and elements should be stated more specifically in the codification of CAH. Since the London Charter, customary international law expanded the notion of slavery to include various forms of slave-related practices, and it includes certain forms of sexual violence.<sup>74</sup>

“Slavery” is included in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute. The ICTY and ICTR have defined “enslavement” as the exercise of any or all of the powers generally attached to the right of ownership over a person.

The ICTY Statute in Article 5 states: “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [ . . . ] (c) *enslavement* [ . . . ].”<sup>75</sup>

<sup>70</sup> See Bassiouni, *Enslavement as an International Crime*, *supra* note 54, at 445.

<sup>71</sup> *Id.* at 467.

<sup>72</sup> See generally Gregory B. Richardson, *Debt Bondage of Children: A Slavery-like Institution and the United Nations Convention on the Rights of the Child*, 62 RIDP 861 (1991); see also Alan Whittaker, *Child Bonded Labour*, 62 RIDP 847 (1991); Marietta Jaramillo de Marin, *Trafficking and the Sale of Children*, 62 RIDP 833 (1991); M. Cherif Bassiouni, *Enslavement: Slavery, Slave-Related Practices, and Trafficking in Persons for Sexual Exploitation*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 535 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); *United Nations Report on Continued Manifestations of Slavery and Slavery-Like Practices*, E/CN.4/Sub.2/1982/20/Rev. 1.; U.N. Doc. E/CN. 4/Sub. 2/1984/ 22, June 22, 1984.

<sup>73</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery arts. 3, 7, Sept. 7, 1956.

<sup>74</sup> See *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict, Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur, Commission on Human Rights*, E/CN.4/Sub.2/1998/13; Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market For Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83 (1994); see also KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997); *COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS* (Indai Lourdes Sajor ed., 1998).

<sup>75</sup> ICTY Statute art. 5, *supra* note 11 (emphasis added).

The ICTR Statute in Article 3 states that “[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds: [ . . . ] (c) *enslavement* [ . . . ].”<sup>76</sup>

The above two formulations found in the ICTY and ICTR Statutes merely state that “enslavement” is a specific crime without adding any definition to the term. These formulations fail to provide any language indicating the exact meaning and scope of the term “enslavement.” Consequently, these formulations gave rise to the same questions that faced London Charter Article 6(c) with respect to “enslavement.” For instance, questions still existed as to examples of “enslavement,” the definition of “enslavement,” and the distinctions between forced labor of civilian population to sustain its existence and economy versus actual enslavement. Again, although the answers to these questions can be derived from customary and conventional international law, there is still the need for such formulations of CAH to define this specifically enumerated crime.

The ICTY considered the definition of “enslavement” in the *Kunarac* case, wherein the charges related to the mistreatment of Muslim women and children and allegations of forced or compulsory labor.<sup>77</sup> The Trial Chamber found that, at the time of the indictment, the *actus reus* of enslavement as a CAH in customary international law “consisted of the exercise of any or all of the powers attaching to the right of ownership over a person,” and the *mens rea* of the violation consists in the intentional exercise of such powers.<sup>78</sup> The Chamber acknowledged that its definition is broader than the traditional, sometimes distinct definitions of slavery, the slave trade, and forced or compulsory labor found elsewhere in international law.<sup>79</sup> The *Kunarac* Appeals judgment accepted the Trial Chamber’s premise that slavery, as defined by the 1926 Slave Convention and in its traditional concept referred to as “chattel slavery,” has evolved to cover its contemporary forms which are also based on “the exercise of any or all of the powers attaching to the right to ownership.”<sup>80</sup> However, the Appeals Chamber did not recognize the “right of ownership over a person” referred to by the Trial Chamber. Rather, it preferred the language of Article 1(1) of the 1926 Slavery Convention, which speaks with more precision “of a person over whom any or all powers attaching to the right of ownership are exercised.”<sup>81</sup> The Appeals Chamber upheld the Trial Chamber as far as the *mens rea* of enslavement: the intentional exercise of a power attaching to the power of ownership. The Chamber also agreed on the question of whether a particular phenomenon is a form of enslavement, concurring that the determination will depend on the operation of the factors of enslavement identified by the Trial Chamber, including the “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion

<sup>76</sup> ICTR Statute art. 3., *supra* note 12 (emphasis added).

<sup>77</sup> Prosecutor v. Kunarac et al., Case No. IT-96-23 & 23/1-T, Judgment (Feb. 22, 2001) [hereinafter *Kunarac et al.* Trial Judgment]; Kunarac et al. v. Prosecutor, Case No. IT-96-23 & 23/1-A, Judgment (Jun. 12, 2002) [hereinafter *Kunarac et al.* Appeals Judgment].

<sup>78</sup> *Kunarac et al.* Trial Judgment, *supra* note 77, ¶¶ 539, 540.

<sup>79</sup> *Id.* ¶¶ 541; see also Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 227 (Dec. 10, 1998); Tadić, v. Prosecutor, Case No. IT-94-1-A, Judgment, ¶ 223 (Jul. 15, 1999) [hereinafter *Tadić* Appeals Judgment].

<sup>80</sup> *Kunarac et al.* Appeals Judgment, *supra* note 77, ¶ 117.

<sup>81</sup> *Id.*; see also ICC Statute art. 7(2)(c), *supra* note 13.



of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>82</sup>

As of the time of the publication of this book, the ICTR has no jurisprudence with regard to “enslavement.”

Article 7 of the Rome Statute states, “[a] ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (c) *enslavement* [...].”<sup>83</sup> Article 7 then provides further language defining “enslavement.” It states, “‘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 [...].”<sup>84</sup> Thus, formulation in the Rome Statute does add specificity to “enslavement” – the statute not only provides a definition of “enslavement” but it also provides an example. Therefore, under this definition, it is clear that an occupying power’s forced labor of a civilian population for that population to sustain its own existence and economy is not an act of enslavement. In such a situation of forced labor, the occupying power is not exercising ownership over the population rather the power is infusing the population with ownership over its own existence by virtue of the fact that the power is enabling the population to literally sustain itself. Further, the example given in Article 7 concerning trafficking of persons is of essential significance. Specifically, the inclusion of trafficking in persons precludes a perpetrator from claiming that he has not “enslaved” because he has not literally “put the person to work.” With the inclusion of this example, it is clear that “enslavement” encompasses not only the practice of “slave labor,” but also practices that deny a person’s self-ownership, even though such practices may not initially involve “slave labor.”

All post-Charter legal formulations borrow from London Charter Article 6(c) the same terminology with respect to “enslavement”, however, only the Rome Statute defines this term. The Rome Statute provides much in the way of identifying the contents of “enslavement.” And while the prospect of even further specification should not be dismissed if the opportunity arises, it is clear that the concerns about specificity that existed at the time of the London Charter are at least partially abated with the formulation found in Article 7 of the Rome Statute. The arrest warrants for Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwan include counts for enslavement as a CAH in relation to the situation in Uganda.<sup>85</sup>

### Elements of Enslavement

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. [Footnote 11: It is understood that such deprivation of liberty may, in some circumstances,

<sup>82</sup> See *Kunarac et al. Appeals Judgment*, *supra* note 77, ¶ 121, citing *Kunarac et al. Trial Judgment*, ¶¶ 542–43. The Appeals Chamber further observed that the duration of the enslavement is not an element of the crime, but the question “turns on the quality of the relationship between the accused and the victim” which will depend on the particular circumstances of each case. *Kunarac et al. Appeals Judgment*, *supra* note 77, ¶ 121.

<sup>83</sup> ICC Statute art. 7, *supra* note 13 (emphasis added).

<sup>84</sup> *Id.*

<sup>85</sup> See e.g. *Prosecutor v. Kony, Otti, Odhiambo & Ongwan*, Case No ICC-02/04-01/05-53, Warrant of arrest for Joseph Kony (Sept. 27, 2005) [hereinafter *Kony Arrest Warrant*].

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

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

A number of the aforementioned international conventions deem slavery and slave-related practices an international crime. Admittedly, these conventions do not cover all forms of slave-related practices, such as trafficking in human beings for some form of sexual servitude or bondage. As in the case of “torture,” the question arises as to whether “enslavement” is intended to be something more than it is in existing conventions. And, in that case, what is its legal utility?

#### **CAH Statistics (as of November 2010)**

**ICTY:** 6 indicted / 2 convicted

**ICTR:** 0 indicted

**SCSL:** 10 indicted / 6 convicted

**SPSC ET:** 0 indicted

**ECCC:** 5 indicted

**WCC BiH:** 8 indicted / 4 convicted

**ICC:** 5 indicted

#### **§2.3. *Deportation***

The prohibition against deportation includes population transfer. It had a shorter historical development than that of slavery and a less decisive one until 1945. Deportation is the forced removal of people from one country to another, while population transfer applies to compulsory movement of people from one area to another within the same state. Protection against deportation is much better embedded in international law than population transfer.

The 1899 Hague Convention and the 1907 Hague Convention provided general and specific protections of civilian population against deportation. The general protection is found in Article 46, which is identical in both conventions and states, “Family honour and rights, the lives of persons and private property, as well as religious convictions and practices must be respected. Private property cannot be confiscated.”<sup>86</sup> Presumably, one can argue that such a general provision extends protection against deportation and transfer within the territory.

Articles 47 to 53 provide other protections, all of which, when read with Article 46 indicate by implication that civilian populations are to remain in place and not to be

<sup>86</sup> 1907 Hague Convention art. 46, *supra* note 20.

deported. Subsequently, Article 49 of the Fourth Geneva Convention of August 12, 1949 unequivocally prohibited deportation: “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited regardless of their motive.”<sup>87</sup> Deportation is a “grave breach” under Article 147 of the Fourth Geneva Convention, which calls for severe penal sanctions for such breaches.<sup>88</sup>

The 1919 Report of the Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties included deportation as a prosecutable crime. “Deportation of civilians” and “internment under inhuman conditions” were included on the list of war crimes and crimes against the “laws of humanity” prepared by the Commission.<sup>89</sup> Though deportation was deemed a crime against the “laws of humanity” and a war crime, it was not prosecuted as such for reasons discussed in [Chapter 3](#), thus weakening the precedent.

The specific incidents of deportation, as set out in detail in Annex I to the Commission Report, include (a) the deportation of more than 1,000,000 Armenians by Turkish authorities; (b) the deportation of 400,000 Greeks living in Thrace and on the west coast of Asia Minor to Greece by Turkish authorities; and (c) the deportation of 1,000,000 Greek-speaking Turks from Turkey by Turkish and German authorities.<sup>90</sup> By virtue of this finding, it is clear that even at the time of World War I, a country’s deportation of its own nationals was classified as an international crime, even though no Turkish official was prosecuted for this crime. The Turks were not prosecuted<sup>91</sup> for two reasons: (1) the United States dissented from that portion of the Commission’s Report concerning crimes “against the laws of humanity” because these were not specifically embodied in positive international law and (2) the Treaty of Sèvres between the Allies and Turkey, which was to establish the responsibility and prosecutability of certain Turkish officials, was never ratified, and its substitute, the Treaty of Lausanne, gave these officials “amnesty.”

The relevant findings of the 1919 Commission had been incorporated into the Treaty of Sèvres, signed by Turkey on August 10, 1920.<sup>92</sup> This treaty provided for various acts of reparation by Turkey, including reparation to those who were deported or displaced. Specifically, Article 142 required Turkish authorities to assist “in the search for and deliverance of all persons, of whatever race or religion, who have disappeared, been carried off, interned or placed in captivity since November 1, 1914.”<sup>93</sup> In addition, Article 144 required the Turkish government to “facilitate to the greatest possible extent the return to their homes and re-establishment in their business of the Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of massacre or any other form of pressure since January 1, 1914.”<sup>94</sup> The same article also provided for the establishment of an arbitral commission that could order “the removal of any person who,

<sup>87</sup> See Geneva IV art 49, *supra* note 7.

<sup>88</sup> *Id.* at art. 147.

<sup>89</sup> 1919 Commission Report, *supra* note 61.

<sup>90</sup> *Id.* at Annex I.

<sup>91</sup> See *infra* ch. 3, §2.

<sup>92</sup> The Treaty of Peace between the Allied Powers and Turkey, Aug. 10, 1920 (Treaty of Sèvres), British Treaty Series No. 11 (1920), *reprinted in* 15 AM. J. INT’L L. 179 (Supp.) (1921).

<sup>93</sup> *Id.* at art. 142.

<sup>94</sup> *Id.* at art. 144.

after inquiry, [was] recognized as having taken an active part in massacres or deportations or as having provoked them.”<sup>95</sup> Article 226 provided for the right of the Allied powers to “bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.”<sup>96</sup> Article 230 also provided that the Turkish Government would hand over to the Allied powers “the persons whose surrender may be required, by the latter, as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.”<sup>97</sup> The inclusion of this clause in the treaty originated in the 1919 Report of the Commission, which included deportations as part of the crimes committed by Turkey against its Armenian nationals on Turkish soil. One should note that the Commission’s report was based on Allied memoranda filed before the Commission. The majority of these memoranda included a reference to deportation as one of the atrocities or outrages committed by Germany or Turkey.<sup>98</sup> Deportations by Germany of non-German nationals were deemed war crimes and those committed by Turkey against Turkish nationals were deemed crimes “against the laws of humanity.”<sup>99</sup>

In defining the term “massacres on Turkish territory” incorporated in the Treaty of Sèvres, numerous documents prepared by Greek and Armenian committees, as well as by independent observers of the activities in the areas, consistently cited deportation and expulsion as violations committed by Turkey.<sup>100</sup> Therefore, although the specific treaty language refers only to the “massacre” based on the reports that formed the basis of the Commission report and the subsequent Treaty of Sèvres provision, one can conclude that the term incorporated the mass deportations.

However, as stated above, the Treaty of Sèvres was never ratified. Later, in 1923, the Treaty of Lausanne,<sup>101</sup> which was ratified, relieved the Turks from submitting to any prosecution for their acts committed against civilian populations during World War I. Thus, while deportation was classified as a crime, its prosecution was waived. But the Treaty of Lausanne also condoned the deportations. As one commentator writes, “The Lausanne Treaty made a very bad precedent in international law, in that it approved the first compulsory transplanting of peoples from lands where their ancestors had lived for many hundreds of years.”<sup>102</sup>

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at art. 226.

<sup>97</sup> *Id.* at art. 230.

<sup>98</sup> 1919 Commission Report, *supra* note 61.

<sup>99</sup> Germany’s deportation of Turkish people living in Germany was a war crime because the act occurred between the peoples of two nations: Germany and Turkey. However, a war crime cannot arise between the citizens of one country and their government. Thus, the Turkish Government’s deportation of Turkish nationals is considered a CAH.

<sup>100</sup> 1919 Commission Report, *supra* note 61.

<sup>101</sup> The Treaty of Peace Between the Allied Powers and Turkey, July 24, 1923 (Treaty of Lausanne), 28 L.N.T.S. 11, reprinted in 18 AM. J. INT’L L. 4 (official documents) (1924).

<sup>102</sup> See *Report of the Commission of Experts and Annexes*. See also *Human Rights and Mass Exoduses, Report of the High Commissioner for Human Rights Submitted Pursuant to Commission Resolution 1997/75* (E/CN.4/1998/51); *Internally Displaced Persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission on Human Rights Resolution 1997/39* (E/CN.4/1998/53); See generally *MIGRATION AND CRIME: A FRAMEWORK FOR DISCUSSION* (International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme, 1995); ALFRED-MAURICE DE ZAYAS, *THE GERMAN EXPELLEES : VICTIMS IN WAR AND PEACE* (1993); Gudmundur Alfredsson & Alfred-Maurice de Zayas, *Minority Rights: Protection by*

Germany also engaged in deportations during World War I, prompting certain countries to protest the mass deportation of their nationals by Germany. Many formal condemnations appear in the Commission's report. For example, France protested the deportation of women and girls from Lille, Roubaix, and Tourcoing by the Germans during the spring of 1916.<sup>103</sup> The unanimous condemnation of the activity is reflected in Oppenheim's remark, "During the First World War the Germans deported to Germany several thousand Belgian and French men and women and compelled them to work there, the whole civilized world stigmatized this practice 'as an outrage.'"<sup>104</sup>

The condemnation of such practices may evidence that deportation of civilians in time of war was contrary to customary international law, but it is difficult to reconcile with the practice of states, including the Allies after World War I, who engaged in or condoned mass deportation and population transfers – a practice in which the Allies freely engaged after World War II, while condemning Germany for doing the same. However, a significant difference must be pointed out in that the German deportation and population transfers were for the purposes of subjecting the people to extermination, slavery, slave-related practices, and forced labor. Thus, in the opinion of this writer, it is not so much the transfer of civilians within a country's national jurisdiction that constitutes the violation, but the transfer for the purposes of extermination, slavery, slave-related practices, and slave labor. Deportation and population transfers of another belligerent state remain war crimes in and of themselves.

During World War II, there were numerous protests against German acts of deportation of civilians under occupation. These protests assailed acts of deportation, which can be classified as both war crimes and CAH depending on the location and nationality of the deportees. If the deportees were non-nationals, it would be a war crime, while if they were nationals, it would be a CAH only if in connection with another crime, as stated above.<sup>105</sup> On January 13, 1942, the Declaration of St. James issued by Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland, and Yugoslavia stated, "Germany, since the beginning of the present conflict, which arose out of her policy of aggression has instituted in the occupied countries, a regime of terror characterized amongst other things by imprisonment, mass expulsions, the execution of hostages and massacres [ . . . ]."<sup>106</sup> While the document specifically makes reference to occupied territories, the speeches surrounding the issuance of the declaration suggest that the declaration was intended, in broader terms, as a condemnation of all the acts

*the United Nations*, 14 HUM. RTS. L. J. 1 (1993); Alfred-Maurice de Zayas, *Human Rights and Refugees*, International Organization for Migration Seminar: (Migration and Migration Policy," Moscow, 13–17 July 1992); Alfred-Maurice de Zayas, *The Legality of Mass Population Transfers: The German Experience 1945–48*, 12 EAST EUROP. Q. 1 (1978); Alfred-Maurice de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L. J. 207 (1975).

<sup>103</sup> See 1919 Commission Report at annex I, No. 7, *supra* note 61 (France).

<sup>104</sup> See OPPENHEIM, *supra* note 58, at 441, citing documents in support of this proposition; See also FERNAND PASSELECQ, DÉPORTATION ET TRAVAIL FORCÉ DES OUVRIERS ET DE LA POPULATION CIVILE DE LA BELGIQUE OCCUPÉE (1916–1918) (1928); CAREL M.O. VAN NISPEN TOT SEVENAER, L'OCCUPATION ALLEMANDE PENDANT LA DERNIÈRE GUERRE MONDIALE (1946).

<sup>105</sup> For declarations made by Allied Leaders, see, e.g., Declaration of German Atrocities, Nov. 1, 1943, 1943 FOR. REL. 749; and The Cairo Declaration, Dec. 1, 1943, 1943 FOR. REL. 448.

<sup>106</sup> For the full text of the Declaration of St. James, see PUNISHMENT FOR WAR CRIMES: THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES' PALACE, LONDON, ON 13TH JANUARY, 1942, AND RELATIVE DOCUMENTS (United Nations Information Office, New York, undated).

that had outraged the conscience of humanity and that had violated national and international law. The declaration went far beyond the then-existing status of international law.

On October 17, 1942, the Polish government in exile approved a Decree on the Punishment of German War Crimes Committed in Poland, which declared, "The punishment inflicted will be increased to life imprisonment or the death penalty will be imposed, if such actions caused death, special suffering, deportation, [or] transfers of population [ . . . ]."<sup>107</sup>

On December 17, 1942, the governments of Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway, Poland, the USSR, the United Kingdom, the United States of America, and Yugoslavia issued a declaration in the United States, the Soviet Union, and Britain.<sup>108</sup> The declaration specifically condemned German actions against the Jews and resolved to ensure that those responsible for those crimes would not escape retribution. The text stated:

[T]he German authorities, not content with denying to persons of Jewish race in all the territories over which their barbarous rule has been extended the most elementary human rights, are now carrying into effect Hitler's oft-repeated intention to exterminate Jewish people in Europe. From all the occupied countries Jews are being transported in conditions of appalling horror and brutality to Eastern Europe. In Poland, which has been made the principle Nazi slaughterhouse, the ghettos established by the German invaders are being systematically emptied of all Jews except a few highly skilled workers required for war industries. None of those taken away are ever heard of again. The able-bodied are slowly worked to death in labor camps. The infirm are left to die of exposure and starvation or are deliberately massacred in mass executions. The number of victims of these bloody cruelties is reckoned in many hundreds of thousands of entirely innocent men, women and children [ . . . ]."<sup>109</sup>

The text continues to reaffirm the solemn resolution to ensure that those responsible for these crimes will not escape retribution.

Another further significant declaration was issued by the United States on March 24, 1944, on behalf of the United Nations. This declaration stated:

The United Nations are fighting to make a world in which tyranny and aggression cannot exist; a world based on freedom, equality and justice; a world in which all persons regardless of race, colour or creed may live in peace, honour and dignity . . . in one of the blackest crimes of all history – begun by the Nazis in the day of peace and multiplied by them a hundred times in time of war – the wholesale systematic murder of the Jews of Europe goes on unabated every hour. As a result of the events of the last few days, hundreds of thousands of Jews who, while living under persecution, have at least found a haven from death in Hungary and the Balkans, are now threatened by annihilation as Hitler's forces descend more heavily upon these lands. That these innocent people who have already survived a decade of Hitler's fury should perish, on the very eve of triumph over the barbarism which their persecution symbolizes, would be a major tragedy.

<sup>107</sup> See 1 WAR AND PEACE AIMS OF THE UNITED NATIONS 480 (Louise Holborn ed., 1943).

<sup>108</sup> Declaration Regarding German Atrocities Against Jews in German Occupied Countries, issued Dec. 17, 1942, VII BULLETIN DEPARTMENT OF STATE, No. 182, Dec. 19, 1942, p. 1009, 385 H.C. DEB. (5th ser.) col. 2083.

<sup>109</sup> *Id.*

It is therefore fitting that we should again proclaim our determination that no one who participates in these acts of savagery shall go unpunished. The United Nations have made it clear that they will pursue the guilty and deliver them up in order that Justice be done. That warning applies not only to the leaders but also to their functionaries and subordinates in Germany and in the satellite countries. All who knowingly take part in the deportation of Jews to their death in Poland or Norwegians and French to their death in Germany are equally guilty with the executioner. All who share that guilt shall share the punishment [ . . . ].<sup>110</sup>

This declaration supported the position that deportation of the Hungarian Jews from Hungary to Germany at that stage of the war was recognized as a crime.

In addition to official protests during the war, the London International Assembly produced a report in 1943 holding deportation as a punishable international offense.<sup>111</sup> The Assembly, created under the auspices of the League of Nations, was composed of representatives of fourteen countries including Britain, France, the United States, and the USSR. In November 1943 the Assembly recommended that the expression “war crimes” should be understood to cover not only war crimes proper, but also the preparation and the waging of aggressive war and crimes committed within or outside any Axis country for the purpose of racial or political extermination. The LIA specified the types of conduct that constituted “[v]iolations of the Laws of War,” which included “Acts whether or not directly connected with warfare [ . . . ] such as: [ . . . ] (2) Crimes ordered by or committed under order of or with approval of authorities: [ . . . ] (9) Mass deportations [ . . . ].”<sup>112</sup>

The treaties, declarations, and reports discussed above recognized deportation as a violation of the laws and customs of war and as a crime against the “laws of humanity” prior to the promulgation of London Charter Article 6(c). Therefore, these sources provide the historical legal foundation for the inclusion of deportation as a CAH in Article 6(c) of the Charter and for its application by the IMT. Consequently, the IMT indictment included the charge of “deportation.” It stated:

In certain occupied territories purportedly annexed to Germany, the defendants methodically and pursuant to plan endeavored to assimilate these territories politically, culturally, socially, and economically into the German Reich. They endeavored to obliterate the former national character of these territories. In pursuance of these plans, the defendants forcibly deported inhabitants who were predominantly non-German and replaced them by thousands of German colonists.<sup>113</sup>

On the first day of the trial, November 20, 1945, Pierre Mounier, Assistant Prosecutor for France, charged the defendants with mass deportations. He stated:

These deportations were contrary to the international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general

<sup>110</sup> Declaration referring to the *Systematic Torture and Murder of Civilians*, issued Mar. 24, 1944, X BULLETIN DEPARTMENT OF STATE, No. 248, Mar. 25, 1944, p. 277.

<sup>111</sup> See THE PUNISHMENT OF WAR CRIMES: RECOMMENDATIONS OF THE LONDON INTERNATIONAL ASSEMBLY (1943).

<sup>112</sup> *Id.* at 17.

<sup>113</sup> 2 IMT 57, Count 3, § J.



principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed [ . . . ].<sup>114</sup>

Another French prosecutor, Edgar Faure, on February 1, 1946, exclaimed that German activities of deportation in France, Belgium, and Luxembourg were “a criminal undertaking against humanity.”<sup>115</sup> L.N. Smirnour, Assistant Prosecutor for the Soviet Union, described other such undertakings when, on February 26, 1946, he read from an official report:

Such was the plan. The facts which were put into practice were the following:

Locality after locality, village after village, hamlets and cities in the incorporated territories were cleared of the Polish inhabitants. This began in October 1939, when the locality of Orlov was cleared of all the Poles who lived and worked there. Then came the Polish port of Gdynia. In February 1940 about 40,000 persons were expelled from the city of Posen. They were replaced by 36,000 Baltic-Germans, families of soldiers and of German officials. The Polish population was expelled from the following towns: Gnesen, Kuln, Kostian, Neshkva, Inovrotzlav [ . . . ] and, many other towns.<sup>116</sup>

The defense unsuccessfully attempted to explain away these crimes. Alfred Seidl, Defense Counsel for Hans Frank, tried to establish that the Allies engaged in the same types of practices by reading from a statement issued by German bishops, which stated:

Some weeks ago, we found occasion to comment on the outrageous happenings in the East of Germany, particularly in Silesia and the Sudetenland, where more than 10 million Germans have been driven from their ancestral homes in brutal fashion, no investigation having been made to ascertain whether or not there was any question of personal guilt. No pen can describe the unspeakable misery there imposed in contravention of all consideration of humanity and justice [ . . . ].<sup>117</sup>

Seidl asserted that the expulsions of millions of Germans from their ancestral lands was done “in accordance with a resolution taken at Potsdam on August 2, 1945 by President Truman, Generalissimo Stalin and Prime Minister Attlee [ . . . ].”<sup>118</sup> This argument sought to equate German deportation with similar practices committed by the Allies. At this point in the proceedings, the Chief Soviet Prosecutor, General Rudenko, objected, stating, “It seems to me that the legal considerations and the criticism of the decisions taken at Potsdam have no bearing on the present case.”<sup>119</sup> The Tribunal sustained the objection and thus evaded the issue of the expulsions carried out as a consequence of the Potsdam political arrangement. Aside from the double standard applied, the argument was legally relevant to demonstrate that the mere transfer of population was not contrary

<sup>114</sup> *Id.* at 49. Further into the trials, on January 17, 1946, the Chief French Prosecutor, François de Menthon, described large-scale expulsions committed by the Nazis, of which he declared, “[t]his inhumane evacuation of entire populations . . . will remain one of the horrors of our century.” *Id.* at 85.

<sup>115</sup> 6 IMT 427.

<sup>116</sup> 8 IMT 256.

<sup>117</sup> 18 IMT 149.

<sup>118</sup> 18 IMT 149, 150.

<sup>119</sup> *Id.*

to customary international law because it was indeed practiced. The IMT also failed to establish a solid distinction between

- (1) Deportation or transfer of population for purposes of murder, extermination, enslavement, other inhumane acts;
- (2) Transfer of populations within the national jurisdiction of a state for valid purposes and in a lawful way;
- (3) Transfer of population by lawful means in connection with a treaty that places a given territory under the sovereignty of another state;
- (4) Deportation arising from transfer of territory to another state; and
- (5) Deportation and transfer of population exclusively on the basis of discrimination.

At the time, customary and conventional international law had evolved different rules and standards for each of these categories. Since then the evolution of international law has not eliminated the legal relevance of these distinctions. The Allies' deportation and population transfers during and after World War II in connection with territorial changes illustrate these distinctions. Between 1944 and 1949 approximately 16 million Germans were expelled from their territory and their homes.<sup>120</sup> In a different category, the United States engaged in population transfers when it moved and interned thousands of its Japanese-American citizens for alleged security reasons, and the United States Supreme Court upheld the legality of these practices.<sup>121</sup> The distinction between United States transfer of population of its Japanese nationals to internment camps in the United States for a temporary period of time, a practice in which Canada also engaged, and Germany's transfer of population and deportation of Jews for extermination and for slave labor use is obvious. The first types of population transfers and internment were conducted as humanely as possible, under conditions of war and were later rescinded, even though they constituted violations of the civil rights of these citizens. They did not produce death and physical injury. The latter did. Thus, they were war crimes with respect to non-nationals of Germany and CAH with respect to citizens of Germany. At the IMT, Baldur von Schirach, one-time head of the Hitler Youth, was convicted of CAH for his participation in the deportation of Jews in his capacity as Gauleiter of Vienna, and was sentenced to twenty years imprisonment. The tribunal, however, did not define the elements that constitute the specific crime of deportation.

As stated above, deportation and transfer of civilian population by the Allies after World War I and World War II took place in large numbers, but essentially as a consequence of territorial changes and transfer of territory from one state to another. Such an instance of acknowledged compulsory transfer of populations occurred after World War I between Turkey and Greece,<sup>122</sup> and was the subject of the PCIJ Advisory Opinion in the case of

<sup>120</sup> De Zayas, *supra* note 158, at 102.

<sup>121</sup> *Korematsu v. United States*, 323 U.S. 214 (1944). In the interim, however, the United States Congress passed a law to compensate these hapless victims.

<sup>122</sup> See ALEXANDRE E. DEVEDJI, *L'ÉCHANGE OBLIGATOIRE DES MINORITÉS GRECQUES ET TURQUES* (1929); Michel de la Grotte, *La Cour Permanente de Justice Internationale en 1925*, 7 REV. DE DROIT INT'L. ET DE LÉGISLATION COMPARÉE 223 (1926); *Judgments and Advisory Opinions of the Permanent Court of International Justice*, 6 BRIT. Y.B. INT'L L. 193 (1925); STEPHEN P. LADAS, *THE EXCHANGE OF MINORITIES: BULGARIA, GREECE AND TURKEY* (1932).

the *Exchange of Greek and Turkish Populations*.<sup>123</sup> The Court describes how the transfer was effectuated:

In the course of negotiations for the establishment of peace with Turkey conducted at Lausanne during 1922 and 1923, amongst other diplomatic instruments, was concluded a Convention concerning the exchange of Greek and Turkish populations. This Convention, which was signed at Lausanne on January 30th, 1923, by the Greek and Turkish delegates, came into effect after the ratification by Greece and Turkey of the Peace Treaty of July 24th, 1923, viz. on August 6th, 1924.

Article II of this Convention provides for the setting up, within one month from its coming into force, of a Mixed Commission composed of four members representing each of the High Contracting Parties and three members chosen by the Council of the League of Nations from amongst nationals of Powers which did not take part in the war of 1914–1918 [ . . . ].

The Mixed Commission's duties, under Article 12, were, amongst other things, to supervise and facilitate the emigration provided for in the Convention and to settle the methods to be followed. Generally speaking, it has full power to take the measures necessitated by the execution of the Convention and to decide all questions to which this Convention may give rise.

The principle governing the emigration in question is laid down in the first article of the Convention as follows:

As from May 1st, 1923, there shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in Greek territory.

These persons shall not return to live in Turkey or Greece respectively without the authorization of the Turkish Government or of the Greek Government respectively.<sup>124</sup>

The court was not asked to rule on the merits of the transfer, but simply to identify who was subject to such transfers,<sup>125</sup> thus implicitly admitting the legal validity of a transfer that was predicated on an international convention. Therefore, the practice of states, including that of the Allies after World War I and World War II, can hardly be said to have been consistent with international law as they invoked it against Germany.

However, after World War II a concerted effort was made to deal with these problems within the context of both war and peace. Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>126</sup> prohibits the deportation and transfer of civilians, although allowing temporary movements of persons where required for the security of the population or "imperative military reasons." Article 147 of the Convention prohibits and deems a "grave breach" the unlawful deportation or transfer of civilians under occupation.<sup>127</sup> As a "grave breach," pursuant to Article 146, the High Contracting Parties are obligated to bring persons alleged to have committed such

<sup>123</sup> *Exchange of Greek and Turkish Populations*, 1925 P.C.I.J. (Ser. B), No. 11, at 6, *reprinted in* 1 *WORLD COURT REPORTS* 440 (Manley O. Hudson ed., 1969).

<sup>124</sup> *Id.* at 9–10.

<sup>125</sup> *Id.* at 10, 25–6.

<sup>126</sup> Geneva Convention IV, *supra* note 7.

<sup>127</sup> *Id.* at art. 147.

practices before their own courts, or “hand such persons over for trial to another High Contracting Power.”<sup>128</sup> The 1977 Protocols extended protection to the effects of hostilities and to armed conflicts that have the nature of organized civil war,<sup>129</sup> thus taking over in part what CAH covered between 1945 and 1977.

In addition to these conventions prohibiting deportation and population transfer in time of war and organized civil war, several other conventions address deportation outside the context of armed conflicts. A number of specific and general instruments prohibit, but do not criminalize, deportation in time of peace. One of the earliest such instruments was the 1951 Convention relating to the Status of Refugees.<sup>130</sup> Article 32 (Expulsion) provides:

- (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
- (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
- (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.<sup>131</sup>

Also, Article 33 on the Prohibition of Expulsion or Return (“*Refoulement*”) states, “(1) No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>132</sup> The 1951 Convention also prohibits any Contracting State from making any

<sup>128</sup> *Id.* at art. 146.

<sup>129</sup> See NAGENDRA SINGH, ENFORCEMENT OF HUMAN RIGHTS 110–11 (1986).

<sup>130</sup> Adopted on July 28, 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of Dec. 14, 1950, *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/h/Rev.2, U.N. Sales No. E. 83 XIV (1983) [hereinafter HUMAN RIGHTS COMPILATION].

<sup>131</sup> Similarly, Article 31 of the Convention relating to the Status of Stateless Persons, adopted on Sept. 28, 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526A (XVII) of Apr. 26, 1954, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 93, 97 provides:

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

<sup>132</sup> *Id.* at art. 33.

reservations to Article 33. Thus, the right to *non-refoulement* is unconditional.<sup>133</sup> In 1967 the Territorial Declaration on Asylum expanded the 1951 Convention.

The 1967 Declaration on Territorial Asylum declares that “No person seeking asylum from persecution shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.”<sup>134</sup> This provision applies to any asylum seeker, regardless of whether the person is legally within the territory of the host state. Exceptions are allowed “only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of people.”<sup>135</sup>

The 1967 Protocol Amending the 1951 Refugee Convention eliminated the time and geographical constraints of the 1951 Convention and broadened the category of refugees entitled to the protection against *non-refoulement*.<sup>136</sup> Other international instruments also prohibit deportation, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Articles 13(2) and 14 of the Universal Declaration more directly address deportation prohibitions. By the terms of Article 13(2), persons have the right to leave any country, including their own, and return to their country.<sup>137</sup> Article 14 guarantees that all persons have the right to seek and enjoy asylum in other countries to escape persecution arising from truly political acts.<sup>138</sup>

Article 12 of the 1966 International Covenant on Civil and Political Rights provides that (1) persons within a territory may move freely within the territory and choose their place of residence; (2) all persons are free to leave any country, including their own; (3) the aforementioned rights are unrestricted except as necessary to protect national security, public order, public health or the rights of others; and (4) no person shall be deprived of the right to enter his own country arbitrarily.<sup>139</sup> Article 13 provides that an alien may be expelled from a country only after a decision is reached in accordance with law by the competent authority, and that this right may only be limited as needed by matters of national security.<sup>140</sup>

Regional human rights instruments also provide similar protections. The Fourth Protocol to the 1950 European Convention on Human Rights and Fundamental Freedoms explicitly addresses deportation in Article 2, which guarantees freedom of movement and choice of residence and the right to leave any country, subject to the interests of national security, public order, and the protection of the rights of others.<sup>141</sup> Article 4 prohibits the

<sup>133</sup> In order to utilize Article 33, the person seeking protection must fall within the definition of “refugee” as stated in the 1951 Convention. This definition is limited to persons who became refugees due to events having taken place in Europe prior to Jan. 1, 1951.

<sup>134</sup> Resolution 2312 (XXII), adopted by the General Assembly of the United Nations on Dec. 14, 1967, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 109, 110, art. 3(1).

<sup>135</sup> *Id.* at art. 3(2). The 1967 Declaration does not cover refugees of “generalized violence,” economic hardship or displaced persons. Currently, scholars argue that the right of “*non-refoulement*” has created a new international norm – the right to temporary refuge. This new norm is an extension of “*non-refoulement*,” and protects refugees from being returned to a country engaged in civil war until the violence ceases.

<sup>136</sup> See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267.

<sup>137</sup> Universal Declaration art. 13(2), *supra* note 5.

<sup>138</sup> *Id.* at art. 14.

<sup>139</sup> ICCPR art. 12, *supra* note 6.

<sup>140</sup> *Id.* at art. 14.

<sup>141</sup> See European Convention, *supra* note 29.

collective expulsion of aliens.<sup>142</sup> The American Convention provides the same in Article 22.<sup>143</sup> The 1969 African Charter on Human and Peoples Rights provides that “the mass expulsion of non-nationals shall be prohibited.”<sup>144</sup> Mass expulsion is “aimed at national, racial, ethnic, or religious groups.”<sup>145</sup>

Of course, important distinctions must be drawn between international and regional human rights instruments prohibiting deportation and transfer of population and instruments that criminalize such acts. In the first category of instruments, it should be noted that with respect to certain specific aspects of these protections, they are not absolute and do not criminalize the violative conduct. In the second category, only those instruments that apply to the regulation of armed conflicts criminalize deportation and transfer of population. But with respect to population transfers that are a consequence of territorial changes, there are no international instruments that criminalize them. Consequently, it is important for the future codification of CAH to integrate those two dimensions of international protection to avoid the confusion between protected rights whose violations are and are not criminalized. Certainly, one way to maintain a distinction between such acts is to apply the prerequisite legal elements,<sup>146</sup> which would allow the criminalization of deportation and population transfer when done as part of state policy in furtherance of a discriminatory policy.

The conflict in the former Yugoslavia gave a new dimension to “deportation” in the practice of ethnic cleansing.<sup>147</sup> Therefore, it was included in Article 5 of the ICTY Statute, in Article 3 of the ICTR Statute, and in Article 7 of the Rome Statute.

The ICTY Statute in Article 5 states, “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [ . . . ] (d) *deportation* [ . . . ].”<sup>148</sup>

The ICTR Statute in Article 3 states, “[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds: [ . . . ] (d) *deportation* [ . . . ].”<sup>149</sup>

Thus, the above two formulations found in the ICTY and ICTR Statutes merely state that “deportation” and “population transfer” are specific crimes, without adding any definition to the terms. These formulations fail to provide any language indicating the exact meaning and scope of the terms “deportation” and “population transfer.” Consequently, these formulations gave rise to the same questions that faced London Charter Article 6(c) with respect to “deportation” and “population transfer.” For instance, questions still existed as to what kinds of deportation and population transfer are lawful. Certainly, there exist contexts, as discussed above, in which deportation and population transfer are lawful. The two formulations above fail to identify such contexts.

<sup>142</sup> *Id.* at arts. 2, 4, *see also* art. 3 (providing that a country’s nationals may not be expelled, either individually or collectively, and a country’s nationals may not be refused re-entry).

<sup>143</sup> *See* American Convention art. 22, *supra* note 29.

<sup>144</sup> *See* African Charter, *supra* note 29. Nairobi, June 1981, as *reprinted in* HUMAN RIGHTS IN INTERNATIONAL LAW: BASIC TEXTS 207 (Council of Europe 1985), based on the text provided by the Division of Press and Information of the Organization of African Unity General Secretariat.

<sup>145</sup> *Id.* at art. 12, §5.

<sup>146</sup> *See infra* ch. 1, §3.

<sup>147</sup> *See infra* note 355.

<sup>148</sup> ICTY Statute art. 5, *supra* note 11 (emphasis added).

<sup>149</sup> ICTR Statute art. 3, *supra* note 12 (emphasis added).

The ICTY has used the term “forcible displacement” to cover both the CAH of deportation and the CAH of forcible transfer (other inhumane acts), which share a number of elements.<sup>150</sup> The *actus reus* of forcible displacement is (1) the displacement of persons by expulsion or other coercive acts (2) from an area in which they are lawfully present (3) without grounds permitted under international law.<sup>151</sup> The *mens rea* for the offence is the intent to displace, permanently or otherwise, the victims within the relevant national border (forcible transfer) or across the relevant national border (deportation).<sup>152</sup> Several judgments from the ICTY Tribunal have concluded that:

[B]oth deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.<sup>153</sup>

The displacement must be involuntary in nature.<sup>154</sup> The deportation is “forced” if the use or threat of physical force created a reasonable belief that failure to relocate would put the person in more danger.<sup>155</sup> ICTY Trial and Appeals Chambers have consistently ruled that it is the absence of a “genuine choice” that makes a given act of displacement unlawful.<sup>156</sup>

The ICTY has recognized two general grounds under international law whereby displacement of persons is legitimate: (1) for the security of a civilian population or (2) for imperative military reasons.<sup>157</sup> In either circumstance, the primary distinction between

<sup>150</sup> See Prosecutor v. Simić et al., Case No IT-95-9, Trial Judgment, ¶¶ 123–24 (Oct. 17, 2003) [hereinafter *Simić et al.* Trial Judgment] (stating “[f]rom the jurisprudence of the Tribunal it is clear that the elements of the offences of deportation and forcible transfer are substantially similar”); *Krnjelac* Trial Judgment, *supra* note 49, ¶ 473.

<sup>151</sup> See *Krnjelac* Trial Judgment, *supra* note 49, ¶ 474 (defining deportation as “the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”); *Blaškić* Trial Judgment, *supra* note 32, ¶ 234 (defining deportation as the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”).

<sup>152</sup> See *Stakić* Appeals Judgment, *supra* note 33, ¶¶ 278, 307, 317; *Martić* Trial Judgment, *supra* note 32, ¶ 111.

<sup>153</sup> See also *Krnjelac v. Prosecutor*, Case No. IT-97-25-A, Judgment, ¶¶ 218, 222–24 (Sept. 17, 2003) [hereinafter *Krnjelac* Appeals Judgment]; *Krnjelac* Trial Judgment, *supra* note 49, ¶¶ 474, 476; *Simić et al.* Trial Judgment, *supra* note 150, ¶ 129; *Krstić* Trial Judgment, *supra* note 32, ¶ 521; *Brđanin* Trial Judgment, *supra* note 34, ¶ 540; *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 595; Prosecutor v. Šainović et al., Case No. IT-99-37-T, Judgment, ¶ 303 (Feb. 26, 2009) [hereinafter *Šainović et al.* Trial Judgment].

<sup>154</sup> See *Šainović et al.* Trial Judgment, *supra* note 153, ¶ 165, citing *Brđanin* Trial Judgment, *supra* note 34, ¶ 543; *Simić et al.* Trial Judgment, *supra* note 150, ¶ 125.

<sup>155</sup> *Krstić* Trial Judgment, *supra* note 32, ¶ 528–30.

<sup>156</sup> See *Krnjelac* Appeals Judgment, *supra* note 153, ¶ 229 (holding that genuine choice cannot be inferred from the fact that consent was expressed where the circumstances deprive the consent of any value); *Stakić* Appeals Judgment, *supra* note 33, ¶ 279; *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 596; *Brđanin* Trial Judgment, *supra* note 34, ¶ 543; *Simić et al.* Trial Judgment, *supra* note 150, ¶ 126 (inferring a lack of genuine choice from threatening and intimidating acts calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of or the threat to commit other crimes “calculated to terrify the population and make them flee the area with no hope of return”).

<sup>157</sup> See *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 597; *Brđanin* Trial Judgment, *supra* note 34, ¶ 556. In addition to these two exceptions, the *Blagojević & Jokić* Trial Chamber concluded that the law allows for evacuations for humanitarian reasons, basing its conclusion on article 17 of Additional Protocol II, which provides that “[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict[.]” *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 600. As noted by the



illegitimate forcible displacement and permissible evacuation is that, regarding the latter, “persons thus evacuated [are] transferred back to their homes as soon as the hostilities in the area in question have ceased.”<sup>158</sup> Thus, it is unlawful to utilize evacuation measures as a pretext to forcibly dislocate a population and seize control over a territory.<sup>159</sup>

At the time of the publication of this book, the ICTR has no jurisprudence on “deportation.”

The Rome Statute in Article 7 states: “[a] ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (d) *deportation or forcible transfer of population* [...]”.<sup>160</sup> Article 7 then provides further language defining “deportation or forcible transfer of population.” It states, “‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law. . . .”<sup>161</sup> Thus, Article 7 of the Rome Statute adds to the specificity of London Charter Article 6(c), as well as to the formulations of the ICTY and ICTR, by providing a definition of “deportation or forcible population transfer” that clearly draws a distinction between lawful and unlawful deportations and population transfers. Specifically, Article 7 includes the language “without grounds permitted under international law.” This is language that exempts from the definition those deportations or population transfers that occur as the result of a treaty concerning territorial changes. Similarly, the inclusion of “lawfully present” permits a state to deport one who is not afforded the right to remain in that state under its domestic laws.

All post-Charter legal formulations borrow from the same terminology from Article 6(c) of the London Charter with respect to “deportation” and “population transfer.” Only the Rome Statute defines these terms. The Rome Statute provides much in the way of identifying the contents of “deportation” and “population transfer.” And while the prospect of even further specification should not be dismissed if the opportunity arises, it is clear that the concerns about specificity that existed at the time of the London Charter are at least partially abated with the formulation found in Article 7 of the Rome Statute. The warrant of arrest issued for Sudanese President Omar Al-Bashir includes a count for forcible transfer as a CAH under article 7(1)(d).<sup>162</sup>

### Elements of Deportation or Forcible Transfer of Population

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion

Trial Chamber in *Šainović et al.*, the Commentary to article 17 recognizes other reasons for legitimate displacement of the civilian population by the parties to the conflict, including the outbreak or risk of outbreak of epidemics, natural disasters, or the existence of a generally untenable and life-threatening living situation. See *Šainović et al.* Trial Judgment, *supra* note 153, n. 308, citing ICRC Commentary to Additional Protocol II, ¶ 4855; *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 600.

<sup>158</sup> *Brđanin* Trial Judgment, *supra* note 34, ¶ 556. The Appeals Chamber has held that deportation and forcible transfer do not require intent that the victims be displaced permanently, only that they be displaced intentionally. See *Stakić* Appeals Judgment, *supra* note 33, ¶¶ 307, 317. But see *Naletilić & Martinović v. Prosecutor*, Case No IT-98-34-A, Judgment, ¶ 24 (May 6, 2006) (dissenting opinion of Judge Schomburg).

<sup>159</sup> *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 597.

<sup>160</sup> ICC Statute art. 7, *supra* note 13 (emphasis added).

<sup>161</sup> *Id.*

<sup>162</sup> *Al Bashir* Warrant of arrest, *supra* note 52.

or other coercive acts [footnote 12: The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment; footnote 13: “Deported or forcibly transferred” is interchangeable with “forcibly displaced.”].

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

In all legal systems, “deportation” is lawful when carried out pursuant to law and on valid legal bases that do not violate certain legally protected rights under domestic or international law. The definition of “deportation” is found in the immigration laws of almost all of the world’s legal systems; however, there is no known domestic criminal code or law in the world that contains the crime of “deportation” *per se*.

A number of conventions on the protection of refugees arose following World War II, in particular the 1967 Protocol amending the 1951 Convention relating to the Status of Refugees, which has been ratified or acceded to by 141 countries. The ICCPR, European Convention on Human Rights, American Convention on Human Rights, and African Charter on Human and Peoples’ Rights all contain provisions against arbitrary deportation, particularly in cases where the person in question would likely be subjected to persecution on the basis of race, religion, national origin, or political opinion. The Torture Convention in Article 3 prohibits extradition and deportation of a person to a country where that person is likely to be tortured.

Another category is called “internally displaced persons,” who are persons moved by a state from one part of the country to another, but in circumstances that do not fall within the meaning of deportation, though *de facto*, such persons are deprived of their right of choice as to their habitat.

Moreover, international human rights law considers forcible transfer of population, considered one of a number of “inhumane acts” in many prosecutions, as also being a form of deportation. This raises questions of how to distinguish between the two. Deportation and forcible transfer are commonly considered as a form of ethnic cleansing, which is the forcible removal of persons on the basis of their race, ethnicity, national origin, or political views, and thus on the basis of discrimination usually reflecting a policy of persecution.

Ethnic cleansing was practiced in the conflict in the former Yugoslavia both in Bosnia, by Serbs against Bosniaks, and in Croatia, by Croats against Serbs in Krajina and in other parts of Croatia. The Serbs also practiced ethnic cleansing against the ethnic Albanian population living in that territory, resulting in 800,000 displaced persons. These were blatant acts that were part of government policy, and executed by state actors and nonstate actors working in support of the policy. For the most part, however, the CAH of persecution has been utilized by the ICTY in order to capture the phenomenon

known as ethnic cleansing (in the same sense that genocide has been the offense most often utilized to encompass the events in Rwanda in 1994).

Population displacement also occurred in conflicts such as in Darfur, Sudan, where an estimated two million persons were displaced. Often the result of such population displacement is death, injury, and illness of a large number of those benignly called refugees. Other less blatant state practices involving forceful displacement of population in occupied territories produce those who are called refugees. For example, the Iraq war produced two million refugees and one million internally displaced persons, and the civil war in Afghanistan prior to the U.S. intervention after 9/11 produced an estimated four million refugees.

#### **CAH Statistics (as of November 2010)**

**ICTY:** 45 indicted / 8 convicted

**ICTR:** 0 indicted

**SCSL:** 0 indicted

**SPSC ET:** 106 indicted / 8 convicted

**ECCC:** 0 indicted

**WCC BiH:** 42 indicted / 14 convicted

**ICC:** 3 indicted (forcible transfer)

#### **§2.4. *Persecution***

Across many cultures and civilizations throughout history, it is understood that the terms “persecute” and “persecution” refer to discriminatory practices resulting in physical or mental harm, economic harm, or all of the above. The term “persecution” has a particular historical meaning in Western civilization, as it has come to be associated with the Roman persecution of Christians. Since World War II, world public opinion has associated it with Nazi atrocities against Jews.

The word “persecute” and the act of “persecution” have come to acquire a universally accepted meaning, for which a proposed composite definition is:

State policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim’s beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.

To support the theory that the above composite definition reflects the common understanding of these terms prior to 1945, this writer turned to the most obvious source – dictionaries. The languages researched are those reflected in the world’s major criminal justice systems, as was the case with the research described earlier in this chapter. They are Arabic, Danish, Dutch, English, French, German, Greek, Hungarian, Italian, Japanese, Norwegian, Polish, Portuguese, Romanian, Russian, Spanish, Swedish, and Turkish. They express the plain and common meaning of the term and to some extent its legal significance in these various cultures.

Still, there is no crime known by the label “persecution” in the world’s major criminal justice systems, nor is there an international instrument that criminalizes it, except for

the *Apartheid* and the Genocide Conventions, which provided that the “persecution” is coupled with other acts and with a specific intent on the part of the perpetrator.

The prosecutions of the IMT, IMTFE, and Subsequent Proceedings dealt with “persecution” in two ways: (1) as a prerequisite legal element<sup>163</sup> and (2) as a specific crime. The former approach is both self-evident and reasonable, but the latter is problematic because “persecution” is either the product of state policy or it is committed by a nonstate supported group action that cannot be imputed to the state. As an example of the latter approach at the IMT, Julius Streicher, a notorious Nazi who was the founder and publisher of *Der Stürmer*, a prominent mouthpiece of Nazi propaganda, was found guilty of incitement to murder and extermination, constituting persecution on political and racial grounds. He received a death sentence. However, the IMT did not specifically define the elements of persecution as a CAH.

It is the conclusion of this writer that “persecution” is neither a crime in the world’s major legal systems, nor an international crime *per se*, unless it is the basis for the commission of other crimes. Therefore, certain national crimes become international criminal violations as they are based on persecutory policies of an identifiable group of persons. The same acts remain criminal, even when national law permits them with regard to some people on the basis of discrimination. A reasonable nexus between the discriminatory policy and existing international crimes is needed.<sup>164</sup>

Since 1945 a number of international instruments prohibit and denounce the use of discriminatory practices or measures that result in the persecution or oppression of persons and groups, though none of these criminalize their violations except the *Apartheid* Convention. They are:

- (1) Universal Declaration of Human Rights;
- (2) International Covenant on Civil and Political Rights;
- (3) International Covenant on Social, Economic and Cultural Rights;
- (4) Declaration on the Elimination of All Forms of Racial Discrimination;<sup>165</sup>
- (5) International Convention on the Elimination of Racial Discrimination;<sup>166</sup>
- (6) International Convention on the Suppression and Punishment of the Crime of *Apartheid*;<sup>167</sup>
- (7) Declaration on the Elimination of Discrimination Against Women;<sup>168</sup>
- (8) Convention on the Elimination of All Forms of Discrimination Against Women;<sup>169</sup>
- (9) Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>170</sup>

<sup>163</sup> See *infra* ch. 3, §§ 9, 10.

<sup>164</sup> *Id.*

<sup>165</sup> U.N. G.A. Res. 1904 (XVIII), Nov. 20, 1963, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 22.

<sup>166</sup> Adopted and opened for signature and ratification by General Assembly Resolution 2106A (XX) of Dec. 21, 1965, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 23.

<sup>167</sup> Adopted and opened for signature and ratification by General Assembly Resolution 3068 (XXVIII) of Nov. 30, 1973, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 29.

<sup>168</sup> U.N. G.A. Res. 2263 (XXII), Nov. 7, 1967, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 41.

<sup>169</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of Dec. 18, 1979, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 43.

<sup>170</sup> U.N. G.A. Res. 36/55, Nov. 25, 1981, *reprinted in* HUMAN RIGHTS COMPILATION, *supra* note 130, at 48.

In addition to these instruments,<sup>171</sup> the Genocide Convention bars and criminalizes discrimination when it leads to certain consequences subject to certain legal requirements, with limitations. However, the Genocide Convention is particularly significant, as it outlines the manners in which persecution is achieved. It states that persecution involves the intentional attempt to destroy a national, ethnic, racial, or religious group by

- (1) Killing members of the group;
- (2) Causing serious bodily or mental harm to members of the group;
- (3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (4) Imposing measures intended to prevent births within the group;
- (5) Forcibly transferring children of the group to another group.<sup>172</sup>

Article II of the *Apartheid* Convention is even more detailed and explicit than others with respect to the policies and practices of racial discrimination and oppression to insure the racial superiority of one group over another. Unlike any other convention, it also specifies economic and labor practices that are employed as a means of preserving the dominance of one racial group over another.

“Persecution” is included in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute. The ICTY Statute in Article 5 states “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [...] (h) *persecutions on political, racial and religious grounds* [...].”<sup>173</sup>

Article 3 of the ICTR Statute in states that “[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds: [...] (h) *persecutions on political, racial and religious grounds* [...].”<sup>174</sup>

The two formulations found in the ICTY and ICTR Statutes merely state that “persecution” is a specific crime without adding any definition to the term. In other words, these formulations merely replicate the language of London Charter Article 6(c). The two formulations failed to clearly define “persecution” in a manner so as to answer the questions and dispel the ambiguity surrounding this term as it existed in Article 6(c).

The ICTY has held that the crime of persecution as a CAH consists of an act or omission, which (1) discriminates in fact and which denies or infringes upon a fundamental rights as provided in international customary or treaty law and (2) was carried out deliberately with the intention to discriminate on political, racial or religious grounds.<sup>175</sup>

<sup>171</sup> For other documents on the prevention of discrimination, see HUMAN RIGHTS COMPILATION, *supra* note 130, at 32–41, 50–55.

<sup>172</sup> Genocide Convention art. II, *supra* note 26. See also Lippman, *supra* note 28, at 403; United Nations Report on the Study of the Prevention and Punishment of the Crime of Genocide, E/CN/4/Sub. 1/416, July 4, 1978, at 1324.

<sup>173</sup> ICTY Statute art. 5, *supra* note 11 (emphasis added).

<sup>174</sup> ICTR Statute art. 3, *supra* note 12 (emphasis added).

<sup>175</sup> See *Martić* Trial Judgment, *supra* note 32, ¶ 113. On appeal, the Appeals Chamber reversed Martić’s conviction for persecution as a CAH, holding that some of the underlying acts relied upon by the Trial Chamber to establish deportation were incorrectly linked to Martić or incorrectly established. Martić

The ICTY has distinguished persecution from other CAH because the underlying act is committed on discriminatory grounds.<sup>176</sup> There is no comprehensive list of acts that may constitute persecution. Such acts may be listed under ICTY Article 5, one of the acts constituting a crime elsewhere in the articles of the Statute, as well as acts that are not listed in the Statute.<sup>177</sup> Furthermore, the acts underlying persecutions under Article

v. Prosecutor, Case No. IT-95-11-A, Judgment, ¶ 212 (Oct. 8, 2008); *see also* Kvočka et al. v. Prosecutor, IT-98-30/1-A, Judgment, ¶ 320 (Feb. 28, 2005) [hereinafter *Kvočka et al.* Appeals Judgment]; *Krnjelac* Trial Judgment, *supra* note 49, ¶ 185; *Vasiljević* v. Prosecutor, Case No. IT-96-32-A, Judgment, ¶ 113 (Feb. 25, 2004) [hereinafter *Vasiljević* Appeals Judgment]; *Blaškić* Appeals Judgment, *supra* note 32, ¶ 131; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 101 (Dec. 17, 2004); *Stakić* Appeals Judgment, *supra* note 33, ¶ 327. Each of the three grounds listed, namely political, racial, or religious, is alone sufficient to qualify conduct as persecution, notwithstanding the conjunctive “and” in the text of Article 5(h). Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 713 (Nov. 11, 1999) [hereinafter *Tadić* Trial Judgment]; and *Krnjelac* Trial Judgment, *supra* note 49, ¶ 184.

<sup>176</sup> Prosecutor v. Kupreškić et al., Case No. IT-95-16, Trial Judgment, ¶ 607 (Oct. 23, 2001).

<sup>177</sup> *See* Brđanin v. Prosecutor, Case No. IT-99-36-A, Judgment, ¶ 296 (Apr. 3, 2007) [hereinafter *Brđanin* Appeals Judgment]; *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶¶ 321–23; *Vasiljević* Trial Judgment, *supra* note 90, ¶ 246, *citing* *Tadić* Trial Judgment, *supra* note 175, ¶ 694; Prosecutor v. Kupreškić et al. Trial Judgment, *supra* note 176, ¶¶ 567–68, 614; *Blaškić* Trial Judgment, *supra* note 32, ¶¶ 218–219; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 192 (Feb. 26, 2001) [hereinafter *Kordić & Čerkez* Trial Judgment]; *Krnjelac* Trial Judgment, *supra* note 49, ¶ 219, 433.

Furthermore, a persecutory act need not be explicitly prohibited in ICTY Article 5 or elsewhere in the Statute. *Kupreškić et al.* Trial Judgment, *supra* note 176, ¶ 614. In the *Tadić* case, the Trial Chamber held that “the persecutory act must be intended to cause, and result in, an infringement on an individual’s enjoyment of a basic right or fundamental right, *Tadić* Trial Judgment, *supra* note 175, ¶ 715. Additionally, it has been held that the acts themselves need not be inherently criminal, but may become criminal and persecutory if committed with discriminatory intent. *See* Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, ¶ 186 (Nov. 2, 2001); *see also* *Tadić* Trial Judgment, *supra* note 175, ¶ 710.

The jurisprudence of the ICTY holds that the following acts may constitute the underlying acts of the crime of persecution: acts of physical violence; extermination and murder; imprisonment; inhumane living conditions; torture; beatings; sexual assault; unlawful attacks on civilians; restrictive and discriminatory measures; robbery; deportation or forcible transfer; the denial of the right not to be denied employment; the denial of the rights of freedom of movement; the denial of the right of proper judicial process; destruction of homes, other public property, cultural institutions, historic monuments and sacred sites. *See* *Brđanin* Appeals Judgment, *supra*, ¶ 297; *Martić* Trial Judgment, *supra* note 32, ¶ 119; *Blaškić* Appeals Judgment, *supra* note 32, ¶¶ 143, 153, 155, 159; *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶¶ 104–06, 108, 672; *Krnjelac* Appeals Judgment, *supra* note 153, ¶¶ 221–22; *Brđanin* Trial Judgment, *supra* note 34, ¶¶ 999, 1029 *et seq.*; *Krnjelac* Trial Judgment, *supra* note 49, ¶¶ 438–43; *Kupreškić et al.* Trial Judgment, *supra* note 232, ¶ 615; *Stakić* Trial Judgment, *supra* note 33, ¶ 757 (holding that “not only rape, but also any other sexual assault falling short of actual penetration is punishable [as persecution]”); *Tadić* Trial Judgment, *supra* note 175, ¶ 717.

Robbery has not previously been expressly considered as a crime that constitutes an underlying act of persecutions, but the Trial Chamber notes that the fundamental right to property is recognized in its jurisprudence. *See e.g.* *Blaškić* Appeals Judgment, *supra* note 32, ¶ 145, *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶¶ 593–94; Prosecutor v. Naletelić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 699 (and authorities cited therein); *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 81.

The Trial Chamber has further noted that destruction of property may constitute an underlying act of the crime of persecutions. *See e.g.* *Martić* Trial Judgment, *supra* note 32, n. 226; *Blaškić* Appeals Judgment, *supra* note 32, ¶ 146 (and authorities cited therein); *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 108. Aggravated forms of crimes against property in the context of plunder under ICTY Article 3 have been recognized as acts of persecutions. *See e.g.* *Kupreškić et al.* Trial Judgment, *supra* note 176, ¶ 631; *Kordić & Čerkez* Trial Judgment, *supra*, ¶ 205.

Furthermore, theft and robbery have been considered in the context of a persecutory campaign. *see* *Kvočka et al.* Trial Judgment, *supra*, ¶ 496 (holding “[the Accused] was involved in the extortion of detainees and stealing money from detainees in Omarska camp, which in this context can be characterized as part of the harassment inflicted upon detainees in the camp and thus a part of the persecutory

5(h) need not necessarily be considered a crime under international law.<sup>178</sup> The Tribunal has required that, to amount to persecutions, the act must constitute a denial or infringement of a fundamental right laid down in customary international law.<sup>179</sup> If the act is not enumerated as a crime in the Statute, to amount to crime of persecution under Article 5(h), the acts “must be of equal gravity to the crimes listed in Article 5, whether considered in isolation or in conjunction with other acts.”<sup>180</sup>

A single act or omission may suffice to constitute persecution “as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.”<sup>181</sup> The ICTY has held that an act is discriminatory when a victim is targeted because of membership “of a group defined by the perpetrator on a political, racial or religious basis.”<sup>182</sup> However, it is not necessary that a victim actually *be* a member of the targeted group.<sup>183</sup>

As for the *mens rea*, the ICTY has held that the crime of persecution requires evidence of a specific intent to discriminate on political, racial or religious grounds.<sup>184</sup> But this intent must be aimed at a group, rather than an individual, because the *mens rea* “is the specific intent to cause injury to a human being because he belongs to a particular community or group.”<sup>185</sup> Discriminatory intent may be inferred from the discriminatory

campaign.”); see also *Kvočka et al.* Trial Judgment, *supra*, ¶ 731; *Kordić & Čerkez* Trial Judgment, *supra*, ¶¶ 514–20. Thus, in the *Martić* case the Trial Chamber was satisfied that the appropriation of property with violence in the form of robbery may constitute an underlying act of the crime of persecution if perpetrated with the requisite intent. As for destruction, the Trial Chamber in the *Kupreškić et al.* case found that the comprehensive destruction of homes and property, which constituted the destruction of the livelihood of a certain population, may constitute a gross or blatant denial of fundamental rights, and if committed on discriminatory grounds, could amount to persecutions. *Kupreškić et al.* Trial Judgment, *supra* note 176, ¶ 631. In the *Kordić & Čerkez* case, the Trial Chamber held that the destruction and damage of religious or educational institutions may constitute persecution. *Kordić & Čerkez* Trial Judgment, *supra*, ¶ 207. In relation to “plunder,” the Appeals Chamber in the *Kordić & Čerkez* case held that it must be considered whether an act of plunder committed separately or cumulatively, with discriminatory intent *in concreto* amounts to persecutions being of an equal gravity as the other CAH listed in ICTY Article 5. *Kordić & Čerkez* Appeal Judgment, *supra* note 175, ¶ 109; see also *Blaškić* Trial Judgment, *supra* note 32, ¶ 227; *Kordić & Čerkez* Trial Judgment, *supra*, ¶ 205; *Kupreškić et al.* Trial Judgment, *supra* note 176, ¶ 631; *Tadić* Trial Judgment, *supra* note 175, ¶¶ 707, 710.

<sup>178</sup> *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶ 323.

<sup>179</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 103; *Blaškić* Appeals Judgment, *supra* note 32, ¶ 139. Not every act that constitutes a denial or infringement of a fundamental right is serious enough to amount to persecution; acts of persecution must be of equal gravity to the acts enumerated elsewhere in Article 5. See *Martić* Trial Judgment, *supra* note 32, ¶ 116; *Blaškić* Appeals Judgment, *supra* note 33, ¶ 160; *Kupreškić et al.* Trial Judgment, *supra* note 176, ¶ 619.

<sup>180</sup> *Brđanin* Appeals Judgment, *supra* note 177, ¶ 206; *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶¶ 321–23; *Naletelić & Martinović v. Prosecutor*, Case No. IT-98-34-A, Judgment, ¶ 574 (May 3, 2006) [hereinafter *Naletelić & Martinović* Appeals Judgment]; *Simić et al. v. Prosecutor*, Case No. IT-95-9-A, Judgment, ¶ 177 (Nov. 28, 2006) [hereinafter *Simić et al.* Appeals Judgment].

<sup>181</sup> *Vasiljević* Appeals Judgment, *supra* note 34, ¶ 113; see also *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 102. Thus, the act or omission itself must have discriminatory consequences and not just be carried out with discriminatory intent. See *Blaškić* Appeals Judgment, *supra* note 33, ¶ 135; see also *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 583; *Stakić et al.* Trial Judgment, *supra* note 33, ¶ 733.

<sup>182</sup> *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 583.

<sup>183</sup> *Krnjelac* Appeals Judgment, *supra* note 153, ¶ 185 (holding that a Serb mistaken for a Muslim may still be the victim of the crime of persecution).

<sup>184</sup> *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶ 460; *Blaškić* Appeals Judgment, *supra* note 33, ¶ 165; *Martić* Trial Judgment, *supra* note 32, ¶ 120.

<sup>185</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 111; *Martić* Trial Judgment, *supra* note 32, ¶ 120.



nature of an attack amounting to a CAH if “the circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.”<sup>186</sup> The ICTY has found circumstances that may be considered when inferring discriminatory intent include “the systematic nature of the crimes committed against a racial or religious group and the general attitude of the alleged perpetrator as demonstrated by his behaviour.”<sup>187</sup> The requisite specific intent can only be inferred from the “objective facts and the general conduct of the accused seen in its entirety.”<sup>188</sup>

Persecution is often contrasted with genocide because of its heightened *mens rea* requirement. However, persecutions and genocide differ in a very fundamental way, as the Trial Chamber stated in the *Kupreškić* case:

[T]he *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.<sup>189</sup>

The ICJ quoted this language to highlight its notion of the specific intent and particular requirements for the crime of genocide in the *Bosnia v. Serbia* case.<sup>190</sup>

<sup>186</sup> *Blaškić* Appeals Judgment, *supra* note 32, ¶ 164; *Krnjelac* Appeals Judgment, *supra* note 153, ¶ 184; *Martić* Trial Judgment, *supra* note 32, ¶ 121. See also *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶¶ 110, 950; *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶ 366; *Naletelić & Martinović* Appeals Judgment, *supra* note 180, ¶¶ 131, 146, 572. But see *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶ 460 (stating that discriminatory intent may not be inferred directly from an attack’s general discriminatory nature alone).

<sup>187</sup> *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶ 460.

<sup>188</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 715.

<sup>189</sup> *Kupreškić et al.* Trial Judgment, *supra* note 176, ¶ 636; see also WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 10 (2000):

In cases of mass killings and other atrocities, attention turned inexorably to the Genocide Convention because there was little else to invoke. This, too, has changed in recent years. The law applicable to atrocities that may not meet the strict definition of the crime of genocide but that cry out for punishment has been significantly strengthened. Such offences usually fit within the definition of ‘crimes against humanity’, a broader concept that might be viewed as the second tier of the pyramid. According to the most recent definition, comprised within the Rome Statute of the International Criminal Court, crimes against humanity include persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law. This contemporary approach to crimes against humanity is really no more than the ‘expanded’ definition of genocide that many have argued for over the years.

*Id.* (internal citations omitted).

<sup>190</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ¶ 188.

The ICTR considered “persecution” as a CAH in the *Semanza* case, wherein the Trial Chamber found that Laurent Semanza participated in mass killing of civilians who were mainly Tutsis across various communes in Rwanda.<sup>191</sup> The Chamber held that the material element of persecution is the “severe deprivation of fundamental rights on discriminatory grounds” and determined that killing could form the material element of persecution if committed on discriminatory grounds.<sup>192</sup> The Tribunal rejected the Prosecutor’s argument that the persecutory acts were committed on political grounds against moderate Hutus and Tutsi sympathizers because the Prosecutor had failed to demonstrate that this was a “political” group.<sup>193</sup>

The Chamber further observes that there is nothing in the concise statement of the facts that suggests that any killings were committed on political grounds. After reviewing the evidence, noting in particular the separation of Tutsis from Hutus at Musha church and the public and private statements of the Accused, the Chamber concludes that the primary target of the killings was the Tutsi ethnic group. There is insufficient evidence on the record to explain the reasons for the deaths of Hutus during these attacks. This finding is, moreover, consistent with the Prosecutor’s own characterization of the killings and the Chamber’s legal findings concerning the counts of genocide.<sup>194</sup>

In the *Nahimana* case, the Trial Chamber defined the crime of persecution as “a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts enumerated as [CAH] under the Statute.”<sup>195</sup> The Chamber continued as follows:

It is evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. In *Ruggiu*, the Tribunal so held, finding that the radio broadcasts of RTL, in singling out and attacking the ethnic minority, constituted a deprivation of “the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society.” Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.<sup>196</sup>

The Trial Chamber explained that hate speech itself constituted persecution and that there was no need for the speech to contain a call to action or for there to be a link between persecution and acts of violence.<sup>197</sup> It further concluded that customary international law prohibits discrimination and that hate speech that expresses ethnic and other forms of discrimination is violative of this prohibition.<sup>198</sup>

<sup>191</sup> *Semanza* Trial 2007 I.C.J. 91, at ¶ 18 (Feb. 26).

<sup>192</sup> *Id.* at ¶ 469.

<sup>193</sup> *Id.* at 471.

<sup>194</sup> *Id.*

<sup>195</sup> Prosecutor v. Nahimana et al., ICTR-96-52-T, Judgment, ¶ 1072 (Dec. 12, 2003) [hereinafter *Nahimana et al.* Trial Judgment].

<sup>196</sup> *Id.* ¶ 22.

<sup>197</sup> *Id.* ¶ 1073.

<sup>198</sup> *Id.* ¶¶ 1074–76.

On appeal, the defendants alleged that the Trial Chamber erred as a matter of law and as a matter of fact in finding them guilty of persecution as a CAH.<sup>199</sup> The Appeals Chamber affirmed the ICTY's definition of persecution as consisting of "an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."<sup>200</sup> Also tracking the ICTY, the Appeals Chamber held that not every discriminatory act constitutes the crime of persecution. The underlying acts of persecution, in isolation or in conjunction with other acts, must be of an equal gravity to the crimes contained in Article 3.<sup>201</sup> Moreover, underlying acts of persecution need not amount to crimes in international law.<sup>202</sup>

According to the Appeals Chamber in the *Nahimana* case, hate speech targeting a population on the basis of ethnicity or any other discriminatory ground, violates the right to respect for dignity of the members of the targeted groups; therefore, it constitutes "actual discrimination."<sup>203</sup> It also ruled that speech that incites violence against a population on the basis of ethnicity, or any other discriminatory grounds, violates the right to security of members of the targeted group; therefore, it also constitutes "actual discrimination."<sup>204</sup> However, the Appeals Chamber differed from the Trial Chamber by concluding that hate speech alone cannot amount to "a violation of the rights to life, freedom and physical integrity of a human being."<sup>205</sup> Thus, to amount to persecution, "other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them."<sup>206</sup>

The Rome Statute in Article 7 states:

[a] 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [ . . . ] (*persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court* [ . . . ]."<sup>207</sup>

Article 7 then provides further language defining "persecution." It states, "'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity [ . . . ]."<sup>208</sup> Thus, Article 7 of the Rome Statute adds to the specificity of "persecution" by adding to the grounds by which such persecution is perpetrated. Specifically, Article 7 adds the following grounds

<sup>199</sup> *Nahimana et al. v. Prosecutor*, ICTR-96-52-A, Judgment, ¶ 971 (Nov. 28, 2007) [hereinafter *Nahimana et al. Appeals Judgment*].

<sup>200</sup> *Id.* ¶ 985; see, e.g., *Krnjelac Appeals Judgment*, *supra* note 153, ¶ 431, aff'g *Krnjelac Trial Judgment*, *supra* note 49, ¶ 431.

<sup>201</sup> *Nahimana et al. Appeals Judgment*, *supra* note 199, ¶ 985.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* ¶ 986.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> ICC Statute art. 7, *supra* note 13 (emphasis added).

<sup>208</sup> *Id.*

of national, cultural, gender,<sup>209</sup> “other grounds that are universally recognized as impermissible under international law,” and “ethnic” grounds. Clearly, Article 7 extends the protection against persecution to a much wider extent, including various groups of people not previously afforded protection against persecution. Furthermore, Article 7 provides a definition of “persecution,” namely, “intentional and severe deprivation of fundamental rights contrary to international law [ . . . ].” But, while Article 7 goes a long way in adding specificity to the contents of “persecution,” it seems to leave open a few unanswered questions.<sup>210</sup> For instance, the definition calls for both “intentional” and “severe” deprivation. Thus, the question arises as to what is “severe.” Conceivably, under this definition, there exists a point where such persecution is intentional but has not yet risen to the level of “severe” so as to constitute “persecution.” When does “persecution” become “severe?” Also, while the definition calls for “intentional,” it makes no mention of imputed intent. Is there a point where intent can be imputed based on the foreseeable outcome or based on what should have been the foreseeable outcome? Finally, does this definition permit “persecutions” that deprive a right, but a right which is not fundamental? And what are the “fundamental rights?”

All post-Charter legal formulations borrow from Article 6(c) of the London Charter the same terminology with respect to “persecution.” Only the Rome Statute provides a more elaborated definition of this term, but even its formulation leaves some questions unanswered. Thus, while the Rome Statute resolved some issues, some of the same concerns still exist about specificity that existed at the time of the Charter. The warrants of arrest issued by the ICC for Ahmed Harun and Ali Kushayb include counts for persecution as a CAH.<sup>211</sup>

### Elements of persecution

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights [footnote 21: This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.].
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court [footnote 22: It is understood that no additional mental element is necessary for this element other than that inherent in element 6.].

<sup>209</sup> For a discussion of the legacy of gender justice before the ICTY and the ICTR, see Beth Van Schaack, *Obstacles On The Road To Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U. J. GENDER SOC. POL’Y & L. 355 (2009).

<sup>210</sup> See ICC Statute art. 7(1)(h), *supra* note 1; see David Luban, 29 Yale J. Int’l L. 85, 103 n. 68. As noted by some commentators, the current wording of “persecution” criminalizes not simply acts of persecution connected with murder-type acts, but also acts of persecution “in connection with [ . . . ] any act of persecution.” Machteld Boot & Christopher K. Hall, *Persecution*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 146, 151 (Otto Triffterer ed., 1999) [hereinafter TRIFTERER COMMENTARY].

<sup>211</sup> *Ahmed Harun Arrest Warrant*, *supra* note 51; *Ali Kushayb Arrest Warrant*, *supra* note 51.

5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

“Persecution” is not a crime *per se* in most of the world’s legal systems. In some countries, criminal conduct could include policies and practices of a discriminatory nature that cause a specific harm to a given person in violation of the law. This may include incitation to violence, or legal and administrative measures designed to deprive a person of certain legal rights or causing the person physical or material harm. However, whenever physical or material injury occurs, it is usually a crime.

“Persecution” is more likely to take the form a motive, policy, or goal; it is not an act in and of itself. To accomplish “persecution” requires the intent to discriminate on prohibited grounds in conjunction with other acts, which are also usually criminal. Consequently, there has always been a historical difficulty in identifying and defining persecution as a stand-alone crime without connecting it to other specific criminal acts. This is why there has never been a case involving the charge of “persecution” that has not involved other specific criminal acts. For these reasons, persecution is often the most analyzed specific act in the jurisprudence of the international and mixed-model tribunals. As mentioned above, it has also been utilized most frequently to encompass the CAH committed during the “ethnic cleansings” of the conflict of the former Yugoslavia prosecuted before the ICTY, which focuses primarily on the discrimination the underlying acts seek to inspire.

#### CAH Statistics (as of November 2010)

**ICTY:** 85 indicted / 42 convicted

**ICTR:** 20 indicted / 6 convicted

**SCSL:** 0 indicted

**SPSC ET:** 178 indicted / 15 convicted (the underlying specific acts incorporated into the convictions for persecutions include *inter alia* imprisonment, abduction, and severe deprivation of liberty)

**ECCC:** 5 indicted / 1 convicted

**WCC BiH:** 67 indicted / 32 convicted (the great majority of convictions for persecution incorporate other underlying specific acts into the conviction for persecution)

**ICC:** 3 indicted

#### §2.5. Other Inhumane Acts

There is no crime labeled “other inhumane acts” under any source of international or national law. However, it seems as though the framers of the London Charter<sup>212</sup> intended the phrase as a residual or “catchall” provision extending by analogy the earlier Article 6(c) crimes to similar species.<sup>213</sup> Thus, other crimes similar to “murder, extermination,

<sup>212</sup> See *infra* ch. 3, §4.

<sup>213</sup> See Machteld Boot, *Article 7 – Crimes against Humanity*, in TRIFFTERER COMMENTARY, *supra* note 210, at 23; see also *Lukić & Lukić Trial Judgment*, *supra* note 32, ¶ 959.

and enslavement” that are “inhumane” are also criminalized. This *ejusdem generis* interpretation may well be deemed a violation of the principles of legality if the interpretation by analogy is not carefully circumscribed.<sup>214</sup>

The international regulation of armed conflicts reveals that the following acts, *inter alia*, are prohibited because they are inhumane: infliction of physical harm upon innocent civilians; subjecting them to undue physical hardship; pillage, plunder, and deprivation of their personal property and means of livelihood; gravely affecting personal honor and dignity; the forceful removal of innocent civilians from their ordinary habitat or environment; breaking up families; desecrating religious symbols; and the seizure or destruction of public, religious, and cultural property. These customary violations have been evidenced in national military laws and regulations, the conduct of states during hostilities, and the prosecution of violators by international and national tribunals and military bodies. These customary rules are embodied in the 1907 Hague Convention and subsequently they were codified in the Geneva Conventions. They have thus acquired a conventional law basis.

In addition, a number of international and regional human rights instruments protect against or prohibit “inhumane acts.” Four of these species are specifically discussed below: torture, unlawful human experimentation, apartheid, and rape. In addition to these four specific crimes that exist under international law, other offenses similar to those enumerated in Article 6(c) of the Charter can be identified in the national criminal laws of the world’s major legal systems. As described earlier in this chapter, certain crimes are universally prohibited under similar or comparable labels, such as assault, battery, rape, kidnapping, forcible detention, robbery, and theft. But once again, it must be noted that just because a given conduct is universally criminal in the national laws, does not make it an international crime. An international element is needed for this change in the character of the offense.<sup>215</sup>

While the term “other inhumane acts” may appear ambiguous, it gains clarity if its interpretation is limited by the theory of *ejusdem generis*, whereby the term is interpreted by close analogy to the specific terms used in Article 6(c) of the London Charter. Article 5 of the ICTY Statute also includes these terms, as does Article 3 of the ICTR Statute.

Because “other inhumane acts” potentially covers a broad range of acts, the ICTY has recognized that “great caution” must be exercised to hold that an act not regulated specifically in Article 5 amounts to “other inhumane acts”<sup>216</sup> so as to avoid contravening the principle of *nullum crimen sine lege*.<sup>217</sup> The ICTY and ICTR have identified four specific requirements for a perpetrator’s act or omission to constitute “other inhumane acts” as a CAH: (1) the conduct must cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity;<sup>218</sup> (2) the conduct must be of equal gravity to the conduct enumerated respectively in ICTY Article 5 and ICTR Article 3;<sup>219</sup> and (3) the perpetrator must have performed the act or omission

<sup>214</sup> See *infra* ch. 5, §1.

<sup>215</sup> See generally *infra* ch. 1, §2.1.

<sup>216</sup> *Martić* Trial Judgment, *supra* note 32, ¶ 82.

<sup>217</sup> *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶¶ 624–25.

<sup>218</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 117; *Krnjelac* Trial Judgment, *supra* note 49, ¶ 130; *Tadić* Trial Judgment, *supra* note 175, ¶ 729.

<sup>219</sup> See *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 671; *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 580; *Prosecutor v. Galić*, Case No IT-98-29-T, Judgment, ¶ 152 (Dec. 3, 2003); *Simić et al.* Trial Judgment, *supra* note 150, ¶ 74; *Vasiljević* Trial Judgment, *supra* note 34, ¶ 234; *Krnjelac* Trial Judgment, *supra* note 49, ¶ 130; *Kordić & Čerkez* Trial Judgment, *supra* note 177, ¶ 269; *Tadić* Trial

deliberately;<sup>220</sup> (4) with the intent to inflict serious physical or mental harm upon the victim or commit a serious attack upon human dignity<sup>221</sup> or with the knowledge that his/her act or omission would probably cause serious physical or mental harm to the victim or constitute a serious attack upon human dignity.<sup>222</sup>

A range of acts or omissions can satisfy the above conditions to constitute the *actus reus* of “other inhumane acts.”<sup>223</sup> In order to determine whether the act or omission is of “similar seriousness” to the other crimes listed respectively in ICTY Article 5 and ICTR Article 3, it is necessary to assess “all factual circumstances, including the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim, as well as the physical and mental effects on the victim.”<sup>224</sup> The *mens rea* of “other inhumane acts” requires proof that “at the time of the act or omission, the perpetrator had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim” or the accused knew that his acts

Judgment, *supra* note 231, ¶ 729; Prosecutor v. Kajelijeli, Case No ICTR-98-44A, Trial Judgment, ¶ 932 (Dec. 1, 2003); *Lukić & Lukić* Trial Judgment, *supra* note 32, ¶ 960 (stating “The act or omission must have been of a seriousness similar to that of the crimes enumerated in Article 5(a) to (h).”); *see also* Prosecutor v. Kayishema and Ruzindana, Case No ICTR-95-1-T, ¶ 154 (May 21, 1999); *Bagilishema* Trial Judgment, *supra* note 32, ¶¶ 91–2; Prosecutor v. Niyitegeka, Case No ICTR-96-14, Trial Judgment, ¶ 459 (May 16, 2003) (stating “[i]n respect of this count, the Accused must be found to have participated in the commission of inhumane acts on individuals, being acts of similar gravity to the other acts enumerated in the Article, such as would cause serious physical or mental suffering or constitute a serious attack on human dignity.”).

<sup>220</sup> *See Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 626; *Simić et al.* Trial Judgment, *supra* note 150, ¶ 74; *Vasiljević* Trial Judgment, *supra* note 34, ¶ 234; *Krnjelac* Trial Judgment, *supra* note 49, ¶ 130.

<sup>221</sup> *See Kordić & Čerkez* Appeals Judgment, *supra* note 174, ¶ 117; *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 628; *Simić et al.* Trial Judgment, *supra* note 150, ¶ 76; *Vasiljević* Trial Judgment, *supra* note 34, ¶ 236; *Krnjelac* Trial Judgment, *supra* note 49, ¶ 132; *Blaškić* Trial Judgment, *supra* note 32, ¶ 243; *Kayishema* Trial Judgment, *supra* note 176, ¶ 154.

<sup>222</sup> *See Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶¶ 627–28; *Simić et al.* Trial Judgment, *supra* note 150, ¶¶ 75–76; Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 154 [hereinafter *Galić* Trial Judgment]; *Krnjelac* Trial Judgment, *supra* note 49, ¶¶ 131–32.

<sup>223</sup> Some examples of acts that have been characterized as “other inhumane acts” by the ICTY include deliberate sniping causing serious injuries and deliberate firing of shells at areas where civilians would be seriously injured. *Galić v. Prosecutor*, Case No. IT-98-29-A, Judgment, ¶ 158 (Nov. 30, 2006) [hereinafter *Galić* Appeals Judgment]; the injury of prisoners of war during the course of their work, *Naletilić & Martinović* Appeals Judgment, *supra* note 180, ¶ 435; *Brđanin* Trial Judgment, *supra* note 34, ¶ 539; mutilation and other types of severe bodily harm, beating and other acts of violence, *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶ 435; forcible transfer, *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 151, *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 627, and *Šainović et al.* Trial Judgment *supra* note 153, ¶ 172; being forced to run down a steep slope and being fired at, *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶¶ 572–73; creation of brutal and deplorable living conditions for detainees, including systematic beatings, *Krnjelac* Appeals Judgment, *supra* note 153, ¶ 163; killing members of the victim’s family before his eyes and causing him severe burns by burning down his home while he was still in it. *Kupreškić et al.* Trial Judgment, *supra* note 176, ¶ 27.

Some examples of acts that have been characterized as “other inhumane acts” by the ICTR include sexual violence to a dead woman’s body, *Niyitegeka* Trial Judgment, *supra* note 219, ¶ 465; sexual violence in multiple acts of rape and the forced undressing and public marching of a woman, *Akayesu* Trial Judgment, *supra* note 32, ¶¶ 688, 693.

<sup>224</sup> *Martić* Trial Judgment, *supra* note 32, ¶ 84; *Blagojević & Jokić* Trial Judgment, *supra* note 32, ¶ 627; *Galić* Trial Judgment, *supra* note 222, ¶ 153. The ICTY has also concluded that it is not necessary that the victim suffer long-term effects from the act or omission. Any long-term effects can be relevant to an assessment of the seriousness of the act. *See Krnjelac* Trial Judgment, *supra* note 49, ¶ 144; *Kunarac et al.* Trial Judgment, *supra* note 72, ¶ 501; *Simić et al.* Trial Judgment, *supra* note 150, ¶ 75; *Vasiljević* Trial Judgment, *supra* note 34, ¶ 235.



or omissions were likely to cause serious physical or mental suffering or a serious attack upon the human dignity of the victim.<sup>225</sup>

The Prosecutor of the Special Court of Sierra Leone charged several of the accused with the CAH of “other inhumane acts” using evidence of forced marriage. In Sierra Leone, forced marriage occurred when girls and women were abducted (often in extremely violent circumstances) and forcibly assigned to male combatants to serve as their “wives.”<sup>226</sup> The “wives” were expected, on demand, to submit to sex with their “husbands.”<sup>227</sup> The “wives” were also expected to cook, wash clothes, and carry the “husband’s” possessions for him.<sup>228</sup> In the face of this treatment, the “wives” are expected to remain loyal to the “husband” and to protect his property.<sup>229</sup> These “wives” were often subjected to physical, emotional, and sexual violence; some contracted sexually transmitted diseases.<sup>230</sup> Many “wives” became pregnant and were forced to bear, care for, and rear the children.<sup>231</sup> Furthermore, Sierra Leonean society has negatively stigmatized these “wives” and their children.<sup>232</sup>

In the *Brima* case, the Trial Chamber of the Special Court held that evidence of forced marriage was completely subsumed by the crime of sexual slavery, and that no lacuna in the law necessitated a separate crime of forced marriage as an “other inhumane act” constituting CAH.<sup>233</sup> However, this holding fails to account for the nonsexual nature of some evidence adduced at trial, that is, evidence of forced household labor. On appeal, the Appeals Chamber distinguished forced marriage from sexual slavery and found that forced marriage is not subsumed by the crime of sexual slavery. The Appeals Chamber defined forced marriage as “a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.”<sup>234</sup> The Appeals Chamber ruled that forced marriage satisfies the elements of “other inhumane acts.”<sup>235</sup> The court was “firmly of the view that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.”<sup>236</sup>

In the Extraordinary Chambers in the Courts of Cambodia (ECCC), Co-Lawyers for the Civil Parties filed an application requesting that Co-Prosecutors investigate forced marriage during the Khmer Rouge period.<sup>237</sup> In response, the ECCC has distinguished

<sup>225</sup> See Prosecutor v. Dragomir Milošević, Case No IT-98-29/1-T, Judgment, ¶ 935 (Dec. 12, 2007); Martić Trial Judgment, *supra* note 32, ¶ 85; Blagojević & Jokić Trial Judgment, *supra* note 32, ¶ 628; Galić Trial Judgment, *supra* note 222, ¶ 154.

<sup>226</sup> Prosecutor v. Brima et al., SCSL-04-16-A, Judgment, ¶ 190 (Feb. 22, 2008) [hereinafter AFRC Appeals Judgment].

<sup>227</sup> AFRC Appeals Judgment, *supra* note 226, ¶ 711.

<sup>228</sup> *Id.* at Doherty opinion, ¶¶ 31–2.

<sup>229</sup> *Id.* at Sebutinde opinion, ¶ 15.

<sup>230</sup> *Id.*

<sup>231</sup> AFRC Appeals Judgment, *supra* note 226, ¶ 190.

<sup>232</sup> *Id.* ¶ 199; and at Doherty opinion, ¶¶ 48, 51.

<sup>233</sup> Prosecutor v. Brima et al., SCSL-04-16-T, Trial Judgment, ¶ 713 (Jun. 20, 2007) [hereinafter AFRC Trial Judgment].

<sup>234</sup> AFRC Appeals Judgment, *supra* note 226, at ¶ 196.

<sup>235</sup> *Id.* ¶¶ 197–203.

<sup>236</sup> *Id.* ¶ 200.

<sup>237</sup> Civil Parties’ Co-Lawyers’ Request for Supplementary Preliminary Investigations, Case No. 001/18–07-2007-ECCC/TC (Feb. 9, 2009).

forced marriage in the Cambodian context from that in the context in Sierra Leone, holding that a unique approach is required.<sup>238</sup> The ECCC viewed forced marriages in the case of Sierra Leone to be “mainly acts of violence perpetrated by individual rebels against women,” whereas in Cambodia forced marriages “were carried out as a matter of state policy”<sup>239</sup> of the Khmer Rouge regime, resulting in the victimization of both men and women.<sup>240</sup> The ECCC went on to characterize the forced marriage policy of the Khmer Rouge as follows:

They were used as methods to weaken the traditional family structure and to guarantee the loyalty of the people of the Regime. By forcing people into random marriages the Khmer Rouge intended to obtain control over people’s sexuality and to ensure that the reproductive function was managed by the state to produce more workers for the revolution. The Khmer Rouge enforced strict limits on how often husbands and wives could meet; their relationship was under permanent observation by “the Party”. The couples were forced to conduct sexual interaction on behalf of the Party’s order and were determined to give birth. More than a severe violation of the victims’ sexual integrity, forced marriages in Cambodia appear as an almost complete deprivation of the people’s autonomy and the right to self-determination.<sup>241</sup>

The ECCC determined that the constitutive elements of forced marriage are (1) that the perpetrator conferred a status of marriage, through words or conduct by force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment or such person’s incapacity to give genuine consent; (2) that the perpetrator caused such person to engage in conduct similar to that arising out of a marriage relationship, including prolonged association, acts of sexual nature, child bearing and the rendering of other conjugal duties; and (3) that the perpetrator caused the loss of virginity and disqualified the marriage to a freely chosen person and hindered the person from separation because he or she had to promise to stay together forever.<sup>242</sup>

Thus, despite the holdings of the SCSL and the ECCC, questions still remain concerning the definition of forced marriage as a CAH, including, Is the definition gender-neutral? Does the definition reflect only patriarchal notions of marriage?<sup>243</sup>

Article 7 of the ICC Statute refers to it as follows: “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” The new formulation is intended to give this term more specificity, not to violate the principles of legality. The arrest warrants issued for Katanga, Ahmad Harun

<sup>238</sup> *Id.* ¶ 28.

<sup>239</sup> *Id.* ¶ 29, citing Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 J. INT’L CRIM. JUST. 1013, 1027 (2009).

<sup>240</sup> *Id.* ¶ 32.

<sup>241</sup> *Id.* ¶ 29.

<sup>242</sup> *Id.* ¶ 30.

<sup>243</sup> See generally Valerie Oosterveld, *The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?*, 10(1) HUMAN RTS. REV. 73, 85 (2009); Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?*, 45-2007 CANADIAN Y.B. INT’L L. 131, 158 (2009); see also Jain, *supra* note 295, at 1031 (arguing that the essential element of forced marriage is the lack of consent to the marital relationship, emphasizing “severe violation of individual autonomy and right to self-determination.”)

and Ali Kushayb, and Kony each contain counts for “other inhumane acts” as a CAH.<sup>244</sup> In refusing to confirm the charge for “other inhumane acts” as a CAH against Germain Katanga, the ICC embraced its narrower formulation:

The Chamber notes, however, that the Statute has given to “other inhumane acts” a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived “other inhumane acts” as a “catch all provision,” leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action.

According to article 7(1)(k)(2) of the Elements of Crimes, an other inhumane act must be of a similar character to any other act referred to in article 7(1) of the Statute. Footnote 30 of the Elements of Crimes states that “character” shall be understood as referring to the nature and gravity of the act.

Although this similarity is required, article 7(1)(k) of the Statute defined as “other” inhumane acts, which indicates that none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as another inhumane act encompassed by article 7(1)(k) of the Statute.

Article 7(1)(k) of the Statute and article 7(1)(k)(1) of the Elements of Crimes further require that great suffering, or serious injury to body or to mental or physical health occur *by means* of an inhumane act.

[ . . . ]

In respect of the subject element, the Chamber notes that in addition to the requirement that the objective elements were committed with intent and knowledge pursuant to article 30 of the Statute, article 7(1)(k)(3) of the Elements of Crimes establishes that the “perpetrator must also [have been] aware of the factual circumstances that established the character of the act.” This offence encompasses, first and foremost, cases of *dolus directus* of the first and second degree.<sup>245</sup>

### Elements of Other Inhumane Acts

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. [Footnote 30: It is understood that “character” refers to the nature and gravity of the act.]
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7.]
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7.]

<sup>244</sup> *Katanga* Arrest Warrant, *supra* note 46; *Ahmad Harun* Arrest Warrant, *supra* note 51; *Ali Kushayb* Arrest Warrant, *supra* note 51; *Al Bashir* Arrest Warrant, *supra* note 52.

<sup>245</sup> *Katanga* Decision Confirming Charges, *supra* note 46, ¶¶ 450–53, 455.

“Other inhumane acts” is not a specific crime or category of crimes found in any legal system in the world. In the definition of CAH, “other inhumane acts” is for all practical purposes an extension of all of the crimes specifically listed to apply by analogy under the rule of interpretation *eiusdem generis*.

“Other inhumane acts” is probably the provision in the definition of CAH that creates the biggest difficulty with respect to the principles of legality, particularly in the views of positivistic legal systems. The acts that have been included under this category in the jurisprudence of the international tribunals vary depending upon the nefarious imaginations of the perpetrators. Thus, it has included forcible transfer, beatings, attempted murder, and forced marriage.

#### CAH Statistics (as of November 2010)

**ICTY:** 91 indicted / 23 convicted – including *inter alia* forcible transfer (13), beatings (2), cruel treatment (2), attempted murder (1)

**ICTR:** 33 indicted / 6 convicted

**SCSL:** 13 indicted / 5 convicted – including *inter alia* “physical violence and mental suffering” (5) and “forced marriage” (3)

**SPSC ET:** 80 indicted / 9 convicted – including *inter alia* attempted murder

**ECCC:** 5 indicted – including *inter alia* “attacks upon human dignity” (4), enforced disappearance (4), forced marriage (4), and forced transfer (4)

**WCC BiH:** 58 indicted / 22 convicted

**ICC:** 6 indicted

#### §2.6. Torture<sup>246</sup>

Torture was not always prohibited. In fact, for a long period of time, it was legal. The first traces of the practice of torture can be found in some of the earliest historical records left by man.<sup>247</sup> In ancient Greece, both Aristotle and Demosthenes expressed the view that torture was the surest method for obtaining evidence. Slaves in Athens were frequently subjected to it.<sup>248</sup> Late Roman law recognized the concept of torture as an aid to fact-finding in criminal investigations and trials.<sup>249</sup> However, this practice, and the

<sup>246</sup>See M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE UNDER THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE? (forthcoming 2010). M. Cherif Bassiouni & Daniel Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 RIDP 17, 23–28 (Nos. 3 and 4, 1977); JOSÉ LUIS DE LA CUESTA ARZAMENDI, EL DELITO DE TORTURA: CONCEPTO BIEN JURIDICO Y ESTRUCTURA TÍPICA DEL ART. 204 BIS DEL CÓDIGO PENAL (1990); see also DANIEL P. MANNIX, THE HISTORY OF TORTURE, (1964); and J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT (1988); NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW (1987); THE IMPLEMENTATION OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ECPT) (Carol Mottet ed., 1995).

<sup>247</sup>See Gerald I.A.D. Draper, *The Judicial Aspects of Torture*, at 1, presented to the International Institute on Humanitarian Law, Aug. 30–Sept. 1, 1977, San Remo, Italy.

<sup>248</sup>James W. Williams & G.W. Keeton, *Torture*, in 22 ENCYCLOPEDIA BRITANNICA 311 (1946).

<sup>249</sup>See, e.g., LIPENIUS, BIBLIOTHECA REALIS JURIDICA, s.v. “TORTURA,” (1679); FRANZ HELBING, DIE TORTUR (1913); P. DE GALLINION, TRAITÉ DES INSTRUMENTS DE MARTYRS ET DES DIVERS MODES DE SUPPLICES EMPLOYÉS PAR LES PAIENS CONTRE LES CHRÉTIENS (1904); Henri Grégoire, *Les Persécutions dans l'Empire*

abuses associated with it, met with disfavor from the Church, and in 384 AD, its use was condemned.

Eventually, torture was applied not only to establish the guilt of an accused, but also to obtain names of accomplices and other information useful to law enforcement authorities. In France, *torture préparatoire*, which was applied before conviction to obtain proof, was accompanied by *torture préalable*, which followed conviction and concentrated on eliciting further useful information. In England, although the common law had made use of torture in obtaining criminal convictions, its other uses were not overlooked. Thus, the *peine forte et dure* was applied to coerce individuals who refused to plead at all, and thereby sought to avoid forfeit of their lands for felony convictions.<sup>250</sup> The oath *ex officio*, while it existed, legalized torture. Torture was also used in England without reference to the common law where the Star Chamber or Crown Council found it expedient.<sup>251</sup> At this point, mention must be made of the Spanish Inquisition, under which ecclesiastic courts came to interrogate accused heretics with the aid of torture. However, the subject of the Inquisition was not criminal justice, but rather orthodox religious thought, speech, and behavior.

In medieval Japan, persons tried for theft were forced to hold a red-hot iron, so that the presence or absence of a burn could be used to determine guilt or innocence respectively. In addition to this remnant of trial by ordeal, confessions were at times extracted by means of an adjustable boot of planks.<sup>252</sup> In the Chinese sphere, torture-obtained confessions were prescribed by the code of the Manchu dynasty.<sup>253</sup> In other, non-Western civilizations, torture also flourished and was still in use when early Western travelers first visited these regions.<sup>254</sup>

The use of torture in connection with armed conflicts reflects the evolution of what used to be called the art of warfare. In many cultures and until the age of enlightenment, the defeated, whether former combatants or not, were subject to enslavement or any form of treatment expedient to the conquering forces. But the efforts to abolish torture in some or all situations have long and well-established historic roots.

The prohibition of torture under all guises gradually entered into different national legal systems and slowly emerged at the international level. In the Orient, where sophistication came earlier to human civilizations, regulation of warfare to minimize incidental suffering was first expressed. Thus, by the sixth century BCE, the customs of war in China had been recorded by Sun Tzu, and among them were provisions for sparing the wounded and elderly.<sup>255</sup> In the second century BCE, the LAWS OF MANU chronicled Hindu regulations for the conduct of war.<sup>256</sup> Other efforts to limit needless suffering in

Romain, 46 MEMOIRE DE L'ACADEMIE ROYAL 1 (1951); GÉRARD DE LACAZE-DUTHIERS, LA TORTURE Á TRAVERS LES AGES (1961); ALEC MELLOR, LA TORTURE, SON HISTOIRE (1949); JACQUES MOREAU, LA PERSÉCUTION DU CHRISTIANISME DANS L'EMPIRE ROMAIN (1956); GEORGE R. SCOTT, THE HISTORY OF TORTURE THROUGHOUT THE AGES (1940).

<sup>250</sup> Williams & Keeton, *supra* note 248, at 74–7; see LEONARD A. PARRY, THE HISTORY OF TORTURE IN ENGLAND (1933).

<sup>251</sup> Williams & Keeton, *supra* note 248, at 79–82.

<sup>252</sup> *Id.* at 314.

<sup>253</sup> See, e.g., TA-T SING LU LI, (George T. Staunton ed., 1810); JAMES MURDOCH, A HISTORY OF JAPAN (1903).

<sup>254</sup> See HUGO GROTIUS, DE JURE BELLI AC PACIS 649 (Francis W. Kelsey ed., 1964).

<sup>255</sup> SUN TZU, THE ART OF WAR 76 (Samuel B. Griffith trans., 1963).

<sup>256</sup> THE BOOK OF MANU: MANUSMURTI discussed in detail by Nagendra Singh in *Armed Conflicts and Human Freedom Laws of Ancient India*, ETUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR

war were made in the Greek, Roman, Hebrew, Babylonian, and Muslim civilizations.<sup>257</sup> But the first major efforts in the West aimed specifically at minimizing suffering of combatants were made in medieval Europe in the form of bans on such weapons as the harquebus, poison, and the crossbow.<sup>258</sup>

Such a pattern was appropriate to the early nature of warfare. But with the development of feudal societies, warfare assumed a role more limited in scope – though just as frequent in occurrence – as a contest among princes rather than peoples. Under this formula, the general population participated only to a limited degree, so that it generally was spared some of the effects of defeat. During this period, the consequences of defeat for former combatants were subject to elaborate customs, of which there were many local variations. Generally, treatment of vanquished combatants was tempered by principles of chivalry.<sup>259</sup> The practice of enslavement and torture of conquered peoples receded.

At the international level, torture was barred under the 1899 and 1907 Hague Conventions.<sup>260</sup> The Geneva Conventions of 1949 proscribed torture in common Article 3, which deemed it a “grave breach.”<sup>261</sup> In addition, the 1977 Additional Protocols reinforced these prohibitions. Article 11 of Protocol I and Article 5, Paragraph 2(e) of Protocol II prohibit interference with the health or mental or physical integrity of persons interned, detained, or deprived of liberty. Articles 6 and 7 of Protocol II governing penal prosecutions and protection and care are of particular note.<sup>262</sup>

Thus, in connection with an armed conflict, the Geneva Conventions and the Protocols prohibit any act constituting torture against any non-nationals, whether innocent civilians, prisoners of war, or persons acting on behalf of an opposing armed force not qualifying as prisoners of war, such as spies or saboteurs. This protection is extended under Protocol I to organized civil wars; thus, it applies in that context to persons of the same nationality.

With regard to instruments not limited to armed conflicts, the 1966 International Covenant on Civil and Political Rights, like the Universal Declaration, makes a strong statement against torture.<sup>263</sup> Article 7 states that “No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>264</sup>

Regional human rights instruments also prohibit torture. The European Convention<sup>265</sup> states in Article 3, “No one shall be subjected to torture or to inhumane or degrading treatment or punishment.”<sup>266</sup> This prohibition is clearly binding on signatories. The American Convention on Human Rights<sup>267</sup> prohibits torture in much the same language in its Article 5, Section 2: “No one shall be subjected to torture or to cruel, inhumane or

LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET (Christophe Swinarski ed., 1984); COMMENTARY: THE LAWS OF MANU (Georg Bühler trans., 1967).

<sup>257</sup> See ANDRÉ L.J. AYMARD AND JEANNINE AUBOYER, *L'ORIENT ET LA GRÈCE ANTIQUE* 293–99 (1951); CHARLES G. FENWICK, *INTERNATIONAL LAW* 7–8 (4th ed. 1965).

<sup>258</sup> See FENWICK, *supra* note 257, at 667; HENRY J.S. MAINE, *INTERNATIONAL LAW* 138–39 (2d ed. 1894).

<sup>259</sup> GROTIUS, *supra* note 254, at 723 *et seq.*

<sup>260</sup> 1907 Hague Convention, *supra* note 76.

<sup>261</sup> Geneva Conventions art. 3, *supra* note 7.

<sup>262</sup> Protocol I art. 11, *supra* note 8; Protocol II arts. 5, 6, 7, *supra* note 8.

<sup>263</sup> ICCPR, *supra* note 3.

<sup>264</sup> *Id.* at art. 7; see also the Universal Declaration art. 5, *supra* note 5.

<sup>265</sup> See European Convention, *supra* note 29.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”<sup>268</sup>

In addition, a number of General Assembly resolutions denounce torture. Of particular note are five General Assembly resolutions relating to torture adopted between 1973 and 1976, against which not a single negative vote was cast. The first, entitled “Question of Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment,”<sup>269</sup> “rejects” any form of such treatment. A year later, another resolution, “Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment in relation to Detention and Imprisonment,”<sup>270</sup> reaffirmed the rejection of torture. It requested the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to include, in its elaboration of the Standard Minimum Rules for the Treatment of Prisoners,<sup>271</sup> which provides for “rules for the protection of all persons subjected to any form of detention or imprisonment against torture and other cruel, inhumane, or degrading treatment or punishment.”<sup>272</sup> In 1975 the “Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment” was adopted.<sup>273</sup> This Declaration defined torture, characterizing it as an aggravated and deliberate form of cruel, inhumane, or degrading treatment or punishment. It also condemned torture as negating the purposes of the Charter of the United Nations and as a violation of the Universal Declaration of Human Rights, regardless of any threats to state security or public order.<sup>274</sup> In addition, the Declaration called on each state to take effective measures to prevent torture. In 1976 the General Assembly passed another resolution, which encouraged diligence in implementation of its earlier requests to subagencies, and which included torture in the provisional agenda for its thirty-second session. Finally, as this report was being compiled, the General Assembly approved a draft resolution based on a draft submitted October 28, 1977, calling on the Commission on Human Rights to draw up a convention against torture and other cruel, inhumane or degrading treatment or punishment.<sup>275</sup> This resolution was acted upon in 1980 with the drafting of the Draft Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,<sup>276</sup> and in 1984 the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment was adopted. It clearly prohibits and criminalizes the infliction of torture under international law.

Article 1 provides a definition of torture:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession,

<sup>268</sup> *Id.* at art. 5 § 2.

<sup>269</sup> G.A. Res. 3059 (XXVIII), adopted unanimously, Nov. 2, 1973.

<sup>270</sup> G.A. Res. 3218 (XXIX), adopted Nov. 6, 1974.

<sup>271</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1955), reproduced in its report, U.N. publication, Sales No. 1956 IV. 4; approved by Resolution 663 (XXIV) of July 31, 1957, of the Economic and Social Council.

<sup>272</sup> *Id.*

<sup>273</sup> G.A. Res. 3552 (XXX), adopted Dec. 9, 1975.

<sup>274</sup> *Id.*

<sup>275</sup> G.A. Res. 31/85, adopted Dec. 13, 1976.

<sup>276</sup> ECOSOC Resolution, Mar. 6, 1984, U.N. Doc. E/CN.4/1984/72/ Annex 1 (1980). See 23 I.L.M. 1027 (1984).



punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>277</sup>

Important procedural aspects with respect to acts of torture are set forth in Article 2, which obligates each State Party to take effective legislative, judicial, and other measures to prevent torture within its territory. Article 2 clearly points out that torture may not be invoked as a justification under any circumstances (e.g., state of war, internal political instability, etc.). Another important provision is found in Article 4, which obligates each State Party to proscribe torture under its criminal laws.

The status of international law prohibiting torture for belligerents has been well-established since the period between 1899 and 1907 and has grown in detail and specificity under the 1949 Geneva Conventions and the 1977 Protocols. It has been unequivocally criminalized in the 1984 Torture Convention, which makes no distinctions between war and peace; thus, it is presumably applicable, in addition to the customary and conventional regulation of armed conflicts, in time of war and organized civil war. Torture was also a crime under the national criminal laws of the world's major criminal justice systems even before the promulgation of the London Charter, as evidenced by the research appearing earlier in this chapter. Finally, it should be noted that every international regional human rights convention and a number of United Nations and other international bodies, including judicial ones, like the European Court of Human Rights, condemn torture and similar practices. Thus, there is no doubt that torture is an international crime, and that it was a war crime before 1945. Its inclusion as one of the acts within the meaning of CAH is perfectly consonant with extant ICL. But there is an important difference between the conventions on torture and torture in general. The various conventions make it a crime if its purpose is to obtain a statement or confession from the tortured person, or if it is to discredit that person. But torture in general, as it should be included in CAH, must not be limited to any purpose. Furthermore, the conventions in question limit torture to instances in which public officials perform the torture. But as has been the case in many conflicts, torture is inflicted by paramilitary groups or civilians when they belong to another ethnic group that is engaged in the conflict. The establishment of an official connection would be difficult.

Torture was not specifically referred to in Article 6(c) of the London Charter, but it falls within the meaning of "other inhumane acts." It is specifically included in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute.

Article 5 of the ICTY Statute states, "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [ . . . ] (f) *torture* [ . . . ]."<sup>278</sup>

<sup>277</sup> U.N. G.A. Res. 39/46. See 24 ILM 535 (1985); 23 I.L.M. 1027 (1984), art. 1. See also M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 151–53 (1987) [HEREINAFTER BASSIOUNI, DRAFT CODE].

<sup>278</sup> ICTY Statute art. 5, *supra* note 11 (emphasis added).

Article 3 of the ICTR Statute states that “[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds: [...] (f) torture [...].”<sup>279</sup>

Thus, the above two formulations found in the ICTY and ICTR Statutes merely state that “torture” is a specific crime without adding any definition to the term. But these formulations do have the distinction of having specifically included the word “torture” within CAH, something Article 6(c) of the London Charter did not do. However, beyond including the term, the above two formulations did not provide any insight into the meaning and scope of “torture.” After these formulations, questions still existed as to what types of pain (physical and/or mental) were included within the meaning, as well as whether there existed circumstances when the infliction of certain pain was justified.

Both the ICTY and ICTR have adopted a definition of the crime of torture similar to the definition contained in the Convention Against Torture,<sup>280</sup> consisting of the following elements: (1) the infliction, by act or omission, of severe pain and suffering whether physical or mental;<sup>281</sup> (2) the act or omission must be intentional;<sup>282</sup> and (3) the act or omission must have occurred to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.<sup>283</sup>

The Tribunals have addressed a number of issues regarding the *actus reus*. The jurisprudence of both the ICTY and ICTR have not specifically set a threshold level of suffering or pain required for the crime of torture as a CAH; therefore, it depends on the individual circumstances of each case.<sup>284</sup> In its assessment of the seriousness of pain and suffering, the Tribunals will consider the objective severity of the harm inflicted, including the nature, purpose and consistency of the acts committed.”<sup>285</sup> Subjective criteria, including the victim’s physical or mental condition, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health, and position of

<sup>279</sup> ICTR Statute art. 3, *supra* note 12 (emphasis added).

<sup>280</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46 (10 Dec. 1984), *opened for signature* 4 Feb. 1985, 23 I.L.M. 1027, 24 I.L.M. 535 (containing the substantive changes from the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, U.N. Doc. E/CN. 4/1984/72, Annex (9 Mar. 1984)) [hereinafter *Torture Convention*].

<sup>281</sup> See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 162 (Dec. 10, 1998) [hereinafter *Furundžija* Trial Judgment]; *Čelebići* Trial Judgment, *supra* note 32, ¶ 468; see also *Semanza* Trial Judgment, *supra* note 32, ¶ 343.

<sup>282</sup> See *Furundžija* Trial Judgment, *supra* note 281, ¶ 162; *Akayesu* Trial Judgment, *supra* note 32, ¶ 594.

<sup>283</sup> See *Kunarac et al.* Trial Judgment, *supra* note 281, ¶ 497; *Krnjelac* Trial Judgment, *supra* note 49, ¶¶ 179, 186. In these two cases, both Trial Chambers concluded that “humiliation” is not a purpose of torture acknowledged under customary international law, which contradicts the conclusions of the *Furundžija* and *Kvočka et al.* Trial Chambers. See *Furundžija* Trial Judgment, *supra* note 281, ¶ 162; *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 141. The *Furundžija* Appeals Chamber subsequently confirmed this approach. See *Furundžija v. Prosecutor*, IT-95-17/1-A, Judgment, ¶ 111 (Jul. 10, 2000) [hereinafter *Furundžija* Appeals Judgment]; see also *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Judgment, ¶ 338 (Mar. 31, 2003) [hereinafter *Naletilić & Martinović* Trial Judgment]; and *Semanza* Trial Judgment, *supra* note 32, ¶ 343; *Ntagerura et al.* Trial Judgment, *supra* note 33, ¶ 703.

<sup>284</sup> See *Brđanin* Trial Judgment, *supra* note 34, ¶ 483; *Čelebići* Trial Judgment, *supra* note 32, ¶ 469; *Kunarac et al.* Trial Judgment, *supra* note 62, ¶ 476.

<sup>285</sup> *Brđanin* Trial Judgment, *supra* note 34, ¶ 484.

inferiority are also relevant to the assessment of the gravity of the harm.<sup>286</sup> Furthermore, the ICTY has concluded that acts of torture as a CAH must aim to attain a certain result or purpose through the infliction of severe mental or physical pain. Thus, if such a purpose or goal is absent, even very severe infliction of pain would not qualify as torture.<sup>287</sup>

According to the ICTR, the perpetrator must be an official, or act at the instigation or the acquiescence of a person acting in an official capacity, and the torture must be inflicted on four grounds: (1) to obtain information or a confession from the victim or a third person; (2) to punish the victim or a third person for an act committed or suspected of being committed by either of them; (3) for the purpose of intimidating or coercing the victim or the third person; or (4) for any reason based on discrimination of any kind.<sup>288</sup>

In contrast, the ICTY departs from the Convention Against Torture, which required that torture be committed “with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>289</sup> Rather, the ICTY has stated that, under international humanitarian law, the presence of a state official or other authority is not necessary for the offense to be regarded as “torture,” and so does not require that the perpetrator of the torture be a public official, nor does it require the torture to have been committed in a public official’s presence.<sup>290</sup>

[T]he Trial Chamber notes that the definition of the [Convention against Torture] relies on the notion of human rights, which is largely built on the premises that human rights are violated by States or Governments. For the purposes of international criminal law, which deals with the criminal responsibility of an individual, this Trial Chamber agrees with and follows the approach of the *Kunarac* Trial Chamber that “the characteristic trait of the offence [under the Tribunal’s jurisdiction] is to be found in the nature of the act committed rather than in the status of the person who committed it.”<sup>291</sup>

The ICTY Appeals Chamber in *Kunarac* adopted the position that the public official requirement was not a requirement under customary international law in relation to individual responsibility for torture outside the fabric of the Torture Convention.<sup>292</sup> Subsequent cases have reaffirmed that the ICTY has departed from previous jurisprudence

<sup>286</sup> *Brđanin* Trial Judgment, *supra* note 34, ¶ 484; *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 143; and *Krnjelac* Trial Judgment, *supra* note 49, ¶ 182; see also *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 148 (holding that permanent injury is not a requirement for torture); *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶¶ 150, 151 (holding that evidence of the suffering need not even be visible after the commission of the crime); *Čelebići* Trial Judgment, *supra* note 32, ¶¶ 480 *et seq.* (holding that the act of rape necessarily implies severe pain and suffering).

<sup>287</sup> See *Brđanin* Trial Judgment, *supra* note 34, ¶ 486; *Čelebići* Trial Judgment, *supra* note 32, ¶ 481; *Krnjelac* Trial Judgment, *supra* note 49, ¶ 180. The prohibited purposes do not constitute an exhaustive list and there is no requirement that the conduct solely serve such prohibited purpose. See *Čelebići* Trial Judgment, *supra* note 32, ¶ 470; *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶ 155. Furthermore, if one prohibited purpose is fulfilled by the conduct, the fact that such conduct also had a non-listed purpose is immaterial. See *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶ 155.

<sup>288</sup> *Akayesu* Trial Judgment, *supra* note 32, ¶ 594.

<sup>289</sup> See e.g. *Furundžija* Trial Judgment, *supra* note 231, ¶ 162.

<sup>290</sup> See *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶ 148; *Kunarac et al.* Trial Judgment, *supra* note 62, ¶¶ 471, 488–96; *Simić et al.* Trial Judgment, *supra* note 150, ¶ 82; *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 139.

<sup>291</sup> *Brđanin* Trial Judgment, *supra* note 34, ¶ 489; *Kunarac* Trial Judgment, *supra* note 62, ¶ 495; *Kunarac et al.* Appeal Judgment, *supra* note 62, ¶ 148.

<sup>292</sup> *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶ 148.

by not requiring the involvement of a state official or any other authority for the offence to amount to torture.<sup>293</sup>

Article 7 of the Rome Statute states, “[a] ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [ . . . ] (f) torture [ . . . ].”<sup>294</sup> Article 7 then provides further language defining “torture.” It states: “‘Torture’ means 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 [ . . . ].”<sup>295</sup> Thus, Article 7 of the Rome Statute adds to the specificity of Article 6(c) of the London Charter, as well as to the formulations of the ICTY and ICTR, by providing a definition of “torture” that clearly prohibits the infliction of both mental and physical pain, and by clearly excluding such pain arising out of lawful sanctions. While the formulation in the Rome Statute does provide added meaning to the contents of this specific crime, it should be noted that it fails to identify whether or not there are circumstances whereby imputed intent may be applicable. As with others of the specific crimes, questions arise as to whether or not a standard of foreseeability should be applied to “torture.” In other words, are there any circumstances when it is foreseeable that given conduct will inflict upon the one in custody severe pain or suffering? Furthermore, at what point does the suffering become severe?

The arrest warrants issued for Ahmad Harun and Ali Kushayb, Sudanese President Al-Bashir, and Jean-Pierre Bemba Gombo each include counts for torture as a CAH.<sup>296</sup> In its confirmation of the charges facing Jean-Pierre Bemba Gombo, the Pre-Trial Chamber observed that “as to the objective element, the *actus reus*, . . . although there is no definition of the severity threshold as a legal requirement of the crime of torture, it is constantly accepted in applicable treaties and jurisprudence that an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture.”<sup>297</sup> Regarding the *mens rea*, the Pre-Trial Chamber expounded as follows:

The subjective element, the *mens rea*, is the intent as expressly mentioned in article 7(2)(e) of the Statute. Bearing in mind that article 30(1) of the Statute is applicable “unless otherwise provided”, and taking into account that the infliction of pain or suffering must be “intentional”, the Chamber finds that this excludes the separate requirement of knowledge as set out in article 30(3) of the Statute. In this respect, the Chamber believes that it is not necessary to demonstrate that the perpetrator knew that the harm inflicted was severe. This interpretation is consistent with paragraph 4 of the General Introduction to the Elements of Crimes. To prove the mental element of torture, it is therefore sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering.

The Chamber notes that under the Statute, the definition of torture as a crime against humanity, unlike the definition of torture as a war crime, does not require the additional element of a specific purpose. This is also clarified in the Elements of Crimes.<sup>298</sup>

<sup>293</sup> *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶ 283; *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 138.

<sup>294</sup> ICC Statute art. 7, *supra* note 13 (emphasis added).

<sup>295</sup> *Id.*

<sup>296</sup> *Ahmed Harun* Arrest Warrant, *supra* note 51; *Ali Kushayb* Arrest Warrant, *supra* note 51; *Al Bashir* Arrest Warrant, *supra* note 52; *Bemba Gombo* Arrest Warrant, *supra* note 46.

<sup>297</sup> *Bemba Gombo* Decision Confirming Charges, *supra* note 46, ¶ 193.

<sup>298</sup> *Id.* at ¶¶ 194–195; see also Christopher K. Hall, in *TRIFFTER COMMENTARY*, *supra* note 210, at 251–252.

### Elements of Torture

[footnote 14: It is understood that no specific purpose need be proved for this crime.]

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

For torture to be part of CAH, it obviously cannot be referred to the individual case or instance. It must instead be part of a pattern, which under the definitions of the international and mixed-model tribunals, must be widespread or systematic. Presumably, such a widespread or systematic practice would be reflective of a state or organizational policy.

#### CAH Statistics (as of November 2010)

**ICTY:** 35 indicted / 8 convicted

**ICTR:** 4 indicted / 4 convicted

**SCSL:** 0 indicted

**SPSC ET:** 101 indicted / 16 convicted

**ECCC:** 5 indicted

**WCC BiH:** 40 indicted / 19 convicted

**ICC:** 4 indicted

#### §2.7. *Unlawful Human Experimentation*<sup>299</sup>

This term was not included in Article 6(c) of the London Charter or in any of the subsequent formulations, but it clearly falls within the meaning of “other inhumane acts.” “Unlawful human experimentation” was the subject of prosecution before the IMT and the CCL Proceedings, as discussed in the following section.

As with torture, human experimentation was at first approved by many civilizations. Also like torture, to be internationally cognizable the practice must be the product of state policy.<sup>300</sup> The history of human experimentation dates to some of the oldest writings on earth. Documents reflect that the ancient civilizations of China, Persia, India,

<sup>299</sup> The following discussion is adopted in part on M. Cherif Bassiouni et al., *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J. CRIM. L. & CRIMINOLOGY 1597, 1598–99, 1601–03, 1606–07, 1639–41 (1981). The euthanasia program of the Nazi regime was, surprisingly enough, not deemed to be of such importance to be included in the major trials. However, they were included in the Subsequent Proceedings of the *Aktion Reinhard* conducted first in Poland – but there were other cases as well.

<sup>300</sup> See *infra* ch. 1.

Egypt, Greece, and Rome all conducted human experimentation.<sup>301</sup> In Western societies, Galen stressed medical experimentation about 1800 years ago.<sup>302</sup> Harvey's dominance in the seventeenth century supplanted the earlier dominance of Galen.<sup>303</sup> Along with experimentation, records show that medical experts were concerned with the welfare of their patients.

Just as the origins of human experimentation have ancient roots, so too do the antecedents of society's burgeoning awareness that experimentation on man creates ethical problems. For example, Celsus, practicing in Alexandria in the third century BCE, spoke out against the dissection of living men.<sup>304</sup> The oath of Hippocrates in the fifth century BCE has been viewed as giving advice on experimental diagnosis and therapy. Other documents, such as Percival's code of 1803, Beaumont's code of 1833, and Claude Bernard's personal code of 1856 express concern about the ethical issues of human experimentation.<sup>305</sup>

Moreover, a number of traditions view the medical practitioner's role as a moral enterprise. For example, the inscription on the Asklepieion of the Acropolis exhorts physicians to treat all men as brothers. The Hindu oath instructs physicians to assist all people as if they are relatives. The Chinese code of Sun Sumiao, seventh century AD, affirms that all people are to be treated equally. And the prayer of Maimonides ends with a request that God support the physician in his task for the benefit of mankind.<sup>306</sup> The credo basic to these ethical statements is *primum non nocere*: "Above all do no harm." An ethical duty arises between the physician and the patient whereby the former is not morally free to exercise his skills in any manner he desires, but rather, he is bound by the origin, nature, and purpose of his enterprise to use them primarily for the patient's benefit.<sup>307</sup>

Governments have entered the arena of human experimentation by recognizing social and economic implications and devoting tax revenues toward its development.<sup>308</sup> Politicians and heads of state have utilized and exploited the popular appeal and potential for population control in human experimentation, and military strategists have sought to use experimentation to achieve victory.<sup>309</sup> Not surprisingly, the role of governments in this field of science evokes serious concerns. Novelists have expressed the fear of widespread government control of people's minds and behavior through experiments intended to perfect psychosurgical techniques, psychological conditioning, and psychotropic drugs.<sup>310</sup> Others have objected to governmental approval of the coercive use of prisoners, orphans,

<sup>301</sup> See Alfred J. Bollet, *Smallpox: The Biography of a Disease*, in *RESIDENT AND STAFF PHYSICIAN* 47, 48 (Aug. 1978); HENRY K. BEECHER, *RESEARCH AND THE INDIVIDUAL: HUMAN STUDIES* 5 (1970).

<sup>302</sup> BEECHER, *supra* note 301, at 5–6.

<sup>303</sup> *Id.* at 6.

<sup>304</sup> *Id.* at 10.

<sup>305</sup> *Id.* at 12.

<sup>306</sup> See William J. Curran, *The Proper and Improper Concerns of Medical Law and Ethics*, 295 *NEW ENG. J. MED.* 1057 (1976); Albert Jonsen, *Do No Harm*, 88 *ANNALS INTERNAL MED.* 827 (1978).

<sup>307</sup> Jonsen, *supra* note 306, at 828.

<sup>308</sup> See Eugene A. Confrey, *PHS Grant-Supported Research With Human Subjects*, 83 *PUB. HEALTH REP.* 127, 130 (1968). Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, G.A. Res. 3384 (XXX), Nov. 10, 1975 (expressing concern that governments should use science and technology for the benefit of mankind).

<sup>309</sup> See EARL ANTHONY RUSSELL, *THE SCOURGE OF THE SWASTIKA* 214 (1954).

<sup>310</sup> See generally ANTHONY BURGESS, *A CLOCKWORK ORANGE* (1962); GEORGE ORWELL, 1984 (1949); ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

and the insane.<sup>311</sup> Physicians reportedly have performed experiments on behalf of their governments to scientifically study the effects of torture.<sup>312</sup>

However, along with these concerns, state involvement in human experimentation has influenced the evolution of controls designed to limit it. Because the state has assumed an increasingly active role in the discovery of medical knowledge, its policies concerning citizens as subjects of experimentation are critical. Many of the current prohibitions against human experimentation are a reaction to the brutal Nazi state policy concerning medical experimentation. Nazi physicians committed atrocious crimes that first came to international attention at Nuremberg.<sup>313</sup> Nothing like that had ever occurred in history and thus neither conventional nor customary international law had provided any specific norms that could be relied upon in the post-World War II prosecutions.

With regard to World War II, the post-Nuremberg medical prosecutions (the *Medical case*)<sup>314</sup> offer the scientific and legal communities important lessons regarding the dangers to individual safety inherent in human experimentation, and the controls needed to maintain a balance between advances in medical knowledge and the need to protect individuals. The principle of individual responsibility and the showing of moral delinquency emerged from the war crimes proceedings. The trials revealed the Nazi belief that humans could be used forcibly as experimental subjects for vague scientific investigations without regard to either therapeutic advantage or the pain and suffering inflicted upon such hapless victims. From the start, the Nazi experiments were in violation of existing German law and the code of ethics of the German medical community.<sup>315</sup> However, by degrees, the Nazi philosophy eroded the resistance of the German medical profession until German law was ignored without legal effect or social opprobrium.<sup>316</sup> What perhaps began as well-intentioned scientific inquiry became distorted beyond all reasonable ethical and humane limits. Even though the defendant physicians at the

<sup>311</sup> See David Daube, *Legal Problems in Medical Advance*, 6 ISR. L. REV. 1, 8 (1971); see also Clayton Yeo, *Psychiatry, the Law and Dissent in the Soviet Union*, 14 REV. INT'L COMM. JUR. 34 (1975); Amy Young-Anawaty, *International Human Rights Norms and Soviet Abuse of Psychiatry*, 10 CASE W. J. INT'L L. 785 (1978).

<sup>312</sup> See Leonard A. Sagan & Albert Jonsen, *Medical Ethics and Torture*, 294 NEW ENG. J. MED. 1427 (1976) (referring to a report in the MANCHESTER GUARDIAN of May 3, 1974, in which photos taken during interrogation appeared of prisoners in Portugal. These prisoners were made available to prison doctors who wanted to study the effects of torture. Medical experimentation can cross the line into torture when no useful scientific purpose is served and the subject is transformed into a suffering victim). But see Gellhorn, *Violations of Human Rights: Torture and the Medical Profession*, 299 NEW ENG. J. MED. 358 (1978) (discussing international medical seminar for purpose of preparing casebook on effects of torture for use when legal redress is possible).

<sup>313</sup> See Cortez F. Enloe, Jr., *The German Medical War Crimes—Their Nature and Significance*, 30 RHODE ISLAND MED. J. 801 (1947); Andrew C. Ivy, *Nazi War Crimes of a Medical Nature*, 139 J.A.M.A. 131 (1949); Andrew C. Ivy, *The History and Ethics of the Use of Human Subjects in Medical Experiments*, 108 SCIENCE 1 (1948); Kenneth Mellanby, *Nazi Experiments on Human Beings in Concentration Camps in Nazi Germany*, 1 BRIT. MED. J. 148 (1947); ALEXANDER MITSCHERLICH & FRED MIELKE, *DOCTORS OF INFAMY: THE STORY OF THE NAZI MEDICAL CRIMES* xi–xii (1949); Robert D. Mulford, *Experimentation on Human Beings*, 20 STAN. L. REV. 99 (1967); see also ROBERT J. LIFTON, *THE NAZI DOCTORS* (1986).

<sup>314</sup> See APPLEMAN, *supra* note 55, at 142–43.

<sup>315</sup> See Fritz Weinschenk, *Nazis Before German Courts*, 10 INT'L LAW., 515, 518–19 (1976).

<sup>316</sup> See Ivy, *Nazi War Crimes of a Medical Nature*, *supra* note 313, at 131. Another factor that has been attributed to the moral destruction of the German medical profession under Hitler is the notion that “the welfare of the armed forces was the supreme good and anything that helped the armed forces was right.” *Id.* at 144; see also Enloe, Jr., *supra* note 313, at 804.



CCL 10 Proceedings argued that their studies led to useful information, this argument was rejected, both on its own terms and in light of the harm done to the victims.<sup>317</sup>

The CCL 10 Proceedings' *Medical* case also suggests that the magnitude of the crimes committed would have been impossible without the involvement of the state. Thus, Nuremberg reflects CAH needing state policy, sponsorship, or condonation as a prerequisite legal element.<sup>318</sup> Because these unlawful human experimentations were conducted essentially against Jews and Slavs, the elements of discrimination and persecution are also evident. German scientists were, in part, persuaded to engage in these experiments because of the knowledge that the subjects available were prisoners already scheduled for disposal by the state.<sup>319</sup> This practice hideously dramatizes the notion that the state is free to treat its nationals in the manner it chooses because it perceives itself as the source of all rights and, therefore, is beyond the reach of law.<sup>320</sup> This was one reason that the drafters of the London Charter formulated in Article 6(c) the principle that national law permitting a practice otherwise unlawful cannot be interposed as a defense. Twenty-three defendants were prosecuted in the *Medical* case. Of the sixteen defendants found guilty, fifteen were convicted of committing war crimes and CAH.<sup>321</sup>

<sup>317</sup> See Ivy, *Nazi War Crimes of a Medical Nature*, *supra* note 313, at 132.

<sup>318</sup> See generally *infra* ch. 1.

<sup>319</sup> 3 IMT 160–61 (1946). With Hitler's full knowledge, and at the instigation of Heinrich Himmler, Reichsführer of the SS, and other members of the High Command, those experiments were carried out, under the direction or organization of the various physicians in positions of authority in the Nazi regime, upon unknown numbers of prisoners in the concentration camps. Though not an exhaustive list, some of the experiments and projects included the following: (1) immersion in tanks of cold water of varying temperatures for periods up to 14 hours to develop technique for rapid and complete resuscitation of German pilots downed at sea; (2) simulation of high-altitude atmospheric conditions in decompression chambers, with autopsies then performed to study the effect of sudden pressure changes on the body; (3) attempted mass sterilization through castration doses of x-rays, treated diet, and intrauterine injections apparently of silver nitrate; (4) mutilation of prisoners as experimental surgical subjects for the training of German surgical students; (5) injection of virulent typhus into prisoners to ensure a ready supply of virus for typhus experiments; (6) infliction of bullet wounds and incisions and introduction of bacteria into the wounds to study and treat infections; (7) shooting of prisoners with poisonous aconite bullets to study the effects of aconite poisoning; (8) forced ingestion of seawater into prisoners to test desalinization processes; (9) experimental bone transplantation; (10) execution and dismemberment of prisoners to furnish "subhuman" skeletal specimens for an anthropological museum; (11) injection of malaria to test malaria immunity; and (12) injection of dye in the eyes to change their color. These human experiments were conducted on the victims without anesthetic, and they received no subsequent treatment for their injuries. Thus, they suffered atrociously, and died in great pain and suffering.

<sup>320</sup> The atrocities reported at Nuremberg were only a few of many examples in political history of misappropriation of individual rights for public expediency. One of the earliest such events recorded concerns the sacrifice of youths to provide blood for Pope Innocent VIII, in a futile attempt to restore the aging pontiff to vigorous youth. See Henry K. Beecher, *Scarce Resources and Medical Advancement*, in EXPERIMENTATION WITH HUMAN SUBJECTS 88. Another example was provided by Queen Caroline of England, who, before allowing her own children to be inoculated with cow pox, had the vaccine tested on prisoners and children of the poor. See Henry K. Beecher, *Experimentation in Man*, 169 J.A.M.A. 461, 469 (1959). Ironically, in Germany, the Nazi brutality presented a contradiction of Germany's greatest philosopher, Immanuel Kant, whose central theory of ethics held that people should never be treated as means but only as ends. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 47 (Lewis W. Beck trans. 1959).

<sup>321</sup> U.S. v. Karl Brandt et al. (the *Medical* case), reprinted in 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1949). Of the fifteen defendants guilty of war crimes and CAH, seven were put to death, five were sentenced to life imprisonment, two were sentenced to twenty years imprisonment, and one was sentenced to fifteen years imprisonment. See APPLEMAN, *supra* note 55, at 139–40; see also THE NAZI DOCTORS AND THE NUREMBERG CODE (George J. Annas & Michael A. Grodin eds., 1992).

There is no doubt that such conduct is prohibited by the general provisions of the 1899 and 1907 Hague Conventions' "laws of humanity" and the specific provisions on the protection of the "lives and honour" of the civilian population. Nothing more needed to be added than the practices that developed during World War II that were unknown until recent history. But the legal prohibition was in existence against such practices, even though it did not specifically address the instrumentalities and methods subsequently developed.

It should be noted that some accounts exist of at least one of the Allies' similar practices against POW's during World War II. These accounts attribute to the USSR some forms of unlawful human experimentation.

The Four Geneva Conventions of August 12, 1949, provide the same basic protection against unlawful human experimentation during war as they do against torture. The Conventions expressly forbid the use of either protected military personnel or civilians for biological experimentation.<sup>322</sup> Moreover, Common Article 3, which protects persons taking no active part in either international or noninternational conflict, requires that all such persons be treated humanely. To this end, cruel, humiliating, or degrading treatment is expressly prohibited. Article 12 of the First and Second Conventions, Article 12 of the Third, and Articles 16, 27, and 32 of the Fourth provide that protected persons be treated humanely.<sup>323</sup> In particular, these articles provide that protected persons not be subject to ill treatment, biological, medical, or scientific experiments regardless of their state of health, age, or sex.<sup>324</sup>

These violations constitute "grave breaches" of Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention, and Article 147 of the Fourth Convention.<sup>325</sup>

The 1977 Protocols provide even more extended legal protection than the 1949 Geneva Conventions. Article 11 of Protocol I prohibits medical or scientific experiments on protected persons even with their consent.<sup>326</sup> Article 16(2) of Protocols I and II provide that medical personnel not be compelled to perform or refrain from performing medical

<sup>322</sup> See generally JEAN S. PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* (1975); and I COMMENTARY: *THE GENEVA CONVENTIONS OF 12 AUGUST, 1949* 370–72 (Jean S. Pictet ed., 1952).

<sup>323</sup> Geneva Conventions, *supra* note 7.

<sup>324</sup> With regard to the specific crime of the "inhumane act" of unlawful human experimentation, this author has defined it in BASSIOUNI DRAFT CODE, *supra* note 274 as follows:

Section 1. Acts of Unlawful Human Experimentation

- 1.0 The crime of unlawful human experimentation consists of any physical and/or psychological alterations by means of either surgical operations, or injections, ingestion or inhalation of substances inflicted by or at the instigation of a public official, or for which a public official is responsible and to which the person subject to such experiment does not grant consent.

Section 2. Defence of Consent

- 2.1 For the purpose of this crime a person shall not be deemed to have consented to medical experimentation unless he or she has the capacity to consent and does so freely after being fully informed of the nature of the experiment and its possible consequences.
- 2.2 A person may withdraw his or her consent at any time and shall be deemed to have done so if he or she is not kept fully informed within a reasonable time of the progress of the experiment and any development concerning its possible consequences.

<sup>325</sup> Geneva Conventions, *supra* note 7.

<sup>326</sup> Protocol I, *supra* note 8.

activities “required by the rules of medical ethics.”<sup>327</sup> Article 12(1)–(2) of Protocol II provides that protected persons shall not be subjected to any medical procedure, particularly a medical or scientific experiment, that is not necessary for their health or that is contrary to accepted medical standards.<sup>328</sup>

These provisions of the Geneva Conventions and Protocols are predicated exclusively on humanitarian considerations and experimentation on human subjects committed during armed conflict.

Although it is reasonable to include unethical human experimentation within the criminal acts prohibited by the Genocide Convention, it is not sufficiently specific to adequately protect against unethical human experimentation. Genocide is an international crime whether it is committed in time of war or peace.<sup>329</sup> In particular, genocide is committed by any individual who causes bodily or mental harm to members of a national, ethnic, racial, or religious group, or by anyone who imposes measures intended to prevent births within such groups.<sup>330</sup> Furthermore, it does not extend to other persons who are within its protected group.

The Standard Minimum Rules for the Treatment of Prisoners<sup>331</sup> set forth standards for adequate medical care of prisoners but are silent as to the use of prisoners as experimental subjects. Moreover, the Rules were passed as a United Nations resolution and consequently are only a recommendation.<sup>332</sup> Nonetheless, the Rules seek to advance the principle of asserting individual interests over those of prison authorities who may be unduly oppressive in their efforts to maintain order.<sup>333</sup>

To the extent that unlawful human experimentation produces pain and suffering, it is also torture, as discussed in the previous section. Thus, it is protected by the same provisions in international human rights law that prohibit all forms of “cruel, inhumane or degrading treatment or punishment,” discussed previously under torture. Unlawful human experimentation is an inhumane act within the meaning of CAH, but it must be the product of state policy.<sup>334</sup>

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> Manuel López-Rey, *Crime and Human Rights*, 42 FED. PROBATION 10, 12 (1978). See generally PIETER N. DROST, *THE CRIME OF STATE* 119–36 (1959).

<sup>330</sup> Article II defines the protected groups as follows:

[I]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

<sup>331</sup> E.S.C. Res. 663 C (XXIV), July 31, 1957; see also Note by the Secretary-General, The Range of Application and the Implementation of the Standard Minimum Rules for the Treatment of Prisoners, U.N. General Assembly Provisional Agenda, Item 6, E/AC. 57/28, May 24, 1976; and Analytical Summary by the Secretary-General, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, U.N. General Assembly Provisional Agenda, Item 75, A/10158, July 23, 1975.

<sup>332</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 14, 696 (1979). JAMES L. BRIERLY, *THE LAW OF NATIONS* 380–96, 413–32 (1963).

<sup>333</sup> *Id.*

<sup>334</sup> See *infra* ch. 1.

## §2.8. Rape and Sexual Violence<sup>335</sup>

Rape and other forms of sexual violence were not explicitly listed as CAH in Article 6(c) of the London Charter, nor in Article 5(c) of the Tokyo Charter. Under “general principles of law,” rape and other forms of sexual violence clearly constitute “other inhumane acts.”<sup>336</sup>

There is no military justification for rape or sexual assault. In war, as in peace, rape and sexual assault are crimes under both domestic criminal codes and ICL. Although cases of rape and sexual assault have historically been left to individual states to try in national or military courts, sexual violence has long been a violation of ICL.<sup>337</sup> Prejudice and a lack of understanding have kept sexual violence from being tried on a wide scale or explicitly criminalized by international conventions, though slowly this has been changing.<sup>338</sup> For

<sup>335</sup> This section is in part based on the discussion and analysis of “rape” that appears in M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), *THE LAW OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996) [hereinafter BASSIOUNI, *THE LAW OF THE ICTY*]. See also LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 100–03 (2005); Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 424 (2005); Meron, *infra* note 276; Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20/2 HUM. RTS. Q. 348 (1998); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996).

<sup>336</sup> See, e.g., *Cyprus v. Turkey*, App. Nos. 6780/74, 6780/75, 4 Europ. H.R. Rep. 482 ¶¶ 358–74 (1982) (Commission Report) (holding that in an international conflict between Turkey allied with Turkish Cypriots and Greek Cypriots, widespread rape constituted torture and inhuman treatment under Article 3 of the European Human Rights Convention).

<sup>337</sup> For a thorough history of rape in war, the criminalization of wartime rape, and the failure of nations to prosecute wartime rape, see COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS (Indai Lourdes Sajor ed., 1998); KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997); *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slave-like Practices During Armed Conflict*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1998/13; SUSAN BROWNMILLER, *AGAINST OUR WILL* (1975). See also ANNE TIERNEY GOLDSTEIN, *THE CENTER FOR REPRODUCTIVE LAW AND POLICY, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME: A SPECIAL REPORT OF THE INTERNATIONAL PROGRAM* 7–14 (n.d.); Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, in *MASS RAPE* 197 (Alexandra Stiglmayer ed., 1994); Theodor Meron, *Shakespeare’s Henry the Fifth and the Law of War*, 86 AM. J. INT’L LAW 1 (1992); Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN’S L.J. 77, 80–82 (1994); Danise Aydelott, Comment, *Mass Rape During War: Prosecuting Bosnian Rapists Under International Law*, 7 EMORY INT’L L. REV. 585 (1993). See generally Doreen Marguerite Koenig, *Women and Rape in Ethnic Conflict and War*, 5 HASTINGS WOMEN’S L.J. 129 (1994).

<sup>338</sup> The most common explanation by feminist theorists for why rape has not been prosecuted internationally has been that acts that primarily harm women have not been viewed by men who make policy decisions as violations of those women’s human rights. Furthermore, rape and sexual assault are often viewed as private aberrational acts, not proper subjects for an international public forum. See generally BROWNMILLER, *supra* note 337; GOLDSTEIN, *supra* note 337; Deborah Blatt, *Recognizing Rape as a Method of Torture*, 19 N.Y.U. REV. L. & SOC. CHANGE 821 (1991–92); Copelon, *supra* note 218; Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN’S L.J. 59, 65 (1993) (concerning the crime of rape in the context of war, “[W]omen are facing twice as many rapists with twice as many excuses, two layers of men on top of them rather than one, and two layers of impunity serving to justify the rapes”). Professor MacKinnon was appointed as a dedicated Gender Legal Advisor for the ICC. See Press Release, Office of the Prosecutor of the ICC, ICC Prosecutor Appoints Prof. Catharine A. MacKinnon as Special Advisor on Gender Crimes, ICC-OTP-20081126-PR377 (Nov. 26, 2008).

There are also several additional explanations that may play a part in why sexual violence has not been vigorously pursued as a violation of international humanitarian law. Traditionally, sex and morality are in most cultures thoroughly intertwined, and legal definitions of rape and sexual assault usually hinge

example, at the IMT, evidence of mass rape was read into the record by the French and Soviet prosecutors,<sup>339</sup> and at the IMTFE, rape was considered a violation of ICL, though it was not extensively prosecuted.<sup>340</sup>

Early treaties and other documents failed to take into consideration the ravages of warfare on the civilian population. Furthermore, for most of human history, the civilian population, and women in particular, were viewed as incidents of war.

Though rape was once accepted within the rules of war, it gradually became illegal, at least formally. Totila the Ostrogoth, who captured Rome in 546 AD, did not allow his troops to rape Roman women. His actions were unique at this point in history.<sup>341</sup> Capital punishment was the penalty for a soldier convicted of rape under the Articles of War of Richard II (1385) and Henry V (1419) in England.<sup>342</sup> One of the earliest documented rape prosecutions in connection with military activity occurred in 1474.<sup>343</sup> However, the laws

on whether the victim consented to the acts. These factors affect our view of rape in two ways: victims are not believed and rape is not viewed as harmful. On the first point, voluntary sex outside of marriage is often viewed as immoral, and women, more so than men, who engage in it are considered immoral and punished socially. Consequently, due to the combination of this penalty and the fact that consent is the key to illegality, victims of sexual violence are always suspect. Victims must prove they did not consent. Second, if it is only the victim's non-consent that makes rape and sexual assault illegal, then what is the real harm? Women generally engage voluntarily in sexual relations, and if the only difference between sex and rape is consent, it is questioned how harmful that can be. Many people conclude that the harm cannot be as serious as for other physical injuries, to which people usually do not consent, such as beatings.

This leads to the second point. Violent crimes are viewed generally as more serious than crimes to property or nonviolent crimes. The violence inherent in rape is often difficult to detect. First, the physical signs of rape are often internal and not readily visible. Secondly, rape and sexual assault do not always leave lasting physical signs even internally. Thus, rape and sexual assault are often referred to as crimes of "honour," which do not sound as serious. Though the language throughout international law concerning women's honour may reflect a sensitivity to the fact that victims are punished a second time by societies that value women's chastity as a measure of worth, it obscures the fact that rape and sexual assault are violent crimes that cause lasting physical and psychological harm.

<sup>339</sup> No witnesses were called to testify about rape, but both prosecutors introduced documentary evidence of rape. Testimony of January 31, 1946, 6 IMT TRIALS at 404–07; 7 *id.* at 456–57 (reading into evidence on 14 Feb. 1946, "The Molotov Note," dated 6 Jan. 1942); *see also* BROWNMILLER, *supra* note 337, at 51–3 (describing the testimony and citing these sources). Additionally, Theodor Meron notes that forced prostitution was prosecuted as a war crime in courts outside Germany. Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426 (1993).

<sup>340</sup> BROWNMILLER, *supra* note 218 at 54–9 (describing the trials); INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 3904–43, 4459, 4464–66, 4467, 4476, 4479, 4501, 4506–07, 4515, 4526–36, 4544, 21944, 33869, 33874 (1947) (containing testimony about rape during World War II); JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 707, 1012–19, 1023 (1948) (finding that there were about 20,000 cases of rape during an attack on Nanking in World War II and describing official involvement); 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 965, 971–73, 988–89 (B.V.A. Röling & C.F. Ruter eds., 1977); *see also* APPLEMAN, *supra* note 55, at 259 (stating that some Japanese military and civilian officials were found guilty of rape for failing to ensure that their subordinates complied with international law); PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 179–80 (1979) (stating that a Netherlands court found some Japanese guilty for war crimes for their part in forced prostitution); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 69–73 (1973) (stating that Admiral Toyoda was charged with war crimes, including rape for failing to prohibit subordinates from committing such war crimes, and that he was eventually acquitted).

<sup>341</sup> BROWNMILLER, *supra* note 337, at 27 (citing 1 THOMAS A. WALKER, A HISTORY OF THE LAW OF NATIONS 65 (1899)).

<sup>342</sup> *Id.* at 27 (citing 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1412 (1896)).

<sup>343</sup> *See* SCHWARZENBERGER, *supra* note 63, at 462–66. Peter von Hagenbach, a knight in the employ of the Duke Charles of Burgundy, was charged with murder, *rape*, perjury and other crimes by omission. The

of war regarding rape were not universally accepted, even as recently as the seventeenth century.<sup>344</sup>

The process of codifying customary laws of war protecting the civilian population to include the prohibition of rape and sexual assault began in the late eighteenth century. One of the first documents protecting the civilian population was the Treaty of Amity and Commerce between the United States and Prussia signed in 1785, which specifically stated that, in the event of war between the two nations, “*women and children [ . . . ] shall not be molested in their persons.*”<sup>345</sup>

In 1847 the American general Winfield Scott issued “Order No. 20,” a supplement to the Rules and Articles of War for the United States, which listed the following offenses among those which would be severely punished: “Article 2: Assassination; murder; malicious stabbing or maiming, *rape*; malicious assault and battery; robbery; the wanton desecration of churches, cemeteries or other religious edifices and fixtures; and the destruction, except by order of a superior officer, of public or private property [ . . . ].”<sup>346</sup>

The Lieber Instructions (1863) prohibited rape as a capital crime as well.<sup>347</sup> The military code of instructions for the treatment of civilians during wartime<sup>348</sup> drafted by Francis Lieber in 1863 contained specific prohibited treatment of individuals both in and out of combat. Article XLIV of the Lieber Code provided, “All wanton violence committed against persons in the invaded country . . . all rape, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.”<sup>349</sup> Although the Lieber Code was originally drafted specifically for internal application, it became the basis for codification of the customary laws of war into the next century.<sup>350</sup>

In addition to the Lieber Code, the “Oxford Manual” was created by the Institute of International Law in 1880 in order to serve as a model for an internal legislation on the laws and customs of war. The Manual proclaimed, “human life, *female honour*, religious beliefs, and forms of worship must be respected. *Interference with family life is to be avoided.*”<sup>351</sup>

The Declaration of Brussels in 1874 attempted to codify the laws of war on an international level. The Declaration confirmed a woman’s right to dignity and honor in Article XXXVIII, which stated that “[t]he *honour and rights of the family* [ . . . ] *should be respected.*”<sup>352</sup> Subsequently, the Declaration of Brussels led to the 1899 Hague Convention and, more importantly, to the 1907 Hague Convention, which codified the laws and customs of war on land.

crimes were committed by his subordinates in Breisach, a town in the Upper Rhine. Breisach was pledged to Charles of Burgundy by the Archduke of Austria, and Hagenbach was placed in charge of the area. At the trial, the defense of superior orders was denied. The tribunal stripped Hagenbach of his knighthood for having failed to prevent the crimes, which was his duty as a knight to prevent. He was subsequently executed.

<sup>344</sup> BROWNMILLER, *supra* note 337, at 27.

<sup>345</sup> YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 3 (1982) (emphasis added).

<sup>346</sup> *Id.* at 4 (emphasis added).

<sup>347</sup> Lieber Code at art. 44.

<sup>348</sup> FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 11 (1987).

<sup>349</sup> KHUSHALANI, *supra* note 345, at 6.

<sup>350</sup> *Id.* at 11–12.

<sup>351</sup> *Id.* at 8 (emphasis added).

<sup>352</sup> *Id.* at 7 (emphasis added).



Although rape had long been considered a war crime under customary international law, the 1899 and 1907 Hague Conventions did not explicitly list rape and sexual assault as war crimes. Though the 1907 Hague Convention did not explicitly prohibit rape and sexual assault, it provided protection for women under Article 46, which states “[f]amily honour and rights, the lives of persons [ . . . ] must be respected.”<sup>353</sup> The protection of “family honour and rights” is a euphemism of the time that encompasses a prohibition of rape and sexual assault, and this provision is mandatory.<sup>354</sup> The general nature of the Article should not be taken to mean that it does not prohibit acts of sexual violence, especially in light of the 1907 Hague Convention’s governing principles of the “laws of humanity” and “dictates of the public conscience.”<sup>355</sup> Its preamble, the Martens Clause, states that where people are not protected by the Hague Conventions, they remain under the protection of customary international law, thus emphasizing and affirming the preexisting customary international law that was general and prohibited sexual violence.

As successors to the 1899 and 1907 Hague Conventions, the London Charter,<sup>356</sup> the Tokyo Charter,<sup>357</sup> and CCL 10<sup>358</sup> do not explicitly list rape and sexual assault as war crimes. However, the fact that rape and sexual assault constitute war crimes is implicitly referenced in each of these documents under the term “ill treatment.” Despite the omission of rape in the list of war crimes under Article 5(b) of the Tokyo Charter, the Tokyo trials did prosecute several military and civilian officials for rape as a war crime.<sup>359</sup> Nevertheless, these prosecutions were viewed as ancillary to other war crimes.

Customary international law concerning rape and sexual assault is evidenced by the conventions prohibiting slavery and slave-related practices,<sup>360</sup> the Universal Declaration

<sup>353</sup> Article 46 applies to civilians in occupied territory. Article 4 applies to prisoners of war and provides that “prisoners of war must be treated humanely.”

<sup>354</sup> KHUSHALANI, *supra* note 345, at 10–11.

<sup>355</sup> 1907 Hague Convention, *supra* note 20, at pmb. “Laws of humanity” and public conscience should also be viewed in the context of the customary international law.

<sup>356</sup> London Charter, *supra* note 10, at art. 6(b).

<sup>357</sup> Charter for the International Military Tribunal for the Far East art. 5(b), *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 BEVANS 27, [hereinafter Tokyo Charter].

<sup>358</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, art. 2(1)(b), 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946, *reprinted in* BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE 488 (1980) [hereinafter CCL 10].

<sup>359</sup> The cases against Admiral Toyoda and General Yamashita are pertinent examples. For a discussion of Admiral Toyoda’s case, see William H. Parks, *Command Responsibility for War Crimes*, 28 MIL. L. REV. 1 (1973). For General Yamashita’s case, see *In Re Yamashita*, 327 U.S. 1 (1946) and *United States v. Yamashita*, 4 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948).

<sup>360</sup> The following Conventions prohibit slavery and slave-related practices: The Slavery Convention, 25 Sept. 1926, 46 Stat. 2184, 60 L.N.T.S. 253 [hereinafter 1926 Slavery Convention], *amended by* Protocol Amending the Slavery Convention, 7 Dec. 1953, 7 U.S.T. 479, 182 U.N.T.S. 51, *replaced by* Slavery Convention Amended by Protocol, opened for Signature or Acceptance at the Headquarters of the United Nations, 7 Dec. 1953, 212 U.N.T.S. 17, *supplemented by* Supplemental Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices Similar to Slavery, 7 Sept. 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 [hereinafter 1956 Slavery Convention].

The following Conventions prohibit sexual slavery, forced prostitution, and the international traffic in persons: International Agreement for the Suppression of the “White Slave Traffic,” 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83, *amended by* Protocol Amending the International Agreement for the Suppression of the “White Slave Traffic,” and the International Convention for the Suppression of the “White Slave Traffic,” 4 May 1949, 2 U.S.T. 1997, 30 U.N.T.S. 23, *replaced by* International Agreement for the Suppression of the “White Slave Traffic” as Amended by the Protocol Signed at Lake Success, 92 U.N.T.S. 19 [hereinafter 1904 Agreement]; International Convention for the Suppression of the White



of Human Rights,<sup>361</sup> the International Convention on the Elimination of all Forms of Racial Discrimination,<sup>362</sup> the International Covenant on Civil and Political Rights,<sup>363</sup> the Convention on the Elimination of Discrimination Against Women,<sup>364</sup> and the Torture Convention.<sup>365</sup>

Under the Geneva Conventions, only “grave breaches” explicitly incorporate penal sanctions. The 1949 Geneva Conventions do not explicitly identify rape and sexual assault as a class of “grave breaches,” but they are subsumed in offenses that are explicitly identified as “grave breaches.” Because most of the alleged rape and sexual assault cases are committed against civilian women, we will analyze grave breaches by referring to Geneva Convention IV, which protects civilians. Article 147 of Geneva Convention IV provides:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons properly protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health [ . . . ] not justified by military necessity and carried out unlawfully and wantonly.<sup>366</sup>

Slave Trade, 4 May 1910, 211 Consol. T.S. 45, 7 Martens Nouveau Recueil (ser. 3) 252, *amended by* Protocol Amending the International Agreement for the Suppression of the “White Slave Traffic,” and the International Convention for the Suppression of the “White Slave Traffic,” 4 May 1949, 2 U.S.T. 1997, 30 U.N.T.S. 23, *replaced by* International Convention for the Suppression of White Slave Traffic as Amended by the Protocol Signed at Lake Success, 4 May 1949, 98 U.N.T.S. 101 [hereinafter 1910 Convention]; International Convention for the Suppression of the Traffic in Women and Children, 30 Sept. 1921, 9 L.N.T.S. 415, *amended by* Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children and the Convention for the Suppression of the Traffic in Women of Full Age, 12 Nov. 1947, 53 U.N.T.S. 13, *replaced by* International Convention for the Suppression of the Traffic in Women and Children as Amended by the Protocol Signed at Lake Success, 12 Nov. 1947, 53 U.N.T.S. 39 [hereinafter 1921 Convention]; International Convention for the Suppression of the Traffic in Women of Full Age, 11 Oct. 1933, 150 L.N.T.S. 431, *amended by* Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children and the Convention for the Suppression of the Traffic in Women of Full Age, 12 Nov. 1947, 53 U.N.T.S. 13, *replaced by* International Convention for the Suppression of Traffic in Women of Full Age as Amended by the Protocol Signed at Lake Success, 12 Nov. 1947, 53 U.N.T.S. 49 [hereinafter 1933 Convention]; Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, 21 Mar. 1950, 96 U.N.T.S. 271 [hereinafter 1950 Convention].

<sup>361</sup> Universal Declaration of Human Rights, arts. 2 (prohibiting discrimination in application of the declaration), 3 (stating that life, liberty, and security of the person are inalienable human rights), 4 (prohibiting slavery and all forms of the slave trade), 5 (prohibiting torture and inhuman treatment), 7 (declaring that all persons are entitled to equal protection of the laws), *supra* note 5.

<sup>362</sup> International Convention on the Elimination of All Forms of Racial Discrimination, arts. 1, 5(b), 7 Mar. 1966, 660 U.N.T.S. 195, 216, 5 I.L.M. 352, 353–54 [hereinafter Convention on Racial Discrimination] (defining what constitutes racial discrimination). This Convention also creates an affirmative duty on states to implement its provisions.

<sup>363</sup> International Covenant on Civil and Political Rights arts. 2, 5(b), 7, 9, *supra* note 6. The ICCPR also creates an affirmative duty on states to implement its provisions.

<sup>364</sup> Convention on the Elimination of all Forms of Discrimination against Women, arts. 1, 6, adopted 18 Dec. 1979, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (22 Jan. 1980), *reprinted in* 19 I.L.M. 33, 36 [hereinafter CEDAW] (defining discrimination against women). This Convention also creates an affirmative duty on states to implement its provisions.

<sup>365</sup> See Torture Convention, arts. 1 (defining torture), 2–16 (creating affirmative duties for states to implement the convention), *supra* note 280.

<sup>366</sup> Geneva Convention IV, *supra* note 7, at art. 147 (protecting civilians). Grave breaches are also defined in Article 50 of Geneva Convention I, Article 51 of Geneva Conventions II and III, and Article 147 of Geneva Convention IV.

Rape and sexual assault are at times “torture” and always constitute “inhuman treatment” and “wilfully [caused] great suffering or serious injury to body or health.” Thus, a normative basis exists to try rape as a “grave breach” of the Geneva Conventions, though it is incomplete. The Geneva Conventions neither define rape and sexual assault, nor do they identify their elements.

Under the Commentary to Article 147, torture is “more than a mere assault on the physical or moral integrity of a person.”<sup>367</sup> Torture is distinguished from inhuman treatment and other acts under Article 147. It is defined as “the infliction of suffering on a person to obtain from that person, or from another person, confessions or information. What is important is not so much the pain itself as the purpose behind its infliction.”<sup>368</sup> Torture requires a secondary purpose behind the acts of injury to distinguish it from inhuman treatment, which does not require a purpose.

It is unclear whether this secondary purpose must be to obtain a confession or information, or if it could be any other purpose.<sup>369</sup> In the conflict in the former Yugoslavia, rape and sexual assault were not used often to obtain a confession or information. However, rape and sexual assault have been used to punish, intimidate, and to force victims and potential victims to flee from their communities. In addition, rape has been committed for the purpose of forced impregnation.<sup>370</sup> The statements could be intended to empower the rapist and magnify the shame of the rape as it is occurring. Alternatively,

<sup>367</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION 598 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY ON THE FOURTH GENEVA CONVENTION].

<sup>368</sup> *Id.*

<sup>369</sup> What constitutes this secondary purpose has changed over time. For example, according to the Declaration on Torture adopted by the UN General Assembly on 9 December 1975:

torture means any act by which severe pain or suffering whether physical or mental is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.

The commentary to Protocol I, Article 75, incorporates this definition of torture. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 873 (Yves Sandoz et al. eds., 1987) (quoting GA Resolution 3452 (XXX)) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]. However, a breach of Article 75 is only an ordinary breach of the Protocol, not a “grave” breach. Under this definition, rape and sexual assault will often constitute breaches of this Protocol. In many cases, in the conflict in the former Yugoslavia, rape and sexual assault were used as means of punishing the victims for suspected acts or special status before and during the conflict. Additionally, sexual violence was widely used as a means of intimidating individuals, groups, and the entire civilian population. Furthermore, the definition of torture contained in the Torture Convention goes further than that above:

Torture Convention art. 1, *supra* note 280. However, this definition merely constitutes evidence of customary international law.

<sup>370</sup> Forced impregnation should be considered a crime separate from rape and sexual assault because the harm it causes is qualitatively and quantitatively different from that caused by sexual violence alone. GOLDSTEIN, *supra* note 337. According to many victims, rapists have stated that they want to impregnate the victims with children of the perpetrator’s ethnicity. Some people insist that these statements do not indicate a true motive of the perpetrator, but rather are used to shame the victim.

they may reflect a sincere desire to impregnate women either to magnify the shame over the victim's lifetime or to dilute the victim's gene pool. Regardless, they demonstrate a secondary purpose of rape.

The Commentary to Article 147 provides a broad interpretation of "inhuman treatment." Generally, "inhuman treatment" is not just the infliction of physical injury, but includes any treatment that damages human dignity. The Commentary states:

[t]he aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them being brought down to the level of animals. That leads to the conclusion that by "inhuman treatment" the Convention does not mean only physical injury or injury to health.<sup>371</sup>

More specifically, the Commentary defines "inhuman treatment" as treatment contrary to Article 27 of Geneva Convention IV. Article 27 states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honours, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack of their honour, *in particular against rape, enforced prostitution, or any form of indecent assault*.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.<sup>372</sup>

Article 27 provides specific protection for women, including an express prohibition against rape and sexual assault. Protections for women are more specifically delineated so that there can be no mistake regarding what acts are prohibited.<sup>373</sup>

Rape, enforced prostitution, i.e., the forcing of a woman into immorality by violence or threats, and any form of indecent assault . . . are and remain prohibited in all places and all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women.<sup>374</sup>

Thus, rape and sexual assault, though not listed explicitly in the "grave breach" provision, are incorporated by reference under inhuman treatment and therefore constitute a "grave breach" of the Geneva Conventions. Furthermore, the European Court of Human Rights concluded that rape was inhuman treatment in *Cyprus v. Turkey* in 1976.<sup>375</sup>

<sup>371</sup> COMMENTARY ON THE FOURTH GENEVA CONVENTION, *supra* note 367, at 598.

<sup>372</sup> Geneva Convention IV, *supra* note 7, at art. 27 (emphasis added).

<sup>373</sup> COMMENTARY ON THE FOURTH GENEVA CONVENTION, *supra* note 367, at 205–06.

<sup>374</sup> *Id.* at 206.

<sup>375</sup> *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 4 Eur. Ct. H.R. Rep. 482 ¶¶ 358–74 (1982) (Commission report) (holding that in an international conflict between Turkey allied with Turkish Cypriots and Greek Cypriots, widespread rape constituted torture and inhuman treatment under Article 3 of the European Human Rights Convention).

According to the ICRC, “Wilfully causing great suffering” means “suffering inflicted without the ends in view for which torture is inflicted or biological experiments carried out. It would therefore be inflicted as a punishment, in revenge or for some other motive, even *pure sadism*.”<sup>376</sup> Rape and sexual assault are certainly attacks on physical integrity, health, and human dignity. Thus, rape and sexual assault are a “grave breach.” Although there is no guidance in the Commentary regarding what exactly constitutes “serious injury to body or health,” rape and sexual assault clearly suffice.<sup>377</sup> The physical and psychology trauma suffered by victims of rape and sexual assault is real and very serious.

In addition to Article 147, Articles 11 and 85 of Protocol I<sup>378</sup> expand the definition of “grave breaches.” Under Article 11, “(1) The physical or mental health and integrity of persons who are in the power of the adverse party or who are interned, detained or otherwise deprived of liberty [...] shall not be endangered by any unjustified act or omission.” The principle stated in Article 11(1) reflects that the physical and mental health free from harm and the integrity of persons are protected rights. Rape and sexual assault clearly endanger the physical and mental health and integrity of the victims. Further, this provision requires leaders and commanders to take affirmative action to prevent rape and sexual assault. This requirement extends liability beyond the actual perpetrator level, and thus adds more to the deterrent value of the Geneva Conventions.

Article 11(4) defines “grave breaches” of Protocol I: “(4) Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which [...] violates any of the prohibitions in paragraph 1 [...] shall be a grave breach.”<sup>379</sup> Both

<sup>376</sup> COMMENTARY ON THE FOURTH GENEVA CONVENTION, *supra* note 367, at 599 (emphasis added).

<sup>377</sup> The ICRC has stated that rape constitutes a serious injury to body or health. ICRC, Aide-Memoire (3 Dec. 1992). This position finds support by the US Department of State, which declared that rape constitutes a grave breach in a Letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Senator Arlen Specter, United States Senate (27 Jan. 1993).

Besides the physical injuries produced by sexual violence, many victims suffer extremely damaging psychological effects. Victims of traumatic events experience what mental health professionals call post-traumatic stress syndrome. Victims of rape often experience a form of this syndrome, called rape-trauma syndrome. The trauma is often re-experienced through nightmares, the inability to stop thinking about it, the sudden panic that the event is recurring, and panic associated with reminders of the event. Some victims experience a numbing or avoidance of the trauma of the event to the extent that they block out current relationships with people close to them, block out most feelings unrelated to the trauma, and stop thinking about the future. Behavioral symptoms include difficulty sleeping, outbursts of anger, difficulty concentrating, fear, and anxiety. See *Diagnostic Criteria for Post-Traumatic Stress Disorder*, in *DIAGNOSTIC AND STATISTICAL MANUAL (DSM-IV)* (4th ed. 1994). Physical symptoms include sexual dysfunction, pelvic pain, vaginal discharge, and headaches. KAREN S. CALHOUN & BEVERLY M. ATKESON, *TREATMENT OF RAPE VICTIMS* 16–17 (1991).

Additionally, rape and sexual assault have far-reaching harms. Most of the victims are women. Women have often been called the caretakers of society, and as such, have primary responsibility for raising children, supporting the needs of men, and preserving cultural history. When women are harmed to the extent that they can barely function, they can no longer take care of themselves, much less fulfill their other responsibilities. Society as a whole suffers when its caretakers cannot function.

Women are often not allowed to seek help for their psychological injuries. If they admit that they were sexually abused, they face retaliation by the perpetrators and being ostracized by their families and community. Men face even greater obstacles to discussing sexual abuse that they suffer. Most male victims of rape and sexual assault cannot even discuss their abuse because it is too painful. They too will not be able to support their families or their society. Stuart Turner, *Surviving Sexual Assault and Sexual Torture*, in *MALE VICTIMS OF SEXUAL ASSAULT* 75, 81, 110 (Gillian C. Mezey & Michael B. King eds., 1992).

<sup>378</sup> Protocol I arts. 11, 85, *supra* note 8.

<sup>379</sup> *Id.*, arts. 11(1), (4).

rape and sexual assault, as wilful acts that seriously endanger the physical and mental health and integrity of the victim, and the wilful failure by leaders to prevent them, would be breaches of Protocol I.

Article 11 is principally aimed at protecting persons against unnecessary medical procedures and medical experiments.<sup>380</sup> However, sexual mutilations, though with no medical aim, are explicitly prohibited under the prohibition of physical mutilations in this Article. Furthermore, as indicated above, omission of necessary medical treatment is also a “grave breach.” Thus, the failure to allow victims of rape and sexual assault access to gynecological services, including legal abortion, would also be a “grave breach” of this Article.

Article 85 makes attacks on civilian populations or individuals a “grave breach” when such attacks are committed wilfully, causing death or serious injury to body or health.<sup>381</sup> An attack is defined in Article 49 of Protocol I as any act “of violence against the adversary, whether in offence or in defence.”<sup>382</sup> Further, Article 51 provides, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>383</sup> Additionally, “[a]ttacks against the civilian population or civilians by way of reprisals are prohibited.”<sup>384</sup> Clearly, both rape and sexual assault and the use of these crimes as a way to spread terror through the civilian population or to retaliate would be “grave breaches” of Protocol I. Rape and sexual assault, as an attack on civilian population or individuals, are therefore a “grave breach” of this Article as well.

Rape and sexual assault are prohibited as a breach under other provisions of the four Geneva Conventions and their Protocols Additional. Under Geneva Conventions I and II, relating to Wounded and Sick on Land and Wounded, Sick and Shipwrecked at Sea, Article 12 prohibits “violence to [women’s] persons” and requires that women be treated humanely and “with all consideration due to their sex.”<sup>385</sup>

Geneva Convention III protects persons who have fallen into the power of the enemy. Under Article 13, all such persons are protected against inhumane acts, and Article 14 specifically protects women while they are held prisoners of war.<sup>386</sup> More specifically, Article 13 provides:

<sup>380</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 367, at 150.

<sup>381</sup> Protocol I art. 85(3)(a), *supra* note 8.

<sup>382</sup> *Id.* at art. 49.

<sup>383</sup> *Id.* at art. 51(2).

<sup>384</sup> *Id.* at art. 51.

<sup>385</sup> Geneva Convention I art. 12, *supra* note 7; Geneva Convention II art. 12, *supra* note 7. It could be argued that violations of these provisions would be grave breaches, because the language of the grave breaches provisions is identical to that in Geneva Convention IV. However, the commentary to Geneva Convention I, Article 50 does not refer to the contents of Article 12 under inhumane treatment as explicitly as Geneva Convention IV, Article 147 refers to Article 27. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION 370–72 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY ON THE FIRST GENEVA CONVENTION]. Geneva Convention II, Article 51, is more explicit than Geneva Convention I, Article 50, but still less explicit than Geneva Convention IV, Article 147: “[t]he Convention provides, in Article 12, that protected persons must always be treated with humanity. The sort of treatment covered here would therefore be whatever is contrary to that general rule.” INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: II GENEVA CONVENTION 268 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY ON THE SECOND GENEVA CONVENTION]. Thus, it is probable that rape and sexual assault would be grave breaches of these Conventions as well.

<sup>386</sup> Geneva Conventions, *supra* note 7.

### Humane Treatment of Prisoners

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or *seriously endangering the health of a prisoner of war in its custody* is prohibited, and will be regarded as a serious breach of the present Convention [ . . . ].<sup>387</sup>

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.<sup>388</sup>

Article 13 calls for “protection” in addition to the prohibition of inhumane acts.<sup>389</sup> Those in control of places of detention, therefore, have an affirmative duty to protect people in their custody. This is a higher level of care than that required by military and political leaders to people not in their custody.

Such protection extends to “moral values, such as the moral independence of the prisoner (protection against acts of intimidation) and his honour (protection against insults and public curiosity).”<sup>390</sup> Despite the use of the terms “moral” harms and harms to “honour,” it is clear that this provision prohibits rape, forced prostitution, and sexual assault.<sup>391</sup> This provision also prohibits any rape or sexual assault accomplished through coercion, as well as that accomplished by force.

Article 14 provides:

### Respect for the Person of Prisoners

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

*Women shall be treated with all the regard due to their sex* [ . . . ].<sup>392</sup>

According to the commentary on Article 14, regard due to women’s sex means taking into consideration women’s “weakness,” “honour and modesty,” and “pregnancy and child-birth.”<sup>393</sup> Of these, honour and modesty includes protecting women prisoners from rape, forced prostitution, and any form of sexual (indecent) assault.<sup>394</sup> Articles 13 and 14 only apply to prisoners of war or civilians who have taken up arms to resist the invading forces.<sup>395</sup>

<sup>387</sup> According to the Commentary, a serious breach is equivalent to a grave breach. Rape and sexual assault constitute a serious endangerment to health. Thus, any unlawful act or omission by the detaining power resulting in a rape or sexual assault would be a grave breach. For example, any camp commander who ordered rape or sexual assault or who knew of such rape or sexual assault and failed to stop it would be guilty of a grave breach of this Convention. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION 140 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY ON THE THIRD GENEVA CONVENTION].

<sup>388</sup> Geneva Convention III art. 13(1), (3), *supra* note 7 (emphasis added).

<sup>389</sup> COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 367, at 141. Furthermore, the protection against insults and public curiosity embodies protection from rape, forced prostitution, and any form of sexual assault. *Id.* at 147.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> Geneva Convention III art. 14, *supra* note 7 (emphasis added).

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at art. 4.

A more specific prohibition of the rape and sexual assault of civilians can be found in Articles 75 and 76 of Protocol I. Article 75 states, in part, that:

- (1) [P]ersons who are in the power of a Party to the conflict [...] shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria [...].
- (2) The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
  - (a) violence to the life, health, or physical or mental well-being of persons, in particular:
    - (i) murder;
    - (ii) *torture of all kinds, whether physical or mental*;
  - (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.<sup>396</sup>

The Commentary defines torture by reference to the Declaration on Torture adopted on December 9, 1975 by General Assembly Resolution 3452 (XXX):

torture means any act by which severe pain or suffering whether physical or mental is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.<sup>397</sup>

Also according to the Commentary, “outrages upon personal dignity” include acts prohibited by Geneva Convention IV, Article 27, which explicitly prohibits rape and sexual assault.<sup>398</sup> The prohibition of forced prostitution and indecent assault in this provision apply equally to men and women.<sup>399</sup>

Article 75 applies to persons who are in the power of a party to an international armed conflict and who do not benefit from more favorable treatment under other provisions of the four Geneva Conventions or this Protocol.<sup>400</sup> Thus, this Article is applicable to nationals of states not parties to the Convention or conflict, nationals of allied states, refugees and stateless persons and any other persons who were, for one reason or another, unable to claim a particular status, such as that of prisoner of war, civilian internee, wounded, sick, or shipwrecked.<sup>401</sup>

Article 76 applies to women protected by Geneva Convention IV and to those who are not.<sup>402</sup> It provides:

- (1) *Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.*

<sup>396</sup> Protocol I art 75, *supra* note 8 (emphasis added).

<sup>397</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 367, at 873.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 874.

<sup>400</sup> Protocol I art. 75(1), *supra* note 8.

<sup>401</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 367, at 864–69.

<sup>402</sup> *Id.* at 892.



- (2) Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
- (3) To the maximum extent feasible, the Parties to the conflict shall endeavor to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.<sup>403</sup>

Article 76 largely restates Article 75. However, the provision in Article 75 regarding forced prostitution and indecent assault applies to both sexes, whereas Article 76 applies specifically to women and makes express reference to rape. Article 76 extends protection for pregnant women and women with small children.

Common Article 3 applies to conflicts of a noninternational character.<sup>404</sup> In cases of noninternational conflict, Common Article 3 is the only protection available under the Geneva Conventions. Rape and sexual assault fall under several provisions of Common Article 3, including:

- (a) violence to life and person, in particular [ . . . ] cruel treatment and torture;<sup>405</sup> and
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>406</sup>

<sup>403</sup> Protocol I art. 76, *supra* note 8 (emphasis added).

<sup>404</sup> There is a debate over whether Common Article 3 and Protocol II establish individual criminal responsibility, because they do not explicitly provide for penalties or universal jurisdiction. Theodor Meron, who argues the position that they do not carry individual criminal responsibility, confuses criminality with jurisdiction and penalties:

The question of what actions constitute crimes must be distinguished from the question of jurisdiction to try those crimes [ . . . ]. Since the [ . . . ] Nuremberg Tribunals [ . . . ] it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offenses, even when there is no accompanying provision for the establishment of the jurisdiction of particular courts or a scale of penalties.

Whether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, states, groups or other authorities [ . . . ]. The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community are all relevant factors in determining the criminality of various acts.

Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 561–62 (1995), describing other international agreements, such as the 1907 Hague Convention, which do not provide penalties, but are universally considered to impose individual criminal responsibility. Additionally, he argues that many military codes recognize the criminality of Common Article 3 and Protocol II and that the underlying crimes prohibited by these provisions are universally prohibited by states' national court systems, so that individuals know their actions are criminal when they are committed. *Id.* at 562–66. On the jurisdiction issue, Meron states that the difference between ordinary and grave breaches produce discretionary jurisdiction by state parties, rather than mandatory jurisdiction. *Id.* at 564.

<sup>405</sup> Geneva Convention I art. 3(1)(a), *supra* note 7; Geneva Convention II art. 3(1)(a), *supra* note 7; Geneva Convention III art. 3(1)(a), *supra* note 7; Geneva Convention IV art. 3(1)(a), *supra* note 7.

<sup>406</sup> Geneva Convention I art. 3(1)(c), *supra* note 7; Geneva Convention II art. 3(1)(c), *supra* note 7; Geneva Convention III art. 3(1)(c), *supra* note 7; Geneva Convention IV art. 3(1)(c), *supra* note 7.

The Commentary on Common Article 3 is purposefully silent on whether rape and sexual assault fall under either of the above provisions.

It may be asked whether the list is a complete one. At one stage of the discussion, additions were considered with particular reference to the biological “experiments” of evil memory [. . .]. The idea was rightly abandoned, since biological experiments are among the acts covered by (a). Besides, it is always dangerous to try to go into too much detail especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible, and, at the same time, precise. The same is true of item (c).<sup>407</sup>

In light of the identical terms used in other provisions of the Geneva Conventions and their Protocols, rape and sexual assault clearly violate Common Article 3.<sup>408</sup> “Outrages upon personal dignity” and “humiliating and degrading treatment”, for example, include rape and sexual assault under Articles 75 and 85 of Protocol I, and Article 4 of Protocol II.<sup>409</sup> Additionally, the Commentary on Common Article 3 specifies that Article 27 of the Fourth Geneva Convention is applicable.<sup>410</sup> Article 27 specifically prohibits “rape, enforced prostitution and any form of indecent assault.”<sup>411</sup>

Although “cruel treatment” is not defined in Geneva Convention IV, “general principles of law” recognize rape and sexual assault as cruel treatment. The “general principles of law” and the criminal laws of all nations include rape and sexual assault as both (a) and (c) under Common Article 3.

Articles 4 and 13 of Protocol II expand the authority of Common Article 3.<sup>412</sup> Article 4 provides that civilians are entitled to respect for their person and honor and that they shall be treated humanely in all circumstances. Under subsection 2(e), “outrages upon personal dignity, in particular humiliating and degrading treatment, *rape, enforced prostitution and any form of indecent assault*” are prohibited at any time and in any place. The Commentary asserts that this provision reaffirms and supplements Common Article 3(1)(c), expanding it to include all persons, not just women.<sup>413</sup>

Article 13 more generally states that, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>414</sup>

<sup>407</sup> COMMENTARY TO THE FOURTH GENEVA CONVENTION, *supra* note 245, at 38–9.

<sup>408</sup> Otherwise, the meaning assigned to these terms under Common Article 3 will differ from the meaning of the terms under other provisions of the Conventions, which seems illogical. Indeed, the Commentary makes reference to other provisions of Geneva Convention IV: “It should be noted that the acts prohibited in items (a) to (d) are also prohibited under other Articles of [. . .] Convention [IV], in particular Articles 27, 31 to 34, and 64 to 77.” *Id.* at 40. Thus, Common Article 3 includes rape and sexual assault as breaches by reference to Article 27 the same way Article 147 of Geneva Convention IV, the grave breaches provision, does. *Id.*

<sup>409</sup> Protocols I, II, *supra* note 8.

<sup>410</sup> COMMENTARY TO THE FOURTH GENEVA CONVENTION, *supra* note 248.

<sup>411</sup> *Id.*

<sup>412</sup> Protocol II arts. 4, 13, *supra* note 8.

<sup>413</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 367, at 1375.

<sup>414</sup> Protocol II art. 13(2), *supra* note 8.

This provision thus prohibits the use of rape and sexual assault as a method of terrorizing the civilian population.

The protection provided under these Articles corresponds to the protection offered by Article 27 of Geneva Convention IV. However, persons who are not able to claim a protected status, such as nationals of allied states and refugees, are not provided with protection in noninternational conflicts.<sup>415</sup>

“Rape” and “sexual violence” are included in Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute. In many cases, in the conflict in the former Yugoslavia, rape and sexual assault were used to punish victims for suspected acts or special status before and during the conflict.<sup>416</sup> Additionally, sexual violence was widely used to intimidate individuals, groups, and the entire civilian population.

Article 5 of the ICTY states “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [...] (g) *rape* [...].”<sup>417</sup> The ICTY Statute does not expand the prohibition against rape and other forms of sexual violence beyond the parameters already in existence through conventions and customary international law. The secretary-general’s commentary states:

Crimes against humanity refer to inhumane acts of a very serious nature, such as [...] *rape*, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called “ethnic cleansing” and *widespread and systematic rape and other forms of sexual assault, including enforced prostitution*.<sup>418</sup>

Thus, rape and sexual assault are prohibited “whether they are committed in an armed conflict, international or internal in character.”<sup>419</sup>

The ICTR Statute in Article 3 states, “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: [...] (g) *rape* [...].”<sup>420</sup>

The above two formulations are significant because they specifically list “rape” as a crime under CAH. But both formulations fail to fully define the term’s contents. In other words, under the above two formulations, questions still existed as to whether other forms of sexual violence were contained within the meaning of CAH.

The ICTY has concluded that the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or (b)

<sup>415</sup> Protocol I art. 75(1), *supra* note 8; see COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 250, at 869–70.

<sup>416</sup> See generally *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia*, Annex IX (“Rape and Sexual Assault”), available at [http://www.law.depaul.edu/centers\\_institutes/ihrli/publications/yugoslavia.asp](http://www.law.depaul.edu/centers_institutes/ihrli/publications/yugoslavia.asp); and BASSIOUNI, *THE LAW OF THE ICTY*, *supra* note 335.

<sup>417</sup> ICTY Statute art. 5, *supra* note 11 (emphasis added).

<sup>418</sup> The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993, at ¶ 48 (emphasis added).

<sup>419</sup> *Id.* ¶ 47; see also *supra* note 198.

<sup>420</sup> ICTR Statute art. 3, *supra* note 12 (emphasis added).

the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the victim's consent. Consent must be given voluntarily, as a result of the victim's free will, and is assessed in the context of the surrounding circumstances. The *mens rea* of rape is the intent to effect such sexual penetration with the knowledge that it occurs without the consent of the victim.<sup>421</sup>

The Appeals Chamber in *Kunarac* rejected a "resistance" requirement as unjustified for "rape" at customary international law. Furthermore, it embraced the Trial Chamber's departure from prior definitions of rape so as to focus on the absence of consent as the *sine qua non* of rape (or rape as a violation of sexual autonomy).<sup>422</sup> The ICTY refused to allow the Prosecution to amend the indictment in the *Lukić & Lukić* case in order to include sexual violence charges concerning the crimes of rape, sexual slavery, enslavement, and torture committed against women, reasoning that to allow the amendment after the Prosecutor's unnecessary delay would unduly prejudice the accused.<sup>423</sup> However, when reading the verdict, Judge Patrick Robinson stated that there were many pieces of evidence pertaining to the other crimes, including rape. The fact that the evidence existed to prove rape in this case, but that rape was not reflected in the conviction or punishment is an injustice to the victims.

The trial judgment in the *Akayesu* case before the ICTR broadly defined rape to include any physical invasion of a sexual nature involving coercion, and which did not limit the crime to forcible sexual intercourse.<sup>424</sup> However, in the *Semanza* case, the Trial Chamber adopted the approach of the ICTY Appeals Chamber in *Kunarac*.<sup>425</sup> ICTR jurisprudence has also addressed "sexual violence" under the category of "other inhumane acts" as a CAH pursuant to ICTR Article 5.<sup>426</sup> The ICTY has adopted the ICTR's definition of "sexual violence" as set forth in the *Akayesu* Trial Judgment as "any act of a sexual nature which is committed on a person under circumstances which are coercive."<sup>427</sup>

The Rome Statute in Article 7 answered many of these questions with its formulation of CAH. Article 7 states: "[a] 'crime against humanity' means any of the following

<sup>421</sup> *Kunarac et al.* Trial Judgment, *supra* note 62, ¶ 460, *aff'd* *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶ 128; *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 177, *aff'd* *Kvočka et al.* Appeals Judgment, *supra* note 175, ¶¶ 394–95.

<sup>422</sup> *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶ 129; *Kunarac et al.* Trial Judgment, *supra* note 62, ¶ 458; *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 177; *see also* *Furundžija* Trial Judgment, *supra* note 281, ¶ 185 (focusing on force as the defining characteristic of rape so that force or threat of force either negates the possibility of resistance through physical violence or renders the context so coercive that consent is impossible). *See generally* Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35 (1992); Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULTURE AND SOC'Y 635 (1983).

<sup>423</sup> *See* Prosecutor v. *Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecutor Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, ¶¶ 57–64 (Jul. 8, 2008) [hereinafter *Lukić & Lukić* Decision on Pre-Trial Judge's Order].

<sup>424</sup> *Semanza* Trial Judgment, *supra* note 32, ¶ 344; *Akayesu* Trial Judgment, *supra* note 32, ¶ 344; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 226 (Jan. 27, 2000) [*Musema* Trial Judgment]. *Compare with* *Kunarac et al.* Appeals Judgment, *supra* note 62, ¶¶ 127–8.

<sup>425</sup> *Semanza* Trial Judgment, *supra* note 32, ¶ 345.

<sup>426</sup> *See supra* note 183.

<sup>427</sup> *See Akayesu* Trial Judgment, *supra* note 32, ¶ 688 (emphasizing that sexual violence need not necessarily involve physical contact and citing forced public nudity as an example); *Kvočka et al.* Trial Judgment, *supra* note 177, ¶ 342.

acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (g) *rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity* [...].”<sup>428</sup> The Rome Statute added further language defining this provision. It stated, “‘Forced pregnancy’ means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy [...]”.<sup>429</sup> The Rome Statute clearly provides the needed specificity with respect to the category of rape and other forms of sexual violence. Article 7 outlines several forms of sexual violence other than rape that are within the meaning of CAH and prohibited. The arrest warrants issued for Germain Katanga, Joseph Kony, and Ali Kushayb include counts for “rape” as a CAH.<sup>430</sup>

The *Katanga* Pre-Trial Chamber further elaborated on the elements of rape as CAH in its confirmation of the rape charge in that case as follows:

The crime against humanity of rape, pursuant to article 7(1)(g) of the Statute and article 7(1)(g)-1 of the Elements of Crimes, occurs when:

- (1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
- (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

The objective elements of the crime against humanity of rape are further explained in footnotes 15 and 16 of the Elements of Crimes to mean that “the concept of ‘invasion’ is intended to be broad enough to be gender neutral” and “that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.”

With regard to the term “coercion”, the Chamber notes the finding of the ICTR Trial Chamber in *The Prosecutor v. Akayesu* that a coercive environment does not require physical force. Rather, “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence” (citation omitted).

Finally, article 30 of the Statute governs the subjective element of the crime against humanity of rape requiring the perpetrator’s intent to invade another person’s body “with a sexual organ, or the anal or genital opening of the victim with any object or any other part of the body” by force or threat of force or coercion.

<sup>428</sup> Rome Statute art. 7, *supra* note 13 (emphasis added).

<sup>429</sup> *Id.*

<sup>430</sup> See *Katanga* Arrest Warrant, *supra* note 46; *Kony* Arrest Warrant, *supra* note 85; *Ali Kushayb* Arrest Warrant, *supra* note 51.

Thus, this offence encompasses, first and foremost cases of *dolus directus* of the first and second degree.<sup>431</sup>

The Elements of Crimes also provides further detail on the elements of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence:

### Elements of rape

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body [footnote 15: The concept of “invasion” is intended to be broad enough to be gender-neutral].
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent [footnote 16: It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7(1)(g)-3, 5 and 6.].
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

### Elements of sexual slavery

[footnote 17: Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as part of a common criminal purpose.]

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty [footnote 18: It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.].
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

<sup>431</sup> *Katanga* Decision Confirming Charges, *supra* note 46, ¶¶ 438–41 (internal citation omitted); *see also Akayesu* Trial Judgment, *supra* note 32, ¶ 688.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

### **Elements of forced prostitution**

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

### **Elements of forced pregnancy**

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

### **Elements of forced sterilization**

1. The perpetrator deprived one or more persons of biological reproductive capacity [footnote 19: The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.].
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent. [footnote 20: It is understood that "genuine consent" does not include consent obtained through deception.].
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

### **Elements of sexual violence**

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress,



detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1(g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

### CAH Statistics (as of November 2010)

**ICTY:** 21 indicted / 5 convicted

**ICTR:** 56 indicted / 6 convicted

**SCSL:** 10 indicted / 6 convicted (rape); 6 indicted / 3 convicted (sexual slavery)

**SPSC ET:** 19 indicted / 1 convicted

**ECCC:** 5 indicted

**WCC BiH:** 26 indicted / 19 convicted

**ICC:** 8 indicted (rape); 4 indicted (sexual slavery)

### §2.9. *Imprisonment*

The crime of “imprisonment,” while not contained in Article 6(c) of the London Charter, is included in the definitions of CAH in the subsequent formulations. The ICTY Statute in Article 5 states that “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [ . . . ] (e) *imprisonment* [ . . . ].” The ICTR Statute in Article 3 states that “[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds: [ . . . ] (e) *imprisonment* [ . . . ].”<sup>432</sup>

Thus, the above two formulations found in the ICTY and ICTR Statutes merely state that “imprisonment” is a specific crime without adding any definition of the term, but these formulations do have the distinction of having specifically included “imprisonment” within CAH, something that Article 6(c) did not do. However, beyond including the term, the above two formulations did not provide any insight as to the meaning and scope of “imprisonment.” After these formulations, questions still existed as to what types of imprisonment were justified – for certainly contexts exist where imprisonment is lawful.

Both the ICTY and ICTR have concluded that “imprisonment” as a CAH refers to the arbitrary or otherwise unlawful detention or deprivation of liberty of an individual without

<sup>432</sup> ICTR Statute art. 3, *supra* note 12 (emphasis added).

due process of law.<sup>433</sup> In the *Kordić & Čerkez* case, the Appeals Chamber found “that the term imprisonment in Article 5(e) of the Statute should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of the law, as part of a widespread or systematic attack directed against a civilian population.”<sup>434</sup> The deprivation of liberty can be achieved by an act or omission on the part of the perpetrator with the intent to deprive a civilian of his or her physical liberty without due process of law or with reasonable knowledge that his/her act or omission was likely to cause the deprivation of physical liberty without due process of law.<sup>435</sup> The *ad hoc* tribunals have considered the following factors when assessing the lawfulness of the initial arrest: whether it was based on a valid warrant of arrest; whether the detainees were informed of the reasons for their detention; whether the detainees were ever formally charged; and whether they were informed of any procedural rights and whether the continued detention was lawful.<sup>436</sup> Furthermore, both *ad hoc* tribunals have affirmed that when national law is relied upon to justify a deprivation of liberty, this law cannot violate international law.<sup>437</sup>

The Rome Statute in Article 7 states: “[a] ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [ . . . ] (e) *imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law* [ . . . ].”<sup>438</sup>

Thus, Article 7 adds the needed specificity to “imprisonment” so as to prohibit only those imprisonments that are contrary to international law. Thus, with the added clarification in this provision, the Rome Statute has drawn a distinction between lawful and unlawful imprisonments, something that the earlier formulations of CAH did not do. Furthermore, by adding the language “other severe deprivation of physical liberty,” Article 7 has broadened the scope of meaning of “imprisonment” to include other conduct that may have been outside the scope of the previous formulations of “imprisonment.” The arrest warrants issued for both Ahmad Harun and Ali Kushayb include counts for imprisonment as a CAH.<sup>439</sup>

### Elements of Imprisonment

1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population [See Introduction to Art. 7]

<sup>433</sup> *Kordić & Čerkez* Trial Judgment, *supra* note 177, ¶ 116; *Martić* Trial Judgment, *supra* note 32, ¶ 87.

<sup>434</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 175, ¶ 116.

<sup>435</sup> See *Simić et al.*, *supra* note 150, ¶¶ 64–5; *Kmojelac* Trial Judgment, *supra* note 49, ¶ 115.

<sup>436</sup> See *Kmojelac* Trial Judgment *supra* note 49, ¶¶ 119–122; *Kordić & Čerkez* Trial Judgment, *supra* note 177, ¶¶ 302–03; *Ntagerura et al.* Trial Judgment, *supra* note 33, ¶ 702.

<sup>437</sup> See *Kmojelac* Trial Judgment, *supra* note 49, ¶ 114; *Ntagerura et al.* Trial Judgment, *supra* note 33, ¶ 702.

<sup>438</sup> ICC Statute art. 7, *supra* note 13 (emphasis added).

<sup>439</sup> *Ahmad Harun* Arrest Warrant, *supra* note 51; *Ali Kushayb* Arrest Warrant, *supra* note 51.

5. The perpetrator knew that the conduct was part of or intended to be part of a widespread or systematic attack directed against a civilian population. [See Introduction to Art. 7]

#### CAH Statistics (as of November 2010)

**ICTY:** 18 indicted / 3 convicted

**ICTR:** 2 indicted / 1 convicted

**SCSL:** 0 indicted

**SPSC ET:** 17 indicted / 4 convicted

**ECCC:** 5 indicted

**WCC BiH:** 59 indicted / 28 convicted

**ICC:** 2 indicted

### §3. The Additional Crimes of Article 7 of the Rome Statute

The crimes contained in Article 7 of the Rome Statute that are also contained in Article 6(c) of the London Charter, Article 5 of the ICTY Statute, and Article 3 of the ICTR Statute were discussed jointly above because of their commonality. The following, however, are additional crimes not contained in any of these prior formulations.

#### §3.1. *Apartheid*<sup>440</sup>

This specific crime was not included in Article 6(c) of the London Charter, nor was it included in Article 5 of the ICTY Statute or Article 3 of the ICTR Statute. It was, however, included in Article 7 of the Rome Statute.

The Rome Statute in Article 7 states, “[a] ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [ . . . ] (j) *the crime of apartheid* [ . . . ].”<sup>441</sup> The Rome Statute provides further language concerning this crime:

The crime of 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 [ . . . ].<sup>442</sup>

The Rome Statute was the first of the various formulations to specifically include apartheid as a crime within the meaning of CAH. This provision does not give rise to claims of insufficient specificity, as the crime of apartheid is well established and defined in international law.

A third form of “inhumane acts” carries the infamous nomenclature of apartheid. The *Apartheid* Convention was opened for signature and ratification by the United Nations on November 30, 1973, and entered into effect on July 18, 1976.

The Convention refers to a variety of forms of human depredation based on racial discrimination in reliance upon the practices of the Union of South Africa, and labels

<sup>440</sup> See generally Roger S. Clark, *Apartheid*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* 599 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>441</sup> ICC Statute art. 7, *supra* note 13 (emphasis added).

<sup>442</sup> *Id.*

these practices CAH. Other international instruments relevant to CAH also refer to apartheid as an “inhumane act” within the meaning of CAH. These instruments are:

- (1) the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,<sup>443</sup> in which “inhumane acts” resulting from the policy of apartheid are condemned as a “crime against humanity”;
- (2) a number of resolutions of the General Assembly in which the policies and practices of apartheid are condemned as a “crime against humanity”;<sup>444</sup>
- (3) Security Council resolutions in which the Council has emphasized that apartheid and its continued expansion seriously disturb and threaten international peace and security;<sup>445</sup> and
- (4) the 1996 Draft Code of Crimes Against Peace and Security of Mankind states that “institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population. . . .” is encompassed in the term “crimes against humanity.”<sup>446</sup>

The Preamble of the *Apartheid* Convention is explicit about the criminal motive of the acts described in Article II that “would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid.”<sup>447</sup> Clark says with regard to criminalizing apartheid that “emphasizing the criminal nature of the deed symbolizes the heinous nature of it, as seen by the international community.”<sup>448</sup>

The substantive part of the Convention in Article II lists six different kinds of “inhumane acts” which, if done with the necessary intent, constitute the crime of apartheid. These six acts include (1) the denial to members of a racial group of the right to life and liberty of person; (2) the deliberate imposition on racial groups living conditions calculated to cause their physical destruction; (3) any legislation calculated to prevent

<sup>443</sup> G.A. Res. 2391 (XXIII), 23 U.N. GAOR, Supp. No. 18 at 40, U.N. Doc. A/7218 (1968).

<sup>444</sup> Notably, G.A. Res. 2202A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1967); G.A. Res. 2671F (XXV) (25 U.N. GAOR, Supp. No. 28 at 33, U.N. Doc. A/8028 (1970). These resolutions had overwhelming support; only South Africa and Portugal voted against them and there were few abstentions.

<sup>445</sup> See S.C. Res. 282, Resolutions and Decisions of the Security Council, 25 U.N. SCOR at 12 (1970); S.C. Res. 311, Resolutions and Decisions of the Security Council, 27 U.N. SCOR at 10 (1972); see also S.C. Res. 392, Resolutions and Decisions of the Security Council, 31 U.N. SCOR at 11, U.N. Doc. S/INF/32 (1976) (adopted by consensus, reaffirming that “the policy of *apartheid* is a crime against the conscience and dignity of mankind and seriously disturbs international peace and security”).

Other formats include (1) the provisions of the Charter in which members of the organization pledge themselves to take joint and separate action on human rights matters; (2) the promise in the Universal Declaration of Human Rights that all are entitled to their rights without distinctions such as race, color, or national origin; (3) the Declaration on the Granting of Independence to Colonial Countries and Peoples with its promise of an end to colonialism and practices of segregation and discrimination associated therewith; (4) the International Convention on the Elimination of All Forms of Racial Discrimination, under which states particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction; and (5) the Convention on the Prevention and Punishment of the Crime of Genocide, in which certain acts, which may also be qualified as acts of *apartheid* constitute a crime under international law.

<sup>446</sup> *Report of the International Law Commission on the work of its forty-eighth session*, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. A/51/10 (1996) at 72 [hereinafter 1996 Draft Code of Crimes], at art. 18.

<sup>447</sup> Convention on Apartheid, pmbl, art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter *Apartheid Convention*].

<sup>448</sup> See Clark, *supra* note 440, at 301.

racial groups from participating in the political, social, economic, and cultural life of the country; (4) any measures designed to racially divide the population; (5) the exploitation of labor of racial groups; and (6) persecution depriving racial groups of their fundamental rights and freedoms.<sup>449</sup>

Article I to the Convention declares:

[A]*partheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in Article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.<sup>450</sup>

Though Article 18 of the 1996 Draft Code does not specifically include “apartheid,” it does include “institutionalized discrimination on racial grounds [ . . . ] involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging apart of the population.”<sup>451</sup>

### Elements of Apartheid

1. The perpetrator committed an inhumane act against one or more persons.

<sup>449</sup> See *Apartheid* Convention art. II, *supra* note 447. The full text of Art. II provides:

For the purpose of the present Convention, the term “the crime of *apartheid*,” which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts 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:

- (a) Denial to a member of members of a racial group or groups of the right to life and liberty of person:
  - (i) By murder of members of a racial group or groups;
  - (ii) By the infliction upon the member of a racial group or groups of serious bodily or mental harm, by infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
  - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups.
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to educate, the right to leave and return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association;
- (d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriage among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organization and persons by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

<sup>450</sup> *Id.* at art. I.

<sup>451</sup> 1996 Draft Code of Crimes art. 18, *supra* note 446.

2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts. [footnote 29: It is understood that “character” refers to the nature and gravity of the act.].
3. The perpetrator was aware of the factual circumstances that established the character or the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction]
7. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction]

### §3.2. *Enforced Disappearance of Persons*

Despite the fact that enforced disappearance of persons was not recognized in the definitions of CAH set forth in the London Charter, CCL 10, or the *ad hoc* tribunals, it has been the predominant CAH for many tyrannical regimes and nonstate actor groups, and was especially notorious in the state terrorism of Latin America, first in the 1960s in the case of Brazil, and the staggering practice of “disappearances” in the cases of Chile in the mid-70s and Argentina’s Dirty War,<sup>452</sup> during which the most severe abuses occurred around the same time. These regimes used “disappearances” as a nefarious means to eliminate political dissidents, while denying responsibility or knowledge of their whereabouts to the victims’ families. Often these regimes were supported by the complicity of the national judiciaries.

Numerous national and international criminal provisions, international human rights instruments,<sup>453</sup> and cases from various national and international courts have recognized the enforced disappearances.<sup>454</sup> But developments in international human rights law were the first to address the crime. Often these regional bodies resorted to a blend of rights protected in other statutory and conventional contexts due to the lack of a specific prohibition of enforced disappearance at the time.<sup>455</sup> By nature enforced disappearance often entails the deprivation of life and liberty (in this sense, there is some overlap with the CAH of imprisonment), and also torture (another specific act that can constitute CAH).

<sup>452</sup> See *infra* ch. 9, § 3.3; CONADEP, *NUNCA MÁS: INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS* (1983). For a discussion of the prosecution of international crimes, but particularly CAH, see Pablo F. Parenti, *The Prosecution of International Crimes in Argentina*, 10 INT’L CRIM. L. REV. 491 (2010). See also Juan Luis Modolell González, *The Crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights*, 10 INT’L CRIM. L. REV. DEC. 20, 2006, 475 (2010).

<sup>453</sup> International Convention for the Protection of All Persons from Enforced Disappearance, UN General Assembly; Inter-American Convention on Forced Disappearances art. 1(1), [1994] OASTS 80.

<sup>454</sup> *Radilla-Pacheco v. Mexico*, Judgment of Nov. 23, 2009, Inter-Am Ct. H.R. (Ser. C) No. 209 (2009); *Gomes Lund et al. v. Brazil*, Judgment of Nov. 24, 2010, Inter-Am. Ct. H.R. (Ser. C) No. 1124 (2010). The Inter-American Commission of Human Rights has heard numerous other cases, on enforced disappearance.

<sup>455</sup> For example, the Inter-American Court described disappearances as “a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the Inter-American system and the Convention.” *Velásquez-Rodríguez v. Honduras*, Judgment of July 30, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), 158.

The Inter-American system in particular was at the forefront of enforced disappearance jurisprudence, including both the reports of the Commission and jurisprudence of the Court, largely due to the fact that victims' families from these countries under the grip of violent dictatorship could not pursue these claims in their compromised judiciaries. The *Velásquez Rodríguez* case of the Inter-American Court of Human Rights first set out a framework to evaluate the institutional apparatus of forced disappearance.<sup>456</sup> Then, in the *Heliodoro Portugal* case, the Court expanded on the particular characteristic of enforced disappearance as a crime of "continuing action":

The Court finds that, contrary to extrajudicial executions, forced disappearance of persons is characterized by being a violation of a continuing or permanent nature. This means that the Court may rule on an alleged forced disappearance, even if this commenced prior to the date on which the State accepted the Court's competence provided that this violation is maintained or continues following that date. Based on this assumption, the Court would have the competence to rule on forced disappearance while this violation continued. In this regard, the Court observes that Article III of the Convention on Forced Disappearance established that a forced disappearance "shall be deemed continuing or permanent as long as the fate or whereabouts of the victim has not been determined". Similarly, the Court has indicated previously that "while the whereabouts of [ . . . ] [disappeared] persons have not been determined, or their remains duly found and identified, the appropriate juridical treatment for [this] situation [ . . . ] is that of forced disappearance of persons."

In the instant case, the whereabouts and fate of Mr. Portugal became known when his remains were identified in August 2000. Hence, his alleged disappearance would have commenced with his detention on May 14, 1970, and would have been maintained or continued until 2000; that is, subsequent to May 9, 1990, the date on which Panama accepted the Court's competence. Accordingly, the Court has competence to rule on the alleged forced disappearance of Heliodoro Portugal, because it continued after May 9, 1990, and up until August 2000.<sup>457</sup>

This characterization of the crime as one of a "continuing" nature was a popular means by which cases were opened despite having occurred before the ratification of the respective convention.<sup>458</sup> The *Barrios Altos* case and cases subsequent have invalidated amnesty laws that prevented the investigation and punishment of enforced disappearance as a violation of the duty to investigate and punish such crimes.<sup>459</sup>

In 1992, the U.N. General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance, which describes the crime as a CAH.<sup>460</sup> The Inter-American Convention on Forced Disappearance followed two years later.<sup>461</sup> In 2006, the General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance, which establishes that enforced disappearance is a CAH

<sup>456</sup> *Velásquez-Rodríguez v. Honduras*, *supra* note 450.

<sup>457</sup> *Heliodoro Portugal v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 12, 2008, ¶¶ 34, 35 (Ser. C) No. 186.

<sup>458</sup> *See, e.g., Blake v. Guatemala*, Judgment, ¶ 76, Inter-Am. Ct. H.R. (Ser. C) No. 48.

<sup>459</sup> *See, e.g., Chumbipuma Aguirre v. Peru (Barrios Altos Case)*, Judgment of May 14, 2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001); *Almonacid-Arellano et al. v. Chile*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 154.

<sup>460</sup> Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. Doc. A/RES/47/133.

<sup>461</sup> Inter-American Convention on Forced Disappearances, *supra* note 453.



in Article 5.<sup>462</sup> Article 4 of the Convention provides that “[e]ach State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.”<sup>463</sup> The Convention also recognizes a right not to be subjected to forced disappearance, and obligates states, *inter alia*, to prohibit secret detentions, to ensure that persons are detained in officially recognized and supervised facilities, to ensure the maintenance of records of all detainees, the right to have information on detainees, and the right of all detainees to challenge the legality of their detention. Article 18 of the Convention prohibits the application of amnesty laws to enforced disappearance.<sup>464</sup> The International Convention defines enforced disappearance as follows:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>465</sup>

The first inclusion of the crime as a CAH occurred in the 1996 Draft Code of Crimes Against Peace and Security of Mankind.<sup>466</sup>

The inclusion of enforced disappearance in Article 7 of the Rome Statute marked the first time that an international criminal tribunal recognized the crimes as a CAH.<sup>467</sup> The Elements of Crimes further defines enforced disappearance as follows:

Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give

<sup>462</sup> International Convention for the Protection of All Persons from Enforced Disappearance art. 5, *supra* note 453.

<sup>463</sup> The first inclusion of the crime as a CAH occurred in the 1996 Draft Code of Crimes Against Peace and Security of Mankind.

<sup>464</sup> *Id.* at art. 18.

<sup>465</sup> International Convention for the Protection of All Persons from Enforced Disappearance art. 2, *supra* note 453.

<sup>466</sup> Draft Code of Crimes, *supra* note 446.

<sup>467</sup> For the Inter-American Commission reports, *see, e.g., Report on the Situation of Human Rights in Argentina*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.49 Doc. 19 corr.1 (Apr. 11, 1980); *Report on the Status of Human Rights in Chile*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.34 Doc. 21 corr. 1 (Oct. 25, 1974).

For the Inter-American Court, *see, e.g., Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, ¶ 148, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988); *Godínez-Cruz v. Honduras*, Judgment, ¶ 153, Inter-Am. Ct. H.R. (Ser. C) No. 5; *Castillo-Páez v. Peru*, Judgment, ¶ 74, Inter-Am. Ct. H.R. (Ser. C) No. 34; *Blake v. Guatemala*, Judgment, *supra* note 458; *Trujillo-Oroza v. Bolivia*, Judgment, ¶¶ 2, 36, Inter-Am. Ct. H.R. (Ser. C) No. 64; *Bámaca-Velásquez v. Guatemala*, Judgment, ¶ 132, Inter-Am. Ct. H.R. (Ser. C) No. 70; *Almonacid-Arellano et al. v. Chile*, Judgment, *supra* note 459, ¶ 103, *La Cantuta v. Peru*, Judgment of 19 Nov. 2006, ¶¶ 114–16, Inter-Am. Ct. H.R. (Ser. C) No. 162 (2006).

For the European Court, *see Imakayeva v. Russia*, Eur. Ct. H.R., Judgment of Nov. 9, 2006), available at <http://cmiskp.echr.coe.int/tkp197/search.asp>; *Cicek v. Turkey*, Eur. Ct. H.R., Judgment of 27 February 2001, <http://cmiskp.echr.coe.int/tkp197/search.asp>.

For national judgments, *see, e.g., Corte Suprema de Justicia [CSJN]*, 14/6/2005, *Case of Julio Héctor Simón/recurso de hecho*, No. 17-768 (Arg.); CSJ, Peru Sala Penal Especial, judgment of 7 April 2009, Exp. No. AV 19-2009, at ¶ 717.

*See generally* Raquel Aldana-Pindell, *In Vindication of Justiciable Victims’ Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSN’L L. 1399 (2002); Juan Méndez and José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507 (1990). ICC Statute art. 7(i), *supra* note 13 (emphasis added).

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.<sup>468</sup>

As mentioned above, there is some overlap between enforced disappearance and the CAH of imprisonment and deprivation of liberty, torture. Moreover, some of the interests protected by the prohibition against enforced disappearance overlap with protected interests of the international human rights law regime, namely the right to life, and the right to human dignity. While further definition of this crime would certainly be helpful, it is likewise apparent that there are no contexts within which “enforced disappearance of persons” is lawful. Thus, the provision here is sufficiently specific so as to obviate any legality concerns.

### Elements of Enforced Disappearance of Persons

[footnote 23: Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as part of a common criminal purpose; footnote 24: This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute]

1. The perpetrator:
  - (a). Arrested, detained, or abducted one or more persons [footnote 25: The word “detained” would include a perpetrator who maintained an existing detention; footnote 26: It is understood that under certain circumstances an arrest or detention may have been lawful.]; or
  - (b). Refused to acknowledge the arrest, detention, or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a). Such arrest, detention, or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
  - (b). Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that [footnote 27: This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.]:
  - (a). Such arrest, detention, or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; [footnote 28: It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.] or
  - (b). Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention, or abduction was carried out by, or with the authorization, support, or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

<sup>468</sup> *Id.*

7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. [See Introduction]
8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population. [See Introduction]

### CAH Statistics (as of November 2010)

**ICTY:** 0 indicted

**ICTR:** 0 indicted

**SCSL:** 0 indicted

**SPSC ET:** 24 indicted

**ECCC:** 0 indicted (indicted as an “other inhumane act” in Case No. 002)

**WCC BiH:** 22 indicted / 11 convicted

**ICC:** 0 indicted

## §4. Normative Overlap

CAH originated as an outgrowth of war crimes even though it subsequently evolved into a distinct category of international crimes. Genocide, though originally intended to encompass CAH, also evolved into a distinct and separate category of international crimes. The norms contained in these three major international crimes – war crimes, CAH, and genocide – have become part of *jus cogens*.<sup>469</sup> Deriving from multiple legal

<sup>469</sup> See M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996). The majority opinion in the *Tadić* Judgement dealt with several aspects of international humanitarian law in an overlapping manner when it held:

The second aspect, determining which individual of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, the language of which reflects “elementary considerations of humanity” which are “applicable under customary international law to any armed conflict,” provides that in an armed conflict “not of an international character” Contracting States are obliged “as a minimum” to comply with the following: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . . .” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the *Commentary*, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term “civilian.” They, and particularly Common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in the furtherance or as part of an attack directed against a civilian population.

*Tadić* Trial Judgment, *supra* note 175, reprinted in 36 I.L.M. 908 at 939–940 (citations and footnotes omitted). The majority does clarify what are the legal boundaries between the customary law of armed

sources, these crimes overlap relative to their context, content, purpose, scope, application, perpetrators, and protected interests:<sup>470</sup>

For decades, the Genocide Convention has been asked to bear a burden for which it was never intended, essentially because of the relatively underdeveloped state of international law dealing with accountability for human rights violations. In cases of mass killings and other atrocities, attention turned inexorably to the Genocide Convention because there was little else to invoke. This, too, has changed in recent years. The law applicable to atrocities that may not meet the strict definition of genocide but that cry out for punishment has been significantly strengthened. Such offences usually fit within the definition of ‘crimes against humanity’, a broader concept that might be viewed as the second tier of the pyramid. According to the most recent definition, comprised within the Rome Statute of the International Criminal Court, crimes against humanity include persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law. This contemporary approach to crimes against humanity is really no more than the ‘expanded’ definition of genocide that many have argued for over the years.<sup>471</sup>

One of the main reasons why the international community felt compelled to draft the Genocide Convention in 1948 was the inadequate scope given to the notion of ‘crimes against humanity’ at the time. When the International Military Tribunal judged the Nazis at Nuremberg for the destruction of the European Jews, it convicted them of crimes against humanity, not genocide. But the Nuremberg Charter seemed to indicate that crimes against humanity could only be committed in the time of war, not a critical obstacle to the Nazi prosecutions but a troubling precedent for future protection of human rights. The *travaux préparatoires* of the Charter leave no doubt that the connection or nexus between war crimes and crimes against humanity was a *sine qua non*, because the great powers that drafted it were loathe to admit the notion, as a general and universal principle, that the international community might legitimately interest itself in what a State did to its own minorities.

Thus, the Genocide Convention, not the Nuremberg Charter, first recognized the idea that gross human rights violations committed in the absence of an armed conflict are

conflicts applicable to conflicts of a noninternational character and, respectively, Common Article 3 of the 1949 Geneva Conventions; see also Protocol II, *supra* note 8.

<sup>470</sup> For example, the ICTY, in the majority opinion in the *Tadić* Judgement, erroneously applied the standards of “state responsibility” reflected in the I.C.J.’s *Nicaragua v. U.S.* case to the determination of whether a conflict is of an international or noninternational character. See *Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14, 331–47 (June 27). The majority also did not impart clarity when it broadly concluded that:

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

*Tadić* Trial Judgment, *supra* note 175, reprinted in 36 I.L.M. 908, 939–940 (1997) (citations and footnotes omitted); see also Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 AM. J. INT’L L. 236 (1998).

<sup>471</sup> WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 10 (2000).

nevertheless of international concern, and attract international prosecution. In order to avoid any ambiguity and acutely conscious of the limitations of the Nuremberg Charter, the drafters of the Convention decided not to describe genocide as a form of crime against humanity, although only after protracted debate. Accordingly, article I of the Convention confirms that genocide may be committed in time of peace as well as in time of war. But it now seems generally accepted that genocide inheres within the broader concept of crimes against humanity.<sup>472</sup>

CAH, war crimes, and genocide also contain certain ambiguities and gaps, the existence of which is due essentially to two facts: (1) the haphazard evolution of ICL<sup>473</sup> and (2) governments, as controllers of the international legislative processes, are not, for a variety of reasons (mostly political), desirous of eliminating the overlaps, closing the gaps, and removing the ambiguities.<sup>474</sup> This is unsurprising because two of the three categories of crimes, namely CAH and genocide, occur with deliberate state policy.<sup>475</sup> Moreover, governments are not particularly inclined to criminalize the conduct of their high officials.<sup>476</sup> War crimes can also be a product of state policy, but frequently individual combatants commit such crimes acting on their own, which probably explains the disinclination to criminalize this type of individual criminal conduct.<sup>477</sup>

CAH and genocide are essentially crimes of state, as are sometimes war crimes, because they need the substantial involvement of state organs, including the army, police,

<sup>472</sup> *Id.* at 10–11, n.37, citing Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity art. 1, (1970) 754 UNTS 73, (emphasis added); European Convention on the Non Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes of 25 January 1974 art 1(1), ETS 82; *Second Report on the Draft Code of Offences Against the Peace and Security of Mankind*, by Mr. Doudou Thiam, *Special Rapporteur*, Yearbook 1984, Vol. II, p. 93, ¶¶ 28–9; *Report of the International Law Commission on the Work of its Forty-Eighth Session* 6 May–26 July 1996, UN Doc. A/51/10, p. 86; STEFAN GLASER, DROIT INTERNATIONAL PÉNAL CONVENTIONNEL 109 (1970); Yoram Dinstein, *Crimes Against Humanity*, in JERZY MAKARCZYK, THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 891–908, at 905; Meron, *supra* note 455, at 577; Prosecutor v. Tadić, Case No IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 140 (Oct. 2, 1995); Tadić Trial Judgment, *supra* note 175, ¶¶ 622, 655; Tadić v. Prosecutor, Case No IT-94-I-A, Appeals Judgment, ¶ 251 (July 7, 1999); *Report on the Situation of Human Rights in Rwanda Submitted by Mr René Degni-Segui, Special Rapporteur, under Paragraph 20 of Resolution S-3/1 of 25 May 1994*, UN Doc. E/CN.4/1996/7, ¶ 7; *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/52/18, ¶ 159.

<sup>473</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 67, at 21–31.

<sup>474</sup> This is evidenced by the position of different governments in the Preparatory Committee on the Establishment of an International Criminal Court. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (1998).

<sup>475</sup> One reason will be the fact that international crimes involving state policy potentially reach the top of the military and civilian hierarchy. See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997), describing the history of international criminal investigatory bodies and international criminal tribunals.

<sup>476</sup> With respect to the limits of command responsibility see also *infra* ch. 7.

<sup>477</sup> The regulation of armed conflicts benefits from the fact that regular armies are usually well disciplined and have a tight command structure that controls discipline and the observance of the laws of armed conflicts. Furthermore, regular armies have a shared interest in observing the laws of armed conflicts because violations by one side to a conflict can result in actions by the other side, even though reprisals are limited. See FRITS KALSHOVEN, BELLIGERENT REPRISALS (1971). Conversely, however, when genocide or CAH occur, the same constraints that exist in armies arising out of the considerations stated above, are not usually present in the course of genocide and CAH.

paramilitary groups, and state bureaucracy.<sup>478</sup> Because these crimes generate significant victimization, they must be strenuously deterred. Even so, governments are loath to remove the ambiguities in the relevant normative provisions applicable to CAH and genocide, and to fill the existing gaps in these proscriptions.<sup>479</sup> The individual criminal responsibility of soldiers and others in the lower echelons of state power is much more easily accepted by governments than that of political leaders, senior government officials, and those in governmental bureaucracy who carry out, execute, and facilitate the policies and practices of CAH, genocide, and even war crimes. Indeed, the articulation of relevant international norms effectively shields them from criminal responsibility relative to CAH and crimes of genocide, and even war crimes are too ambiguous to effectively reach into this category of violators, rendering their prosecution virtually impossible.

Many of the specific acts deemed criminal are contained within the definitions of war crimes, CAH, and genocide. That is where the overlap exists. Thus, legal questions arise as to when the same acts constitute one or the other of these three crimes. At this point, a jurist must examine the other legal elements required in the sources of law applicable to these three categories of crime. The “grave breaches” of the 1949 Geneva Conventions<sup>480</sup> and Protocol I<sup>481</sup> are the clearest enunciation of what the elements of war crimes are, but that is because they apply to the context of conflicts of an international character. This is not quite the case with respect to common Article 3 of the 1949 Geneva Conventions<sup>482</sup> and Protocol II,<sup>483</sup> which apply to conflicts of a noninternational character, but with the exclusion in Protocol II of conflicts between internal dissident groups. Still, the gap between normative proscriptions applicable to the two contexts of conflicts exists, as does the overlap between these violations.<sup>484</sup> The overlaps essentially are aimed at individual deviant conduct, the same type of criminal conduct that falls also within the scope of CAH and genocide, because the latter two crimes apply to all contexts of armed conflicts as well as to nonarmed conflict contexts and to tyrannical regime victimization. Clearly, such a situation need not exist because it would be easy to articulate the elements of each of these three categories of crimes clearly, in a way that prevents these unnecessary overlaps and gaps. So far, however, the political will to do so is nonexistent.

Another of the indications of overlaps, gaps, and ambiguities is in charging. We run into cumulative charging that in part may be prosecutorial strategy, but also may arise

<sup>478</sup> See *infra* ch. 2. However, genocide and CAH, as discussed below, are also applicable to nonstate actors. The problem of nonstate actors, acting by themselves or in concert with state actors nevertheless remains, as the definitions of genocide and CAH do not specifically contemplate nonstate actors, particularly when there is no concert of action with state actors. However, by implication it should be clear that genocide and CAH apply to nonstate actors as well.

<sup>479</sup> The most recent example of such governmental reluctance to remove ambiguities and fill gaps is that of the ICC Diplomatic Conference in Rome, June 15–July 17, 1998, whose statute has not removed the overlaps, gaps, and ambiguities with respect to genocide, CAH, and war crimes. See ICC Statute, *supra* note 13.

<sup>480</sup> See Geneva Conventions cited *supra* note 7.

<sup>481</sup> See 1977 Protocol I, *supra* note 8.

<sup>482</sup> See Geneva Conventions, *supra* note 7.

<sup>483</sup> See 1977 Protocol II, *supra* note 8.

<sup>484</sup> In one contemporary approach, Leslie Green argues that “it is time to dispense with the differentiation between genocide, grave breaches and war crimes. All of these are but examples of the more generically termed ‘crimes against humanity.’” Leslie C. Green, “Grave Breaches” or Crimes Against Humanity, 8 U.S.A.F. ACAD. J. L. STUD. 19, 29 (1997–8).

because things are so unclear to prosecutors that they lump them all together. Cumulative charging has been practiced since the prosecutions of the IMT, which entered multiple convictions based on the same underlying conduct if there was a materially distinct element in each of the relevant crimes, even when one charge is fully subsumed by another charge, for example, where an individual is charged with both the CAH of murder and extermination based on the same underlying conduct.

Cumulative charging issues have been addressed in the subsequent international tribunals of the ICTY, the ICTR, and the Special Court for Sierra Leone. The ICTY Appeals Chamber has reasoned that cumulative charging is warranted because, before the trial, the Prosecutor may not be able to decide with certainty which charges will be proven, and because the Trial Chamber is in the better position to determine the appropriate charge after the presentation of all of the evidence. The ICTY has also explained that the fears of those against cumulative charging could be avoided at the conviction or sentencing stages of proceedings.

The ICTY Appeals Chamber in *Čelebići* Appeals Judgment set forth the standard used to evaluate cumulative charges:

Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision [ . . . ].<sup>485</sup>

Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.<sup>486</sup>

Then, in the *Krstić* case, the Appeals Chamber discussed cumulative charging between individually enumerated CAH crimes:

The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered [ . . . ].<sup>487</sup>

<sup>485</sup> Mucić et al. v. Prosecutor, Case No IT-96-21-A, Appeals Judgment, ¶¶ 412–13 (Feb. 20, 2001) [hereinafter *Mucić et al.* Appeals Judgment].

<sup>486</sup> Id. ¶ 400.

<sup>487</sup> *Krstić* Appeals Judgment, *supra* note 32, ¶ 218.



The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements in genocide. While a perpetrator's knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide as defined in the Statute and in international customary law, does not require proof that the perpetrator of genocide participated in a widespread or systematic attack against civilian population [...].<sup>488</sup>

Persecution and extermination, as crimes against humanity under Article 5, share the requirement that the underlying act form a part of a widespread or systematic attack against a civilian population and that it be perpetrated with the knowledge of that connection. The analysis above concerning extermination therefore applies also to the relationship between the statutory elements of persecution and genocide. The offence of genocide does not subsume that of persecution. The Trial Chamber's conclusion to the contrary was erroneous [...].<sup>489</sup>

The Appeals Chamber addressed these two issues in its recent decisions in *Vasiljević* and *Krnjelac*. In *Vasiljević*, the Appeals Chamber disallowed convictions for murder and inhumane acts under Article 5 as impermissibly cumulative with the conviction for persecution under Article 5 where the persecution was accomplished through murder and inhumane acts. The Appeals Chamber concluded that the offence of persecution is more specific than the offences of murder and inhumane acts as crimes against humanity because, in addition to the facts necessary to prove murder and inhumane acts, persecution requires the proof of a materially distinct element of a discriminatory intent in the commission of the act.<sup>490</sup>

The ICTR Appellate Chamber in the *Akayesu* case, the ICTR used a test to determine whether two crimes charged resulted in a cumulative effect upon the defendant:

It is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.<sup>491</sup>

The ICTR Appeals Chamber adopted the ICTY's holding from the *Čelebići* Appeals Judgment in the *Musema* case.<sup>492</sup> In *Musema*, the Trial Chamber found the defendant guilty of genocide and CAH of extermination and rape. On appeal, *Musema* argued that the Trial Chamber erred in using the same facts to find him guilty of genocide and CAH. The Appeals Chamber found that cumulative charging was permitted under the ICTR Statute and determined that it would use the *Čelebići* approach to evaluate when cumulative charging may occur.<sup>493</sup> After applying the *Čelebići* test, the Appeals

<sup>488</sup> *Id.* at ¶ 223.

<sup>489</sup> *Id.* at ¶ 229.

<sup>490</sup> *Id.* at ¶ 231.

<sup>491</sup> *Akayesu v. Prosecutor*, Case No. ICTR-96-4-A, Judgment, ¶ 468 (Jun. 1, 2001).

<sup>492</sup> *Musema v. Prosecutor*, Case No. ICTR-96-13-A (Nov. 16, 2001) [hereinafter *Musema* Appeals Judgment].

<sup>493</sup> *Id.* ¶ 361.

Chamber concluded that convictions for genocide and the CAH of extermination are permissible because each contains elements unique to each crime:

Genocide requires proof of an intent to destroy, in whole or part, a national, ethnical, racial or religious group; this is not required by extermination as a crime against humanity. Extermination as a crime against humanity requires proof that the crime was committed as part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide.<sup>494</sup>

On June 15, 2009, the ICC Pre-Trial Chamber in the *Bemba Gombo* case issued a decision confirming several of the charges lodged against Bemba.<sup>495</sup> The Pre-Trial Chamber found sufficient evidence to establish substantial grounds to believe that Bemba was responsible for the commission of rapes. Importantly, however, the Chamber held that the Prosecution had acted inappropriately in bringing “cumulative charges” based on the acts of rape. Specifically, the Chamber concluded that the Prosecution had inappropriately brought cumulative charges for four crimes based on the same conduct: the CAH of rape, the war crime of rape, the CAH of torture, and the war crime of outrages against personal dignity.<sup>496</sup> Because of this, the Chamber declined to confirm the torture as a CAH, which it concluded was subsumed by rape as a CAH.<sup>497</sup> Critics have argued that nothing prohibits the practice of cumulative charging at the ICC, and that persuasive reasons exist to permit the practice.<sup>498</sup>

Because there is a connection between the rigors of evidentiary requirements to prove war crimes, CAH, and genocide, and access to that evidence, the major governments who have the capacity to obtain such evidence remain in control of its use, and thereby in control of any eventual prosecution.<sup>499</sup> Such governments are left with the option to barter the pursuit of justice in exchange for political settlements.<sup>500</sup> An examination of what happened in all types of post-World War II conflicts clearly indicates that the pursuit of justice has been almost always given way to *Realpolitik*.<sup>501</sup> Consequently, the pursuit of justice has become part of the toolbox of political settlements.<sup>502</sup> This is true for all three major crimes essentially because armies, police, and paramilitary groups acting

<sup>494</sup> *Id.* ¶ 366; see also Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 577 (June 1, 2001) (wherein all elements were satisfied to establish that the defendants had committed CAH, but the court felt that the counts of CAH were “fully subsumed” by the counts of genocide).

<sup>495</sup> See The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the confirmation of charges (Jun. 15, 2009).

<sup>496</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor Against Jean-Pierre Bemba Gombo ¶¶ 190–205 (Jun. 15, 2009).

<sup>497</sup> *Bemba* Decision confirming charges, *supra* note 494, ¶ 204 (“the act of rape requires the additional specific material element of penetration which makes it the most appropriate legal characterization in this particular case.”).

<sup>498</sup> See, e.g., War Crimes Research Office, *The Practice of Cumulative Charging at the International Criminal Court*, International Criminal Court Legal Analysis and Education Project (American University Washington College of Law, May 2010) (arguing that the ICC’s judges should consider the legal elements of each charge, not the conduct giving rise to the charge).

<sup>499</sup> See *infra* ch. 9.

<sup>500</sup> See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9 (1996).

<sup>501</sup> See *id.*; see also M. Cherif Bassiouni, TRANSNATIONAL JUSTICE (3 vols., Neil Kritz ed., 1995).

<sup>502</sup> W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT’L L. 175 (1995).

pursuant to orders from the state's highest authorities commit them. The need for an integrated codification of these three categories of crimes is self-evident. But when that opportunity arose in connection with the establishment of a permanent international criminal court, it was carefully avoided for lack of political will by many governments, including the major powers.

## §5. “General Principles of Law”: Meaning, Method, and Function

As stated in the general introduction to this Chapter, “general principles of law” are recognized as a source of international law.<sup>503</sup> The text of Article 21 specifically permits the resort to “general principles of law,” provided that the Court has (a) applied the Statute, Elements of Crimes, and Rules of Procedure and Evidence, and (b) where appropriate, turned to “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” If these two options have not proven successful, Article 21 provides that the Court “shall apply [ . . . ] general principles of derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”<sup>504</sup> The Statute of the PCIJ employed the terms “general principles of law recognized by civilized nations,” as did the Statute of the ICJ.<sup>505</sup> Both the PCIJ and the ICJ have relied upon “general principles of law” in their decisions.<sup>506</sup>

A number of the most distinguished publicists have put forth definitions of “general principles of law.” For example, Professor Hersch Lauterpacht states:

They are . . . those principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of general and fundamental character . . . a comparison, generalization and synthesis of rules of law in its various branches – private and public, constitutional and administrative, procedural – common to various systems of national law.<sup>507</sup>

To Bin Cheng, one of the most authoritative scholars on the subject, they are “[c]ardinal principles of the legal system in the light of which international [ . . . ] law is to be interpreted and applied.”<sup>508</sup>

<sup>503</sup> See LASSA OPPENHEIM, 1 INTERNATIONAL LAW 29–30 (Hersch Lauterpacht ed., 8th ed. 1955); see also M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768 (1990) (on which this section is predicated and from which it borrows text of the article cited).

<sup>504</sup> ICC Statute, *supra* note 13.

<sup>505</sup> Statute of the Permanent Court of International Justice art. 38 § 1(3), Dec. 13, 1920, 1926 PCIJ (ser. D) No. 1; Statute of the International Court of Justice art. 38 § 1(c), 26 June 1945, 33 U.N.T.S. 993.

<sup>506</sup> National courts also may rely upon “general principles of law”; see BIN CHENG, *GENERAL PRINCIPLES OF LAW, AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 400–08 (1953) (providing as an appendix *Municipal Codes Which Provide for the Application of the General Principles of Law, Equity or Natural Law*).

<sup>507</sup> 1 INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT (THE GENERAL WORKS) 69, 74 (Elihu Lauterpacht ed., 1970).

<sup>508</sup> See Discussion of Bin Cheng, in *The Meaning and Scope of Article 38(1)(c) of the Statute of the International Court of Justice*, 38 GROT. SOC. TRANS. FOR THE YEAR I, 125, 132 (1952).

Professor Rudolf Schlesinger refers to them as “a core of legal ideas which are common to all civilized legal systems.”<sup>509</sup> Another distinguished scholar, Verzijl, states that they are “principles which are so fundamental to every well-ordered society that no reasonable form of co-existence is possible without their being generally recognized as valid.”<sup>510</sup>

Frances Jalet asserts a universalist formulation as she states, “principles that . . . constitute that unformulated reservoir of basic legal concepts universal in application, which exist independently of the institutions of any particular country and form the irreducible essence of all legal systems.”<sup>511</sup> As can be seen, the consensus of these scholarly definitions emphasizes the objective character of the term “principle.”

As noted above, the PCIJ and ICJ, under Article 38(I)(3) and Article 38(1)(c) respectively, have applied “general principles of law”<sup>512</sup> in a number of cases, even though the extent of the two courts’ reliance on “general principles” and the specificity with which the courts utilized them varied from case to case.

One of the earliest references to “general principles of law” by the PCIJ is found in the *Mavrommatis Palestine Concessions* case.<sup>513</sup> In his dissenting opinion, Judge John Bassett Moore asserted that a court’s requirement for jurisdiction is one of the principles common to all legal systems. He concluded that:

There are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has no jurisdiction [ . . . ]. The requirement of jurisdiction, which is universally recognized in the national sphere, is not less fundamental and peremptory in the international.<sup>514</sup>

The S.S. *Lotus* case<sup>515</sup> is a seminal PCIJ case that illustrates how the court may ascertain the existence of a given principle. The issue in S.S. *Lotus* was whether Turkey had acted in conflict with principles of international law when it assumed jurisdiction over an officer of a French ship that had collided with a Turkish vessel on the high seas.<sup>516</sup> The court explained:

[I]n the fulfillment of its task of itself ascertaining what the international law is [ . . . ] [the Court] has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law . . . the result of these researches has not been to establish the existence of any such principles.<sup>517</sup>

<sup>509</sup> Rudolf Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT’L L. 734, 739 (1957).

<sup>510</sup> JAN H.W. VERZIJL, 1 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 59 (1968) (REFERRING TO FRIEDRICH A. VON DER HEYDTE, GLOSSEN ZU EINER THEORIE DER ALLGEMEINEN RECHTSGRUNDSATZIE IN DIE FRIEDENSWARTE 289, *et seq.* (1933)).

<sup>511</sup> Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations: A Study*, 10 UCLA L. REV. 1041, 1044 (1963).

<sup>512</sup> See Bassiouni, *supra* note 500.

<sup>513</sup> *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 6.

<sup>514</sup> *Id.* (Moore, J., dissenting) at 57–9.

<sup>515</sup> S.S. *Lotus*, 1927 P.C.I.J. (Ser. A) No. 10, at 4.

<sup>516</sup> *Id.* at 21.

<sup>517</sup> *Id.* at 31.

In *Chorzów Factory (Claim for Indemnity)*,<sup>518</sup> which involved the German government seeking damages for harm sustained by two of its companies and caused by the express acts of the Polish government, the PCIJ again articulated the basis of the general principle upon which it relied. The court stated:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability, have existed if that act had not been committed.<sup>519</sup>

The court was not always so specific in articulating the basis of the general principle it found and relied upon. For example, in the advisory opinion concerning the *Greco-Bulgarian Communities*,<sup>520</sup> the issue arose as to which of two conflicting provisions – a convention or a national law – should be preferred. The PCIJ simply held that “it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.”<sup>521</sup>

The PCIJ relied on “general principles of law” in a number of other cases.<sup>522</sup> Though not always clearly expressing how it identified them, it nonetheless resorted to “general principles of law” as a source of law in cases presented before it.

The ICJ continued the PCIJ’s tradition of utilizing “general principles of law,”<sup>523</sup> and both courts used that source of law to fill gaps or lacunae in conventional and customary international law. These gaps arise where conventions and customs (whether general, particular, or regional) fail to address the issues in a particular legal dispute or fail to provide a solution to the dispute. For example, in the *South West Africa* cases,<sup>524</sup> Judge Jessup’s separate opinion relied on “general principles of law” to fill the gap in a treaty. In that case, South Africa had argued that the court lacked compulsory jurisdiction because no dispute existed pursuant to Article 7 of the League of Nations Mandate that triggered the Court’s jurisdiction.<sup>525</sup> Jessup rejected South Africa’s argument on the grounds that parties have a “legal interest” in a case in which the outcome of the case directly affects

<sup>518</sup> *Chorzów Factory (Claim for Indemnity)*, 1928 P.C.I.J. (Ser. A) No. 17, at 4; *reprinted in* MANLEY O. HUDSON, 1 *WORLD COURT REPORTS* 646 (1969).

<sup>519</sup> *Id.* at 47.

<sup>520</sup> *Greco-Bulgarian Communities*, 1930 P.C.I.J. (Ser. B) No. 17, at 4.

<sup>521</sup> *Id.* at 32.

<sup>522</sup> *See, e.g.*, *German Interests in Polish Upper Silesia*, 1925 P.C.I.J. (Ser. A), No. 6, at 4, 19; *Chorzów Factory (Judgment)*, 1927 P.C.I.J. (Ser. A) No. 9, at 4, 31; *Serbian Loans (Judgment)*, 1929 P.C.I.J. (Ser. A) Nos. 20/21, at 39–40; *Treatment of Polish Nationals in Danzig*, 1932 P.C.I.J. (Ser. A/B) No. 44, at 4, 24; *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Ser. A/B) No. 53, at 22, 68–9; *Lighthouses (Judgment)*, 1934 P.C.I.J. (Ser. A/B) No. 62, at 4, 47; *Electricity Company of Sophia and Bulgaria (Interim Protection)*, 1944 P.C.I.J. (Ser. A/B) No. 79, at 194, 199.

<sup>523</sup> *See, e.g.*, *International Status of South West Africa, Advisory Opinion (Sep. Op. McNair)*, 1950 I.C.J. 146, at 148–49; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits*, 1962 ICJ Reports 6, at 23; *North Sea Continental Shelf (Judgment)*, (Sep. Op. Ammoun, J.), 1969 I.C.J. 101, at 134. A number of ICJ dissenting opinions make reference to “general principles of law.” *See, e.g.*, *Columbian Peruvian Asylum Case (Judgment)*, (Castilla, J., dissenting) 1950 I.C.J. 359, at 369; *and South West Africa Cases (Second Phase)* (Tanaka, J., dissenting) 1966 I.C.J. 199; *North Sea Continental Shelf, supra* (Lachs, J., dissenting), at 229.

<sup>524</sup> *South West Africa Cases*, 1950 I.C.J. 128.

<sup>525</sup> *Id.* at 401.

their financial and economic interest.<sup>526</sup> He thereby recognized the principle that a party may seek adjudication if it has a “legal interest” at stake and applied it to fill *lacunae* on standing in the treaty in question.

The two courts have also relied on “general principles of law” as a means of interpreting existing conventions by examining words not susceptible to an ordinary or common meaning or interpretation, or as a means for objectively ascertaining the intent of the parties. Judge Fernandes advocated this position in the *Right of Passage* case:

The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a simultaneous application of those principles and of the first two sources of law. It frequently happens that a decision given on the basis of a particular or general convention or of a custom requires recourse to the general principles [...]. A court will have recourse to those principles to fill gaps in the conventional rules, or to interpret them.<sup>527</sup>

In the *Right of Passage* case, two conflicting rights existed because Portugal had a sovereign claim over the enclaves, while India claimed right of passage. Judge Wellington Koo resorted to “general principles of law” to determine if Portugal had a right of access to the Dadra enclaves. Based on the elementary principle of justice founded on logic and reason and evidenced in international customary law, he concluded that a principle existed, as a necessity, in the form of a right of passage in surrounding territories and suggested Portuguese sovereignty over the enclaves was subject to control and regulation by India.<sup>528</sup>

As a source of international law, “general principles of law” perform four functions.<sup>529</sup> First, they are a source of interpretation for conventional and customary international law. In this respect, they have been used to clarify and interpret international law. This interpretive function is the most widely recognized and applied. Second, they are a means for developing new norms of conventional and customary international law. This may be called the “growth function” because such an approach injects dynamism into international law that is constantly evolving to meet the needs of this discipline. Third, they serve as a supplemental source to conventional and customary international law, thereby providing a norm or standard when a custom or treaty is inapplicable or nonexistent. The framers of Article 38 of the PCIJ Statute had this function in mind, as one Advisory Committee member pointed out: “[a] rule must be established to [...] avoid the possibility of the court declaring itself incompetent through lack of an applicable rule.”<sup>530</sup> Fourth, “general principles of law” may serve as a modifier of conventional and customary international law. Thus, “general principles of law” can be used to set aside or modify provisions of conventional or customary law in favor of a greater good. The argument that “general principles of law” in certain circumstances should be utilized to modify conventional or customary law is at the heart of the *jus cogens* doctrine. Professor Gordon Christenson explains this as follows: “Some principles of general international law are or ought to be so compelling that they might be recognized by the international

<sup>526</sup> *Id.* at 425.

<sup>527</sup> *Right of Passage Over Indian Territory (Portugal v. India)*, (Fernandes, J., dissenting) 1960 I.C.J. 123, 140 (Apr. 12).

<sup>528</sup> *Id.* at 66–68.

<sup>529</sup> For further elaboration, see Bassiouni, *supra* note 500.

<sup>530</sup> See CHARLES S. RHYNE, *INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE* 59 (1971).

community for the purposes of invalidating or forcing revision in ordinary norms of treaty or custom in conflict with them.”<sup>531</sup> In this respect, “general principles of law” that rise to the level of *jus cogens* are “peremptory” in that they modify or overturn, as the case may require, customary or conventional law.

The majority of scholars recognize that “general principles of law” under Article 38(I)(3) of the PCIJ statute and Article 38(1)(c) of the ICJ Statute can be identified from two sources: national and international. Under the national source, a given principle must be objectively found at the national level of the world’s major legal systems. Under the international source, it must be found in the practice of states or in the positive legal expressions of states.<sup>532</sup> This requires the identification of a given principle by means of inquiring into the various perfected and unperfected sources of international law: treaties and conventions, customs and practices of states, writings of the most distinguished publicists, and decisions of international tribunals.<sup>533</sup>

Furthermore, *opinio juris*, policies, and pronouncements of states as expressions of their national commitment are also relevant in evidencing the existence of a “general principle of law.” The application of this source of “general principles of law” reveals that CAH are prohibited by conventional and customary international law. The evidence for that proposition is found in the cumulative effect of the history of the international regulation of armed conflicts<sup>534</sup> and in the record of international and national prosecutions.<sup>535</sup> The writings of the most distinguished publicists and other sources of conventional and customary international law also support this conclusion.

The national law source of “general principles of law,” as discussed in the following section, also reveals that the specific violations contained within the meaning of CAH, as defined in the London Charter, are also crimes under the national criminal justice systems of all countries representing the world’s major legal systems.

The combined and cumulative weight of these international and national sources of law evidences the existence of “general principles of law” that prohibit the commission of those acts included in the definition of CAH. In time such universal condemnation raised these principles to the level of *jus cogens*.<sup>536</sup>

<sup>531</sup> Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585, 586 (1988).

<sup>532</sup> Not all scholars agree that “general principles of law” are found in both national legal systems and the international expression of states. See Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 53, 57 (Frits Kalshoven et al., eds., 1980) (citing several authorities). The difference between those who claim that “general principles” are found only in national legal systems and those who advance the proposition that they are also found in the international legal system is based on two unarticulated premises: specificity and certainty. Principles embedded in national law will usually have undergone the test of time and experience and therefore are more easily ascertainable and also more reliable and more specific. Consequently, they are believed to be worthy of greater deference. By contrast, the international legal system may prove more tentative and thus less specific and more difficult to ascertain. This author nonetheless asserts that those principles deemed basic to international law may emerge in the international legal context without necessarily having a specific counterpart in national legal systems. The reason for this separate source of “general principles of law” is found in the nature of international law as a discipline, which regulates international relations between states on the basis of consent of the parties, and voluntary acquiescence.

<sup>533</sup> Bassiouni, *supra* note 500.

<sup>534</sup> See *infra* ch. 3, §1.

<sup>535</sup> See *infra* ch. 9.

<sup>536</sup> See *infra* ch. 4, Part A, §8; see also JOHANN K. BLUNTSCHLI, *MODERN LAW OF NATIONS OF CIVILIZED STATES* (1869) cited in MYRES MCDUGAL, HAROLD LASWELL, LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD*



CAH, as defined in Article 6(c) of the Charter, includes the same specific crimes of “murder,” “extermination,” “enslavement,” “deportation,” “other inhumane acts,” and “persecution” that constitute crimes in the criminal laws of the world’s major legal systems prior to the promulgation of the Charter. However, to demonstrate this proposition, it is important to first establish the methodology used to arrive at this conclusion.

The inductive method of research is employed to identify “general principles of law” that arise from the various national legal systems. By that method, one identifies the existence of a legal principle in the world’s major legal systems or, more specifically, one searches for an identity or commonality that exists with respect to a given principle under the national laws of different countries that represent the world’s major legal systems. Obviously, such an inductive method, which is both the most logical and simple approach to comparative research methodology, will have to be particularized with respect to each subject or specific inquiry for which the research is undertaken. Thus, if the principle that is being researched is one of great generality, it will more likely be easier to identify in the various major legal systems and in specific national legal systems. However, if the principle inquired of is narrow or specific, the focus of the research will have to be on the more relevant or particularized sources of law within the various national legal systems representing the world’s major legal systems.

It should be noted that this methodology is also recognized and relied upon in the identification of customary rules of international law.<sup>537</sup> The PCIJ utilized this methodology in the *S.S. Lotus* case,<sup>538</sup> wherein both Turkey and France relied on inductive methodology to identify a principle of criminal jurisdiction in the various national legal systems. Turkey surveyed the various legal systems to identify their criminal jurisdiction norms and correlated them to derive the principle of territorial criminal jurisdiction. The court relied on these findings.<sup>539</sup>

In his research on customs, Professor Akehurst confirms that this methodology has been recognized and relied upon by international and national courts and policy-makers in different countries.<sup>540</sup> He specifically cites both Great Britain and the United States.<sup>541</sup>

As early as 1877, the British Foreign Office recognized the validity of this approach, particularly with respect to criminal matters, and so instructed the British Minister in Rio de Janeiro as follows: “Her Majesty’s Government [ . . . ] would not be justified in protesting against a law extending the jurisdiction of Brazilian criminal courts because the law was similar to the laws of several other countries.”<sup>542</sup>

The United States has also followed this position since the late 1800s.<sup>543</sup> A landmark ruling on this point is the *Cutting* case between the United States and Mexico.<sup>544</sup>

PUBLIC ORDER (1980) (stating that, “Treaties, the contents of which violate the generally recognized human rights . . . are invalid.” *Id.* at 341).

<sup>537</sup> See, e.g., ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); Michael Akehurst, *Custom As a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1 (1974). The remaining portion of this methodological analysis is adapted from Bassiouni, *supra* note 10.

<sup>538</sup> See *S.S. Lotus*, *supra* note 515, at 21.

<sup>539</sup> *Id.*; see also KRYSZYNA MAREK, 2 RÉPERTOIRES DES DÉCISIONS ET DES DOCUMENTS DE LA CPJI ET DE LA CIJ 864, 876–88 (1967).

<sup>540</sup> See Akehurst, *supra* note 537, at 8–12.

<sup>541</sup> *Id.* at 8.

<sup>542</sup> ARNOLD D. MCNAIR, 2 INTERNATIONAL LAW OPINIONS 153 (1956).

<sup>543</sup> See 1887 FOREIGN RELATIONS OF THE UNITED STATES 859–67 (1888); *The Scotia*, 81 U.S. 170 (1871); *The Paquete Habana*, 175 U.S. 677, 699–700 (1899).

<sup>544</sup> *The Cutting Case*, 1887 FOREIGN RELATIONS OF THE UNITED STATES 751 (1888).

Both countries relied on the laws of different countries to establish the existence of a principle, custom, or both. But of particular relevance in this case was the emphasis on the representation of the countries referred to and the sufficiency of their number.<sup>545</sup> Italy has relied on this approach in its national courts.<sup>546</sup>

The ICJ, like its predecessor the PCIJ, examined national legal systems to derive from them the existence of a custom or “general principle of law.” In both instances, the methodology of empirical research was the same, though obviously the relevance of the laws discovered and their widespread similarity made for their inclusion in these two sources of international law. The ICJ in the *Nottenbohm* case<sup>547</sup> comparatively examined national legal provisions on nationality law, and in the *North Sea Continental Shelf* case<sup>548</sup> the Court looked for relevant national laws on exploration of continental shelves.<sup>549</sup>

Akehurst concludes, “Obviously a law which is frequently applied carries greater weight than a law which is never or seldom applied; any kind of state practice carries greater weight if it involves an element of repetition.”<sup>550</sup> Thus, the existence of the same legal prohibition in a number of legal systems evidences the existence of the principle embodied in the prohibition. Also, the more a given principle is reiterated the more it deserves deference.<sup>551</sup>

As mentioned above, the empirical methodology used herein for demonstrating the existence of “general principles of law” is the same for demonstrating the existence of a customary rule of international law, thus giving additional legal support to the validity of this methodology. It must be pointed out that while this method can serve as a valid technique for identifying both a custom and a principle, the appraisal of the research will be different with respect to establishing the existence of a custom as compared to the identification of a given principle.<sup>552</sup>

The significance of this parallelism is that customs draw from “general principles of law” to establish their existence and that “general principles of law” also draw from customs. Thus, “general principles” are a means to interpret and fill gaps in customary law.

In the context of CAH, “general principles of law” are a valid source for the identification of the specific crimes contained in the meaning of Article 6(c) of the London Charter as they arise under the customary law of armed conflicts, including that portion of customary law that is incorporated in the conventional law of armed conflicts, namely the 1907 Hague Convention.<sup>553</sup>

<sup>545</sup> *Id.* at 754–55 and 781–817.

<sup>546</sup> See *Lagos v. Baggianini* (1953), 22 I.L.R. 533, 534 (1955) (Tribunal of Rome) (looking at custom and practice of states to determine “the generally accepted rule” of diplomatic immunity).

<sup>547</sup> *Nottenbohm* (Lichtenstein v. Guatemala), 1955 I.C.J. 4, at 22 (Apr. 6).

<sup>548</sup> See *North Sea Continental Shelf*, *supra* note 523.

<sup>549</sup> *Id.* at 129, 175 and 228–29 containing the views of Judges Ammoun, Tanaka, Lachs.

<sup>550</sup> Akehurst, *supra* note 537, at 9.

<sup>551</sup> Samuel A. Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INT’L L. 444 (1969).

<sup>552</sup> The difference will depend on the nature of the custom and the “principle,” which in some cases could be the same. This is indeed an overlap between sources of international law. Professor D’AMATO, *supra* note 537, looks at treaties as evidence of custom and practice. Akehurst, *supra* note 537, and both the PCIJ and ICJ, use national laws as evidence of practice, while other PCIJ and ICJ cases use it to evidence “general principles of law.”

<sup>553</sup> See generally *infra* ch. 3, §2.

The “general principles of law” identified hereinafter serve three functions:

1. To interpret and fill gaps in the conventional law of armed conflicts;
2. To interpret and fill gaps in the customary law of armed conflicts; and
3. To form a separate legal source of international law, which becomes a *jus cogens* principle when universally recognized.

The methodology employed is based on a four-step approach: (1) identifying the world’s major families of legal systems; (2) identifying representative national legal systems within the families of the world’s major legal systems; (3) correlating the “principles” identified within the “representative national legal systems”; and (4) demonstrating the equivalence between the principles identified and the specific crimes enunciated in Article 6(c) of the London Charter.

What follows is a discussion of both “general principles of law” as a source of law, and the method by which the source is identified. Importantly, this discussion of “general principles of law” and the method of their identification applies also to the general part and defenses and exonerations discussed in Chapters 7 and 8.

### §5.1. *The World’s Major Legal Systems*

Scholars in comparative legal studies recognize the major legal systems of the world as<sup>554</sup>

1. The Romanist-civilist-Germanic family of legal systems
2. The common law family of legal systems
3. The Islamic family of legal systems

The first question that arises is whether universality is required in order to find that a “general principle of law” exists. In 1945 there were seventy-four states. Clearly, the smaller the number of states, the more feasible it is to establish universality, as was the case when the PCIJ decided the *S.S. Lotus* case in 1927. Such a requirement would no longer be realistic in 2010 when 195 states exist, of which 192 are member-states of the United Nations.

Consequently, it is appropriate to rely on a representative sample of the national laws of those states that most represent a given legal system. But because of the growing diversity in national legal systems that have become hybrid legal systems, it would be necessary to also include a new category of hybrid legal systems to insure that there is universal representation. In other words, universality can be representatively established.

<sup>554</sup> In his work *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAIN* (5th ed. 1973), René David, recognized as the world’s leading authority on comparative law, states that the major world systems are: (1) the Romanist-Germanic; (2) the Socialist; (3) the common law; (4) Islamic law; and (5) Asian legal systems. David refers to them as “families,” or “families of law.” *Id.* at 22–32. The legacies of colonial domination left African states and Asian states with either a common law or French-Civilist tradition, though in the course of time many such states have evolved into hybrid legal systems. The legal systems of Asian countries that are not former colonies of the United Kingdom are considered part of the civil law system; *see also* Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 *HASTINGS INT’L & COMP. L. REV.* 411, 425 n.71 (1989).

### §5.2. *Identifying Legal Principles*

A distinction must be made between broad and narrow legal principles. For example, a broad legal principle may be whether a right to life exists in the major legal systems of the world. A narrow legal principle may be whether the taking of the life of one person by another without legal justification constitutes a crime or, even more specifically, what crime it constitutes. The type of inquiry will determine the appropriateness of the choice of legal sources.

### §5.3. *Correlation Between the Sources of Law to Be Consulted and the Principle Sought to Be Identified*

The sources of law to be consulted with respect to narrow or specific legal principles are the relevant statutes, laws, or other normative sources. Thus, the inquiry of whether the killing of one person by another without legal justification constitutes murder would necessarily entail consultation of the criminal laws of the countries representing the world's major legal systems with appropriate geographic representation, as identified in the following section.

The quantitative factor as to the number of national legal systems that need to be consulted within the world's major legal systems will depend upon the type of inquiry and the degree of identity or similarity that may emerge from the research. Thus, the more obvious the similarity or sameness of the outcome of the research in the different legal systems, the more likely it is that adding more countries with the same general legal basis may not significantly add to the research. However, if there is only general similarity that is only vaguely equivalent, but not of such sufficient comparative equivalence to ensure a broad consensus, then it would appear that a larger number of national legal systems would have to be consulted.

It is obvious that no two national legal systems are alike and certainly the legal provisions of different countries, for example on the definition of murder, are not likely to be identical. Therefore, the question is whether, by the notion of sameness, one intends (1) identical normative formulation; (2) identical legal elements; or (3) substantial similarity, irrespective of the identical normative formulation or required elements. In short, the question is whether or not one has to seek sameness of normative provisions or comparative equivalence of normative provisions. The answer to that question will depend on whether the inquiry involves a broad "general principle" or not. By its very nature, a broad "general principle" does not require sameness in terms of its specific normative formulation, but a narrower or specific principle will require greater similarity.

In comparative criminal law research involving the determination of what constitutes a crime in different national legal systems, there is a substantial historical basis and national practice that provides a foundation for such an inquiry. This is embodied in the law and practice of international extradition that has been in existence for a substantial period of time throughout history and has been relied upon by almost all countries in the world. In that process, the search for comparative criminal legal provisions is referred to as the "principle of double criminality" or as the "principle of dual criminality."<sup>555</sup>

<sup>555</sup> See M. CHERIF BASSIOUNI, 1 INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE 319–80 (5th rev. ed. 2007); GERARD V. LAFOREST, EXTRADITION TO AND FROM CANADA 52–6 (2d ed. 1970) (noting

Under the principle of double/dual criminality, the requested state in an extradition process examines the crime charged by the requesting state and seeks to determine whether that crime also constitutes a crime under the national criminal laws of the requested state. In the course of that inquiry there are two methods: the application of the *in concreto* and *in abstracto* approaches.<sup>556</sup> In the *in concreto* approach, the use of which has been gradually abandoned since the late 1800s, the search is for whether or not the elements of the crime in the laws of the requested state are the same as the elements of the crime in the laws of the requesting state. In other words, the search is for greater specificity and sameness of incentive provisions. In the *in abstracto* application, which is now generally adopted by almost all states, the inquiry is whether or not the crime in the requested state is generally comparable to the crime in the requesting state.

The modern trend is to examine the underlying facts of the criminal charge to determine whether or not these facts would give rise in the requested state to the same or to a comparable charge as the one in the requesting state.<sup>557</sup>

Therefore, a person who is charged with the killing of another person without legal justification may be charged in different countries under different types of statutes involving criminal homicides. These homicide laws may have different labels, as well as distinctions as to either the different degrees or types of intentional killings and different elements required for each such offense. But all would have in common the same general elements: (1) the material element of one person engaging in conduct that produced

that it is the position of the Canadian government that "an exact correspondence between offenses in two countries cannot be expected. It is, therefore, not necessary that the crime concerned bears the same name in both countries. It is sufficient if the acts constituting the offence in the demanding state also amount to a crime in the country from which the fugitive is sought to be extradited even though it may be called by a different name. As already mentioned, it is the essence of the offence that is important."); see also ALUN JONES, JONES ON EXTRADITION (1995); OTTO LAGODNY, DIE RECHTSSTELLUNG DES AUSZULIEFERNDEN IN DER BUNDESREPUBLIK DEUTSCHLAND (1987); HAFID A. BOUKHRISS, LA COOPERATION PÉNALE INTERNATIONALE PAR VOIE D'EXTRADITION AU MAROC (1986); Manuel A. Vieira, *L'Evolution Récente de l'Extradition dans le Continent Américain*, 185 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL 155 (1984); V.E. HARTLEY BOOTH, BRITISH EXTRADITION LAW AND PROCEDURE (1980); IAN SHEARER, EXTRADITION IN INTERNATIONAL LAW 132-49 (1971); LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES (Council of Europe, European Committee on Crime Prevention, 1970); MARJORIE M. WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 773-79 (1968).

<sup>556</sup> See 39 RIDP (1968) dedicated to national reports on extradition from Austria, Belgium, Brazil, Chile, Czechoslovakia, Finland, France, Federal Republic of Germany, Greece, Hungary, Italy, Japan, Poland, Sweden, Switzerland, United States and Yugoslavia. All of these country reports indicate reliance on the principle of "double criminality," whether "*in concreto*" or "*in abstracto*."

<sup>557</sup> The principle of double/dual criminality is also required in all modalities of international cooperation in penal matters. See EKKEHART MÜLLER-RAPPARD & M. CHERIF BASSIOUNI, EUROPEAN INTER-STATE COOPERATION IN CRIMINAL MATTERS, LA COOPÉRATION INTER-ÉTATIQUE EUROPÉENNE EN MATIÈRE PÉNALE (2d ed. 1992). For different modalities of international cooperation in penal matters, see Bruce Zagaris, *United States Treaties on Mutual Assistance in Criminal Matters*, in INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 385 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Michael Plachta, *Cooperation in Criminal Matters in Europe: Different Models and Approaches*, in INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 457 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Heinrich Grützner, *International Judicial Assistance and Cooperation in Criminal Matters*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 189 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973). DOUBLE CRIMINALITY STUDIES IN INTERNATIONAL CRIMINAL LAW (Nils Jareborg ed., 1989). For a survey of Mutual Legal Assistance Treaties between the United States and other countries, see Ethan A. Nadelmann, *Negotiations in Criminal Law Assistance Treaties*, 33 AM. J. COMP. L. 467 (1985); Bruce Zagaris & David Simonetti, *Judicial Assistance Under U.S. Bilateral Treaties*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM 219 (M. Cherif Bassiouni ed., 1988).

the death of another; (2) the mental element of intention to commit the act, however described; and (3) the causation between conduct and resulting death.

As a result of the above, the fact that a person would be charged in one country with a crime called murder, whereas in another it is called intentional killing or voluntary manslaughter, would not be legally relevant to a finding that double/dual criminality exists. The reason is that the underlying facts would give rise to a similar, though not necessarily identical, charge in the requested state.

The inquiry then focuses on the general characteristics of the crime charged in comparative analysis and not on the sameness, identity of the label of the crime, or the legal elements needed to prove it. It would be of no consequence to the requested state if the charge by the requesting state is murder or intentional killing or voluntary manslaughter or, for that matter, involuntary manslaughter, so long as the crime charged, irrespective of the specificity of its elements, generally corresponds to an equivalent counterpart crime in the requested state. Therefore, the issue will not turn on what type of mental element is required – that is, for the offense of murder or first-degree murder, or voluntary manslaughter or involuntary manslaughter. Rather, the inquiry will be whether the facts of the conduct allegedly committed by the individual sought constitute the material element of the killing of one person by another, accompanied by some type of mental state, and which resulted in a death. If these basic facts would constitute a homicidal offense in both the requested and requesting states, then extradition shall be granted.

On the basis of the methodology described above, this writer conducted research in the pre-London Charter criminal laws of the most representative countries reflecting the world's major criminal justice systems.<sup>558</sup> That research revealed that the crimes contained in Article 6(c) of the London Charter were deemed crimes in the national criminal laws of the most representative countries reflecting the world's major criminal justice systems. Consequently, they can be deemed part of "general principles of law."

None of the international tribunals ever explicitly followed this methodology, including the IMT, IMTFE, the *ad hoc* tribunals, and the mixed-models. One has a feeling at times that the judges are internalizing this process, and that they may be undertaking an internal intellectual exercise. However, this process has never been articulated, defined, or specifically stated. This is still relevant today, because Article 7 contains specific

<sup>558</sup> In 1987 this writer served as Canada's chief legal expert in the first case brought in that country on charges of CAH arising out of WWII. Because Canada's legislature requires proof that such a category of crimes existed in international law at the time of the acts charged, it was necessary to prove the existence and elements of that crime. This writer proceeded to research the criminal laws of 39 of the 74 countries that existed at that time. The extensive research included presentation of copies of the criminal laws of these thirty-nine countries, with English translation, of all the specific acts listed in Article 6(c) of the London Charter. Furthermore, expert officials from each one of these countries described the elements of these crimes in their respective national criminal law. The result was proof of the existence of all the specific acts listed in Article 6(c), except for "persecution" *per se*. The following 34 states were selected for specific empirical study because they are geo-politically representative of all the then existing countries of the world, and more importantly, because they represent the major criminal justice systems of the world. This selection reflects the methodology outlined above, which is based on the representation of all families of legal systems. These countries are Argentina; Arabian Peninsula; Australia; Austria; Belgium; Brazil; Chile; China; Columbia; Czechoslovakia; Denmark; Egypt; Ethiopia; Finland; France; Germany; Ghana (Gold Coast); Greece; Hungary; India; Italy; Japan; Liberia; Mexico; Netherlands; New Zealand; Poland; Portugal; South Africa; Spain; Sudan; Switzerland; Tunisia; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United States; Venezuela; and Yugoslavia.

crimes, and the question arises as to how these specific crimes are going to be defined. Even the findings of cases are not specific, and often the findings seem generalized.

## Conclusion

The contents of the specific crimes included in CAH formulations are fairly easy to ascertain. However, deviant human imagination is always capable of designing new ways to inflict human harm. Thus, the law must be flexible enough, without breaking the principles of legality, to extend to these variations on the theme of mass atrocity crimes. But beyond such a broad-brush approach, it is more difficult to ascertain the legal elements of such crimes without reference to “general principles,” with all that this method comports of problems relating to the principles of legality.<sup>559</sup> For a penalist requiring specificity, this is an arduous task. This is why positivists, whether publicists or penalists, challenge the contents of CAH as formulated in Article 6(c) of the London Charter, which came about in reaction to Nazi atrocities and was largely tailored to address such conduct. To validate its pre-1945 existence, and to some extent even today, is like weaving a tapestry with uneven threads and expecting to come out with a cohesive and harmonious result. Instead, the product that comes out is of uncertain design with contrasting colors. Nevertheless, a definite commonality exists among all these threads, and the product ultimately reveals an overall harmony. But if it were not for the determination of the weavers at Nuremberg and their power positions, the final product would not have been achieved. Indeed, those weavers – the Charter’s drafters, the prosecutors and the judges – were, for all practical purposes, part of the same team.<sup>560</sup>

Surely one can find support for the proposition that the specific crimes listed in Article 6(c) of the Charter, with the exception of “persecution” *per se*, existed before 1945 in the world’s major criminal justice systems, as evidenced in this chapter. It can also be shown that these acts were prohibited in whole or in part in “general principles of law.”

Since 1945 the overall situation has not changed significantly with respect to the specificity of Article 6(c) crimes, since no comprehensive convention on CAH was adopted, even though so many other conventions in the field of ICL have been adopted.<sup>561</sup> Certainly, it cannot be argued that the legal needs evidenced by the London Charter and its ensuing prosecutions and by the post-Charter developments have not been readily apparent since 1945, nor can it be argued that similar crimes have ceased.<sup>562</sup> Thus, the unexplainable void fills the concerned with justifiable perplexity and frustration.

Article 5 of the ICTY, Article 3 of the ICTR, and Article 7 of the Rome Statute confirm all of Article 6(c)’s contents. This establishes customary law as to the definitional content of CAH. Article 7 of the Rome Statute brought about some changes, as well as specificity, to the contents of CAH. However, because the ICC is established by treaty and the application of its provisions is prospective, it cannot be said to be in violation of the principles of legality. Thus, the basic difference between Article 7 of the Rome Statute and Article 6(c) of the Charter is that the concerns about the legality with prior formulations do not exist with respect to Article 7.

<sup>559</sup> See *infra* ch. 5.

<sup>560</sup> See *infra* ch. 3, §§3–5.

<sup>561</sup> See BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW ch. 3 (M. Cherif Bassiouni ed., 3d. rev. ed. 2008).

<sup>562</sup> See *generally infra* chs. 4, 9.



It is important to note that CAH was first defined in the aftermath of the Nazi atrocities of World War II and was largely tailored to address such conduct. Even the most modern definitions did not take into account that the majority of specific acts are either redundant or insufficiently defined, or have been incorporated into new conventions criminalizing them, as in the case of torture.

Understandably, the drafters of the contemporary instruments felt that states would perceive these new texts as offering a higher level of comfort if the wording remained the same as previous texts. Nevertheless, as discussed in this Chapter and as evidenced by the jurisprudence of the various tribunals, it is clear that the judges have at times been wrestling with arcane, if not archaic terminology with weaknesses that were perceived at the time of immediate post-Charter developments, but which one would have assumed by now to have been corrected.

One of the obvious problems that this situation creates is how to distinguish specific acts such as torture and slavery and slave-related practices as separate crimes that are still part of CAH. In short, can a person be guilty of both crimes, or is the specific crime deemed part of the broader criminal category, what is referred to in domestic criminal law as an included offense. Moreover, questions arise with respect to sentencing for what may constitute multiple crimes, and also as to whether the sentences are to run concurrently or consecutively.

These issues raise further questions as to whether ICL is really able to doctrinally address the characteristics of a state crime or a crime that is the product of a nonstate actors' group policy, and which is by its very nature a dual-dimension collective crime, meaning its perpetrators act in a collective manner and the victims are a collective. Surely, these types of crimes are different and must be treated differently from individual crimes, as discussed in [Chapter 2](#).

## 7 The Theories and Elements of Criminal Responsibility

In the law, it is not the obvious that needs to be specified, but the ambiguous that must be clarified.

### Introduction

All criminal justice systems of the world recognize the concept of individual criminal responsibility. Consequently, individual criminal responsibility is a “general principle of law” applicable to ICL. But national criminal justice systems have developed a variety of individual criminal responsibility doctrines. The divergences that exist among families of legal systems, and within them the differences as to doctrines of criminal responsibility (and their corollary elements), make it difficult to identify among them that which would constitute “general principles of law” that could be applied to ICL. As discussed in [Chapter 6](#), the method by which “general principles of law” can be identified in comparative criminal law makes it difficult to reach outcomes that can be ascertained with any degree of scientific validity.

Although it can be asserted that the general principle of individual criminal responsibility exists in all of the world’s criminal justice systems, it cannot be said, for example, that membership in a group deemed criminal by operation, and based on that group’s purposes and/or actions, or other attempts to address collective responsibility, is so generally recognized.

The range of what legal systems include as part of individual criminal responsibility includes several models, which are essentially based on the policies of prevention and repression that a given legal system decided to select and apply. For example, some states provide for criminal responsibility of legal entities as the counterpart of physical persons. The policy supporting this doctrine is based on the fact that individuals operate legal entities and derive benefits therefrom. It follows that if the legal entity is criminally sanctioned by fine and the interdiction from operating, the consequent economic loss will reach the entity’s operators and the others who also benefit as the shareholders. Presumably, the loss of economic benefits will cause the shareholders to be diligent in their choice of directors, and the directors more judicious in their management. The outcome, as in all theories of prevention and deterrence, is assumed to have the effect of enhancing compliance and reducing noncompliance.

The same reasoning exists with respect to theories of responsibility for the conduct of others. Some of these theories partake of civil law, which includes civil liability for harmful conduct. The social policies reflected in civil and regulatory norms are also designed to enhance compliance and reduce noncompliance. Thus, it is not unusual to see legal systems moving civil law doctrines of wrongful and harmful conduct into the criminal law. Suffice it to compare national laws on vehicular accidents to see how many have moved reckless driving resulting in death into the category of homicide. Whereas some legal systems have done so by articulating reasons why recklessness is not a more serious form of negligence, which in Civilist systems would be *dolus eventualis* (the equivalent of the common law's unintentional conduct), but a form of general criminal intent.

This book is not the place for more extensive discussion of comparative criminal law, but the reader should be mindful of the problems posed by any valid methodology designed to ascertain what certain "general principles of law" are in the area of comparative criminal law. This may explain why there is so little evidence of a judicial methodology relied upon to ascertain the theories of criminal responsibility in almost all of the decisions of international tribunals from the IMT to the ICC. The absence of method necessarily means the absence of consistency in following the method in decision-making. For all practical purposes, the method of judicial decision-making from the IMT to the ICC is *ad hoc*, devoid of methodology, and, consequently, disparate. The only way to track the evolution of bases and models of criminal responsibility, as well as their elements and the grounds for exoneration, is a non-doctrinal approach.

Paradoxically, the absence of a doctrinal approach is in itself an approach, which in the practice of all international tribunals tends toward a narrowed common law approach, but one that is implicitly justified by an *ad hoc* judicial practice that has ripened into a doctrine of precedential validity – the rough equivalent of the common law's *stare decisis*. This is particularly true with respect to the ICTY's doctrine of joint criminal enterprise, which has no specific precedent in any legal system, and which is a patchwork of different components of criminal responsibility doctrines borrowed from several legal systems. Once postulated, the doctrine embodied in its first judicial decision made its way to judicial firmness by consistent reiteration. In other words, this was not a process of judicial accretion (which brings about the growth of an idea) that gave the doctrine its precedential authority, but its simple reiteration – a very existentialist phenomenon.

What follows is simply a compilation of doctrines and practices seen through the jurisprudence of international and mixed-model tribunals.

## §1. International Criminal Responsibility of Individuals

The concept of individual criminal responsibility arising directly under ICL and subject to direct enforcement by international tribunals first arose in connection with the London Charter and the Tokyo Charter, and then applied in the prosecutions before the IMT and IMTFE.<sup>1</sup>

<sup>1</sup> See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

Article 6 of the London Charter established the principles of individual criminal responsibility.<sup>2</sup> The IMT Judgment held, “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>3</sup> Subsequently, on December 11, 1946, the General Assembly formulated what became known as the “Affirmation of the Nuremberg Principles,”<sup>4</sup> and confirmed the principle of direct individual criminal responsibility under ICL, irrespective of the dictates of national law.

These precedents were reinforced with the establishment of ICTY<sup>5</sup> and ICTR,<sup>6</sup> where the principle of individual criminal responsibility for commission of international crimes is embodied in Articles 7(1) and 23(1) of the ICTY Statute and in Articles 6(1) and 22(1) of the ICTR Statute.<sup>7</sup> The Rome Statute provides for individual criminal responsibility and its related questions of defenses in Articles 25 to 33.

The ILC’s 1996 Draft Code of Crimes against the Peace and Security of Mankind, though to date not approved by the General Assembly, provides in Article 2,

1. A crime against the peace and security of mankind entails individual responsibility.
2. An individual shall be responsible for the crime of aggression in accordance with article 16.
3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
  - a. intentionally commits such a crime;
  - b. orders the commission of such a crime which in fact occurs or is attempted;
  - c. fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
  - d. knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
  - e. directly participates in planning or conspiring to commit such a crime which in fact occurs;

<sup>2</sup> See Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]. The same principle was established in the IMTFC Charter, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946; T.I.A.S. No. 1589, 4 BEVANS 20 to which the IMTFC Charter was annexed.

<sup>3</sup> NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT OF THE IMT 66 (1947); see also I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 223 (1947).

<sup>4</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, GA Res. 95 (I), UN Doc. A/236 (1946), at 1144.

<sup>5</sup> See Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1–2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute].

<sup>6</sup> See Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

<sup>7</sup> See ICTY Statute, *supra* note 5; ICTR Statute, *supra* note 6; see also M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), THE LAW OF INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 491 (1996) [hereinafter BASSIOUNI, THE LAW OF THE ICTY]; Larry Johnson, *The International Tribunal for Rwanda*, 67 RIDP 211 (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2 vols. 1998).

- f. directly and publicly incites another individual to commit such a crime which in fact occurs;
- g. attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.<sup>8</sup>

The General Assembly's Preparatory Committee on the Establishment of an International Criminal Court addressed the issue of individual criminal responsibility early in its work. In its 1996 Report, the Committee stated that "[i]t was generally accepted that the concept of individual criminal responsibility for the crimes, including those acts of planning, instigating and assisting the person who actually committed the crime, was essential and should be stipulated in the Statute [of the ICC]."<sup>9</sup> These postulates were incorporated into the Rome Statute.

Article 25 of the Rome Statute is the most recent and comprehensive provision on individual criminal responsibility in ICL.<sup>10</sup> It contains four paragraphs: the first provides that the ICC has jurisdiction over natural persons; the second reiterates the principle of individual criminal responsibility; the third is the basis for an examination of individual and participatory liability; and the fourth deals with attempt to commit a crime. Article 25 is discussed in greater detail below.

Whereas these precedents and contemporary legal developments establish both the principle of individual criminal responsibility under ICL and the ability of ICL to directly enforce this principle without going through the mediation of states, other issues arise in connection with the legal content of individual criminal responsibility.

National criminal justice systems differ as to what constitutes criminal responsibility, what conditions constitute exonerations, and other questions of criminal responsibility arising under the "general part" of national criminal law; thus, it is neither sufficient nor satisfactory that certain ICL instruments propound the principle of individual criminal responsibility before international bodies without addressing the questions of the "general part." Understandably, this is a difficult task, but without a "general part," attribution of individual criminal responsibility under ICL raises questions about whether it is contrary to the requirements of the principles of legality, which are discussed in Chapter 5.

It is in this respect that one can see the difficulty of making the transition from the "indirect" to the "direct enforcement system" in ICL. But that difficulty is not inherent in the discipline of ICL; rather it is a consequence of the shortsightedness of the international legislative process through which ICL develops, a process whose participants are diplomats and not experts in ICL and comparative criminal law and procedure. An extension of the problem of the lack of a "general part" in ICL is the absence of jurisdictional

<sup>8</sup> Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. A/51/10 (1996) at 72 [hereinafter 1996 Draft Code of Crimes].

<sup>9</sup> See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II (Compilation of proposals), U.N. GAOR, fifty-first session, Supp. No. 22A (A/51/22) (1996) [hereinafter 1996 PrepCom Report] at Vol. II, p. 44, & 191.

<sup>10</sup> See The Rome Statute of the International Criminal Court arts. 25, 26, 27, and 28, 17 July 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 [hereinafter ICC Statute].

norms or standards to be used to determine when ICL's established basis of responsibility is to be enforced by national criminal justice systems, and, when jurisdiction will vest in an international investigatory and adjudicatory body, whether such international jurisdiction is established on an *ad hoc* basis by the Security Council pursuant to its Chapter VII powers or by the ICC.

The primacy of such direct enforcement mechanisms over national criminal justice systems is not settled. With respect to the ICTY and ICTR, the Security Council, which created these bodies as the functional equivalents of subsidiary organs of the Council, established the primacy of these Tribunals over national criminal justice systems. But this was possible because the Security Council established these bodies pursuant to its powers under Chapter VII of the United Nations Charter.<sup>11</sup> However, a treaty established the ICC, and the question of its jurisdictional relationship with national criminal justice systems is controlled by the principle of complementarity and other jurisdictional mechanisms.<sup>12</sup>

The conclusions drawn by this author are as follows:

- (1) The principle of individual criminal responsibility is a "general principle" of national criminal law and of ICL, but it does not exclude other forms of criminal responsibility;
- (2) ICL can develop proscriptive norms which can be enforced by national criminal justice systems, ("indirect enforcement"), as well as through internationally established bodies ("direct enforcement");

<sup>11</sup> See BASSIOUNI, *THE LAW OF THE ICTY*, *supra* note 7, at ch. 2, p. 201.

<sup>12</sup> See ICC Statute arts. 12, 13, *supra* note 10. The text of these articles provide:

#### Article 12

##### Preconditions to the exercise of jurisdiction

- 1 A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
- 2 In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
  - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
  - (b) The State of which the person accused of the crime is a national.
- 3 If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

#### Article 13

##### Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

- (3) The primacy of “direct enforcement” over “indirect enforcement” is not settled, except insofar as the primacy of Security Council established bodies based on Chapter VII of the United Nations Charter;
- (4) Treaty-created bodies designed to enforce ICL are regulated by provisions contained in that treaty as to relations with national criminal justice systems and that includes primacy issues;
- (5) ICL norms that rise to the level of *jus cogens*, or are part of general customary law, have primacy over substantive and procedural notions of law, as do treaty-created norms, unless notions of law hold to the contrary and that is reflected as a reservation of understanding contained in the instrument of ratification;
- (6) Jurisdictional primacy issues between national criminal justice systems and internationally created enforcement bodies, whether *ad hoc* or permanent, are independent of substantive issues pertaining to the primacy of ICL norms over contradictory or inconsistent national norms, even though both sets of issues derive from the concept of national sovereignty, because the first are more of a procedural nature and the second are purely substantive in nature.

These conclusions have a direct bearing on some of the legal issues pertaining to the “general part.” For example, how will these conclusions affect the interpretation of the “general principle” *ne bis in idem*?<sup>13</sup> Clearly, if an international body has primacy, as does the ICTY,<sup>14</sup> then a judgment by that body bars any national jurisdiction from subsequent adjudication. But the reverse may not necessarily be true if, for example, the judgment of a national jurisdiction is found to have been intended to defeat the purpose of the international body’s exercise of jurisdiction.

The problems of primacy of an international jurisdiction and primacy of ICL norms over national ones derive essentially from the proposition that both international law and international jurisdiction are not deemed supranational because of the existence of the doctrine of state sovereignty. But international law implies the recognized

<sup>13</sup> See ICC Statute art. 20, *supra* note 10. It provides:

Article 20  
*Ne bis in idem*

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried before another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
  - (a). Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
  - (b). Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Interestingly, this article was not put in the ICC’s “general part,” but in Part 2 that is entitled “Jurisdiction, Admissibility and Applicable Law.”

<sup>14</sup> See ICTY Statute arts. 9 and 10, *supra* note 5; see also BASSIOUNI, LAW OF THE ICTY, *supra* note 7, at 306–34.



cession of some sovereign characteristics by national legal systems to the international one.

However, the ICC's principle of complementarity gives primacy to national jurisdictions.<sup>15</sup> Nevertheless, the ICC developed detailed norms for the "general part" that are applicable to cases within the jurisdiction of the Court. They are Article 22, "*Nullum crimen sine lege*"; Article 23, "*Nulla poena sine lege*"; and Article 24, "Non-retroactivity *ratione personae*." Thus, the ICC has developed a codification that can be said to embody "general principles of law" because it represents a blending of different legal systems that has been approved by 120 states.<sup>16</sup> The Rome Statute did not include penalties within the "general part," but dealt with that topic in a separate part.<sup>17</sup>

### §1.1. *Doctrinal Differences in International Law and National Criminal Law Related to Individual, Group, and State Responsibility: General Considerations*

Are the subjects of ICL only individuals, or does ICL's *ratione personae* also include legal entities such as organizations and states? The answer to this query depends essentially on whether the legal doctrine relied upon in the analysis stems from national criminal law or from international law, and with respect to national criminal law doctrine, whether it derives from the Romanist-civilist tradition or from the common law tradition.

Traditionally, under the Romanist-civilist law systems, *les personnalités morales* (legal entities) could not be held criminally responsible; only individuals could. But recently, some changes that extend criminal sanctions to legal entities have occurred in that legal tradition, as evidenced in contemporary national criminal legislation dealing with "organized crime"<sup>18</sup> and "white collar crime."<sup>19</sup>

The common law tradition, which is characterized by pragmatism and is less constrained by doctrinal or dogmatic considerations than the Romanist-civilist and Germanic systems,<sup>20</sup> has evolved norms for the responsibility of legal entities that include sanctions akin to those for individual criminal responsibility. Thus, in common law systems, legal entities may be fined and their assets may be seized. Decision-makers of these entities can also be held individually responsible for harm caused by the entities.<sup>21</sup> Such a form of criminal responsibility can be based either on an expanded concept of conspiracy or on the ground of belonging to a criminal organization.<sup>22</sup> These new concepts of corporate criminal responsibility have not yet found their way into ICL, but

<sup>15</sup> See ICC Statute art. 12, *supra* note 10, "Preconditions to the exercise of jurisdiction."

<sup>16</sup> On July 17, 1998, the final vote for the adoption and opening for signature of the Rome Statute was 120 in favor; 7 against; and 21 abstentions.

<sup>17</sup> See ICC Statute arts. 77, 78, 79, 80, *supra* note 10, at Part 7 "Penalties."

<sup>18</sup> See, e.g., Italian Code of Criminal Law, *Associazione per Delinquere*, Articles 416–18, *Associazione Sover-siva*, Article 270 and *Associazione per Delinquere di Stampo Mafioso*, Article 416 bis; the French Criminal Code Article 265–7, *Association de Malfaiteurs*.

<sup>19</sup> See INTERNATIONAL CONGRESS OF COMPARATIVE LAW, *LA CRIMINALISATION DU COMPORTEMENT COL-LECTIF: XIVE CONGRÉS INTERNATIONAL DE DROIT COMPARÉ* (Hans de Doelder & Klaus Tiedeman eds., 1996).

<sup>20</sup> See, e.g., GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

<sup>21</sup> For the responsibility of corporate directors and officers in U.S. law, see M. CHERIF BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 149–57 (1978).

<sup>22</sup> See *infra* note 39, and for the U.S., see Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961–8 (1984).

contemporary international efforts to deal with “organized crime,”<sup>23</sup> “corruption,”<sup>24</sup> and “drug trafficking” move in this direction.<sup>25</sup>

The differences between the world’s major legal systems are narrowing on the issue of whether a legal abstraction can commit a crime and can be found criminally responsible.<sup>26</sup> Certainly, legal entities, as legal abstractions, can neither think nor act as human beings, and what is legally ascribed to them is the resulting harm produced by individual conduct performed in the name or for the benefit of those participating in them. The need to develop a legal theory concerning the criminal responsibility of legal entities such as organizations and states derives from the fact that traditional doctrines of individual criminal responsibility are not well suited to dealing with the type of group conduct that is carried out under the cover of legal entities.<sup>27</sup>

Whereas ICL has clearly recognized that individuals are criminally accountable and that organizations can also be deemed criminally responsible, this concept has not yet been applied to states, though it has been articulated, in theory, in the ILC’s Draft

<sup>23</sup> The United Nations, led by Poland, undertook efforts to develop an international convention criminalizing organized crime in international criminal law. The result was The United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex, U.N. Doc. A/Res/55/25/Annex (Nov. 10, 2000). For the efforts leading up to the convention, see *Questions on the Elaboration of an International Convention Against Organized Transnational Crime*, G.A. Res. 51/120, 51st Sess., U.N. Doc. A/RES/51/120 (1996); *Questions on the Elaboration of an International Convention Against Organized Transnational Crime, Letter dated 24 September 1996 from the Minister for Foreign Affairs of the Republic of Poland addressed to the Secretary General*, U.N. GAOR, 3d Committee, 51st Sess., Agenda Item 158, U.N. Doc. A/C.3/51/7 (1996). These efforts began in 1994 in Naples with the World Ministerial Conference on Organized Transnational Crime. See *Report of the World Ministerial Conference on Organized Transnational Crime*, U.N. GAOR, 49th Sess., Annex, Agenda Item 96, U.N. Doc. A/49/748 (1994). For a review of UN efforts in combating organized crime, see ORGANIZED CRIME: A COMPILATION OF UNITED NATIONS DOCUMENTS, 1975–1998 (M. Cherif Bassiouni & Eduardo Vetere eds., 1999); THE UNITED NATIONS AND TRANSNATIONAL ORGANIZED CRIME (Phil Williams & Ernesto U. Savona eds., 1996).

<sup>24</sup> The UN has stepped up its efforts to combat public corruption, but has yet to develop a convention on the subject. On January 28, 1997, the General Assembly, adopted the International Code of Conduct for Public Officials in its Resolution on Action against Corruption, G.A. Res. 51/59, U.N. Doc. A/RES/51/59 (1997). The Organization of American States has recently developed a convention against public corruption. See Inter-American Convention against Corruption, Mar. 29, 1996, OES/ser. K/XXXIV.1 CICOR/doc. 14/96 rev. 2. For background and an explanation of its provisions, see Bruce A. Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 FORDHAM INT’L L. J. 1888 (1996); Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. 179 (1996). For a general discussion, see Charles S. Saphos, *Something Is Rotten in the State of Affairs between Nations: The Difficulties of Establishing the Rule of International Criminal Law because of Public Corruption*, 19 FORDHAM INT’L L. J. 1947 (1996).

<sup>25</sup> See *Report of the Secretary General on Progress Made in the Implementation of General Assembly Resolution 49/158*, U.N. GAOR, 50th Sess., Provisional Agenda Item 108, U.N. Doc. A/50/432 (1995); *Report of the World Ministerial Conference on Organized Transnational Crime*, U.N. GAOR, 49th Sess., Annex, Agenda Item 96, U.N. Doc. A/49/748 (1994). For a discussion of international control of drugs see Bernard Leroy, M. Cherif Bassiouni & Jean-François Thony, *The International Drug Control System*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 855 (M. Cherif Bassiouni ed., 3d rev. ed., 2008).

<sup>26</sup> Though scholars in these systems are likely to argue, properly so, that similarities in outcomes do not negate differences in doctrinal bases. FLETCHER, *supra* note 20, and INTERNATIONAL CONGRESS OF COMPARATIVE LAW, LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: XIVE CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, *supra* note 19.

<sup>27</sup> As Lacey wrote, we must “entertain the possibility that particular conceptions of responsibility might have distinctive conditions of existence – intellectual, cultural, economic, social, political, or otherwise.” Nicola Lacey, *In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory*, 64 MOD. L. REV. 350, 355 (2001).

Article 19 of the Principles of State Responsibility.<sup>28</sup> Under international law, states are the subject of accountability for wrongful conduct, and this may result in the imposition of damages and other sanctions against them. Publicists and penalists argue that states' sovereignty precludes their criminal accountability and that, as legal abstractions, states cannot be subjected to criminal responsibility in the same way as individuals. Both arguments are valid, but they ignore the need to deter and punish persons who act under color of state authority or through organizations, and who use the instrumentalities and capabilities of the state or the organization in question to commit international crimes.

The doctrinal debates among penalists and publicists offer an abundance of arguments for propositions that conclude for or against the criminal responsibility of legal entities, be they private (organizations) or public (including states and their organs). Nevertheless, all positions now accept, in some form, the principle that a legal entity, private or public, through its policies or actions can transgress a norm for which the law, whether national or international, provides damages, at the very least, that could be both compensatory and punitive, and other remedies, such as seizure and forfeiture of assets. Thus, the query concerning the international criminal responsibility of legal entities is how to label it, how to define it, what penalties apply to it, and how to enforce such penalties.<sup>29</sup>

However, it must be noted that since legal entities are legal abstractions whose policies and operations are made and carried out by individuals, further refinement is needed in distinguishing between the criminal responsibility of individuals and that of legal entities. Furthermore, a distinction needs to be made between the consequences of criminal responsibility of legal entities for individuals who are decision-makers and executors of decisions to commit the proscribed conduct, individuals who are low-level actors, and those who are merely members of the entities whose individual role in the proscribed conduct has not been established.

An interrelationship may exist between direct individual criminal responsibility and indirect individual criminal responsibility resulting from criminal acts of a state or an organization, but these two types of international criminal responsibility must be clearly distinguished. Criminal responsibility of states and organizations must necessarily be established through the conduct of individuals. To the extent that such persons' individual conduct for or on behalf of a state or an organization is deemed criminal when they acted for or on behalf of a state or an organization, they are also individually accountable. Thus, the argument that states or organizations' criminal responsibility derives from that of the individual, and vice versa, is tautological. Indeed, individual criminal responsibility is needed to establish the legal entity's basis of responsibility. But once that criminal responsibility is established, it also results in the derivative responsibility of those individuals who acted for or on behalf of that entity. Furthermore, if the same persons are to be both the source and consequence of the criminal responsibility, the argument favoring an independent basis for direct individual criminal responsibility, as opposed to derivative individual criminal responsibility, is self-evident. Therefore, a distinction must be established between direct and derivative individual criminal responsibility. In

<sup>28</sup> See Draft Code of Principles of State Responsibility, U.N. GAOR, Int. Law Comm., 46th Sess., Supp. No. 10, at 3327, U.N. Doc. A/49/10 (1994). IAN BROWNLIE, *STATE RESPONSIBILITY: SYSTEM OF THE LAW OF NATIONS* (1983).

<sup>29</sup> See INTERNATIONAL CONGRESS OF COMPARATIVE LAW, *LA CRIMINALISATION DU COMPORTEMENT COLLECTIF: XIV<sup>e</sup> CONGRÈS INTERNATIONAL DE DROIT COMPARÉ*, *supra* note 20.

addition, as a matter of legal policy, a distinction should be established between the criminal responsibility of the decision-makers and senior executors who plan and initiate the proscribed conduct, those who carry it out or allow it to occur by purposeful omission when they could have prevented it, and those who are at lower echelons of the process.

Lastly, there is the question of the consequences of imposing criminal responsibility on a state, because the penalties for state criminal responsibility may apply collectively to persons who are innocent of the state's proscribed conduct. This raises fundamental questions of justice and fairness and thus argues against indiscriminate criminal sanctions for state or group criminal responsibility that would befall persons whose individual criminal responsibility was not established. Thus, it is necessary to distinguish between (1) conduct that gives rise to direct individual criminal responsibility; (2) conduct that gives rise to the criminal or quasi-criminal responsibility of legal entities; (3) conduct that gives rise to derivative individual criminal responsibility, as a consequence of the criminal responsibility of legal entities; and (4) the consequences of criminal sanctions against persons whose individual criminal responsibility has not been established.

With respect to distinctions between criminal responsibility of individuals and public and private legal entities, the first distinguishing characteristic is that individual criminal responsibility arises whenever a person, with intent, knowledge, or recklessness, engages in a conduct deemed violative of an existing norm irrespective of the resulting harm, or fails to perform a pre-existing legal duty, the result of which is also a violation of an existing norm. These features of individual criminal responsibility are generally recognized in contemporary penal legal systems, irrespective of their differences and variations on that theme.

Beyond that, an individual may engage in concert of action with others with the requisite mental state to commit collectively, as opposed to individually, the violation of an existing norm. In such instances, when the collective individual conduct (whether by omission or commission) is performed for or on behalf of, or under color of authority of a legal entity, that conduct may be ascribable to that legal entity, as well as to each individual person who has been a part of the decision-making process or the execution of decisions that resulted and that constitute a violation of a particular legal norm. The question then becomes one of apportioning legal responsibility between the individual and the legal entity, and that is more a question of legal policy than a question of the principle of who is responsible for what, which sanctions follow, and the purpose of such sanctions. However, these questions do not dispose of many other questions involved in determining responsibility, its typology, the means and methods of ascertaining it, the appropriate sanctions and remedies, and the appropriate enforcement modalities.

The resolution of these issues may depend on the nature of each type of transgression, rather than on some abstract principle or doctrine of internal or international law that could hardly be, at once, broad enough to encompass all types of transgressions and yet specific enough to satisfy the basic and derogable principles of legality: *nullum crimen sine lege* and *nulla poene sine lege*. As such, it is the belief of this writer that whereas the *ratione personae* of ICL applies to individuals and legal entities both private and public, all other legal issues pertaining to the penal responsibility of legal entities should depend on the type of transgression and the policies developed to prevent and punish the transgression in question. That will depend on the *ratione materiae* of each international crime because of the diverse nature and consequences of such crimes. In that respect, there is another potential conflict between international and national law when the

former establishes a prohibition and the latter commands, permits, or condones that very conduct. In response to such a potential conflict, ICL has developed specific norms on the defense of obedience to superior orders and command responsibility.<sup>30</sup> But more generally, ICL purports to be hierarchically superior to national law with respect to *jus cogens* crimes, which states cannot derogate.<sup>31</sup>

The Rome Statute specifically did not include the notion of state criminal responsibility and other forms of group responsibility. But it especially stated, “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law,” thus leaving open the prospects of future developments of ICL that could include state criminal responsibility.<sup>32</sup>

Article 25 also provides for responsibility for conduct of another, as discussed in the ensuing section. Article 25, paragraph 3 provides:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - d. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - ii. Be made in the knowledge of the intention of the group to commit the crime.

### §1.2. *Responsibility for the Conduct of Another and Group Responsibility in the Law of the IMT, IMTFE, and CCL 10: The Foundations of Contemporary Notions*

CAH often connotes a plurality of offenders, which explains why in the Nuremberg Judgment and the Subsequent Proceedings many convictions were based on accomplice liability or criminal participation. But accomplice liability has limitations when applied

<sup>30</sup> YORAM DINSTEIN, THE DEFENSE OF “OBEDIENCE TO SUPERIOR ORDERS” IN INTERNATIONAL LAW (1965); LESLIE C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976); NICO KEIJZER, MILITARY OBEDIENCE (1978); EKKHART MULLER-RAPPARD, L’ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ PÉNALE DU SUBORDONNÉ (1965); Leslie C. Green, *Superior Orders and Command Responsibility*, 1989 CAN. Y.B. INT’L L. 167.

<sup>31</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996).

<sup>32</sup> ICC Statute art. 25, *supra* note 10.

to culprits of “system criminality”<sup>33</sup> or “collective wrongdoing.”<sup>34</sup> The words of A. N. Trainin speak to this point:

[A]s distinct from common crimes, international crimes are almost always committed not by one person, but by several or many persons – a group, a band, a clique.

The accomplices in international crimes are extremely peculiar in their official position and their social composition. These are not some Tom, Dick or Harry of unknown lineage, without hearth or home. These are ‘titled personages’, upper classes, Ministers, generals, ‘leaders’. But the particularly complicated character of responsibility for complicity in international crimes is determined, of course, not by the high ranks and titles of the accomplices. The complexity and exceptional peculiarity of the structure of complicity, in international crimes are caused by the extremely complex connections between the individual accomplices in international offences.

[ . . . ]

The peculiarity of the role of the perpetrator of an international crime consists in this: that he acts not only himself but also with the help of a complex executive machinery. In the hands of international criminals, masses of peoples become an instrument of the most heinous crimes, just as a knife becomes an instrument of crime in the hands of a murderer.<sup>35</sup>

Imputed criminal responsibility varies from one legal system to another and its different doctrinal bases and applications also vary within each legal system; therefore, it is difficult to find sufficient commonality among the world’s major legal systems to arrive at a general principle.

Colonel Murray C. Bernays, in his memorandum entitled “Trial of European War Criminals”, proposed a trial that dealt with pre-World War II and wartime atrocities.<sup>36</sup> The Bernays approach was notable because, on the basis of individual responsibility, it enabled the conviction of each of the perpetrators of crimes, their superiors, and the thousands of lower echelon Nazis who were passive observers. In his proposal, Bernays provided as follows:

The basic difficulty with the suggestions heretofore considered is in the approach. It will never be possible to catch and convict every Axis war criminal, or even any great number of them, under the old concepts and procedures. Even if this could be done it would not, of itself, be enough. The ultimate offence, for example, in the case of Lidice, is not alone the obliteration of the village, but even more, the assertion of the right to do it. The ordinary thug does not defend on the ground that thuggery is noble; he only contends that the police have arrested the wrong man. Behind each Axis war criminal, however, lies the basic criminal instigation of the Nazi doctrine and policy. It is the guilty nature of this instigation that must be established, for only thus will the conviction and punishment of the individuals concerned achieve their moral and juristic significance. In turn, this approach throws light on the nature of the individual’s

<sup>33</sup> B. V. A. Röling, *Aspects of the Criminal Responsibility for Violations of the Laws of War*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 203 (A. Cassese ed., 1979).

<sup>34</sup> A. Jokic (ed.), *WAR CRIMES AND COLLECTIVE WRONGDOING: A READER* (2001).

<sup>35</sup> A. N. TRAININ, *HITLERITE RESPONSIBILITY UNDER INTERNATIONAL LAW* 79 (1944).

<sup>36</sup> B. F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944–1945*, Doc. 16, 33–37 (1982).

guilt, which is not dependent on the commission of specific criminal acts, but follows inevitably from the mere fact of voluntary membership in organisations devised solely to commit such acts.<sup>37</sup>

The Bernays approach heralded the theory of collective criminality utilized at Nuremberg, where both crimes and criminals were collectivized.<sup>38</sup> According to this approach, collectives – namely, the SS, the Gestapo, and the Nazi cabinet – would be prosecuted through their individual representatives, who would be responsible for being part of a criminal conspiracy:

The judgement should adjudicate: [...] that every member of the Government and organisations on trial is guilty of the same offence. Such adjudication of guilt would require no proof that the individuals affected participated ('affected participation') in any overt act other than membership in the conspiracy.<sup>39</sup>

Thus, as noted by van Sliedregt, conspiracy and criminal organizations formed the pillars of the theory of collective criminality:

The plan was to be carried out in two phases. First, before an international court entrusted with the task of adjudicating major war criminals for having participated in the commission of crimes against humanity and war crimes, and for conspiring to commit crimes against peace. This International Court would then declare Nazi organisations such as the Nazi government, the Nazi party, Gestapo, SS, and SA to be criminal. In the second phase, national courts of the Allied Powers would try individual members of the criminal organisations declared criminal by the International Military Tribunal, proof of membership being sufficient for establishing guilt.<sup>40</sup>

For those Allies whose domestic legal regimes followed civil law, conspiracy was problematic. Nevertheless, it was the touchstone for this approach to collective criminality at the IMT, and was incorporated into Article 6(a) of the London Charter.<sup>41</sup> Article 6(a) states, "Leaders, organizers and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."<sup>42</sup> On its face, this formulation derives from the common law and it does not have much in common with civilist systems.

The IMT did not rely on this provision for CAH, though it did rely on a concept of vicarious criminal responsibility, better known in common law as flowing from aiding and abetting. The IMT also did not rely on conspiracy in establishing responsibility for belonging to a "criminal organization." It did so on a different basis. The conspiracy charge in the Nuremberg Judgment was limited to crimes against peace.<sup>43</sup>

<sup>37</sup> *Id.* at 35.

<sup>38</sup> E. VAN SLIEDREGT: THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 17 (2003).

<sup>39</sup> *Id.* at 36.

<sup>40</sup> VAN SLIEDREGT, *supra* note 38, at 17.

<sup>41</sup> *Id.* at 17, citing H. H. JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAFRECHT 276 (1952).

<sup>42</sup> IMT Charter art. 6(c), *supra* note 2.

<sup>43</sup> Nuremberg Judgment, in LEON FRIEDMAN, 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 941 (2 vols., 1972).



As discussed in the following section, the concept of conspiracy and understanding of collective criminality survives at the ICTY and the ICTR in those Tribunals' concept of common purpose, which has developed into a separate mode of participation in the case law of both Tribunals. The "common purpose" language can be traced back to the Nuremberg Judgment:

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the state for membership unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.<sup>44</sup>

The confusion between different forms of vicarious criminal responsibility and conspiracy later induced the ILC's error in its formulation of the Nuremberg Principles, wherein Principle VII held, "Complicity in the commission of a crime against peace, a war crime, or a [CAH] as set forth in Principle VI is a crime under international law."<sup>45</sup>

This is clearly contrary to the express linkage in the London Charter's Article 6(a), as quoted above, between conspiracy and "crimes against peace." The error of the ILC may have been induced by the subtle difference between individual responsibility for participating in the "common plans" of aggression and responsibility for membership in "criminal organizations," which included all three crimes. Even Justice Jackson seems to have fallen into the same confusion when, in his preface to the REPORT TO THE PRESIDENT OF THE UNITED STATES, he broadly stated,

The charter also enacts the principle that individuals rather than states are responsible for criminal violations of international law and applies to such lawbreakers the principle of conspiracy by which one who joins in a common plan to commit crime becomes responsible for the acts of any other conspirator in executing the plan.<sup>46</sup>

The cases involving "criminal organizations" are quite confusing with regard to the basis of criminal responsibility on which they rely. In contrast, the IMTFE, whose Charter was similar to the London Charter, was unrestricted by the narrow concept of individual criminal responsibility and they freely applied their own version of guilt by association. In this respect, the record of the IMT is far superior to that of the IMTFE, as it only relied in a limited way on "common plan" or "conspiracy" with respect to "crimes against peace" as defined in Article 6(a), but not for other crimes.

As to the concept of responsibility for those who "directed, organized, instigated or were accomplices," the targets of this basis for criminal responsibility were the decision-makers of the ruling Nazi regime. This is entirely different from the more generalized

<sup>44</sup> *Id.* at 962–63.

<sup>45</sup> Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. INT'L L. COMM'N pt. III, paras. 95–127, U.N. Doc. No. A/1316 (A/5/12) [hereinafter Nuremberg Principles].

<sup>46</sup> REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS IX (U.S. Gov't Print. Off. 1945) [hereinafter Jackson's Report].

bases of criminal responsibility under Article II paragraph 2 of CCL 10. The latter simply assimilated, or joined in one category of criminal responsibility, many categories applied differently in the world's major criminal justice systems. Thus, it assimilates those who conspired to have the crime performed; ordered it; performed it; aided and abetted in its planning, preparation, performance, and concealment; and those who voluntarily participated in a "criminal organization" implicated in the commission of Article 6 crimes. No distinctions or gradations were made as between principals (and their diverse degrees), accessories (and their diverse degrees), and the different aspects of responsibility for the conduct of another. Such an approach is in essential contradiction with basic principles of individual criminal responsibility and the individualization of punishment existing in the world's major criminal justice systems.

The drafters of CCL 10 clearly wanted to avoid such legal distinctions, which would have mired these trials in technical legal arguments for years. Like the drafters of the London Charter, they were driven by the facts, and the defendants they knew would be accused were to be those who were factually part of or connected to the decision-making and senior level in the chain of command. Above all, they wanted a swift process that would express legally sanctioned retribution of abhorrent collective and also individual conduct.

Articles 9 and 10 of the London Charter charged organizations with criminal responsibility, without defining it, and extended such responsibility to its individual components, subject to certain conditions. This notion of group or collective criminal responsibility is different from that of state criminal responsibility,<sup>47</sup> but it is in contradiction to the notion of individual criminal responsibility asserted above and discussed in this chapter. This issue is particularly significant in light of two other inquiries, namely whether there was any basis in international law to apply such a concept of criminal responsibility, and to what extent it satisfies the requirements of legality.<sup>48</sup> It is this writer's conclusion that both inquiries should be answered in the negative.

The IMT and CCL 10 Proceedings' judgments took the approach that "criminal organizations" were in the nature of a "conspiracy in action."<sup>49</sup> But rather than holding individuals responsible if they were part of a criminal organization, the tribunals held that organizations could be deemed criminal as a result of the individual criminal responsibility of their members.<sup>50</sup> Thereafter, on certain conditions, individual members could be found guilty of participating in a criminal organization. This completely lopsided approach was intended to serve only one purpose, to brand as criminal such organizations as the SS.<sup>51</sup> However, the problem is what to do with such an anomalous

<sup>47</sup> See BASSIOUNI, DRAFT CODE, *supra* note 1, at 49–52; FARHAD MALEKIAN, INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES (1985); Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 94, UN Doc. A/46/10 (1991) [hereinafter 1991 Draft Code] at art. 5; ILC Draft Principles of State Responsibility, [1980] 2 Y.B. INT'L L. COMM'N, UN Doc. A/CN.4/SER.A/1980/Add.1, at art. 19; IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 32–33 (1983); VESPASIAN V. PELLA, LA CRIMINALITÉ COLLECTIVE DES ÉTATS ET LE DROIT PÉNAL DE L'AVENIR (2d ed. 1925). See also for earlier works on state responsibility, JEAN PERSONNAZ, LA RÉPARATION DU PRÉJUDICE EN DROIT INTERNATIONAL PUBLIC (1939); CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); CHARLES DE VISSCHER, LA RESPONSABILITÉ DES ÉTATS (1924).

<sup>48</sup> See generally *infra* ch. 5.

<sup>49</sup> See IMT Judgment at 270; and Donnedieu de Vabres, *infra* note 52, at 543.

<sup>50</sup> The Gestapo was not declared a criminal organization until one of its leaders, Ernst Kaltenbrunner, was found guilty.

<sup>51</sup> Of the six organizations charged in the indictment, only four were found criminal: the SS, the Gestapo, the SD, and the leadership of organizations of the Nazi Party. The other three that were not found to be

precedent, particularly in light of the trend in the world's major criminal justice systems and in ICL to develop a viable approach to the criminal responsibility of states and that of organizations, in addition to individual criminal responsibility.

It is useful to remember what Professor Donnedieu de Vabres, a judge at the IMT, lamented only one year after the judgment, namely that the absence of any codification following Nuremberg can have dire consequences on international justice. He said that it would be "*funeste au prestige de la justice internationale*."<sup>52</sup>

The IMT, most mindful of the complexity of such a basis for criminal responsibility, astutely predicated it on three conditions:

- (1) the public activities of the organization must include one of the Article 6 crimes;
- (2) the majority of the members of the organization must be volunteers;
- (3) the majority of the members of the organization must have been knowledgeable or conscious of the criminal nature of the organization's activity.

Although the first two of these conditions can be objectively ascertained, the third one is more difficult. But what none of these questions addresses, singularly or collectively, is how to specifically apply the consequences of a finding of group responsibility. Does it extend to all the members in the same way and thus become a form of collective strict accountability? The IMT held that there should be an additional finding that each individual have been a volunteer member of the organization. But it did not require that each member have specific knowledge that the organization's purpose was the commission of international crimes.<sup>53</sup> Instead, a variety of tests were used to hold persons accountable for knowledge of the organization's moral wrongdoing. To a large extent, one can conclude that a judicial finding that an organization is criminal constitutes a *prima facie* showing against its members, which they could rebut by showing that they lacked knowledge of the criminal purposes or activities of the organization.

Thus, the concept of participatory criminal responsibility articulated in the London Charter is that of presumptive individual criminality arising out of the mere voluntary participation in an organization declared to be criminal, on the basis of the above-stated three conditions, but the accused could rebut the presumption. Such a rebuttal would be in the nature of factual denials, and mixed questions of law and fact pertaining to a person's knowledge and intent. Both questions of fact and law raise the issue of what legal standard and test to apply. Considering the wide differences between objective and subjective approaches to the adjudicative determination of intent in the world's major criminal justice systems, the legal issues raised above are far from resolved. However, it should be noted that a presumptive approach could violate the general principle of law of presumption of innocence, which since World War II has been specifically expressed

criminal organizations were the SA, the Military High Command, and the Reich Cabinet, but individual members of these organizations were found guilty either at the IMT or Subsequent Proceedings.

<sup>52</sup> See Henri Donnedieu de Vabres, *Le Procès de Nuremberg devant les Principes Modernes du Droit Pénal International*, 70 RECUEIL DES COURS 480, 546 (1947). See generally ANDRÉ DE HOOCH, OBLIGATION ERGA OMNES AND INTERNATIONAL CRIMES (1996); INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (J. Weiler et al. eds., 1988); FERHAD FARHAD MALEKIAN, INTERNATIONAL CRIMINAL RESPONSIBILITY OF STATES (1985); John Dugard, *Criminal Responsibility of States*, *infra* in this volume; Geoffrey Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L.Q. 345 (1990); Pierr-Marie Dupuny, *Observations sur le Crime International de l'Etat*, 84 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 449 (1980).

<sup>53</sup> Donnedieu de Vabres, *supra* note 52, at 548.

in international and regional human rights instruments.<sup>54</sup> But it should also be noted that the IMT judgment and individual judgments in the CCL 10 Proceedings repeatedly affirmed the common law's principles of presumption of innocence and proof of guilt beyond a reasonable doubt to be established by the prosecution.

It is also notable that the London Charter did not provide for any penalties for belonging to a "criminal organization," but that CCL 10 in Article II, paragraph 2 did. These penalties ranged from the deprivation of certain civil rights to death. Such a range of penalties promulgated after the fact, for a concept of criminal responsibility that already stretches the requirements of legality, may well be said to violate the principles of legality.<sup>55</sup>

CAH are by their very nature the product of state policy.<sup>56</sup> What then is the purpose of a concept of group responsibility under the rubric "criminal organizations?" It would have been so much simpler to rely on German doctrines of imputed criminal responsibility and participation, and would have achieved a better result. One obvious reason that the Allies did not pursue this approach was their rejection of everything German. Another reason may well have been that they feared that German criminal law, with which they were not very familiar, could have defeated the ultimate goal of finding the designated defendants not criminally responsible. But it could also have been a consequence of the strategic approach to the post-World War II prosecutions in Germany. This approach was that the IMT dealt with the "majors," CCL 10 dealt with the second echelon of those less than majors and with the "minors." Allied and German courts would deal with the rest.

It could very well be that for the sake of expedience and because of the large number of potential defendants, the Allies found the concept of participatory criminal responsibility would give the prosecutors and judges maximum flexibility and result in swift adjudication. Thus, Article II, paragraph 2 of CCL 10 became the legislative basis for this new concept of criminal responsibility. But it should be noted that CCL 10 was not to be deemed part of international law because the legislative authority over Germany, the Allied Control Council, passed it,<sup>57</sup> in view of Germany's unconditional surrender. Thus, it must be concluded, on the basis of this reasoning, that the CCL 10 and its resulting trials do not constitute a valid international legal precedent, except for its affirmations of certain general principles. This means that the participatory principles of criminal responsibility that the CCL 10 trials enunciated, prescinding from their validity then, have no subsequent validity in ICL. And that is certainly for the best, particularly since the trend in ICL on this point is contrary to Article II, paragraph 1 of CCL 10.<sup>58</sup>

<sup>54</sup> See Universal Declaration of Human Rights art. 11, G.A. Res. 217(III), UN GAOR, 3d Sess., UN Doc. A/810 (1948); International Covenant on Civil and Political Rights art. 14, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter European Convention on Human Rights]; American Convention on Human Rights art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123, 145 [hereinafter Inter-American Human Rights Convention]; African Charter on Human and Peoples' Rights art. 7, O.A.U. Doc. CAB/LEG/67/3 rev. 5; Arab Charter on Human Rights art. 5, Sept. 15, 1994, *reprinted in* 18 HUM. RTS. L.J. 151, 152 (1997).

<sup>55</sup> See *infra* ch. 5.

<sup>56</sup> See *infra* ch. 1, §1.

<sup>57</sup> See *infra* ch. 3, §6.

<sup>58</sup> These critical views have also been expressed by a number of commentators shortly after the IMT's judgment. See Donnedieu de Vabres, *supra* note 52, at 546; HANS-HEINRICH JESCHECK, DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAFRECHT 400 *et seq.* (1952); HENRI MEYROWITZ, LA RÉPRESSION PAR LES TRIBUNAUX ALLEMANDS DES CRIMES CONTRE L'HUMANITÉ ET DE L'APPARTENANCE

However, the judges at the CCL 10 Proceedings were mindful of the troublesome questions posed by Article II, paragraph 2, as evidenced by the prosecution's opening statement in the *Farben* case, which stated:

This provision, we believe, is not intended to attach criminal guilt automatically to the holders of high positions, but means, rather, that the legitimate and reasonable inferences are to be drawn from the fact that a defendant held such a position, and places upon him the burden of countering the inferences which must otherwise be drawn.<sup>59</sup>

But then the Tribunal went on to state:

In weighing the evidence and in determining the ultimate facts of guilt or innocence with respect to each defendant, we have sought to apply these fundamental principles of Anglo-American criminal law:

1. There can be no conviction without proof of personal guilt;
2. Guilt must be proved beyond a reasonable doubt;
3. Each defendant is presumed to be innocent, and that presumption abides with him throughout the trial;
4. The burden of proof is, at all times, upon the prosecution;
5. If from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must prevail. (*United States vs. Friedrich Flick, et al.*, Case 5, American Military Tribunal IV, Nuremberg, Germany).

In considering the many conflicts in the evidence and the multitude of circumstances from which inferences may be drawn, as disclosed by the voluminous record before us, we have endeavored to avoid the danger of viewing the conduct of the defendants wholly in retrospect. On the contrary, we have sought to determine their knowledge, their state of mind, and their motives from the situation as it appeared, or should have appeared, to them at the time.<sup>60</sup>

August von Knieriem comments upon this question by reference to the *Krupp* and *Farben* cases of the CCL 10 Proceedings as follows:

In the *Krupp Case* the prosecution went even further and called the provision to establish "at least – at the very least" a presumption of guilt. But none of the Nuremberg Tribunals seems to have gone so far. In the *Farben Case*, Judge Hebert expressly took up the problem in his concurrent opinion, stating quite correctly that:

À LEURS ORGANIZATIONS CRIMINELLES 365–85 (1960); AUGUST VON KNIERIEM, THE NUREMBERG TRIALS 195–230 (1959); Quincy Wright, *International Law and Guilt by Association*, 43 AM. J. INT'L L. 746 (1947).

<sup>59</sup> U.S. v. Carl Krauch et al. (the *Farben* case), reprinted in VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, D.C: GPO, 1949), at 955.

<sup>60</sup> *Id.* at 1108. Judge Herbert on Count Two of the charge held:

The indictment charges that the acts were committed unlawfully, willfully, and knowingly, and that the defendants are criminally responsible "in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups, including Farben, which were connected with the commission of said crimes."

*Id.* at 1128.

Paragraph 2(f) does not shift the burden of proof, which remains at all times with the prosecution. Neither does it change the presumption of innocence.<sup>61</sup>

Professor Quincy Wright, an advisor to the United States prosecution team who was also consulted on the drafting of the London Charter and was a supporter of the post-World War II prosecutions, had strong misgivings about “guilt by association,” as he called it. He stated:

Advanced systems of criminal law accept the principle that guilt is personal. Guilt is established by evidence that the acts and intentions of the individual were criminal. Evidence concerning the acts or intentions of persons with whom he was associated, the programs or policies of organizations of which he was a member, or the behavior of groups or people with whom he was classed have sometimes been admitted as indications of the bad character of the accused, but, in common law, only to rebut the defendant’s effort to prove his good character. No matter how bad his character by general reputation or association, the accused must be considered innocent unless his guilt is established by evidence that he himself committed, attempted, or intended the crime charged.<sup>62</sup>

The London Charter provided a basis for criminal responsibility of groups and organizations.<sup>63</sup> Indeed, the IMT held as criminal groups the Leadership Corps of the

<sup>61</sup> See VON KNIERIEM, *supra* note 58, at 206.

<sup>62</sup> Quincy Wright, *International Law and Guilt by Association*, 43 AM. J. INT’L L. 746, 747 (1947). He further stated:

As I read International Law, the idea of state criminal responsibility has not been favored. The cases where that has been suggested are rare, and on the whole, it has been considered that the state should be only civilly responsible; that is, only bound to make reparations for damages which have resulted from its violation of International Law. I would suggest, on the other hand, that criminal responsibility is based upon psychological considerations and ought therefore to be a responsibility only of individuals. We should, therefore, recognize that the individual is criminally responsible when he commits an act which is an offense against the law of nations, and that the state cannot cover such an act with a blanket of immunity if it is itself under an international obligation not to permit such acts, even though it may be civilly liable to make reparation for the damage.

*Id.* at 748–49 (quoting ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1947) for the proposition that reprisals and other forms of collective, and thus presumably indiscriminate, use of force were a barbaric practice that modern international law does not countenance. *Id.* at 34). See also *infra* note 80 for the positions of Grotius, Vittoria, and Gentili.

Wright goes on to state:

It has also been suggested that the Nuremberg Charter, in authorizing the Tribunal to declare organizations criminal, thus creating a presumption of criminality against all the members of such organizations, accepted the concept of guilt by association. However, in its interpretation of this provision, the Tribunal limited the liability flowing from a finding that an organization was criminal to those who were voluntary members of the organization aware of its criminal purposes at the time the organization was engaging in criminal acts. An individual defendant was assured an opportunity to defend himself on all of these points. With this interpretation the concept of criminal organization was identified with that of conspiracy. No individual could be found guilty unless, in intention or act, he participated in a criminal conspiracy.

*Id.* at 754.

<sup>63</sup> In Article 9, the London Charter provide, “the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.”

And in Article 10 stated: “In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature

Nazi Party,<sup>64</sup> the Gestapo and SD,<sup>65</sup> and the SS.<sup>66</sup> But the question is not only whether an organization can have a criminal purpose, but whether its members can be guilty by virtue of association or membership, or whether something more is required. These and other related questions are within the province of the general part of criminal law that has not so far been sufficiently addressed in ICL. Among these questions are the following: Is mere membership in an organization deemed criminal enough or must active participation in a criminal activity be demonstrated? Must a member's specific knowledge of the criminal purposes of the organization and his intent to be part of the criminal scheme perpetrated by the organization be demonstrated before he can be held criminally responsible as a member of the organization? In its Judgment, the IMT explicitly noted, "a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of *the crime of membership* and be punished for that crime by death."<sup>67</sup>

To impose international criminal responsibility merely for a passive membership in an organization stretches the generally accepted principles of criminal responsibility in most legal systems. Such a proposition would be tantamount to guilt by association, which most legal systems reject as fundamentally unfair. Indeed, the IMT was aware that imposing criminal responsibility on members of groups or organizations simply by virtue of their membership in such organizations was a "far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."<sup>68</sup> In its Judgment, the IMT went on to observe that Article 9 of the London Charter gave the Tribunal discretion to declare an organization criminal and continued as follows:

This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with *well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided*. If satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.<sup>69</sup>

The IMT then analogized a criminal group or organization to a conspiracy and said that for a criminal organization to exist "there must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter."<sup>70</sup>

The IMT specified that a definition of a criminal group or organization "should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts defined as criminal [...] as members of the organization."<sup>71</sup> The IMT implemented the foregoing in its Judgment and declared as

of the group or organization is considered proved and shall not be questioned." I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 12 (1947) (emphasis added).

<sup>64</sup> *Id.* at 262.

<sup>65</sup> *Id.* at 268.

<sup>66</sup> *Id.* at 273.

<sup>67</sup> *Id.* at 256 (emphasis added).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (emphasis added).



criminal the group of members of the SS “who became or remained members of the organization *with knowledge* that it was being used for the commission [of crimes] [ . . . ] or who were *personally implicated as members of the organization in the commission of such crimes* [ . . . ].”<sup>72</sup> This theme was repeated with respect to other groups that the IMT held to be criminal.<sup>73</sup> Thus, for the IMT, mere membership was not enough for criminal liability stemming from membership in a criminal group. It required either a commission of a criminal act by the individual member or membership with knowledge that the organization was used for the commission of crimes. However, this latter assertion sidesteps the question of what constitutes crime under what law. Contemporary ICL would answer that question with the proposition that it refers to *jus cogens* crimes.

Traditionally, it has been easier for common law systems than for others to accommodate themselves to a theory of criminal liability based on membership in a criminal group or organization under the concept of conspiracy. However, in recent times, as a result of the expansion of organized crime groups and drug trafficking, many states have enacted laws that provide for organizational criminal responsibility either under the common law conspiracy model or under hybrid models that combine participation, intent, and some conduct. How far these new approaches to group criminality can become part of ICL is yet to be determined.<sup>74</sup>

National legal systems vary as to the types, standards, and methods of assessing and determining criminal responsibility for participation in its various forms and degrees. In general, one can distinguish between participation in the decision-making and participation in the actual carrying out of the decision. Obviously, the more segmented or compartmentalized the carrying out of an unlawful decision, the more difficult it is to establish the knowledge and intent of the person charged with the ultimate consequences of the unlawful act. None of the ICL instruments elaborated to date have dealt with these questions. The Geneva Convention of 1949 and the Additional Protocols of 1977, the Genocide Convention, and the *Apartheid* Convention have only touched upon these questions with general references and by implication. The 1996 Draft Code of Crimes does not adequately deal with any of these questions.

As discussed in [Chapter 1](#), CAH are characterized by state policy, without which this category of international crimes cannot occur. Of course, other mass victimization crimes can occur without the need for state policy. Also, as discussed in [Chapter 1](#), the very fact that state policy exists implies that segments of the state’s personnel are directly or indirectly involved in the criminalization process. These segments of the state’s personnel can be the military, police, and paramilitary, or those in the civilian bureaucratic apparatus. As to the first segment, it is subject to national military law and to international humanitarian law,<sup>75</sup> and in that respect the basis of responsibility for the conduct of another is essentially that of command responsibility, which is discussed below. Its counterpart is the defense of obedience to superior orders.<sup>76</sup> However, both doctrines are predicated on the hierarchical nature of military and paramilitary structures, which depend on a high degree of hierarchical discipline to carry out their goals.

<sup>72</sup> *Id.* at 273 (emphasis added).

<sup>73</sup> Including the leadership Corps of the Nazi Party, Gestapo and the SD. *Id.* at 262, 268.

<sup>74</sup> The United Nations developed an international convention criminalizing organized crime: The United Nations Convention Against Transnational Organized Crime, *supra* note 23.

<sup>75</sup> See Bassiouni, *supra* note 31.

<sup>76</sup> See *infra* ch. 8, §1.

The same does not necessarily apply to the civilian bureaucratic apparatus that may be hierarchical only in terms of certain units composing a given bureaucratic apparatus; other units may only be horizontally related. Thus, in civilian bureaucratic structures command is not necessarily centralized, as is in military structures, even though modern presidential systems may have given the president the position of the highest bureaucratic authority. Furthermore, the very nature of civilian bureaucracies and certainly the way they function have clearly demonstrated not only that they are unable to effectively coordinate, but that they are frequently unaware of what their respective units are doing.

This bureaucratic reality makes it easier for decision-makers and planners to exploit the compartmentalization of the bureaucratic apparatus, and to control the flow of information of one unit to another. In so doing, it becomes more feasible for some to orchestrate the actions of the state's bureaucratic apparatus to achieve the intended goals of mass victimization and more particularly, genocide and CAH. This situation raises a number of questions,<sup>77</sup> but more particularly to this chapter, it raises the question of whether a concept of group or collective criminality can arise for those members of the state's bureaucratic apparatus, whether military or civilian, with respect to actions that were directed or that contributed to the result of mass victimization by means of a broader doctrine of complicity.

The answer to this question depends on whether and to what extent ICL will rely on existing doctrines of criminal responsibility (as they exist in general principles of criminal law). If that is the case, then ICL will depend on developments in general principles of criminal law concerning group or collective criminal responsibility as they are developing in several legal systems with respect to corporate criminal responsibility and to responsibility for belonging in organized crime or terrorism groups. But national developments in these areas, as well as others, such as corporate criminal responsibility for regulatory crimes, do not have the same policies that may exist with respect to *jus cogens* crimes of genocide and CAH. In the latter crimes, the victimization is massive and harms the entire society. It is therefore unconscionable to think that ICL policy with respect to such *jus cogens* crimes is unable to develop independent of national criminal justice policy, which relates to wholly different subjects and whose consequences are far less harmful than genocide and CAH.

The policy of ICL in these crimes should maximize deterrence and prevention. Whereas the former is self-evident, the latter can be achieved by making it more difficult for personnel in the bureaucratic apparatus to be orchestrated and manipulated by decision-makers and planners pursuing the goal of mass victimization. By expanding the concept of group criminal responsibility and thus making more of the state apparatus' personnel liable to criminal prosecution, there is a greater potential for such personnel to refuse to carry out certain acts without which such mass victimization could not occur or could be mitigated or retarded. It also enhances the possibilities that such plans can become public, thus bringing about domestic and international pressure to stop or mitigate the harmful effects.

To render such a policy operative, the following is needed:

- (1) Establish a rebuttable presumption of knowledge of the consequences by all management level personnel in the bureaucratic apparatus.
- (2) Establish the objective test of reasonableness to determine what that person should have known under the prevailing circumstances.

<sup>77</sup> See *infra* chs. 1, 2.

- (3) Reject the defense of ignorance of the facts or mistake of fact if the person failed to use reasonable efforts to discover them.
- (4) Apply the defense of obedience to superior orders on the same basis as the defense of coercion that exists in general principles of criminal law.
- (5) Provide for a duty to refuse to obey a superior order if it appears to reasonable persons in the same circumstances that such an order is manifestly unlawful, or leading or contributing to a manifestly unlawful result in the end.
- (6) Allow the use of evidentiary records in some cases where state policy was established to be used in the Subsequent Proceedings without having to prove in each subsequent case the history of a given conflict or event, how it occurred, by what means, what victimization occurred, where, how, and why.<sup>78</sup>
- (7) Apply internationally recognized procedural due process rights.

It is the belief of this writer that such an approach to international criminal responsibility would enhance prevention, deterrence, and suppression, and ultimately strengthen both peace and justice. However, the Rome Statute does not recognize group criminal responsibility, only certain forms of responsibility for the conduct of another.<sup>79</sup>

## §2. Criminal Responsibility and the “General Part”: From the IMT to the ICC

Whether criminal responsibility arises or not depends on the existence of a proscribing norm commonly contained in the “special part” of national criminal codifications, and on the norms establishing the basis for the responsibility of an accused in accordance with the requirements of what is commonly contained in the “general part” of national codifications. This includes conditions for the establishment of individual criminal responsibility, such as the material and mental elements required, and other requirements and conditions that negate or excuse the conduct of the perpetrator, or that even justify it. The former are covered in this chapter, the latter in [Chapter 8](#).

The “general part” in most national criminal codifications is based on a theoretical scheme from which certain legal consequences follow. Even when such a scheme does not exist, a certain method is followed that determines the order and sequence of the legal provisions contained in the “general part.” Commonly, a “general part” will start with the elements of criminal responsibility, including minimum age and mental capacity, followed by the elements required for specific crimes, such as the material element (act or omission), the mental element (specific and general intent, recklessness or criminal negligence), and causation. What follows are conditions that exonerate one from criminal responsibility. However, some of the exonerating conditions may be classified as conditions negating criminal responsibility and they would therefore appear earlier in the “general part” under the heading of elements of criminal responsibility. Other conditions may be classified under the categories of justification and excuse. The following exonerating conditions are most commonly found in national criminal codes, irrespective of how they are legally characterized: insanity; intoxication; self-defense; defense of others; necessity; coercion or duress; mistake of law; and mistake of fact. No matter how these exonerating conditions are legally characterized (i.e., conditions that

<sup>78</sup> Anything that a defendant wishes to use to prove the truth or falsehood of any such facts should always be allowed.

<sup>79</sup> See ICC Statute arts. 25 ¶ 3 (a)-(d), *supra* note 10.

negate criminal responsibility, justification, excuse, or defense) or where they may be located in the sequence of the “general part” norms, they constitute, along with the elements of a crime, the “general part” of criminal law.

Responsibility for the conduct of another and vicarious criminal responsibility is also to be included in the “general part” of ICL. Their position in the “general part” in relationship to the elements of criminal responsibility and exonerating conditions varies in different national codification approaches.

Since ICL is not yet codified, it has no defined “general part,” except for that which emerged from the practices of ad hoc international tribunals of the IMT, the IMTFE, the ICTY, the ICTR,<sup>80</sup> and the ICC.<sup>81</sup> The “general part” elements that emerged from these four precedents include: responsibility for the conduct of others; command responsibility; removal of the absolute defense of “obedience to superior orders;” and removal of immunities for certain international crimes. All other questions relating to the “general part” have been dealt with on an *ad hoc* and sometimes improvised manner, which does not leave much basis for precedential reliance. However, the Rome Statute’s relevant provisions depart from these precedents, as evidenced in Articles 27 and 28.<sup>82</sup>

One of the consequences of ICL’s policy on criminal responsibility is the extent to which a person can be held accountable for the conduct of others, as well as being held accountable for the conduct of subordinates. A concomitant of that policy is the extent to which a person can be held criminally accountable for the conduct of subordinates, and that is the extent to which the defense of obedience to superior orders can be allowed.<sup>83</sup> Therefore, the questions are whether it shall be deemed a defense in its own right under some exigent circumstances, or equivalent to coercion or duress, or whether the defense of obedience to superior orders will be reduced to the level of a mitigating factor. Another approach is to treat the question as falling within the area of intent as opposed to examining it as a defense.

Another particularity of ICL, especially with respect to major crimes that involve state policy, including when the conduct is perpetrated by nonstate agents,<sup>84</sup> involves the distinction between decision-makers and senior executors, intermediate-level public personnel who facilitate the mobilization of state capabilities to carry out the policy and execute higher directives, and last, those in the lower echelons who carry out the policy and directives and who commit the material element of the given crime.<sup>85</sup> A criminal justice policy judgment is needed to distinguish between these strata of responsibility for purposes, *inter alia*, of determining a form of mental element (specific or general intent, or recklessness) as may be required for each of these three *strata* of perpetrators. Thus, for example, the defenses of insanity and intoxication would not apply to decision-makers, since it would be inappropriate, to say the least, to have a leader ordering mass victimization escape criminal punishment because he was intoxicated when he gave such orders. Similarly, self-defense would be inapplicable because it applies to immediate personal danger.

<sup>80</sup> See generally Bassiouni, *supra* note 1.

<sup>81</sup> See ICC Statute arts. 20, 25–33, *supra* note 10.

<sup>82</sup> *Id.* at 27, 28.

<sup>83</sup> See *infra* ch. 8, §1.

<sup>84</sup> See *infra* ch. 1, §7.

<sup>85</sup> *Id.*

In short, classic defenses in “general principles” of criminal law that are based on specific policies and goals and that are predicated on individual and interpersonal actions and reactions are not applicable to decision-makers and senior executors of CAH and genocide. These crimes and others speak to the need for a “general part” of ICL that reflects the policies and goals of that discipline and does not merely select or borrow randomly from different national legal doctrines. However, the Rome Statute fails to account for these important distinctions.<sup>86</sup>

Another problem arises in connection with responsibility for the conduct of another, and in particular complicity, however defined in the various legal systems. It is the legally required connection between the completed criminal act committed, usually by those in the lower strata of perpetrators, and those in the intermediate and higher strata of executors and decision-makers of the policy. There is also a problem of how to establish the causal connection between these three *strata* of perpetrators. No matter whether one starts from the final act that constitutes the crime and moves up the chain of causation, or whether one starts from the initial conduct that brought about the final result and seeks to identify contributing causal factors, the relationship between the final result and any causal conduct must be established.

Causality can be of a direct or of a contributing nature and it must be established through a rational causal connection. In that connection, most legal systems are divided between the objective standard of reasonableness and the subjective standard of personal knowledge. The former is subject to the test of foreseeability, because criminal justice policy, unlike policy considerations in civil liability law, seeks to achieve deterrence. Indeed, if criminal responsibility would attach on the sole basis of a criminal result, it would hold individuals to the standard of insurers of safety without providing meaningful deterrence. Criminal law doctrine in most legal systems rejects criminal responsibility that is not based, at least, on the standard of reasonable foreseeability. However, the Rome Statute fails to take these important distinctions into account.<sup>87</sup>

For the most part, these and other norms and problems of the “general part” are not covered by ICL’s conventional or customary law sources, but they can be adduced from “general principles” of criminal law. But because ascertainment of a given norm as constituting a “general principle” is sometimes uncertain or insufficiently specific, it may not satisfy the principles of legality that not only apply to the content of specific crimes (i.e., *nullum crimen sine lege*), but also extend to the principles of criminal responsibility and to penalties (i.e., *nulla poena sine lege*).<sup>88</sup> The Rome Statute specifically provided for these principles in Articles 22, 23, and 24.<sup>89</sup>

The finding that a given general principle exists requires substantial similarity as to any given issue in the world’s major criminal justice systems.<sup>90</sup> That is very difficult to obtain

<sup>86</sup> See ICC Statute art. 30, *supra* note 10.

<sup>87</sup> *Id.*

<sup>88</sup> See *infra* ch. 5, §1. Concerning penalties, most national legal systems contain certain principles applicable to penalties in the “general part,” whereas the penalties applicable to specific crimes either follow the definition of the crimes or they are contained in a separate part. But international criminal law does not have a conventional or customary law track record sufficient enough to rely upon. Consequently, penalties in international criminal law pose a problem with respect to the “principles of legality” that require that there be no penalty without law. For penalties, see ICC Statute arts. 77–80, *supra* note 10.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

in comparative criminal law, particularly as to the “general part.”<sup>91</sup> Consequently, in the absence of codification, the identification of the “general part” of ICL<sup>92</sup> is a very difficult task to accomplish. This probably explains why the drafters of the London Charter did not address these questions. It also explains why the judgments of the IMT, IMTFE, and CCL 10 Proceedings only superficially touched upon most of these issues.

Almost fifty years later, the drafters of the ICTY and ICTR Statutes were equally daunted by the task and only addressed a few of the pertinent questions. In these latter two tribunals, the drafters also wanted to obtain quick approval of the statutes by the Security Council and omitted a detailed “general part” and “procedure part” simply to obtain it.<sup>93</sup> To have done otherwise would have meant that the Security Council member states would have sent these texts to their respective ministries of justice, as probably the drafters of the London Charter might have felt compelled to do. That step would have surely prolonged and complicated the process. So, in the judgment of this writer, it was mostly because of political considerations that both the “general part” and the “procedure part” were not developed by the ICTY and ICTR. That may also be one of the reasons these parts were also not developed in the IMT, IMTFE, and CCL 10. Interestingly, at the ICC PrepCom, the “general part” and the “procedure part” benefited from a number of criminal law experts from justice ministries who were part of their government’s delegation and from informal intersessional meetings that substantially advanced the process.<sup>94</sup>

However, the London Charter unequivocally established the principle of individual criminal responsibility under ICL, irrespective of any mandates under national law and irrespective of the doctrine of act of state and other immunities. The Charter also eliminated the defense of obedience to superior orders.<sup>95</sup>

<sup>91</sup> See Stefan Glaser, *Culpabilité en Droit International Pénal*, 99 RECUEIL DES COURS 473 (1960). Glaser also states “*en matière de culpabilité le droit international pénal emprunte les idées et les constructions juridiques au droit intern contre.*” *Id.* at 482. See also in support of this position, Jean S. Graven, *Les Crimes Contre l’Humanité*, 76 RECUEIL DES COURS 433 (1950); Donnedieu de Vabres, *supra* note 40. Indeed so long as international criminal law is not codified, it must rely on the domestic “general part” of criminal law. This can be easily accomplished by applying the “general part” of the criminal law of the state where the crime occurred. To attempt the development of a “general part” for international criminal law from general principles of the world’s major criminal justice systems is, in the absence of codification, a very arduous task. Professors Donnedieu de Vabres, Graven and Glaser, while generally supporting this view, nevertheless felt that “general principles” are more easily identifiable than does this writer. They probably reached this conclusion because, at that time, the French-Civilist system was dominant in the world and the identification of similar principles was easier to make. But the topography of legal systems has changed significantly since the 1960’s and the diversity that now exists is much more difficult to reconcile.

<sup>92</sup> See BASSIOUNI, DRAFT CODE, *supra* note 1, at 81–114.

<sup>93</sup> See BASSIOUNI, THE LAW OF THE ICTY, *supra* note 7, at ch. 6, pp. 337–423.

<sup>94</sup> See 1996 PrepCom Report, *supra* note 9, at vol. II, pp. 80–104, 150–234; see also *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands*, A/AC.249/1998/L.13, at arts. 15–28 and arts. 55–67; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add.1, at arts. 21–34 and arts. 62–74; and *The International Criminal Court: Observations and Issues Before the 1997–98 Preparatory Committee; and Administrative and Financial Implications*, 13 NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1998); *Observations on the Consolidated ICC Text Before the Final Session of the Preparatory Committee*, 13 bis NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1998); and *Model Draft Statute for the International Criminal Court Based on the Preparatory Committee’s Text to the Diplomatic Conference, Rome, June 15–July 17, 1998*, 13 ter NOUVELLES ÉTUDES PÉNALES (M. Cherif Bassiouni ed., 1998).

<sup>95</sup> See ch. 8 nn. 9–143 and accompanying text.

In the opening statement before the IMT, Justice Jackson eloquently stated:

Of course, it was under the law of all civilized peoples a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding firearms to bare knuckles, made a legally innocent act? The doctrine was that one could not be regarded as criminal for committing the usual violent acts in the conduct of legitimate warfare [ . . . ] An International Law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare [ . . . ] the only answer to recalcitrance was impotence of war [ . . . ]. Of course, the idea that a state, any more than a corporation, commits crimes is a fiction. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity. The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states [ . . . ]. The Charter also recognizes a vicarious liability, which responsibility is recognized by most modern systems of law, for acts committed by others in carrying out a common plan or conspiracy to which a defendant has become a party [ . . . ]. [M]en are convicted for acts that they did not personally commit but for which they were held responsible because of membership in illegal combinations or plans or conspiracies.<sup>96</sup>

The ICTY and ICTR essentially followed the example of the IMT. The nature of liability of participants in committing crimes within the 'Tribunals' jurisdiction is secondary.<sup>97</sup> Whereas, for instance, "aiding and abetting" is regarded as a contribution to the perpetration of the principal offence,<sup>98</sup> a person who has aided or abetted a CAH (or a genocide or war crime) is convicted of the principal offence.<sup>99</sup> This approach is found in the formulations of both Article 6 of the ICTR Statute and Article 7(1) of the ICTY Statute:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

<sup>96</sup> ROBERT H. JACKSON, THE NUREMBERG CASE 82–3, 88–9 (1971). Hugo Grotius, who advocated individual criminal responsibility, was, however, contrary to punishing one person for the wrongs of another. Thus, implicitly, he was contrary to various forms of imputed criminal responsibility for the conduct of another. HUGO GROTIUS, DE JURE BELLI AC PACIS, Bk. III, Ch. IV, 643–48 (Carnegie Endowment ed. 1925). Grotius also stated "that no one who was innocent of wrong may be punished for the wrong done by another." *Id.* at 539. He also cites Vittoria's DE JURE BELLI in support of that position. *Id.* at 723. Alberico Gentili was also opposed to collective punishment; see DE JURE BELLI, Bk. III, Ch. VIII, 322–27 (Carnegie Endowment ed. 1933).

<sup>97</sup> VAN SLIEDREGT, *supra* note 38, at 64.

<sup>98</sup> See Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 674 (Nov. 11, 1999) [hereinafter *Tadić* Trial Judgment] (identifying the actus reus of criminal participation as "[t]he conduct of the accused contributed to the commission of the illegal act").

<sup>99</sup> See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 296 (Dec. 10, 1998) [hereinafter *Furundžija* Trial Judgment]. Furundžija was found guilty, not of having aided and abetted a rape perpetrated by his associate, but of rape – a violation of international humanitarian law as well as Article 3 of the ICTY Statute. In *Furundžija*, the Trial Chamber found that the presence of Furundžija, an approving spectator who was held in such esteem by the perpetrators that his presence encouraged them to commit or continue to commit a crime, may be guilty of complicity by omission in a CAH. *Id.* at ¶ 207.



The Rome Statute does not follow the example of the IMT. Instead, it codifies both the “general part” and the “procedural part” with some specificity. Article 25 of the Rome Statute provides,

**Article 25**  
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - d. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - ii. Be made in the knowledge of the intention of the group to commit the crime;
  - e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - f. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Thus, Article 25 paragraph 3 of the Rome Statute adopts a different approach from that of the ICTR/Y Articles 6/7(1):

In accordance with this Statute, a person shall be *criminally* responsible and liable for punishment for a crime, within the jurisdiction of the court if that person: commits such a crime, whether as an individual, jointly with another or through another person [ . . . ].<sup>100</sup>

<sup>100</sup> ICC Statute art. 25(3)(c), *supra* note 10.

Thus,

[w]hile subparagraph 3(a) is reserved for direct and indirect perpetrators (joint perpetrators and perpetrators by means), aiders and abettors pursuant to subparagraph 3(c) qualify as participants in a crime. If we were to attach any value to the [ . . . ] distinction between “individually” and “criminally” responsible, we could argue that under the ICC Statute aiders and abettors are held criminally liable for their contribution to the crime rather than for the crime itself.<sup>101</sup>

The essentially pragmatic approach of the Rome Statute is the result of the diversity of legal conceptions and approaches. Its statute furthers the resort to “general principles of law” as an applicable source of law. Article 21 states,

**Article 21**  
Applicable law

1. The Court shall apply:
  - (a). In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - (b). In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  - (c). Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

§2.1. *National Legal Norms and Standards and Their Relevance to International Criminal Law*

National criminal laws vary as to the types and degrees of direct, participatory, and imputed responsibility, and as to the legal techniques employed to determine their application.<sup>102</sup> There are also wide-ranging diversities in national criminal laws pertaining

<sup>101</sup> VAN SLIEDREGT, *supra* note 38, at 64.

<sup>102</sup> For the German system, see HANS-HEINRICH JESCHECK, *LEHRBUCH DES STRAFRECHTS* 365 *et. seq.* (4th ed. 1988). For the French system, see STEFANI ET AL., *DROIT PÉNAL GÉNÉRAL* 241 *et. seq.* (12th ed. 1984) (stating “l’intention criminelle réside dans la connaissance ou la conscience chez l’agent qu’il accomplit un acte illicite.” *Id.* at 241); see also ROGER MERLE & ANDRÉ VITU, *TRAITÉ DE DROIT CRIMINEL* 425 *et. seq.* (1967); HENRI DONNEDIEU DE VABRES, *TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE* (3d ed. 1947). For the Italian system, see FERRANDO MANTOVANI, *DIRITTO PENALE: PARTE GENERALE* 303 *et. seq.* (1988). For the United States system, see BASSIOUNI, *supra* note 21, at 158 *et. seq.*; HELEN SILVING, *THE CONSTITUENT ELEMENTS OF CRIME* (1967); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*

to conditions that constitute a bar to criminal responsibility or justify or excuse the conduct, as well as those conditions that reduce the level of responsibility, or that mitigate the punishment.<sup>103</sup> In some national legal systems, the questions of individual, participatory, or imputed responsibility, and exonerating factors are deemed part of the concept of culpability, while in other systems they may be deemed part of the elements or conditions of responsibility. These differences have certain consequences bearing on the criteria for criminal responsibility to be applied to those charged with CAH.

Furthermore, national military laws and regulations applicable to military personnel, whether in times of war or peace, differ in some respects from their criminal law counterparts applicable to civilians. This is particularly true with respect to the question of obedience to superior orders, which is treated differently in the various national military and criminal laws.<sup>104</sup> Because discipline is of such critical importance to a military system, a subordinate is duty-bound to obey a superior's orders. A logical corollary of the duty to obey is the defense of obedience to superior orders.<sup>105</sup> To remove or reduce the defense implicitly removes or reduces the duty to obey. But to maintain the duty to obey requires the imposition of command responsibility, as discussed below. Thus, military regulations struggle with the extent of the duty to obey and the limits of the defense and also with the legal standards and tests to be applied to command responsibility and to the defense of obedience to superior orders.

Criminal responsibility for CAH by those who do not personally carry out the specific acts centers on the role of a given person in the chain of events, ranging from the highest levels of the decision-making process to any conduct performed before, during, or after the commission of any crime in whole or in part, or conduct that in some way aided or abetted the commission in whole or in part of any crime. Persons who are part of a collective decision-making body or group are also individually responsible for the group's collective decisions, for subsequent actions by all or some of those who carry out decisions to commit specific crimes, and for the harmful results caused by such collective decision-making groups. That responsibility persists even when the accused dissented or opposed the crime or withdrew from the group but did nothing to oppose the wrongful decision or prevent the harm from occurring. Thus, the more closely a person is involved in the decision-making process and the less he does to oppose or prevent the decision, or fails to dissociate himself from it, the more likely that person's criminal responsibility will be at stake.

National criminal laws also vary significantly as to the applicable legal standard in criminal adjudication for the determination of responsibility or culpability. One such issue, which is particularly relevant to ICL, is knowledge of the law – whether knowledge

(2d ed. 1960). For a critical appraisal of the United States system, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978). For a contemporary English common law perspective, see HERBERT L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 187 *et. seq.* (1968). For a survey of different legal conceptions of culpability, see Giuliano Vassalli, *Copevolezza*, *ENCYCLOPEDIA GUIRIDICA TRECCANI*, 1–24 (vol. 6 1988).

<sup>103</sup> See JUSTIFICATION AND EXCUSE (Albin Eser & George P. Fletcher eds., 1987); PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* (4 vols. 1984); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 360–588 (2d. ed. 1960); L.A. HART, *supra* note 102.

<sup>104</sup> Compare *U.S. v. Calley* (1971, 1973) CM 426402, 46 CMR 1131; 48 CMR 19; 1 MLR 2488; 22 USCMA 534 (1973) (military); with *U.S. v. Barker*, 546 F.2d 940 (D.C. Cir. 1976); and *U.S. v. Barker*, 514 F.2d 208 (1975) (criminal).

<sup>105</sup> See *infra* ch. 8 § 1.

is legally presumed, or if the prosecution has to prove actual knowledge, and by what legal standards. The application of either one or the other of these standards could have diametrically opposed results with respect to proof of guilt.

The next level of issues is the choice of general legal standards and tests. These standards range from the strictly objective to the purely subjective. The choice of one test over the other can also produce different outcomes as to guilt or innocence.

CAH are the product of state policy.<sup>106</sup> But only individuals can perform such crimes, by commission or omission, for or on behalf of or under color of authority of their public position, function, or their power given by public authority. While that conduct can be abstractly ascribable to the state, it extends to each individual person who has been part of the decision-making process or part of the execution of those decisions that resulted in the violation of an existing legal norm. At this point, the question becomes one of apportioning legal responsibility between the individual and the collective decision imputable to the group that shared in the decision, planned and executed the decision, or contributed to its realization. Obviously, these questions do not arise with respect to those who physically carry out the acts described in the definition of CAH. For them, the responsibility is direct. But can it be for CAH in the absence of specific intent or knowledge that their specific acts furthered the state policy? In other words, although it is possible to rely on the objective standard of general intent for some, it may be necessary in the interests of justice to require specific intent of those in the lowest echelons of the state's apparatus who carry out these acts.

There are many questions pertaining to the various forms of responsibility, their typology, means and methods of ascertaining them, the appropriate sanctions and remedies, and the enforcement modalities employed. In national systems, certain general doctrines exist that apply to all or most crimes. In ICL, these issues depend largely on the nature of each type of transgression. Thus, the elements of criminal responsibility for international crimes that are predicated on state policy,<sup>107</sup> like aggression, CAH, genocide, and apartheid, differ from other international crimes performed by an individual on his own, such as international traffic in drugs or hostage-taking.

Except in the cases of attempt, adjudication of individual conduct for purposes of assessing criminal responsibility is mostly after the fact. This is justified by the pre-existence of a law that provides specificity as to the prohibited conduct, and whose knowledge is available to those who are expected to heed it or incur the legal consequences of its violation. This three-pronged principle of pre-existing law – specificity of its mandates and knowledge of those to whom it applies – is the foundation of every criminal justice system. Yet the boundaries between lawful and unlawful conduct are not always clear in national criminal law,<sup>108</sup> let alone in ICL. This is particularly true with respect to the fundamental question of the extent to which a person may be legally held to the knowledge of ICL and, more particularly, to the requirements of the twenty-five categories of specific international crimes.<sup>109</sup> ICL also does not provide rules of conduct for other questions of law and mixed questions of law and fact. In fact, as discussed above, rules of conduct in ICL are mostly unarticulated because of the absence of a “general part.”

<sup>106</sup> See *infra* ch. 1.

<sup>107</sup> *Id.*

<sup>108</sup> See Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

<sup>109</sup> See, e.g., INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (M. Cherif Bassiouni ed., 1997) [hereinafter BASSIOUNI, ICL CONVENTIONS].

Furthermore, there is no indication as to whether ICL is cause-oriented or result-oriented in its unarticulated premises of criminal responsibility.<sup>110</sup>

Some of these unanswered questions make it very difficult to determine other ones, such as the secondary basis of criminal responsibility provided by various national criminal law techniques<sup>111</sup> that are also not articulated in ICL. Yet the three general categories of imputability found in the world's major criminal justice systems have been relied upon in international prosecutions, but without much explanation: responsibility for the conduct of another, responsibility for completed crimes arising out of partial conduct, and responsibility for lawful conduct producing an unlawful result.<sup>112</sup> Furthermore, ICL does not distinguish between risk-creation and risk-taking, which is particularly relevant in the determination of causal responsibility,<sup>113</sup> whose consequences with respect to lesser included offenses are quite significant. This is particularly true with respect to homicides in CAH that are not "murder" and could be part of "extermination" (which does not include necessarily only "murder").<sup>114</sup>

ICL does not provide for any legal test, such as the common law's "ordinary reasonable person,"<sup>115</sup> which is so important for the subjective or mental element and for the determination of criminal responsibility and exonerating factors.<sup>116</sup> In most legal systems, these factors are deemed to remove the existence of a culpable state of mind, which is one of the basic requirements for criminal responsibility in the world's major criminal justice systems, even though there are many divergences in and among these systems as to fundamental doctrines and their application.<sup>117</sup> Indeed, the intersection of responsibility and exoneration is the gray area of criminal law in the world's major criminal justice systems. It is even more so in ICL.<sup>118</sup>

Individual criminal responsibility for violations of ICL raises the same set of legal issues that exist in the national criminal law of all states, starting with concepts of responsibility and culpability. Indeed, the world's major legal systems differ in their conceptual and doctrinal approaches as to the legal bases of criminal responsibility and culpability. This is reflected in the use of such diverse terminology as criminality, culpability, responsibility,

<sup>110</sup> See Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974). For a comparison between the United States, English, and German systems, see FLETCHER, *supra* note 102, at 759–69. For a legal-philosophical perspective based on positivism in the common law of England, see HART, *supra* note 102, at 13–14.

<sup>111</sup> For some views of United States problems of criminal imputability and their common law origins, see, e.g., Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 613 (1984); BASSIOUNI, *supra* note 21, at 140–58, 201–22; Otto Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942). For an English common law approach, see JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 164 (John Bowring ed., 1859).

<sup>112</sup> See *infra*, §§1, 2.

<sup>113</sup> *Id.*

<sup>114</sup> For a discussion of murder and extermination, see ch. 6, §3.1.

<sup>115</sup> Even though it appears to have become the accepted test with respect to such doctrines as military necessity, command responsibility, and defense of obedience to superior orders. See e.g., NICO KEIJZER, *MILITARY OBEDIENCE* (1978); LESLIE C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 15–242 (1976); YORAM DINSTEIN, *THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW* 5–20 (1965); EKKEHART MÜLLER-RAPPARD, *L'ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ DU SUBORDONNÉ* 185–251 (1965).

<sup>116</sup> See *infra* ch. 8; and *supra* note 102.

<sup>117</sup> See Vassalli, *supra* note 102.

<sup>118</sup> See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985).

and punishability. In some legal systems these terms are predicated on another level of legal abstractions represented by value-laden terms that have different legal significance and impact, including such terms as “right,” “wrong,” and “blameworthiness.” But ICL’s policies and goals are somewhat different from those of national criminal laws because of the different types of crimes that require state policy, like CAH. Thus, ICL needs a separate and distinct “general part.” That is what the Rome Statute accomplishes in large part,<sup>119</sup> but the relevant provisions lack norms on several elements of general criminal responsibility as well as norms on the applicable standards of evidence. However, the Rome Statute contemplates two additional instruments intended to address these aspects. Article 9 states,

**Article 9**  
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
  - (a). Any State Party;
  - (b). The judges acting by an absolute majority;
  - (c). The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

And Article 51 states,

**Article 51**  
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
  - (a). Any State Party;
  - (b). The judges acting by an absolute majority; or
  - (c). The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.
4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the

<sup>119</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add.1, at arts. 21–34.

detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

## §2.2. *Problems in Identifying the Contents of the “General Part” of International Criminal Law: From the London Charter to the Rome Statute*

Prior to the London Charter, ICL was in its early stages. It consisted of some conventional and customary international law, mostly concerning piracy, slavery, drug trafficking, the regulation of armed conflicts, and some legal doctrine by a few specialists.<sup>120</sup> However, it did not have a counterpart in national criminal law’s “general part.” Prior to 1945, few, if any, of the conventional ICL instruments contained provisions on the “general part.”<sup>121</sup> As to the customary practice of states, it consisted essentially of a body of domestic jurisprudence and private international law doctrine on questions of jurisdictional conflicts between different national criminal systems.<sup>122</sup>

Article 6(c) of the London Charter defines the substantive contents of CAH<sup>123</sup> but it does not contain general elements of criminal responsibility or exonerating factors that are usually found in the “general part” of criminal law in the world’s major criminal justice systems,<sup>124</sup> except for (1) the notion of accomplice responsibility and conspiracy and (2) the removal of the absolute defense of obedience to superior orders and the immunity of heads of state, as discussed below.<sup>125</sup>

It can be assumed that the London Charter’s drafters wanted to avoid the difficulties inherent in reconciling the different legal conceptions in the four legal systems represented by the negotiators.<sup>126</sup> Surely they were not oblivious to these questions, as evidenced by the fact that they specifically dealt with one of them – the defense of obedience to superior orders.<sup>127</sup> Perhaps more troublesome to the principles of legality<sup>128</sup> was the absence of any reference to penalties in the Charters of the IMT, IMFTE, and CCL 10.

As is evident from the record of the proceedings, the attitudes of the IMT and IMTFE judges and prosecutors were overwhelmingly negative to the defenses’ raising of “general part” issues, except for their readiness to tackle the major issues relating to military law:

<sup>120</sup> See *infra* ch. 3, §1.

<sup>121</sup> See generally BASSIOUNI, ICL CONVENTIONS, *supra* note 109.

<sup>122</sup> See *inter alia* HENRI DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL (1928); INTRODUCTION À L’ÉTUDE DU DROIT PÉNAL INTERNATIONAL (1922); FRIEDRICH MEILI, LEHRBUCH DES INTERNATIONALEN STRAFRECHTS UND STRAFPROZESSRECHTS (1910); AUGUST HEGLER, PRINZIPIEN DES INTERNATIONALEN STRAFRECHTS (1906). The most noteworthy case decided by the PCIJ was the S.S. *Lotus* case, which involved questions of jurisdiction and conflict of jurisdiction; see also M. CHERIF BASSIOUNI, 1 INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE 319–80 (5th rev. ed. 2007).

<sup>123</sup> See *infra* ch. 3, §3.

<sup>124</sup> The London Charter, however, contains a provision on conspiracy, “common design,” in Article 6. This charge came out of a specific common law substantive crime that was, and still is, unknown to other legal systems. Because it was used in the Law of the Charter as a specific crime, it cannot be viewed as referring to a form of imputed criminal responsibility.

<sup>125</sup> See IMT Charter arts. 7, 8, *supra* note 2.

<sup>126</sup> See *infra* ch. 3, §4.

<sup>127</sup> See IMT Charter art. 8, *supra* note 2.

<sup>128</sup> See *infra* ch. 5, §§2, 3.



obedience to superior orders, command responsibility, military necessary reprisals, and *tu quoque*.<sup>129</sup> The judges' and prosecutors' readiness to deal with these issues when raised by the defense does not mean that they were more ready to consider and apply customary law as it then existed. But these issues were amply debated. It can almost be surmised from these attitudes and from the Tribunals' rulings that there was a tacit agreement between judges and prosecutors not to let the proceedings get out of control by allowing the defendants to effectively use such legal arguments to override factual arguments on which criminal responsibility was to be assessed.<sup>130</sup> With the exception of the military law issues mentioned above, the Tribunals ignored the cumbersome and complicated "general part" issues as much as they could. This situation can be explained in several ways, but the three most likely hypotheses are:

- (1) The defendants were selected for having been part of the highest echelons of decision-makers and executors of the crimes charged,<sup>131</sup>
- (2) The law was driven by the facts because of the enormity of the human harm that occurred, and
- (3) The tangible evidence, at least at the IMT, overwhelmingly showed that almost all the defendants at these trials committed or ordered these crimes or allowed them to occur when they presumably could have avoided or prevented them.

Post-1945 ICL instruments seldom contained provisions relating to a "general part" question.<sup>132</sup> The specific elements of the twenty-five categories of international crimes, whenever they are found in the 322 international instruments applicable to these crimes,<sup>133</sup> usually identify the objective or material element of the crime, but they seldom identify the subjective or mental element of the offense.<sup>134</sup> The causation element is rarely identified and the result is occasionally found in these instruments, though more frequently by implication only. With the exception of this writer's *Draft International Criminal Code*,<sup>135</sup> there was, until recently, no source for the "general part" of ICL,

<sup>129</sup> See *infra* ch. 8.

<sup>130</sup> One noted scholar said:

*Il s'agissait en effet de trouver les règles juridiques préciser permettant de frapper, tous les coupables. Il fallait éviter deux écueils opposés: d'un côté une extension illimitée du cercle des personnes considérées comme responsables; de l'autre côté la dilution de la culpabilité par l'admission des causes justificatives ou de non-imputabilité tirées de l'ordre juridique nazi.*

HENRI MEYROWITZ, *supra* note 58, at 290 (1960). See also Henri Donnedieu de Vabres, *Le Procès de Nuremberg devant les Principes Modernes du Droit Pénal International*, 70 RECUEIL DES COURS 480 (1947) (taking the same position as Meyrowitz).

<sup>131</sup> Some of the defendants before the IMTFE were not the actual decision-makers, and some of the cases brought before the United States Military Commission in the Philippines, particularly in the *Yamashita* case, discussed in ch. 7 and below under "Command Responsibility," were a miscarriage of justice.

<sup>132</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 109.

<sup>133</sup> See *Id.*; BASSIOUNI, DRAFT CODE, *supra* note 1, at 115–78.

<sup>134</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] requires a "specific intent," and Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter] at Article 6(c) requires a policy of "persecution" which could also be deemed to be of a specific intent type. See *infra* ch. 6.

<sup>135</sup> See BASSIOUNI, DRAFT CODE, *supra* note 1, at 81–114.

whether for all or part of it, except for the scholarly writings on some aspects of the “general part,” notably those of the late Professor Stefan Glaser.<sup>136</sup>

In 1993 and 1994, the Statutes of the ICTY and ICTR respectively borrowed from Articles 7 and 8 of the Charter and provided for the elimination of the defense of obedience to superior orders. The two statutes strengthened the principle of command responsibility as developed by the IMT’s judgment, but in substance those two statutes did not add much to what had already been developed almost fifty years earlier, except for provisions on *ne bis in idem*. But neither the ICTY nor ICTR dealt with penalties, leaving open to the respective Tribunals’ jurisprudence the same questions that were faced by the IMT, IMTFE, and the CCL 10 Proceedings.

However, by 1996 the ICC’s PrepCom took a decidedly different approach and boldly dealt with the codification of “General Principles of Criminal Responsibility.”<sup>137</sup> The PrepCom’s work from 1997 to 1998 produced a comprehensive and well-drafted text that could have been elaborated by any group of comparatists representing the world’s entire array of national legal systems.<sup>138</sup> The Rome Statute refined the text proposed by the PrepCom and produced two relevant parts, one dealing with “General Principles of Criminal Law,” Part (3), Articles 22 through 33, and one Article in Part 2 on *ne bis in idem*, Article 20, and Part 7, Articles 77 through 80 on “Penalties.” The Rome Statute also clearly refers to “general principles” as a source of applicable law in Article 21 (contained in Part 2, “Jurisdiction, Admissibility and Applicable Law”). It may well be that in the future the “general part” of the Rome Statute, as well as other provisions, will be viewed as the embodiment of general principles and thus become the principal legal source for the “general part” of ICL.

### §2.3. *The Jurisprudential Application of the “General Part”: From the IMT to the ICC*

In general, the indictments, the judgments, and the record of proceedings of the IMT, IMTFE, and the CCL 10 Proceedings do not particularly deal with “general part” questions. For example, the charges before the IMT against Alfred Krupp were dismissed because he was deemed *non compos mentis*, and the charges against “criminal organizations,” like the SS and SD, were deemed not to constitute *ipso jure* or *ipso facto* criminal responsibility for its individual members. Various judgments held that CAH were international crimes, but without stating the elements of such crimes. Others stated the proposition that the mental element of “knowingly and intentionally” is required or is found to exist in a particular case but did not explain or discuss the requirements of the mental element, its legal standards and tests. Other related questions of intent such as knowledge and mistakes of law and facts were superficially addressed in the IMT

<sup>136</sup> See STEFAN GLASER, *INFRACTION INTERNATIONALE, SES ÉLÉMENTS CONSTITUTIFS ET SES ASPECTS JURIDIQUES* (1957). The late Professor Glaser also published numerous articles on international criminal law, including dealing with the “general part.” See, e.g., *L’élément moral des infractions de commission par omission en droit international pénal*, 73 *REVUE PÉNAL SUISSE* 263 (1958); *Culpabilité en Droit International Pénal*, 99 *RECUEIL DES COURS* 473 (1960).

<sup>137</sup> 1996 PrepCom Report, *supra* note 9, at vol. II, pp. 79–104.

<sup>138</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/Add.1.

judgment, and in the CCL 10 Proceedings. The IMTFE judgment on these questions was the worst.

Two cases from the CCL 10 Proceedings, the *Justice* case<sup>139</sup> and in the *Pohl* case,<sup>140</sup> the American military court found participatory liability based on the division of tasks in an organization or bureaucratic system.<sup>141</sup> Those defendants who did not physically commit crimes were held responsible as accomplices because of their functional participation in carrying out Nazi policy. These trials did not distinguish between principals and accomplices:

[T]he person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of the commission, and the person who pulls the trigger are all principals or accessories to the crime.<sup>142</sup>

In the *Pohl* case, Oswald Pohl and seventeen other SS officers employed by the SS-*Wirtschafts-Verwaltungshauptamt* (WVHA), the governmental office that ran the concentration and extermination camps, were prosecuted for war crimes and CAH committed during their involvement in and administration of the Final Solution. The U.S. military court analogized to four men robbing a bank where “the acts of any of the four, within the scope of the overall plan, become the acts of all the others” in establishing the guilt of various participants in the exterminations and deportations of the Jews.<sup>143</sup> All forms of participation were treated equally, and each participant was liable as a direct perpetrator.<sup>144</sup>

In the *Mauthausen Concentration Camp* case, the U.S. military court applied the conception of “criminal organizations” in holding that membership of the staff of a concentration camp amounted to membership of a “criminal organization.” Thus, a high-echelon position “implied a rebuttable presumption of knowledge of the atrocities,”<sup>145</sup> and “[e]very official engaged in the operation of running a camp was presumed to have had knowledge of the criminal practices therein.”<sup>146</sup>

In the *Dachau Concentration Camp* case, forty officials who staffed Dachau, including commandant Gottfried Weiss and camp doctor Claus Schilling, were charged with

<sup>139</sup> The U.S. v. Alstötter et al. (the *Justice* case), reprinted in III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 954–1201 (U.S. GPO, 1951). In the *Justice* case, the defendants were sixteen German jurists and lawyers, of which nine were officials in the Reich Ministry of Justice, while the others were prosecutors and judges of the Special Courts and People’s Courts of Nazi Germany. These individuals were held responsible for implementing and furthering the Nazi “racial purity” program through racial and eugenic laws. The chief defendant in the *Justice* case, Joseph Alstötter, was convicted on the count of membership because the court concluded that he had knowledge of the criminal purpose and criminal acts of the SS, of which he was a voluntary member.

<sup>140</sup> The U.S. v. Pohl et al. (the *Pohl* case), V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. GPO, 1951), at 958–1163.

<sup>141</sup> VAN SLIEDREGT, *supra* note 38, at 27.

<sup>142</sup> *Justice* case, *supra* note 139, at 1063.

<sup>143</sup> *Pohl* case, *supra* note 140, at 1173.

<sup>144</sup> VAN SLIEDREGT, *supra* note 38, at 27.

<sup>145</sup> Mauthausen Concentration Camp Case, V LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1947–49), at 15.

<sup>146</sup> VAN SLIEDREGT, *supra* note 38, at 28; see also United States of America v. Brandt et al. (the *Medical* case), II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. GPO, 1951), wherein Brandt and eight other defendants were found guilty of membership in the SS. The *Medical* case is discussed further *infra* ch. 6.

having acted in pursuance of a “common criminal design.”<sup>147</sup> The prosecution established guilt in two ways:

- (a) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or
- (b) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner.<sup>148</sup>

Thus, as noted by Van Sliedregt,

[i]f an accused held the position of deputy camp commander or of an SS doctor, this was sufficient to establish guilt. If, on the other hand, the accused was merely a guard or a prisoner administrator then the prosecutor had to prove that the accused used his position to ill-treat prisoners. The *actus reus* of the crime was merely holding a certain position in the hierarchy.<sup>149</sup>

British courts dealing with a plurality of defendants analogized to the English criminal doctrine of “common design.” Defendants were found guilty of being “concerned in” committing war crimes.<sup>150</sup> In the *Almelo Trial*, for example, Otto Sandrock was in command of a group of soldiers responsible for killing a British POW and a Dutch civilian in Almelo, the Netherlands.<sup>151</sup> In other cases before British courts, the Judge Advocate reasoned that to be concerned in a killing does not require the accused’s presence at the scene of the crime:

If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with knowledge that that other man was going to put the killing into effect then he [is] just as guilty as the person who fired the shot or delivered the blow.<sup>152</sup>

Thus, the jurisprudence for “common design” shows that to be “concerned in” a crime, it must be established that (1) the defendant knew of the crime<sup>153</sup> and (2) that his/her conduct amounted to “a certain degree of criminal participation in the crime.”<sup>154</sup>

<sup>147</sup> Trial of Martin Gottfried Weiss & Thirty-Nine Others (the *Dachau Concentration Camp* case), XI LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1947–1949), at 5–17.

<sup>148</sup> *Id.* at 13.

<sup>149</sup> VAN SLIEDREGT, *supra* note 38, at 28.

<sup>150</sup> *Id.*

<sup>151</sup> Trial of Otto Sandrock & Three Others (The Almelo Trial), IV LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1947–49), at 40. The Judge Advocate provided that “[i]f people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law.” *Id.*

<sup>152</sup> Trial of Werner Rohde & Eight Others, V LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1951), at 56.

<sup>153</sup> See, e.g., Trial of Bruno Tesch & Others (The Zyklon B Case), in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (U.N. War Crimes Comm’n, 1947–49).

<sup>154</sup> See, e.g., Trial of Max Wielen & Seventeen others, holding “[t]he persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid.” XI LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1947–49), at 46. The various roles of the defendants were accounted for at sentencing. VAN SLIEDREGT, *supra* note 38, at 29–30.

Because, as noted above, civil law systems disfavored “conspiracy,” the French courts in the CCL 10 Proceedings utilized “complicity”<sup>155</sup> to address collective criminality.<sup>156</sup> The courts did not treat the different forms of participation equally; thus, it distinguished between principals, perpetrators, and accomplices.<sup>157</sup> This is illustrated in *Robert Wagner & Six Others*, wherein the court made this distinction.<sup>158</sup> In *Franz Holstein & Twenty-Three Others*, the court similarly distinguished between the various roles of defendants as instigators, perpetrators, and accomplices.<sup>159</sup>

The post-World War II courts also utilized aiding and abetting. A review of the relevant case law demonstrates that knowledge was the applicable *mens rea* standard. For example, in the *Zyklon B* case, a British military court sentenced to death two industrialists who supplied poison gas to the Nazis, because they had knowledge that the gas would be used to commit murder.<sup>160</sup> A German court in the French occupied zone also applied a knowledge standard for aiding and abetting:

He *knew* the conduct he was supporting by his participation [...] [and] he *knew* that by means of his participation he supported the principal criminal conduct [...]. The accused’s reasoning that, if he had refused to execute the measures requested by the Gestapo himself, somebody else would have implemented those measures, does not exclude his awareness; on the contrary, it proves its existence [...]. The abettor’s intent, however, does not require that the accused himself acted for racist motives.<sup>161</sup>

The CCL 10 Proceedings undertaken by the U.S. at Nuremberg also required knowledge as the standard for aiding and abetting liability. In *U.S. v. Flick*, the U.S. military court convicted Friedrich Flick, a civilian industrialist, because he knew of the criminal activities and widespread abuses of the SS but nevertheless contributed money that was vital to its financial existence.<sup>162</sup> The court noted that Flick “did not approve nor [...]

<sup>155</sup> VAN SLIEDREGT, *supra* note 38, at 30.

<sup>156</sup> *Id.* at 31.

<sup>157</sup> The Dutch and Norwegian military courts also punished complicity in war crimes without distinguishing between facilitators and other accomplices. See Article 4 of the Norwegian War Crimes Law, in XV LAW REPORTS OF TRIALS OF WAR CRIMINALS (UN War Crimes Comm’n, 1949), at 89.

<sup>158</sup> Trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others, III LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1949), at 24. Robert Wagner was referred to as the “Butcher of Alsace.”

<sup>159</sup> Trial of Franz Holstein and Twenty-three others, VII LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm’n, 1947–49), at 26. Those in command of the men who committed the crimes were guilty as instigators; those who facilitated and prepared the crimes beforehand, or those who supplied means during the crime were accomplices. *Id.* at 32, 33. The French courts did not distinguish between facilitators and other accomplices. *Id.* at 32; see also VAN SLIEDREGT, *supra* note 38, at 30–31.

<sup>160</sup> The *Zyklon B* Case, *supra* note 152, at 101; see also Matthew Lippmann, *War Crimes Trials of German Industrialists: The “Other Schindlers,”* 9 TEMP. INT’L & COMP. L.J. 173, 181–82 (1995). This case was later cited by the ICTY Trial Chamber in the *Furundžija* case, *supra* note 99, ¶ 238 (“in *Zyklon B* [...] the prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they *knew* what the buyer in fact intended to do with the product they were supplying.”) (emphasis added).

<sup>161</sup> *Furundžija* Trial Judgment, *supra* note 99, ¶ 240 n. 261, citing *LG Hechingen*, Jun. 28, 1947, Kls 23/47 and OLG Tübingen, Jan. 20, 1948, Ss 54/47 reported in *Justiz und NS-Verbrechen*, case 002, vol. I, pp. 469 ff. (unofficial translation) (emphasis added).

<sup>162</sup> *U.S. v. Flick* (the *Flick* case), reprinted in VI TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. GPO, 1951), at 1187.

condone the atrocities of the SS.”<sup>163</sup> Nonetheless, it found that “[o]ne who knowingly by his influence and money contributes to the support [of a violation of the law of nations] thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”<sup>164</sup> In the *Einsatzgruppen* case, the U.S. military court again articulated the knowledge standard. Waldemar Klingelhofer, who was convicted of CAH and war crimes, held a variety of roles, among them that of a translator.<sup>165</sup> The court noted that even if his only role was as a translator, he would still be guilty “as an accessory.”<sup>166</sup>

Consistent with its reasoning in the *Flick* and *Einsatzgruppen* cases, the U.S. military court in the *Ministries* case affirmed the knowledge standard for the *mens rea* standard across all relevant theories of criminal liability.<sup>167</sup> When examining defendants Von Weizsacker and Woermann’s criminal liability for deportations of Jews, the court explained that they “neither originated [the deportation program], gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted or implemented it.”<sup>168</sup>

Some Nuremberg-era defendants were acquitted on charges of aiding and abetting for lack of *mens rea* – not because they lacked the purpose of facilitating the crime, but rather because they lacked knowledge of the consequences of their assistance. For example, in *Schonfeld*, a British military court acquitted defendants Karl Brendle and Eugen Rafflenbeul who, acting as drivers, provided substantial assistance to their other defendants who executed three Allied airmen.<sup>169</sup> Brendle and Rafflenbeul claimed not to have known the aim of the mission and the court acquitted them because “[d]espite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.”<sup>170</sup>

In the *Farben* case, the U.S. military court found that the chemical corporation Degesch, largely controlled by I.G. Farben, had supplied large quantities of poison gas used to exterminate concentration camp inmates.<sup>171</sup> In contrast to the defendants in the aforementioned *Zyklon B* case, however, the I.G. Farben executives believed that the gas was used to delouse prisoners and were unaware of the “criminal purposes to which this substance was being put.”<sup>172</sup> In the *Farben* case, pharmaceutical executives provided drugs that were used in medical experiments on concentration camp inmates who had been deliberately infected with disease. The court was not convinced beyond a

<sup>163</sup> *Id.* at 1222.

<sup>164</sup> *Id.* at 1217.

<sup>165</sup> *United States v. Ohlendorf* (the *Einsatzgruppen* case), reprinted in 4 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. GPO, 1951), at 411.

<sup>166</sup> *Id.* at 569 (emphasis added).

<sup>167</sup> *United States v. Von Weizsacker* (the *Ministries* case), 14 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. GPO, 1951), at 10.

<sup>168</sup> *Id.* at 478; see also at 953 (upholding, on appeal, this conviction under a knowledge standard).

<sup>169</sup> See *The Trial of Franz Schonfeld and Nine Others* (*Schonfeld*), 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 64 (U.N. War Crimes Comm’n, 1947–1949) at 66–7.

<sup>170</sup> *Furundžija* Trial Judgment, *supra* note 99, ¶ 239 (referring to *Schonfeld* at 69 f) (emphasis added).

<sup>171</sup> *Farben* case, *supra* note 59, at 1169.

<sup>172</sup> *Id.* at 1168–69 (“The evidence does not warrant the conclusion that the executive board or the defendants [...] [had] any significant knowledge as to the uses to which its production was being put.”).

reasonable doubt, however, that the executives had the requisite “guilty knowledge” of the Nazis’ intentions.<sup>173</sup>

In sum, the IMT produced an unsatisfactory concept of criminal participation that was followed by the various concepts utilized by the different countries conducting the CCL 10 Proceedings. The proceedings of the British and Americans further defined participation, much in line with the Bernays approach to collective criminal responsibility, but these courts failed to distinguish between the varying roles of participants, which instead were taken into account during sentencing. The French and Dutch adopted an approach to “complicity” that distinguished accomplices from perpetrators. These post-World War II developments later were codified into law.<sup>174</sup>

In these cases, command responsibility as a basis for imputed criminal responsibility and the defenses of obedience to superior orders and military necessity were frequently raised and broadly discussed in all the proceedings and in the judgments, while other “general part” questions were hardly addressed. One reason may well be that most of the accused were military men who had operated in what could be termed as a military environment – the judges and prosecutors were predominantly military, and the investigators were almost all military. Thus, it was natural that the issues that are so much part of the military law of the countries involved became the subject of concentration by all concerned. In fact, these legal issues of a military nature became the common denominator of judges, prosecutors, defendants, and defense counsels. In a sense, these issues were the legal ligaments of these proceedings that otherwise could have turned into a tragedy of the absurd, as each one of the participants would have approached the law and the proceedings from a different perspective.

Other than arguments about the principles of legality,<sup>175</sup> the following “general part” issues were recurring throughout the post-World War II proceedings: (1) knowledge of the law; (2) consciousness of wrongdoing; (3) individual responsibility for participation in a criminal organization as an accessory to a crime and conspiracy; (4) command responsibility; (5) the defense of obedience to superior orders; (6) compulsion (necessity); (7) reprisals; and (8) *tu quoque*.

Theoretically, responsibility under ICL presents the same issues as those arising under national criminal law. But since ICL lacks a codified, customary, or case law “general part,” except for a few rules, the legal requirements cannot be conclusively stated unless one resorts to “general principles” of criminal law, whose methodology is discussed in Chapter 6.

### §3. Knowledge of the Law and Intent

The mental or subjective element is required in major crimes and in some lesser ones in almost every legal system of the world. It is considered the essential basis for the determination of criminal responsibility or culpability, depending upon whether national legal systems consider the mental element an element of responsibility or culpability. But in all systems it is predicated on a number of legal assumptions or presumptions, most notably freedom of will, mental capacity, and knowledge of the law.

<sup>173</sup> *Id.* at 1171–72 (finding it reasonable to believe that there was a “legitimate need for such drugs in these institutions”).

<sup>174</sup> VAN SLIEDREGT, *supra* note 38, at 31.

<sup>175</sup> See generally *infra* ch. 5, §4.



The London and Tokyo Charters' Article 6(c) and 5(c) and CCL 10 Article II, 1(c) declared that the crimes defined are punishable irrespective of whether they constitute a violation of the laws of the state where they were performed. Although this provision removes the effect of national legislation designed to "legalize" what would otherwise be criminal,<sup>176</sup> the implications of this provision carry over into the mental element. Thus, if a person engaged in conduct on the basis of a superior's order and relied on the existence of national legislation that permitted such conduct, then for such a person the order cannot be patently unlawful unless that individual has specific knowledge of the wrongdoing. Without such knowledge, there is no objective basis to ascertain the existence of intent that would have to include knowledge of the illegality or conscious wrongdoing. The outcome would be exoneration from culpability. However, positivists distinguish knowledge of wrongdoing from knowledge of committing a violation of the law. The first conception derives from materialism, whereas the second from positivism, and the choice between the two is essentially a question of legal philosophy.<sup>177</sup>

Though the IMT and IMTFE Judgments and the CCL 10 Proceedings are important sources of law for developing a theory of individual responsibility under ICL, they did not leave anything that can be called a system of criminal law or doctrine. In this regard, municipal is more helpful. ICTY and ICTR jurisprudence demonstrates that the judges have looked to national law and doctrine to assist in forming their judgments and interpreting concepts.<sup>178</sup>

In Romanist-Civilist legal systems the problems related to intent and knowledge are more acute than in the common law system. In these systems, the mental element is called *l'élément moral de l'infraction*, which highlights the subjective dimension of intent.<sup>179</sup> In the German system, knowledge does not mean the specific or formal illegal character of the conduct, but its general prohibition or punishability.<sup>180</sup> German legal doctrine and jurisprudence debated that question extensively in the 1920s, particularly with respect to the post-World War I Leipzig trials.<sup>181</sup> But the views of the German dogmatic school, in contradiction to other views, gave rise to many subtleties as to the distinction between the various aspects of knowledge of the lawfulness or unlawfulness of the conduct and the prohibition. The judges and prosecutors at the IMT and CCL 10 Proceedings who were not German scholars would have been at a significant disadvantage in facing German defense counsels had they been permitted to argue these questions. This is probably another reason that German law was not relied upon in the American, British, and French proceedings, though it was relied upon before German courts when they decided to apply German law in place of CCL 10.<sup>182</sup>

The critical problem with knowledge, or lack thereof, can be characterized in the Nazi era and in all totalitarian regimes, in negative terms: it is *the will not to know*

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

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

<sup>178</sup> For instance, both the ICTY and ICTR have used the terms *actus reus* and *mens rea* to describe the subjective and objective elements of crimes, and to analyze individual, participatory, and superior responsibility. See VAN SLIEDREGT, *supra* note 38, at 41 *et seq.*

<sup>179</sup> See STEFANI ET AL., *supra* note 102; MERLE & VITU, *supra* note 102; DONNEDIEU DE VABRES, *supra* note 102.

<sup>180</sup> See JESCHECK, *supra* note 102, at 252–54.

<sup>181</sup> See Hofacker, *Die Leipziger Kriegsverbrecher prozess*, ZSTW 649 *et. seq.* (1922).

<sup>182</sup> See MEYROWITZ, *supra* note 58, at 197–98.

the essential nature of one's wrongdoing or that of others, which one aids and abets.<sup>183</sup> Whether international law had, by 1945, imposed a duty on individuals that went beyond the positive legal norms of national systems is surely questionable. Yet Article 6 of London Charter specifically enunciated that its provisions applied irrespective of national law. The closest analogy to such a policy is the right or duty to disobey an order that is patently unlawful. The German military regulations applicable at the time required it.<sup>184</sup> Later, the Geneva Conventions also contained similar provisions on the nonexecution of a patently unlawful order.<sup>185</sup>

The Roman law maxim, *ignorantia juris neminem scusat* (ignorance of the law is no defense to anyone) is recognized in the world's major criminal justice systems and as such it constitutes a "general principle of law" applicable to ICL. However, this presumes persons criminally responsible for breach knew the law. The world's major criminal justice systems assume that the proper promulgation and dissemination of information about laws fulfills the legal requirement that permits the operation of the legal presumption that all know the criminal law. Such a presumption of knowledge of the law thus rationalizes the validity of the maxim *ignorantia non scusat*. But the validity of this presumption is not without question or challenge in legal systems, particularly with the contemporary inflation of criminal and quasi-criminal legislation in all countries of the world. Thus, if the question arises in national legal systems as to the reasonableness of this presumption, it surely also arises in ICL. What then can reasonably be attributed to the public knowledge of all or some persons throughout the world about international crimes? And what is the degree of specificity of knowledge as to the legal infraction that is required to ensure the legal validity of such a presumption?

The unarticulated premise of this legal presumption in the national legal systems is that the criminal law is known to everyone because crimes are an emanation of social values that national communities deem so significant that they seek to protect them through penal sanctions. Thus, their prohibition is a matter of public and general awareness. The absence of these unarticulated premises would deny legal support for the validity of the irrebuttable presumption of knowledge of the criminal law. Applying these basic considerations to ICL in light of the peculiarities of that legal system raises a number of closely related legal issues: (1) whether the presumption of knowledge of ICL satisfies the principles of legality; (2) whether it is rebuttable or irrebuttable; (3) whether legal defenses can include ignorance of the law as exoneration by way of justification or excuse; (4) whether ignorance of the law can be viewed as a factor eliminating criminal intent; and (5) whether ignorance of the law, if it is not considered as exonerating, can nevertheless be considered in mitigation of punishment.

<sup>183</sup> In the case of Walther Funk, the Minister of Economy and President of the Reichsbank, he claimed not to have seen nor to have had knowledge that the gold deposited by the SS with his authorization in the bank's vaults (actually in the basement of the building where his office was located) had come from dispossessed Jews, including gold that had been removed from the teeth and glasses of those who had been sent to the death camps. Assuming this contention to be true, Mr. Funk must have gone to great length not to see or know what he claimed he didn't see or know existed in his own basement and which was placed there by his authorization. See 1 IMT 326.

<sup>184</sup> See EBERHARD SCHMIDT, *MILITÄRSTRAFRECHT* (1936). For a German perspective on breaches of the law of war, see FRITZ BAUER, *DIE KRIEGSVERBRECHER VOR GERICHT* (1945).

<sup>185</sup> As a result of the Geneva Conventions, the military laws of all the parties thereto include a similar provision.

The presumption of knowledge of ICL is predicated on whether a given international crime satisfies the principles of legality of that discipline.<sup>186</sup> But if legality is predicated on the validity of the presumption of knowledge, the inquiry is a vicious circle, one remanding to the other, thus assuming the character of a perpetual *renvoi*. To break the vicious circle, each of these two concepts must be considered independent of the other.

The peculiarities of ICL often result in the formulation of international crimes in a way that is less certain and less specific than what the principles of legality in many of the world's major criminal justice systems would require.<sup>187</sup> Thus, the presumption of knowledge of ICL cannot be irrebuttable because its unarticulated premises of public knowledge and certainty and sufficiency of content would be lacking, and that would violate minimum standards of legality.

However, not all international crimes lack certainty or specificity of content, though their levels differ from crime to crime. The reasons for these differences are (1) the absence of a singular legislative source; (2) the occasional and even episodic process by which conventional ICL develops; (3) as a consequence of the above, the absence of cohesion, harmony, and consistency in drafting international instruments; and (4) the inherent uncertainty and lack of specificity of noncodified customary ICL. Thus, the doctrinal dilemma for ICL is

- (1) to accept, reject, or qualify the presumption of knowledge in ICL;
- (2) if the presumption is accepted in principle, whether it is realistic to assume the world public's general knowledge of ICL (which is the unarticulated premises upon which the presumed knowledge of national criminal law is founded);
- (3) if the presumption is rejected, whether it results in a requirement of proving in each case the individual's specific knowledge of the international crime that is charged; and
- (4) if the presumption is accepted as rebuttable or qualified, whether ignorance of the law becomes part of the mental element of the specific crime (which when established, results in removing criminal responsibility) or whether it would be only a mitigating factor in punishment.

There are two doctrinal approaches to the presumption of knowledge and ignorance of ICL. One approach is to treat the question as part of the mental element of criminal responsibility; the other is to treat it as an evidentiary question needed to prove the mental element. The consequence of the first hypothesis is that absence of knowledge or culpability negates responsibility altogether, and with respect to the second, it becomes an exonerating factor in the nature of a legal excuse or nonpunishability. However, in both of these instances there are also questions of legal standards and burdens of proof that will depend on a variety of doctrinal approaches as to the questions raised in the various legal systems. Thus, irrebuttable presumptions need no proof by the prosecution and only in cases of rebuttable presumption can the defense raise the question. In this case, another question arises and that is the quantum of proof required to rebut the presumption.

<sup>186</sup> See *infra* ch. 5, §2.2.

<sup>187</sup> *Id.*

Because of the wide diversity in the world's major criminal justice systems, some judgments are needed in ICL, and it is this writer's conclusion that they should be as follows:

- (1) The presumption of knowledge of ICL should exist as a policy choice for the same reasons recognized in the world's major criminal justice systems, even though in this case with lesser degrees of validity because of the questionable unarticulated premises of public awareness and public knowledge upon which the presumption is founded. But precisely for this reason, the presumption must be rebuttable and not irrebuttable; otherwise it would violate the minimum standards of legality.
- (2) Ignorance of the existence of ICL is in principle no defense, but ignorance of a specific crime would be a legal excuse if it negated the mental element of the crime.
- (3) If the international crime also exists in the national criminal law of the individual's state of nationality or residence, ignorance of the ICL should not be deemed as negating the mental element.
- (4) Ignorance of a specific violation of ICL should, however, be taken into account in mitigation of punishment.
- (5) ICL should not recognize the principle of strict criminal responsibility, that is responsibility without intent, and intent presupposes actual knowledge of the law.
- (6) None of the above should affect other bases of criminal responsibility, such as those pertaining to omissions or responsibility for the conduct of another, except that none of these and other principles of imputed criminal responsibility should be based on strict responsibility.

For the reasons stated above, the legal presumption of knowledge in ICL should be deemed a rebuttable presumption. This rebuttable presumption includes knowledge of the illegality of the act performed, based on the standard of reasonableness. Notwithstanding this standard of reasonableness, an individual may present the defense of ignorance of the law. Thus, this legal standard is ultimately subjective, not objective. This approach reconciles the common law and the Romanistic-Civilist-Germanic legal systems. This standard may be gleaned from various instruments on the regulation of armed conflicts, particularly with respect to norms concerning discretionary judgment, as in the defense of military necessity. With respect to these and other issues, both national and international regulation of armed conflicts indicates that a reasonableness test is applicable, but not as a purely objective one, because it includes the subjective knowledge and intent of the accused. The test for this legal standard can be formulated as follows:

Whether the ordinary reasonable person, possessed of the intellectual capacity and background of the actor, should have reasonably known or believed the act to be unlawful under international or national law.

Thus, an actor who knew the act to be unlawful would clearly be found to have satisfied this mental element, as would the actor who intentionally committed the act with malice at common law, or with motive in the Romanist-Civilist-Germanic theories of the subjective element. Therefore, complete knowledge of all aspects of the international criminality of the act is not necessary. It could also be argued that conscious knowledge

of moral wrongdoing should be enough to at least trigger a duty to inquire.<sup>188</sup> However, such an inquiry could lead to an interpretation of the law or of a mixed question of law and facts. The outcome of this inquiry could thus lead to the negation of intent and exoneration from criminal responsibility or culpability, as the applicable substantive law would deem such a condition to be.

CAH are *mala in se* acts, which are manifestly contrary to the norms, rules, and principles of ICL and to those of the world's major criminal justice systems, for which most reasonable persons would not have consciousness of wrongdoing. Consequently, a perpetrator cannot take refuge in the act of state doctrine or in the defense of obedience to superior orders unless exigent circumstances necessitated compliance with such orders. Such a perpetrator must necessarily face individual criminal responsibility for whatever violative acts he committed and for his aiding and abetting others in the commission of such acts. Whether such a perpetrator is found culpable is a question of judicial ascertainment based on the facts and on the applicable substantive criminal law. The latter depends on whether the adjudicating jurisdiction will apply its own law, the law of the state wherein the act was committed, or if it is different, the law of the actor's nationality or that of the victim's nationality.

Therefore, ICL must necessarily rely on "general principles of law," which will either emerge from the national legal systems, or from relevant international legal experiences and practices, to determine what substantive law the adjudication jurisdiction will apply.<sup>189</sup> International practice with respect to violations of the regulation of armed conflicts reveals that the prosecuting state having *in personam* and subject matter jurisdiction may apply its own precepts of imputability, culpability, and punishment.<sup>190</sup> However, it is not clear what substantive law the adjudicating state can use if it has only *in personam* and not subject matter jurisdiction. Consequently, one has to turn to that state's rules of private international law applicable to conflicts of laws in the criminal context and which allow the prosecuting state to apply its own conflicts of law rules to determine the applicable "general part" of substantive criminal law. This, in turn, will determine the rules of imputability of criminal responsibility, with all that these rules comport of standards

<sup>188</sup> RAYMOND CARTIER, *LES SECRETS DE LA GUERRE DÉVOILÉS PAR NUREMBERG* (1967) (reporting that Field Marshall Halder stated at his trial that Hitler had told his generals in 1941, that because the U.S.S.R. did not ratify the 1907 Hague Convention, its provisions, particularly those applying to POWs and civilians, should not be respected). It is this writer's assumption that if Hitler, who was not a jurist, made such a statement, it was because some legal advisor had suggested it. Such advice must have been founded on the notion that the 1907 Hague Convention abrogated the 1899 one, and that the Hague rules were not part of the customary international law. But the point here is that knowledge of the law did exist, even though it was erroneously interpreted. And that, in turn, raises a question as to the consequences of mistake of law which bears on intent and consequently on criminal responsibility. *Id.* at 359.

<sup>189</sup> See, e.g., DONNEDIEU DE VABRES, *supra* note 102. For contemporary works on theories of international criminal jurisdiction, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 122; Christopher L. Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM* (M. Cherif Bassiouni ed., 1988); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in *INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS* 84 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Shneur-Zalman Feller, *Jurisdiction over Offenses with a Foreign Element*, in 2 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* 5–61 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

<sup>190</sup> See MEYROWITZ, *supra* note 58; JEAN PIERRE MAUNOIR, *LA RÉPRESSION DES CRIMES DE GUERRE DEVANT LES TRIBUNAUX FRANÇAIS ET ALLIÉS* (1956); Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, in 2 BASSIOUNI & NANDA *TREATISE*, *supra* note 189, at 65–96.

of individual and group responsibility, responsibility for the conduct of another, responsibility based on commission or omission, exonerating conditions (including justifiable and excusable conditions and circumstances), measuring standards of conduct, applying legal tests (i.e., subjective or objective) and the meting of punishment, and mitigating or aggravating circumstances or conditions.

The forum having jurisdiction will thus control both the applicable substantive and procedural law, and with it all relevant issues bearing on responsibility.<sup>191</sup> But the question remains as to whether international crimes do not impose certain substantive legal requirements that transcend or override the prosecuting state's norms and rules. So far, no clear answer is discernible in positive ICL because, as stated above, conventional ICL has not been formally codified and no "general part" of ICL exists, except for the writings of some scholars.<sup>192</sup>

The London Charter and CCL 10 provide that national law cannot be a bar to criminal responsibility for acts constituting international crimes as specified in Article 6. One of the consequences of this principle is that knowledge of national law is displaced by the presumed knowledge of international law. But it does not resolve two basic issues: (1) which specific aspect of international law overrides national law and under what circumstances it does so and (2) whether it is proper to place the burden of resolving questions of conflict between international and national law on the individual. This is particularly significant with respect to ICL that is not codified and more so with respect to its "general part."

One way to solve these problems is to revert back to applying the national criminal law of the situs where the crime was committed or the national law of the perpetrator. From this perspective, all of the London Charter's Article 6(c) crimes, except for "persecution," were crimes under the 1871 German Penal Code that was in effect in 1945.<sup>193</sup> Thus, there can be no valid claim that the perpetrators did not know of the legal prohibition. However, they could still argue lack of intent on the basis of mistake of law, if they reasonably believed that their national law obligated them to do what they otherwise perceived to be a crime, or a *malum in se* act. But this presupposes a consciousness of wrongdoing, which also evokes the questions of whether such consciousness is purely moral because of the potential conflict of legal mandates and legal duties. Some of these mandates and legal duties derive from international law, whereas others derive from national law. How, and on what basis should the individual resolve these conflicts? And how, and on what basis is the individual going to be judged? These are questions that neither the Law of the London Charter nor post-Charter legal developments have addressed, let alone resolved. Furthermore, the interrelationship between knowledge of international and national law, intent, consciousness of wrongdoing, and the factors negating intent (i.e., mistake of law) are also among the issues that neither the Charter, nor the post-Charter legal developments have resolved, although some tribunals were asked to rule on these issues.

<sup>191</sup> This approach was taken by this writer in the proposal for the establishment of an international criminal court presented to the VIII United Nations Congress on Crime Prevention and the Treatment of Offenders (Havana, Aug.–Sept. 1990) as *Draft Statute for an International Criminal Tribunal*, E/Conf.144/NGO ISISC, July 31, 1990, reprinted in 15 NOVA L. REV. 372 (1991).

<sup>192</sup> See, e.g., GLASER, *supra* note 136; DONNEDIEU DE VABRES, *supra* note 102; Donnedieu de Vabres, *supra* note 52.

<sup>193</sup> See German Penal Code.

In the *Hostages* case of the CCL 10 Proceedings, for instance, the tribunal held that, under certain circumstances, the subordinate could claim a defense of mistake.<sup>194</sup> If the subordinate did not know, or should not have known that the order was illegal, he or she lacked the required intent for the crime.<sup>195</sup>

Fault requirements from the various national prosecutions of war crimes and CAH have varied.<sup>196</sup> The French courts in the *Barbie* and *Touvier* cases required knowledge of the criminal plan and full intent for the substantive acts.<sup>197</sup> In the *Finta* case, the Canadian Supreme Court required knowledge of the broader context in which perpetrator's act occurred.<sup>198</sup>

Because the Statutes of the ICTY and ICTR do not contain a provision on *mens rea* (or the mental element), the jurisprudence of both Tribunals developed this law.<sup>199</sup> The *mens rea* of CAH is cognitive in character.<sup>200</sup> The *ad hoc* tribunals' jurisprudence requires the defendant to have actual knowledge that his/her act is part of a widespread or systematic attack on a civilian population.<sup>201</sup>

The conclusion is therefore warranted that the relevant case law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated [ . . . ].

The Appeals Chamber does not consider it necessary to further require, as a substantive element of *mens rea*, a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof of the accused's motives.<sup>202</sup>

Since the London Charter, ICL has not significantly evolved these concepts of responsibility, but the national laws of several states have. For example, in a civil case involving an assassination plot by Chilean officials against the former Chilean Ambassador to the United States, Orlando Letelier, the District Court for the District of Columbia held that

<sup>194</sup> U.S. v. Wilhelm List et al. (the *Hostages* case), reprinted in XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S. GPO, 1951).

<sup>195</sup> *Id.* at 1303, 1307.

<sup>196</sup> See Public Prosecutor v. Menton, Supreme Court, reprinted in 75 INT'L L. REP. 332, 361–66 (1987) (Neth.); CrimC(Jer) 40/61 Attorney General of the Government of Israel v. Eichmann, IsrDC 45, 3 (1961); CrimA 366/61 Eichmann v. Attorney General 17 IsrSC 2033 [1962]. See also KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS: ANSÄTZE EINER DOGMATISIERUNG 171–75, 184, 190, 223 (2002).

<sup>197</sup> *Id.* at 192–195.

<sup>198</sup> R. v. Finta, [1989] 61 D.L.R. 85; R. v. Finta, [1992] 92 D.L.R. (4th) 1, 84; R. v. Finta, [1994] 1 S.C.R. 701, cited in AMBOS, *supra* note 193, at 203; see *infra* ch. 9, § 3.2.

<sup>199</sup> The full scope and detail of this discussion is beyond the reach of this book. See MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES (2002).

<sup>200</sup> VAN SLIEDREGT, *supra* note 38, at 49.

<sup>201</sup> *Tadić* Trial Judgment, *supra* note 98, ¶¶ 626, 638, 656–57 (May 7, 1997), *aff'd* *Tadić* v. Prosecutor, Case No. IT-94-I-A, Judgment (Jul. 15, 1999) [hereinafter *Tadić* Appeals Judgment]; Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶¶ 556–557 (Jan. 14, 2000) [hereinafter *Kupreškić et al.* Trial Judgment].

For the ICTR, see, e.g., Prosecutor v. Kayishema, Case No. ICTR-95-IT, Judgment, ¶¶ 133–34 (May 21, 1999); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 69 (Dec. 6, 1999) [hereinafter *Rutaganda* Trial Judgment]; Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 206 (Jan. 27, 2000); Prosecutor v. Ruggiu, Case No. ICTR-97-32-I-T, Trial Judgment, ¶ 20 (Jun. 1, 2000).

<sup>202</sup> *Tadić* Appeals Judgment, *supra* note 201, ¶¶ 270, 272.



[T]here is no discretion to commit, or to have one's officers or agents commit, an illegal act. Whatever policy options may exist for a foreign country, it has no discretion to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.<sup>203</sup>

With respect to the ICC, the Rome Statute does not utilize the terms *mens rea* or *actus reus*. Instead, it defines the “mental element” in Article 30 as follows:

#### Article 30 Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - a. In relation to conduct, that person means to engage in the conduct;
  - b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.<sup>204</sup>

That formulation is a significant improvement over what existed before, but it is far short of covering all of the issues pertaining to the mental element. That is why Article 21 elaborates on the “Applicable Law.” Article 21 permits the interpretation of Article 30, and, for that matter, other questions concerning the “general part,” by resorting to other sources of law. However, such a technique may well be deemed in contradiction of the principles of legality contained in Articles 22 and 23. The Elements of Crimes concerning CAH provides that “proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization” is not required.<sup>205</sup>

#### §4. The Jurisprudence of the ICTY and ICTR on Individual Criminal Responsibility

As discussed in [Chapter 6](#), “general principles of law” are the only source of international law that, for all practical purposes, applies to ICL. It is possible that some conventions, particularly the Rome Statute, embody specific norms applicable to the general part of ICL. But that source would be limited to the states parties. Customary international law would hardly be adequate, because international law is not customarily practiced with regard to the general part of the criminal law of domestic criminal justice systems. Moreover, relying on that source of law is likely to violate the principles of legality,

<sup>203</sup> *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

<sup>204</sup> ICC Statute art. 30, *supra* note 10.

<sup>205</sup> Compare with *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 257 (Mar. 3, 2000) [hereinafter *Blaškić Trial Judgment*] (phrasing the specific intent of CAH in terms of “risk,” so that it was sufficient “that [Blaškić] knowingly took the risk of participating in the implementation of the ideology, policy or plan.”)

as it would lack the necessary specificity regarding its contents. Admittedly, “general principles” may also lack that level of certainty that may be required in the different national criminal justice systems with regard to the application of the principles of legality.

This source of law and methodological set of issues first arose in ICL with the ICTY, followed by the ICTR, whose respective Statutes adopted by the Security Council contain very few norms concerning the general part. This meant that the identification of “general principles of law” was left to the jurisprudence of the Tribunals, which follows below. This jurisprudence applied both to the principles of criminal responsibility and to the conditions of exoneration, which are discussed in the following chapter. But as described below, the Tribunals’ jurisprudence substantially failed in developing a clear methodology and in applying it consistently. Instead, the jurisprudence either was *ad hoc* or was simply the product of judicial determination based on the experience of the judges in a given Trial Chamber and, as experience now reveals, with heavy reliance on legal assistants who had never been more than recently graduated young jurists. Nevertheless, that jurisprudence seems to have been accepted as authoritative, which it certainly is with regard to the two Tribunals in question. This is especially true with respect to the ICTR, which continuously cites and disposes of issues by deferring to the jurisprudence of the ICTY.

Article 7(1) of the ICTY Statute provides, “Any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 [ . . . ] shall be individually responsible for the crime.”<sup>206</sup> Likewise, Article 6(1) of the ICTR Statute provides, “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 [ . . . ] shall be individually responsible for the crime.”<sup>207</sup> Thus, both Statutes provide for five forms of participation that can lead to individual criminal responsibility: planning, instigating, ordering, committing, and aiding and abetting.

#### §4.1. *Planning, Instigating, Ordering, and Committing*

According to the jurisprudence of the ICTY, “planning constitutes a discrete form of responsibility under Article 7(1) of the Statute and [ . . . ] an accused may be held criminally responsible for planning alone.”<sup>208</sup> Both the ICTY and ICTR have defined the *actus reus* of planning as follows: “‘Planning’ requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.”<sup>209</sup> Both *ad hoc* tribunals have held that planning “implies that one or several persons plan

<sup>206</sup> ICTY Statute art. 7(1), *supra* note 5.

<sup>207</sup> ICTR Statute art. 6(1), *supra* note 6.

<sup>208</sup> *Kordić & Čerkez v. Prosecutor*, Case No. IT-95-14/2-A, ¶ 386 (Dec. 17, 2004) [hereinafter *Kordić & Čerkez Appeals Judgment*]; *see also* *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, ¶ 30 (Jun. 7, 2001) [hereinafter *Bagilishema Trial Judgment*] (“An individual who participates directly in planning to commit a crime under the Statute incurs responsibility for that crime even when it is actually committed by another person.”)

<sup>209</sup> *Id.* at ¶ 26; *see also* *Prosecutor v. Limaj et al.*, IT-03-66-T, ¶ 513 (Nov. 30, 2005) [hereinafter *Limaj et al. Trial Judgment*] (similar language); *and* *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A ¶ 479 (Nov. 28, 2007) [hereinafter *Nahimana et al. Appeals Judgment*].

or design the commission of a crime at both the preparatory and execution phases.”<sup>210</sup> The Prosecutors at both tribunals must demonstrate that “the planning was a factor substantially contributing to such criminal conduct.”<sup>211</sup> Both tribunals further define the *mens rea* of planning as entailing “the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.”<sup>212</sup>

As for “instigating,” both the ICTY and ICTR have defined the *actus reus* as “prompting another person to commit an offence.”<sup>213</sup> Both tribunals require a clear or substantial contribution to the conduct of the other person.<sup>214</sup> Both tribunals have similarly defined the *mens rea* of “instigating” to mean that “the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.”<sup>215</sup>

<sup>210</sup> *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 513; Prosecutor v. Brđanin, Case No. IT-99-36-T, ¶ 268 (Sept. 1, 2004) [hereinafter *Brđanin* Trial Judgment] (similar language); Prosecutor v. Stakić, Case No. IT-97-24-T, ¶ 443 (Jul. 31, 2003) (similar) [hereinafter *Stakić* Trial Judgment] (similar); Prosecutor v. Krstić, Case No. IT-98-33-T, ¶ 601 (Aug. 2, 2001) [hereinafter *Krstić* Trial Judgment] (similar); *Blaskić* Trial Judgment, *supra* note 205, ¶ 279.

For the jurisprudence from the ICTR, see Prosecutor v. Seromba, Case No. ICTR-2000-66-I, ¶ 303 (Dec. 13, 2006) [hereinafter *Seromba* Trial Judgment] (“Participation by ‘planning’ presupposes that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phase.”); see also Prosecutor v. Gacumbitsi, ICTR-2001-64-T, ¶ 271 (Jun. 17, 2004) [hereinafter *Gacumbitsi* Trial Judgment] (similar language); Prosecutor v. Kamuhanda, Case No. ICTR-95-54-A-T, ¶ 592 (Jan. 22, 2004) [hereinafter *Kamuhanda* Trial Judgment] (similar); Prosecutor v. Kajelijeli, Case No. ICTR-98-44-A-T, ¶ 761 (Dec. 1, 2003) [hereinafter *Kajelijeli* Trial Judgment] (similar); Prosecutor v. Musema, Case No. ICTR-96-13-T, ¶ 119 (Jan. 27, 2000) [hereinafter *Musema* Trial Judgment] (similar); *Rutaganda* Trial Judgment, *supra* note 201, ¶ 37 (similar); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶ 480 (Sept. 2, 1998) [hereinafter *Akayesu* Trial Judgment] (similar).

<sup>211</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 208, ¶ 26; *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 513 (same language). For the ICTR, see *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 479.

<sup>212</sup> *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 479. For similar language from the ICTY, see *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 513 (“A person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute for planning”).

<sup>213</sup> *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 480; see also Prosecutor v. Zigiranyirazo, Case No. ICTR-01-73-T, ¶ 382 (Dec. 18, 2008) [hereinafter *Zigiranyirazo* Trial Judgment] (similar language); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, ¶ 504 (Apr. 28, 2005) [hereinafter *Muhimana* Trial Judgment] (similar); *Gacumbitsi* Trial Judgment, *supra* note 210, ¶ 279 (same language as *Muhimana* Trial Judgment); *Kamuhanda* Trial Judgment, *supra* note 210, ¶ 593 (same language as *Muhimana* Trial Judgment); *Kajelijeli* Trial Judgment, *supra* note 210, ¶ 762 (similar language).

For the ICTY, see *Kordić & Čerkez* Appeals Judgment, *supra* note 208, ¶ 27 (“The *actus reus* of ‘instigating’ means to prompt another person to commit an offence”); see also *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 514 (similar language); *Brđanin* Trial Judgment, *supra* note 210, ¶ 269 (same language as *Limaj et al.* Trial Judgment).

<sup>214</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 208, ¶ 27 (“While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.”); see also *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 514 (similar language as *Kordić & Čerkez* Appeals Judgment). For the ICTR, see *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 660 (“The Appeals Chamber recalls that, for a defendant to be convicted of instigation to commit a crime under Article 6(1) of the Statute, it must be established that the acts charged contributed substantially to the commission of the crime, but they need not be a *sine qua non* condition for its commission”).

<sup>215</sup> *Limaj et al.*, *supra* note 209, ¶ 514. For the ICTR, see *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 480; *Zigiranyirazo* Trial Judgment, *supra* note 213, ¶ 382 (same language).

The ICTY and ICTR have provided that the *actus reus* of “ordering” requires “that a person in a position of authority instructs another person to commit an offence.”<sup>216</sup> Neither tribunal requires a formal superior-subordinate relationship, so long as the accused possessed *de jure* or *de facto* authority to order or that authority might be implied.<sup>217</sup> Finally, neither Tribunal requires direct intent in its respective definitions of the *mens rea* of ordering: “A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering.”<sup>218</sup>

The ICTY Trial Chamber applied instigation in the *Brđanin* case, wherein the accused was charged with deportation as a CAH:

The Trial Chamber has found that decisions of the [Autonomous Region of Krajina] Crisis Staff regarding the disarmament, dismissal and resettlement of non-Serbs [from the Autonomous Region of Krajina] were systematically implemented by the municipal Crisis Staffs, the local police, and the military. Moreover, it has been abundantly proved that the Accused made several inflammatory and discriminatory statements, *inter alia*, advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay on the territory of the [Autonomous Region of Krajina]. In light of the various positions of authority held by the Accused throughout the relevant time, these statements could only be understood by the physical perpetrators as a direct invitation and a prompting to commit crimes. Against this background, the Trial Chamber is satisfied that the Accused instigated the commission of some crimes charged in the Indictment [namely, deportations from the Autonomous Region of Krajina to Karlovac and forcible transfer from the Autonomous Region of Krajina to Travnik, and the crime of persecution].”

*Brđanin* Trial Judgment, *supra* note 210, ¶ 360.

<sup>216</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 208, ¶ 28; see also *Limaj et al.*, *supra* note 209, ¶ 515 (same language as *Kordić & Čerkez* Appeals Judgment); *Brđanin* Trial Judgment, *supra* note 210, ¶ 270 (similar).

For the ICTR, see *Ntagerura et al. v. Prosecutor*, Case No. ICTR-99-46-A, ¶ 365 (Jul. 7, 2006) [hereinafter *Ntagerura et al.* Appeals Judgment] (“the material element (or *actus reus*) is established when a person uses his position of authority to order another person to commit a crime . . .”); see also *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 481 (“With respect to ordering, a person in a position of authority may incur responsibility for ordering another person to commit an offence, if the person who received the order actually proceeds to commit the offence subsequently.”).

<sup>217</sup> For the ICTY, see *Kordić & Čerkez* Appeals Judgment, *supra* note 208, ¶ 28 (“A formal superior-subordinate relationship between the accused and the perpetrator is not required.”); *Prosecutor v. Strugar*, Case No. IT-01-42-T, ¶ 331 (Jan. 31, 2005) [hereinafter *Strugar* Trial Judgment] (similar language as *Kordić & Čerkez* Appeals Judgment); *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 515 (“It is not necessary to demonstrate the existence of a formal superior-subordinate command structure or relationship between the orderer and the perpetrator; it is sufficient that the orderer possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.”); *Brđanin* Trial Judgment, *supra* note 210, ¶ 270 (similar language to *Limaj et al.* Trial Judgment).

For the ICTR, see *Seromba v. Prosecutor*, Case No. ICTR-2001-66-A, ¶¶ 201–02 (Mar. 12, 2008) [hereinafter *Seromba* Appeals Judgment] (“To be held responsible under Article 6(1) of the Statute for ordering a crime . . . it is sufficient that the accused have authority over the perpetrator of the crime, and that his order have a direct and substantial threat on the commission of the illegal act.”); *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, ¶¶ 181–82 (Jul. 7, 2006) [hereinafter *Gacumbitsi* Appeals Judgment] (“The Appeals Chamber agrees with the Prosecution that ordering does not require the existence of a formal superior-subordinate relationship.”).

<sup>218</sup> *Kordić & Čerkez* Appeals Judgment, *supra* note 208, ¶ 30; *Blaškić v. Prosecutor*, Case No. IT-95-14-A, ¶ 166 (Jul. 29, 2004) [hereinafter *Blaškić* Appeals Judgment] (similar language as *Kordić & Čerkez* Appeals Judgment).

For the ICTR’s jurisprudence, see *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 481 (“Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order.”); *Ntagerura et*

Both tribunals define “committing” as covering “physically perpetrating a crime or engendering a culpable omission in violation of criminal law.”<sup>219</sup> Likewise, both tribunals define the *mens rea* of “committing” to require that “the accused acted with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.”<sup>220</sup> The ICTY and ICTR both treat the doctrine of joint criminal enterprise, discussed in the following section, as a form of commission, though “joint criminal enterprise” takes a less broad form.<sup>221</sup>

#### §4.2. *Aiding and Abetting*

“Aiding and abetting,” as opposed to “commission,” is a form of accessory liability that was discussed in greater detail in the sections above dealing with theories of collective criminality. The ICTY Appeals Chamber in the *Vasiljević* case set forth the *actus reus* and *mens rea* of “aiding and abetting”:

- (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime [ . . . ].

*al.* Appeals Judgment, *supra* note 216, ¶ 365 (“the requisite mental element (or mens rea) is established when such person acted with direct intent to give the order.”).

<sup>219</sup> *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 509; Prosecutor v. Galić, Case No. IT-98-29-T, ¶ 168 (Dec. 5, 2003) [hereinafter *Galić* Trial Judgment] (“‘Committing’ means that an ‘accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal’s Statute’. Thus, it ‘covers first and foremost the physical perpetration of a crime by the offender himself.’”); *Stakić* Trial Judgment, *supra* note 210, ¶ 439 (“The Trial Chamber prefers to define ‘committing’ as meaning that the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others.”).

For the ICTR, see *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 478 (“The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law. . . .”); *Seromba* Trial Judgment, *supra* note 210, ¶ 302 (similar language).

<sup>220</sup> *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 509; see also *Seromba* Appeals Judgment, *supra* note 217, ¶ 173 (“an accused evinces the requisite mens rea for committing a crime when he acts with an intent to commit that crime.”).

<sup>221</sup> *Stakić* Trial Judgment, *supra* note 210, ¶¶ 438, 528 (“The Trial Chamber emphasizes that joint criminal enterprise is only one of several possible interpretations of the term ‘commission’ under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a more direct reference to ‘commission’ in its traditional sense should be given priority before considering responsibility under the judicial term ‘joint criminal enterprise.’” “‘Commission,’ as a mode of liability, is broadly accepted, and joint criminal enterprise provides one definition of ‘commission.’”). For the ICTR, see *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 478 (“Commission covers ‘participation in a joint criminal enterprise.’”); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, ¶ 463 (Sept. 12, 2006) [hereinafter *Muvunyi* Trial Judgment] (similar language as *Nahimana et al.* Appeals Judgment); Prosecutor v. Simba, Case No. ICTR-01-76-T, ¶ 385 (Dec. 13, 2005) [hereinafter *Simba* Trial Judgment] (similar).

Note that joint criminal enterprise is a mode of responsibility and not a crime itself. See also the discussion of joint criminal enterprise, *infra*. Joint criminal enterprise is recognized by both Tribunals and the ICTR applies the ICTY’s jurisprudence.

- (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal.<sup>222</sup>

The ICTY's "detailed investigation" of post-World War II case law found a "clear pattern" of requiring a *mens rea* of knowledge for "aiding and abetting."<sup>223</sup>

The ICTR's jurisprudence has closely tracked the jurisprudence of the ICTY with regard to "aiding and abetting."<sup>224</sup> It follows that the ICTR has also recognized the same

<sup>222</sup> *Blaškić Appeals Judgment*, *supra* note 218, ¶ 45; *see also Strugar Trial Judgment*, *supra* note 217, ¶ 349 ("Aiding and abetting has been defined in the case-law of the Tribunal as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a crime, before, during or after the commission of the crime, and irrespective of whether these acts took place at a location other than that of the principal crime.").

<sup>223</sup> *Prosecutor v. Delalić*, Case No. IT-96-21-T, ¶¶ 321, 325–29 (Nov. 16, 1998) [hereinafter *Delalić Trial Judgment*] (endorsing the approach of the *Tadić Trial Judgment*, *supra* note 98, ¶ 692, under which "the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law."); *see also Furundžija Trial Judgment*, *supra* note 99, ¶ 245:

[I]t is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.

The ICTY has systematically reaffirmed this principle. *See, e.g., Delalić Trial Judgment*, *supra*, ¶ 321; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, ¶¶ 60–64 (Jun. 25, 1999) [*Aleksovski Trial Judgment*] (citing *Tadić*, *Čelebići*, *Furundžija*, and *Akayesu*); *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23-1-T, ¶ 392 (Feb. 22, 2001) [hereinafter *Kunarac et al. Trial Judgment*] ("The *mens rea* of aiding and abetting consists of the knowledge that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal."); *Krnjelac v. Prosecutor*, Case No. IT-97-25-A, ¶ 51 (Sept. 17, 2003) [hereinafter *Krnjelac Appeals Judgment*]; *Vasiljević v. Prosecutor*, Case No. IT-98-32-A, ¶ 102 (Feb. 25, 2004) [hereinafter *Vasiljević Appeals Judgment*] ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal.").

The ICTY Appeals Chamber has confirmed this standard. *See Tadić Appeals Judgment*, *supra* note 201, ¶ 229 ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist in the commission of a specific crime by the principal."); *Blagojević & Jokić v. Prosecutor*, Case No. IT-02-60-A, ¶ 127 (May 9, 2007) ("The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."); *Prosecutor v. Brđanin*, Case No. IT-99-36-A, ¶ 484 (Apr. 3, 2007) [hereinafter *Brđanin Appeals Judgment*] (same language); *Prosecutor v. Milutinović*, Case No. IT-05-87-T, ¶ 94 (Feb. 26, 2009) [hereinafter *Milutinović Trial Judgment*] (for aiding and abetting "[a]lthough the accused's lending of practical assistance, encouragement, or moral support must itself be intentional, *intent to commit the crime or underlying offence is not required*. Instead, the accused must have *knowledge* that his acts or omissions assist the principal perpetrator or intermediary perpetrator in the commission of the crime or underlying offence. *Such knowledge need not have been overtly expressed and may be inferred from the circumstances.*") (emphasis added); *Blaškić Appeals Judgment*, *supra* note 218, ¶ 50 (concurring with *Furundžija Trial Judgment*, *supra* note 102); *Simić v. Prosecutor*, Case No. IT-95-9-A, ¶ 82 (Nov. 28, 2006) [hereinafter *Simić Appeals Judgment*] ("The requisite *mens rea* for aiding and abetting is *knowledge* that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal perpetrator.") (emphasis added).

<sup>224</sup> *Muvunyi Trial Judgment*, *supra* note 221, ¶ 79 ("[A]n aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime."); *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, ¶ 189 (May 21, 2007) [hereinafter *Muhimana Appeals Judgment*] (similar to *Muvunyi Trial Judgment*); *Seromba Appeals Judgment*, *supra* note 217, ¶ 44 ("[T]o establish the *actus reus* of aiding and abetting . . . , it must be proven that the alleged aider and abettor committed acts specifically aimed at assisting,



knowledge standard.<sup>225</sup> This knowledge standard for the aider and abettor has also been recognized as the customary norm at the Special Court for Sierra Leone.<sup>226</sup>

Whether the ICC will also fail to establish a clear and consistent methodology in its approach to the “general part” is yet to be seen, though it likely will follow in the footsteps and bad habits of the *ad hoc* Tribunals.<sup>227</sup> The problem with regard to the ICC is less significant because it is based on normative provisions provided in the Rome Statute. Nevertheless, there is ample reason to question the general part provisions of the Rome Statute if it is assumed that they are derived from “general principles of law” of criminal law as evidence by the world’s major criminal justice systems. There is hardly a comparatist specializing in criminal law who has not criticized the contents of the Rome Statute’s “general part” contained in Articles 22 to 33.

## §5. Command Responsibility: Policy Considerations

“Command responsibility” was first codified in Protocol I of the Geneva Conventions,<sup>228</sup> but the doctrine now clearly encompasses civilians with duties and powers that are similar to those of military commanders. International tribunals have utilized the broader concept of command responsibility to convict prominent officials in both civilian governments and the private sector.<sup>229</sup> For our purposes, the term “superior responsibility”

encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime.”); *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 482 (similar language).

<sup>225</sup> *Akayesu* Trial Judgment, *supra* note 210, ¶ 545 (“[A]n accused is liable as an accomplice to the genocide if he *knowingly* aided and abetted or instigated one or more persons in the commission of genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.”) (emphasis added); *Rutaganda* Trial Judgment, *supra* note 201, ¶¶ 389–91, 416, 439 (convicting defendant for aiding and abetting a massacre by distributing weapons to militia, *knowing* an attack would take place) (emphasis added); *Musema* Trial Judgment, *supra* note 210, ¶ 180 (“The intent or mental element of complicity in general implies that, at the moment he acted, the accomplice *knew* of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted *knowingly*.”) (emphasis added); *Ntagerura et al.* Appeals Judgment, *supra* note 216, ¶ 370 (“The requisite mens rea is the fact that the aider and abettor *knows* that his acts assist in the commission of the specific crime of the principal.”) (emphasis added); Prosecutor v. Nindabahizi, Case No. ICTR-01-71-A, ¶ 122 (Jan. 16, 2007) (citing *Blaškić* Appeals Judgment); *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 482 (“The mens rea for aiding and abetting is *knowledge* that acts performed by the aider and abettor assist in the commission of the crime by the principal. It is not necessary for the accused to know the precise crime which was intended and which in the event was committed.”) (emphasis added).

<sup>226</sup> See, e.g., *Brima et al. v. Prosecutor*, Case No. SCSL-04-16-A, ¶¶ 242–43 (Feb. 22, 2008) (“The mens rea required for aiding and abetting is that the accused *knew* that his acts would assist the commission of the crime by the perpetrator or that he was *aware* of the substantial likelihood that his acts would [do so].”) (emphasis added); Prosecutor v. Fofana, Case No. SCSL-04-17-T, ¶ 231 (Aug. 2, 2007) (“The Chamber recognizes that the *mens rea* of aiding and abetting is the *knowledge* that the acts performed by the Accused assist the commission of the crime by the principal offender.”) (emphasis added).

<sup>227</sup> The judges of the ICC, at least in the years since it has been operating, have not come from a criminal law background, whether practical or academic. Reliance on young legal assistants seems to be even heavier at the ICC than at the ICTY.

<sup>228</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 86–87, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol].

<sup>229</sup> Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Summary, ¶¶ 5–7 (Dec. 3, 2003) [hereinafter *Nahimana et al.* Summary of Trial Judgment].



or “civilian command responsibility” will be used unless exclusively referring to military commanders, in which case “command responsibility” will be used.<sup>230</sup> Thus, superior responsibility is best defined as “a form of culpable omission by superiors – usually military commanders – leading subordinates to violate humanitarian law.”<sup>231</sup>

Command responsibility includes two different concepts of criminal responsibility. The first is direct responsibility for a commander’s orders that may be unlawful. The second is imputed criminal responsibility for a subordinate’s unlawful conduct that is not based on the commander’s orders. The latter is essentially based on the commander’s failure to act to (1) prevent specific unlawful conduct; (2) provide for general measures likely to prevent or deter unlawful conduct; (3) investigate allegations of unlawful conduct; and (4) prosecute, and upon conviction, punish the author of the unlawful conduct.

Because these four categories of imputed responsibility for the conduct of another are based on failure to act, the legal standards and tests used to determine whether the omission is culpable or not are outcome determinative of guilt or innocence. Thus, if the legal standard is an objective one, that is, the ordinary reasonable person having the commander’s knowledge of the facts and operating under like circumstances, it will produce a different outcome than a subjective standard that relies on the actual personal knowledge of the commander, whether he acted with or without conscious wrongdoing. Similarly, if the test for the objective standard is whether the commander “could have reasonably known under the circumstances,” it would produce a different outcome than if the test is that he “should have known.” The former is more speculative than the latter.

The choice of any legal standard and test is ultimately a matter of legal policy. Thus, to place a reasonably higher level of duty on commanders on the assumption that this would maximize their vigilance and thus minimize the potential violations of subordinates is a policy that favors the adoption of a “should have known” test. An unreasonably high standard of responsibility on commanders, particularly in combat situations, is not likely to be accepted or followed. Commanders cannot be held to be ensurers of the proper conduct of their subordinates, and no concept of imputed criminal responsibility for the conduct of another can deter anyone who is unable to foresee the unlawful conduct that the law requires him to prevent.

A person in command is not necessarily part of a military or paramilitary organization. If a person in command of a governmental or police unit issues an order for the performance of any of the specific acts within the meaning of CAH, and that crime is committed by those under his command, he is criminally responsible. Similarly, such a nonmilitary commander is responsible for his omissions if they lead to the commission of such crimes. However, the source of law that applies to military and paramilitary personnel differs from that which is applicable to others in the civilian hierarchy of government or in the police, unless they can be linked by an agency relationship to the military. Members of the armed forces are subject to national military law and the international regulation

<sup>230</sup> See Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM L. REV. 1751 (2005), at 1760 n.39. Military commanders have a duty to ensure that subordinates observe humanitarian law, as recognized in international treaties, national military codes, and army training manuals. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 127, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

<sup>231</sup> *Id.* at 1773 (arguing that “[p]rosecutors should look to superior responsibility when a chain of command exists but culpable elites have been too careful to have issued orders that are clearly criminal.”).

of armed conflicts. Nonmilitary personnel are subject to national criminal law, unless an agency relationship can be established between such persons and the armed forces, in which case military law and the international regulation of armed conflicts also apply to them.

The doctrine of command responsibility originated in national military law and gradually become a basis of international criminal responsibility.<sup>232</sup> Command responsibility is the legal and logical concomitant to the defense of obedience to superior orders.<sup>233</sup> Indeed, if a subordinate is to be exonerated from criminal responsibility for carrying out a superior's order, that superior should be accountable for the issuance of an order that violates ICL. Thus, a nexus exists between the legal policies underlying each of these two conceptions. When a violation of the international regulation of armed conflict takes place, it usually results in harm to protected persons or protected targets. Consequently, the responsibility of the violator must be assessed. The inquiry will usually start with the perpetrator of the violation and then gradually move up the chain of command to the superior who issued the order. Depending upon the factual circumstances, such a chain of command can reach up to the highest echelon in the military hierarchy. In this respect, the London Charter removed any limits up to and including the head of state. Article 7 of the Charter states that "the official position of the defendants or responsible officials in Government Departments, should not be considered as freeing themselves for responsibility or mitigation of punishment."<sup>234</sup>

The London Charter followed the postulate of Article 227 of the Treaty of Versailles, which provided for the prosecution of Kaiser Wilhelm II for the supreme offense against peace. But the Tokyo Charter in Article 6 differed from its counterpart, Article 7 of the London Charter, in that it provided that an official's position could "be considered in mitigation of punishment if the tribunal determines that justice so requires."

Throughout the process of inquiry into the chain of command, different legal standards may apply depending upon whether the person who is the focus of inquiry is the one who committed the violative act, the one who ordered it, or the one who could or should have prevented its occurrence.<sup>235</sup> The reason for such different standards derives from deterrence policy considerations. However, criminal responsibility remains personal and is individually judged based on whether such a person issued the order, related the order, failed to act to prevent illegal conduct by others, or failed to punish a subordinate after the illegal act had been established.

A person who issues an order is obviously responsible for that order and bears individual criminal responsibility for it. This is clearly a standard of direct personal responsibility, a standard well recognized in the world's major criminal justice systems and in ICL. This responsibility is direct for those who command another to commit a crime, not secondary as it is in some national legal systems. A commander's responsibility for failure to prevent, if no prior knowledge of the possible violation exists, is ancillary. This is

<sup>232</sup> See William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973). See also Leslie C. Green, *Superior Orders and Command Responsibility*, 27 CAN. Y.B. INT'L L. 167 (1989).

<sup>233</sup> See *infra* ch. 8 nn. 9–143 and accompanying text.

<sup>234</sup> The IMTFE refused to recognize the diplomatic immunity of Ambassador Oshima, who was sentenced to life imprisonment. See Document Section C.10. See also ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* 207 (1987).

<sup>235</sup> For the application of various legal standards to command responsibility and obedience to superior orders, see Parks and Green, *supra* note 232. But see particularly the four major works on the subject that support the application of the objective standard of reasonableness: KEIJZER, GREEN, DINSTEIN, MÜLLER-RAPPARD, *supra* note 115.

the case in national criminal law, even though there are separate legal elements and exonerating conditions in military law and international regulation of armed conflicts, such as the doctrine of military necessity, which have no counterpart in the national criminal law. Furthermore, those in a superior position have the legal duty to supervise, control, and prevent unlawful conduct by subordinates. Their failure to do so becomes the basis for their criminal responsibility. But these duties differ in military law and national criminal law applicable to civilians. The military standards are higher than their civilian counterparts for essentially two policy reasons: (1) the need to preserve a higher standard of discipline in a military structure, whose concomitant is the superior's responsibility; and (2) the effectiveness of deterrence within the two contexts.

The difficult problems in military criminal responsibility arise in four areas, all of which fall under the general category of omission. They are

- (1) responsibility of a superior who does not initiate an unlawful order but who conveys it to a subordinate;
- (2) responsibility for the conduct of a subordinate where that superior ordinarily exercises direct command and control, but in this case fails to do so;
- (3) responsibility for the conduct of a subordinate where the superior ordinarily exercises indirect command control, but in this case fails to do so;
- (4) responsibility for the conduct of all subordinates under the general command of a senior officer or commanding general officer up to and including the military commander-in-chief, for failure to establish policies and procedures for the prevention of violations and for the punishment of violators, and for failure to implement them.

A subordinate actor's responsibility for a violative act does not necessarily eliminate command responsibility because the latter includes failure to act, failure to prevent, and failure to punish upon discovery of the violation. But failure to act depends on knowledge and opportunity to act (1) in the prevention of the criminal act; and (2) subsequent to the act if the superior failed to supervise, discover, and take remedial action as needed under the circumstances and (3) to prosecute and, if found guilty, punish the violator. Conversely, a subordinate actor's exoneration under the defense of obedience to superior orders does not necessarily imply that the immediate superior officer and those in the chain of command above him are criminally responsible if the order was wrongly understood or applied by the subordinate.

Because military law is based on a hierarchical structure of command and control, those in the chain of command have the duty to develop measures designed to prevent the commission of violative acts, to investigate information about violative acts, to punish the perpetrators, and to institute measures to prevent and correct situations leading to potential violations. The essential element in cases of command responsibility, particularly with respect to those in the higher echelons in the chain of command, is causation. Establishing a chain of cause and effect is more difficult in these cases than in other cases of criminal violation. Thus, the policy of deterrence, as perceived by policymakers, is more determinative than any other legal consideration. Furthermore, the more removed a superior is from the scene of the violative act, the more difficult it is to factually assess his responsibility, particularly in combat situations.

The applicable legal standard, which is embodied in the military laws and civilian criminal law of the world's major legal systems, is the objective standard of "reasonableness" in light of the existing circumstances, in terms of actual knowledge or knowledge

that should have been known. The reasons for this standard are consonant with the personalization of criminal responsibility in light of the potential deterrent of the criminal sanction. Indeed, greater compliance with the requirements of the law is not achieved if individuals are unable to prevent the conduct that the criminal law seeks to avert. No one can be deterred from conduct beyond the control of the person whose responsibility may be called into question. Therefore, to hold a superior accountable on the basis of omission for the conduct of a subordinate requires intent or knowledge that the omission can actually or reasonably and foreseeably lead to a violative act and that the superior is in a position or has the ability act to prevent the violative act.

§5.1. *The Evolution of Command Responsibility in the Law of Armed Conflicts as Reflected in the Law and Jurisprudence of the ICTY, the ICTR, and the ICC*

Issues involving command responsibility are not new. In the sixth century BCE, Sun Tzu wrote, “When troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes.”<sup>236</sup> In the Western world, an early comment on command responsibility came from Grotius, who asserted that rulers “may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it.”<sup>237</sup> During the same period, in 1621, King Gustavus Adolphus of Sweden promulgated his “Articles of Military Law to be Observed in the Warres,” which, in Article 46, provided that “No Colonel or Captain shall command his soldiers to do any unlawful thing which who so does, shall be punished according to the discretion of the Judges [ . . . ].”<sup>238</sup>

In the United States, the Articles of War, enacted on June 30, 1775, provided that

Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender’s wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.<sup>239</sup>

<sup>236</sup> See SUN TZU, *THE ART OF WAR* 125 (Samuel B. Griffith trans., 1963) (saying several thousand years ago that commanders are responsible for the action of their men). Later, Napoleon emphasized the responsibility of military commanders when he quipped “There are no bad regiments; there are only bad colonels.” ROBERT D. HEINL, *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 56 (1956).

<sup>237</sup> HUGO GROTIUS, 2 *DE JURE BELLI AC PACIS* 523 (Francis W. Kelsey trans., 1925). Grotius further stated, “Kings and public officials are liable for neglect if they do not employ the remedies which they can and ought to employ for the prevention of robbery and piracy.” HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* BK. II, Ch. XVII, pt. XX (1) (Carnegie ed., Francis W. Kelsey trans., 1925) (supporting Jean Bodin’s similar view in *SIX LIVRES DE LA RÉPUBLIQUE* (1577)); ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES*, 99 (Carnegie ed., John C. Rolfe trans., 1933); see also Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) art. 146, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 86, Dec. 12, 1977, 1124 U.N.T.S. 609, 16 I.L.M. 1442 (1977).

<sup>238</sup> Quoted in Parks, *supra* note 232, at 5.

<sup>239</sup> FRANCIS LIEBER, *THE LIEBER CODE OF 1863: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD*, General Order No. 100 (Apr. 24, 1863).

In 1863, the United States promulgated the Instructions for the Government of the Armies of the United States in the Field, which became known as the Lieber Code. Article 71 provides,

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.<sup>240</sup>

In the late nineteenth century, in the authoritative *MILITARY LAW AND PRECEDENTS*, Winthrop expounded upon the duty of a commander during an armed conflict. He stated, “It is indeed the chief duty of the commander of the army of occupation to maintain order and the public safety, as far as practicable without oppression of the population, and as if the district were a part of the domain of his own nation.”<sup>241</sup> He further added,

The observance of the rule protecting from violence the unarmed population is especially to be enforced by commanders in occupying or passing through towns or villages of the enemy’s country.

All officers or soldiers offending against the rule of immunity of non-combatants or private persons in war forfeit their right to be treated as belligerents, and together with civilians similarly offending, become liable to the severest penalties as violators of the laws of war.<sup>242</sup>

In international conventional law regulating the conduct of armed conflict, Article 1 of the 1907 Hague Convention provides the condition that a combatant must fulfill to be accorded the rights of a lawful belligerent. That condition also exists under the 1949 Geneva Conventions and the 1977 Protocols and requires such a force to be “commanded by a person responsible for his subordinates.”<sup>243</sup> This condition affirms the responsibility of commanders. The 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties concluded after World War I that:

The ex-Kaiser and others in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air [. . .]. All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of State, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.<sup>244</sup>

Thus, the Treaty of Versailles called for the trial by an international military tribunal of the Kaiser, the Supreme German Commander, for the same crime that the London

<sup>240</sup> *Id.* art. 71.

<sup>241</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1895).

<sup>242</sup> *Id.* at 799.

<sup>243</sup> 1907 Hague Convention, art. 1. See also Frederick Pollock, *Criminal Responsibility: The Defense of Superior Orders*, in *The Work of the League of Nations*, 35 *LAW Q. REV.* 195 (1919). The same requirements exist in the four Geneva Conventions of 1949, and in the 1977 Additional Protocols, *supra* note 237.

<sup>244</sup> *Report of the Majority, and Dissenting Reports of American and Japanese Members of the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties*, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR, CONFERENCE OF PARIS, 1919 (Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32 (1919)), reprinted in 14 *AM. J. INT’L L.* 95, 117 (1920).

Charter in 1945 called “Crimes against Peace” in Article 6(a). The Versailles Treaty provided that:

The Allied and Associated Powers publicly arraign William II of Hohenzollen, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties [ . . . ].

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.<sup>245</sup>

This provision established the personal responsibility of a commander-in-chief. The Versailles Treaty also provided for the prosecution, before an international military tribunal or Allied military tribunals, of those accused of violating the laws of war. Article 228 stated:

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Governor shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office, or employment which they held under the German authorities.<sup>246</sup>

As discussed in [Chapter 3](#), after World War I, the Allies did not form an international military tribunal nor did they prosecute accused German military personnel before their military tribunals.<sup>247</sup> Instead, the German Supreme Court sitting at Leipzig heard only a handful of cases resulting from criminal acts conducted during the War.<sup>248</sup> Some of these trials, however, dealt with the issues of obedience to superior orders and command responsibility.

The issues of command responsibility were plentiful in the post-World War II prosecutions before the IMT, IMTFE, and CCL 10 Proceedings.<sup>249</sup> For instance, the IMT applied command responsibility for ordering crimes. Yet, on the whole, the major precedents concerning command responsibility are associated with the CCL 10 Proceedings, whereas the defense of obedience to superior orders was more central to the trials of the major Third Reich leaders at Nuremberg.

<sup>245</sup> Treaty of Peace Between the Allied and Associated Powers of Germany arts. 228–230, June 28, 1919, 225 C.T.S. 188, 285, 2 BEVANS 43, 136–37, at art. 227.

<sup>246</sup> *Id.* at art. 228.

<sup>247</sup> The Allies seem to have accepted the objections of the Commission members from the United States, Lansing and Scott, who objected to the “unprecedented proposal” to put on trial before an international criminal court the heads of States not only for having directly ordered illegal acts of war but for having abstained from preventing such acts. This would be to subject chiefs of State to a “degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations.” JAMES W. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* vol. II, 492, n. 1 (1920).

<sup>248</sup> See *infra* ch. 9, §2; CLAUD MULLINS, *THE LEIPZIG TRIALS* (1921).

<sup>249</sup> See *infra* ch. 3, §§9, 10.

In the IMT Judgment, in the case against the Chief of the *RuSHA*, Ernst Kaltenbrunner, who filled a primarily civilian role as a penal administrator and executioner of the Final Solution, the IMT ruled:

During the period in which Kaltenbrunner was head of RSHA, the Gestapo, and SD in occupied territories continued the murder and ill-treatment of the population, using methods which included torture and confinement in concentration camps, usually under orders to which Kaltenbrunner's name was signed.<sup>250</sup>

In the case of Alfred Rosenberg, the Reichs Minister for the Occupied Eastern Territories, who was liable for ordering and actively participating in crimes, the IMT concluded:

Rosenberg had knowledge of the brutal treatment and terror to which the Eastern people were subjected. He directed that the Hague Rules of Land warfare were not applicable in the Occupied Eastern territories. He had knowledge of and took an active part in stripping the Eastern territories of raw materials and foodstuffs, which were sent to Germany. He stated that feeding the German people was first on the list of claims on the East, and that the Soviet people would suffer thereby. His directives provided for the segregation of Jews, ultimately in ghettos [ . . . ]. He gave his civil administrators quotas of laborers to be sent to the Reich [ . . . ]. His signature of approval appears on the order of 14 June 1944 [ . . . ]. Upon occasion Rosenberg objected to the excesses and atrocities committed by his subordinates [ . . . ] but these excesses continued and he stayed in office until the end.<sup>251</sup>

In the case of Wilhelm Frick, the first Minister of Interior and later Reichs Protector of Bohemia and Moravia and the author of the anti-Semitic Nuremberg Laws, the IMT provided:

During the war nursing homes, hospitals, and asylums in which euthanasia was practiced as described elsewhere in this Judgement, came under Frick's jurisdiction. He had knowledge that insane, sick, and aged people, "useless eaters", were being systematically put to death. Complaints of these murders reached him, but he did nothing to stop them.<sup>252</sup>

The major military defendants prosecuted at the IMT were Field Marshal Wilhelm Keitel, Hitler's ranking officer in the *Wehrmacht*; General Alfred Jodl, Hitler's chief of staff; and Admirals Erich Raeder and Karl Dönitz, the successive commanders of the German navy. Each of these defendants were found guilty of following and disseminating "The Commando Order," which mandated the execution of enemy commandos in violation of Article 23 of the Hague Convention, which gave commandos status as prisoners of war if captured. Keitel and Jodl were convicted by the IMT on all counts and received death sentences. Raeder was convicted of planning, preparing, initiating, and conducting a war of aggression but not participating in the conspiracy to carry out the war. Although Dönitz was convicted of war crimes, he was found not guilty of CAH. Thus, only those convicted of CAH under command responsibility – Raeder, Keitel, and Jodl – were executed.

<sup>250</sup> Nuremberg Judgment, in 2 FRIEDMAN, *supra* note 43, at 979.

<sup>251</sup> *Id.* at 982.

<sup>252</sup> *Id.* at 987.



The most notorious of the post-World War II trials involved the case of the Japanese General Tomoyuki Yamashita,<sup>253</sup> which even today remains a controversial ruling. General Yamashita served as the commanding general of the Japanese forces in the Philippines as well as the military governor of the islands during the last year of the war. On October 2, 1945, a month after his surrender, Yamashita was served with this charge:

Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, *unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes* against people of the United States and its allies and dependencies, particularly, the Philippines; and he, General Tomoyuki Yamashita, thereby violated the law of war.<sup>254</sup>

Subsequently, the prosecution submitted two separate bills of particulars, which contained an aggregate of 123 specifications.<sup>255</sup> These specific charges included the murder and mistreatment of over 32,000 Filipino civilians and captured Americans, the rape of 500 Filipino women and the arbitrary and unwarranted destruction of private property.<sup>256</sup> These facts notwithstanding, the bills of particulars did not establish a direct link between the perpetration of those unlawful acts and Yamashita.<sup>257</sup>

Yamashita was tried before a U.S. Military Commission (comprised of officers who lacked legal training) sitting in the Philippines and convened under the authority of General Douglas MacArthur at the United States Army Forces, Western Pacific. It began on October 19, 1945 (contemporaneous with the IMT). After hearing 286 witnesses and receiving 423 documents into evidence, it ended with a judgment rendered on a

<sup>253</sup> For detailed examinations of the *Yamashita* case, see A. FRANK REEL (one of Yamashita's defense attorneys), *THE CASE OF GENERAL YAMASHITA* (1949); RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (1982); see also Parks, *supra* note 232, at 22–38; and REEL, *supra* provides a first hand account of the trial, he states:

But let us assume that General Yamashita had been given a fair trial, that the rules of evidence and the constitutional guaranty of due process of law had been adhered to. In my opinion, even then the condemnation was unjust because Yamashita was held accountable for crimes committed by persons other than himself, crimes committed without his knowledge and, in fact, against his orders. He was held so accountable on the basis of a “principle” of command responsibility, a principle that in this perverted form has no basis in either law or logic.

*Id.* at 242; see also *In Re Yamashita*, 327 U.S. 1 (1945) and particularly the dissents of Justices Murphy and Rutledge.

<sup>254</sup> The record of the trial is found in *United States of America v. Tomoyuki*, a Military Commission appointed by General Douglas MacArthur by Special Order 110, ¶ 24 Headquarters United States Army Forces, Western Pacific, dated October 1, 1945, at 23 [hereinafter Commission Record] (emphasis added); reprinted in LAEL, *supra* note 253, at 80. Colonel Clark, Yamashita's senior defense counsel, commenting on the charge, argued:

The Accused is not charged with having done something or having failed to do something, but solely with having been something. For the gravamen of the charge is that the Accused was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command.

*Id.* at 82.

<sup>255</sup> See Parks, *supra* note 232, at 24.

<sup>256</sup> See LAEL, *supra* note 253, at 80.

<sup>257</sup> See *id.* at 80–81.

particularly significant date, December 7, 1945, the four-year anniversary of the Japanese attack on Pearl Harbor. During this period, the prosecution “sought to demonstrate the bestiality, enormity, and widespread nature of Japanese war crimes in the Philippines, and sought to convict Yamashita of dereliction of duty.”<sup>258</sup> The Military Commission learned how Japanese soldiers executed priests in their churches, murdered patients in their hospitals, and burned alive or beheaded American prisoners of war during the Japanese defense against the American reconquest of the Philippines.<sup>259</sup> Yamashita’s defense team argued that although these forces were under his formal command, Yamashita did not have effective control of them because of his inability to communicate orders or receive reports from them, due to American disruption of his command infrastructure. The prosecution could not prove that General Yamashita had ordered the atrocities, or that he had direct knowledge of them.<sup>260</sup> Consequently, their case depended on the argument that Yamashita “must have known” of the widespread and enormity of the atrocities. As one writer states:

Of the hundreds of witnesses produced by Kerr and his colleagues [the prosecutors], almost all emphasized the actual commission of atrocities and war crimes rather than any evidence linking them to high-ranking Japanese officers. By proving the commission of the numerous murders and rapes, the prosecution hoped to convince the court that there was no way for Yamashita not to have known, unless he had made a determined effort not to know. In either case, he was guilty of failure to control his men, guilty of failing to exercise his command responsibility.<sup>261</sup>

The Commission accepted this argument; it found General Yamashita guilty and sentenced him to death, stating, *inter alia*:

The Prosecution presented evidence to show that the crimes were so extensive and wide-spread, both as to time and area, that they must have been wilfully permitted by the Accused, or secretly ordered by the Accused. . . .

Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood [ . . . ].

The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your [i.e., Yamashita’s] command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were

<sup>258</sup> *Id.* at 83.

<sup>259</sup> *Id.*

<sup>260</sup> The prosecution did present two witnesses who linked Yamashita to these crimes, but the two, former Japanese collaborators imprisoned by the Americans, were shown to be not very credible. See *id.* at 84–86; Parks, *supra* note 232, at 29–30.

<sup>261</sup> LAEL, *supra* note 253, at 86.

methodically supervised by Japanese officers and noncommissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.<sup>262</sup>

Along the same lines, a staff judge advocate, who reviewed a summary of the evidence daily, concluded:

The evidence affirmatively shows a complete indifference on the part of the accused as a commanding officer either to restrain those practices or to punish their authors. The evidence is convincing that the overall responsibility lay with the Army Commander, General Yamashita, who was the highest commander in the Philippines; that he was charged with the responsibility of defending the Philippines and that he issued a general order to wipe out the Philippines if possible and to destroy Manila; that subsequently he said he would not revoke the order.

The pattern of rape, murder, mass execution and destruction of property is widespread both in point of time and of area to the extent a reasonable person must logically conclude the program to have been the result of deliberate planning.

From all the facts and circumstances of record, it is impossible to escape the conclusion that the accused knew or had the means to know of the widespread commission of atrocities by members and units of his command; his failure to inform himself through official means available to him of what was common knowledge throughout his command and throughout the civilian population can only be considered as a criminal dereliction of duty on his part.<sup>263</sup>

As a last resort, Yamashita's defense counsel filed a writ of certiorari to the U.S. Supreme Court, and *In re Yamashita*<sup>264</sup> was argued before the Court on January 7, 1945. With respect to the question of whether the charge against Yamashita specified an offense against the laws of war, a majority of the Supreme Court stated:

[I]t is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of

<sup>262</sup> Commission Record at 4059–63. Based on the commission's opinion, William H. Parks concludes that the verdict could have been based on any one of four theories of command responsibility:

- (1) that General Yamashita ordered the offenses committed;
- (2) that, learning about the commission of the offenses, General Yamashita acquiesced in them;
- (3) that, learning about the commission of the offenses, General Yamashita failed to take appropriate measures to prevent their reoccurrence or to halt them;
- (4) the offenses committed by the troops under General Yamashita were so widespread that under the circumstances he exhibited a personal neglect or abrogation of his duties and responsibilities as a commander amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

Parks, *supra* note 232, at 30–31.

<sup>263</sup> Cited in *id.* at 32. For other cases that also contributed to the command responsibility doctrine, see also *id.* at 58–77 (discussing, *inter alia*, the *Hostages* case and the trial of Japanese Admiral Toyoda).

<sup>264</sup> 327 U.S. 1 (1945).

the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result [ . . . ].

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect the civilian population and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.<sup>265</sup>

However, the impassioned dissent of Justice Murphy, joined in with a concurring opinion by Justice Rutledge, argued that:

He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.<sup>266</sup>

On February 23, 1946, Yamashita was hanged, but the infamous legacy of his trial survives.

The IMT did not rely upon the controversial “must have known” command responsibility standard from *Yamashita*, but both the *Hostages* and *High Command* cases of the American CCL Proceedings adopted the “dereliction of duty” argument from *In re Yamashita*.

In the *High Command* case, General Wilhelm von Leeb was acquitted of charges relating to the crimes of his subordinates, including the participation in a plan or conspiracy to implement the Commissar Order, an illegal order for German forces to execute Soviet Commissars and other communist officials, and the Command Order, an illegal

<sup>265</sup> *Id.* at 14–15.

<sup>266</sup> *Id.* at 28. Justice Murphy did affirm “inaction or negligence may give rise to liability, civil or criminal.” *Id.* at 39.

General Telford Taylor, who succeeded Justice Jackson as Chief U.S. prosecutor at Nuremberg and who supervised the CCL 10 trials, in his book *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (1970) compares the positions of General Westmoreland and General Yamashita in terms of their ability to supervise their troops. He states:

From General Westmoreland down they were more or less constantly in Vietnam, and splendidly equipped with helicopters and other aircraft, which gave them a degree of mobility unprecedented in earlier wars, and consequently endowed them with every opportunity to keep the course of the fighting and its consequences under close and constant observation. Communications were generally rapid and efficient, so that the flow of information and orders was unimpeded.

These circumstances are in sharp contrast to those that confronted General Yamashita in 1944 and 1945, with his forces reeling back in disarray before the oncoming American military powerhouse. For failure to control his troops so as to prevent the atrocities they committed, Brig. Gens. Egbert F. Mullene and Morris Handwerk and Maj. Gens. James A. Lester, Leo Donovan and Russel B. Reynolds found him guilty of violating the laws of war and sentenced him to death by hanging.

*Id.* at 181. The conclusion is inescapable: by the *Yamashita* standards, Westmoreland is guilty.

order for German forces to execute enemy personnel captured in areas to the rear of conventional combat operations.<sup>267</sup>

With respect to command responsibility, the Tribunal did not pursue the almost strict liability approach taken by the *Yamashita* Commission, and rejected the theory that a commander could found criminally responsible solely based on a “duty to know” grounded in the commander/subordinate relationship. The tribunal stated:

*Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.*<sup>268</sup>

The tribunal specifically delineated the standard of knowledge by which a commander can be held criminally responsible: “[I]t is not considered under the situation outlined that criminal responsibility attaches to him merely on the theory of subordination and over-all command. He must be shown both to have had knowledge and to have been connected to such criminal acts, either by way of participation or criminal acquiescence.”<sup>269</sup>

Thus, according to the *High Command* case, clearly a commander must have *actual knowledge* of criminal conduct or must acquiesce to such conduct. But it should be noted that the tribunal also recognized that commanders have specific duties, and that failure to carry them out could result in their individual criminal responsibility.<sup>270</sup> Here, the tribunal applied the duty of military commanders that was applied in the *Hostages* case:

The commanding general of occupied territories having executive authority as well as military command will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defence for the commanding general of occupied territory. The duty and responsibility for

<sup>267</sup> U.S. v. von Leeb (the *High Command* case), reprinted in XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (U.S.: GPO, 1951), at 597–600.

<sup>268</sup> *Id.* at 543–44 (emphasis added).

<sup>269</sup> *Id.* at 555.

<sup>270</sup> *Id.*

maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence.<sup>271</sup>

As noted by van Sliedregt, the tribunal in the *Hostages* case further distinguished between the command responsibility of field commanders and the commanders of occupied territories:

The U.S. military tribunal in the *High Command* case seemed to have been of the view that with regard to the latter type of commander it is not a matter of course that there is actual control over subordinates, and an ability to intervene. "Occupation commanders" might have a formal position of command but not possess the actual powers of command. Legal authority to direct the actions of subordinates was not considered an absolute requirement for the imposition of superior responsibility.<sup>272</sup>

In the *Hostages* case, the tribunal held General Wilhelm List criminally responsible for the executions of thousands of civilians in Greece, Yugoslavia, Norway, and Albania from September 1939 to May 1945.<sup>273</sup> The tribunal ruled that the accused's position of command entailed a duty to control of the area within his authority. As mentioned above, it also addressed the knowledge element:

The defendant List also asserts that he had no knowledge of many of the unlawful killings of innocent inhabitants which took place because he was absent from his headquarters where the reports came in and that he gained no knowledge of the acts. A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. [ . . . ] If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense [ . . . ] His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal liability.<sup>274</sup>

Ultimately, the tribunal in the *Hostages* case concluded that List failed to acquire information of the crimes that had been available to him in the form of reports. But whereas the judges seemed to apply a "should have known" standard, unlike the *Yamashita* case, responsibility arose because of the availability of concrete information (in the form of reports) and not the widespread nature of the crimes.<sup>275</sup>

The issue of control was also considered in relation to nonmilitary superiors in both the *Pohl* and the *Medical* cases of the CCL 10 Proceedings. In the *Pohl* case,<sup>276</sup> the defendant Karl Mummenthey was an officer of the SS and managed businesses that employed concentration camp slave labor. Mummenthey found guilty for the mistreatment of POWs by concentration camp guards under his control. The tribunal held that as an officer of the SS, Mummenthey "wielded power of command."<sup>277</sup> It also applied the "must have known" standard of knowledge regarding the mistreatment:

If excesses occurred in the industries under his control he was in a position not only to know about them, but to do something. From time to time he attended meetings of the concentration camp commanders where all items pertaining to concentration camp

<sup>271</sup> *Id.* at 631–32.

<sup>272</sup> VAN SLIEDREGT, *supra* note 38, at 126.

<sup>273</sup> *Hostages* case, *supra* note 194.

<sup>274</sup> *Id.* at 1271.

<sup>275</sup> VAN SLIEDREGT, *supra* note 38, at 125–26.

<sup>276</sup> *Pohl* case, *supra* note 140, at 1052.

<sup>277</sup> *Id.* at 1052–1053.

routine such as labour assignment, rations, clothing, quarters, treatment of prisoners, punishment, etc., were discussed.<sup>278</sup>

In the *Medical* case,<sup>279</sup> doctors and military officers were prosecuted for having conducted medical experiments on concentration camp prisoners of Dachau, Buchenwald, and Ravensbrueck. Although not using the term “command responsibility” in the case of Karl Brandt, the tribunal imposed on Brandt, a doctor and Hitler’s personal physician, the duty to investigate medical experiments, and the related responsibility for his failure to intervene:

In the medical field Karl Brandt held a position of the highest rank directly under Hitler. He was in a position to intervene with authority on all medical matters; indeed, it appears that such was his positive duty [...] Occupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless continue to be, conducted in the concentration camps.<sup>280</sup>

However, the tribunal imposed on Brandt an affirmative duty to prevent or to intervene on the military officials prosecuted in the *Medical* case:

As has been pointed out in this judgment, the law of war imposes on a military officer in a position of command an affirmative duty to prevent or intervene with authority on all medical matters; indeed, it appears that such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war [...] With all this knowledge, or means of knowledge, before him as a commanding officer, he blindly approved a continuation of typhus research by Haagen, supported by the program, and was furnished reports of its progress, without so much as taking one step to determine the circumstances under which the research had been or was being carried on, to lay down rules for the conduct of present or future research by his subordinates, or to prescribe the conditions under which the concentration camp inmates could be used as experimental subjects.<sup>281</sup>

As for the IMTFE,<sup>282</sup> twenty-eight former leaders of Japan were prosecuted at the Tokyo Tribunal, including the Japanese Cabinet, superior military officers, and administrative officials charged with crimes against peace, murder and conspiracy to commit murder, war crimes, and CAH.<sup>283</sup> In the words of Elies van Sliedregt, the IMTFE focused on the “operational aspect in attributing responsibility, the failure to act, anticipate, or react, and the functional aspect, the person’s function which entails a duty to act.”<sup>284</sup>

Concerning the civilian cabinet, the IMTFE provided,

[a] member of a Cabinet which collectively, as one of the principle organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of

<sup>278</sup> *Id.*

<sup>279</sup> *Medical* case, *supra* note 146, at 193.

<sup>280</sup> *Id.* at 193–94.

<sup>281</sup> *Id.* at 212–13.

<sup>282</sup> International Military Tribunal for the Far East, 29 April 1946–12 November 1948, The Tokyo War Crimes Trial (Tokyo Judgment), in 2 FRIEDMAN, *supra* note 43, at 1029–1183.

<sup>283</sup> W.H. Parks, *Command Responsibility for War Crimes*, 62 MLR 64–5 (1973).

<sup>284</sup> VAN SLIEDREGT, *supra* note 38, at 128.



such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing the participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.<sup>285</sup>

Kuniaki Koiso, who served in two cabinets as a minister and was appointed Prime Minister in 1944, was found to have known of war crimes being committed in “every theater of war” by way of information from the Supreme Council for the Direction of War, which he attended.<sup>286</sup> Though it was established that Koiso had requested a directive to be issued to prohibit the mistreatment of POWs, the fact that he served in office for further six months, when the treatment of POWs and internees did not improve, was held to amount to a “deliberate disregard of duty.”<sup>287</sup>

The IMTFE applied command responsibility in the context of war crimes in the prosecution of Kōki Hirota, who as foreign minister received reports of the atrocities committed by the Japanese troops in Nanking, known as the “Rape of Nanking.”<sup>288</sup> Hirota brought the crimes to the attention of the ministry of war, and he was assured that such atrocities would not continue, but they did for at least another month.<sup>289</sup> Thus, Hirota was convicted even though subordinates who committed the crimes were not in his ministry. This decision has been criticized for overemphasizing Hirota’s function, when, as a matter of fact, he lacked actual control over the subordinates:

Evidence [...] shows that it was far from easy for a Foreign Minister to deal with the military [...] The peculiar structure in Japan, where the armed forces possessed an independent position, made it the more difficult for the government to intervene in Army affairs [...].

Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behavior of the Army in the field.<sup>290</sup>

Another Japanese civilian minister, Hideki Tōjō, was held responsible for Japanese soldiers’ mistreatment of civilian internees and prisoners of war.<sup>291</sup> Tōjō was held responsible because he was deemed aware of the atrocities and yet failed to take effective action to end them.<sup>292</sup> The IMTFE imposed on Tōjō a “continuing responsibility for the care of prisoners and civilian internees” in his capacity as Prime Minister.<sup>293</sup> It further held that a superior with a duty to secure the proper treatment of POWs could not be excused of this duty for a failure to know of the crimes when they should have.<sup>294</sup>

<sup>285</sup> 2 FRIEDMAN, *supra* note 43, at 1039.

<sup>286</sup> *Id.* at 1141.

<sup>287</sup> *Id.*

<sup>288</sup> THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (IMTFE), vol. 1 (B.V.A. Röling and C.F. Rüter, eds., 1977), at 1126, *cited in* VAN SLIEDREGT, *supra* note 38, at 129.

<sup>289</sup> VAN SLIEDREGT, *supra* note 38, at 129.

<sup>290</sup> THE TOKYO JUDGMENT, *supra* note 128, at 1126–27, *cited in* VAN SLIEDREGT, *supra* note 38, at 129–30 (“Emphasis on his *function* as Foreign Minister entailed the disregard of the reality of his actual power.”).

<sup>291</sup> 2 FRIEDMAN, *supra* note 43, at 1154, *cited in* VAN SLIEDREGT, *supra* note 38, at 130.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Superiors deemed to have a duty to secure proper treatment of prisoners included (1) members of the government (2) military or naval officers in command of formations having prisoners in their possession;

In a case before a British military court tasked with prosecuting lower-level superiors in war crimes trials, *Franz Schonfeld et al.*, the defendant Harders was charged along with Schonfeld for the murder of Allied personnel in the Netherlands. The Judge Advocate referred to domestic law, providing,

In English law, a person can be held responsible for the commission of criminal offences committed by others, if he employs them or orders them to act contrary to law. He would, in such circumstances, be criminally responsible for the crimes of his employees whether he was present or not at their commission. Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence, for example, if Harders had reasonable grounds for supposing that his men were going to indulge in committing a war crime against their opponents [...] and in fact they did so, and he failed to take all reasonable steps to prevent such an occurrence.<sup>295</sup>

Almost at the same time as the *Yamashita* case, the Canadian Military Court in Germany was hearing the *Abbaye Ardenne* case.<sup>296</sup> The trial was conducted in accordance with the Canadian War Crimes Regulations. Article 10 of these regulations states

- (4) Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.
- (5) Where there is evidence that a war crime has been committed by members of a formation, unit, body or group and that an officer or non-commissioned officer was present at or immediately before the time when such crime was committed, the court may receive that evidence as *prima facie* evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime.<sup>297</sup>

The accused, *Brigadeführer* Kurt Meyer, was found guilty based on his knowledge that his subordinates had killed POWs, which was, in turn, based on the proximity of his headquarters to the shootings (he claimed lack of knowledge).<sup>298</sup>

The Judge Advocate in the trial provided as follows:

[T]he Regulations do not mean that a military commander is in every case liable to be punished as a war criminal for every war crime committed by his subordinates, but once certain facts have been proved by the Prosecution, there is an onus cast upon the accused to adduce evidence to negative or rebut the inference of responsibility which the Court is entitled to make [...]. The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question

(3) officials in those departments concerned with the well-being of prisoners; and (4) officials, whether civilian, military, or naval, having direct and immediate control of prisoners. *Id.* at 1038–39.

<sup>295</sup> Trial of Franz Schonfeld and nine others, *reprinted in XI LAW REPORTS OF TRIALS OF WAR CRIMINALS* (U.N. War Crimes Comm'n, 1951), at 70–71.

<sup>296</sup> Trial of S.S. Brigadeführer Kurt Meyer (the *Abbaye Ardenne* case), *reprinted in IV LAW REPORTS OF TRIALS OF WAR CRIMINALS* (U.N. War Crimes Comm'n, 1951). The extracts quoted here are taken from the unpublished transcript, at 839–45 as cited in Leslie C. Green, *Superior Orders and Command Responsibility*, 1989 CAN. Y.B. INT'L L. 167, 196 (1989).

<sup>297</sup> *Abbaye Ardenne* case, *supra* note 296, at 43.

<sup>298</sup> *Id.* at 89–90; Green, *supra* note 296, at 197.

whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or willfully failed in his duty as a military commander to prevent, or to take action as the circumstances required to endeavour to prevent, the killing of prisoners are matters affecting the question of the accused's responsibility.<sup>299</sup>

In the *Takashi Sakai* case before a Chinese court, Lieutenant General Sakai was convicted of inciting and permitting his troops to engage in crimes against civilians and prisoners. Sakai argued that he no knowledge of the acts of his subordinates, but the court rejected this in recognition of the "accepted principle" that "a field commander must hold himself responsible for the discipline of his subordinates."<sup>300</sup>

In the *Masao* case, Lieutenant General Baba Masao was convicted for the cruel treatment and murder of Allied POWs who had been evacuated by his subordinates and forced to march sixty-five miles – many prisoners died on the march and the survivors were shot.<sup>301</sup> At trial, Masao claimed that he had no knowledge of the killings, as the Allies had cut off his communication with his subordinates. However, the Australian military court followed the precedent of the *Yamashita* case, citing Masao's affirmative duty to do everything within his power to intervene to protect the prisoners.<sup>302</sup>

One national prosecution in the United States arising out of the Vietnam War is notable because it brings the command responsibility doctrine full circle from *Yamashita* ("must have known"), through the *High Command* case ("should have known"), to simple actual knowledge.<sup>303</sup> The case was that of Captain Ernest Medina, the immediate superior to Lieutenant William L. Calley, Jr., who the U.S. Court of Military Appeal determined had directed and participated in the killing of men, women, and children who were in the custody of armed soldiers under Calley's command in the My Lai (Son My) massacre of March 16, 1968.<sup>304</sup>

Although the village of Son My included families of local Viet Cong forces operating in the area, no military or insurgent personnel were found there, and the American forces did not sustain any casualties, aside from one self-inflicted injury. The summary findings of the official investigation of the My Lai massacre by the Department of the Army

<sup>299</sup> Quoted in Green, *supra* note 296, at 198.

<sup>300</sup> XIV UNWCC at 7.

<sup>301</sup> Trial of Lieutenant-General Baba Masao, *reprinted in* XI LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm'n, 1951).

<sup>302</sup> *Id.* at 59.

<sup>303</sup> *U.S. v. Medina*, 20 USCMA 403; 43 CMR 243 (1971). See also 2 FRIEDMAN, *supra* note 43, at 1729.

<sup>304</sup> *U.S. v. Calley* (1971, 1973) CM 426402, 46 CMR 1131; 48 CMR 19; I MLR 2488; 22 USCMA 534 (1973). In a review of MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI: THE SOLDIERS OF CHARLIE COMPANY* (1992), Marc Leepson states:

To criticize the author's analysis of the war, the Army and the causes of My Lai in no way excuses the reign of terror exacted by most, but by no means all, of the soldiers of Charlie Company (of the American Division's 11th Infantry Brigade). Under Capt. Ernest Medina and Lt. William L. Calley, Jr. the company – which never was fired upon, took no enemy prisoners and recovered no enemy weapons – killed some 400 men, women and children.

Calley himself murdered dozens of unarmed people, including young children and babies. Medina was aware of what was happening and did nothing to stop the raping, sodomizing and killing. Lt. Col. Frank Barker, Col. Warren K. Henderson and General Samuel H. Koster, the officers directly above Calley and Medina, deliberately suppressed the facts of the massacre. Only Calley was convicted of war crimes, and he was given lenient treatment by the Nixon administration and the army.

documented the mass murder of between 175 and 400 civilians, including “individual and group acts of murder, rape, sodomy, maiming, and assault on noncombatants.”<sup>305</sup> Lt. Calley unsuccessfully pled the defense of obedience to superior orders, and was sentenced to life imprisonment for murder. Lt. Calley was the only officer the army successfully convicted for the My Lai massacre. In the end, he served three and a half months in a military prison.

Captain Medina was prosecuted for involuntary manslaughter of 100 Vietnamese.<sup>306</sup> The Peers Commission held Captain Medina, the senior commander on the ground, responsible for planning, ordering, and supervising “the execution by his company of an unlawful operation against inhabited hamlets in Son My village which included the destruction of homes by burning, killing of livestock, and destroying crops and other foodstuffs, and the closing of wells; and directed the killing of any person there.”<sup>307</sup> Captain Medina also claimed the defense of superior orders. However, because his immediate superior, Lieutenant Colonel Frank Barker, had died in Vietnam four months after the massacre, direct responsibility for illegal orders for the Song My stopped with Captain Medina.

In his comments to the jury, the military Judge Colonel Kenneth Howard explained a commander’s responsibilities:

After taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.<sup>308</sup>

Captain Medina was acquitted because of lack of actual knowledge. This standard of “actual knowledge” for command responsibility blatantly contradicted the American military tribunal in the *Hostages* case of the CCL 10 Proceedings by abandoning the phrase “should have known.”<sup>309</sup> The *Medina* case seems to be an anomaly in United States jurisprudence on the subject of command responsibility, especially in light of the *Yamashita* case.<sup>310</sup>

<sup>305</sup> Report of the Department of the Army Review of the Preliminary Investigations in to the My Lai Incident: Volume I, The Report of the Investigation (Department of the Army, 1970) [hereinafter Peers Reports].

<sup>306</sup> Lippman, *supra* note 160, at 154.

<sup>307</sup> Peers Report, *supra* note 305, at 439–41.

<sup>308</sup> Cited in LAEL, *supra* note 253, at 130–31; see also 2 FRIEDMAN, *supra* note 43, at 1729–39.

<sup>309</sup> *Hostages* Case, *supra* note 194, at 1323.

<sup>310</sup> In light of this, Professor Clark states that it is “hard to avoid a feeling that there is a certain amount of hypocrisy lurking somewhere.” Lippman, *supra* note 160, at 154. To date, no high-level superiors have been charged or brought to trial for having failed to supervise the operation at My Lai. General Koster, commanding officer of the unit that launched the My Lai operation, received administrative penalties as a replacement to court-martial charges. Lippman, *supra* note 160, at 154; see also VAN SLIEDRECT, *supra* note 38, at 132–33; and LAWRENCE P. ROCKWOOD, WALKING AWAY FROM NUREMBERG: JUST WAR AND THE DOCTRINE OF COMMAND RESPONSIBILITY (2007). Rockwood convincingly states:

The Army Field Manual provides responsibility for actual knowledge of a commander and also knowledge that the commander should have had, specifically:

#### Responsibility for Acts of Subordinates

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. *The commander is also responsible if he has actual knowledge, or other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.*<sup>311</sup>

This position reflects contemporary international norms on the subject. Protocol I provides:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled him to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.<sup>312</sup>

Furthermore, Article 87 establishes affirmative duties for the commander to prevent any breaches of the Conventions:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going

The fact that American officers were held to a lesser standard of command responsibility [than the leaders of the forces in the *Hostage Case*] cannot be explained in terms of any distinction between conditions under which separate criminal acts were perpetrated; rather, it must be explained in terms of the specific identity and/or nationality of the respective perpetrators . . .

The Vietnam-era failure of America to hold its own citizens to the same standards it held out to its defeated enemies has contemporary consequences that includes the U.S. possession of a unilateralist legal precedent concerning command responsibility that conflicts not just with its military doctrine, but also with a developing international consensus in humanitarian law.

*Id.* at 115.

<sup>311</sup> U.S. Dept. of Army, Law of Land Warfare, ¶ 501 (Field Manual 27–10, 1956) (emphasis added).

<sup>312</sup> Protocol I art. 86(2), *supra* note 228.

to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or their Protocol, and where appropriate, to initiate disciplinary or penal actions against violators thereof.<sup>313</sup>

The 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides:

If any of the crimes mentioned in article I is committed [i.e., “war crimes” and “crimes against humanity”], the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.<sup>314</sup>

The 1991 Draft Code of Crimes, in Article 12, proposes the following:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.<sup>315</sup>

This formulation differs from the evolution that has taken place since the CCL 10 Proceedings. The Report of the Secretary-General on the statute of the ICTY stated:

Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.

A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal

<sup>313</sup> *Id.* at art. 87; *see also* art. 43, ¶ 1, which provides that armed forces must be placed “under a command responsible [...] for the conduct of its subordinates.”

<sup>314</sup> United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity art. II, Nov. 26, 1968, 754 U.N.T.S. 73.

<sup>315</sup> Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 94, UN Doc. A/46/10 (1991) [hereinafter 1991 Draft Code].

may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.

The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon “general principles” of law recognized by all nations.<sup>316</sup>

The Final Report of the Commission of Experts stated:

The Commission addressed the matter of command responsibility in paragraphs 51 through 53 of its first interim report as follows:

51. A person who gives the order to commit a war crime or crime against humanity is equally guilty of the offence with the person actually committing it. This principle, expressed already in the Geneva Conventions of 1949, applies to both the military superiors, whether of regular or irregular armed forces, and to civilian authorities.

52. Superiors are moreover individually responsible for a war crime or crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act.

53. Military commanders are under a special obligation, with respect to members of the armed forces under their command or other persons under their control, to prevent and, where necessary, to suppress such acts and to report them to competent authorities.”

The Commission notes with satisfaction that article 7 of the statute of the International Tribunal uses an essentially similar formulation.

The doctrine of command responsibility is directed primarily at military commanders because such persons have a personal obligation to ensure the maintenance of discipline among troops under their command. Most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused. Political leaders and public officials have also been held liable under this doctrine in certain circumstances.

It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein. To determine whether or not a commander must have known about the acts of his subordinates, one might consider a number of indices, including:

- (a) The number of illegal acts;
- (b) The type of illegal acts;
- (c) The scope of illegal acts;
- (d) The time during which the illegal acts occurred;
- (e) The number and type of troops involved;
- (f) The logistics involved, if any;

<sup>316</sup> *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25/94, May 3, 1993.



- (g) The geographical location of the acts;
- (h) The widespread occurrence of the acts;
- (i) The tactical tempo of operations;
- (j) The *modus operandi* of similar illegal acts;
- (k) The officers and staff involved;
- (l) The location of the commander at the time.

The military commander is not absolutely responsible for all offences committed by his subordinates. Isolated offences may be committed of which he has no knowledge or control whatsoever. As a fundamental aspect of command, however, a commander does have a duty to control his troops and to take all practicable measures to ensure that they comply with the law. The arguments that a commander has a weak personality or that the troops assigned to him are uncontrollable are invalid. In particular, a military commander who is assigned command and control over armed combatant groups who have engaged in war crimes in the past should refrain from employing such groups in combat, until they clearly demonstrate their intention and capability to comply with the law in the future. Thus, a commander has a duty to do everything reasonable and practicable to prevent violations of the law. Failure to carry out such a duty carries with it responsibility.

Lastly, a military commander has the duty to punish or discipline those under his command whom he knows or has reasonable grounds to know committed a violation.<sup>317</sup>

In its first interim report, the Commission of Experts made the following statement:

54. A subordinate who has carried out an order of a superior or acted under government instructions and thereby has committed a war crime or a crime against humanity, may raise the so-called defence of superior orders, claiming that he cannot be held criminally liable for an act he was ordered to commit. The Commission notes that the applicable treaties unfortunately are silent on the matter. The Commission's interpretation of the customary international law, particularly as stated in the Nuremberg principles, is that the fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact available to him."

The Commission notes with satisfaction that Article 7, paragraph 4, of the statute of the International Tribunal adopts an essentially similar approach on this subject.<sup>318</sup>

The 1996 Draft Code of Crimes addresses these issues in several articles. Article 4 states:

#### Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.<sup>319</sup>

Article 5 states:

#### Order of a Government or a superior

<sup>317</sup> *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. Doc. S/1994/674 (May 27, 1994).

<sup>318</sup> *First Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, Annex, U.N. Doc. S/25274 (Feb. 10, 1993).

<sup>319</sup> 1996 Draft Code of Crimes art. 4, *supra* note 8.

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.<sup>320</sup>

Article 6 states:

#### Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.<sup>321</sup>

Finally, Article 7 states:

#### Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.<sup>322</sup>

The doctrine of command responsibility now clearly exists in conventional and customary international law. This was evidenced by the *Report of the Kahan Commission* set up by Israel to inquire into criminal events that took place at the Palestinian refugee camps Sabra and Shatila in Lebanon on September 16, 1982.<sup>323</sup> On that day, to prevent an escalation of violence after the assassination of Lebanese Christian Phalangist leader Bachir Gemayel, the Israeli Defense Forces (IDF) occupying Beirut after the June invasion of Lebanon authorized the Phalange militia group to enter Sabra and Shatila to capture and detain Palestinian guerillas.<sup>324</sup>

The Israeli leaders, including military Chief of Staff Lieutenant General Rafael Eitan and Defence Minister Ariel Sharon, had knowledge of the desire for revenge within the Phalange, and cautioned them to respect the civilian inhabitants of the camps. However, from approximately 6:00 P.M. September 16, until 8:00 A.M. September 18, this force massacred unarmed civilians consisting mostly of older men and women and children, including Palestinians, Lebanese, Iranians, Syrians, Pakistanis, and Algerians.<sup>325</sup> Estimates of those massacred have ranged from roughly 800 to as many as 3,000 people.<sup>326</sup>

The Israeli government established the Kahan Commission, headed by the President of the Israeli Supreme Court, Yitzhak Kahan, to establish who amongst the Israeli political and military leadership bore responsibility for the decision to authorize the agreement with the Phalange and for failing to end the massacre.<sup>327</sup> The Commission

<sup>320</sup> *Id.* at art. 5.

<sup>321</sup> *Id.* at art. 6.

<sup>322</sup> *Id.* at art. 7.

<sup>323</sup> 22 I.L.M. 473.

<sup>324</sup> Linda A. Malone, *The Kahan Report, Ariel Sharon and the Sabra-Shatilla Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations*, 1985 UTAH L. REV. 373, 374 (1985).

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*; see Lippman, *supra* note 160, at 156; Leslie C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSN. L. & CONTEMP. PROBS. 319, 361 *et seq.* (1995).

<sup>327</sup> *Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut* (7 February 1983), 22 ILM 473 (1983) [hereinafter *Kahan Commission*].

found Prime Minister Menachem Begin was blamed for relying on calming reports and failing to continue to monitor.<sup>328</sup> Defence Minister Ariel Sharon was found “indirectly responsible” for not having anticipated the slaughter.<sup>329</sup> The Commission stated:

It is true that no clear warning was provided by military intelligence or the Mossad about what might happen if the Phalangist forces entered the camps [...] But [...] even without such warning, it is impossible to justify the Minister of Defence’s disregard of the danger of the massacre [...] [There was] the widespread knowledge regarding the Phalangists’ combat ethics, their feelings of hatred toward the Palestinians, and their leaders’ plans for the future of the Palestinians when said leaders would assume power [...] In the circumstances that prevailed after [the] assassination, no prophetic powers were required to know that concrete danger of acts of slaughter existed.<sup>330</sup>

The Commission further held that Sharon had the duty to prevent the entry of the Phalangist forces.<sup>331</sup> Chief of Staff Eitan was held responsible for having approved the entry of the Phalangist force without taking precautionary measures for the Palestinian inhabitants of the camps.<sup>332</sup> Foreign Minister Yitzhak Shamir was held responsible for having ignored a statement from a fellow minister on the dangers posed by the Phalange, and was found guilty due to his inaction.<sup>333</sup>

As one writer notes:

[I]t would appear that the members of the Commission were aware of the relevant articles of the Geneva Convention and the Protocols for their comments regarding direct and indirect, as well as personal responsibility of the various commanders involved, not only reflect these provisions, but may be considered to go beyond them.<sup>334</sup>

The Kahan Commission, however, was not a criminal court.

As the doctrine of command responsibility is evident in both conventional and customary international law, one may wonder as to the responsibility of Captain Will Rogers III, the commander of the U.S.S. *Vincennes*, who shot down an Iranian civilian airliner, Flight 665, on a scheduled flight in July, 1988.<sup>335</sup> Rogers relied on his crew’s mistaken reading of the instruments due to the stress of the situation and assumed he was about to be attacked by a military aircraft.<sup>336</sup> As one author states, “One may apply to the commander, especially in view of his rank and long service, responsibility for weakness in organization and morale of his troops and failure to show the standards of inspection and training to be expected of a senior officer in the American forces.”<sup>337</sup>

The *ad hoc* tribunals have also considered the doctrine of command responsibility. The *Čelebići* case was first time that the ICTY heard arguments regarding command

<sup>328</sup> Kahan Commission, *supra* note 327, at 501.

<sup>329</sup> Malone, *supra* note 320, at 324.

<sup>330</sup> Kahan Commission, *supra* note 327, at 501–2.

<sup>331</sup> *Id.* at 502.

<sup>332</sup> *Id.* at 505–7.

<sup>333</sup> *Id.* at 519.

<sup>334</sup> See Green, *supra* note 296.

<sup>335</sup> David K. Linnan, *Iran Air Flight 665 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT’L L. 245, 248 (1991); see also Aerial Incident of July 3, 1988 (Islamic Republic of Iran v. United States of America), 1989 I.C.J. 132 (Dec. 13).

<sup>336</sup> See Green, *supra* note 296, at 196.

<sup>337</sup> *Id.*

responsibility.<sup>338</sup> Until the *Čelebići* case, accused before the ICTY were charged and convicted for direct participation under Article 7(1) of the Statute. The Trial Judgement in *Čelebići* listed the three criteria for command responsibility, which reflect the doctrine as it developed in the post-World War II jurisprudence:

- (i) the existence of a superior-subordinate relationship (*superior-subordinate relationship*);
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed (*mens rea*); and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof (*failure to prevent/punish*).<sup>339</sup>

The Chamber held that pursuant to the text of Article 7(3), the concept of “superior” is not limited to military superiors, when read in light of Article 7(2), which affirms individual criminal responsibility for civilian heads of state or responsible government officials. Thus, Article 7(2) was deemed to extend command responsibility doctrine beyond military commanders to civilian political leaders and other nonmilitary superiors in positions of authority.<sup>340</sup> The existence of the position of command may arise from *de jure* status of a superior, or from the existence of *de facto* powers of control.<sup>341</sup> A position of command derives essentially from the “actual possession or non-possession of powers of control over the actions of subordinates.”<sup>342</sup>

To determine the degree of control to be exercised by the superior over the subordinate, the ICTY Appeals Chamber has endorsed the “effective control” standard, which is defined as the material ability to prevent or punish criminal conduct.<sup>343</sup> The existence of a superior-subordinate relationship does “not [...] import a requirement of direct or formal subordination.”<sup>344</sup> A permanent relationship of command and subordination is not required.<sup>345</sup> Furthermore, a unit’s temporary nature has been held not to be, in

<sup>338</sup> Prosecutor v. Mucić et al., Case No. IT-96-21-T (Nov. 10, 1998) [hereinafter *Čelebići* Trial Judgment], *aff’d* Mucić et al. v. Prosecutor, Case No. IT-96-21-A (Feb. 20, 2001) [hereinafter *Čelebići* Appeals Judgment]. For more on the *Čelebići* case, see I. Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AJIL 573 (1999); M. Fera Tinta, *Commanders on Trial: The Blaškić Case and the Doctrine of Command Responsibility under International Law*, 47 NILR 293 (2000); Lippman, *supra* note 160, at 139; L.S. Sunga, *The Čelebići Case: a Comment on the Main Legal Issue’s in the ICTY’s Trial Judgment*, 13 LJIL 105 (2000); Commentary on the *Čelebići* Judgment by Harmen van der Wilt in Klip/Shuiter, ALC-III-669–683.

<sup>339</sup> *Čelebići* Trial Judgment, *supra* note 338, ¶ 346, *aff’d* *Čelebići* Appeals Judgment, *supra* note 338, at ¶¶ 189–98, 225–26, 238–239, 256, 263; *Blaškić* Appeals Judgment, *supra* note 218, ¶ 484; *Aleksovski* Trial Judgment, *supra* note 223, *aff’d* *Aleksovski* v. Prosecutor, Case No. IT-95-14/1-A, Judgment, ¶ 72 (Mar. 24, 2000) [hereinafter *Aleksovski* Appeals Judgment] (author’s additions in italics); see also Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2, Judgment, ¶ 827 (Dec. 17, 2004) [hereinafter *Kordić & Čerkez* Trial Judgment]; *Blaškić* Trial Judgment, *supra* note 205, ¶ 294; Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, ¶ 314 (Nov. 2, 2001) [hereinafter *Kvočka et al.* Trial Judgment]; Prosecutor v. Halilović, Case No. IT-01-48, Judgment, ¶ 56 (Nov. 16, 2005) [hereinafter *Halilović* Trial Judgment]; Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-T, Judgment, ¶ 558 (Sept. 27, 2007) [hereinafter *Mrkšić et al.* Trial Judgment].

<sup>340</sup> *Aleksovski* Appeals Judgment, *supra* note 339, ¶ 76; *Čelebići* Trial Judgment, *supra* note 338, ¶ 356.

<sup>341</sup> *Mrkšić et al.* Trial Judgment, *supra* note 339, ¶ 560.

<sup>342</sup> *Čelebići* Trial Judgment, *supra* note 335, ¶ 370; Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 362 (Jan. 31, 2005) [hereinafter *Strugar* Trial Judgment]; *Limaj et al.* Trial Judgment, *supra* note 209, ¶ 552; *Mrkšić et al.* Trial Judgment, *supra* note 339, ¶ 560.

<sup>343</sup> See Osiel, *supra* note 230, at 1174.

<sup>344</sup> *Čelebići* Appeals Judgment, *supra* note 338, ¶ 303.

<sup>345</sup> *Strugar* Trial Judgment, *supra* note 342, ¶ 362.

itself, sufficient to conclude that a superior-subordinate relationship does not exist.<sup>346</sup> The ICTY has held that the “effective control” test “implies that more than one person may be held responsible for the same crime committed by a subordinate.”<sup>347</sup>

The elements of “effective control,” and the capacity to prevent or punish subordinates’ wrongs raise evidentiary issues that have frustrated the ICTY Prosecutor’s Office, which prefers the more elastic concept of joint criminal enterprise.<sup>348</sup>

The control requirement might mean many things. It might mean, for instance, that the superior decides which subordinate or subordinates will perform the criminal actions; he would then, of course, have to know their names in advance of the wrongful acts. Or the requirement might mean that the superior determines which offenses – torture, murder, rape – the subordinates will commit, perhaps also the conditions under which these might occur. The control requirement might even be understood to entail that the superior chooses the particular persons whom the subordinate will victimize in these ways. Or it could mean that he merely identifies the type of person to be subjected to such treatment, such as Bosnians or Shiites.<sup>349</sup>

Thus, if a judge chooses the most demanding interpretation of the control requirement, he/she risks defeating that requirement’s purpose.

The existence of “effective control” in a given case is addressed when determining liability, forcing the law into a predicament. Professor Osiel states:

If it is very difficult to find effective control, then serious risk arises of acquitting many of those whose contributions were considerable – even if they did not completely dominate the behavior of other participants. If the law makes it easy to show sufficient control, however, then it risks classifying too many as superiors, when their contributions were little different from those of many around them, including those of inferior rank. Often the nominal commander greatly influences the behavior of others without completely controlling it, and the law should reflect as much. This is especially true when he offers them positive incentives rather than threatening punishment, as by tacitly authorizing – not ordering – looting and pillaging.<sup>350</sup>

Defendants before the ICTY have often claimed that their *de facto* power was significantly less than, or different from, their *du jure* authority.<sup>351</sup> However, the superior-subordinate relationship may be deemed to also exist *de facto*, without a legal basis – as

<sup>346</sup> *Kunarac et al.* Trial Judgment, *supra* note 223, ¶ 399.

<sup>347</sup> *Blaškić* Trial Judgment, *supra* note 205, ¶ 303, referring to *Aleksovski* Trial Judgment, *supra* note 223, ¶ 106; *see also* *Strugar* Trial Judgment, *supra* note 342, ¶ 365.

<sup>348</sup> *See* *Blaškić* Appeals Judgment, *supra* note 218, ¶¶ 407–08, 421 (holding that defendant lacked effective control over brigades committing the criminal acts); *see also* *Čelebići* Appeals Judgment, *supra* note 338, ¶¶ 268, 293, 313–14 (similarly affirming acquittals of defendants Zejnil Delalić and Hazim Delić). In the *Kunarac et al.* case, the ICTY acquitted Bosnian Serb reconnaissance commander Dragoljub Kunarac of command responsibility for rape even though the Tribunal found that for several months he had often chosen Muslim women at a detention center and escorted them to suites where they were repeatedly raped by militia members. *Kunarac et al.* Trial Judgment, *supra* note 223, ¶¶ 583, 626–29. Because members of Kunarac’s unit were picked for particular missions on an ad hoc basis, the Tribunal held that that the time and place of the rapes there was no clear superior-subordinate relationship between Kunarac and the specific subordinates. *Id.* at ¶ 628.

<sup>349</sup> Osiel, *supra* note 230, at 1774.

<sup>350</sup> Osiel, *supra* note 230, at 1776–77.

<sup>351</sup> *Čelebići* Appeals Judgment, *supra* note 338, ¶ 197.

in the case of Slobodan Milošević, who lacked *de jure* authority over Bosnian Serb forces during the Srebrenica massacre, though he may have exercised *de facto* control.<sup>352</sup>

The ICTY also has a strict view on the *mens rea* requirement for command responsibility. Prosecutors must show that the defendant received information putting him on *actual notice* of a developing problem concerning his subordinates' adherence to humanitarian law and ICL.<sup>353</sup> In determining whether a superior "had reason to know" that his subordinates were committing or about to commit a crime, it must be shown that specific information was in fact available to the superior that would have provided notice of the offences committed or about to be committed by his subordinates.<sup>354</sup>

Even establishing *de jure* authority has been difficult at the ICTY. For instance, in the *Krstić* case involving the Srebrenica massacre, General Radislav Krstić argued that General Ratko Mladić had created a separate chain of command that went around Krstić; thus, he claimed that he lacked actual knowledge of the massacre.<sup>355</sup> In the *Kvočka* case, the Trial Chamber acquitted the deputy commander and the shift leader of police guards at the Omarska death camp because it was established that multiple lines of authority existed, and the police who performed the interrogations that involved torture and murder did not report to the defendants.<sup>356</sup> Furthermore, the crime committed by the defendants' subordinates was so spontaneous, disorganized, and chaotic that the perpetrators seemed to have "acted without accountability."<sup>357</sup> In the *Blaškić* case, the Appeals Chamber similarly acquitted General Tihomir Blaškić of murders and other crimes during the Lašva Valley ethnic cleansing campaign on the grounds that the members of the police

<sup>352</sup> *Id.* ¶ 193; see Tim Judah, *Milošević on Trial*, SURVIVAL (Summer 2002), at 157, 162, 164. Cf. Gary Bass, STAY THE HAND OF VENGEANCE 227 (2000) ("Relations between Milošević's regime in Belgrade and the Bosnian Serb leaders in Pale were always fractious and often poisonous").

<sup>353</sup> *Blaškić Appeals Judgment*, *supra* note 218, ¶ 407. But see Osiel, *supra* note 230, at 1778–79 n.116 (arguing that postmodern views of power are irrelevant to legal assessment of superior-subordinate relations within a military, which locates power in the professional discourses and "actuarial" practices persons are authorized to deploy, not in the persons themselves). A superior's actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed, but may be established by circumstantial evidence, including the number, type and scope of the illegal acts, the time during which the illegal acts occurred, number and type of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, *modus operandi* of similar illegal acts, officers and staff involved, and location of the commander at the time. *Čelebići Trial Judgment*, *supra* note 338, ¶ 386; see also *Kordić & Čerkez Trial Judgment*, *supra* note 339, ¶ 427; *Blaškić Trial Judgment*, *supra* note 205, ¶ 307; *Strugar Trial Judgment*, *supra* note 342, ¶ 368.

<sup>354</sup> *Čelebići Trial Judgment*, *supra* note 338, ¶ 393; *Strugar Trial Judgment*, *supra* note 342, ¶ 369; *Limaj et al. Trial Judgment*, *supra* note 209, ¶ 525. It is not required that the superior actually familiarized himself/herself with the information, it must only be available to him. *Čelebići Appeals Judgment*, *supra* note 338, ¶ 239. Furthermore, if the superior deliberately refrains from obtaining further information, even though he/she had the means to do so, he may well be considered to have "had reason to know" of the crimes. *Čelebići Appeals Judgment*, *supra* note 338, ¶ 226; *Blaškić Appeals Judgment*, *supra* note 218, ¶ 406; *Halilović Trial Judgment*, *supra* note 339, ¶ 69.

<sup>355</sup> See JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL 156, 168 (2003).

<sup>356</sup> Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment, ¶¶ 410–412 (Nov. 2, 2001) [hereinafter *Kvočka Trial Judgment*].

<sup>357</sup> *Id.* ¶ 411. Though there was no evidence that the defendants had tried to punish the crimes reported to them, the character of the subordinates' violence suggested that the perpetrators did not constitute a disciplined force and that they did not acknowledge Kvočka as a commander with authority over them. *Id.*

and paramilitary groups to whom he sometimes issued orders were under the command of Rajic Kordić at the time of the massacre and did not recognize Blaškić's authority.<sup>358</sup>

Moreover, the degree of superior control can be fluid, depending on such factors the degree of disruption of the lines of authority and communication.<sup>359</sup> These evidentiary burdens on the prosecutor may help to explain why the ICTY has favored the more elastic concept of joint criminal enterprise liability to command responsibility.<sup>360</sup>

The ICTY has also held that a superior's duty to take the necessary and reasonable measures to prevent the commission of a crime or punish the perpetrators thereof relates to his possession of effective control, that is, his material ability to take such measures. A superior may be held liable for failing to take measures even in the absence of explicit legal capacity to do so, if it is proven that it was within his material ability.<sup>361</sup> The Trial Chamber has further ruled that ICTY Statute Article 7(3) contains two distinct legal obligations:<sup>362</sup> (1) the duty to prevent the commission of the offense and (2) to punish the perpetrators; both have been deemed obligatory.<sup>363</sup> The duty to prevent arises from the time a superior acquires knowledge, or has reason to know that a crime is being or is about to be committed, whereas the duty to punish arises after the superior acquires knowledge of the commission of the crime.<sup>364</sup> A superior is required to act from the moment that he/she acquires such knowledge, and his duty to prevent will not be met by simply waiting and punishing afterward.<sup>365</sup>

With respect to the duty of the superior to prevent the commission of the offense, in the *Hadžihasanović & Kubura* case, the Trial Chamber held that a superior could only be held liable for crimes committed while the superior-subordinate relationship was in place.<sup>366</sup> The Chamber's judgment in the case dedicated almost fifty pages to this topic.<sup>367</sup> The Chamber used mostly its own precedent as justification for its holding.<sup>368</sup> The Appeals Chamber concluded that there was no basis in customary international law to hold a superior liable for the crimes of his or her subordinates when such crimes are

<sup>358</sup> *Blaškić Appeals Judgment*, *supra* note 218, ¶¶ 382–400.

<sup>359</sup> This was the claim of Japanese General Tomomurni Yamashita before the IMTFE. *In re Yamashita*, 327 U.S. 1, 32–33 (1946) (Murphy, J., dissenting).

<sup>360</sup> See VAN SLIEDRECT, *supra* note 38, at 364 (stating that “the role superior responsibility used to play” has been partially supplanted by enterprise participation, which “has become the concept *par excellence* on which to base the criminal responsibility of senior military and political figures”).

<sup>361</sup> *Čelebići Trial Judgment*, *supra* note 338, ¶ 395; *Kordić & Čerkez Trial Judgment*, *supra* note 339, ¶ 443; *Halilović Trial Judgment*, *supra* note 339, ¶ 73; *Limaj et al. Trial Judgment*, *supra* note 207, ¶ 526; *Strugar Trial Judgment*, *supra* note 342, ¶ 373; see also *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶ 73 (Jan. 17, 2005) [hereinafter *Blagojević & Jokić Trial Judgment*]; *Brđanin Trial Judgment*, *supra* note 210, ¶ 279; *Stakić Trial Judgment*, *supra* note 210, ¶ 461.

<sup>362</sup> *Blaškić Appeals Judgment*, *supra* note 218, ¶ 83; *Halilović Trial Judgment*, *supra* note 339, ¶ 72; *Limaj et al. Trial Judgment*, *supra* note 208, ¶ 527.

<sup>363</sup> *Blaškić Appeals Judgment*, *supra* note 218, ¶ 83; *Limaj et al. Trial Judgment*, *supra* note 209, ¶ 527.

<sup>364</sup> *Blaškić Appeals Judgment*, *supra* note 218, ¶ 83; *Kordić & Čerkez Trial Judgment*, *supra* note 339, ¶¶ 445–446; *Limaj et al. Trial Judgment*, *supra* note 209, ¶ 527; *Strugar Trial Judgment*, *supra* note 342, ¶ 372.

<sup>365</sup> *Strugar Trial Judgment*, *supra* note 342, ¶ 373; *Limaj et al. Trial Judgment*, *supra* note 209, ¶ 527.

<sup>366</sup> See *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Judgment, ¶ 199 (Mar. 15, 2006) [hereinafter *Hadžihasanović et al. Trial Judgment*]; *Hadžihasanović & Kabura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003) [hereinafter *Hadžihasanović & Kabura Interlocutory Appeal*].

<sup>367</sup> *Hadžihasanović et al. Trial Judgment*, *supra* note 366.

<sup>368</sup> See 1 GLOBAL CMTY Y.B. INT'L L. & JURISPRUDENCE 371 (2007).



committed prior to the superior's assumption of his or her position of command.<sup>369</sup> Judge Mohamed Shahabuddeen penned a dissent<sup>370</sup> that he reworked in the *Orić* case as a declaration<sup>371</sup> that was joined by Judges Liu Daqun<sup>372</sup> and Wolfgang Schomburg.<sup>373</sup> The declaration urged the Tribunal to overrule its decision in *Hadžihasanović & Kubura*; however, because a majority of judges were unwilling to formally dissent, the Appeals Chamber declined to reconsider the reasoning even though the parties briefed the issue.<sup>374</sup>

This ruling in *Hadžihasanović & Kubura* then affected the *Orić* case,<sup>375</sup> wherein the Trial Chamber had originally convicted Naser Orić, a Bosniak commander of the Joint Armed Forces around Srebrenica, for failing to prevent subordinates under his command from mistreating Bosnian Serb prisoners and sentenced him to two years imprisonment.<sup>376</sup> The Chamber acknowledged that, although it would have ruled differently if the issue was one of first impression, it was bound by *Hadžihasanović & Kubura*, and thus the accused could not be prosecuted or convicted for failing to punish police officer subordinates whose crimes were committed before the creation of a superior-subordinate relationship.<sup>377</sup>

The ICTR has required the Prosecutor to establish three elements for the accused to be held responsible under Article 6(3) of the Statute. They are

- (1) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (i.e., he had the material ability to prevent or punish commission of the crime by his subordinate);
- (2) the accused knew or had reason to know that the crime was going to be committed or had been committed; and
- (3) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.<sup>378</sup>

In the *Ntagerura et al.* case, the ICTR covered the trials of three accused: Andre Ntagerura, the Minister of Transportation and Communication, Emmanuel Bagambiki, the prefect with legal authority to requisition both gendarmes and soldiers, and Samuel Imanishimwe, the commander of the Karambo military camp, for large-scale attacks

<sup>369</sup> *Hadžihasanović & Kabura* Interlocutory Appeal, *supra* note 366, ¶ 45.

<sup>370</sup> *Hadžihasanović et al.* Interlocutory Appeal, *supra* note 366, Dissent by Judge Shahabuddeen (July 16, 2003).

<sup>371</sup> Orić v. Prosecutor, Case No. IT-03-68-A, Declaration of Judge Shahabuddeen (July 3, 2008) [hereinafter Shahabuddeen *Orić* Declaration].

<sup>372</sup> Orić v. Prosecutor, Case No. IT-03-68-A, Partially Dissenting Opinion and Declaration of Judge Liu (July 3, 2008) [hereinafter Liu *Orić* Dissent].

<sup>373</sup> Prosecutor v. Orić, Case No. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg (July 3, 2008) [hereinafter Schomburg *Orić* Dissent].

<sup>374</sup> Orić v. Prosecutor, Case No. IT-03-68-A, Judgment. ¶ 167 (Jul. 3, 2008) [hereinafter *Orić* Appeals Judgment].

<sup>375</sup> *Id.*

<sup>376</sup> Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶¶ 490, 565–72, 578 (June 30, 2006) [hereinafter *Orić* Trial Judgment]. He was immediately released for time served. The Appeals Chamber reversed the conviction on the Prosecutor's appeal. *Orić* Appeals Judgment, *supra* note 374, ¶ 180.

<sup>377</sup> *Orić* Trial Judgment, *supra* note 376, ¶ 335. The Trial Chamber noted “for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime.” *Id.* ¶¶ 574–75.

<sup>378</sup> *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 484. See also *Gacumbitsi* Appeals Judgment, *supra* note 217, ¶ 143 (similar language).

against Tutsi refugees, as well as the imprisonment, mistreatment, and killings of specific individuals.<sup>379</sup> Despite the absence of evidence of Bagambiki's knowledge of the attack before it happened, the Chamber found that, as a superior, he should have known of his subordinate's participation.<sup>380</sup> However, the Chamber determined that the Prosecutor failed to prove beyond a reasonable doubt that Bagambiki had failed to take "necessary and reasonable measures" to punish Kamana, and therefore, Bagambiki was ultimately not held responsible.<sup>381</sup> The Chamber decided differently in the case of Imanishimwe, who it determined knew or should have known that soldiers over whom he had both *de jure* and effective control killed a group of Tutsi refugees.<sup>382</sup> Imanishimwe was convicted for the CAH of extermination, which the Chamber determined to be a more comprehensive description of the acts than murder.<sup>383</sup>

The history of command responsibility doctrine thus shows that a commander's responsibility for his troops has long been recognized. It has always been clear that if a superior orders a subordinate to perform unlawful acts, he is criminally responsible. Because this precept is so well recognized, much of the literature and opinions of courts, especially after World War II, have concentrated on the second aspect of the doctrine, namely that a commander may be held responsible for the unlawful acts of his subordinates if he failed to act to prevent the unlawful activity when he "knew" or "should have known" of the activity. However, national courts have set different legal tests ranging from "could have known" to "having actual knowledge."<sup>384</sup>

The London Charter and post-Charter legal developments did not resolve two fundamental legal issues. One is the dilemma of conflicting legal duties that may arise in part by law or by a superior's order running contrary to a commander's general or specific legal duty. The other is the range of options and legal standards and tests to determine what a military person must do in the face of superior orders that violate or appear to violate his legal duties.

In the *High Command* case of the CCL 10 Proceedings, the Tribunal held:

While, as stated, a commanding officer can be criminally responsible for implementing an illegal order of his superiors, the question arises as to whether or not he becomes responsible for actions committed within his command pursuant to criminal orders passed down independent of him. The choices which he has for opposition in this case are few:

- (1) he can issue an order countermanding the order;
- (2) he can resign;
- (3) he can sabotage the enforcement of the order within a somewhat limited sphere.

As to countermanding the order of his superiors, he has no legal status or power. A countermanding order would not only subject him to the severest punishment, but would undoubtedly have focused the eyes of Hitler on its rigorous enforcement.

<sup>379</sup> Prosecutor v. Ntagerura et al., Case No. ICTR-97-36-T, ¶ 5, 12, 13 (Feb. 25, 2004) [hereinafter *Ntagerura et al.* Trial Judgment]. The Trial Chamber found the indictment of Ntagerura too vague, citing the failure of the prosecutor to allege any criminal conduct on the part of the accused in finding him not guilty on all charges.

<sup>380</sup> *Id.* ¶ 649.

<sup>381</sup> *Id.* ¶ 650.

<sup>382</sup> *Id.* ¶ 654.

<sup>383</sup> *Id.*

<sup>384</sup> See Parks, *supra* note 232.

His second choice – resignation – was not much better. Resignation in war time is not a privilege generally accorded to officers in an army. This is true in the Army of the United States. Disagreement with a state policy as expressed by an order affords slight grounds for resignation. In Germany, under Hitler, to assert such a ground for resignation probably would have entailed the most serious consequences for an officer.

Another field of opposition was to sabotage the order. This he could do only verbally by personal contacts. Such verbal repudiation could never be of sufficient scope to annul its enforcement.

A fourth decision he could make is to do nothing.

Control Council No. 10, Article II, paragraph 2, provides in pertinent part as follows:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph I of this article, if he . . .

- (b) was an accessory to the commission of any such crime or ordered or abetted the same or
- (c) took a consenting part therein or
- (d) was connected with plans or enterprises involving its commission. . . .

As heretofore stated, his “connection” is construed as requiring a personal breach of a moral obligation. Viewed from an international standpoint, such has been the interpretation of preceding Tribunals. This connection may however be negative. Under basic principles of command, authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal, violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility. His only defense lies in the fact that the order was from a superior which Control Council Law No. 10 declares constitutes only a mitigating circumstance<sup>385</sup> [ . . . ].<sup>386</sup>

In this respect, the issue of command responsibility rejoins that of obedience to superior orders, which is discussed in [Chapter 8](#). The Rome Statute discusses these issues in Articles 27 (“Irrelevance of official capacity”) and 28 (“Responsibility of commanders and other superiors”), which are excerpted in full as an Appendix to this Chapter. The Rome Statute’s formulation does not depart from extant customary international law, and constitutes an adequate restatement of it.<sup>387</sup>

## §5.2. *Civilian Command Responsibility in the ICTY, the ICTR, and the ICC*

Civilian superiors in a state hierarchal structure who are not part of the military or subject to its control do not fall under the command responsibility norms and standards discussed above. Instead, they are subject to national criminal laws, which vary significantly from state to state. Whereas national military laws, as a result of the London Charter’s influence and the international regulation of armed conflicts, have achieved a high level of conformity, national criminal laws have not. Thus, a major difference exists between command responsibility norms and standards in national military law (applicable to military and in some states also to paramilitary organization’s personnel) and national

<sup>385</sup> *High Command* case, *supra* note 267, at 511-12.

<sup>386</sup> 2 CCL Trials.

<sup>387</sup> See, e.g., WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 454 *et seq.* (2010); GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* (2009).

criminal laws (applicable to civilians in the governmental hierarchy and in most states to law enforcement agencies). Consequently, there are different legal outcomes depending upon the applicable source of law.

In assessing the international norms and standards that have been received in national military laws in comparison to the norms and standards of civilian command responsibility in the world's major criminal justice systems, it appears that the former are more homogenous than the latter. This dissimilarity of criminal responsibility levels produces asymmetrical treatment of those who have engaged in similar conduct resulting in similar harmful outcomes. The essential reason for this situation is the lack of cohesive legislative policy in almost every country in the world, which allows the compartmentalization of different aspects of the law.

However, another explanation, which is related to the essential reason stated above, is the fact that in post-Charter legal developments,<sup>388</sup> particularly the international regulation of armed conflicts under the impetus of the Geneva Conventions, a separate source of law has imposed upon states a duty of conformity with international norms and standards in military law unparalleled in other aspects of national criminal laws. But because international norms and standards of command responsibility penetrate national laws,<sup>389</sup> they should logically extend to all branches of national laws whether they are applicable to military or civilian personnel. That breakthrough, however, has not yet occurred in national criminal justice systems. If any similarities exist between national norms and standards of command responsibility in military laws and criminal laws, they are usually coincidental.

The differences between these two sources of national laws are a consequence of their respective policies, goals, and methods. However, in the last few decades national criminal laws have introduced a concept of decision-makers' criminal responsibility, particularly applicable to business structures, similar to that of military command responsibility. In the United States, for example, it first arose in the fields of antitrust and food and drug control, whereby senior corporate executives up to and including the chief executive officer could be held criminally accountable for their commissions and particularly for their omissions for failure to take appropriate steps to prevent a known or foreseeable harmful result.<sup>390</sup> The increased reliance of national criminal justice systems on concepts of corporate criminal responsibility has also generated new approaches to the individual criminal responsibility of those in the corporate hierarchy.<sup>391</sup>

But national criminal justice systems that struggle with these new concepts and policy approaches to the control of harmful behavior produced by organizations (which are of

<sup>388</sup> See *infra* ch. 4.

<sup>389</sup> *Id.*

<sup>390</sup> See *United States v. Parks*, 421 U.S. 658 (1975); *United States v. Dotterwich*, 320 U.S. 277 (1943). Both cases are discussed in BASSIOUNI, *supra* note 21, at 148–57. For the application of the same principle in the areas of antitrust, securities, and tax, see, e.g., INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (Ved P. Nada & M. Cherif Bassiouni eds., 1987).

<sup>391</sup> For an early position, see Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927). The International Association of Penal Law has devoted several of its Congress subjects and volumes of the RIDP to this topic. See, e.g., *Les Sociétés Commerciales et le Droit Pénal* 58 RIDP 17–165 (1987); *Infractions D'Omission et Responsabilité Pénale pour Omission* 55 RIDP 453–1040 (1984); *Conception et Principes du Droit Pénal Économique et des Affaires y Compris la Protection du Consommateur*, 54 RIDP 17–865 (1983); *Criminalité d'Affaires*, 53 RIDP 21–523 (1982).

course commanded, controlled or influenced by persons) fail to take into account the international norms and standards of military command responsibility. This is particularly significant with respect to CAH, which are the product of state policy.<sup>392</sup> But state policy is not the exclusive province of the military. In fact, the military may only be a part of it, and in some cases it is not involved. Thus, the international and national norms and standards of military command responsibility would not be applicable to some or all of those who were part of the processes leading to the decision and/or to its implementation of state policy leading to the commission of CAH. Such nonmilitary perpetrators would be judged in accordance with national norms and standards of civilian criminal laws, and that, of course, does not provide a uniform international legal basis of accountability. To try to develop international civilian norms and standards on the basis of general principles would almost be impossible because of the diversity in norms of responsibility and imputability in the world's major criminal justice systems.

There are signs that civilian responsibility may be gaining ground. In order to sustain a conviction against a civilian superior for command responsibility, both the ICTY and ICTR have required a showing that the civilian superior possessed powers of authority analogous to those of a military commander.<sup>393</sup>

The successful prosecution of Jean Kambanda,<sup>394</sup> the former Prime Minister of Rwanda, before the ICTR showed that international tribunals had jurisdiction over and were capable of hearing cases involving heads of state who formerly would have been entitled to substantive immunity for their actions, even those actions constituting war crimes and CAH. Kambanda, who pleaded guilty to the crime of genocide, was sentenced to life imprisonment. The ICTY also tackled the idea of head of state immunity in its prosecution of Slobodan Milošević for crimes against humanity and war crimes, relying on Article 7(2) of its Statute<sup>395</sup> to remove Milošević's temporal immunity.<sup>396</sup>

Following these examples, the Special Court for Sierra Leone revoked the immunity of Charles Taylor, President of Liberia.<sup>397</sup> Most recently, the ICC Prosecutor presented a case to the pre-trial chamber regarding Sudanese President Omar Hassan Ahmad Al-Bashir. Prosecutor Luis Moreno-Ocampo presented evidence against President Al-Bashir for genocide, CAH, and war crimes in the Darfur region of Sudan.<sup>398</sup>

Although the prosecution of heads of states has occurred less with respect to national jurisdiction, some recent events show that more states may be willing to prosecute heads of state, immunity notwithstanding, should certain prerequisites be met. In the 2000 decision of *Congo v. Belgium*, the ICJ described several situations in which immunity

<sup>392</sup> See *infra* ch. 1.

<sup>393</sup> See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment ¶ 75 (Jun. 25, 1999) (noting that doctrine applies to civilian authorities who are "in a similar position of command and exercise a similar degree of control with respect to their subordinates."); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 880 (Jan. 27, 2000) (finding defendant exercised sufficient *de jure* and *de facto* control over employees of his tea factory to support a finding of command responsibility, but dismissing command responsibility counts involving crimes by nonemployees within the general population).

<sup>394</sup> *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

<sup>395</sup> See ICTY Statute, *supra* note 5, at art. 7(2).

<sup>396</sup> For more on the Milošević trial, see *infra* ch. 4 and citations therein.

<sup>397</sup> *Prosecutor v. Taylor*, Case No. 2003-01-I, Decision on Immunity from Jurisdiction, ¶ 35 (May 31, 2004).

<sup>398</sup> Press Release, International Criminal Court, ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur, ICC-OTP-20080714-PR341-ENG (July 14, 2008).

may not apply, including prosecution within an international tribunal or within a national jurisdiction after leaving office.<sup>399</sup> Since this ruling, several states have initiated national prosecutions of former heads of state including Hissenè Habré, the former dictator of Chad, who was tried in absentia, found guilty, and sentenced to death in Chad amid fears that he would not face prosecution in Senegal;<sup>400</sup> Alberto Fujimori, who was finally extradited to Peru to face charges of human rights abuses;<sup>401</sup> and Saddam Hussein, who was convicted November 5, 2006 by the Iraqi High Tribunal for CAH.<sup>402</sup> Whether this trend will continue is unknown, as many more former heads of states alleged to have committed human rights abuses continue to enjoy asylum abroad.

Civilian government officials, industrialists, business persons, and even law enforcement officials who are either part of the decision-making or implementing processes of CAH are therefore likely to escape accountability or punishability, or to be judged by lesser standards than their counterparts in the military. The Law of the London Charter does not address this question, nor do post-Charter legal developments, in contrast to the Rome Statute. Articles 27 and 28 specifically apply to officials whether military or civilian, and whether they exercise direct “command and control” or not. In fact, these provisions constitute a notable progressive development in ICL.<sup>403</sup>

## §6. Joint Criminal Enterprise: The ICTY’s New Doctrine and Its Extended Influence

“Joint criminal enterprise” is a form of international criminal liability that has largely been created by judges and prosecutors of the ICTY, and has been followed by other international and internationalized courts despite concerns regarding its legality.<sup>404</sup> According

<sup>399</sup> Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. ¶ 61 (Feb. 14).

<sup>400</sup> *Senegal May Finally Try Habre*, REUTERS, July 24, 2008. Habré was, however, not tried for CAH, leaving that option open for Senegal to pursue. Habré instead was convicted of threatening the democratic government of Chad. For a discussion of Habré’s August 15, 2008 conviction in Chad, see *Chad confirms former president Habré’s conviction*, AGENCE FRANCE PRESSE, Aug. 19, available at <http://afp.google.com/article/ALeqM5jRB8NAgF4CYAzlVwngJZzPdkgKFw>; see also *infra* ch. 9, §3.4.2.

<sup>401</sup> *Extradited Fujimori Back in Peru*, BBC.CO.UK (Sept. 22, 2007); Moumine Ngarmbassa, *Habré death sentence won’t alter Senegal case – Chad*, REUTERS AFRICA (Aug. 19, 2008), available at <http://africa.reuters.com/wire/news/usnLJ487890.html>.

<sup>402</sup> John F. Burns and Kirk Semple, *Hussein Is Sentenced to Death by Hanging*, N.Y. TIMES, Nov. 6, 2006. The Iraqi High Tribunal has also produced some information regarding the case against Saddam Hussein, available at <http://www.iraq-ihl.org/en/aldujail.htm>; see also *infra* ch. 9 §3.4.2.

<sup>403</sup> See ICC Statute, *supra* note 5, at arts. 25–27.

<sup>404</sup> The ICTY in the *Tadić* case referred to this doctrine by an array of names and used the various descriptions interchangeably: “common criminal plan,” “common criminal purpose,” “common design or purpose,” “common criminal design,” “common purpose,” “common design,” “common concerted design,” “criminal enterprise,” “common enterprise,” and “joint criminal enterprise.” Prosecutor v. Brđanin, Case No. IT-99-36 Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 24 (June 26, 2001) (describing the *Tadić* Judgment); see also Osiel, *supra* note 230 (referring to “enterprise participation” as shorthand for “participation in a joint criminal enterprise”). Moreover, the Office of the Prosecutor of the ICTY has used the phrase “acting in concert” in its indictments to refer to joint criminal enterprise. Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 63 (Nov. 29, 2002) [hereinafter *Vasiljević* Trial Judgment]. The ICTY Appeals Chamber has said that the phrase “joint criminal enterprise is preferred.” Prosecutor v. Šainović et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 36 (May 21, 2003) [hereinafter *Šainović et al.* Jurisdictional Decision].

to joint criminal enterprise theory, an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design that involves the commission of a crime provided for in the Statute if the defendant participates with others in the common design.<sup>405</sup> Prosecutorial enthusiasm for the incredible potency of joint criminal enterprise must be weighed against doubts about the broad applicability of the doctrine.

Joint criminal enterprise links crimes to several persons (perpetrators and accomplices); on the other hand, it also connects persons with distinct crimes and attempts to represent the interaction and cooperation between members of a group or organization by depicting the dynamics of collective action that, for many, embodies international crimes, particularly CAH. It has been utilized to address mob violence, the criminal responsibility of political and military leaders, and the responsibility of persons involved in a criminal organization similar to a concentration or death camp.<sup>406</sup> In such situations, a strict principal-accomplice relationship may insufficiently define the relationship wherein joint principals individually make essential causal contributions to an element of the *actus reus*:

The doctrine of common purpose or joint criminal enterprise compensates for this “deficiency” in the Anglo-American complicity doctrine by not requiring an exact identification of the causal contributions that led to the offence(s), but rather leaving them under the cover of “joint enterprise” or “common purpose”. Common purpose is based on the principles of accomplice liability where the responsibility of one is (partly) derived from the causal contribution of the other and where joint “principals” are each liable for their joint acts and are punished for the principal crime.<sup>407</sup>

The phrase “joint criminal enterprise” is not contained in the Statutes of the ICTY or ICTR, but judges from both Tribunals have declared that it is implicitly included in the language of Article 7(1) and Article 6(1), respectively.<sup>408</sup> Both the ICTY and ICTR qualify participation in a joint criminal enterprise as a form of commission, and both view the

<sup>405</sup> *Vasiljević Appeals Judgment*, *supra* note 223, ¶¶ 94–101 (summarizing joint criminal enterprise jurisprudence). *But see* Osiel, *supra* note 230, at 1803 (stating one of the general criticisms of joint criminal enterprise, namely that it has a vagueness problem because it operates as a legal fiction, because “none of its supposed members would have defined themselves in this particular manner.”).

<sup>406</sup> Joint criminal enterprise attracts prosecutors because it has been utilized to extend beyond the formal military hierarchy in order to include civilian bosses and paramilitary groups that often operate outside of formal command. *See generally* Osiel, *supra* note 230; LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 1 (2002). Joint criminal enterprise could also reach the multitude of new armies increasingly subcontracted for military work, including combat – i.e., the increasing use of privately contracted soldiers. *See, e.g.*, P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 40–70 (2003).

<sup>407</sup> VAN SLIEDREGT, *supra* note 38, at 75.

<sup>408</sup> *See* Martić v. Prosecutor, Case No. IT-95-11-A, Judgment, ¶ 82 (noting that the “crimes contemplated in the Statute mostly constitute the manifestations of collective criminality and are often carried out by groups of individuals acting in pursuance of a common criminal design or purpose.”); *see also* Simba Trial Judgment, *supra* note 221, ¶ 385 (“Article 6(1) does not make explicit reference to ‘joint criminal enterprise.’ However, the Appeals Chamber has previously held that participation in a joint criminal enterprise is a form of [responsibility] under customary international law.”).



doctrine as grounded in post-World War II jurisprudence and thus part of customary international law.<sup>409</sup>

The sudden rise to preeminence of joint criminal enterprise at the ICTY dates from the *Tadić* case, wherein the Appeals Chamber treated joint criminal enterprise as a prosecutable form of “commission,” despite the statutory silence and exclusion of conspiracy (except with respect to genocide).<sup>410</sup> The *Tadić* indictment did not specifically allege joint criminal enterprise liability; however, the theory was allowed on appeal.<sup>411</sup> At trial, Tadić was convicted of several counts of war crimes and CAH, but he was acquitted of one of the most serious charges: murder as a CAH for the deaths of five Muslims in the Bosnian village of Jaskići.<sup>412</sup> The Trial Chamber concluded that Tadić was a member of a group of armed men who entered Jaskići and beat its inhabitants, though it noted that the five victims, who were alive when the armed group entered the town, were shot to death after the group’s departure. Ultimately, the Trial Chamber determined that it could not find Tadić guilty beyond a reasonable doubt.<sup>413</sup>

This judgment was overturned by the Appeals Chamber, which held that “the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which [Tadić] belonged killed the five men.”<sup>414</sup> The Appeals Chamber noted that the forms of liability articulated in Article 7(1) described “first and foremost the physical perpetration of a crime by the offender himself”; however, it also found that the crimes within the jurisdiction of the Tribunal “might also occur through participation in the realization of a common design or purpose.”<sup>415</sup> In order to determine the relevant requirements this mode of liability, the Chamber turned to customary international law, which it derived primarily from a selective jurisprudence of post-World War II period. It

<sup>409</sup> *Stakić* Trial Judgment, *supra* note 210, ¶¶ 438, 528 (“The Trial Chamber emphasizes that joint criminal enterprise is only one of several possible interpretations of the term ‘commission’ under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a more direct reference to ‘commission’ in its traditional sense should be given priority before considering responsibility under the judicial term ‘joint criminal enterprise.’” “‘Commission,’ as a mode of liability, is broadly accepted, and joint criminal enterprise provides one definition of ‘commission.’”).

For the ICTR, see *Nahimana et al.* Appeals Judgment, *supra* note 209, ¶ 478 (“Commission covers ‘participation in a joint criminal enterprise.’”); *Muvunyi* Trial Judgment, *supra* note 221, ¶ 463 (similar language as *Nahimana et al.* Appeals Judgment); *Simba* Trial Judgment, *supra* note 221, ¶ 385.

<sup>410</sup> *Tadić* Appeals Judgment, *supra* note 201, ¶¶ 187–220.

<sup>411</sup> Since the *Tadić* Appeals Judgment, *supra* note 201, when the Prosecutor intends to rely on joint criminal enterprise, it must specifically plead joint criminal enterprise in the indictment. See e.g., Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 398 (Dec. 2, 2008), citing *Simić* Appeals Judgment, *supra* note 223, ¶ 22 (stating, “[W]hen the Prosecution charges the ‘commission’ of one of the crimes . . . , it must specify whether the said term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. It is not enough for the generic language of an indictment to ‘encompass’ the possibility that joint criminal enterprise is being charged. The Appeals Chamber reiterates that joint criminal enterprise is being charged. The Appeals Chamber reiterates that joint criminal enterprise must be specifically pleaded in an indictment. . . . [I]t is insufficient for an indictment to merely make broad reference to Article 7(1) . . . ; such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility.”).

<sup>412</sup> Tadić was convicted of the killing of two Muslim policemen in the town of Kozarac. Prosecutor v. Tadić, Case No. IT-94-I-T, Sentencing Judgment, ¶ 57 (July 14, 1997).

<sup>413</sup> *Tadić* Trial Judgment, *supra* note 98, ¶ 373.

<sup>414</sup> *Tadić* Appeals Judgment, *supra* note 201, ¶ 183.

<sup>415</sup> *Id.* at ¶ 188.

identified several cases from this period in which it found that military courts had convicted individuals on the basis of participating in a “common plan.”<sup>416</sup> After reviewing this jurisprudence, the Chamber extrapolated that, “broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality,” namely,

- (1) *Category 1* – which provides for liability where an individual intentionally acts collectively with others to commit international crimes pursuant to a common plan;<sup>417</sup>
- (2) *Category 2* – which provides for liability for individuals who contribute to “organized systems of repression and ill-treatment,” primarily death or concentration camps;<sup>418</sup> and
- (3) *Category 3* – which relates to criminal acts that fall outside the common design.<sup>419</sup>

To be found guilty of the crime of murder as a CAH under *Category 1*, the prosecution must prove that (1) a common plan was to kill the victim, (2) the defendant voluntarily participated in at least one aspect of this common design, and (3) the defendant intended to assist in the commission of murder, even if he did not himself perpetrate the killing.<sup>420</sup> For *Category 2*, the prosecution must demonstrate the participants’ adherence to a system of repression and ill treatment; however, the prosecution is not required to prove a formal or informal agreement among the participants.<sup>421</sup> Whereas *Category 2* largely applies to death and concentration camps, the system in question is arguably susceptible to a broader definition.<sup>422</sup> To convict an individual under *Category 2*, the prosecution must prove (1) the existence of an organized system of repression; (2) the active participation by the accused in the enforcement of this system of repression; (3) the accused’s knowledge of the nature of the system; and (4) the accused’s intent to further the system of repression.<sup>423</sup> Thus, in both *Category 1* and *Category 2*, all members of the joint criminal enterprise may be found criminally responsible for all crimes committed that fall within the common design.

The *Tadić* case exemplifies *Category 3*, which covers situations wherein a participant commits a criminal act that falling “outside the common purpose.”<sup>424</sup> If such an act, though not agreed upon by all participants, still represents a “natural and foreseeable consequence” of the implementation of the common purpose, common liability for the commission of the crime may be imputed to all participants.<sup>425</sup> In *Tadić*, the Appeals

<sup>416</sup> *Id.* at ¶ 195.

<sup>417</sup> *Id.* at ¶ 196. In later cases, the Appeals Chamber reformulated the common design element to require that the defendants have entered into an agreement with other members of the joint criminal enterprise to commit crimes. See Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 135–139 (discussing elements of joint criminal enterprise doctrine) [hereinafter *Haradinaj Trial Judgment*]; *Sainović et al.*, Jurisdictional Decision, *supra* note 404, ¶ 23, Case No. IT-99-37-AR72 (May 21, 2003); see also Osiel, *supra* note 230, at 1785.

<sup>418</sup> See *Tadić Appeals Judgment*, *supra* note 201, ¶ 196.

<sup>419</sup> *Id.* ¶¶ 195 *et seq.* The theory of *Category 3* is that participants in the joint criminal enterprise willingly took the risk of the commission of additional nonintentional but foreseeable crimes.

<sup>420</sup> *Id.* ¶ 196.

<sup>421</sup> *Krnjelac Appeals Judgment*, *supra* note 223, ¶ 96.

<sup>422</sup> Osiel, *supra* note 230, at 1785, n.151.

<sup>423</sup> *Tadić Appeals Judgment*, *supra* note 201, ¶ 203.

<sup>424</sup> *Id.* ¶¶ 204, 206.

<sup>425</sup> *Id.* ¶ 204; *Brđanin Trial Judgment*, *supra* note 210, ¶ 258; *Vasiljević Trial Judgment*, *supra* note 404, ¶ 99: “An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members

Chamber failed to address adequately the objections to the extended of joint criminal enterprise. Instead, it cherry-picked World War II-era cases to justify the doctrine as a matter of customary international law and to explicate its elements.

The Appeals Chamber in *Tadić* referenced two types of prosecutions conducted by as part of the CCL 10 Proceedings: (1) a group of cases involving unlawful killings of small groups of Allied POWs either by German soldiers townspeople; and (2) a group of cases in connection with concentration camps.<sup>426</sup> For instance, the *Essen Lynching* case<sup>427</sup> was said to epitomize the series of POW cases cited in *Tadić*, some which explicitly rely on some notion of a collective form of common purpose liability.<sup>428</sup> This line of cases has been subject to criticism for not clearly explaining the defendant's exact contribution to the murders.<sup>429</sup> Thus, there are questionable aspects both with respect to the support for "common plan" liability at customary law, as well as its specific applicability as set forth in *Tadić*.<sup>430</sup>

The second group of World War II-era cases cited in *Tadić* consisted of concentration camp staff (*Category 2*) including the U.S. prosecution of forty staff members of Dachau. The indictment in the *Dachau Concentration Camp* case alleged that the defendants "acted in pursuance of a common design to commit the acts hereinafter alleged."<sup>431</sup> The notes on the case set out the three legal elements that the prosecution had to show to prove this common design:

To establish a case against each accused the prosecution had to show (1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, (3) that each accused, by his conduct "encouraged, aided and abetted or participated" in enforcing this system.<sup>432</sup>

The Appeals Chamber reproduced precisely these requirements from the *Dachau Concentration Camp* case, which constitute the elements of *Category 2*:

of one ethnicity from their town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, one or more of the victims is short and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."

<sup>426</sup> For general criticism of joint criminal enterprise doctrine, especially with respect to the cases used to support *Category 3* liability, see Allison Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 110 (2005).

<sup>427</sup> Trial of Erich Heyer and Six Others (the *Essen Lynching* case), reprinted in I LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm'n, 1947), at 88.

<sup>428</sup> The Almelo Trial, *supra* note 151, at 35, 40.

<sup>429</sup> See cites contained in this section. Indeed, in one of the few cases that lays out the legal principles of common plan liability, the British Judge Advocate explains:

In our law if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out that purpose, kills a man, it is murder in all who are present, whether they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.

IX UNWCC, *Schonfeld*, *supra* note 169, at 68. The Judge Advocate later recognizes that a person may be charged with this form of liability even if he is not actually present, so long as he "[was] near enough to give assistance." *Id.* at 70.

<sup>430</sup> See generally Osiel, *supra* note 230; Danner & Martinez, *supra* note 426.

<sup>431</sup> Trial of Martin Gottfried Weiss and Thirty-nine Others, (the *Dachau Concentration Camp* case, reprinted in XI LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Comm'n, 1951), at 5, 12.

<sup>432</sup> *Id.* at 13.

This category of cases [...] is really a variant of [Category 1] [...]. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective “position of authority” within the concentration camp system and because they had “the power to look after the inmates and make their life satisfactory” but failed to do so. It would seem that in these cases the required *actus reus* was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual’s high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.<sup>433</sup>

It further concluded that the accused had participated in the common “criminal purpose to eliminate the non-Serb population of Prijedor.”<sup>434</sup> The killing of non-Serbs was deemed foreseeable in light of this purpose, and Tadić was deemed to have been aware of this risk but nonetheless willingly participated in the common plan.<sup>435</sup>

After the *Tadić* Appeals Judgement, joint criminal enterprise became increasingly prevalent at the ICTY, where indictments frequently use it as the basis for liability.<sup>436</sup> The subsequent cases have expanded the scope of the doctrine, such as in the *Brđanin* case, wherein the Appeals Chamber held that members of a joint criminal enterprise were also liable for crimes committed by principal perpetrators who were not members of the enterprise but were rather used by the enterprise members to commit the crimes, if the crimes formed part of the common purpose and an enterprise member used the nonmembers as part of the common plan.<sup>437</sup> Even if the crimes committed by the nonenterprise member were not part of the common plan, such crimes can still be imputed to the enterprise members if such crimes were the natural and foreseeable consequence of implementing the common plan, and if the enterprise members willingly took the risk that such crimes were a possible consequence of the enterprise.<sup>438</sup> The tribunal must be satisfied beyond a reasonable doubt that the commission of the crimes by nonenterprise members formed part of one of the three categories of joint criminal enterprise.<sup>439</sup>

Because of such expansive (and expanding) interpretations of joint criminal enterprise, it has effectively replaced command responsibility as the primary theory of responsibility for regime leaders and their subordinates at the ICTY and the subsequent tribunals that have been enchanted by the doctrine. For example, Slobodan Milošević was accused of participating in three large-scale joint criminal enterprises in Kosovo, Croatia, and

<sup>433</sup> *Tadić* Appeals Judgment, *supra* note 201, ¶ 203 (internal citations omitted).

<sup>434</sup> *Id.* ¶ 232.

<sup>435</sup> *Id.*

<sup>436</sup> Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 910–11 (2003) (“In the last two years, it appears that participating in a joint criminal enterprise has become the principal charging preference in ICTY indictments.”); *see also* Danner & Martinez, *supra* note 426, at 107–8.

<sup>437</sup> *Brđanin* Appeals Judgment, *supra* note 223, ¶¶ 410, 413, 418, 430.

<sup>438</sup> *Id.* ¶¶ 411, 413.

<sup>439</sup> *Tadić* Appeals Judgment, *supra* note 201, ¶ 220.

Bosnia.<sup>440</sup> More recently, Radovan Karadžić was also charged under joint criminal enterprise theory for counts of genocide and CAH.<sup>441</sup>

Some scholars have remarked on the “symbolic dimension” of the prosecution’s choice of joint criminal enterprise over command responsibility as a theory of liability:

There is a clear symbolic dimension to convicting a defendant for having participated in a JCE. In a doctrinally unimportant but psychologically critical move, JCE *sounds more serious* than simply alleging that someone participated in a “common plan” or has been found liable on a complicity theory. We suspect that the increasing use of the label JCE by international prosecutors in lieu of “common plan” owes much to the rhetorical weightiness of the former term. Certainly, press releases about indictments prominently feature the allegation that an individual participated in a JCE. More substantively, JCE allows the prosecution and judges to capture the seriousness of a leader’s responsibility for the violent course of events.<sup>442</sup>

Other scholars, however, attribute the overreliance on joint criminal enterprise by international prosecutors as a sign of prosecutorial desperation resulting from the difficulties involved in proving command responsibility:

A more parsimonious explanation of the shift [to JCE], however, would be that prosecutors simply discovered a colossal obstacle – proving “effective control” – to convicting almost anyone on the basis of culpable omission in the exercise of command. This failure has left them “desperate.”<sup>443</sup>

However, joint criminal enterprise appeals to prosecutors in ways not solely based on desperation, as Professor Mark Osiel continues:

<sup>440</sup> Prosecutor v. Milosević, Case No. IT-01-51-1, Initial Indictment, ¶ 6 (Nov. 22, 2001) (alleging that Milosević participated in a joint criminal enterprise, whose purpose “was the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina”). This indictment also states that “[‘Committed’ in this indictment refers to participation in a joint criminal enterprise as a co-perpetrator.” *Id.* at ¶ 5; see also Prosecutor v. Milosević, Case No. IT-02-54-T, First Amended Indictment, ¶ 6 (Oct. 23, 2002) (alleging that Milosević participated in a joint criminal enterprise, whose purpose “was the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state”); Prosecutor v. Milosević, Case No. IT-99-37-PT, Second Amended Indictment, ¶ 16 (Oct. 29, 2001) (alleging that Milosević participated in a joint criminal enterprise as a co-perpetrator whose purpose “was, *inter alia*, the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serb control over the province”).

See also William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1034 (2003) (arguing that joint criminal enterprise weakens the didactic function of international courts as reflected in the IMT because its *Category 3* lowers relevant mens rea in order to secure convictions: “[i]f it cannot be established that leaders such as Milosević actually intended the atrocities with which they are charged, the door is left ajar for future generations to deny the truth”). Compare with Danner & Martinez, *supra* note 426, at 145 (finding merit in Schabas’s argument, but noting that in the case of senior leaders, the tensions with the criminal law paradigm become less acute so that the international forum should be reserved for them); see also Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005) (describing the “prosecutorial focus” on political and military leaders).

<sup>441</sup> See *infra* ch. 4, § 3.

<sup>442</sup> See Danner & Martinez, *supra* note 426, at 145 (internal citation omitted) (emphasis added).

<sup>443</sup> Osiel, *supra* note 230, at 1784 (internal citations omitted).

Enterprise participation appeals to international prosecutors for its reach beyond the formal military hierarchy to civilian bosses and paramilitaries over whom no command is exercised. The doctrine will also be valuable in reaching many new private armies to which states increasingly subcontract military work, including combat itself. The amplitude and elasticity of enterprise participation lets indictments transcend the confines of a bureaucracy to the informal networks connecting it to other individuals and organizations, often exercising greater power than many within [...].

*But the danger lies in the breadth with which the common purpose of the criminal enterprise is couched.* By defining that enterprise as the expulsion of non-Serbs from a given region of the former Yugoslavia, a very substantial portion of the Serbian population in that region could credibly be considered participants, and prosecuted as such.<sup>444</sup>

The number of indictments explicitly utilizing joint criminal enterprise may even understate the doctrine's popularity since the *ad hoc* tribunals have ruled that a defendant could be convicted based on joint criminal enterprise even if his indictment did not explicitly reference it,<sup>445</sup> and that phrases such as acting "in concert" may be read to implicitly reference joint criminal enterprise.<sup>446</sup> In fact, as noted by Mark Osiel, the ICTY no longer analyzes command responsibility under Article 7(3) if it finds the defendant liable under at least one form of Article 7(1) "commission," including joint criminal enterprise.<sup>447</sup>

The decision by the ICTY Appeals Chamber to read such a wide-ranging form of liability into the Statute has been contentious, and answers to significant doctrinal questions still remain unclear or unacceptable from a legality perspective. Most controversy stems from joint criminal enterprise at its margins – that is, whether even a *de minimis* contribution to the enterprise suffices to place an individual within the criminal enterprise, and whether there are any limits on the prosecutorial discretion in defining the scope.

*Category 3* is what most legal scholars see as the most troubling aspect of joint criminal enterprise.<sup>448</sup> According to the "extended liability" of *Category 3*, if the prosecution successfully demonstrates that the defendant intended to participate in a joint criminal enterprise, he or she will be liable for any foreseeable crimes committed by others, even those he or she did not intend. Consequently, *Category 3* lowers the relevant *mens rea* from intent or knowledge to recklessness. Furthermore, this category is especially

<sup>444</sup> *Id.* at 1786, 1802 (internal citations omitted) (emphasis added); see also LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 1 (2002) (examining "international accountability for acts committed by armed opposition groups during internal armed conflict" including both highly organized groups resembling "de facto governments" and groups only "loosely organized with no effective control command"); see also P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 40–70 (2003); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1004 (2004).

<sup>445</sup> See Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 602 (Aug. 2, 2001); Kvočka et al. Trial Judgment, *supra* note 339, ¶ 246. In the Blaškić case, the Appeals Chamber clarified that "the alleged form of participation of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment." Blaškić Appeals Judgment, *supra* note 218, ¶ 215.

<sup>446</sup> See Prosecutor v. Simić et al., Case No. IT-95-9-T, Judgment, ¶ 149 (Oct. 17, 2003) ("It is commonly accepted that a reference to 'acting in concert together' means acting pursuant to a joint criminal enterprise"); Vasiljević Trial Judgment, *supra* note 404, ¶ 63.

<sup>447</sup> See Osiel, *supra* note 230, at 1784, n.141 (citing to Interview with ICTY Prosecutor, in The Hague, Neth. In July 2005).

<sup>448</sup> See, e.g., Danner & Martinez, *supra* note 426, at 108.



problematic because many national judicial systems do not recognize the liability of participants in a common plan for crimes that fall outside the scope of the common objective.<sup>449</sup>

Whereas *Category 3* lacks a clear precedent in World War II-era cases, it does, however, resemble two contentious doctrinal tactics used at the IMT, namely the prosecution of criminal organizations and the inclusion of the crime of conspiracy.<sup>450</sup> Notably, neither the *Tadić* case nor any subsequent case from the ICTY has relied on the concept of criminal organizations or used conspiracy and common plan from the IMT to justify joint criminal enterprise as part of customary international law.<sup>451</sup>

The ICTY has sought to distance joint criminal enterprise from simply being a “vehicle for organizational liability.”<sup>452</sup> The Appeals Chamber declared that “[c]riminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter.”<sup>453</sup> Another Trial Chamber asserted, “Joint criminal enterprise cannot be viewed as membership in an organization because this would constitute a new crime not foreseen under the Statute and therefore [would] amount to a flagrant infringement of the principle of *nullum crimen sine lege*.”<sup>454</sup>

The ICTY demonstrated that joint criminal enterprise doctrine is not foolproof in the *Haradinaj* case, which concerned crimes allegedly committed by the Kosovo Liberation Army (KLA). The Trial Chamber concluded that KLA soldiers committed some acts of cruel treatment, torture, rape, and murder alleged; however, it determined that the evidence was insufficient to infer the existence of a common criminal objective among the accused and the other participants in the enterprise.

Joint criminal enterprise remains in flux before the ICTR, though it has mostly followed the jurisprudence of the ICTY. Importantly, because most defendants before

<sup>449</sup> *Id.*; For instance, Germany, the Netherlands, and Switzerland do not provide for this form of liability in their respective criminal codes. Marco Sassòli & Laura M. Olson, *The Judgment of the ICTY Appeals Chamber on the Merits in the Tadić Case*, 82 INT’L REV. RED CROSS 733, 749 (2000). Even in countries that recognize liability in this situation, like Britain and Canada, the doctrine is criticized because it effectively lowers the relevant mens rea for commission of the principal crime without providing any formal reduction in the imposed sentence. See C.M.V. CLARKSON & H.M. KEATING, CRIMINAL LAW: TEXT AND MATERIALS 520 (2d ed. 1990) (questioning “why an accessory [should] be guilty of the same offence as the principal on the basis of a lesser mens rea”).

In the U.S., the closest equivalent to common plan liability is the often derided Pinkerton conspiracy liability, which includes liability for foreseeable crimes outside of the object of the conspiracy. See, e.g., GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 192 (1998) (stating “the doctrine of conspiracy means, in effect, that it is impossible under American law to hold individuals liable simply for what they do, each according to his degree of criminal participation”); Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 7 (1992) (stating Pinkerton conspiracy can amount to “guilt by association”). *Category 3* has also been compared to U.S. rules on felony murder, which makes any participant in a dangerous felony liable for murder caused by another. See Richard J. Bonnie et al., CRIMINAL LAW 855–95 (2d. ed. 2004).

<sup>450</sup> Danner & Martinez, *supra* note 426, at 112.

<sup>451</sup> Compare with Judge Hunt of Australia, who has recognized the close relationship between *Category 2* and the criminal organization provisions. Prosecutor v. Šainović et al., Case No IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction-Joint Criminal Enterprise, ¶ 30 (Oct. 7, 1997).

<sup>452</sup> Šainović et al. Jurisdictional Decision, *supra* note 404, ¶ 24.

<sup>453</sup> *Id.* ¶ 26.

<sup>454</sup> Stakić Trial Judgment, *supra* note 210, ¶ 433.



the ICTR have been charged with genocide, the Prosecutor has mainly relied upon charges of conspiracy to commit genocide rather than a joint criminal enterprise theory.<sup>455</sup> An exception is the *Zigiranyirazo* case, wherein the Prosecutor indicted the defendant, a businessman, for committing genocide through a joint criminal enterprise (*Category 1*) in addition to conspiracy to commit genocide.<sup>456</sup> In that case, the Trial Chamber acquitted Zigiranyirazo of conspiracy to commit genocide for lack of evidence that the accused entered into an agreement with others to commit genocide. The Chamber recognized that the Prosecutor could prove the existence of a conspiracy on indirect evidence, but also ruled that the law requires that “the existence of the conspiracy [...] be the only reasonable inference from the evidence.”<sup>457</sup> However, the Trial Chamber convicted Zigiranyirazo for participating in a joint criminal enterprise to commit genocide, noting that the massacre could only have been implemented through prior planning and coordination, which gave rise to an inference of the existence of a common criminal purpose.<sup>458</sup> The Chamber considered that the particular circumstances, including the defendant’s stature, his well-received speech, and his presence at the inception of the massacre, were enough to infer that Zigiranyirazo shared the common purpose to commit genocide.<sup>459</sup>

Other cases demonstrate that the ICTR has mostly followed the joint criminal enterprise jurisprudence of the ICTY. For instance, in the *Karempera* case, the Appeals Chamber held that customary international law permits the imposition of *Category 3* liability for crimes committed by fellow participants in a joint criminal enterprise of “vast scope.”<sup>460</sup> In the *Rwamakuba* case, the Appeals Chamber held that the Tribunal had jurisdiction to try the appellant on a charge of genocide through joint criminal enterprise.<sup>461</sup> In the *Nkaturutimana and Nkaturutimana* case, the Appeals Chamber relied upon *Category 1*, but found that the Trial Chamber had been correct in not applying the doctrine to that particular case.<sup>462</sup> In the *Simba* case, a Trial Chamber held that the accused was guilty of joint criminal enterprise to commit genocide and extermination.<sup>463</sup> In the *Mpambara* case, the Prosecution similarly charged a defendant with joint criminal enterprise to commit genocide and extermination; however, the Trial Chamber concluded that there

<sup>455</sup> Conspiracy to commit genocide is defined as “an agreement between two or more persons to commit genocide.” *Zigiranyirazo* Trial Judgment, *supra* note 213, ¶ 389. Conspiracy to commit genocide is an inchoate crime. It is completed once the agreement is reached, regardless of the realization of the common objective. *Id.* ¶ 389. Genocide remains the only crime for which the conspiracy theory of liability is available before the *ad hoc* tribunals, according to Article III of the Genocide Convention. See ICTR Statute, art. 2(3)(b).

<sup>456</sup> *Zigiranyirazo* Trial Judgment, *supra* note 213, ¶ 6. Zigiranyirazo was also convicted of extermination as a CAH.

<sup>457</sup> *Id.* ¶ 394. This was so even though the Trial Chamber had established beyond a reasonable doubt that a Hutu power group existed (and *Akazu*) that included the accused. *Id.* ¶ 103.

<sup>458</sup> *Id.* ¶ 407.

<sup>459</sup> *Id.* ¶ 408.

<sup>460</sup> *Karempera et al.*, Case No ICTR-98-44-AR72.5 and ICTR-98-44-AR72.6, Appeals Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ¶ 12 (Apr. 12, 2006).

<sup>461</sup> *Prosecutor v. Rwamakuba*, Case No ICTR-98-44C, Appeals Decision on Interlocutory Appeals, ¶¶ 9–30 (Oct. 22, 2004).

<sup>462</sup> *Prosecutor v. Nkaturutimana*, Case No ICTR-96-10 and ICTR-96-17-A, Judgment, ¶¶ 462, 466, 468–84 (Dec. 13, 2004).

<sup>463</sup> *Simba* Trial Judgment, *supra* note 221, ¶¶ 386–96, 411–19, 420–26.

was insufficient proof to establish that the accused possessed the intent to be a part of a joint criminal enterprise.<sup>464</sup>

In light of the problems posed by joint criminal enterprise, it is troubling that every international criminal court or tribunal established since the founding of the ICTY and ICTR has incorporated a version of the doctrine into its jurisprudence, either formally as a matter of statutory law or informally as a matter of prosecutorial policy.<sup>465</sup>

The Statute of the Special Court for Sierra Leone, drafted in 2000 (one year after the *Tadić* decision), closely resembles the provision on individual criminal responsibility contained in the ICTY and ICTR statutes:

[A] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 to 4 of the present Statute shall be individually responsible for the crime.<sup>466</sup>

Thus, the Statute of the Special Court contains no reference to joint criminal enterprise or common plan liability. Nevertheless, the Special Court's indictments specifically accuse individuals of participating in a joint criminal enterprise. For instance, the indictment of Charles Taylor accuses him of participating in a "common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas."<sup>467</sup> Other indictments also accuse the defendants of participating in a joint criminal enterprise to exercise control over Sierra Leone.<sup>468</sup> The language of these indictments includes *Category 3*, which charges the accused with liability for all crimes reasonably foreseeable from the joint criminal enterprise. For example, the indictment of Sam Hinga Norman charges him with various crimes that he "planned, instigated, ordered, committed, or in whose planning, preparation or execution [he] otherwise aided and abetted, or which crimes were within a common purpose, plan or design in which [he] participated or were within a common purpose, plan or design in which [he] participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which [he] participated."<sup>469</sup> This language thus demonstrates that the prosecutor embraced the most wide-ranging and troublesome application of joint criminal enterprise: *Category 3*.

In East Timor, the Special Panel for Serious Crimes established by the United Nations Transitional Administration in East Timor (UNTAET) replicates the individual criminal responsibility provision of the Rome Statute, including its common purpose language.<sup>470</sup> For example, one of the indictments issued by the Prosecutor for Serious Crimes charges a variety of senior individuals, including Abilo Jose Osorio Soares, the former Governor

<sup>464</sup> Prosecutor v. Mpambara, Case No. ICTR-01-65-T, Judgment, ¶¶ 13–14, 38–40, 76, 113, 164 (Sept. 11, 2006).

<sup>465</sup> Danner & Martinez, *supra* note 426, at 154.

<sup>466</sup> Statute of the Special Court for Sierra Leone, at art. 6.

<sup>467</sup> Prosecutor v. Taylor, Case No. SCSL-2003-13-1, Indictment, ¶¶ 23–5 (Mar. 7, 2003).

<sup>468</sup> Prosecutor v. Kanu, Case No. SCSL 2003-13-1, Indictment, ¶ 23 (Sept. 15, 2003); Prosecutor v. Kondewa, Case No. SCSL-2003-12-1, Indictment, ¶ 14 (June 24, 2003) (referring to the accused's plan, purpose, or design); Prosecutor v. Fofana, Case No. SCSL-2003-11-1, Indictment, ¶ 14 (June 24, 2003) (same); Prosecutor v. Kamara, Case No. SCSL-2003-09-1-009, Indictment, ¶ 25 (Apr. 16, 2003); Prosecutor v. Brima, Case No. SCSL-2003-06-1, Indictment, ¶ 23 (Mar. 7, 2003); Prosecutor v. Sesay, Case No. SCSL-2003-05-1, Indictment, ¶ 23 (Mar. 7, 2003); Prosecutor v. Bockarie, Case No. SCSL-2003-04-1, Indictment, ¶ 25 (Mar. 7, 2003); Prosecutor v. Koroma, Case No. SCSL-2003-03-1, Indictment, ¶ 24 (Mar. 7, 2003).

<sup>469</sup> Prosecutor v. Norman, Case No. SCSL-2003-0801, Indictment, ¶ 13 (Mar. 7, 2003).

<sup>470</sup> U.N. Transitional Administration in East Timor, at § 14.3(d).

of East Timor, with CAH.<sup>471</sup> The indictment reproduces the language of the individual criminal responsibility provision and therefore does not indicate whether Soares is charged with committing, ordering, aiding and abetting, or acting with a common purpose.<sup>472</sup> Other indictments before the Special Panel also include this language.<sup>473</sup>

More recently, joint criminal enterprise has emerged as a disputed issue before the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC Law does not specifically provide for joint criminal enterprise. Nevertheless, the Co-Prosecutors' Initial Submission on July 18, 2007 sought to indict Duch for war crimes, CAH (murder, torture, rape, extermination, persecution, imprisonment, enslavement, and other inhumane acts), and certain domestic crimes under the 1956 Penal Code pursuant to principles of direct, accomplice, and command responsibility.<sup>474</sup> The Closing Order limited Duch's "commission" of the crimes to those incidents in which he "personally tortured or mistreated detainees."<sup>475</sup>

One of the Co-Prosecutors' grounds for appeal of the Closing Order was the failure to indict Duch as a co-perpetrator under joint criminal enterprise. They contended that the modes of liability contained in the indictment, namely, ordering, instigating, and planning, failed to cover all of Duch's criminal actions, and further argued that aiding and abetting and command responsibility, the two other modes of liability, failed to adequately convey Duch's central role in the crimes at S-21.<sup>476</sup> The Co-Prosecutors further argued that joint criminal enterprise satisfied all four conditions required for use at the ECCC: (1) the doctrine is provided for under the ECCC Law; (2) it was part of customary international law when the crimes were committed; (3) the accused was able to know of the mode of liability at the time the crimes were committed; and (4) the accused was able to foresee that he or she could be held criminally liability for his or her actions.<sup>477</sup>

Due to the uncertainty as to whether joint criminal enterprise in its three categories were part of customary international law during the Khmer Rouge regime and whether they are applicable at the ECCC, the Pre-Trial Chamber selected former ICTY Judge Antonio Cassese, Professor Kai Ambos, and the Centre for Human Rights and Legal Pluralism at McGill University to pen amicus briefs on the evolution of joint criminal enterprise doctrine as a mode of liability, particularly focusing on the period from 1975–1979.<sup>478</sup> The Pre-Trial Chamber issued its ruling on the Co-Prosecutors' appeal on

<sup>471</sup> Deputy General Prosecutor for Serious Crimes v. Wiranto, Case No. 5/2003, Indictment, at 36 (Feb. 22, 2003).

<sup>472</sup> *Id.* at 34–35.

<sup>473</sup> See, e.g., General Prosecutor of the United Nations Transitional Administration in East Timor v. Sarmento, Case No 18/18A/18B/18C/2001, ¶ 11 (Aug. 7, 2001).

<sup>474</sup> Kaing Guek Eav ("Duch"), Case No. 002/14-08-2006/ECCC/OCP, Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning Their Rule 66 Final Submission Regarding Kaing Guek Eav alias "Duch" (July 18, 2008); Kaing Guek Eav ("Duch"), Case No. 002/14-08-2006, Closing Order Indicting Kaing Guek Eav alias Duch (Aug. 8, 2008) [hereinafter *Duch Closing Order*]. Duch is alleged to have committed, ordered, planned, instigated, aided, and abetted the crimes in question. *Id.* ¶¶ 153–56, 159–61. The Co-Investigating Judges also utilized the doctrine of superior responsibility in the indictment due to the fact that he exercised effective command and control over the staff of S-21. *Id.* ¶¶ 157–58.

<sup>475</sup> *Duch Closing Order*, *supra* note 474, ¶ 153.

<sup>476</sup> PTC, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch," 8 Dec. 2008, ¶¶ 108–10 [hereinafter *Duch Decision on Closing Order Appeal*].

<sup>477</sup> *Id.*

<sup>478</sup> *Id.* ¶¶ 14–16. Professor Ambos argued that *Category One* of Joint Criminal Enterprise was the only category that formed part of customary international law during the Khmer Rouge era, and that only a narrow

December 8, 2008.<sup>479</sup> The second ground for appeal concerned the failure to indict Duch as a co-perpetrator in a joint criminal enterprise.<sup>480</sup> The Pre-Trial Chamber held only that the doctrine of joint criminal enterprise could not apply to Duch because he was not adequately informed of the allegation prior to the Co-Prosecutors' Final Submission pursuant to Internal Rule 21(1)(d).<sup>481</sup>

On July 2008, a higher-ranking defendant, Ieng Sary, submitted his Request that the Co-Investigating Judges declare joint criminal enterprise to be inapplicable before the ECCC, arguing that joint criminal enterprise would violate the principle *nullum crimen sine lege* at the ECCC because it was not acknowledged as customary international law in 1975 to 1979.<sup>482</sup> The defense also noted that joint criminal enterprise is not specified in ECCC law, not part of Cambodian law, and not recognized by any international convention enforceable before the ECCC.<sup>483</sup> The Co-Prosecutors mostly supported the stance set forth by the ICTY, subscribing to the belief that joint criminal enterprise has been established and utilized since the IMT<sup>484</sup> and therefore does not violate *nullum crimen sine lege* before the ECCC.<sup>485</sup> The lawyers for each of the other defendants requested to intervene on the issue.<sup>486</sup>

In the Order on the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise, the Office of the Co-Investigating Judges acknowledged that joint criminal enterprise was a mode of liability that was not expressly articulated in the ECCC Law or the ECCC Agreement.<sup>487</sup> However, the Judges referred to the doctrine as defined

interpretation of *Category Two* could be considered part of *present-day* customary international law. See Kai Ambos, Amicus Curiae Concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 28 Oct. 2008. But see Antonio Cassese et al., Amicus Curiae Brief of Professor Antonio Cassese and Members of the JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE on Joint Criminal Enterprise Doctrine, 28 Oct. 2008; McGill University Center for Human Rights and Legal Pluralism, Amicus Curiae Brief In the Matter of the Co-Prosecutor's Appeal of the Closing Order of Kaing Guek Eav "Duch," 28 Oct. 2008 (arguing that all three categories of joint criminal enterprise were part of customary international criminal law during the Khmer Rouge era).

<sup>479</sup> Duch Decision on Closing Order Appeal, *supra* note 474.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* ¶¶ 113–42.

<sup>482</sup> Motion Against the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise by the Defence for Ieng Sary, dated July 28, 2008, ¶ 29; Supplementary Observations from the Defence for Ieng Sary, dated Nov. 24, 2008, §1(A).

<sup>483</sup> Motion Against the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise by the Defence for Ieng Sary, dated July 28, 2008, 1, 15; Request for an Extension of the Page Limit for Filing Supplementary Observations on the Application of Joint Criminal Enterprise Liability at the ECCC by the Defence for Ieng Sary, dated Nov. 24, 2008, 2; Supplementary Observations from the Defence for Ieng Sary, dated Nov. 24, 2008, §1(B-F).

<sup>484</sup> Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, dated Aug. 11, 2008, ¶ 2.

<sup>485</sup> *Id.* ¶¶ 3, 40; Supplementary Observations from the Co-Prosecutors, dated December 31, 2008, ¶ 51.

<sup>486</sup> Submissions from the Defence for Ieng Thirith, dated Dec. 30, 2008, ¶ 13. The Defence for Ieng Thirith set forth an alternative argument that the ECCC, if it has jurisdiction to apply joint criminal enterprise at all, only has jurisdiction to its *Category One* form. *Id.* ¶ 32. The Defence for Nuon Chea also filed a submission supporting the positions of Ieng Sary and Ieng Thirith. Submissions from the Defence for Nuon Chea, dated Dec. 30, 2008, ¶ 2. Duch's lawyers, however, did not file any observations. Submissions from the Defence for Kaing Guek Eav alias Duch, dated Dec. 24, 2008, ¶ 2.

<sup>487</sup> Order on the Application at the ECCC of the Form of Liability known as Joint Criminal Enterprise, dated Dec. 8, 2009, ¶ 10 [hereinafter Order on the Application of JCE at the ECCC]. Article 29 of ECCC law states, "Any suspect who planned, instigated, ordered, aided and abetted or committed any of the crimes referred to in Article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for this crime." See ECCC Law art. 29. Thus, Article 29 does not expressly refer to joint criminal enterprise.

by the ICTY in the *Tadic* Appeals Judgment, which outlined three categories of joint criminal enterprise.<sup>488</sup> The Judges then considered whether joint criminal enterprise, as defined by the ICTY, violated the principles of legality set forth in Article 33 of the ECCC Law.<sup>489</sup> In so doing, the Judges turned again to the ICTY's jurisprudence concerning the assessment of the principles of legality:

The criminal liability in question was *sufficiently foreseeable* and that the law providing for such liability must be *sufficiently accessible* at the relevant time for it to warrant a criminal conviction and sentencing under the head of responsibility selected by the Prosecution.<sup>490</sup>

The Judges ultimately found that joint criminal enterprise was a mode of liability according to customary international law that pre-existed the events under investigation at the ECCC.<sup>491</sup> However, the Order limited the application of joint criminal enterprise to international crimes and not the domestic crimes of Cambodia.<sup>492</sup> The issue of the applicability of joint criminal enterprise before the ECCC is currently on appeal.<sup>493</sup>

The Rome Statute provides that an individual is criminally responsible for a crime if he or she commits, orders, or aids and abets the crime, or “[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.”<sup>494</sup> The provision continues,

Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court, or (ii) Be made in the knowledge of the intention of the group to commit the crime.<sup>495</sup>

Thus, under one of its alternative names – the “common purpose doctrine” – joint criminal enterprise arguably falls within the scope of the Rome Statute.<sup>496</sup> However,

<sup>488</sup> *Tadic* Appeals Judgment, *supra* note 201, ¶¶ 196, 203–4.

<sup>489</sup> Article 33 of the ECCC Law closely tracks Article 15 of the International Convention on Civil and Political Rights. International Convention on Civil and Political Rights art. 15, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

<sup>490</sup> *Prosecutor v. Milutinovic et al.*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 37 (May 21, 2003) (emphasis added).

<sup>491</sup> The decision applied to all three categories as defined by the *Tadic* Appeals Court of the ICTY. The *mens rea* of *Category Three* is the subjective acceptance of the natural and foreseeable consequences of the implementation of the common plan. Order on the Application of JCE at the ECCC, *supra* note 487, ¶ 21, *citing Tadic* Appeals Judgment, *supra* note 201, ¶ 185 *et seq.*

<sup>492</sup> *Id.* ¶ 22.

<sup>493</sup> See Case File No. 002/19-09-2007-ECCC-OCIJ (CP/39), Khieu Samphan's Defence to the Co-Prosecutors' Joint Response, ¶ 16 (Mar. 25, 2010) (stating, “Application of this ambiguous and indirect mode of commission is contrary to both the spirit and letter of the ECCC Law and the ECCC Agreement, and also amounts to making the judicial decisions of the *ad hoc* Tribunals the benchmark for determining the hierarchy of norms in the Cambodian domestic legal systems; there is no jurisdiction for that.”).

<sup>494</sup> ICC Statute art. 25, *supra* note 10.

<sup>495</sup> *Id.*

<sup>496</sup> But see Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, J. INT'L CRIM. JUST. 109, 132 (2007) (arguing that though the ICC Statute embraces the notion of notion of joint participation in Article 25(3)(d), it always requires intent as the necessary subjective element for a finding of criminal liability). Thus, it follows that the ICC, while generally authorized to rely upon *Category One* and *Two*, would be barred from applying *Category Three*.

some legal scholars argue that the Statute must be seen on its own as an independent set of rules so that a mechanical transfer of ICTY jurisprudence would be inappropriate.<sup>497</sup>

In its decision in the *Lubanga* case,<sup>498</sup> the Pre-Trial Chamber provided detailed objective and subjective requirements of “co-perpetration based on joint control over the crime,” which has the elements that have been compared to those of joint criminal enterprise. According to the doctrine of co-perpetration, the principals involved in a crime are not limited to those who physically commit the objective elements of the offence, but also include those who control or mastermind the commission because they decide whether and how the offence will be committed.<sup>499</sup>

As delineated in the *Katanga & Chui* Decision on the Confirmation of Charges, the ICC’s approach to co-perpetration encompasses three categories of principal:

1. The individual who physically carries out all elements of the offense (individual commission);
2. The individual who has, together with others, control over the offence by way of the essential tasks assigned to him (joint commission);
3. The individual who controls the will of those who carry out the objective elements of the offence (commission through another).<sup>500</sup>

The decision further treated co-perpetration as an alternative mode of liability to the doctrine of command responsibility:

[T]hrough a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of ‘senior leaders’ adequately.<sup>501</sup>

Regarding the objective elements of co-perpetration, one scholar provides the following:

It seems that one of the main differences between co-perpetration pursuant to Article 25(3)(a) and JCE is that the former requires that acts of every co-perpetrator be “essential,” whereas the latter only demands contributions “that in some way are directed to the furtherance of the common design.” The rationale behind such a distinction is that co-perpetration under the Rome Statute (as opposed to the “intent-focused” JCE concept) is founded on the control over crime approach, where “only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime.”

<sup>497</sup> See M.E. Badar, *Just Convict Everyone!: Joint Preparation: from Tadić to Stakic and Back Again*, 6 INT’L CRIM. L. REV. 293, 301 (2006); V. Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 INT’L CRIM. L. REV. 167, 195, 197 (2005); G. Mettraux, *International Crimes and the ad hoc Tribunals*, 292 (2005); S. Powles, *Joint Criminal Enterprise Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT’L CRIM. JUST. 606, 615 (2004).

<sup>498</sup> Prosecutor v. Lubanga, Case No ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

<sup>499</sup> Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 485 (Sept. 30, 2008) [hereinafter *Katanga & Chui* Decision on the Confirmation of Charges].

<sup>500</sup> *Id.* ¶ 488.

<sup>501</sup> *Id.* ¶ 492.



The Chamber also noted “although some authors have linked the essential character of a task – and hence the ability to exercise joint control over the crime – to its performance at the execution stage of the crime, the Statute does not contain any such restriction. In other words, those who perform acts contributing to the *preparation* of a crime in the framework of the common plan can also be considered co-perpetrators.”<sup>502</sup>

As for the subjective elements of co-perpetration, the Chamber listed three requirements: (1) the fulfillment of the *mens rea* necessary for the particular crime; (2) the co-perpetrators, including the suspect, must all mutually know that carrying out the common plan can lead to “the realization of the objective elements of the crime, and they must all agree on this result;<sup>503</sup> and (3) the knowledge about the factual circumstances that make it possible to employ joint control over the crime.<sup>504</sup> This requirement suggests that the accused knows the importance of his or her role in the realization of the common plan and capability. Thus, the accused knows that, “by refusing to perform the task assigned to him or her,” he/she would “frustrate the implementation of the common plan, and hence the commission of the crime.”<sup>505</sup>

Legal scholars claim that the ICC can avoid the pitfalls of *Category 2* and *3* through its “control over the crime” concept of co-perpetration, which requires the closer connection of co-perpetrators with a concrete crime. However, to the extent that *Category 1* reaches joint control over the crime, it may be subsumed under co-perpetration (Article 25(3)(a); *Category 1* not rising to such a level may be considered under aiding and abetting (Article 25(3)(c) or complicity in group crimes (Article 25(3)(d). Moreover, *Category 2* and *3* may be designated in the future under accessory modes of liability, much to the consternation of some legal scholars troubled by joint criminal enterprise from a legality perspective.<sup>506</sup>

In sum, since the IMT, the prosecution of perpetrators of genocide, war crimes, CAH, and other acts criminalized under international law clearly constitutes one of the most significant concerns of the international community. However, for many the principles of criminal justice and legality demand that the rights of defendants be guaranteed so that an individual bears criminal responsibility for his or her acts on the basis of their culpability. Liability theories that distort the contributions of individual defendants risk producing an inaccurate record of how and why such crimes occurred. In turn, this could hinder the effectiveness of such trials to the process of national reconciliation and post-conflict justice. By adopting a more careful and pragmatic use of joint criminal enterprise, judges and prosecutors (in particular) will ensure that the culpability principle of criminal law is not unacceptably deteriorated.

### §6.1. *Organisationsherrschaft*

As discussed above in §5, the theory of command responsibility originated from the military, which is predicated on clear, hierarchical command structures. Typically, an order is given directly to a subordinate, presupposing (1) control and (2) that the order will be direct. In turn, the subordinate must execute the order. The nature of the

<sup>502</sup> Gunel Guliyeva, *The Concept of Joint Criminal Enterprise and ICC Jurisdiction*, 5/1 EYES ICC 72–73 (2008) (internal citations omitted).

<sup>503</sup> Lubanga Decision on the Confirmation of Charges, *supra* note 498, ¶¶ 361–65.

<sup>504</sup> *Id.* ¶ 367.

<sup>505</sup> *Id.*

<sup>506</sup> Guliyeva, *supra* note 502, at 84.



command/control structure gives coherence to the doctrine. Therefore, in cases involving command responsibility, the elements of control and knowledge must be established. But outside of this context, in the civilian/political/organized crime contexts, the doctrine does not work so well. The same assumptions about control, as well as the manner in which control is exercised, do not exist. Command responsibility is not applicable unless the facts of the case show that there is a parallelism in command/control structure. Often, this is not the case in the civilian/political/organized crime contexts (as discussed in §5.2). These contexts operate in a way that essentially does not show the hierarchical nature, because in these examples, the goal is not transparency. Rather, the goal is often the *avoidance* of the law or transparency. The question is what can be substituted in the place of command responsibility?

One option is found in the civil law system, in particular the Germanic system, which is very rigid and reliant upon doctrine. This option is the theory of liability developed by Claus Roxin known as *Organisationsherrschaft*, aspects of which shaped the development of the ICTY theory of joint criminal enterprise.<sup>507</sup>

In the words of Professor Osiel:

The superior's control over an 'organizational apparatus of hierarchical power,' as Roxin calls it, enables him to utilize the subordinate 'as a mere gear in a giant machine' to produce the criminal result 'automatically.' The inferior's compliance with illegal orders, however, flows neither from coercion nor deception, whether by mistake of fact or law, and so he remains responsible for his actions. This culpability – characteristic of most foot soldiers to mass atrocity – leaves the inferior susceptible to prosecution.

Loose talk about such inferiors as gears or cogs always seemed to imply that the law must treat them as “the blameless instrument of an alien will.” The appeal of Roxin's approach is that it does not follow from his characterization that the inferior is innocent. Rather, the interchangeability of subordinates implicitly envisions the subordinate's compliance as knowing and voluntary; those disinclined to obey would have been replaced by more willing peers. Roxin's key insight, then, is that the more powerful party behind the scenes may, through the organizational resources at his disposal (including the culpable inferior), be said to commit the offense.<sup>508</sup>

<sup>507</sup> See generally CLAUS ROXIN, *TÄTERSCHAFT UND TÄTHERRSCHAFT* 242–52, 653–54 (7th ed., 2000). See also Elies van Sliedregt, *Modes of Liability*, in LEILA NADYA SADAT, *FORGING A CONVENTION ON CRIMES AGAINST HUMANITY* 223, 242 (2010); Kai Ambos, *The Fujimori Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus*, J. Int'l Crim. Just. 1, 9–21 (2010); HÉCTOR OLÁSULO ALONSO, *THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES* 116 *et seq.* (2009); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1831–37 (2005) (referred to as “domination over an organizational apparatus”); and *id.* at 1836, n.391: “Roxin's work might [...] be seen as an effort to translate Arendt's sociopolitical analysis of Eichmann into a legal idiom potentially acceptable to courts.” See also *infra* ch. 2, § 1.5.

But see Ambos, *supra*, at 10: “[T]he control over the act is the key structural difference between indirect perpetration and joint criminal enterprise, the latter resting in contrast on the shared intent or common purpose of the members of a criminal enterprise.”

<sup>508</sup> Osiel, *supra* note 230, at 1832–33 (internal citations omitted). Osiel argues that the control element of command responsibility “should be read to incorporate Roxin's theory of perpetration by means of an organizational apparatus. The requirement could then be more easily met than at present, and could be satisfied without compromising the personal culpability principle.” Osiel, *supra* note 230, at 1837.

Scholars have also noted that the Rome Statute appears to authorize Roxin's approach,<sup>509</sup> whereas others favor the utilization of co-perpetration or instigation.<sup>510</sup> The Pre-Trial Chamber in the *Katanga and Ngudjolo Chui* case agreed.<sup>512</sup>

However, it is important to realize that Roxin's theory works well in the countries following the Germanic system (i.e., Spain, Chile, and Japan).<sup>512</sup> The doctrine will be less accepted in the French and American systems. The common law would call Roxin's theory an "objective responsibility" doctrine (which brings to mind *res ipsa loquitur*). This form of liability has been used, for instance, in the U.S. Supreme Court case *U.S. v. Dotterweich*, wherein the president and general manager of a drug purchaser was convicted under the 1906 Food and Drugs Act of 1906 for shipping adulterated and misbranded drugs in interstate commerce, even though he did not directly participate in the shipment.<sup>513</sup> It also brings to mind the *Yamashita* case, discussed above, which butchered command responsibility in other respects. The U.S. has moved in the direction of civil law for corporate criminal responsibility and in organized crimes cases, in which basically, as a matter of legislative policy, the burden of proof has shifted as a means of accomplishing the doctrinal purpose, namely making prosecution easier.

## Conclusion

The few elements of the "general part" that emerged from the Law of the London Charter were not evident prior to 1945. But they were not developed adequately in the post-Charter legal developments, as discussed in [Chapter 4](#) and in this chapter. The 1996 version of the Draft Code of Crimes against the Peace and Security of Mankind is far from satisfactory on these questions. One reason for this significant gap may be the assumption of the ILC that, if and when adopted, the national courts would apply the provisions of the Draft Code of Crimes. Hence, these courts, whether civilian or military, would apply the "general part" of their respective criminal or military laws. But of course, that ignores the possibility of the ICC, unless one can further assume that such a tribunal would apply the law of the state wherein the crime was committed, or alternatively the law of nationality of the victims or the transgressor.

The sparse and eclectic "general part" norms of ICL need systematization and codification. Otherwise, it would be difficult to understand why a given rule is relied upon and not another, or from where such a rule derives. As one author states, "A fact or law is explained only when a sufficient knowledge of the system is reached to enable one to interpret the fact or law in terms of that system, and as one of the actual members [parts] of that coherent and orderly whole."<sup>514</sup>

<sup>509</sup> See Osiel, *supra* note 230, at 1831. The Rome Statute Article 25(3)(a), in contrast to the ICTY and ICTR Statutes, creates liability where the accused "[c]ommits . . . a crime . . . through another person, regardless of whether that other person is criminally responsible." ICC Statute art. 25(3)(a), *supra* note 10.

<sup>510</sup> Ambos, *supra* note 507, at 11, nn. 59-60.

<sup>511</sup> Prosecutor v. Katanga and Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the confirmation of charges ¶ 470 *et seq.* (Sept. 30, 2008).

<sup>512</sup> Kai Ambos, for instance, uses cases from these countries to fill in for the vacuum of command responsibility in these contexts. See, e.g., Ambos, *supra* note 507.

<sup>513</sup> *U.S. v. Dotterweich*, 320 U.S. 277 (1943).

<sup>514</sup> PAUL H. ROBINSON, *THE PRINCIPLES OF REASONING* 291 (1947).

The similarity between ICL and the common law of crimes is greater than acknowledged. Indeed, all systems that evolve without a theory share some common traits. Principal among these is the haphazard emergence of legal proscriptions and their evolution through custom and practice. Such a *cursus* is necessarily conditioned by pragmatic factors that do not usually include consideration for such factors as consistency and cohesion. But in time, particularly after the reaching of a certain level of accumulation of disparate norms and diverse applications, the need for systematization imposes itself. Such systematization may or may not be based on a theory or on a system, and could simply be an ordering process. The history of the common law of crimes is the most appropriate example of that type of historical evolutionary process, as opposed to the Germanic and French-Civilist codifications.

The Rome Statute provides a useful codification of ICL's "general part." However, what these applicable norms lack is some rearrangement and redrafting so that they can reflect a cohesive method.<sup>515</sup>

## Appendix

### ARTICLE 25<sup>516</sup>

#### Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
  - (a). Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b). Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
  - (c). For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
  - (d). In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

<sup>515</sup> For example, the "general part" is in Part 3, but "*Ne bis in idem*" is in Part 2, Article 20 as is "Applicable law" in Article 21; "non-retroactivity" is both in Part 3, Article 24 and Part 2, Article 7; Article 31 covers "Grounds for excluding criminal responsibility" but then Article 32 covers "Mistake of fact or mistake of law" and Article 33 covers "Superior orders and prescription of law." These are only examples of some of the problems with organization and method. But there are also some *lacunae* in the ICC's statute, which presumably may be covered in additional instruments contemplated in Article 9, Part 2, and Article 51.

<sup>516</sup> See Regulation 52, *Document containing the charges*, and Regulation 55, *Authority of the Chamber to modify the legal characterization of facts*. See also JONES & POWLES, *INTERNATIONAL CRIMINAL PRACTICE*; Andrea Sereni, *Individual Criminal Responsibility*, in LATTANZI COMMENTARY, at 139; SADAT, *THE TRANSFORMATION OF INTERNATIONAL LAW*, at 192; SCHABAS INTRODUCTION, at 71; Kai Ambos, *Individual Criminal Responsibility*, in TRIFFTERER COMMENTARY, at 475.

- ii. Be made in the knowledge of the intention of the group to commit the crime;
  - (e). In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f). Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of the circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

#### ARTICLE 26<sup>517</sup>

##### Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime.

#### ARTICLE 27<sup>518</sup>

##### Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

#### Article 28<sup>519</sup>

##### Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority

<sup>517</sup> See JONES & POWLES, *INTERNATIONAL CRIMINAL PRACTICE*; SCHABAS INTRODUCTION, at 71; Roger S. Clark & Otto Triffterer, *Exclusion of Jurisdiction over Persons under Eighteen*, in TRIFFTERER COMMENTARY, at 493.

<sup>518</sup> See SADAT, *THE TRANSFORMATION OF INTERNATIONAL LAW*, at 200; SCHABAS INTRODUCTION, at 71; Otto Triffterer, *Irrelevance of Official Capacity*, in TRIFFTERER COMMENTARY, at 501.

<sup>519</sup> See Regulation 52, *Document containing the charges*, and Regulation 55, *Authority of the Chamber to modify the legal characterization of facts*. See also JONES & POWLES, *INTERNATIONAL CRIMINAL PRACTICE*; SADAT, *THE TRANSFORMATION OF INTERNATIONAL LAW*, at 203; SCHABAS INTRODUCTION, at 71; William J. Fenrick, *Responsibility of Commanders and Other Superiors*, in TRIFFTERER COMMENTARY, at 515.

and control as the case may be, as a result of his or her failure to exercise control properly over such forces, whereas

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

#### ARTICLE 29<sup>520</sup>

##### Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

#### ARTICLE 30<sup>521</sup>

##### Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a). In relation to conduct, that person means to engage in the conduct;
  - (b). In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

<sup>520</sup> See SCHABAS INTRODUCTION, at 71; William A. Schabas, *Non-applicability of Statute of Limitations*, in TRIFFTERER COMMENTARY, at 523.

<sup>521</sup> See KNOOPS, SURRENDERING; Christopher K. Hall, *The Jurisdiction of the Permanent International Criminal Court over Violations of Humanitarian Law*, in LATTANZI COMMENTARY, at 43; Maria Kelt & Herman von Hebel, *What Are Elements of Crimes?*, in Lee, *Elements and Rules*, at 16; SADAT, *THE TRANSFORMATION OF INTERNATIONAL LAW*, at 208; SCHABAS INTRODUCTION, at 71; Donald K. Piragoff, *Mental Element*, in TRIFFTERER COMMENTARY, at 527.

## 8 Defenses and Exonerations

Theirs not to make reply,  
Theirs not to reason why  
Theirs but to do or die.

Alfred Lord Tennyson,

– Alfred, Lord Tennyson, “The Charge of the Light Brigade” (1852).

### Introduction

The legal defenses discussed in this chapter do not involve questions of fact that negate a criminal accusation; rather, they involve questions of law that stand in the way of finding criminal responsibility or applying a criminal sanction to a person charged with a crime. Legal systems differ as to how they characterize these factors. The differences in characterization reflect the ways that families of legal systems conceptualize criminal responsibility. The Germanic legal systems are the most doctrinally rigid, as are positivistic one, such as those deriving from what is commonly referred to as the French-civilist system. The common law family is more pragmatic.

As a consequence of the families of legal systems approaching criminal responsibility with different conceptualizations, the same factors bearing on criminal responsibility or exoneration are defined differently. For example, sanity may be deemed a foundational condition for criminal responsibility, whereas insanity may be deemed an exonerating factor, a legal excuse, or a legal defense.

These factors relate both to subjective conditions pertaining to the individual actor or to objective conditions relating to the circumstances of the purported criminal act. The subjective and objective conditions may overlap. In the common law system, for example, conditions that negate one of the elements of the offense, namely the act, intent, concurrence of act and intent, or causation, reflect both objective and subjective factors and affect conditions of responsibility and punishability. Conditions of responsibility and punishability are conceptually distinct in the French-Civilist and Germanic legal systems.

The world’s major criminal justice systems differ as to what they consider conditions for responsibility, conditions for punishability, and their applications to theories of exoneration from responsibility or punishment.<sup>1</sup> Because conditions of exoneration differ in

<sup>1</sup> See generally *supra* ch. 6, §2 for a discussion of the process of identifying “general principles” in the world’s major legal systems.

the world's major legal systems, a comparative analysis is necessary to determine the existence of "general principles of law." However, this proves difficult, as is evident from the contents of [Chapter 5](#) concerning principles of legality. This is why this writer has taken the common law's nondoctrinal approach.<sup>2</sup> This pragmatic approach seeks (whenever possible) to combine, as opposed to reconcile, the approaches of different legal systems. This was also the approach adopted by the Rome Statute,<sup>3</sup> which admittedly leaves much to be desired as to its "general part," because of, *inter alia*, the absence of a legal method and consistency.

National legal systems differ as to the legal nature of the factors affecting responsibility and punishment, which this writer calls, for lack of a better, more all-encompassing term, "defenses and exonerations." Nevertheless the systems common recognize the following factors: insanity, self-defense, mistake of law or fact, compulsion (coercion and duress), necessity, and limitedly, obedience to superior orders. It follows that these defenses and exonerations rise to the level of "general principles of law," and that they are therefore part of ICL's "general part."

This writer is mindful that the proposition offered above will fly in the face of recognized methods of comparative criminal law analysis, particularly with respect to the "general part," and even more so with respect to the doctrinal differences between conditions of responsibility and punishment, and conditions deemed to be justifiable or excusable. But, this is not the place for such a discussion. The purpose of this chapter is to reflect the law and jurisprudential record applicable to ICL. The approach can therefore be characterized as a form of legal realism.

With respect to CAH, the number of potentially applicable defenses is more limited than those set forth above. But of greater significance to ICL, and CAH in particular, are those defenses that have been rejected or limited. They are obedience to superior orders, coercion (and compulsion and duress), reprisals, *tu quoque*, and immunity of heads of state.<sup>4</sup>

These defenses differ as to their respective sources of law. For example, obedience to superior orders, reprisals, and *tu quoque* arise under ICL, national military law, and national criminal law. Coercion (and compulsion and duress) arises essentially from national criminal law and national military law, though over time it became part of ICL. Last, head of state immunity arose first under international law, and was curtailed since the Treaty of Versailles.<sup>5</sup> After the London Charter, it became part of ICL.

The customary practices of states, including national military law and practice, have shaped international law. But since World War II, conventional ICL has acquired a

<sup>2</sup> See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987) [hereinafter BASSIOUNI, DRAFT CODE].

<sup>3</sup> See The Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute] at Part 3.

<sup>4</sup> See BASSIOUNI, DRAFT CODE, *supra* note 2, at 109–13; see also Charter of the International Military Tribunal at Nuremberg arts. 7, 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter] (negating the act of state doctrine and obedience to superior orders); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int'l L. Comm'n pt. III, paras. 95–127, U.N. Doc. No. A/1316 (A/5/12) [hereinafter Nuremberg Principles] at 3, 4 (negating, respectively, the act of state doctrine and obedience to superior orders); see also, e.g., STEFAN GLASER, *INFRACTION INTERNATIONALE, SES ÉLÉMENTS CONSTITUTIFS ET SES ASPECTS JURIDIQUES* (1957).

<sup>5</sup> Treaty of Peace Between the Allied and Associated Powers of Germany arts. 228–30, June 28, 1919, 225 C.T.S. 188, 285, 2 Bevans 43, 136–37, at art. 227 [hereinafter Treaty of Versailles] (providing for the prosecution of Kaiser Wilhelm II).



more preponderant position over that of customary law. This is particularly true with respect to the 1949 Geneva Conventions, which, because of their codified nature, are a more specific and reliable source of law than custom. But because the 1949 Geneva Conventions are also part of customary law, the question loses some of its significance.<sup>6</sup>

The multiplicity of legal sources applicable to the questions raised in this chapter further evidences the complexity of the multidisciplinary nature of ICL. The problems occasioned by this complex situation also argue for the need to codify the general part of ICL,<sup>7</sup> a task that has partially been undertaken by the Rome Statute.<sup>8</sup>

The same questions that arose in connection with Chapters 6 and 7 also arise in this chapter. They include, but are not limited to: How do the various defenses or exonerating conditions arise in ICL? If their legal source is “general principles of law,” how are these principles identified, and by what method? What is the influence of the jurisprudence of the international tribunals on the evolution of these questions?

The reader should be mindful of the fact that there is very little doctrinal material on the “general part” of ICL, essentially because internationalists dominate the field. Their knowledge of comparative criminal law is limited, and so it appears that their interest in the methods and techniques of that specialization is scant. As to comparative criminal law specialists, they feel alienated by the cavalier manner adopted by internationalists to this aspect of ICL. Nowhere is this more evident than in the formulation of the statutes of the *ad hoc* and mixed-model tribunals, and in the jurisprudence of these courts from the IMT to the ICC.

## §1. Obedience to Superior Orders

### §1.1. *Rationale*

Unlike national criminal law, which is designed to apply to civilians, military law is based on a hierarchical system requiring the obedience of subordinates to the orders of superiors. In fact, throughout the history of military law, obedience to superior orders has been one of the highest duties of the subordinate. This obedience exonerates the subordinate from responsibility because of the command responsibility of the superior who issued the order.<sup>9</sup>

Criminal responsibility attaches to the decision-maker and exonerates the executor of the order. As a counterpart, the subordinate is expected to obey the orders of a superior. This approach to responsibility is predicated on the assumption that the superior can be deterred from wrongful conduct by the imposition of criminal responsibility for unlawful commands. Obviously, when this assumption fails, the overall approach must be reconsidered.

The essential reasons for the defense of obedience to superior orders are (1) the hierarchical nature of the command military structure; (2) the need to maintain discipline

<sup>6</sup> See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* 493 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>7</sup> But see BASSIOUNI, *DRAFT CODE*, *supra* note 2.

<sup>8</sup> See ICC Statute, *supra* note 3, at Part 3.

<sup>9</sup> For a distinction between the military and civilian criminal approaches to command responsibility, see *supra* ch. 7, §5.

in the military structure; and (3) the fact that a commanding officer is responsible (command responsibility) for the acts of his subordinate.

CAH are committed by individuals, but are the product of state policy (or organizational policy in the case of nonstate actors) because of their nature and scope.<sup>10</sup> Like crimes against peace (which the U.N. Charter labels “Aggression”),<sup>11</sup> genocide,<sup>12</sup> and apartheid,<sup>13</sup> CAH requires group participation by individuals whose control over the state apparatus can set in motion a chain of events involving a large number of persons whose actions and interactions can produce the criminal outcome, irrespective of who made the original decision or how it was made. Surely in these cases a certain number of decision-makers have to be involved, and a large number of subordinates have to execute their orders. Thus, exonerating the subordinates, particularly those who are in opposition to executing such orders, reduces the prevention of such crimes. It follows that crimes committed as part of state policy necessarily require the broadening of the bases for criminal responsibility in order to maximize prevention. The question is how far down the chain of command the law must reach in order to be effective and fair.

In considering the individual responsibility of the different actors carrying out the state policy, one must inevitably realize that some give orders and others carry them out.<sup>14</sup> In situations where one person exclusively made the decision, those who carried out the policy can claim that they acted pursuant to superior orders and thus shield themselves from criminal responsibility. Such an approach was embodied in the *Führerprinzip*, and is necessarily counterproductive to effective deterrence and prevention of these types of crimes. Accordingly, the London Charter and the IMT Judgment rejected such an approach and that particular defense.

The military laws of almost all states prior to the London Charter essentially provided for an absolute or qualified defense of obedience to superior orders. For example, the United States Rules of Land Warfare provided that

Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.<sup>15</sup>

<sup>10</sup> See *supra* chs. 1, 2.

<sup>11</sup> See M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From Its Origins to the ICC*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 207 (M. Cherif Bassiouni ed., 3d rev ed. 2008).

<sup>12</sup> See Matthew Lippman, *Genocide*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 403 (M. Cherif Bassiouni ed., 3d rev ed. 2008).

<sup>13</sup> See Roger S. Clark, *Apartheid*, in *INTERNATIONAL CRIMINAL LAW* 599 (M. Cherif Bassiouni ed., 3d rev ed. 2008).

<sup>14</sup> Professor Anthony D'Amato finds a paradox when a subordinate and a superior can both be prosecuted and convicted though only one crime was committed. He states that: “If [the subordinate] is wholly responsible as the perpetrator of the crime, then how could [the superior] be held responsible for issuing an order that legally was required to be ignored by [the subordinate]?” Anthony D'Amato, *Agora: Superior Orders vs. Command Responsibility*, 80 AM. J. INT'L L. 604 (1986).

<sup>15</sup> U.S. DEP'T OF THE ARMY RULES OF LAND WARFARE 347 (Field Manual 27–10, 1940). However, on Nov. 15, 1944, a revision added § 345 (1) which stated:

Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to the order of a superior

Until 1940, many of the world's military laws were influenced by Oppenheim's formulation of the defense:

[V]iolations of rules regarding warfare are war crimes only when committed without an order of the belligerent government concerned. If members of the armed forces commit violations by order of their government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals.<sup>16</sup>

In the last half of the twentieth century, the trend among most national legal systems, whether in their military laws or their civilian criminal laws, is to restrict obedience to superior orders<sup>17</sup> and coercion (and compulsion and duress), while also enlarging command responsibility.<sup>18</sup> For instance, the position of the United States after World War II, as embodied in the 1956 Army Field Manual, became,

- a) The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defence in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defence to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.
- b) In considering the question whether a superior order constitutes a valid defence, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received: that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.<sup>19</sup>

or government sanction may be taken into consideration in determining culpability, either by way of defense, or in mitigation of punishment. The person giving such orders may also be punished.

U.S. DEP'T OF ARMY RULES OF LAND WARFARE § 345.1 (1940).

<sup>16</sup> LASSA OPPENHEIM, 2 INTERNATIONAL LAW 264–65 (1st ed. 1906) (subsequent stylistic alterations in later editions replaced the words “cannot” and “can” with “may not” and “may”). The BRITISH MANUAL (1914), No. 443, closely followed Oppenheim: “Members of armed forces who commit such violations of the recognized rules of warfare as are ordered by their government or by their commander are not war criminals and cannot therefore be punished by the enemy. . . .”

<sup>17</sup> For a survey of such laws and regulations as they appear in various national legal systems, see 10 REVUE DE DROIT PÉNAL MILITAIRE 87 *et seq.* (1971). This survey contains the position of many states in the world and reveals that there is no absolute defense of obedience to superior orders in the military law of national legal systems; see also D.J. Hancock, *A South African Approach to the Defense of Superior Orders in International Criminal Law*, 2 RESPONSA MERIDIANA 188 (1972).

<sup>18</sup> See BASSIOUNI, DRAFT CODE, *supra* note 2, at 149–157 (stating “In furtherance of the policy of the command responsibility model, a person who has a responsible relationship to the violation cannot be shielded from responsibility by claiming a defense of ‘obedience to superior orders’”. The rejection of this defense originated in military law and then found its way in a parallel manner into the realm of responsibility of corporate officers and directors”); see also *supra* ch. 7.

<sup>19</sup> U.S. DEP'T OF THE ARMY, LAW OF LAND WARFARE, § 509 (Field Manual 27–10, 1956). Commenting on the provision, TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 51–2 (1970), states:

[T]he language [of Par. 509, FM27–10] is well chosen to convey the quality of the factors, imponderable as they are, that must be assessed in a given case. As with so many good rules, the difficulty lies

The change in U.S. military law corresponded to a change in Oppenheim's treatise in Sir Hersch Lauterpacht's 1952 edition, which stated,

The fact that a rule of warfare has been violated in pursuance of an order of the belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime: neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured state [ . . . ]. [M]embers of the armed forces are bound to obey lawful orders only and [ . . . ] cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.<sup>20</sup>

### §1.2. *Policy Considerations*

The goal of the humanitarian law of armed conflicts is to prevent certain forms of harm to protected targets. In light of modern warfare techniques and weapons, this goal requires a broad base of responsibility. It became clear after World War II that the goals of deterrence and prevention would not be accomplished by holding only superiors responsible. Consequently, a new policy approach developed whereby those carrying out unlawful orders would also be held criminally accountable, in addition to those who issued such orders.

The differences between the two branches of national law (military and civilian) are essentially characterized by policy considerations predicated on the goals sought to be achieved by each branch. In the military, discipline is a goal achieved in part through norms requiring obedience to superior orders. But in the civilian context, except in law enforcement agencies, discipline does not carry the same legally preserved value.

With the advent of democracy and the advancement of the rule of law in modern societies, the quest for legality and lawfulness has superseded concerns for discipline, irrespective of whether the issue arises under military or nonmilitary law. It follows that the defense of obedience to superior orders has been subordinated to the legality of the order and the lawfulness of its foreseeable outcome. But distinctions still exist between the military and civilian branches of the law.

In the military branch, the obedience of an order is expected unless it is patently illegal or its foreseeable outcome is unlawful. A military order is presumptively lawful and places the burden of assessing its illegality, including the risk of discipline for disobeying it, on the subordinate. Military legal systems differ, however, as to the standards of illegality and the point of judgment at which the subordinate must or can disobey the order, and under what circumstances he or she will be held accountable for carrying out an unlawful order.

in its application – in weighing evidence that is likely to be ambiguous or conflicting. Was there a superior order? Especially at the lower levels, many orders are given orally. Was a particular remark or look intended as an order, and if so what was its scope? If the existence and meaning of the order are reasonably clear, there may still be much doubt about the attendant circumstances – how far the obeying soldier was aware of them, and how well equipped to judge them. If the order was plainly illegal, to what degree of duress was the subordinate subjected? Especially in confused ground fighting of the type prevalent in Vietnam, evidentiary questions such as these may be extremely difficult to resolve.

<sup>20</sup> LASSA OPPENHEIM, 2 INTERNATIONAL LAW, 568–69 § 253 (Hersch Lauterpacht ed., 7th ed. 1952).

The question of legality or lawfulness of a military order not only derives from the pragmatic goal of insuring discipline, but also from a reflection on legal philosophy. Similarly, in civilian criminal law, whether a person is legally justified or excused from criminal responsibility derives from philosophical conceptions.<sup>21</sup> For instance, authoritarian philosophies presume absolute legality and lawfulness of the hierarchical orders, while democratic conceptions do not. In short, the philosophical issue is whether legality stems from authority or whether authority is subordinated to legality. This dichotomy of perspectives is represented in the works of the English philosophers Thomas Hobbes and John Locke. Hobbes, who held to an absolute duty of obedience to superior orders, wrote,

The King has to determine right and wrong, and therefore the argument is erroneous – although one can hear it daily expressed – that only he would be a King who were acting lawfully, and – which is also defended – that the King would have to be obeyed only as far as his orders are lawful. Because before the establishment of public authority no lawful or unlawful existed, as their essence derives from a command, and by itself an act is neither right nor wrong. Lawful and unlawful derives from the law of public power. What is ordered by a legitimate King is made lawful by his command and what he forbids is made unlawful by his prohibition. Contrariwise, when single citizens arrogate to themselves to judge right and wrong, they want to make themselves equal to the King, which counters the State's prosperity. The oldest of God's Commandments says: Thou shalt not eat from the tree of knowledge of right and wrong.

When I do, by order, an act which is wrong for the one who commands it, it is not my wrongdoing, as far as the commander is my legitimate master.<sup>22</sup>

Locke, on the other hand, wrote,

Allegiance being nothing but an Obedience according to Law, which when he violates, he has not right to Obedience, nor can claim it otherwise than as the public Person vested with the Power of the Law, and so is to be considered as the Image, Phantom or Representative of the Commonwealth, acted by the will of Society, declared in Laws; and thus he has no Will, no Power, but that of the Law.<sup>23</sup>

Similar to Locke, Hugo Grotius wrote of obedience as being subordinate to the legitimacy of the order because, in his view, that is the only way to resist injustice. The notion of legitimacy of superior orders is also a consequence of the philosophical conceptions of law and authority evidenced in the writings of Montesquieu, Voltaire, Rousseau, Pufendorf, Vattel, Burlemaqui, and Bluntschli.

To illustrate this point further, in Germany, in particular during the Third Reich, the supremacy of the *Führer's* orders was called the *Führerprinzip*.<sup>24</sup> The legal philosophy of

<sup>21</sup> See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 377–415 (1947); PAUL H. ROBINSON, 2 *CRIMINAL LAW DEFENCES*, at § 171, 259–74, § 177, 347–72 (1984); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989).

<sup>22</sup> THOMAS HOBBS, *ELEMENTA PHILOSOPHICA DE CIVE* ch. 12, § 1, 2, *quoted in* NICO KEIJZER, *MILITARY OBEDIENCE* 146–47 (1978).

<sup>23</sup> *Quoted in* KEIJZER, *supra* note 22, at 147.

<sup>24</sup> It should be noted that the German Military Code of that time provided in § 47:

If the execution of a military order in the course of duty violates the criminal law, then the superior giving the order will bear the sole responsibility therefor. However, the obeying subordinate will share the punishment of the participant: (1) if he has exceeded the order given to him, or (2) if it

German law at the time was partially based on the views of Hegel, which sublimated the authority of the state. That philosophy became the foundation for the supremacy and legitimacy of the *Führer's* orders.<sup>25</sup> However, unquestioned obedience to superior orders in German legal philosophy was primarily founded on Immanuel Kant, who propounds that, apart from inner conscience, every action is legal when it is according to law.<sup>26</sup> Kant's proposition is the basis of external legality as opposed to internal morality. The external law (*inbegriff*) is what must be obeyed in the social context.<sup>27</sup> According to this legal philosophy, the authority of the *Führer* was the legitimate basis for the orders that subordinates followed. Only the *Führer* could be held responsible, and everyone else who obeyed his superior orders could not. However, this was not the approach taken by German law and doctrine before 1935. Therefore, the question is whether legitimacy flows to the order-giver, as opposed to whether the import or legality of the order controls.

At the time of World War II, positive international law still had no specific norms disallowing the defense of obedience to superior orders, and precedents were few and inconclusive.<sup>28</sup> The most important modern precedent was established in the Leipzig trials following World War I, which recognized the defense, but not in absolute terms. Thus, prior to the London Charter, neither conventional nor customary international law specifically disallowed the defense. By resorting to general principles of law,<sup>29</sup> however, it is possible to ascertain that the unarticulated premise of the defense, whether in military or civilian criminal laws, is the legitimacy of the order and the lawfulness of its conduct.

The issue arises as to whether legality or lawfulness derives from the authority of the order given, its contents, its impact, or other moral-ethical considerations. Strict positivism argues in favor of the legal authority of the order given irrespective of value-content or impact.<sup>30</sup> Other legal philosophies may include substantive and procedural legality considerations.<sup>31</sup>

was within his knowledge that the order of his superior officer concerned an act by which it was intended to commit a civil or military crime or transgression.

Cited in ROBERT H. JACKSON, *THE NUREMBERG CASE* 89 (1971) (quoting REICHSGESETZBLATT, 1926, No. 37, Art. 47, at 278). Thus, the Code established the responsibility of the superior as a consideration for the exoneration of the subordinate.

<sup>25</sup> See GEORG W.F. HEGEL, *INTRODUCTION TO THE PHILOSOPHY OF HISTORY* 406 (Jacob Loewenberg ed. 1929), which states:

The State, its laws, its arrangements, constitute the rights of its members; its natural features, its mountains, air, and waters, are their country, their fatherland, their outward material property; the history of this State, their deeds; what their ancestors have produced, belongs to them and lives in their memory. All is their possession, just as they are possessed by it; for it constitutes their existence, their being.

Also cited and discussed in Anthony D'Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 TEX. INT'L L.J. 1, 7 (1989).

<sup>26</sup> See IMMANUEL KANT, *THE CATEGORICAL IMPERATIVE* (1797); see also HERBERT J. PATON, *THE METAPHYSICS OF MORALS* (1947).

<sup>27</sup> While Kant's internal law is based on the natural law maxims of Aristotle, *honeste vivere, neminem laedere*, and *surim cuique tribuere*, his external law premises are different, and the twain do not meet.

<sup>28</sup> See CLAUD MULLINS, *THE LEIPZIG TRIALS* (1921).

<sup>29</sup> See *supra* ch. 6, §2.

<sup>30</sup> See *supra* ch. 5, §1.

<sup>31</sup> *Id.*

Another view of the defense deserves careful consideration, namely that the entire question of obedience to superior orders should be viewed as part of the mental element, not as a separate defense. This position was asserted by Lauterpacht, who held that “it is necessary to approach the problem of superior orders on the basis of general principles of criminal law, namely as an element in ascertaining the existence of mens rea as a condition of accountability.”<sup>32</sup>

The multiplicity of legal sources defining the defense makes it difficult to ascertain with specificity the scope, contents, and legal standards applicable to obedience to superior orders. The only way to ascertain them is by way of an inductive, empirical approach from the world’s major criminal justice systems in order to determine whether and to what extent they may be deemed a “general principle of law.”<sup>33</sup> This is problematic for reasons set forth in the preceding two chapters.

The customary practice of states, as evidenced by their international relations and national experiences, provides an alternative legal basis to that of national criminal law systems. However, in this case the focus is on a much narrower sampling of practices and experiences. A review of the writings of the most distinguished publicists and the decisions of international tribunals reveals that the same principle exists in national legal systems and in international legal customs and practices. Their applications, however, have widely diverged.

A number of legal issues arise with respect to the defense, many of which pertain to doctrinal differences between the different legal systems and some that pertain to concepts of culpability and responsibility.<sup>34</sup> Other issues that pertain to the specifics of the defense include (1) the type of order; (2) its manifest illegality; (3) what a subordinate can do under the circumstances; (4) how far the subordinate should go in refusing to obey the order; and (5) under what circumstances the subordinate would be subject to a legal condition of coercion. Another further question exists as to whether these issues are based on the objective standard of the “ordinary reasonable man” in the common law, or on the more subjective one of *dolus* in the Romanist-Civilist-Germanic systems.

There is also a wide array of issues concerning the circumstances that can be deemed coercion (compulsion and duress), involving the question of what are the legal or moral limits of the permissible harm that the subordinate is legally required to face if he disobeys the order. Another important issue is whether one can inflict death or serious bodily harm on others to avoid similar harm.<sup>35</sup> All of these and other issues are approached with diversity in the military laws and civilian criminal laws of the world’s legal systems.

<sup>32</sup> Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT’L L. 58, 87 (1944); see also Edward M. Wise, *War Crimes and Criminal Law*, in STUDIES IN COMPARATIVE CRIMINAL LAW 35 (Edward M. Wise & Gerhard O.W. Mueller eds., 1976).

<sup>33</sup> See M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768 (1990); BIN CHENG, *GENERAL PRINCIPLES OF LAW, AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953).

<sup>34</sup> See *supra* ch. 7.

<sup>35</sup> See HALL, *supra* note 21. See also the discussion on the defenses of coercion and necessity *infra*, at pp. 613–623.



### §1.3. Scholarly Views

Academia has contributed to the debate,<sup>36</sup> though as one scholar stated, “[T]he problem raised by the plea of superior orders is, by general admission, one of great complexity both in international and in municipal law.”<sup>37</sup> Although each scholar postulates his own particular view on the subject,<sup>38</sup> since World War II essentially two basic approaches

<sup>36</sup> See, e.g., HENRY W. HALLECK, *ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR* (1866); JAMES M. SPAIGHT, *WAR RIGHTS ON LAND* (1911); JOSEPH R. BAKER & HENRY G. CROCKER, *THE LAWS OF LAND WARFARE* (1918); WILLIAM H. WINTHROP, *MILITARY LAW AND PRECEDENTS* (1920); Lauterpacht, *supra* note 32; Alexander N. Sack, *War Criminals and the Defense of Superior Order in International Law*, 5 *LAW. GUILD REV.* 11 (1945); PAUL GUGGENHEIM, 2 *LEHRBUCH DES VÖLKERRECHTS* (1951); HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* (1952); HANS-HEINRICH JESCHECK, *DIE VERANTWÖRTLICHKEIT DER STAÄTSORGANE NACH VÖLKERSTRAFRECHT* (1952); JEAN S. PICTET, *THE GENEVA CONVENTIONS OF AUGUST 12, 1949: A COMMENTARY* (4 vols. 1956); GERALD I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* (1958); GEORG DAHM, *VÖLKERRECHT* (1961); FRIEDRICH BERBER, II *LEHRBUCH DES VÖLKERRECHTS* (1962); PETER FUHRMANN, *DER HÖHERE BEFEHL ALS RECHTFERTIGUNGSGRUND IM VÖLKERRECHT* (1963); YORAM DINSTEIN, *THE DEFENCE OF “OBEDIENCE TO SUPERIOR ORDERS” IN INTERNATIONAL LAW* (1965); Hans-Heinrich Jescheck, *Befehl und Gehorsam in der Bundeswehr*, in *BUNDESWEHR UND RECHT* 63 (1965); EKKEHART MÜLLER-RAPPARD, *L’ORDRE SUPÉRIEUR MILITAIRE ET LA RESPONSABILITÉ PÉNALE DU SUBORDONNÉ* (1965); Alan M. Wilner, *Superior Orders as a Defense to Violations of International Criminal Law*, 26 *MD. L. REV.* 127 (1966); Leslie C. Green, *Superior Orders and the Reasonable Man*, 8 *CAN. Y.B. INT’L L.* 61 (1970); Franklin A. Hart, *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised*, 26 *NAVAL WAR COL. REV.* 19 (1972); Aubrey M. Daniel III, *The Defense of Superior Orders*, 7 *U. RICH. L. REV.* 477 (1973); LESLIE C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); KEIJZER, *supra* note 22, at 140–225; LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* (1985); Daniel H.N. Johnson, *The Defence of Superior Orders*, 9 *AUSTL. Y.B. INT’L L.* 291 (1985); Theo Vogler, *The Defense of “Superior Orders” in International Criminal Law*, in *INTERNATIONAL CRIMINAL LAW* 619 (M. Cherif Bassiouni ed., 1st ed. 1986); Jordan J. Paust, *Superior Orders and Command Responsibility*, in *III INTERNATIONAL CRIMINAL LAW: ENFORCEMENT* 73 (M. Cherif Bassiouni ed., 1987); Mark Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 5 *CALIF. L. REV.* 939 (1998); Kim Carter, *Command Responsibility and Superior Orders in the Rome Statute*, in *THE CHANGING FACE OF INTERNATIONAL CRIMINAL LAW: SELECTED PAPERS* 169–181 (2002); EVAN WALLACH & I MAXINE MARCUS, *Command Responsibility*, in *INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT* 459 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); OTTO TRIFFTERER, *Article 33*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE* 915–929 (Otto Triffterer ed., 2d ed., 2008); WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 507–514 (2010).

<sup>37</sup> Lauterpacht, *supra* note 32, at 70.

<sup>38</sup> For example, Professor Röling contended that the problem of superior orders has two aspects: one of knowledge and the other of fear. As he explains:

1. The superior order to commit a war crime is a complete defence if it leads to an excusable *error juris*. Certain rules of war are controversial. It may be difficult to come to a correct decision in case of reprisals. It is possible that the alleged criminal did not know and could not reasonably have been expected to know that the act ordered was unlawful. In case he thought, in good faith, that the superior did not order a war crime to be committed, and if he was entitled to come to that conclusion – that is; if there did not exist any negligence on his part, the only conclusion should be that he cannot be punished.
2. In case he knew that the order was an illegal one, demanding the commission of a crime, then a second defense is feasible. The accused may argue: I knew that what I was going to do was criminal, but I did not dare disobey: I would have been shot on the spot. I was in a clear position of duress, because I realized that serious personal harm would be the consequence of disobedience. This position of duress can have all shades of intensity. Consequently, this line of defence may lead to mitigation of punishment and even to no punishment at all.

Bernard V.A. Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 *REV. BELGE DE DROIT INT’L* 8, 18–19 (1976).

to the issue come to force: (1) a subordinate may not assert the defense of obedience to superior orders if the subordinate recognized, or should have recognized, the patent illegality of the order; and (2) a subordinate may rely on obedience to superior orders for purposes of mitigation of culpability.<sup>39</sup> In both cases there is a further condition, namely that the subordinate had a choice in refusing to obey the order, a choice which, similar to coercion (compulsion and duress), would not subject the subordinate to a greater harm than the one he is required to inflict.

Francis Wharton aptly stated the former approach as follows:

[W]here a person relies on a command of legal authority as a defence, it is essential that the command be a lawful one, which he was required to obey [ . . . ]. An order which is illegal in itself, and not justified by the rules and usages of war, or which is, in substance, clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection [ . . . ]. When an act committed by a soldier is a crime, even when done pursuant to military orders, the fact that he was ordered to commit the crime by his military superior is not a defence.<sup>40</sup>

Also, William H. Winthrop, a leading American expert on military law, asserted “A command not lawful may be disobeyed, no matter from what source it proceeds. But to justify an inferior in disobeying an order as illegal, the case must be an extreme one and the illegality not doubtful.”<sup>41</sup>

<sup>39</sup> It should be noted of course that there exists a third view on the defense of obedience to superior orders, that the defense is an absolute one (*Befehl ist Befehl*). See KEIJZER, *supra* note 22, at xxix. Although today this approach does not carry much weight, for the greater part of history it was the dominant view. Cicero was of the opinion that if a subordinate was indeed obliged to obey the superior in the matter to which the order referred, then not he, but the superior, was the person who had committed the offense. *Id.* at 145 citing DE INVENTIONE I, XI, 15. Also, as provided in the DIGESTS OF JUSTINIAN, in ancient Rome, “he causes loss who orders it to be caused, but he is without blame who is under the necessity of obeying it.” Quoted in KEIJZER, *supra* note 22, at 144. Even in Shakespeare’s day, this view was maintained, for as stated in HENRY V, Act IV, 1, “we [soldiers] know enough if we know we are the Kings subjects: if his cause be wrong, our obedience to the King wipes the crime of it out of us.”

For a survey of the approaches taken by various nations to the defense, see 10 REV. DE DROIT PENAL MILITAIRE 87 *et seq.* (1971); see also MÜLLER-RAPPARD, *supra* note 36, for an international and comparative approach.

<sup>40</sup> FRANCIS W. WHARTON, 1 CRIMINAL LAW AND PROCEDURE 257–58, § 118 (1957). For a discussion on the issue of knowledge, see Leslie C. Green, *The Man in the Field and the Maxim Ignorantia Juris Non Excusat*, 19 ARCHIV DES VÖLKERRECHTS 169 (Hans-Jürgen Schlochauer ed., 1981).

The most comprehensive doctrinal statement of the United States’ position, and one adopted by the courts, is by William Hare:

The question is . . . had the accused *reasonable cause for believing in the necessity* of the act which is impugned, and in determining this point a soldier or member of the *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, *unless the case is so plain as not to admit of a reasonable doubt*. A soldier consequently runs little in obeying any order *which a man of common sense so placed would regard as warranted by the circumstances*.

WILLIAM HARE, CONSTITUTIONAL LAW 920 (1889) (emphasis added); see also Green, *supra* note 36.

<sup>41</sup> WINTHROP, *supra* note 36, at 575.

Sir James Stephen expressed a similar, though less stringent, view:

[Soldiers] are bound to execute any lawful order which they may receive from their military superior [...]. Probably [...] the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons [...]. [A] soldier should be protected by orders for which he might reasonably believe his officer to have good grounds.<sup>42</sup>

The first approach was also that of Albert V. Dicey, who states,

While, however, a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law, he [...] cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime.<sup>43</sup>

More recently, Justice Nico Keijzer concluded,

The main criterion for the liability of a subordinate acting in compliance with orders is whether the illegality of the order was manifest, meaning that a man of ordinary sense and understanding would in his place have known the order to be illegal. Also, as

<sup>42</sup> JAMES F. STEPHEN, 1 *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 204–06 (1883). Stephen's concern for the subordinate echoes that of St. Augustine, who writes:

[A] just man, who happens to serve under an impious king, may justly fight at the latter's command, either if he is certain that the command given him, preserving the order of the public peace, is not contrary to the law of God, or if he is uncertain whether it is so; so that an unjust order may perhaps render the king responsible, while the duty of obedience preserves the innocence of the soldier.

AUGUSTINE, *CONTRA FAUSTUM MANICHAEM*, XXII Ch. 76 (*Oeuvres Complètes* vol. XXVI p. 224), *quoted in* KEIJZER, *supra* note 22, at 146.

THE BRITISH MANUAL (1929), ch. III, § 12, defines a lawful command as follows:

"Lawful command" means not only a command which is not contrary to the ordinary civil law, but one which is justified by military law; in other words, a lawful military command to do or not to do, or to desist from doing, a particular act. A superior officer has a right at any time to give a command, for the purpose of the maintenance of good order, or the suppression of a disturbance, or the execution of any military duty or regulation, or for any purpose connected with the amusements and welfare of a regiment or other generally accepted details of military life. But a superior officer has no right to take advantage of his military rank to give a command which does not relate to military duty or usages, or which has for its sole object the attainment of some private end. Such a command, though it may not be unlawful, is not such a lawful command as will make disobedience of it an offence under the Act. In other words, the command must be one relating to military duty, that is to say, the disobedience of it must tend to impede, delay or prevent a military proceeding.

<sup>43</sup> ALBERT V. DICEY, *THE LAW OF THE CONSTITUTION* 302 (8th ed. 1915). Dicey also explains the dilemma of a soldier forced to decide whether or not he should follow the order. As he states, a soldier's "position is in theory and may be in practice a difficult one. He may... be liable to be shot by a Court martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it." *Id.* at 299. Dinstein recognized the same dilemma, when he stated that:

[W]hen a soldier is confronted with an [illegal] order to perform an act constituting a criminal offence, the demands of military discipline, as expressed in the duty of obedience to superior orders, come into conflict with the imperative need to preserve the supremacy of the law as manifested in the proscriptions of criminal law: military discipline requires unflinching compliance with orders; the supremacy of law proscribes the commission of criminal acts.

DINSTEIN, *supra* note 36, at 6.

has become apparent from some cases, if the subordinate himself actually knew of the illegality of the order he could not successfully invoke that order as a defense.<sup>44</sup>

Professor Hans-Heinrich Jescheck also writes,

An illegal command cannot justify the deeds [...] of the subordinate but is to be considered only as excluding his guilt [...]. The illegal command does have the effect of an excuse if the subordinate might reasonably rely on its legality. Such reliance is not to be protected if the order was obviously illegal.<sup>45</sup>

Similarly, Dahm takes the position that a soldier does not incriminate himself when acting pursuant to a superior's order unless he either recognizes or should have recognized the illegality of the order.<sup>46</sup>

These views allowed Professor Theo Vogler to conclude that the "decisive criterion for the culpability or blamelessness of the subordinate is whether or not he could rely on the legality of the command."<sup>47</sup>

On the other side of the debate, Halsbury describes the basic alternative approach to the defense:

The mere fact that a person does a criminal act in obedience to the order of a duly constituted superior does not excuse the person who does the act from criminal liability, but the fact that a person does an act in obedience to a superior whom he is bound to obey, may exclude the inference of malice or wrongful intention which might otherwise follow from the act [...]. Soldiers and airmen are amenable to the criminal law to the same extent as other subjects [...]. Obedience to superior orders is not in itself a defence to a criminal charge.<sup>48</sup>

For Professor Paul Guggenheim, the assertion of the defense does not eliminate the personal criminal culpability of the subordinate, but, subjectively, whether or not the subordinate had a choice in the execution of the order needs to be determined for purposes of mitigation.<sup>49</sup> This position is also supported by Professor Yoram Dinstein, who is the author of one of the most authoritative works on the subject.<sup>50</sup> Dinstein writes,

[O]bedience to orders constitutes not a defence *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on lack of mens rea, that is, mistake of law or fact or compulsion.<sup>51</sup>

<sup>44</sup> KEIJZER, *supra* note 22, at 169.

<sup>45</sup> Jescheck, *Befehl und Gehorsam in der Bundeswehr*, *supra* note 36; also cited in Vogler, *supra* note 36.

<sup>46</sup> DAHM, *supra* note 36, at 311.

<sup>47</sup> Vogler, *supra* note 36, at 634. But see the positivist HERBERT L.A. HART, *THE CONCEPT OF LAW* 206 (1961) (stating: "What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny").

<sup>48</sup> HARDINGE S.G. HALSBURY, 10 *THE LAWS OF ENGLAND* 541, 1169 (3d Lord Simonds ed., 1955). Another author states: "Superior order is never a justification, unless it itself was lawful. If the order was unlawful, the act done in obedience thereto will also be unlawful, even though, in some cases, the law will excuse the one who did it, or will reduce his punishment." Sack, *supra* note 36, at 12.

<sup>49</sup> GUGGENHEIM, *supra* note 36, at 551.

<sup>50</sup> DINSTEIN, *supra* note 36, also GREEN, MÜLLER-RAPPARD, *supra* note 36.

<sup>51</sup> DINSTEIN, *supra* note 36, at 88.

For Dinstein, “the existence of *mens rea* is the signpost that ought to direct our thoughts and guide us in the attempt to solve the problem of obedience to superior orders.”<sup>52</sup> Sir Hersch Lauterpacht had previously expressed the same view: “[I]t is necessary to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of *mens rea* as a condition of accountability.”<sup>53</sup> As Dinstein continues:

[O]bedience to orders should be regarded as a factual detail germane to the offence, just like the time when, and the place where, the offence was committed; just like the weapon by which it was carried out; and just like myriads of other circumstantial minutiae. None of these factual details standing alone and out of context is endowed with special traits which radiate special legal significance. When the only thing that we know about a particular offence is that it was performed pursuant to orders, the knowledge does not get us, legally speaking, any farther than if the only thing that we knew were that the offence was committed, for instance, at 6 o'clock p.m. It would have been rash and impetuous on our part, if, on the basis of this knowledge alone, we had jumped to the conclusion that when the offender is brought to trial he must need be relieved of responsibility. No particularly immunizing ingredient is inherent in the mere fact that the offender obeyed an order, just as no specially exculpating component is inherent in the fact that the offence was committed at 6 o'clock p.m. Of course, when the scope of our knowledge in respect of the circumstances of the case broadens and all the facts are assembled and evaluated, the fact that the offence was carried out in submission to orders may contribute to the discharge of the defendant from responsibility, just as the fact that the offence was committed at 6 o'clock p.m. may be material in the achievement of the same result.<sup>54</sup>

Thus, “superior orders are not a magical talisman which wards off the spirit of justice.”<sup>55</sup> Indeed, as another authoritative scholar, Professor Leslie C. Green, states, “Whether in time of peace or armed conflict, it is clear that while they may constitute ground for mitigating punishment, these orders cannot be accepted as justifying an illegal act.”<sup>56</sup>

German military doctrine before 1945 was premised on the maxim *befehl ist befehl* (“an order is an order”), and many national military doctrines followed that view. But the IMT, as discussed below, revoked *befehl ist befehl*. Instead, it relied on the Charter to reject the defense for all unlawful orders, irrespective of the actor’s state of mind, knowledge, and the consequences facing a subordinate who refused the order. The CCL 10 Proceedings tempered this view with the caveat that the actor had “no moral choice” but to obey the order. This latter approach prevailed in the post-Charter developments in national military law, which provide for the consideration of reasonableness in light of the circumstances.

#### §1.4. *The Judgments of Tribunals*

In addition to the views of scholars, military tribunals and other courts have contributed to the development and advancement of the superior orders doctrine. Perhaps the first person to assert the defense of superior orders before a tribunal was Peter von Hagenbach

<sup>52</sup> *Id.*

<sup>53</sup> Lauterpacht, *supra* note 32, at 73.

<sup>54</sup> DINSTEIN, *supra* note 36, at 88–9.

<sup>55</sup> *Id.* at 89.

<sup>56</sup> Green, *supra* note 36, at 103.

in the year 1474.<sup>57</sup> Charles, the Duke of Burgundy, appointed Hagenbach the governor of the Upper Rhine, including the town of Breisach. At the behest of Charles, Hagenbach, with the aid of his henchmen, sought to reduce the populace of Breisach to a state of submission by committing such atrocities as murder, rape, and illegal confiscation of property.<sup>58</sup> Hagenbach was finally captured and accused of having “trampled under foot the laws of God and man.”<sup>59</sup> Hagenbach relied primarily on the defense of obedience to superior orders. His counsel claimed that Hagenbach “had no right to question the order which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors?”<sup>60</sup> The Tribunal refused to accept Hagenbach’s defense. He was found guilty and sentenced to death.

Another failed attempt to assert the defense occurred in England, where in 1660, after the restoration of King Charles II, the commander of the guard who presided at the execution of Charles I, Colonel Axtell, was tried for treason and murder. He pled that he was acting upon superior orders, but the court rejected his plea on the basis that obedience to a treasonable order is itself treasonable.<sup>61</sup>

In the United States, a striking case occurred during the War of 1812. During that war, the populace of the United States was split in its attitudes toward the war, and in New England the U.S. Navy was not very popular.<sup>62</sup> It happened that while the ship *Independence* was docked in Boston Harbor, a passerby directed abusive language at a marine named Bevans, who was standing guard on the ship. Bevans responded by bayoneting the man. He was charged with murder, and asserted as a defense that the marines on *Independence* had been ordered to bayonet whomever showed them disrespect. Justice Joseph Story instructed the jury that such an order was illegal and void, and if given and carried out both the superior and subordinate would be guilty of murder. Bevans was convicted.<sup>63</sup>

In another early American case, *United States v. Bright*,<sup>64</sup> the court clearly expressed its view on the issue:

<sup>57</sup> See GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 462–66 (1968); see also Daniel III, *supra* note 36, at 481.

<sup>58</sup> As Professor Green points out, Hagenbach perpetrated acts which today would be considered CAH. Green, *supra* note 36, at 77; see also SCHWARZENBERGER, *supra* note 57, at 466.

<sup>59</sup> See SCHWARZENBERGER, *supra* note 57, at 465; see also AMABLE G.P.B. DE BARANTE, 10 HISTOIRE DES DUCS DE BOURGOGNE 1364–1477, 15 (1839).

<sup>60</sup> See SCHWARZENBERGER, *supra* note 57, at 465; and DE BARANTE, *supra* note 59, at 16.

<sup>61</sup> See HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 219 (1990). The court concluded that “his superior was a traitor, and all that joined him in that act were traitorous and did by that approve the treason; and where the command was traitorous, there the obedience to that command is also traitorous.” 84 ENG. REP. 1060 (1660).

<sup>62</sup> See TAYLOR, *supra* note 19, at 43–4.

<sup>63</sup> *U.S. v. Bevans*, 24 F. Cas. 1138 (C.C.D. Mass. 1816) (No. 14589). Bevans’s conviction was later reversed by the Supreme Court on jurisdictional grounds. *U.S. v. Bevans*, 3 Wheat. 336 (1818).

<sup>64</sup> *U.S. v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14647). See also *Little v. Barrone*, 1 U.S. (2 Cranch) 465, 467 (1804) in which Chief Justice Marshall stated:

[i]mplicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appears to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them.

However, as a matter of law, he held, “the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.” *Id.*

In a state of open and public war, where military law prevails, and the peaceful voice of military law is drowned in the din of arms, great indulgences must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors. But even there the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass, in the regular judicial tribunals of this country.<sup>65</sup>

During the Napoleonic Wars, a Scottish court in the *Ensign Maxwell* case rejected the plea as asserted by a soldier who shot and killed a French POW. The court stated:

If an officer were to command a soldier to go out to the street and to kill you or me, he would not be bound to obey. It must be a legal order given with reference to the circumstances in which he is placed; and thus every officer has a discretion to disobey orders against the known laws of the land.<sup>66</sup>

Another important prosecution in the development of the superior orders doctrine occurred after the American Civil War. In the *Wirz* case,<sup>67</sup> the defendant, Major Henry Wirz, was charged with committing atrocities against POWs at Camp Sumter, the Confederate internment camp in Andersonville, Georgia.<sup>68</sup> Wirz was tried before a military commission of six Union generals and two colonels. The commission heard a prodigious amount of evidence that showed that Union prisoners were inadequately sheltered and provided inadequate food and contaminated water. Wirz turned away farmers from the neighboring counties who offered relief. Human waste and corpses fouled a stream that was Camp Sumter's only source of water. Some 14,000 prisoners died there by the end of the war. Wirz provided evidence in his defense that he administered the camp pursuant to the orders of General John H. Winder, the officer in charge of all Confederate prison camps. The commission found Wirz guilty of murder and other crimes in violation of the laws and customs of war; he was sentenced to death by hanging.<sup>69</sup> There was no

<sup>65</sup> *U.S. v. Bright*, *supra* note 64, at 1237–38; *see also Martin v. Mott*, 25 U.S. (12 Wheat) 537 (1827). *But see U.S. v. Jones*, 26 F. Cas. 653 (C.C.D. Pa, 1813); *Hyde v. Melvin*, 11 Johns (N.Y.) 521 (1814), wherein the courts did not discuss special rules for the military.

<sup>66</sup> WILLIAM BUCHANAN, 2 REPORTS OF CERTAIN REMARKABLE TRIALS 3, 58 (1813).

<sup>67</sup> H.R. Exec. Doc. No. 23, 40th Cong. 2d Sess., 764; *see also Riggs v. State*, 3 Coldwell 85, 91 Am. Dec. 272 (1866). This was one of the most frequently cited cases during this period on the question of obedience. The court found no error in a lower court instruction that:

Any order given by an officer to a private, which does not expressly and clearly show on its face or in the body thereof its own illegality, the soldier would be bound to obey and such an order would be a protection to him [. . .]. But an order illegal in itself and not justified by the rules and usages of war, or in its substance being clearly illegal so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order.

*Id.* at 273.

<sup>68</sup> An early American case addressed the issue of obedience to superior orders in the context of an action arising from the seizure of property. Chief Justice Roger B. Taney stated:

[T]he order given was to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed [. . .]. And upon principle, [. . .] it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order or his superior. The order may palliate, but it cannot justify.

*Mitchell v. Harmony*, 13 How. 115, 137 (1851).

<sup>69</sup> *See TAYLOR, supra* note 19, at 45–6.



formal judgment because the case was a military trial, but we may assume that the judges shared the view expressed by the Judge Advocate, who stated, “A superior officer cannot order a subordinate to do an illegal act, and if a subordinate obeys such an order and disastrous consequences result, both the superior and the subordinate must answer for it.”<sup>70</sup>

Another notable case is *Regina v. Smith*,<sup>71</sup> which involved a British soldier who, under orders, killed a South African native for not performing a menial task. Although the court acquitted the soldier, it introduced the “manifest illegality” test, stating:

It is monstrous to suppose that a soldier would be protected where the order is grossly illegal. [That he] is responsible if he obeys an order that is not strictly legal is an extreme proposition which the Court cannot accept [ . . . ]. Especially in time of war immediate obedience [ . . . ] is required [ . . . ]. I think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the command of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior.<sup>72</sup>

The issue of obedience to superior orders first gained contemporary international significance during the war crimes trials that followed World War I.<sup>73</sup> By virtue of Article 228 of the Treaty of Versailles, Germany submitted to the Allied Powers’ right to try alleged war criminals.<sup>74</sup> Although the Treaty originally provided that the trials would be administered by the state against whose nationals the alleged crimes were committed,<sup>75</sup> it was subsequently agreed that the German Supreme Court sitting at Leipzig would be the court to preside over these cases.<sup>76</sup> The two most notable cases involving the issue of obedience to superior orders during the Leipzig trials<sup>77</sup> were the *Dover Castle*<sup>78</sup> and *Llandovery Castle*<sup>79</sup> cases.

<sup>70</sup> H.R. Exec. Doc. No. 23, 40th Cong. 2d Sess., 764, 773.

<sup>71</sup> *Regina v. Smith*, 17 S.C. 561 (Cape of Good Hope, 1900).

<sup>72</sup> *Id.* at 567–68. A half-century later, an American tribunal also emphasized the manifest illegality of an order. In *U.S. v. Kinder*, 14 C.M.R. 742, 774 (1953), the court noted, “of controlling significance in the instant case is the manifest and unmistakable illegality of the order.”

<sup>73</sup> See generally DINSTEIN and MÜLLER-RAPPARD, *supra* note 36, at 10–20; Green, *supra* note 36, at 79–81; see also MULLINS, *supra* note 28.

<sup>74</sup> Treaty of Versailles art. 228, *supra* note 5. See also *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* 83 (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 32, 1919), reprinted in 14 AM. J. INT’L L. 95 (1920) [hereinafter 1919 Commission Report], at ch. III, which stated:

We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offense. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.

14 AM. J. INT’L L. 95, 117 (1920).

<sup>75</sup> Treaty of Versailles, *supra* note 5, at Art. 229.

<sup>76</sup> As Dinstein explains, because only a relatively few secondary offenders were tried and sentenced at Leipzig, these trials have become synonymous “with a judicial farce.” DINSTEIN, *supra* note 36, at 11.

<sup>77</sup> The superiors orders issue was also addressed in *Robert Neumann’s* case, see 16 AM. J. INT’L L. 696 (1922); see also MULLINS, *supra* note 28, at 87–98; see also the *Stenger and Crusius* case, see MULLINS, *supra* note 28, at 151–67.

<sup>78</sup> See *Dover Castle*, 16 AM. J. INT’L L. 704 (1922); see also MULLINS, *supra* note 28, at 99–107, 198, 221–22.

<sup>79</sup> See *Llandovery Castle*, 16 AM. J. INT’L L. 708 (1922); see also MULLINS, *supra* note 28, at 107–33, 221.

In *Dover Castle*, the defendant, Lieutenant Captain Karl Neuman, the commander of a German submarine, was charged with torpedoing the *Dover Castle*, a British hospital ship. Neuman claimed that he was acting pursuant to superior orders issued by his naval superiors, who claimed that they believed that Allied hospital ships were being used for military purposes in violation of the laws of war. He was acquitted, the court writing:

It is a military principle that the subordinate is bound to obey the orders of his superiors [...] [w]hen the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible. This is in accordance with the terms of the German law, § 47, para. 1 of the Military Penal Code [...].

According to § 47 of the Military Penal Code No. 2, a subordinate who acts in conformity with orders is [...] liable to punishment as an accomplice, when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanor. There has been no case of this here. The memoranda of the German Government about the misuse of enemy hospital ships were known to the accused [...]. He was therefore of the opinion that the measures taken by the German Admiralty against enemy hospital ships were not contrary to international law, but were legitimate reprisals [...]. The accused [...] cannot, therefore, be punished for his conduct.<sup>80</sup>

In the *Llandovery Castle* case, the court did not so readily accept the defense. In that case, also involving a German submarine attack upon a British hospital ship, the submarine commander ordered his subordinates to open fire on the survivors of the torpedoed *Llandovery Castle*, who had managed to get into lifeboats. The officers that carried out the order were charged with the killings and pleaded that they followed the orders of their commander. The court rejected this defense:

The firing on the boats was an offence against the law of nations. . . . The rule of international law, which is here involved, is simple and is universally known [...]. [The commander's] order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation the superior giving the order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law.<sup>81</sup>

<sup>80</sup> 16 AM. J. INT'L L. 707–08 (1922).

<sup>81</sup> *Id.* at 721–22. The Court stated further:

In examining the question of the existence of this knowledge, the ambiguity of many rules of international law, as well as the actual circumstances of the case, must be borne in mind, because in war time decisions of great importance have frequently to be made on very insufficient material. This consideration, however, cannot be applied to the case at present before the court. *The rule of international law, which is here involved, is simple and is universally known. No possible doubt can exist with regard to the question of its applicability.* The court must in this instance affirm Patzik's guilt of killing contrary to international law.

*Id.* at 721 (emphasis added).

This statement notwithstanding, the court acknowledged that the defense should be a factor taken into account for mitigation of punishment.<sup>82</sup>

Professor Dinstein's analysis of the use of the defense of obedience to superior orders at the Leipzig trials concluded that

- (1) As a general rule, a subordinate committing a criminal act pursuant to an order should not incur responsibility for it.
- (2) This rule is inapplicable if the subordinate knew that the order entailed the commission of a crime, and obeyed it nonetheless.
- (3) To determine whether the subordinate was aware of the fact that he had been ordered to perform a criminal act, the Court may use the auxiliary test of manifest illegality.<sup>83</sup>

Undoubtedly, the IMT rendered the most important decision dealing with the superior orders issue. For the first time a rule was set down in positive international law that addressed the superior orders defense, even though the Charter specifically articulated a rule applicable to the defense.<sup>84</sup> Article 8 of the Charter provides, "The fact that the Defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that Justice so desires."<sup>85</sup>

As Professor Dinstein notes with respect to the IMT, "The prosecution and the defence crossed swords many times in the arena of obedience to orders, and the Tribunal seriously pondered the question."<sup>86</sup> When senior military commander Wilhelm Keitel raised the

<sup>82</sup> *Id.* at 723.

<sup>83</sup> See DINSTEIN, *supra* note 36, at 19.

<sup>84</sup> See IMT Charter art. 8, *supra* note 4. In 1946, by way of a General Assembly Resolution, the United Nations affirmed the principles of international law articulated in the London Charter, Article 8 included. See Affirmation of Nuremberg Principles. Specifically, the resolution states, "The General Assembly [ . . . ] affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal."

Similarly, in 1950 the ILC affirmed the principles of the London Charter. See Nuremberg Principles, *supra* note 4. As to the obedience defense, the Commissions Reports states that "The Fact that a person acted pursuant to orders of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." Nuremberg Principles, *supra* note 4.

<sup>85</sup> IMT Charter art. 8, *supra* note 4. The London Charter's formulation on this issue resulted as a compromise between the Allies. The United States' original position was "The fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the Tribunal before which the charges are being tried determines that justice so requires." American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 24 (U.S. Gov't Print. Off. 1945) [hereinafter JACKSON'S REPORT].

The Soviet proposal, on the other hand, stated that "The fact that the accused acted under orders of his superior or his government will not be considered as justifying the guilt circumstance." Aide-Mémoire from the Soviet Government, June 14, 1945, in JACKSON'S REPORT, *supra*, at 62.

The U.S., however, insisted that superior orders be admissible for purposes of mitigation of punishment and offered another proposal: "The fact that a defendant acted to order of a superior or to government sanction shall not constitute a defense *per se*, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945, in JACKSON'S REPORT, *supra*, at 124.

<sup>86</sup> DINSTEIN, *supra* note 36, at 125. For individual cases where the defense was raised see: 18 IMT 362, Nuremberg Trial, Final Plea for Defendant Karl Dönitz (by Otto Kranzbühler); 18 IMT 362, Nuremberg

defense, the IMT refused to grant mitigation of punishment because of the shocking nature of the crimes:

There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes so shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.<sup>87</sup>

One greatly contested issue in the defense of superior orders at the IMT involved the *Führerprinzip*.<sup>88</sup> The IMT explained the *Führerprinzip* as follows:

The procedure within the [Nazi] party was governed in the most absolute way by the “leadership principle” (*Führerprinzip*).

According to the principle, each *Führer* has the right to govern, administer or decree, subject to no control of any kind and at his complete discretion, subject only to the orders he received from above.

This principle applied in the first instance to Hitler himself as the Leader of the Party, and in a lesser degree to all other party officials. All members of the Party swore an oath of “eternal allegiance” to the Leader.<sup>89</sup>

In light of the *Führerprinzip*, the Nuremberg defendants argued that Article 8 of the Charter did not apply to them.<sup>90</sup> As one defense attorney, Dr. Herman Jahrreiss, pointed out, “The *Führer*’s orders [had] a special aura of sanctity [ . . . ]. His orders were something quite different from the orders of any official within the hierarchy under him.”<sup>91</sup>

The arguments of the defense, however, were dealt with “by one thrust of the sword of logic.”<sup>92</sup> The chief Soviet prosecutor, General Roman Rudenko, stated with regard to the applicability of Article 8 to the *Führer*’s orders:

[I]t is quite incomprehensible what logical or other methods have led him to assert that the provisions of the Charter, specially drafted for the trial of major war criminals of fascist Germany, did not factually imply the very conditions themselves of the activities of these criminals. What orders then issued by whom and in what country are meant by the Charter of the Tribunal?<sup>93</sup>

Similarly, Justice Robert Jackson, the chief American prosecutor, repudiated the defense counsel’s use of the *Führerprinzip*:

I admit that Hitler was the chief villain. But [ . . . ] we know that even the head of the state has the same limits to his senses and to the hours of his days as do lesser men. He

Trial, Final Plea for Defendant Walther Funk (by Fritz Sauter); 18 IMT 248, Nuremberg Trial, Final Plea for Defendant Alfred Jodl (by Franz Exner); 18 IMT 67, Nuremberg Trial, Final Plea for Defendant Ernst Kaltenbrunner (by Kurt Kauffmann); 18 IMT 426, Nuremberg Trial, Final Plea for Defendant Erich Raeder (by Walter Siemers); 17 IMT 597–99, Nuremberg Trial, Final Plea for Defendant Joachim von Ribbentrop (by Martin Horn); 18 IMT 505, Nuremberg Trial, Final Plea for Defendant Fritz Sauckel (by Robert Servatius); 19 IMT 72, Nuremberg Trial, Final Plea for Defendant Arthur Seyss-Inquart (by Gustav Steinbauer); 19 IMT 210, Nuremberg Trial, Final Plea for Defendant Albert Speer (by Hans Flachsner).

<sup>87</sup> 2 FRIEDMAN (1972), at 977.

<sup>88</sup> See, e.g., 17 IMT 482, 493, Nuremberg Trial, Closing Speech for the Defense (by Herman Jahrreiss).

<sup>89</sup> *Command Papers* No. 6964, 5, Nuremberg Trial, Judgment, reprinted in DINSTEIN, *supra* note 36, at 141.

<sup>90</sup> See DINSTEIN, *supra* note 36, at 140–41.

<sup>91</sup> 17 IMT 484.

<sup>92</sup> See DINSTEIN, *supra* note 36, at 144.

<sup>93</sup> 19 IMT 577 Nuremberg Trial, Closing Speech for the Prosecution (by Roman Rudenko).

must rely on others to be his eyes and ears as to most that goes on in a great empire. Other legs must run his errands; other hands must execute his plans. On whom did Hitler rely for such things more than upon these men in the dock? [...] These men had access to Hitler and often could control the information that reached him and on which he must base his policy and his orders. They were the Praetorian Guard, and while they were under Caesar's orders, Caesar was always in their hands.<sup>94</sup>

Another Allied prosecutor, Lord Shawcross, commented on the obvious illegality of the orders, regardless of who passes the order, "By every test of international, of common conscience, of elementary humanity, these orders [...] were illegal."<sup>95</sup>

In its judgment, the IMT stood firm in its belief in the validity of Article 8 of the London Charter. The Tribunal stated that:

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations is not the existence of the order, but whether moral choice was in fact possible.<sup>96</sup>

This oft-quoted statement has been the center of much discussion, especially the last sentence, which introduces the "moral choice test." A point of contention is whether the moral choice test undermines the provision in Article 8 that specifically provides that even though an accused "acted pursuant to orders of his Government or of a superior [it] shall not free him from responsibility."<sup>97</sup>

One commentator, Morris Greenspan, contends that the moral choice test does undercut Article 8. He states, "It is clear that the test of moral choice was applied to the question of criminal punishment."<sup>98</sup> This contention contradicts what the Tribunal explicitly asserted previously when it endorsed the provisions of Article 8: "[T]hat a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts [...]."<sup>99</sup>

A more correct view is that of Dinstein, who states that "the moral choice test was meant to complement the provision of Article 8 and not to undermine its foundations, and that it does not permit the fact of obedience to orders to be considered for defence purposes."<sup>100</sup>

<sup>94</sup> *Id.* at 430.

<sup>95</sup> 19 IMT 466.

<sup>96</sup> 22 IMT 466, reprinted in 41 AM. J. INT'L L. 221 (1947). Other parts of the Tribunal's judgments referred to the superior orders issue. The Tribunal stated that "Participation in [...] crimes [...] have never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes." *Id.* at 316. Ironically, the words used by the Tribunal in its judgment echoed those of Dr. Joseph Goebbels, the German Minister of Propaganda, who in May 1944 published an article condemning bombings by the Allies. He exclaimed:

No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established usage of warfare.

Deutsche Allgemeine Zeitung, May 28, 1944, quoted in TAYLOR, *supra* note 19, at 48.

<sup>97</sup> IMT Charter, *supra* note 4, at art. 8.

<sup>98</sup> MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 493, n. 343 (1959).

<sup>99</sup> Command Papers No. 6964, p. 42, cited by DINSTEIN, *supra* note 36, at 147.

<sup>100</sup> DINSTEIN, *supra* note 36, at 152.

In other words, it seems that the Tribunal intended that if, for example, a defendant was in a position where he or she would be killed for failing to comply with the illegal order (i.e., no ability to make a moral choice), the defendant may be acquitted once all the relevant circumstances had been examined pursuant to “general principles of law” (e.g., the traditional criminal law defense of coercion), without regard to the defense of superior orders. On the other hand, if the defendant were in a position to make a moral choice and nonetheless complied with the illegal order, then, applying Article 8, the defendant may not assert the defense of superior orders.

One author sums up best the obedience defense in relation to Nuremberg in this manner:

Article 8 [of the Nuremberg Charter] provided that “[t]he fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.” The Nuremberg Tribunal put a gloss on these words with its statement: “The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.” Nevertheless, it accepted the basic point – the defendant’s position in the governmental hierarchy and any orders from above were not available as defenses.<sup>101</sup>

As discussed in [Chapter 3](#), the IMTFE Charter<sup>102</sup> was similar to the London Charter. Article 6 of the Tokyo Charter provides:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to the order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.<sup>103</sup>

While the IMT and, to a lesser extent, the IMTFE serve as important markers in the progression of the superior orders defense, the use of the defense continued in the Allies’ Subsequent Proceedings,<sup>104</sup> which were conducted pursuant to CCL 10.<sup>105</sup>

Article II (4)(b) of CCL 10 states, “The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”<sup>106</sup> Nevertheless, the CCL 10 Proceedings, though not allowing the defense, recognized that under certain circumstances a plea of obedience to superior orders could exempt the defendant from liability.

<sup>101</sup> Roger S. Clark, *Codification of the Principles of the Nuremberg Trial and the Subsequent Development of International Law*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 249, 261 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

<sup>102</sup> See Charter for the International Military Tribunal for the Far East art. 5(b), *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 BEVANS 27 [hereinafter Tokyo Charter].

<sup>103</sup> *Id.* at art. 6.

<sup>104</sup> As Dinstein points out, the defense of superior orders has been raised in war crimes trials more frequently than any other. See DINSTEIN, *supra* note 36, at 121.

<sup>105</sup> Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, art. 2(1)(b), 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946, *reprinted in* BENJAMIN FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE* 488 (1980) [hereinafter CCL 10].

<sup>106</sup> *Id.* at art. 2(4)(b).

The *Einsatzgruppen* case serves as the best example of how the CCL 10 Proceedings dealt with the superior orders issue, because it did so in a comprehensive manner. The tribunal stated:

[T]he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of widespread consumption that a soldier is required to do everything his superior officer orders him to do [. . .]. The subordinate is bound to obey only the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead Superior Orders in mitigation of his defence. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance of the criminality of the order. If one claims duress in the execution of an illegal order, it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse [. . .] if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he himself would risk a few days of confinement. Nor if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases [. . .].<sup>107</sup>

In two other notable cases of the CCL 10 Proceedings, the Tribunal again denied the use of the superior orders defense.<sup>108</sup> In the *Milch* case, the court stated:

The defendant had his opportunity to join those who refused to do the evil bidding of an evil master, but he cast it aside [. . .]. By accepting such attractive and lucrative posts under a head whose power they knew to be unlimited, they ratify in advance his every act, good or bad. They cannot say at the beginning, "The *Führer's* decisions are final; we will have no voice in them; it is not for us to reason why; his will is law," and then, when the *Führer* decrees [. . .] barbarous inhumanities [. . .] to attempt to exculpate themselves by saying, "Oh, we were never in favor of those things [. . .]."<sup>109</sup>

In the *High Command* case, another case from the CCL 10 Proceedings involving senior officers, the court stated:

All of the defendants in this case held official positions in the armed forces of the Third Reich. Hitler, from 1938 on, was Commander-in-Chief of the Armed Forces and was the Supreme Civil and Military Authority in the Third Reich, whose personal decrees had the force and effect of law. Under such circumstances, to recognize as a defence [. . .] that a defendant acted pursuant to the order of his government or of a superior would be in practical effect to say that all the guilt charged [. . .] was the guilt of Hitler alone because he alone possessed the lawmaking power of the State and the supreme authority to issue civil and military directives. To recognize such a contention would be to recognize an absurdity [. . .]. The rejection of the defence of superior orders [. . .] would follow of necessity from our holding that the acts [. . .] are criminal [. . .] because they then were crimes under International Common Law. International Common Law

<sup>107</sup> U.S. v. Ohlendorf et al. [hereinafter the *Einsatzgruppen* case], reprinted in IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1951), at 470. With regard to the defense of duress, the Tribunal concluded that: "No court will punish a man, who, with a loaded pistol at his head is compelled to pull a lethal lever." *Id.* 411–589.

<sup>108</sup> See also DINSTEIN, *supra* note 36, at 196 (noting that in only one "unique" case, the superior orders defense was successful in resulting in an acquittal).

<sup>109</sup> Trial of Erhard Milch (the *Milch* case), VII LAW REPORTS OF TRIALS OF WAR CRIMINALS 27, 42 (U.N. War Crimes Comm'n, 1947).



must be superior to and, where it conflicts with, take precedence over National Law or directives issued by any governmental authority. A directive to violate International Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive [ . . . ]. The defendants [ . . . ] who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.<sup>110</sup>

The *High Command* case further allowed for the possibility that a defendant, under certain circumstances, may claim the defense due to excusable ignorance of the unlawfulness of an order:

Within certain limitations, a soldier in a subordinate position has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.<sup>111</sup>

The *Hostages* case subsequently limited this language as follows:

An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character.<sup>112</sup>

Another view of the treatment of the question by the post-World War II courts was that of Geoffrey Best:

Justice in the event was found to require sympathetic consideration of the “superior orders” plea when made by underlings in all but the most atrocious cases but the plea was indignantly dismissed when offered by officers and officials in the higher echelons.<sup>113</sup>

Four national prosecutions also merit mention. One of these cases was the prosecution in Israel of Adolf Eichmann, who consistently claimed that everything he did was pursuant to superior orders.<sup>114</sup> However, the District Court of Jerusalem rejected his plea:

We reject absolutely the accused’s version that he was nothing more than a ‘small cog’ in the extermination machine. We find that in the RSHA, which was the central authority dealing with the final solution of the Jewish question, the accused was at the head of those engaged in carrying out the final solution. In fulfilling this task, the accused acted in accordance with general directives from his superiors, but there still remained to him wide powers of discretion which extended also to the planning of operations on his own

<sup>110</sup> Trial of Wilhelm von Leeb, (the *High Command* case), XII LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948), at 71–72.

<sup>111</sup> *High Command* case, *supra* note 110, at 73.

<sup>112</sup> Trial of Wilhelm List et al. (the *Hostages* case), *reprinted in* XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1947–53), at 1271.

<sup>113</sup> GEOFFREY BEST, *WAR AND LAW SINCE 1945* 190 (1994).

<sup>114</sup> *CrimC(Jer) 40/61 Attorney General of the Government of Israel v. Eichmann*, *IsrDC* 45, 3 (1961); *CrimA 366/61 Eichmann v. Attorney General* 17 *IsrSC* 2033 [1962]. *See generally* GIDEON HAUSNER, *JUSTICE IN JERUSALEM* 353 *et. seq.* (1966). For further discussion on the national prosecution of Eichmann and for full citations to the cases, *see infra* ch. 9, §3.2.

initiative. He was not a puppet in the hands of others; his place was amongst those who pulled the strings.<sup>115</sup>

In the French trial of Klaus Barbie,<sup>116</sup> who was charged with CAH under French criminal law for crimes committed during War World II, it was argued that when an accused is charged with the commission of crimes contained in Article 6(c) of the London Charter, the presiding judge must follow the mandate of Article 8.<sup>117</sup> Barbie thus contended that the trial court deprived him of the benefit of the Article 8 provisions with respect to mitigating circumstances. As one author points out, Barbie's counsel, Jacques Vergès, misinterpreted Article 8 of the Charter:<sup>118</sup> obedience to a superior's orders is not an excuse under the London Charter, nor is it a mandatory mitigating circumstance, but rather, it "may be considered in mitigation of punishment, if the Tribunal determines that justice so requires."<sup>119</sup>

Two other cases involved atrocities committed by U.S. soldiers during the Vietnam War. In *United States v. Schultz*, the accused was found guilty of the premeditated murder of a Vietnamese and sentenced to thirty-five years of imprisonment. In its judgment, the tribunal stated:

[T]he issuance or execution of an order to kill under the circumstances of this case is unjustifiable under the laws of this nation, the principles of international law, or the laws of land warfare. Such an order would have been beyond the scope of authority for a superior to give and would have been palpably unlawful.<sup>120</sup>

In the case of Lt. William Calley, arising out of the My Lai (Song My) massacres, the military judge, in his instructions to the court members, stated that, "[T]he obedience of a soldier is not the obedience of an automaton, a soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders."<sup>121</sup>

### §1.5. Post-Charter Developments

Since the London Charter's promulgation, a number of international documents have addressed the issue of defense of obedience to superior orders.<sup>122</sup> The first such example

<sup>115</sup> *Id.* (First Instance) Judgment, § 180.

<sup>116</sup> See *infra* ch. 9, §3.2 for the relevant cites for the *Barbie* case.

<sup>117</sup> Since the Charter is part of international law, and expressly incorporated into French domestic law by Law No. 64-1326, Barbie argued that it has force in France. He also argued on the basis that Article 55 of the French Constitution of October 1958 decrees that the national law of France must defer to international law. See Nicholas R. Doman, *Aftermath of Nuremberg: The Trial of Klaus Barbie*, 60 COLO. L. REV. 449, 467 (1989).

<sup>118</sup> *Id.*

<sup>119</sup> IMT Charter art. 8, *supra* note 4.

<sup>120</sup> *U.S. v. Schultz*, 39 M.R. 133, 136 (1966, court martial; 1968 Review Board).

<sup>121</sup> *U.S. v. Calley* (1971), 46 C.M.R. 1131 (1973), *aff'd* 22 U.S.C. M.A. 534, 48 C.M.R. 19 (1973). At the time of this trial the *United States Manual for Court Martial*, § 216d (1968) provided that orders requiring the performance of a "military duty may be inferred to be legal," but: "An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable." For more about the My Lai massacre, see *infra* ch. 7.

<sup>122</sup> One effort between the wars was put forth; however, it failed. In the 1922 Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, 25 L.N.T.S. 202, 16 AM. J. INT'L L. 57 (Supp. official docs., 1922), Art. III provided in part that Of the five necessary contracting parties, Britain, Italy,

is the 1946 United Nations Resolution on the Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal.<sup>123</sup> The Resolution, by affirming the principles enunciated in the Charter, expressly recognizes the validity of the Article 8, which provides that the fact that an accused acted pursuant to an order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.

Shortly after this resolution, the United Nations began to formulate the Genocide Convention.<sup>124</sup> In June of 1947, the Secretariat of the United Nations Organization submitted a Draft Convention, which in Article V provided, "Command of the law or superior orders shall not justify genocide."<sup>125</sup> Those who opposed inclusion of the article argued that it would conflict with provisions of national law, which took a different approach to obedience to orders. On the other side, those who advocated for the article asserted that rules of international law are superior to those of national law.<sup>126</sup> Nevertheless, a majority of the *ad hoc* Committee on Genocide rejected the article and it never appeared in the Convention.

The drafting process of the four Geneva Conventions<sup>127</sup> produced similar results. In late 1948, the International Committee of the Red Cross (ICRC) invited four experts to study the problems surrounding the sanctions imposed for violations of the Conventions. At the behest of the experts, the ICRC recommended to the Diplomatic Conference, convened to formulate and sign the Conventions, to include the same four articles in each of the four Conventions. The third draft article provided:

The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify.

The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

Japan, and the United States ratified, but France refused and the treaty never entered into force. This led one author to comment, "It appears to be equally admitted that the defenses of act of state and superior orders . . . condition any prosecution for war crimes. The very fact that one writer suggests a reappraisal of these orthodox principles is only further proof of their general acceptance in positive law." George Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AJIL 406, 433 (1943).

It is interesting to note that France, in order to be consistent with her Allies, enacted an ordinance on August 28, 1944, to the effect that superior orders cannot be pleaded as a justification but can be admitted as "extenuating or exculpating circumstances." See LASSA OPPENHEIM, 2 INTERNATIONAL LAW 568 n.1 (Hersch Lauterpacht ed., 7th ed. 1952).

<sup>123</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, GA Res. 95 (I), UN Doc. A/236 (1946), at 1144.

<sup>124</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, art. II (Dec. 9, 1948) [hereinafter Genocide Convention].

<sup>125</sup> Draft Convention on the Crime of Genocide, 25, U.N. Doc. E/447 (June 26, 1947).

<sup>126</sup> See DINSTEIN, *supra* note 36, at 220–21.

<sup>127</sup> 1949 Geneva Conventions.

Full responsibility shall attach to the person giving the order, even if in giving it he was acting in his official capacity as a servant of the State.<sup>128</sup>

The Diplomatic Conference, however, decided not to include this proposed article in the four Conventions and also did not make an unequivocal statement as to the obedience defense. The reasons for the rejection included the apprehension that, because of lack of general agreement on the subject, the article might hinder the ratification of the Conventions, and the belief that principles of international law relating to the obedience defense were concurrently being examined and formulated by various bodies of the United Nations.<sup>129</sup> The same position had been taken earlier in the drafting of the Genocide Convention.

The ILC assumed the task in 1950 while reformulating the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.<sup>130</sup> Principle IV of the document states, “The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”<sup>131</sup>

In the commentary to the Principle, the Commission explains the connection between its formulation and that of the IMT:

105. This text is based on the principle contained in Article 8 of the Charter of the Nuremberg Tribunal as interpreted in the judgment. The idea expressed in Principle IV is that superior orders are not a defence provided a moral choice was possible to the accused. In conformity with this conception, the Tribunal rejected the argument of the defence that there could not be any responsibility since most of the defendants acted under the orders of Hitler. The Tribunal declared: “The provisions of this article [article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.”

106. The last phrase of Article 8 of the Charter “but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires,” has not been retained for the reason stated under “principle III, in paragraph 104 above. [i.e., “The Commission considers that the question of mitigating punishment is a matter for the competent Court to decide.”]<sup>132</sup>

Since 1950, there have been a number of draft instruments and instruments which have embodied a provision on this question. Throughout this historic process, including the Rome Statute in 1998, the formulations adopted were substantially similar.

<sup>128</sup> 1 COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 359, n.1 (Jean S. Pictet ed., 1952).

<sup>129</sup> See DINSTEIN, *supra* note 36, at 224–25. Comparing the efforts of the drafters of the Genocide and Geneva Conventions, he concludes that “[I]n both cases, when the authors of the Conventions encountered the kernel of a problem, they preferred to get rid of it rather than spend time and energy on baring its pith.” *Id.* at 225.

<sup>130</sup> Nuremberg Principles, *supra* note 4.

<sup>131</sup> *Id.* Principle IV.

<sup>132</sup> *Id.* as reprinted in 2 FERENCZ 237. For further information on the drafting history of Principle IV, see DINSTEIN, *supra* note 36, at 228–41.

In addition to the Affirmation of the Nuremberg Principles, which referred to this question, the ILC also undertook to draft a Code of Offences Against the Peace and Security of Mankind. In 1951, the ILC submitted its first draft of the Code. Article 4 provides, “The fact that a person charged with an offence defined in this Code acted pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.”<sup>133</sup> This text is substantially the same as that of the Affirmation of the Nuremberg Principles quoted above. In its report to the General Assembly, the ILC explained the similarities:

The observation on Principle IV, made in the General Assembly during its fifth session, have been carefully studied; no substantial modification, however, has been made in the drafting of this article, which is based on a clear enunciation by the Nürnberg Tribunal. The article lays down the principle that the accused is responsible only if, in the circumstances, it was possible for him to act contrary to superior orders.<sup>134</sup>

After the ILC submitted the Draft Code of Offences to the General Assembly, the Secretary General in 1952 requested the member-states to comment upon the draft. With regard to Article 4, a number of governments objected to the moral choice test. After taking the comments of the governments into account, the ILC in 1954 submitted a revised Draft Code with a revised Article 4 no longer containing the language of the moral choice test. The new Article 4 provides:

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.<sup>135</sup>

The ICTY Statute addressed the obedience to superior orders defense in its Article 7 and mirrored the ILC’s 1954 definition with respect to the coercion exception, making it a mitigating circumstance. Article 7 states, “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”<sup>136</sup>

Article 6 of the ICTR Statute was adopted in nearly identical form to Article 5 of the ICTY. It states, “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but

<sup>133</sup> *Report of the ILC*, 2 YEARBOOK OF THE ILC, 1951, 123–24.

<sup>134</sup> *Id.* at 137.

<sup>135</sup> 1954 Draft Code of Offences, at art. 4. As the ILC noted in its report to the General Assembly, “Since some Governments had criticized the expression ‘moral choice,’ the Commission decided to replace it by the wording of the new text.” *Report of the ILC*, 2 YEARBOOK OF THE ILC, 1954, 140–73, at 151. The 1991 Draft Code of Crimes states, in Article 11, “The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order.”

<sup>136</sup> Statute of the International Tribunal for the Former Yugoslavia art. 7, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1–2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute].

may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.”<sup>137</sup>

In 1996, the ILC amended its 1954 and 1991 position in the Draft Code of Offences and renamed the Draft Code of Crimes, on the basis of the ICTY and ICTR formulations. Article 5 of the 1996 Draft Code of Crimes provides that, “The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.”<sup>138</sup>

As for the Rome Statute, Article 33 provides:

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
  - (b) The person did not know that the order was unlawful; and
  - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Thus, the text of the Rome Statute rolls back the formulations of the Articles 7 and 6 of the ICTY and ICTR Statutes and the ILC Article 5 by emphasizing in paragraph 1(a) that the person was under a legal obligation to obey orders, and by allowing for a defense of ignorance of the “unlawful” nature of the order in 1(b). This formulation is the first to exclude “orders to commit genocide or crimes against humanity” (paragraph 2) from the required knowledge of the unlawful nature of the order.

This latest formulation gives rise to a number of questions:

- (1) Procedurally, and from an evidentiary perspective, are the dual issues of ignorance that the order was unlawful under 1(a), and the objective fact that the order was not manifestly unlawful 1(b), to be treated in the same way or differently? One can assume that under 1(a), the defense would raise the issue of ignorance, or lack of intent, and the prosecution would have to prove it beyond a reasonable doubt as an element of the crime. That places a heavy burden on the prosecution.

Or would the defense have to prove the ignorance or lack of intent? That, in effect, would shift the burden of proof if 1(a) is construed as an element of the crime. But if it is deemed a defense like those contained in Article 31, the burden of coming forth with some evidence would be with the defense. The prosecution would then have to rebut it. The question of which party has the burden of proof or the burden of coming forth with the evidence has to be considered in light of Article 67 on the rights of the accused, which states, “Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”

<sup>137</sup> Statute of the International Criminal Tribunal for Rwanda art. 6, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 [hereinafter ICTR Statute].

<sup>138</sup> Report of the International Law Commission on the work of its forty-eighth session art. 5, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. A/51/10 (1996) at 72 [hereinafter 1996 Draft Code of Crimes].

- (2) This procedural and evidentiary question also applies to paragraph 2: Does the prosecution first prove that the “orders were to commit genocide or crimes against humanity,” and then the defense rebuts it? Is it an objective legal question or a mixed question of law and fact? If it is the latter, then clearly the defense can argue against what the prosecution presents the law to be, and that would be an objective legal question. But with respect to the factual question, would that have to be first proven by the prosecution, or defended against by the defense without the prosecution having first proven it, having regard to Article 67 (1)(i) quoted above? Last, can a question of fact like this one exclude the mental element, i.e., did the accused understand, have knowledge, have intent, etc.? These and other questions will have to be answered by the future jurisprudence of the ICC. Certainly, the formulation of Article 33 opens up many more questions than the relevant provisions of the ICTY and ICTR statutes.

Other than these formulations, international conventional law has addressed the issue of obedience to superior orders in the 1984 Torture Convention,<sup>139</sup> which provides in Article 2 that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”<sup>140</sup> Other ICL conventions make no mention of it or, like the Apartheid Convention,<sup>141</sup> address it indirectly.<sup>142</sup> As an explanation for the absence of such a provision in other treaties, obedience to superior orders is clearly no longer recognized by customary international law as an absolute defense.

As discussed above, the ICTY and ICTR Statutes verified the absolute liability approach. Both statutes closely track the language of the London Charter. The ICTY has held that superior orders and duress “are separate, but related, concepts and either may count in mitigation of sentence.”<sup>143</sup> In the *Erdemović* case, the ICTY reflected the views of the IMT and the Nuremberg Principles. The defense was raised by the accused, Dražen Erdemović, who occupied a low rank in the Bosnian Serb army.<sup>144</sup> The Trial Chamber distinguished between duress and superior orders, and reasoned that Erdemović was in fact positing the defense of duress. However it accepted that the absolute liability rule was applied with more flexibility than the approach of the CCL 10 Proceedings:

In practice, the Trial Chamber therefore accepts that tribunals have considered orders from superiors as valid grounds for a reduction of penalty. This general assertion must be qualified, however, to the extent that tribunals have tended to show more leniency

<sup>139</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46 (10 Dec. 1984), *opened for signature* 4 Feb. 1985, 23 I.L.M. 1027, 24 I.L.M. 535 [hereinafter Torture Convention]; see 24 I.L.M. 535 (1985) which contains the substantive changes from the Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984).

<sup>140</sup> *Id.* at art. 2; see also Inter-American Convention to Prevent and Punish Torture art. 2, Dec. 9, 1985, O.A.S. T.S. No. 67, 25 I.L.M. 519 [hereinafter Inter-American Convention] (excluding the defense of superior orders, as well as the act of state defense).

<sup>141</sup> Convention on Apartheid, art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention].

<sup>142</sup> *Id.* at art. III of the Convention (asserting that international criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State). See Clark, *supra* note 101, at 261.

<sup>143</sup> Prosecutor v. Bralo, Case No. IT-95-17-T, ¶ 53 (Dec. 7, 2005) [hereinafter *Bralo* Trial Judgment].

<sup>144</sup> Prosecutor v. Erdemović, Case No. IT-96-22, Sentencing Judgment, ¶¶ 51–52 (Nov. 29, 1996) [hereinafter *Erdemović* Sentencing Judgment].



in cases where the accused arguing a defence of superior orders held a low rank in the military or civilian hierarchy.<sup>145</sup>

The Trial Chamber further provided that it would not accept the defense where the defendant carried out the order with the required *mens rea*:

If the order had no influence on the unlawful behavior because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.<sup>146</sup>

On appeal, the Appeals Chamber also distinguished the defenses of superior orders and duress, concluding that the former was merely a factual circumstance that confirmed the existence of duress.<sup>147</sup> Judge Gabrielle Kirk McDonald and Judge Vohrah of the majority clearly state that superior orders are not a per se defense at the ICTY:

We subscribe to the view that obedience to superior orders does not amount to a defence per se but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.<sup>148</sup>

Judge Antonio Cassese dissented on the merits of the appeal, but shared the majority opinion regarding the distinction between superior orders and duress:

It is also important to mention that, in the case-law, duress is commonly raised in conjunction with superior orders. However, there is no necessary connection between the two. Superior orders may be issued without being accompanied by *any* threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance. Equally, duress may be raised entirely independently of superior orders, for example, where the threat issues from a fellow serviceman. Thus, where duress is raised in conjunction with manifestly unlawful superior orders, the accused may only have a defence if he first refused to obey the unlawful order and then only carried it out after a threat to life or limb.<sup>149</sup>

In the *Bralo* case, the Trial Chamber accepted that accused was pressured into becoming a member and active combatant of the “Jokers,” a platoon of the 4th Military Police Battalion of the Croatian Defense Council (HVO).<sup>150</sup> The Chamber concluded that Bralo should have refused to participate in combat activities at an earlier stage if he knew the orders to be unlawful or was required to engage in activities he knew to be illegal, and further found that “any orders given to Bralo to kill civilians and destroy homes would have been manifestly unlawful, such that they have no mitigatory value in the determination of the sentence [ . . . ].”<sup>151</sup>

<sup>145</sup> *Id.* ¶ 53.

<sup>146</sup> *Id.*

<sup>147</sup> *Erdemović v. Prosecutor*, Case No. IT-06-22-A, Appeals Judgment, ¶¶ 34–6 (Oct. 7, 1997) [hereinafter *Erdemović Appeals Judgment*].

<sup>148</sup> *Id.* ¶ 34.

<sup>149</sup> *Id.*, Separate and Dissenting Opinion of Judge Cassese, ¶ 15 (Oct. 7, 1997).

<sup>150</sup> See *Bralo* Trial Judgment, *supra* note 143.

<sup>151</sup> *Id.* at ¶¶ 53–56.

Similarly, the ICTR Trial Chamber in the *Bagosora* case denied the defendants' requests to mitigate their sentences based on their claim of obedience to superior orders:

The Chamber is aware that Nsengiyumva and Ntabakuze were at times following the superior orders in executing their crimes, which is a mitigating factor under Article 6(4) of the Statute. However, given their own senior status and stature in the Rwandan army, the Chamber is convinced that their repeated execution of these crimes as well as the manifestly unlawful nature of any orders they received to perpetrate them reflects their acquiescence in committing them. No mitigation is therefore warranted on this ground.<sup>152</sup>

Thus, over time the absolute liability approach to superior orders has proven subtler in its post-Charter applications. However, in the Rome Statute, as discussed above, the ICC adopted a conditional liability approach of its own.

### §1.6. Conclusion

A review of scholarly positions, judgments of tribunals, and international legislative efforts leads to the conclusion that obedience to superior orders is not a defense for CAH at customary international law when the order is manifestly illegal and the subordinate has no moral choice with respect to obeying or refusing to obey the order. If the subordinate is coerced or compelled to carry out the order, the norms for the defense of coercion (compulsion and duress) should apply. In such cases, the issue is not justification, but excuse or mitigation of punishment.

In regard to this important issue, the words of Dr. Lieber are telling: "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God."<sup>153</sup>

Since 1989, with the fall of the communist regimes in Eastern and Central Europe and the Republics that succeeded the USSR, obedience to superior orders has arisen once again with the same legal and moral implications raised in connection with the post-World War II prosecutions. These cases, as well as some national legislation, may have the effect of retroactive application either by declaring certain past laws null and void or by passing new laws that would not recognize the legal affects of certain prior laws. Although this would clearly violate the principles of legality,<sup>154</sup> it nonetheless also relates to superior orders in that the legal basis for the legitimacy of the order would be removed. Should such a situation prevail, it could apply to many different categories of public officials, including but not limited to army, police, and security officials, as well as judges and prosecutors. While command responsibility<sup>155</sup> would implicate higher ranking officials, the removal of superior orders would not in this case work as a way of policy prevention, but as retributive vengeance against those who may have been in a position where they could only assume the legality of the order and may not have been in a position to exercise a different moral choice. This case arose, for example, with a February 1992 conviction of two former East German border guards who followed the order to "shoot to kill!" people trying to cross the borders of East Germany. In so doing, one of the guards, a soldier aged

<sup>152</sup> Prosecutor v. Bagosora et al., ICTR-98-41-1-T, ¶ 2274 (Dec. 18, 2008).

<sup>153</sup> Cited by TAYLOR, *supra* note 19, at 41.

<sup>154</sup> See *infra* ch. 5.

<sup>155</sup> See *infra* ch. 7, §5.

twenty-seven, killed a person fleeing towards West Berlin in February 1989. He was convicted of manslaughter and sentenced to three and a half years in prison. His defense of obedience to superior orders was denied, Judge Theodore Sidell holding “Not everything that is legal is right.”<sup>156</sup>

## §2. Coercion (Compulsion and Duress) and Necessity

The next category of defenses includes what different legal systems refer to as coercion, or compulsion and duress, and necessity. But these defenses differ, particularly as to their origin. For example, coercion is closely related to the defense of obedience to superior orders but necessity is not. Notwithstanding the differences between German-civilist and common law legal doctrines, necessity can be viewed together with coercion and duress for purposes of this analysis.

These defenses have essential differences. Coercion is the product of compulsion by another person, whereas necessity is the product of natural causes that place a person in some form of danger. These defenses arise in a context wherein a person, as a consequence or coercion/compulsion or necessity, may act in a way that brings harm to others. Courts confronted by these defenses have been asked to balance the instinct for self-preservation against the resulting equal or greater harm to others. The jurisprudence of these cases illustrates the courts’ role in limiting the contexts in which these defenses may apply.

The extent to which national legal systems permit such defenses varies significantly, and it is, therefore, very difficult to arrive at a “general principle of law” that transcends the recognition of the defense for certain crimes and that can apply to ICL. From a policy perspective, it is difficult to foresee under what circumstances necessity could justify or excuse CAH. From a moral-ethical perspective it is equally difficult to justify or excuse CAH by reason of coercion. The moral-ethical question asks how can one justify or excuse the taking of multiple lives in order to save one’s own.<sup>157</sup> Positive ICL has given these defenses only a limited recognition.

Criminal responsibility in the world’s major criminal justice systems embodies basic social values. No matter what thoughts or motives compel an individual to commit a crime, it is possible for that individual to control his conduct. However, the law is not so rigid that it ignores basic human instincts such as survival. In certain circumstances, an individual is unable to act of free will to conform his conduct to positive or natural

<sup>156</sup> Another example demonstrating that obedience to superior orders is not a defense under customary international law is the case of two former East German guards who were convicted of slaying an East German citizen who was trying to escape over the Berlin Wall despite the fact that they had orders to do so. The judge said: “At the end of the 20th century [...] no one has the right to ignore his conscience when it comes to killing people on behalf of the power structure.” CHI. TRIB., Jan. 21, 1992, sec. 1, p. 3, col. 1; *see also* TIME, vol. 139, no. 5, Feb. 3, 1992, 36, which reports that during the 28 years in which this policy existed there were an estimated 200 people killed and 700 injured and only 38 border guards. *Id.* So far none of the political decision makers or officers who devised the order or carried it out have been accused, let alone prosecuted. This case, however, highlights the unfairness of denying the defense of obedience to superior orders to the lowest-ranking soldier without imposing concomitant responsibility on commanders and decision-makers.

<sup>157</sup> *See generally* Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Professor Lon. L. Fuller’s response, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

law. In these circumstances, where the individual is acting out of necessity or coercion, a defense is recognized.

For Aristotle, “necessity is manifested in eternal phenomena [. . .]. We may say that that which is a necessary thing because the conclusion cannot be otherwise [. . .] and the causes of this necessity are the first premises [. . .]. The necessary in nature, then, is plainly what we call by the name of matter, and the changes in it.”<sup>158</sup> He divided necessity into absolute and hypothetical necessity: absolute necessity is “the starting point,” “that which is,” while hypothetical necessity is “that which is to be.” The latter may also be referred to as that which is necessary to attain an end, while the former corresponds to causation as it is grounded in human and common experience. The law draws an arbitrary line between the two, whereas common sense of the hypothetically legal standard of the ordinary reasonable person is conditioned by the fact that “human conduct implies decision, initiative, action and not mere reaction, but at the same time, it is always more or less influenced by external conditions. Hence: ‘With regard to the things that are done from fear of greater evils [. . .] it may be debated whether such actions are voluntary or involuntary.’”<sup>159</sup> Thus, the inexorability of the end of self-preservation lies at the base of criminal accountability and will provide legal grounds for those defenses of necessity and coercion.

The distinction between these categories is not only a question of degrees but also of qualitative substance. Professor Hall, a positivist, aptly distinguishes necessity and coercion in the following terms:

There are valid grounds in support of the above noted differences between the doctrines of necessity and coercion. In the former, the pressure which influences the action is physical nature, while in coercion it is the immoral and illegal conduct of a human being that creates the problem. Certain major consequences result. In coercion, the situation may be completely transformed in a split second by the malefactor’s change of mind, and he is morally obliged to do that. There can hardly ever be any such very high probability that he will not change his mind, as that no relief will come to alter imminent destructive physical forces. From the viewpoint of the coerced, there are usually far greater chances of removing the evil human coercion – by positive action or by flight; certainly the cases show that the courts take this view. Even if the execution of the coercer’s threat were just as probable as the continuing impact of destructive, physical phenomena, there would frequently be a duty to resist the evildoer – and that is the meaning of the policy which excludes murder and other serious crimes. In necessity, man bows to the inevitable; but in coercion there is no such inevitability.<sup>160</sup>

Essentially, the defense of coercion rests on the assumption that a person who commits a crime under the compulsion of a threat by another person may not choose to protect another over oneself.<sup>161</sup> The actor is threatened by a greater harm than the one he is compelled to carry out against another. In such a case, he can be exonerated from criminal responsibility. In determining whether the defense of coercion should apply to decision-makers, such as the defendants at the IMT, or those under their command,

<sup>158</sup> ARISTOTLE, *METAPHYSICS* 1015a and AQUINAS, *SUMMA THEOLOGICA* II-1 § 6 art. 6; THOMAS HOBBS, *THE ELEMENTS OF LAW, NATURAL AND POLITIC* 47–8 (1928); HALL, *supra* note 21, at 419.

<sup>159</sup> HALL, *supra* note 21, at 420–21, *quoting* ARISTOTLE, *supra* note 158, at 1015a and b; ARISTOTLE, *ETHICS* b v. III.

<sup>160</sup> HALL, *supra* note 21, at 447.

<sup>161</sup> BASSIOUNI, *DRAFT CODE*, *supra* note 2, at 454.

the criteria of the defense must necessarily be different for the policy reasons discussed above in the context of obedience to superior orders. In other words, these defenses, like intoxication and insanity, apply to those who execute orders, not to those who originate orders or those who give them because they are part of a group of decision-makers.

In most legal systems, coercion is recognized but varies with respect to certain crimes, the nature and type of threats, the immediacy of the harm likely to occur to the actor, the reasonableness of the belief, and the harm inflicted upon others.<sup>162</sup> For policy reasons, most national laws do not recognize the defense for the most serious crimes, particularly murder.<sup>163</sup>

At common law, the defense of coercion may be raised with respect to crimes involving death or serious bodily harm when the threat induces a reasonable fear of immediate death or serious bodily injury to the threatened person.<sup>164</sup> Threats of future injury are not sufficient; the threat must be immediate and present.<sup>165</sup> Thus, threats of violence after defendants had voluntarily participated in a criminal act are not sufficient.<sup>166</sup> The person seeking to rely on the defense of coercion must have been unable to avoid the circumstances that led to the crime, and the threat must be such as to directly induce the criminal act.<sup>167</sup> The defense must always be grounded on the actor's reasonable belief that a danger to life and personal safety exists.<sup>168</sup> For policy reasons, the common law excludes the defense when the resulting harm to another is death.

Many landmark British cases on compulsion deal with treason and the coercion of a wife by her husband.<sup>169</sup> But as Hall states, "The law of the former is uncertain, and the latter has become little more than a vestige of the medieval conception of marriage."<sup>170</sup> As to murder cases, more than a century ago Justice Denman remarked to the jury:

You probably, gentlemen, never saw two men tried at a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other . . . yet that circumstance has never been received by the law as an excuse for his crime [ . . . ]. [T]he law is, that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind.<sup>171</sup>

In British treason cases, it was held that joining or aiding rebels was excusable only if the actor had a well-grounded fear of death and escape was effected as soon as possible.<sup>172</sup>

<sup>162</sup> *Id.* at 455.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* See *U.S. v. Bailey et al.*, 444 U.S. 394 (1980); *U.S. v. May*, 727 F.2d 764 (8th Cir. 1984); *U.S. v. Nickels*, 502 F.2d 1173 (7th Cir. 1974); *Amin v. State*, 811 P.2d 255 (Wyo. 1991); *Frasier v. State*, 410 S.E.2d 572 (So. Car. 1991); *State v. Migliorino*, 150 Wis.2d 513, 442 N.W.2d 36 (1989); *State v. Myers*, 233 Kan 611; 664 P.2d 834 (1983).

<sup>165</sup> *Id.*; *U.S. v. Stevison*, 471 F.2d 143 (7th Cir. 1972); *R.I. Recreation Center, Inc. v. Aetna Casualty and Surety Co.*, 177 F.2d 603 (1st Cir. 1949); *Shanon v. United States*, 76 F.2d 490 (10th Cir. 1935); *Nall v. Commonwealth*, 208 Ky 700, 271 S.W. 1058 (1925); *State v. Ellis*, 232 Ore. 70, 374 P.2d 461 (1962).

<sup>166</sup> See BASSIOUNI, DRAFT CODE, *supra* note 2, at 455.

<sup>167</sup> *Id.* at 456.

<sup>168</sup> *Id.* at 457.

<sup>169</sup> HALL, *supra* note 21, at 437.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 438.

<sup>172</sup> *Id.*

German-civilist legal systems provide a different approach for the defense of necessity<sup>173</sup> than the common law that includes coercion. Necessity is defined in this instance as:

[C]haracterized by a conflict between a legal duty and an impelling personal interest rather than by one between two incompatible legal duties. In the state of necessity, the personal interest is imperiled in such a way that it cannot be protected except by violation of a legal duty. The problem of state of necessity is thus concerned with the question of determining under what circumstances, if any, a person shall be permitted to disregard a legal duty in order to avert a danger threatening his or another person's interests. The question can be answered easily when the legal duty is insignificant as compared with the magnitude of the harm threatening. Where the interest endangered is one of high value, while that which is sought to be protected by the legal duty in question is of considerably lesser value, it makes good sense to approve of the violation of the legal duty in order to protect the more valuable interests at stake. Hence, a person does not act illegally if he infringes upon an interest of considerably less valuable legal good in order to protect one of higher value. In terms of legal theory, state of necessity, being based upon a comparative evaluation of legal interests, thus constitutes a ground for excluding illegality.<sup>174</sup>

Therefore, necessity in this context includes both coercion and necessity, and does not distinguish the two, as does the common law. However, the German-civilist legal systems hold in all cases of necessity that the actor must not have created the danger by his or her own fault.<sup>175</sup>

Necessity, unlike coercion, is a defense arising whenever a person, by reason of natural circumstances beyond his/her control, is compelled to engage in criminal conduct as the most reasonable means available to avoid an impending harm.<sup>176</sup> The threatened or endangered person must weigh the impending material danger against the harm that may result from the criminal violation, and in so doing it must appear that the harm he/she is going to inflict is less than (or at most equal to) the harm that he/she might incur if the violation were not to take place.<sup>177</sup>

The classic problem of necessity is the survival situation in the context of a shipwreck, where the people are at sea or stranded on an island when the question arises of who should be sacrificed for the survival of the others.<sup>178</sup> In two landmark cases, *U.S. v. Holmes*<sup>179</sup> and *Regina v. Dudley and Stevens*,<sup>180</sup> American and British courts stated the common law rule, holding it unlawful to preserve one life at the expense of another. In *Holmes*, an American ship was traveling from Liverpool to Philadelphia when it struck an iceberg and sank. Forty-two passengers and crew boarded a lifeboat that had a leak and was in danger of sinking due to overcrowding. After twenty-four hours, the crew decided to throw some of the passengers overboard. Women and children were excluded, as

<sup>173</sup> AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* 259 (1959).

<sup>174</sup> *Id.* at 258.

<sup>175</sup> *Id.* at 259.

<sup>176</sup> BASSIOUNI, *DRAFT CODE*, *supra* note 2, at 458.

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

<sup>178</sup> For an interesting discussion of such a situation and the different legal philosophical approaches in determining the guilt of the survivors, see Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 *HARV. L. REV.* 616 (1949).

<sup>179</sup> *U.S. v. Holmes* 26 F. Cas. 360 (C.C.E.C.Pa. 1949). These two cases take the same position, as have European courts in similar cases, including the notorious case of *Le Radeau de Le Méduse*.

<sup>180</sup> 14 Q.B.D. 273 (1884).

were married men and crew. A total of fourteen men were thrown overboard. On the following day, the lifeboat was rescued. A crewman in the *Holmes* case was convicted of manslaughter on the high seas. The lenient sentence he received (a \$20 fine and five months of solitary confinement and hard labor) was a result of the great public outcry surrounding the case and a tacit recognition of the defense of necessity in order to mitigate the punishment, if not to excuse the crime.

The facts of *Regina v. Dudley and Stevens* were similar to those of *Holmes*. In it, three survivors were lost at sea for twenty days in a lifeboat, the last eight days without food, and without any reasonable prospect of rescue. The two men killed the third, a boy, who was the weakest of the trio and the least likely to survive. The two men fed off the body of the boy until they were rescued. Though they were convicted of murder, their death sentences were commuted to twenty years hard labor.

In modern statutory formulations, the basic requirements of the defense of necessity are as follows:

- (1) To be justified, the harm must have been committed under pressure of physical forces;
- (2) It must have made possible the preservation of at least an equal value; and
- (3) The commission of the harm must have been the only means of conserving that value.<sup>181</sup>

In addition, good faith and reasonableness must exist in the belief that acting in derogation of the law is the only possible way to avoid the hardship of the circumstances.<sup>182</sup>

The defense of necessity could not apply to CAH, which are the result of state policy (or organizational policy for nonstate actors), and not of unforeseen natural forces. However, one case in which necessity may hypothetically apply as a defense for CAH would be an instance of famine in which the state may have to eliminate some of its citizens, or a minority group for the benefit of other civilians. This issue has not yet been resolved in positive law, though it is under natural law, where a man cannot decide on the fate of another man only on the basis of the instinct for self-preservation.

Commenting on the inconsistent jurisprudence of the IMT on necessity, Von Knieriem writes:

The conditions that must prevail in order to justify the plea of state of necessity can [...] be summarized as follows:

1. The actor must have been in imminent danger to life or limb.
2. It must not be possible to blame the actor for the danger.
3. The actor must not be obliged to live up to the danger.
4. The act committed must be the only possible means by which the actor could have saved himself from the danger.

<sup>181</sup> HALL, *supra* note 21, at 426.

<sup>182</sup> BASSIOUNI, DRAFT CODE, *supra* note 2, at 460; JAMES F. STEPHEN, DIGEST OF THE CRIMINAL LAW 32 (1877) (stating: "An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided").



5. The actor must have committed the act in a mental state of compulsion rather than of approval.<sup>183</sup>

These conditions closely correspond with the conditions established by the IMT, which confused the use of the terms compulsion, duress, and necessity in its various judgments.

The IMT Judgment marked the introduction of the “moral choice test.” As discussed above, the IMT declined the defense of superior orders, and stated the following regarding Article 8 of the London Charter:

The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not existence of the order, but whether moral choice was in fact possible.<sup>184</sup>

The moral choice test is not found in the text of Article 8, and it has been called “cryptic”<sup>185</sup> and “not easy to fathom.”<sup>186</sup> For Dinstein, the moral choice test was meant to complement the exclusion of the superior orders defense in Article 8 in that “a defendant ought to be acquitted anyway in accordance with the general principles of law owing to the other circumstances of the case and without any consideration being given to the fact of obedience to orders.”<sup>187</sup> Greenspan seems to endorse Dinstein, and further contends that the moral choice test implies that a person who had a moral choice to carry out an illegal order is criminally responsible; thus, the absence of choice leads to freedom from responsibility.<sup>188</sup> Defendants at the IMT often raised this conception of the defense, claiming that they had acted under the threat of political pressure from the leaders and the security organs of the Nazis. In response, the IMT and CCL 10 Proceedings thus concluded that the absence of choice could be considered a defense that could operate both as a justification and an excuse in the forms of necessity and coercion.

The CCL 10 Proceedings’ jurisprudence is inconsistent on these points, to say the least. In consideration of the plea of necessity by the defendants in the *Einsatzgruppen* case, the tribunal held that mass killings of civilians are never permitted.<sup>189</sup> It further rejected the plea of state of necessity, and adopted the moral choice approach of the IMT:

But it is stated that in military law even if the subordinate realizes that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat,

<sup>183</sup> *Id.* at 261.

<sup>184</sup> Nuremberg Judgment, in 2 FRIEDMAN (1972), at 940.

<sup>185</sup> GREENSPAN, *supra* note 98, at 493.

<sup>186</sup> DINSTEIN, *supra* note 36, at 148.

<sup>187</sup> *Id.* at 150, 152.

<sup>188</sup> GREENSPAN, *supra* note 98, at 493.

<sup>189</sup> *Einsatzgruppen* case, *supra* note 107, at 465.

however, must be *imminent, real and inevitable*. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.

Nor need the peril be that imminent in order to escape punishment. But were any of the defendants coerced into killing Jews under the threat of being killed themselves if they failed in their homicidal mission? The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order. If the second proposition be true, the plea of Superior Orders fails.<sup>190</sup>

In his evaluation of the *Einsatzgruppen* case, Von Knierem compares a single case of execution by a soldier overcome by fear of death, who pulls down the lever only once, with that of a member of a death squad like the *Einsatzgruppen*, who under the threat of court martial and firing squads, kills an endless number of victims daily:

Every day he sees groups of ten, twenty, or even more people; he knows that new groups will arrive perhaps for years to come; also, he has time for contemplation; he can sleep and relax and he is not on “special duty” uninterruptedly.<sup>191</sup>

Von Knierem then asks:

Might it not be possible to deny the plea of state of necessity to such a man without relapsing into an attitude which now fortunately belongs to the past and without sacrificing that hard-won principle that “no man must be punished unless he has acted with a guilty mind”? Should the denial of the plea not be possible where a man although in fear for his life but after quiet deliberation and in full knowledge of the significance of his acts has allowed himself to become the participant in atrocities of the most horrendous kind?<sup>192</sup>

In the *Flick* case, the tribunal relied on national case law on necessity to conclude as follows:

Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil.<sup>193</sup>

In another case from the CCL 10 Proceedings, the *Krupp* case, the tribunal applied a similar approach and adopted a test of proportionality:<sup>194</sup>

In such cases, if, in the execution of the illegal act, the will of the accused be no thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct.<sup>195</sup>

<sup>190</sup> *Id.* at 668 (emphasis added).

<sup>191</sup> VON KNIEREM, *supra* note 173, at 264.

<sup>192</sup> *Id.*

<sup>193</sup> U.S. v. Flick et al. [hereinafter the *Flick* case], VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1949–1953), at 47, quoting F. WHARTON, I WHARTON’S CRIMINAL LAW, ch. III, subdivision VII, ¶ 126.

<sup>194</sup> U.S. v. Krupp et al. [hereinafter the *Krupp* case], IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1949–1953), at 1443–44.

<sup>195</sup> *Id.* at 1436 (establishing that an agreement between the defendants and the political leadership regarding slave labor excluded the defense of necessity); see also *Flick*, *supra* note 193, at 1202 (establishing that the defendant Weiss was barred from making a plea of a defense of necessity).

The tribunal in the *Krupp* case further concluded that a subjective standard should apply to determine whether there was a danger that caused the defendants to act:

Wharton himself says “that the danger of the attack is to be tested [...] from the standpoint of the part attacked, not from that of the jury or of an ideal person.” We have no doubt that the same thing is true of the law of necessity. The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defense, the mere fact that such danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual.<sup>196</sup>

In the *I.G. Farben* case, the court considered that the situations in which a subordinate can rely on the defense of duress, holding:

It follows that the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such an order or decree [...].<sup>197</sup>

The Israeli trial of Adolf Eichmann considered duress in the context of CAH. The Israeli Supreme Court indicated that the moral choice test of the IMT constituted a defense of coercion or necessity, neither of which, it considered, was available for war crimes or CAH. The defense was found to be particularly inapplicable in Eichmann’s case, because he had shown a dark sense of enthusiasm in playing his part in the deportations and executions that took place during World War II:

But we stress in particular the non-fulfillment of the second condition because each of the said two defences goes to the question of *motive* that urged the accused to carry out the criminal act to save his own life – and also because the District Court relied in the main on its finding that the appellant performed the order of extermination at all times *con amore*.<sup>198</sup>

In the *Touvier* case, the French courts followed a similar approach to the Israeli courts in *Eichmann*, and denied the accused the defense of duress.<sup>199</sup> The case involved the question of whether Touvier, a French citizen and former official of the *Milice*, the militia of the Vichy regime, had participated in CAH willingly, or, as he claimed, only under duress due to the pressure of the occupying Nazi regime.<sup>200</sup> The Court of Appeal in Versailles refused Touvier’s plea of duress, concluding that he voluntarily joined the *Milice*, which was responsible for the murder of seven Jews.

Similarly, a Dutch court was asked to consider the defense of duress in the *Fullriede* case, wherein the accused was a member of the Nazi occupying forces in the

<sup>196</sup> *Krupp et al.*, *supra* note 194, at 1438.

<sup>197</sup> U.S. v. Krauch et al. [hereinafter the *Farben* case], VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (Washington, DC: GPO, 1949–53), at 1179.

<sup>198</sup> LEON FRIEDMAN, 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1684 (1972) (emphasis added). Further discussion and citations to the *Eichmann* trial can be found *infra* ch. 9.

<sup>199</sup> Cour d’ Appel (CA), *Bull. Crim.* 770–74 (1993); 100 ILR (1995), cited in ELIAS VAN SLIEDREGT: The Criminal Responsibility of Individuality for Violations of International Humanitarian Law (2003), at 283. The writer must cite and pay particular respect to VAN SLIEDREGT, *supra* 283–290, which were particularly helpful in this section.

<sup>200</sup> For more detail on the prosecution of Paul Touvier for CAH, see *infra* ch. 9.

Netherlands.<sup>201</sup> In reprisal for an attack on Nazi officers, Fullriede executed an order to burn down the village of Putten and deport its men to Germany.<sup>202</sup> At trial, he claimed that the order was not executed in full force, and that another officer may have executed it to its full extent. The Dutch Special Court of Cassation rejected this argument, reasoning that he had failed to prove that there was no other way that he could have prevented the order from being executed by other means.

On the other hand, in the Canadian prosecution of Imre Finta for crimes committed in his past as a Hungarian commander during World War II,<sup>203</sup> The Supreme Court ruled that duress *could* operate as a complete defense to CAH. As noted by van Sliedregt, the court interpreted the moral choice test from the IMT “as an extension of the superior orders defense by duress,” holding that acting in situations of compulsion (i.e., when there is an “imminent, real and inevitable threat” when being forced to comply with a superior order) could support the defense by negating the required culpable intent.<sup>204</sup>

The plea of duress was also raised in the Italian prosecution of Erich Priebke. Erich Priebke, a member of the SS, was prosecuted and convicted for his participation in the execution of 335 civilians at the Ardeatine Caves outside of Rome.<sup>205</sup> Priebke claimed that if he had refused to obey the order to kill the civilians, he would have been killed. The Rome Military Tribunal,<sup>206</sup> the Rome Military Court of Appeal,<sup>207</sup> and the Court of Cassation<sup>208</sup> dismissed the plea of duress, concluding that there was insufficient evidence that Priebke had acted under an imminent threat, and that it was unlikely that his refusal to obey the order would have resulted in serious danger to his life. These judgments further reasoned that the plea of duress lacked proportionality, but, as noted by others, this point is not entirely clear from the decisions. For example, Judge Cassese asks:

Does it concern the possible death (by killing) of the defendants on the one side, and their participation in the execution, on the other? Or does it instead relate to the fear by the defendants to be court-martialled by an SS-court on the one side, and their participation in the execution, on the other?<sup>209</sup>

The *Erdemović* case from the ICTY is the leading case on the issue of duress from the *ad hoc* tribunals.<sup>210</sup> In it, the defendant Dražen Erdemović was charged in the murder of

<sup>201</sup> Dutch Special Court of Cassation, 10 January 1949, NJ (1949) 541. See also B.V.A. Röling, *Commentary to the Judgment of the Dutch Special Court of Cassation, 10 January 1949, NJ (1949) 541, 989–90, cited in VAN SLIEDREGT, supra note 199, at 284.*

<sup>202</sup> *Id.*

<sup>203</sup> R. v. Finta, [1994] 1 SCR 701 48, 284. For more detail on the *Finta* case, see *infra* ch. 9.

<sup>204</sup> VAN SLIEDREGT, *Supra* note 199, at 284.

<sup>205</sup> See generally F. Martines, *The Defence of Reprisals, Superior Orders and Duress in the Priebke Case before the Italian Military Tribunal*, in 1 YIHL 354–361 (1998); G. Sacerdoti, *A Propositio del Caso Priebke: La Responsabilità per l'Esecuzione di Ordini Illegittimi Costituenti Crimini di Guerra*, 80 REVISTA DI DIRITTO INTERNAZIONALE 130–151 (1997); P. Gaeta, *War Crimes Trials Before Italian Criminal Courts: New Trends*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 751–68 (H. Fischer et al., eds., 2001), cited in VAN SLIEDREGT, *supra* note 199, at 285.

<sup>206</sup> Military Court of Rome, *Priebke*, decision of 1 August 1996, nr. 305. The *Priebke* case is also cited and discussed in greater detail *infra* ch. 9, § 3.2.

<sup>207</sup> Military Court of Appeal, *Hass and Priebke*, Judgment of 7 March 1998.

<sup>208</sup> Supreme Court of Cassation, *Priebke*, Judgment of 16 November 1998.

<sup>209</sup> *Erdemović Appeals Judgment, supra* note 147, Separate and Dissenting Opinion of Judge Cassese, ¶ 34, n. 69, cited in VAN SLIEDREGT, *supra* note 199, at 286.

<sup>210</sup> Prosecutor v. Erdemović, Case No. IT-96–22-T, Judgment (Mar. 5, 1998) [hereinafter *Erdemović Trial Judgment*].

approximately 1,200 men in the Srebrenica massacre.<sup>211</sup> Erdemović confessed to killing some seventy persons, but he claimed that he acted under duress.<sup>212</sup> Because duress was not specifically included in the ICTY Statute, the Trial Chamber relied on post-World War II jurisprudence to conclude that duress can constitute a defense for violations of international humanitarian law and ICL.<sup>213</sup>

The Appeals Chamber, however, rejected this approach by a three-to-two majority.<sup>214</sup> The joint separate opinion of Judges McDonald and Vohrah concluded that duress can be a mitigating circumstance, but cannot be a complete defense to violations of international humanitarian law and ICL.<sup>215</sup> Judge Li agreed with this conclusion, but differed in his reasoning.<sup>216</sup>

Judges Cassese and Stephen each penned separate dissenting opinions.<sup>217</sup> For Judge Cassese, duress may generally serve as a defense under ICL only if certain requirements are met.<sup>218</sup> Cassese adopted the views of the *Einsatzgruppen* case of the CCL 10 Proceedings and the French *Touvier* case, both of which held that duress is inapplicable when a person voluntarily enters such a situation:

Duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.<sup>219</sup>

Cassese further urged the Trial Chamber to account for Erdemović's low rank, arguing that it influenced whether or not he acted under duress, as the lower rank heightens the propensity to give in to compulsion.<sup>220</sup>

The ICTR Trial Chamber in the *Rutaganira* case followed the approach that duress is not a complete defense to CAH or war crimes, but can be considered as a mitigating factor.<sup>221</sup>

The Rome Statute's formulation synthesizes the various legal approaches on coercion discussed above, and clearly limits duress to situations where "the person does not intend to cause a greater harm than the one sought to be avoided." It excludes decision-makers, senior executors, and even mid-level executors from the defense, leaving it open only to low-level executors, as indeed it should be. Article 31(1)(d) of the Rome Statute states:

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

<sup>211</sup> See *infra* ch. 4 for a citations to more material on the Srebrenica massacre.

<sup>212</sup> *Erdemović* Sentencing Judgment, *supra* note 144, ¶ 10 (explaining that he was forced to participate in the killings at the risk of death or harm to himself or his family).

<sup>213</sup> *Id.* ¶¶ 16–20.

<sup>214</sup> *Erdemović* Appeals Judgment, *supra* note 147, ¶ 19.

<sup>215</sup> *Id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah.

<sup>216</sup> *Id.*, Separate and Dissenting Opinion of Judge Li.

<sup>217</sup> *Id.*, Separate and Dissenting Opinion of Judge Cassese, and Separate and Dissenting Opinion of Judge Stephen.

<sup>218</sup> *Id.* Separate and Dissenting Opinion of Judge Cassese, ¶ 12.

<sup>219</sup> *Id.* Separate and Dissenting Opinion of Judge Cassese, ¶ 17.

<sup>220</sup> *Id.* ¶ 51.

<sup>221</sup> *Prosecutor v. Rutaganira*, Case No. ICTR-95-IC-T, ¶ 161 (Mar. 14, 2005) (emphasis in original).

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.<sup>222</sup>

### §3. Reprisals

#### §3.1. Introduction

Reprisals are retributive practices recognized in the context of the international regulation of armed conflicts. In time these practices became more limited because they indiscriminately punish persons on a collective basis, but they have not reached the level of complete prohibition. Reprisals are not permissible with respect to CAH, and whatever basis exists for a legal justification or excuse in the context of armed conflicts should not be applicable to CAH.

After the 1907 Hague Convention, reprisals became the method of compelling a belligerent enemy who violated norms and standards of the regulation of armed conflicts into compliance. It continued to be somewhat retributive, though its purposes were narrowed and its justification limited to insure future compliance. Consequently, reprisals had to be proportionate to the violation, as, for example, the use of force in self-defense that contains a proportionality limitation. A genuine link also had to exist between the type of original violation and the type of reprisals engaged in as a response to that original violation. Reasonableness, proportionality, and counterpart of violations were the three essential elements that the post-World War I developments produced.<sup>223</sup>

No matter whether or how excusable they are, reprisals are acts that otherwise violate international norms and standards of the law of armed conflict. Therefore, it cannot be claimed that reprisals are justified in and of themselves, but they may constitute an excusable condition that exonerates the performing party from responsibility. The legal basis for reprisal is predicated on the assumption that when a belligerent state violates its legal obligations, the mutuality of obligations that would otherwise bind the other state to comply with the infringed norms is removed. The exoneration from state responsibility also extends to those individuals who carried out the acts in question, provided they were in conformity with all other legal requirements.

The victims of reprisals, however, are not states. They are protected persons and protected targets who unduly suffer from the consequences of a belligerent state's breach

<sup>222</sup> ICC Statute art. 31(1)(d), *supra* note 3.

<sup>223</sup> Described by one author as:

[B]oth the actor and the addressee of the act are States or other entities enjoying a degree of international personality.

The act must be a retort to a previous act on the part of the addressee which has adversely affected or continues so to affect the interests of the actor and which the latter can reasonably consider a violation of international law. It must, moreover, itself amount to a violation either of the identical or of another norm of international law.

The *prima facie* unlawful act is not authorized by any previous authoritative community decision. Neither is it an act of self-defence, as its aim is not directly to ward off the blow of the addressee's preceding act.

The act, finally, must respect the conditions and limits laid down in international law for justifiable recourse to reprisals; that is, first of all, objectivity, subsidiarity, and proportionality.

FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 33 (1971).

of its international obligations. This is the notion of collective punishment, which is no longer accepted with respect to protected persons and targets, and with respect to prohibited means of warfare. As Kalshoven writes:

It should be emphasized, however, that “collective responsibility,” as understood in this context, is something widely different from real responsibility for an act committed: usually, it will amount to nothing else but a passive attitude and a lack of cooperation in tracing the perpetrators of the act. In any event, it will be a long way off what would constitute a minimum for criminal or civil responsibility; in actual fact, it more closely resembles joint liability of the members of the community, based on the idea of group solidarity, than on anything like responsibility in the proper sense of the term. Exactly the same idea of group solidarity, however, also underlies the retaliatory measures against innocents. This leads to the conclusion that there is no real difference between “punitive” and “deterrent” retaliatory measures against (members of) an occupied population.<sup>224</sup>

Both practices violate the spirit of international humanitarian law and international human rights law applicable to protected persons.

As the notion of humanitarian law progressed, it became clear that although the infliction of harm on protected persons and protected targets may induce a state that has breached international obligations to desist from such practice, such conduct nonetheless unduly harms those protected persons and protected targets who should be protected, irrespective of any state’s conduct. Thus, the notion of humanitarian law, as it gained further recognition, particularly with the four Geneva Conventions of 1949, has removed the justification for certain forms of reprisals against protected persons and certain protected targets. Even so, the prohibition of reprisals is not absolute. As Kalshoven states:

[B]elligerent reprisals will obviously tend to be in conflict with elementary humanitarian considerations. A number of rules of the law of war have a marginal character, in that their purpose is not so much the realization of some kind of ideally chivalrous combat as the prevention of what is generally felt to be below the standard of what can be tolerated from the viewpoint of humanity, even in the context of warfare. Consequently, a reprisal transgressing such a marginal norm is bound to constitute an inherently inhuman act. In this light, particular importance attaches to the question of whether a rule might have developed to the effect that such sub-marginal acts would be prohibited even by way of reprisals.<sup>225</sup>

### §3.2. *Historical Evolution*

Reprisals arose under the customary and then the conventional regulation of armed conflicts. The evolution of the concept of reprisals began in the Roman Empire as a private way of compensating an individual for damage caused by a foreigner.<sup>226</sup> Although a private remedy, reprisals were not arbitrary; regulations kept them in check.<sup>227</sup> Public reprisals emerged in the sixteenth century, due to the decentralization of authority in Europe and a lack of means to ensure enforcement short of war. Although not subject

<sup>224</sup> *Id.* at 43.

<sup>225</sup> *Id.* at 39.

<sup>226</sup> *Id.* at 1.

<sup>227</sup> *Id.* at 2.



to any limitations, reprisals often took the form of seizures in ports or on the high seas of public or private ships of the opposing state.<sup>228</sup>

The breadth of reprisals widened as they were increasingly viewed as an alternative to war and therefore removed from the regulations of armed conflict. Reprisals also began to include nonviolent actions involving economic, diplomatic, or cultural relations.<sup>229</sup> It was not until the nineteenth century that reprisals were used to enforce the regulation of armed conflicts and the concept of reprisals emerged. As Lassa Oppenheim writes:

Whereas reprisals in time of peace are injurious acts committed for the purpose of compelling a State to consent to a satisfactory settlement of a difference created through an international delinquency, reprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare, in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare and to comply in future with the rules of legitimate warfare. Reprisals between belligerents cannot be dispensed with, for the effect of their use and of the fear of their being used cannot be denied. Every belligerent, and every member of his forces, knows for certain that reprisals are to be expected in case they violate the rules of legitimate warfare.<sup>230</sup>

The concept of reprisals was specifically alluded to in 1863 in Article 27 of the Lieber Code, which states, “[t]he law of war can no more wholly dispense with retaliation than could the law of nations, of which it is a branch.”<sup>231</sup> However, as set forth in Article 28:

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously, and unavoidably – that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.<sup>232</sup>

Reprisals were also referred to in Article 84 of the Oxford Manual,<sup>233</sup> which states:

[I]f the injured party deems the misdeed so serious in character as to make it necessary to recall the enemy to a respect for the law, no other recourse than a resort to reprisals remains.

Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy [ . . . ].<sup>234</sup>

The Oxford Manual, however, places limitations on the right to resort to reprisals in Articles 85 and 86. Reprisals may be resorted to only if (1) the injury complained of has not been redressed; (2) the reprisals are proportionate to the infraction of the law of war;

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 4.

<sup>230</sup> LASSA OPPENHEIM, 2 INTERNATIONAL LAW 560 (Hersch Lauterpacht ed., 7th ed. 1948).

<sup>231</sup> FRANCIS LIEBER, THE LIEBER CODE OF 1863: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, General Order No. 100 (Apr. 24, 1863).

<sup>232</sup> *Id.*

<sup>233</sup> Reprinted in THE LAWS OF ARMED CONFLICTS 35 (Dietrich Schindler & Jirè Toman eds., 1988).

<sup>234</sup> *Id.*

- (3) the reprisals are carried out with the authorization of the commander-in-chief; and
- (4) the reprisals conform to the laws of humanity and morality.<sup>235</sup>

Although the 1899 and 1907 Hague Regulations did not deal with reprisals for fear that their mention could serve to validate their use,<sup>236</sup> customary practice prior to World War I formed the basis of the law of reprisals, and states widely agreed that reprisals could be used under the appropriate circumstances.<sup>237</sup>

Reprisals were used frequently during World War I, seemingly without any limitations.<sup>238</sup> Subsequently, the 1919 Commission Report condemned many practices conducted under the guise of reprisals. But it was not until the 1949 Geneva Conventions that the first express prohibition of reprisals was formulated.<sup>239</sup> Even then, the limitations were restricted to the use of reprisals against prisoners of war, and they were considered innovative rather than a codification of the customary international law existing at that time.<sup>240</sup> In fact, at that time, the International Law Association thought that there should be a mitigated right of reprisals against prisoners of war, not a total prohibition.<sup>241</sup> Some argued that even though the use of reprisals against innocent prisoners was detestable, the threat of its use could actually secure better treatment for prisoners.<sup>242</sup>

The uncertainty surrounding the law of reprisals provided a fertile ground for their large-scale use during World War II. Two possible norms existed at the outset of the War: (1) reprisals may not violate humanitarian norms; and (2) the requirement of proportionality must be met.<sup>243</sup> With respect to the former, none of the combatants in World War II

<sup>235</sup> *Id.* at arts. 85–6, as cited in Edward K. Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49, 52–3 (1990).

<sup>236</sup> See KALSHOVEN, *supra* note 223.

<sup>237</sup> Kwakwa, at 54; see also JAMES M. SPAIGHT, WAR RIGHTS ON LAND 463 n.1 (1911) (suggesting that the Anglo-American War of 1812 provides an example of a “war in which each side deliberately practiced inhumanities on the greatest scale by way of reprisals”).

The German MANUAL OF LAND WARFARE (*Kriegsbrauch in Landkriege*) similarly sanctioned the killing of prisoners in unavoidable cases of urgent necessity. The MANUAL distinguished between the *Kriegsraison* (reason, necessity, or convenience of war) and the *Kriegsmanier* (custom of war). The *Kriegsmanier* was deemed to be generally binding on belligerents but could be overruled by the *Kriegsraison* in special circumstances, even for attaining military success. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 352 (1954).

<sup>238</sup> Oppenheim describes one shocking incident as follows:

In September 1914, during the First World War, the German armies in Belgium burned the University of Louvain, including its world-famed library, and other buildings in other towns, by way of reprisals, alleging that Belgian civilians had fired upon the German troops. The Belgian Government denied these charges, and maintained that German soldiers in Louvain had shot one another; the civilized world was horrified at these reprisals.

OPPENHEIM, *supra* note 230, at 564 n.3.

<sup>239</sup> See KALSHOVEN, *supra* note 223, at 107; and Kwakwa, *supra* note 237, at 55.

<sup>240</sup> Kwakwa, *supra* note 237, at 55.

<sup>241</sup> KALSHOVEN, *supra* note 223, at 107.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 212–13. The United States’ position on reprisals at the time of World War II can be found in U.S. DEPT OF THE ARMY RULES OF LAND WARFARE § 358 (Field Manual 27–10, 1940), which states

358. **Reprisals.** – *a. definition.* – Reprisals are acts of retaliation resorted to by one belligerent against the enemy individuals or property for illegal acts of warfare committed by the other belligerent, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.

*b. When and how employed.* – Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices. They should never be employed by individual soldiers except by direct orders of a commander, and the latter

showed any great respect for civilian life and property of the enemy, as evidenced by the indiscriminate bombing of enemy towns and the use of economic blockades.<sup>244</sup> In relative contrast, the prohibition of the use of reprisals against prisoners of war fared better.<sup>245</sup> Notably, in August 1944, French partisans shot and killed eighty German prisoners after learning that the Germans had executed eighty French prisoners.<sup>246</sup> But proportionality of the reprisals was more often disregarded; it is hard to assess in the case of an economic blockade,<sup>247</sup> but not so in cases of human lives. Hitler's order to kill ten Italian soldiers for every German soldier who was killed in an attack on a truck in Rome was clearly disproportionate.<sup>248</sup> Kalshoven remarked that reprisals in World War II were

[I]n fact virtually useless, for instance, in respect to an enemy who by his whole attitude demonstrates a total disrespect for certain parts of the law of war (as was the case with Germany, particularly where occupation law was concerned). They are equally useless when applied in a situation where the interests at stake are so great as to make it utterly improbable that a belligerent would change his policy merely on account of a certain pressure exerted on him by the enemy: instances of such crucial issues were the strategic air bombardment and the unrestricted submarine warfare, practiced by either side in the course of the Second World War.<sup>249</sup>

The Germans and Allies indiscriminately bombed civilian populations during World War II on numerous occasions. After the mistaken bombing of London by the *Luftwaffe* in September 1940, England bombed Berlin as an act of reprisal. Germany responded

should give such orders only after careful inquiry into the alleged offense. The highest accessible military authority should be consulted unless immediate action is demanded as a matter of military necessity, but in the latter event a subordinate commander may order appropriate reprisals upon his own initiative. Hasty or ill-considered action may subsequently be found to have been wholly unjustified, subject the responsible officer himself to punishment as for a violation of the laws of war, and seriously damage his cause. On the other hand, commanding officers must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of barbarous outrages.

*c. Who may commit acts justifying reprisals.* – Illegal acts of warfare justifying reprisals may be committed by a government, by its military commanders, or by a community or individuals thereof, whom it is impossible to apprehend, try, and punish.

*d. Subjects of reprisals.* – The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed. Reprisals against prisoners of war are expressly forbidden by the Geneva Convention of 1929 (See par. 73.)

*e. Form of reprisal.* – The acts resorted to by way of reprisal need not conform to those complained of by the injured party, but should not be excessive or exceed the degree of violence committed by the enemy. Villages or houses, etc., may be burned for acts of hostility committed from them, where the guilty individuals cannot be identified, tried, and punished. Collective punishments may be inflicted either in the form of fines or otherwise.

*f. Procedure.* – The rule requiring careful inquiry into the real occurrence will always be followed unless the safety of the troops requires immediate drastic action and the persons who actually committed the offense cannot be ascertained.

<sup>244</sup> KALSHOVEN, *supra* note 223, at 212–13.

<sup>245</sup> *Id.*

<sup>246</sup> Kwakwa, *supra* note 237.

<sup>247</sup> KALSHOVEN, *supra* note 223, at 213.

<sup>248</sup> Kwakwa, *supra* note 237.

<sup>249</sup> KALSHOVEN, *supra* note 223, at 214.

by excessive bombing of London and other British cities, and explained it as acts of legitimate reprisals. Then, the Allies firebombed Dresden in reprisal for the bombing of Coventry. The entire city of Dresden lay desolate, leaving, by different estimates, 30,000 to 100,000 casualties in its wake. The Allies bombed German civilian centers extensively during the war, but were never held accountable for their actions. The same tit-for-tat occurred in the treatment of POWs by Germany, Japan, and the USSR. An untold number of POWs were killed and mistreated in the name of this barbaric practice, yet few of the perpetrators of such crimes were prosecuted. No one was prosecuted from the Allies.

The IMT did not deal with the doctrine of reprisals in its judgment, though the question was dealt with in the Subsequent Proceedings. However, a discussion of reprisals did take place due to a remark by Hermann Göring that led Justice Jackson to believe that the defense was going to be raised.<sup>250</sup> Jackson set out the conditions of reprisal as follows:

First, the defence would have to relate the plea to acts other than against prisoners of war, as reprisals against those persons were specifically prohibited under the P.O.W. Convention of 1929. Then, any act claimed to be justified as a reprisal “must be related to a specific and continuing violation of international law on the other side;” otherwise international law would have no foundation, as any “casual and incidental violation” on one side would “completely absolve the other from any rules of warfare.” Next, the act claimed to constitute a reprisal “must follow within a reasonable time” after the offence, and then only after due notice; and the act “must be related reasonably to the offense which it sought to prevent. That is, you cannot by way of reprisal engage in wholesale slaughter in order to vindicate a single murder.” A final most important point was that “a deliberate course of violation of international law cannot be shielded as a reprisal. . . . You cannot vindicate a reign of terror under the doctrine of reprisals.”<sup>251</sup>

Thus, Justice Jackson did not view reprisals as a defense to the crimes enunciated in the London Charter. Even if the defense did apply to war crimes and crimes against peace, it could not apply to CAH, as one of the elements of the defense is that the action is against belligerents, not against a state’s own citizens. The definition of reprisals quoted above states, “Reprisals in time of war occur when one belligerent retaliates against another.”<sup>252</sup> Furthermore, Oppenheim writes, “Only reprisals against belligerents are admissible.”<sup>253</sup>

In the *Hostages* case of the CCL 10 Proceedings, the murder of thousands of civilians from Greece, Yugoslavia, and Albania by German troops under the command of the defendants formed part of the indictment.<sup>254</sup> The victims were in two categories: those who were simply rounded up and put in prison camps, and those arbitrarily labeled as partisans.<sup>255</sup> Victims in both categories were murdered without trial in retaliation for attacks by lawfully constituted enemy military forces, and for attacks by unknown persons against German troops.<sup>256</sup> The indictment stated, “These acts of collective punishment

<sup>250</sup> *Id.* at 217.

<sup>251</sup> 9 IMT 323. Kalshoven, *supra* note 223, at 217–18.

<sup>252</sup> See *supra* note 243.

<sup>253</sup> OPPENHEIM, *supra* note 230, at 562.

<sup>254</sup> U.S. v. Wilhem List et al. [hereinafter the *Hostages* case], reprinted in XI Trials of War Criminals before Nuernberg Military Tribunals under Control Council Law No. 10 (U.S. GPO, 1951), at 765–66.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

were part of a deliberate scheme of terror and intimidation, wholly unwarranted and unjustified by military necessity and in flagrant violation of the laws and customs of war.”<sup>257</sup>

In his opening statement at the CCL 10 Proceedings, General Taylor stated for the prosecution,

[T]he concepts of “hostage” and “reprisal” both derive from relations between nations, or between their opposing armed forces, and not from relations between a nation or its armed forces on the one hand and the civilian population of an occupied territory on the other: retaliatory measures against the latter category could indeed constitute reprisals, but only if these were inflicted for the purpose of persuading the enemy government to discontinue an unlawful course of action, and not for the purpose of punishing the civilian inhabitants themselves [ . . . ]. [T]he execution of hostages, under the circumstances pertinent to this case, [was] quite definitely and clearly a crime under international law.<sup>258</sup>

Defendant’s counsel, Dr. Laternser, argued in his opening statement that the hostage killings had been reprisals. He denied that reprisals could not apply in relations of a nation or its armed forces to the population of an occupied territory:

The action according to plan of inciting the civilian population to acts of sabotage and attacks upon members of the German occupation forces and the fight of the partisans in violation of international law in the occupied territories had the result that during the Second World War reprisals had to be resorted to above all against illegal actions of the civilian population, in order to force the latter to desist from its illegal conduct. It would be absurd to assume that the commanders of the armed forces of a belligerent party had to endure acts of an enemy civilian population in violation of international law, without being able to protect their troops, when necessary, by retaliatory measures.<sup>259</sup>

Thus, Laternser concluded,

[T]he killing of hostages by way of reprisals was specifically justified by the very operation of the doctrine of reprisals. A contrary opinion might be readily understandable “from the point of view of humanitarian principles, but it is also quite certain that it is incorrect from the point of view of the laws of war.”<sup>260</sup>

In its judgment, the court distinguished the taking of hostages (holding persons to insure the other party’s future good conduct) from reprisal (holding or punishing persons for past violations or conduct). The court determined that in this instance the term “hostage” was improperly used to describe reprisals.<sup>261</sup> The court, after making the distinction, did not treat the subjects differently.<sup>262</sup> It determined that the execution of hostages – that is, reprisal – could be used only as a last resort, that the act could not exceed in severity the unlawful act it was designed to correct, that there had to be

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 841.

<sup>259</sup> *Id.* at 867.

<sup>260</sup> *See Id.* In particular, the closing statement, pp. 1207–09; quoted words are from 1209.

<sup>261</sup> *Id.* at 1248–49.

<sup>262</sup> KALSHOVEN, *supra* note 223, at 225.

publication of proclamations notifying the fact that hostages or reprisal prisoners had been taken, and that there had to be judicial proceedings in order to determine whether the fundamental requirements for shooting hostages or reprisal prisoners had been met.<sup>263</sup> Kalshoven comments on this position as follows:

It is submitted that what the Tribunal considered to be a rule of international law, in reality was its own invention: it is not believed that international law has yet considered the details of the procedure which a military commander ought to follow in order to arrive at a balanced decision in respect to a contemplated execution of hostages or reprisal prisoners. What remains, of course, is the rule at the root of the Tribunal's reasoning, that "the lives of persons may not be arbitrarily taken."<sup>264</sup>

Reprisal was raised in several other cases from the CCL 10 Proceedings. In both the *Einsatzgruppen* and *Hostages* cases, reprisal was allowed in principle, but was denied in the national prosecutions of *Calley*<sup>265</sup> and *Priebke*<sup>266</sup> by the United States and Italy, respectively.

In the *Hostages* case, the court considered that the shooting of prisoners in reprisal was "justified as a last resort in procuring peace and tranquility in occupied territory and has the effect of strengthening the position of a law-abiding occupant." The Tribunal further specified that "excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission."<sup>267</sup>

In the *Einsatzgruppen* case, the defense raised the justification of reprisals for the extermination program of the Jews and other groups.<sup>268</sup> The tribunal, noting that the victims of reprisals are usually innocent of the acts retaliated against, stated, "There must at least be such close connection between these persons and these acts as to constitute a joint responsibility."<sup>269</sup> The tribunal discussed an incident where "859 out of 2100 Jews shot in alleged reprisal for the killing of twenty-one German soldiers near Topola were taken from concentration camps in Yugoslavia, hundreds of miles away."<sup>270</sup> This fact, along with the fact that 2,100 were killed for twenty-one deaths, led the tribunal to conclude that it was "obvious that a flagrant violation of international law had occurred and outright murder has resulted."<sup>271</sup> The tribunal went on to define reprisals as follows:

Reprisals in war are the commission of acts which, although illegal in themselves may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future.<sup>272</sup>

In the *High Command* case, the defendants were charged, with *inter alia*, having taken part in the making and implementation of the policy of terror and murder undertaken

<sup>263</sup> *Hostages* case, *supra* note 254, at 1250; See also KALSHOVEN, *supra* note 223, at 219–30.

<sup>264</sup> KALSHOVEN, *supra* note 223, at 228–29.

<sup>265</sup> *U.S. v. Calley*, *supra* note 121, at 1174.

<sup>266</sup> See KAI AMBOS, DIE ALLEGEMEINE TEIL DES VÖLKERSTRAFRECHTS: ANSÄTZE EINER DOGMATISIERUNG 215–21 (2002).

<sup>267</sup> *Hostages* case, *supra* note 254, at 1250–51.

<sup>268</sup> *Einsatzgruppen* case, *supra* note 107, at 411.

<sup>269</sup> *Id.* at 493–94.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 493.

in the occupied territories. The tribunal reduced the views of the *Hostages* case to the following statement:

[T]hat under certain very restrictive conditions and subject to certain rather extensive safeguards, hostages may be taken, and after a judicial finding of strict compliance with all pre-conditions and as a last desperate remedy hostages may even be sentenced to death. It was held further that similar drastic safeguards, restrictions, and judicial pre-conditions apply to so-called “reprisal prisoners.”<sup>273</sup>

Subsequent to World War II, the law of reprisals emerged as conventional law in the four Geneva Conventions of 1949. These Conventions prohibit:

- (1) Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention.<sup>274</sup>
- (2) Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention.<sup>275</sup>
- (3) Measures of reprisals against prisoners of war.<sup>276</sup>
- (4) Reprisals against civilians and their property.<sup>277</sup>

The use of reprisals was further restricted in conventional international law by Protocol I to the Geneva Conventions. Because of the strong opposition to a broad article that outlawed the use of all reprisals, many articles were adopted outlawing individual types of reprisals. This virtually had the same effect as a broad prohibition. The relevant articles of Protocol I provide that:

- (1) Reprisals against the wounded, sick and shipwrecked and against medical transportation are prohibited.<sup>278</sup>
- (2) Civilian objects shall not be the object of reprisals.<sup>279</sup>
- (3) Objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, shall not be made the object of reprisals.<sup>280</sup>
- (4) Attacks against the civilian population or civilians by way of reprisals are prohibited.<sup>281</sup>
- (5) Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be

<sup>273</sup> KALSHOVEN, *supra* note 223, at 233.

<sup>274</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) art 46, 75 U.N.T.S. 31, 6 U.S.T. 3114.

<sup>275</sup> Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (Geneva Convention II), 75 U.N.T.S. 85, 6 U.S.T. 3217, at art. 47.

<sup>276</sup> Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 75 U.N.T.S. 135, 6 U.S.T. 3316, at art. 13, ¶ 3.

<sup>277</sup> Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, at art. 33.

<sup>278</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1124 U.N.T.S. 609, 16 I.L.M. 1442 (1977) at art. 20.

<sup>279</sup> *Id.* at art. 52(1).

<sup>280</sup> *Id.* at art. 54(4).

<sup>281</sup> *Id.* at art. 51(6). *See also* art. 51(5)(6) for prohibition of indiscriminate attack.



expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population.<sup>282</sup>

The concept of impermissibility of reprisals extends to various aspects of the ways and means of conducting war. It also applies implicitly to certain prohibitions, such as the prevention of humanitarian aid to civilian populations, which is a war crime. In recent conflicts, belligerents have taken to using food as a weapon of war by preventing civilian populations from receiving it. This constitutes a war crime, but when states resort to it as reprisals, it is prohibited under the two aspects of the law of armed conflicts.<sup>283</sup>

The ICTY and ICTR Statutes, which do not have detailed provisions defining war crimes but incorporate by reference the “laws and customs of war” and the “grave breaches” of the Geneva Conventions, do not cover reprisals. Similarly, the Rome Statute does not specifically address the issue of reprisal.

The ICTY rejected the defense of reprisal upon its first instance dealing with the concept in the *Kupreškić* case,<sup>284</sup> wherein the Trial Chamber ruled that:

[w]hile reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in the future within international law, at present they can no longer be justified in this manner.<sup>285</sup>

The Trial Chamber sought to determine the status of reprisals under customary international law, and concluded that they are also precluded in internal armed conflicts, wherein the “demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule.”<sup>286</sup> This point has been criticized.<sup>287</sup>

In the *Martić* case,<sup>288</sup> Milan Martić was accused of having ordered Operation Flash, the bombardment of the Croatian city of Zagreb with cluster bombs after the Croats recaptured the Krajina region from Serb forces. Civilians were killed in the bombardment. The Trial Chamber stated that customary international law contained an absolute prohibition on reprisals against civilians in both internal and international conflicts.<sup>289</sup> The Chamber observed that a reprisal is an exceptional measure defined as an otherwise unlawful act rendered lawful by the fact that it is made in response to another belligerent’s violation of international humanitarian law.<sup>290</sup> The reprisal must also be a measure of

<sup>282</sup> *Id.* at art. 35 and 55(1).

<sup>283</sup> See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (May 27, 1994). There are several sections in that report on humanitarian relief as a war crime.

<sup>284</sup> Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment (Jan. 14, 2001) [hereinafter *Kupreškić et al.* Trial Judgment].

<sup>285</sup> *Id.* ¶ 530.

<sup>286</sup> *Id.* ¶ 533.

<sup>287</sup> See, e.g., C. Greenwood, *Belligerent Reprisals in the Jurisprudence*, in INTERNATIONAL AND NATIONAL PROSECUTIONS OF CRIMES UNDER INTERNATIONAL LAW 549–556 (H. Fischer et al., eds., 2001), cited in VAN SLIEDREGT, *supra* note 199, at 293–94 (observing a seeming gap between international law and criminal law thinking on the matter of reprisals).

<sup>288</sup> Prosecutor v. Martić, Rule 61 Decision, Case No. IT-95-11-R61 (Mar. 8, 1996) [hereinafter *Martić* Rule 61 Decision].

<sup>289</sup> *Id.* ¶¶ 15–18.

<sup>290</sup> See Martić v. Prosecutor, Case No. IT-95-11-T, Judgment, ¶ 465–67 [hereinafter *Martić* Trial Judgment], *aff’d* Prosecutor v. Martić, Case No. IT-95-11-A, Judgment, ¶ 263 [hereinafter *Martić* Appeals Judgment],

last resort, and must be preceded by a formal warning.<sup>291</sup> The Trial Chamber's findings were confirmed on appeal.<sup>292</sup>

The jurisprudence of the ICTR and eventually that of the Rome Statute will have to address reprisals on the basis of existing conventional and customary law. It is doubtful that the ICC will allow the defense of reprisal under Article 31(3) and Article 21. However, with the requirements of proportionality (express warning in advance, and termination as soon as the adversary has discontinued unlawful attacks are followed), the question issue is unclear. Professor Osiel provides insights on this current state of the law on reprisals against civilians, which are of great significance to specific crimes and the protected population of CAH:

First, when interpreted in light of enduring state practice, the pertinent treaties do not fully outlaw civilian reprisal, as they purport to do on their face. Second, even insofar as these treaties ban civilian reprisal, they are at odds with customary law, which does not do so. Third, to the extent that customary law has moved in the direction of prohibiting civilian reprisals, the United States has been a persistent objector to that trend and therefore is not bound by it. The same goes for *jus cogens* norms, a concept that the United States has never officially endorsed in any dispute.

If there is an armed conflict with Al Qaeda, then America does not need a right of reprisal to kill that organization's leaders and detain its members for the duration of the conflict. Both leaders and followers could then be considered combatants and as such may lawfully be treated in these ways. But if there is no armed conflict, then even a right of belligerent reprisal would not permit torture, other inhumane treatment, and arbitrary detention, insofar as the United States may have accepted the *jus cogens* status of these prohibitions. Any legal argument in favor of such practices would then have to be consistent with the international law of peacetime countermeasures, which is even more restrictive of force than the rules on belligerent reprisals. Applying this view of the law to pertinent facts, reprisals and countermeasures – the chief expression of the reciprocity principle within relevant law – were therefore either unnecessary or insufficient to authorize the Bush administration's most controversial counterterrorism practices.

Yet, this is only because current humanitarian law, as the United States and key allies endorse it, relies on distinctions that are logically incoherent or morally indefensible, we will see. These countries insist that international law respect the reciprocity principle to such an extent that remaining doctrinal obstacles to justifying all Bush administration policies as lawful reprisal become entirely arbitrary. Moreover, most legal specialists hold the view that members of terrorist groups are not "directly participating in hostilities" except when immediately or imminently perpetrating violence against others. If so, then

referring to COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 3457 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY ON ADDITIONAL PROTOCOLS]; Kupreškić et al. Trial Judgment, *supra* note 284, ¶ 535.

<sup>291</sup> See Martić Trial Judgment, *supra* note 290, ¶¶ 302, 468 n.943 referring to Witness MM-117, 13 Oct 2006, T. 9402–9403 (holding that even if Croatian units had committed serious violations of humanitarian law as Martić alleged, the shelling of Zagreb still illegal because (1) it was not a last resort as peace negotiations were conducted during Operation Flash until 3 May 1995, and (2) because the RSK authorities had not formally warned Croatian authorities before the shelling). The Appeals Court affirmed the Trial Judgment on these findings. See Martić Appeals Judgment, *supra* note 290, ¶¶ 265–67.

<sup>292</sup> *Id.* ¶ 269.

they generally remain protected as civilians at other times, and the reprisal right then becomes necessary to justify America's attacking them.<sup>293</sup>

#### §4. *Tu Quoque*

The argument of *tu quoque* ("you also" or "my accusers did the same thing") resembles that of reprisal, as both presuppose a violation of international law. The former purports to justify the conduct of a state that violates norms and standards of international regulation of armed conflicts on the grounds that the state upon whom or upon whose subjects the harm has been inflicted has engaged in similar conduct. *Tu quoque* differs from reprisal in that it is not meant to compel the adversary to act within international norms.<sup>294</sup> As Von Knierem writes:

[T]he principle of *tu quoque* is invoked not for the purpose of inducing the enemy to desist from its unlawful conduct but as an estoppel against the enemy's subsequent attempt to call into question the lawfulness of the same kind of conduct of the other side. Conduct violating a rule of international law cannot indeed be claimed to have been taken in reprisal by one who at the time was ignorant that the enemy had engaged in the same kind of conduct. But it would still be a mockery of justice if either state could blame the other for the violation of international law or even punish the latter's citizens for it. If it were to try, it would properly be met with the plea of estoppel, unless it were willing to have applied against itself the same sanction which it tries to inflict on the other side.<sup>295</sup>

*Tu quoque* is essentially a retributive argument based on the Old Testament's "an eye for an eye, and a tooth for a tooth." But the biblical retribution is to be against the offender who inflicted the original harm; in *tu quoque*, the harm is inflicted against persons other than those who committed the original violation. Thus, it shares a common denominator with reprisals: collective punishment.

Under *tu quoque*, a state would be allowed to reciprocate against another's violation of international law – that is, commission of a war crime – even where such reactions would not be justifiable as reprisal.<sup>296</sup> The net result is a situation in which neither state views itself as bound by a rule of international law. This suspension of a rule of international law will last for the duration of the situation, such as a war.<sup>297</sup> Thus, once one state violates a norm, this norm no longer applies to the relations between the violating state and the state against which the violation occurred.<sup>298</sup>

*Tu quoque* was raised before both the IMT and IMTFE. In the trials of Admirals Karl Dönitz and Erich Raeder, the IMT refused to punish Dönitz and Raeder for violations of the international law concerning submarine warfare:

In view of all the facts proved, and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answer to interrogatories by Admiral Nimitz that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the

<sup>293</sup> OSIEL, *supra* note 36, at 50–51, 153.

<sup>294</sup> VAN SLIEDREGT, *supra* note 199, at 294.

<sup>295</sup> VON KNIEREM, *supra* note 173, at 312.

<sup>296</sup> *Id.* at 313.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

first day that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.<sup>299</sup>

The British in the Skagerrak and the Americans in the Pacific also employed unrestricted submarine warfare against neutral merchant ships, according to the testimony of a defense witness, Admiral Chester Nimitz.<sup>300</sup>

Similarly, the prosecutors did not charge any Nazi defendants for planning or ordering the mass bombing of London and Coventry because of similar Allied bombings of the German cities of Hamburg and Dresden and the Japanese cities of Hiroshima and Nagasaki, among others. In the words of Francis Biddle, an American judge at Nuremberg, “We would have looked like fools.”<sup>301</sup>

The IMTFE rejected an argument similar to *tu quoque* in the case of a defense counsel who sought to absolve his client, who stood accused of authorizing the rape and murder of Chinese women, reasoning that the Chinese military forces had committed similar crimes.<sup>302</sup> The IMT, IMTFE, and the CCL 10 Proceedings rejected *tu quoque* in all other respects, holding that it did not sit to pass judgment on the violations of international law of other nations.<sup>303</sup> This is understandable in light of the vulnerability of the Allies arising from such a plea.<sup>304</sup>

In the *Ministries* and *High Command* cases of the CCL 10 Proceedings, *tu quoque* was explicitly rejected. The courts essentially held that one’s wrongs cannot serve to make right another’s wrongs.<sup>305</sup> In the *Einsatzgruppen* case, it was established that Allied violations of international humanitarian law were incomparable to those committed by the Nazis:

There is still no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.<sup>306</sup>

As one author states:

As far as the *tu quoque* argument is concerned, it need only be mentioned that it is no defence for an individual to claim that a crime for which he is being tried has also been committed by others. Only if there is sufficient evidence to conclude that the act is practiced with impunity by a large number of other persons, would it be justified to assume that it was not a crime, since international custom and general practice condoned it [...]. But under no circumstances can the *tu quoque* argument be considered an absolute defence for a crime against international law.<sup>307</sup>

<sup>299</sup> 22 IMT 559. The Tribunal arrived at the same conclusion for Raeder at 563.

<sup>300</sup> See RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002).

<sup>301</sup> FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 452, 455 (1962).

<sup>302</sup> See YUMA TOTANI, *THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II* 124–25 (2008).

<sup>303</sup> VON KNIERIEM, *supra* note 173, at 314.

<sup>304</sup> BEST, *supra* note 113, at 78.

<sup>305</sup> See *U.S. v. Von Weizsäcker et al. (the Ministries case)*, XIV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (Washington, DC: GPO, 1949–53), at 322; and *U.S. v. von Leeb [hereinafter the High Command case]*, reprinted in XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (GPO, 1951), at 482.

<sup>306</sup> *Einsatzgruppen* case, *supra* note 107, at 457.

<sup>307</sup> ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 120–21 (1962).

Woetzel further states:

It would be conceivable if such cases where the practice of nations is generally in contravention of certain provisions of international law, that a person responsible for the carrying on of such practices did not act with any *mala intention* or did not intend to violate the law of nations. His action would, therefore, lack sufficient *mens rea* for holding him guilty of committing a crime against international law. This does not, however, represent a recognition of the *tu quoque* argument as justifying a violation of international law.<sup>308</sup>

*Tu quoque* was raised before the ICJ in the case of *Bosnia Herzegovina v. Federal Republic of Yugoslavia*, wherein the former objected to claims by the latter contending that one could not rebut a charge of genocide by pointing at an opponent's offenses. Although the ICJ did not expressly make a ruling, Vice-President Weeramantry dissented from the majority, endorsing Bosnia's argument.<sup>309</sup>

The ICTY rejected *tu quoque* in the *Kupreškić* case, wherein it ruled that the defense was "fallacious and inapplicable."<sup>310</sup> When the defense counsel presented a list of crimes allegedly committed by the adversaries, the Trial Chamber referred to post-World War II jurisprudence and customary international law in barring the defense. Moreover, the Trial Chamber considered the nature of the norms of international humanitarian law to be absolute, especially those forbidding war crimes, CAH, and genocide, which were found, in principle, to be immune to the *tu quoque* argument.<sup>311</sup> In the *Limaj et al.* case, the Trial Chamber also rejected the *tu quoque* principle, emphasizing that "the existence of an attack from one side involved in an armed conflict against the other side's civilian population does not justify an attack by that other side against the civilian population of its opponent."<sup>312</sup> Similarly, in the *Martić* case,<sup>313</sup> the Appeals Chamber held that "[i]t is well established in the jurisprudence of the Tribunal that arguments based on reciprocity, including the *tu quoque* argument, are no defense to serious violations of international humanitarian law."<sup>314</sup> The Trial Chamber in the *Kupreškić* case, however, expressly admitted that state practice did not support its view that reprisals are illegal, choosing instead to rely on *opinio juris* to discern custom.<sup>315</sup> In other words, "The actual practice of states [ . . . ] reflects a much deeper commitment to the reciprocity principle than does learned judicial opinion."<sup>316</sup>

*Tu quoque* at the ICC may be less problematic than it was before the IMT and the CCL 10 Proceedings, where the victorious Allies were the judges, the prosecution, and the executioners, and where the victors also committed acts that warranted investigation or prosecution.<sup>317</sup>

<sup>308</sup> *Id.* at 188–89.

<sup>309</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, 1997 I.C.J. 243 (Dec. 17).

<sup>310</sup> *Kupreškić et al.* Trial Judgment, *supra* note 284, ¶ 515–20 (stating that "individual criminal responsibility for serious violations of that law may not be thwarted by recourse to arguments such as reciprocity").

<sup>311</sup> *Id.* ¶¶ 515–20.

<sup>312</sup> Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgment, ¶ 193 (Nov. 30, 2005).

<sup>313</sup> *Martić* Appeals Judgment, *supra* note 290, ¶ 111.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* ¶ 527.

<sup>316</sup> OSIEL, *supra* note 36, n.294.

<sup>317</sup> *Id.*, at 105.

## §5. Nonapplicability of Reprisals and *Tu Quoque* to Crimes Against Humanity

CAH are committed pursuant to state policy, carried out by individuals acting for or on behalf of a state or by virtue of a policy, for or on behalf of a given group of persons, whose victims are a group of persons who are nationals of their same state.<sup>318</sup> By analogy to war crimes, neither reprisals nor *tu quoque* can serve as an excuse, or even as a mitigating factor, in connection with CAH. However, the question arises with respect to some of the specific acts contained within CAH.

These specifics will of course vary depending upon the formulations applied. Article 6(c) of the London Charter contains the shortest list of specific crimes, while the Rome Statute's Article 7 contains the longest.<sup>319</sup> Some of these specifics may be deemed reasonable reprisals if they apply to acts that are not prohibited in the law of armed conflicts. The reason for that analogy is that the law of armed conflicts prohibits reprisals. An example is deportation, which, as a specific crime of CAH, could be the subject of reprisals because it is not clearly prohibited by the law of armed conflicts (if it is deportation of the nationals of a state that has deported the nationals of the responding state). Since that practice violates other international human rights law norms, can it still be deemed excusable under reprisals?

A human vulnerability gap still exists with respect to certain situations, such as the one described above. This gap derives from the distinction between applicable sources of law, that is, humanitarian regulation of armed conflicts and human rights law, and the legal distinction based on the contexts of armed conflict and peace and the diversity of nationality between victim and perpetrator. Surely, if the goal of international law is the protection of victims, these distinctions should not apply.<sup>320</sup>

It is therefore indispensable that a new codification of CAH includes an explicit exclusion of reprisals and *tu quoque* as excusable factors, since no international instrument applicable to CAH has yet addressed these questions.

## §6. Immunity of Heads of State

Historically, heads of state were not subject to criminal responsibility for their actions because of the merger of the sovereign and the sovereignty of the state. This is particularly true with respect to monarchies, as evidenced by Louis XIV's statement, "*L'état c'est moi*."<sup>321</sup> It was not until the Treaty of Versailles that immunity of a head of state was

<sup>318</sup> See *infra* ch. 1, §5. If the same acts were committed by belligerents in time of war or against nationals of another state, these acts would be war crimes. For the overlap between these normative provisions, see Bassiouni, *supra* note 6.

<sup>319</sup> These various texts appear *infra* ch. 3, §3, and ch.4, Part A, §4.

<sup>320</sup> See *International Protection of Victims*, 7 NOUVELLES ETUDES PÉNALES (M. Cherif Bassiouni ed., 1988); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N.G.A. Res. A/Res./40/34, Dec. 11, 1985; M. Cherif Bassiouni, *The Protection of "Collective Victims" in International Law*, N.Y.U. L. SCH. J. HUM. RTS. 239 (1985).

<sup>321</sup> Mark A. Summers, *Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that are not Parties to the Statute of the International Criminal Court*, 3 BROOK. J. INT'L L. 463, 464 (2006). Some scholars argue that, until the last century, the doctrine of head of state immunity and the doctrine of state sovereign immunity were one and the same. See Daniel M. Singerman, *It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT'L L. REV. 413, 427 (2007). But see Kerry Creque O'Neill, *A New Customary Law of Head of State Immunity?: Hirohito and Pinochet*, 38 STAN. J. INT'L L. 289, 292

removed for the crime of aggression by virtue of that document's Article 227, which provides:

The Allied and Associated Powers publicly arraign William II of Hohenzollen, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties [ . . . ].

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.<sup>322</sup>

This effort was not carried beyond the stage of its inclusion in a treaty. The Allies did not set up an international tribunal or to seek to secure jurisdiction over Kaiser Wilhelm, and the Dutch government refused extradite the German emperor because of his position as a sovereign.<sup>323</sup>

It would surely be difficult to construct a customary rule of international law on this limited basis, but by 1945 the Allies, acting through representatives at the London Conference, asserted the principle of heads of state responsibility for aggression, war crimes, and CAH, as if it were both well established and uncontroverted. Article 7 of the London Charter states:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.<sup>324</sup>

By 1946, when the IMT convened, both Hitler and Mussolini had died, and thus no prosecutions for heads of state took place in the European theater. In Japan, however, Emperor Hirohito was still alive and the Tokyo Charter equally removed the immunity. Article 6 of the Tokyo Charter states:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.<sup>325</sup>

By the good grace of General Douglas MacArthur, Hirohito was spared the indignity of being held accountable for his country's acts of aggression against more than one state. Thus, we can find no further practice in support of this proposition.

However, the ILC's Nuremberg Principles asserted, "The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law."<sup>326</sup>

(2002) (arguing that head of state immunity and sovereign immunity were separate doctrines but "arose at a time when the state and its sovereign were viewed as one").

<sup>322</sup> Treaty of Versailles, *supra* note 5, at art. 227.

<sup>323</sup> See *infra* ch. 3, §2.

<sup>324</sup> IMT Charter, *supra* note 4, at art. 7.

<sup>325</sup> Tokyo Charter, *supra* note 102, at art. 6.

<sup>326</sup> Nuremberg Principles, *supra* note 4, at Principle III.



The ILC's 1991 Draft Code of Crimes reaffirms that heads of state should be held accountable for their crimes against the peace and security of mankind. Article 13 provides, "The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility."<sup>327</sup> Article 7 of the 1996 Draft Code of Crimes restates the language of the 1991 formulation: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."<sup>328</sup>

Article 7 of the ICTY Statute states in very similar language that, "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."<sup>329</sup> Article 6 of the ICTR Statute offers language identical to that of ICTY Article 7 regarding this issue.

The Rome Statute goes further in detailing the nonapplicability of procedural and substantive immunities, and goes even further than any other formulation in listing the type of persons who could claim such immunities by virtue of their official capacity. The removal of immunities is all-encompassing.

Article 27 of the Rome Statute reaffirms extant customary international law as follows:

#### Article 27

##### Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Although the prosecution of heads of states has occurred less with respect to national jurisdiction, recent events show that more states may be willing to prosecute heads of state so long as certain prerequisites are met. For instance, the torture, hostage taking, and murder that occurred during the Pinochet regime, as discussed in the next chapter, are best characterized as CAH. By 1990, when Pinochet finally agreed to step aside for democratic elections, thousands of Chileans had left the country while at least 2,279 individuals were murdered or disappeared.<sup>330</sup> The Chilean government provided him with complete amnesty for past crimes, and he was named a "Senator for Life."<sup>331</sup> Pinochet also kept his post as commander-in-chief of the army.<sup>332</sup> When it proved difficult for the

<sup>327</sup> Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 94, UN Doc. A/46/10 (1991) [hereinafter 1991 Draft Code] at art. 13.

<sup>328</sup> 1996 Draft Code of Crimes, *supra* note 138, at art. 7.

<sup>329</sup> ICTY Statute, *supra* note 136, at art. 7.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> Terence Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 FORDHAM INT'L L.J. 512, 539 (1996).

subsequent regime to address the crimes of the Pinochet regime, other nations, led by Spain, sought his prosecution.<sup>333</sup>

Spain asserted jurisdiction over those cases involving genocide and torture that occurred during Pinochet's regime,<sup>334</sup> justifying its claim for jurisdiction through a combination of universal and extraterritorial jurisdiction according to Chilean law.<sup>335</sup> Pinochet was arrested in London in October 1998 pursuant to an international arrest warrant. Spain based its claim to jurisdiction on Article 23.4 of Organic Law of the Judiciary, which permits jurisdiction without any national or presence requirement where Spain has a treaty-based obligation to prosecute. The Spanish courts held that a 1978 Chilean amnesty law did not apply, but did not address the issue of head of state immunity.<sup>336</sup>

The English House of Lords, on the other hand, assumed that if Pinochet were indeed a present head of state, he would have full immunity from prosecution.<sup>337</sup> In November 1998, a panel of five Lords ruled that there was no head of state immunity for Pinochet. The majority reasoned that any other decision would be absurd, as those most often responsible for international crimes would operate outside of the law.<sup>338</sup>

The case was reargued in front of different judges in March 1999, and decision was six to one against immunity. The Lords concluded that Pinochet committed torture and other extraditable crimes, and that his immunity as a former head of state did not extend to such crimes. A majority of the Lords agreed that a sitting head of state has personal immunity, but a former head of state only has immunity for his official acts.<sup>339</sup> For different reasons, three of the seven Lords found that torture could not be part of a head of state's immunity for official functions. Eventually, Pinochet was sent home due to ill health. He died in 2006 having never been prosecuted for his crimes.

In another case, Muammar al-Gaddafi, the head of state of Libya, was prosecuted in France for his role in the bombing of an airliner over Niger in 1989.<sup>340</sup> The *Gaddafi* case followed the events of the Pinochet extradition, but did not expand its precedent. The *Cour de cassation* held that Gaddafi was entitled to immunity because "under international law as it currently stands, the crime alleged [an act of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from

<sup>333</sup> ANDREA O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 59 (2002). The newly elected president, Patricio Aylwin, created the National Truth and Reconciliation Commission by presidential decree in order to address the human rights abuses of the 17-year Pinochet regime. Rebecca A. Fleming, *Comment, Holding State Sovereigns Accountable for Human Rights Violations: Applying the Act of State Doctrine Consistently with International Law*, 23 MD. J. INT'L L. & TRADE 187, 192 & n. 45 (1999). However, this commission lacked judicial authority to hold individuals responsible as would a court of law. See Coonan, *supra* note 332, at 512, 540.

<sup>334</sup> Bernaz and Prouvéze, *supra* note 300, at 367.

<sup>335</sup> *Id.*

<sup>336</sup> See generally Naomi Roht-Arriaza, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).

<sup>337</sup> Thus, the House of Lords decision corresponds with the ICJ's decision in the *Arrest Warrant* case, discussed *infra*.

<sup>338</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 1), House of Lords, 25 November 1998, 119 ILR 51 (2002).

<sup>339</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), House of Lords, 24 March 1999, [1999] 2 All ER 97.

<sup>340</sup> *Competing for top pariah*, ECONOMIST, Mar. 7, 1992, at 41.

jurisdiction for incumbent foreign Heads of State.”<sup>341</sup> This quotation would be used by Belgium in *Congo v. Belgium* to argue that the French court explicitly recognized exceptions to the principle of temporal immunity when it stated that an act of terrorism did not fit within one of the exceptions.<sup>342</sup> The court hearing the case, the ICJ, disagreed, as discussed below.

After Pinochet and Gaddafi, in the years between 1990 and 2006, fifty-nine heads of state from thirty-nine countries around the world were indicted for their misconduct while in office, whether for humanitarian law or human rights crimes, corruption crimes, or both.<sup>343</sup> The vast majority of recent prosecutions of heads of state have been by national courts exercising territorial jurisdiction, while a smaller group have involved transnational prosecutions based on universal or passive personality jurisdiction, and the smallest group have involved prosecutions by international tribunals.

In an important case from the smallest group, *Congo v. Belgium*, a Belgian judge issued an international arrest warrant in absentia against Abdoulaye Yerodia Ndombasi, who was at that time the incumbent Minister for Foreign Affairs of the Congo.<sup>344</sup> The arrest warrant charged that Yerodia had made “various speeches inciting racial hatred during the month of August 1998”<sup>345</sup> that resulted in the killing and lynching of several hundred Tutsis of Kinshasa.<sup>346</sup> The arrest warrant further alleged these acts constituted “grave breaches of the Geneva Conventions of 1949 and the Additional Protocols thereto and [...] crimes against humanity.”<sup>347</sup> Although Yerodia was not a Belgian national, these crimes were punishable under Belgian law, which provided, “The Belgian courts shall have jurisdiction in respect of the offenses [...] wheresoever they may have been committed,” and “[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law.”<sup>348</sup>

On October 17, 2000, the Congo responded to the arrest warrant by filing an application with the ICJ challenging Belgium’s use of universal jurisdiction and alleging Belgium had violated Yerodia’s diplomatic immunity as recognized in the Vienna Convention on Diplomatic Relations.<sup>349</sup> Belgium argued that temporal and substantive immunities are inapplicable when an individual is suspected of committing war crimes or CAH.<sup>350</sup> The ICJ examined both the *Pinochet* and *Gaddafi* cases, and concluded that a Minister for Foreign Affairs enjoys full functional immunity from criminal jurisdiction

<sup>341</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3, ¶ 56 (Feb. 14) [hereinafter *Congo v. Belgium*] (citing English translation of *Affaire Gaddafi*, Cassation Criminelle) (Mar. 13, 2001), <http://www.legifrance.gouv.fr/WAspad/LeRtf?cid=118878&table=CASS> (last visited on June 23, 2009).

<sup>342</sup> *Id.* at ¶ 56.

<sup>343</sup> ELLEN L. LUTZ AND CAITLIN REIGER, PROSECUTING HEADS OF STATE (Ellen Lutz and Caitlin Reiger eds., 2009).

<sup>344</sup> *Congo v. Belgium*, *supra* note 341, at ¶ 13.

<sup>345</sup> *Id.* at ¶ 15.

<sup>346</sup> *Id.* at ¶ 67.

<sup>347</sup> *Id.* at ¶ 13.

<sup>348</sup> *Id.* at ¶ 15 (citing Belgium Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto as amendment by Law of 19 February 1999 concerning the Punishment of Serious Violations of International Humanitarian Law).

<sup>349</sup> *Id.* at ¶ 17.

<sup>350</sup> *Id.*

and inviolability during his term of office,<sup>351</sup> and that there is no distinction between private acts and official acts during this period.<sup>352</sup>

In dicta, the ICJ described several situations in which immunity may not apply, including prosecution within an international tribunal or within a national jurisdiction after leaving office: (1) in a national court of the Foreign Minister's own country; (2) in a foreign national court if the State he represents waives immunity; (3) in any international criminal tribunal that may have jurisdiction; and (4) in any court with jurisdiction after he leaves office for acts committed prior or subsequent to his tenure in office, as well as for acts committed in his private capacity while he held office.<sup>353</sup> Also in dicta, the Court stated that substantive immunity was available for official acts.<sup>354</sup> Thus, the *Congo v. Belgium* case clearly leaves breathing room for immunity as an obstacle to prosecution of state representatives.<sup>355</sup>

The successful prosecution of Jean Kambanda,<sup>356</sup> the former Prime Minister of Rwanda, in the ICTR introduced cases involving heads of state into international tribunals. Kambanda, who pleaded guilty to the crime of genocide, was sentenced to life imprisonment. The ICTY followed suit in its prosecution of Slobodan Milošević for CAH and war crimes, relying on Article 7(2) of its statute<sup>357</sup> to remove Milošević's temporal immunity, but he died before a sentence could be reached in his case.<sup>358</sup> Following the examples of the *ad hoc* tribunals, the Special Court for Sierra Leone revoked the immunity of Charles Taylor, President of Liberia.<sup>359</sup>

Recently, the ICC Prosecutor presented to the Pre-Trial Chamber a case against Sudanese President Al-Bashir for genocide, CAH, and war crimes in the Darfur region of Sudan.<sup>360</sup>

Thus, two major issues remain unsettled in international law with respect to head of state immunity and other immunities. The first arises in connection with the distinction between substantive and temporal immunity. Since Article 7 of the London Charter, there has been a consistent approach evidenced in the ICTY/R Articles 7/6 and ICC Article 27. The ICJ held that customary international law distinguishes between substantive and procedural immunity, and that there was no substantive immunity for international crimes such as genocide, war crimes, CAH, and presumably torture, slavery, slave-related practices, and piracy, with possible inclusion of certain terrorism-related crimes.<sup>361</sup> Thus,

<sup>351</sup> *Id.* at ¶ 54.

<sup>352</sup> *Id.* at ¶ 55.

<sup>353</sup> *Id.* at ¶ 61.

<sup>354</sup> *Id.*

<sup>355</sup> For critical comments on the ICJ's judgment see Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes?: Some Comments on the Congo v. Belgium case*, 13 EJIL 853 (2002); and Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AJIL 407 (2004).

<sup>356</sup> Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

<sup>357</sup> See ICTY Statute art. 7(2), *supra* note 136.

<sup>358</sup> See *infra* ch. 4 and citations therein.

<sup>359</sup> Prosecutor v. Taylor, Case No. 2003-01-I, Decision on Immunity from Jurisdiction, ¶ 35 (May 31, 2004).

<sup>360</sup> Press Release, International Criminal Court, ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, CAH and war crimes in Darfur, ICC-OTP-20080714-PR341-ENG (July 14, 2008).

<sup>361</sup> See *Congo v. Belgium*, *supra* note 341, ¶ 60:

It should be further noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply

the ICJ's interpretation of customary international law varies from the previously mentioned statutes and the jurisprudence of the courts thereunder. Consequently, a potential issue may arise with respect to the ICC's confirmation order for the arrest of President Al-Bashir of the Sudan,<sup>362</sup> insofar as the Sudan is not a State Party to the ICC and the situation in question has been referred to the ICC from the Security Council.<sup>363</sup>

Referring to the Security Council's adoption of the Statutes of the ICTY and ICTR as being no more than the embodiment of customary international law thus makes it permissible for the Security Council to establish these *ad hoc* tribunals, as this is not explicitly contained in the UN Charter as part of the Security Council's prerogatives. The referral by the Security Council of the Sudan situation to the ICC should, on the basis of these precedents, be subject to the limitations of customary international law. In other words, if any portion of the Rome Statute does not conform to customary international law, it would not be applicable to a non-State Party. In this case, President Al-Bashir would have temporal immunity so long as he was the head of state of the Sudan. Consequently, he could not be prosecuted while in office, but only after. This of course differs from what would apply to a sitting head of state under Article 27 of the Rome Statute because the narrowing of the temporal immunity is based on the treaty and not on customary international law.

The other unsettled question is whether a head of state or other official benefitting from immunity under international law can deem his or her acts as being done in a private capacity. In other words, can such a person claim, in order to avoid implicating state responsibility, that he or she was acting in a personal capacity as opposed to that person's official capacity. On its face, the answer would seem to be that no head of state or government official capable of establishing policy for the state or an organ thereof, or capable of leading an action by agents of the state (such as the military, police, special forces, intelligence units) can claim that such action was carried out in an individual capacity as opposed to that person's official position. The reason that this issue is still unsettled, other than for the writings of many distinguished scholars, who have taken a position in favor of the proposition stated above, is that this issue arises under the

absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution of extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: A COMPILATION OF UN DOCUMENTS, 1972–2001, 2 vols. (2002).

<sup>362</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) [hereinafter *Al Bashir* Arrest Warrant].

<sup>363</sup> *Reports of the Secretary-General on the Sudan*, 31 March 2005, S.C. Res. 1593, U.N. SCOR, 61st sess., 5158th mtg., U.N. Doc. S/RES/1593 (2002).

international law of state responsibility.<sup>364</sup> In recent times, the ICC has not reached such matters.

Since the ruling in *Congo v. Belgium*, several states have initiated national prosecutions of former heads of state, including Hissène Habré, the former dictator of Chad, who was tried *in absentia*, found guilty, and sentenced to death in Chad amid fears that he will not face prosecution in Senegal.<sup>365</sup> Alberto Fujimori was finally extradited to Peru to face charges of human rights abuses.<sup>366</sup> Fujimori was sentenced to twenty-five years of imprisonment on April 7, 2009, after being found guilty of the ordering of killings and kidnappings carried out by Peru's security forces in the massacres of Barrios Altos and La Cantuta.<sup>367</sup> On November 5, 2006, the Iraqi High Tribunal convicted Saddam Hussein of CAH for ordering the murder of 148 Iraqi men, the torture of women and children, and the illegal arrest of 399 others in the Dujail massacre of 1982, which followed a failed assassination attempt against Hussein on July 8, 1982.<sup>368</sup> Whether this trend will continue is unknown, as many more former heads of states alleged to have committed human rights abuses continue to enjoy asylum abroad.

## Conclusion

The problems in identifying a “general part” for international criminal responsibility<sup>369</sup> also apply to the identification of conditions of exoneration from criminal responsibility discussed in this chapter. The legal sources of CAH are found in the international regulations of armed conflicts that contain only some elements of a “general part.” The London Charter did not contain a general part, though it did specifically exclude the defense of obedience to superior orders and the immunity of heads of state.<sup>370</sup>

The IMT, IMTFE, and the CCL 10 Proceedings dealt with the defense of obedience to superior orders and compulsion, and, in a very limited way, with reprisals and *tu quoque*. These judgments also dealt with the issue of mistake of law as part of command responsibility and obedience to superior orders.<sup>371</sup> However, these judgments did not satisfactorily establish the existence of a pre-Charter legal foundation. Although there was sufficient pre-existing national legal experience with command responsibility and

<sup>364</sup> *Report of the International Law Commission on the Work of Its 52nd Session*, 19 January 2001, A/RES/55/152 (2001).

<sup>365</sup> *Senegal May Finally Try Habré*, REUTERS, July 24, 2008. However, Habré was not tried for CAH, leaving that option open for Senegal to pursue. Habré instead was convicted of threatening the democratic government of Chad. For a discussion of Habré's August 15, 2008 conviction in Chad, see *Chad confirms former president Habré's conviction*, AGENCE FRANCE PRESSE, Aug. 19, available at <http://afp.google.com/article/ALEqM5jRB8NAGF4CYAzIvwnGJZzPdkgKFw>.

<sup>366</sup> *Extradited Fujimori Back in Peru*, BBC Sept. 22, 2007; Moumine Ngarmbassa, *Habré death sentence won't alter Senegal case – Chad*, REUTERS AFRICA, Aug. 19, 2008, available at <http://africa.reuters.com/wire/news/usnLJ487890.html>.

<sup>367</sup> *Fujimori Gets Lengthy Jail Term*, BBC, April 7, 2009, available at <http://news.bbc.co.uk/2/hi/americas/7986951.stm>). See also *infra* ch. 9, § 4.

<sup>368</sup> John F. Burns and Kirk Semple, *Hussein is Sentenced to Death by Hanging*, N.Y. TIMES, Nov. 6, 2006. The Iraqi High Tribunal has also produced some information regarding the case against Saddam Hussein, available at <http://www.iraq-ihf.org/en/aldujail.html>. See also *infra* ch. 9.

<sup>369</sup> See *infra* ch. 7, § 1.

<sup>370</sup> *Id.*

<sup>371</sup> Because the issues raised were more closely connected with command responsibility, mistake of law was discussed in that section of ch. 7, § 5.

obedience to superior orders, there was practically none with the other legal defenses. The London and Tokyo Charters, which were the legislative bases for the IMT and IMTFE, respectively, took a significant progressive step by removing the immunity of heads of state and the obedience defenses. The CCL 10 Proceedings interpreted this defense in a narrow way, recognizing it whenever the accused actor had no moral alternative, thus transferring it into compulsion.

Post-Charter legal developments, except for the Rome Statute, have not solved the problems raised by the lack of a “general part” and, with respect to this Chapter, the lack of a reliable legal source with enough specificity to identify defenses and exonerating conditions. However, the international regulation of armed conflicts and national military laws in the world’s major legal systems have each significantly contributed to the clarification of obedience to superior orders. Also, doctrinal developments in public international law seem to have consolidated the notion that heads of states cannot be immune from prosecution for violations of ICL, as discussed above, as evident in state and international practice.

National criminal justice systems vary significantly with respect to the conceptual and doctrinal legal bases for criminal responsibility and punishability, including defenses and exonerating conditions. Consequently, it is very difficult to arrive at “general principles of law” that are sufficiently common to the world’s major criminal justice systems and that constitute a legally sufficient basis for all possible applicable defenses. The result is a great deal of legal uncertainty compounded by the uncertainties raised with respect to other aspects of the general part.

The obvious solution, as argued in the introduction to this chapter and throughout this book, is the elaboration of a new convention on CAH that would include a “general part” more specifically tailored to this criminal category until such time as an international criminal code containing one is developed. In the meantime, however, the Rome Statute offers us the next best thing to such a comprehensive codification that would apply to ICL.

## ARTICLE 31<sup>372</sup>

### Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:
  - (a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
  - (b) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
  - (c) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to

<sup>372</sup> See JONES & POWLES, *INTERNATIONAL CRIMINAL PRACTICE*; Enrico Mezzetti, *Grounds for Excluding criminal Responsibility*, in LATTANZI COMMENTARY, at 147; KNOOPS, *SURRENDERING*, at 89; Maria Kelt & Herman von Hebel, *General Principles of Criminal Law and Elements of Crimes*, in LEE, *ELEMENTS AND RULES*, at 38; SADAT, *THE TRANSFORMATION OF INTERNATIONAL LAW*, at 211; SCHABAS INTRODUCTION, at 71; Albin Eser, *Grounds for Excluding Criminal Responsibility*, in TRIFFTERER COMMENTARY, at 537.



control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

- (d) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
  - (e) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
    - (i) Made by other persons; or
    - (ii) Constituted by other circumstances beyond that person's control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
  3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

#### Rule 79: Disclosure by defence

1. The defence shall notify the Prosecutor of its intent to:
  - a. Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi; or
  - b. Raise a ground for excluding criminal responsibility provided for in article 31, paragraph 1, in which case the notification shall specify the names of witnesses and any other evidence upon which the accused intends to rely to establish the ground.
2. With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.
3. Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.
4. This rule does not prevent a Chamber from ordering disclosure of any other evidence.

Rule 80: Procedures for raising a ground for excluding criminal responsibility under article 31, ¶ 3

1. The defence shall give notice to both the Trial Chamber and the Prosecutor if it intends to raise a ground for excluding criminal responsibility under article 31, paragraph 3. This shall be done sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial.
2. Following notice given under sub-rule 1, the Trial Chamber shall hear both the Prosecutor and defence before deciding whether the defence can raise a ground for excluding criminal responsibility.
3. If the defence is permitted to raise the ground, the Trial Chamber may grant the Prosecutor an adjournment to address that ground.

Rule 81: Restrictions on disclosure

1. Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.
2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
3. Where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72, and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, such information shall not be disclosed, except in accordance with those articles. When the disclosure of such information may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance.
4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of the information, in accordance with articles 54, 72, and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.
5. Where material or information is in the possession or control of the Prosecutor which is withheld under article 68, paragraph 5, such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.
6. Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances similar to those which would allow the Prosecutor to rely on article 68, paragraph 5, and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor.

ARTICLE 32<sup>373</sup>

## Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

ARTICLE 33<sup>374</sup>

## Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
  - (b) The person did not know that the order was unlawful; and
  - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

<sup>373</sup> See JONES & POWLES, *INTERNATIONAL CRIMINAL PRACTICE*; MEZZETTI, *supra* note 372, at 417; KNOOPS, *SURRENDERING*, at 89; KELT & VON HEBEL, *supra* note 372, at 417; SADAT, *THE TRANSFORMATION OF INTERNATIONAL LAW*, at 216; SCHABAS *INTRODUCTION*, at 71; Otto Triffterer, *Mistake of Fact or Mistake of Law*, in *TRIFFTERER COMMENTARY*, at 555.

<sup>374</sup> See JONES & POWLES, *INTERNATIONAL CRIMINAL PRACTICE*; KNOOPS, *SURRENDERING*, at 63; Mezzetti, *supra* note 372, at 417; SADAT, *THE TRANSFORMATION OF INTERNATIONAL LAW*, at 216; SCHABAS *INTRODUCTION*, at 71; Otto Triffterer, *Superior Orders and Prescriptions of Law*, in *TRIFFTERER COMMENTARY*, at 573.

## 9 A Survey of National Legislation and Prosecutions for Crimes Against Humanity

Justice without force is impotent. Force without justice is tyrannical. Justice without force is infringed because there is always the mean. One must, therefore, combine justice and force, and, therefore, make strong what is right, and make right what is wrong.

– BLAISE PASCAL, *THE PROVINCIAL LETTERS* (William F. Trotter trans., 1941).

### Introduction

The evolution of international humanitarian law and the international regulation of armed conflicts<sup>1</sup> established individual criminal responsibility and the basis for national and international prosecutions. In the twentieth century, a journey began at Versailles in 1919<sup>2</sup> and ended in Rome on July 17, 1998,<sup>3</sup> befittingly in the year of the fiftieth anniversary of both the Genocide Convention<sup>4</sup> and the Universal Declaration of Human Rights.<sup>5</sup> In Rome, a Diplomatic Conference for the Establishment of a permanent International Criminal Court (ICC) concluded its work with the adoption of a draft convention, which opened for signature on July 18 to all United Nations member states. One hundred thirty-nine states signed the treaty and, by August 2010, 113 states have become State Parties to the ICC. This three-quarter century pursuit of international criminal justice has been long and arduous, studded with terrible tragedies that ravaged the world,<sup>6</sup> and too often this journey has been characterized by missed opportunities.<sup>7</sup>

<sup>1</sup> See generally *infra* ch. 3.

<sup>2</sup> See Treaty of Peace Between the Allied and Associated Powers of Germany arts. 228–30, June 28, 1919, 225 C.T.S. 188, 285, 2 Bevans 43, 136–37 [hereinafter Treaty of Versailles].

<sup>3</sup> G.A. Res. 207, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/207 (1997) (calling a diplomatic conference on the establishment of an international criminal court to convene in Rome, June 15–July 17, 1998); M. Cherif Bassiouni, 1–3 *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* (M. Cherif Bassiouni ed., 2005).

<sup>4</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>5</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

<sup>6</sup> See M. Cherif Bassiouni, *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* (2 vols., M. Cherif Bassiouni ed., 2010) [hereinafter *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE*].

<sup>7</sup> M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective*, 3 *INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT* 29 (3d ed., M. Cherif Bassiouni ed., 2008); M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269 (2010).

World War I was proclaimed “the war to end all wars” because it produced unprecedented victimization. Some 20 million people were killed, mostly combatants.<sup>8</sup> World War II followed with all its horrors and devastation with more than 40 million dead, mostly noncombatants.<sup>9</sup> Since then, some 313 armed conflicts of all types have caused an estimated 92 to 101 million deaths,<sup>10</sup> falling within the categories of genocide, CAH, and war crimes, as well as other international crimes such as torture and slavery and slave-related practices. Most of the perpetrators of these crimes benefited from impunity.

The following data emerge from the post-World War II conflicts:<sup>11</sup>

- Less than 1 percent of the perpetrators of international crimes have been brought to justice. These selective prosecutions have taken place in only 53 of the 313 conflicts identified by the study, which represents 17 percent of the total number of conflicts.<sup>12</sup> In contrast, amnesty laws were enacted in 126 of the 313 conflicts identified, which means that in 40 percent of all conflicts, perpetrators have benefited from impunity.<sup>13</sup>
- Since 1948, only 823 persons have been indicted by international and mixed model tribunals. The average cost of prosecution before the ICTY, ICTR, and ICC is approximately \$10 million per case.
- Fifty-six truth commissions and other investigative bodies have been established, mostly in Latin America.<sup>14</sup> Despite the well-known Truth and Reconciliation Commission of South Africa, this modality of post-conflict justice has been comparatively rare in Africa, as well as in Europe and Asia. In the Arab world, only Morocco and Israel have undertaken investigatory commissions.
- In only 16 of the 313 conflicts was some form of victim reparation undertaken, involving less than 1 percent of the victims of the conflicts.<sup>15</sup> With the exception of some post-World War II victim compensation,<sup>16</sup> there has been no instance of monetary victim compensation for other conflicts.
- By the end of the twentieth century, the ratio of military to civilian victims soared to an average of 9,000 to one, from one to one in World War I.
- Over \$100 billion have been spent on peacekeeping operations (not including humanitarian assistance).

Most people of the world, it is believed, reject the practices of governments in bartering away justice in exchange for political settlements. Instead, they expect accountability

<sup>8</sup> See John Keegan, *The First World War* (1999).

<sup>9</sup> See Michael Bess, *Choices under Fire: Moral Dimensions of World War II* (2006); see also Gerhard Weinberg, *A World at Arms: A Global History of World War II* (2d ed. 2005).

<sup>10</sup> Christopher Mullins, *Conflict Victimization and Post-Conflict Justice 1945–2008*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 6, at 67; M. Cherif Bassiouni, *Assessing Conflict Outcomes: Accountability and Impunity*, in *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 6, at 3.

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

<sup>12</sup> See Nadia Bernaz, *International and Domestic Prosecutions*, in *The Pursuit of International Criminal Justice*, *supra* note 6, at 269.

<sup>13</sup> See Louise Mallinder, *Amnesties*, in *The Pursuit of International Criminal Justice*, *supra* note 6, at 793.

<sup>14</sup> See Eric Wiebelhaus-Brahm, *Truth Commissions and Other Investigative Bodies*, in *The Pursuit of International Criminal Justice*, *supra* note 6, at 477.

<sup>15</sup> See M. Cherif Bassiouni, *International Recognition of Victims' Rights*, in *The Pursuit of International Criminal Justice*, *supra* note 6, at 575; Naomi Roht-Arriza, *Reparations in International Law and Practice*, in *The Pursuit of International Criminal Justice*, *supra* note 6, at 655.

<sup>16</sup> See J.D. Bindenagel, *Victims' Rights: The German Experience*, in *The Pursuit of International Criminal Justice*, *supra* note 6, at 709.

through international and national criminal prosecutions. The former necessarily required the establishment of an independent, fair, and effective international criminal court. However, as the world community achieves higher levels of perceived interdependence and commonly shared values concerning international criminal justice and how to achieve it, the focus will shift from the ICC to national criminal justice systems.

All previous war crimes and CAH prosecutions, whether before international or national adjudicative bodies, were on the basis of individual criminal responsibility and command responsibility. This too may change if we see new modes of criminal responsibility emerge; domestic systems may develop alternative modes of criminal responsibility. The post-World War II prosecutions at the IMT, the IMTFE, and the Subsequent Proceedings have been the models and precedents for internationally constituted tribunals like the ICTY, ICTR, and mixed model tribunals. All of these tribunals were limited in scope and time. The jurisprudence of these tribunals also presents problems discussed at greater length in Chapters 3 and 4. This reaffirms the need for the ICC to avoid the shortcomings of past experiences.<sup>17</sup>

National prosecutions are needed for the development of CAH, and, more importantly, as evidence that complementarity between international and national institutions is the most effective way of expanding the range of accountability for international crimes. This chapter serves as a survey of domestic prosecutions for CAH. The national experiences described herein are not exhaustive because such comparative research has not been done so far. Whenever a comprehensive CAH convention is adopted and national implementing legislation is developed, domestic prosecutions will surely increase, as will international cooperation between states in support of their respective national investigations and prosecutions.<sup>18</sup>

## §1. Pre-World War I National Prosecutions for International Crimes

Prior to the late 1800s, the applicability of international criminal law to individuals was limited to piracy, slavery, and certain violations of the regulations of armed conflicts.<sup>19</sup> Notwithstanding the history of the international regulation of armed conflicts, piracy can claim a more widely recognized historical starting point in the 1600s as a customary international crime.<sup>20</sup>

Evidence of piracy as an international crime for which there was individual criminal responsibility can be found as early as 1511, when King Henry VIII commissioned John Hopton to:

seize and subdue all pirates wherever they shall from time to time be found; and if they cannot otherwise be seized, to destroy them, and to bring all and singular of them,

<sup>17</sup> See generally Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 7.

<sup>18</sup> Forging a Convention for Crimes Against Humanity (Leila Nadya Sadat ed., forthcoming, 2011); M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, 9 Wash. U. Global Stud. L. Rev. (forthcoming 2010); M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 Colum. J. Transnat'l L. 457 (1994).

<sup>19</sup> See generally Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 7, at 296–311.

<sup>20</sup> See ALFRED P. RUBIN, *THE LAW OF PIRACY* (1988); Jacob W.F. Sundberg, *The Crime of Piracy*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS* 799 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

who are captured, into one of our ports, and to hand over and deliver them . . . to our commissioners.<sup>21</sup>

Evidencing further the concept of individual responsibility of those accused of piracy, Pierino Belli wrote in 1563 that “. . . people whose hand is against every man should expect a like return from all men, and it should be permissible for any one to attack them.”<sup>22</sup> A reason for the early recognition of individual criminal responsibility of pirates is that this offense involves conduct that affects state interests. As one author noted:

It is right to make war on pirates . . . for they violate the common law of nations. And if war against pirates justly calls all men to arms because of love of our neighbors and the desire to live in peace, so also does the general violation of the common law of humanity and a wrong done to mankind. Piracy is contrary to the law of nations and the league of human society [ . . . ].<sup>23</sup>

Piracy, initially a customary international crime, was codified in 1937 in two international instruments.<sup>24</sup> In addition, there are four other instruments dating from 1841 that contain provisions applicable to piracy.<sup>25</sup> Under the 1958 Geneva Convention on the High Seas<sup>26</sup> that the 1982 United Nations Convention on the Law of the Sea, piracy emerged as a conventional international crime.<sup>27</sup> These conventions were the product of numerous efforts, dating back to the League of Nations, to achieve comprehensive international regulation of piracy.<sup>28</sup>

Slavery, throughout the ages, was thought to be morally repugnant by many societies, and it has evolved from a “moral” offense to an international crime.<sup>29</sup> As one commentator noted, “As circumstances changed, what was legally and morally legitimate gradually became condemned. The Church [of England] again took the lead and the law reluctantly followed.”<sup>30</sup> Due to the widespread economic benefit of the slave trade,

<sup>21</sup> Rubin, *supra* note 20, at 100 citing REGINALD G. MARSDEN, DOCUMENTS RELATING TO THE LAW AND CUSTOM OF THE SEA 146–47 (1916).

<sup>22</sup> PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS 83 (Herbert C. Nutting trans., 1936), *quoted in* RUBIN, *supra* note 20, at 18.

<sup>23</sup> Leslie C. Green, *International Criminal Law and the Protection of Human Rights*, in INTERNATIONAL CRIMINAL LAW 116, 119 (M. Cherif Bassiouni ed., 1986) citing ALBERICO DE GENTILI, DE IURE BELLI (1612), Bk. I, Ch. XXV, 124 (Carnegie trans., 1933).

<sup>24</sup> See The Nyon Arrangement, Nyon, 14 September 1937, 181 L.N.T.S. 135; Agreement Supplementary to the Nyon Agreement, Geneva, 17 September 1937, 181 L.N.T.S. 149. Subsequent to the Charter two more international agreements criminalized piracy. These agreements are the Convention on the High Seas (Geneva Convention on the Law of the Sea), Geneva, 29 April 1958, 450 U.N.T.S. 82, 13 U.S.T. 2313, T.I.A.S. No. 5200; and the Convention on the Law of the Sea (Montego Bay Convention) Montego Bay, 10 December 1982, U.N. Doc. A/CONF. 62/122.

<sup>25</sup> Subsequent to the Charter, four more instruments contained provisions applicable to piracy. These instruments are: 1954 Draft Code of Offenses Against the Peace and Security of Mankind, U.N. GAOR, 9th Sess., U.N. Doc. A/2693 (1954); Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention]; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter Law of the Sea Convention]; Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 94, UN Doc. A/46/10 (1991) [hereinafter 1991 Draft Code].

<sup>26</sup> See Geneva Convention on the Law of the Sea, *supra* note 24.

<sup>27</sup> See Montego Bay Convention, *supra* note 24.

<sup>28</sup> See Sundberg, *supra* note 20, at 442.

<sup>29</sup> M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. 445, 450 (1991).

<sup>30</sup> Umzurike O. Umzurike, *The African Slave Trade and the Attitudes of International Law Towards It*, 16 How. L.J. 334, 341 (1971), *cited in* Bassiouni, *supra* note 29.



many countries found it difficult to abolish. France did so in 1791, as did England in 1833, although both allowed the practice to continue in some of their colonies.<sup>31</sup> Sweden abolished slavery in 1846, Denmark in 1848, Portugal in 1856, Holland in 1860, Brazil in 1884 and 1890, and the United States in 1862.<sup>32</sup>

The prohibition of slavery, which was ultimately embodied in customary law, was the result of efforts by European powers that recognized its evil nature and gradually established duties to prohibit, prevent, prosecute, and punish those who trafficked in slavery.<sup>33</sup> By making slavery an international crime, states acquired the power to search and detain suspected slave vessels.<sup>34</sup> The goal was to eliminate slavery by obligating each state to make it a crime and by creating universal jurisdiction over it.<sup>35</sup> For example, under Article 5 of the 1890 Convention Relative to the Slave-Trade and Importation into Africa of Firearms, Ammunition, Spirituous Liquors (General Act of Brussels Conference),<sup>36</sup> the contracting parties obligated themselves to enact or introduce penal legislation to punish serious offenses against individuals.<sup>37</sup> Those responsible for mutilating male adults and children, and anyone participating in the capture of slaves by force, were to be punished.<sup>38</sup> Those guilty of such crimes were to be brought to justice in the country where they were found, thus establishing universal jurisdiction over those violating the terms of the Treaty.<sup>39</sup> In all, 79 separate international instruments and documents have addressed the issue of slavery, the slave trade, slave-related practices, forced labor, and their respective institutions.<sup>40</sup>

The historical evolution of the international regulation of armed conflicts was a slow process, but its manifestations predated all other efforts toward the international criminalization of certain violations and, as with piracy and slavery, placed responsibility on individual offenders. The historical record even reveals war crimes prosecutions imposing individual criminal responsibility on the violators of international law as far back as third-century BCE Greece.<sup>41</sup> The first documented prosecution for initiating an unjust war is reported to have occurred in Naples in 1268 when Conradin von Hohenstafen was put to death.<sup>42</sup> The first modern international prosecution for war crimes took place in 1474 in Breisach, Germany, against Peter von Hagenbach.<sup>43</sup> Von Hagenbach was tried

<sup>31</sup> See Bassiouni, *supra* note 29, at 451.

<sup>32</sup> *Id.* at 451–52.

<sup>33</sup> *Id.* at 454; see also 42 MARTENS NOUVEAU RECUEIL 432, reprinted in 63 PARRY'S T.S. 473 (1969).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 27 Stat. 886, T.S. No. 383, reprinted in 1 Bevans 134.

<sup>37</sup> See Bassiouni, *supra* note 29, at 463.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 454.

<sup>41</sup> See ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW, WITH A POSTLUDE ON THE EICHMANN CASE 17–18 (1962). Woetzel refers to a lecture by Professor Georges S. Maridakis, citing Georges S. Maridakis, *Un précédent du Procès de Nuremberg tiré de l'histoire de la Grèce ancienne*, 5 REV. HELLÉNIQUE DE DROIT INT'L 1 (1952), who makes reference to a kind of court, established in 405 BCE after the destruction of the Athenian fleet at Aegospotamos, which examined evidence and heard witnesses before it passed judgment and sentenced to death all but one Athenian prisoner.

<sup>42</sup> Reported by Remigiusz Bierzanek, *War Crimes: History and Definition*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 559–60 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) [hereinafter 1 BASSIOUNI & NANDA TREATISE]. The original source is likely to be EMMERICH DE VATTEL, LE DROIT DES GENS, bk. III (1887).

<sup>43</sup> See GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 462–66 (1968); AMABLE G.P.B. DE BARANTE, HISTOIRE DES DUCS DE BOURGOGNE, vols. 9, 10

before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire. He was stripped of his knighthood by this international tribunal, which found him guilty of murder, rape, perjury, and other crimes against the “laws of God and man” in connection with a military occupation.<sup>44</sup> Later, in 1689, James II of England, although then in exile, relieved one Count Rosen of all further military duties, not for the failure of his mission, but rather because his siege of Londonderry was so outrageous and included the murder of innocent civilians.<sup>45</sup>

Other than the courts of chivalry in the Middle Ages,<sup>46</sup> there are practically no other instances of national prosecutions for violating internationally accepted principles, norms, and rules regulating the conduct of armed conflicts. As one author states,

Insofar as the written law of war is concerned, nothing has appeared concerning the trial of individual offenders save in national military codes. Thus, by the time of the establishment of the Commonwealth, England had promulgated its Lawes and Ordinances of Warre regulating the behaviour of the armed forces, forbidding, marauding of the countryside, individual acts against the enemy without authorization from a superior, private taking of booty, or private detention of an enemy prisoner.<sup>47</sup>

Individual criminal responsibility for violation of the rules governing armed conflict as customary international law is also evident in the few national prosecutions. In 1863, the United States stated its intentions in the Lieber Code,<sup>48</sup> which was soon to have a dramatic impact concerning the treatment of Union POWs in the American Civil War. Enacted as Instructions for the Government of Armies of the United States in the Field, this Code states in part, “A prisoner of war remains answerable for his crime against the captors’ army or people, committed before he was captured, and for which he has not been punished by his own authorities.”<sup>49</sup> The Lieber Code further provides, “Whoever intentionally inflicts additional wounds on or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.”<sup>50</sup> A similar position was adopted by the Institute of International Law in the Oxford Manual of Laws of War of 1880, which stated in part that “In case the preceding rules are violated, the perpetrator shall, after a due process of law, be punished by the belligerent in whose power he is.”<sup>51</sup>

Pursuant to the Lieber Code, the United States tried and sentenced to death Confederate Major Henry Wirz, a prisoner of war camp commandant, for his role in the death

(1837); JOHANNIS KNEBEL CAPPELLANI, ECCLESIAE BASILIENSIS DIARIUM, Sept. 1473–Jan. 1476, p. 1 *et. seq.* BASLER CHRONIKEN (Wilhelm Vischer & Heinrich Boos eds., Vol. II – 1880).

<sup>44</sup> See 10 DE BARANTE, *supra* note 43, at 15 and HILDBURG BRAUER-GRAMM, DER LANDVOGT PETER VON HAGENBACH 235, 282–84 (1957).

<sup>45</sup> Reported in William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 5 (1973). See also Elbridge Colby, *War Crimes*, 23 MICH. L. REV. 482 (1925).

<sup>46</sup> See generally THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES (1993); Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 AM. J. INT’L L. 1 (1998); Theodor Meron, *Shakespeare’s Henry the Fifth and the Law of War*, 86 AM. J. INT’L L. 1 (1992).

<sup>47</sup> Green, *supra* note 23, at 6; see also CHARLES M. CLODE, I MILITARY FORCES OF THE CROWN, App. VI (1869).

<sup>48</sup> See also discussion of Lieber Code *infra* ch. 3, §1.

<sup>49</sup> FRANCIS LIEBER, THE LIEBER CODE OF 1863: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, General Order No. 100 (Apr. 24, 1863) at art. 59 [hereinafter Lieber Code].

<sup>50</sup> *Id.* at art. 71.

<sup>51</sup> OXFORD MANUAL ON THE LAWS AND CUSTOMS OF WAR ON LAND, art. 84 (Institute of International Law 1880).

of several thousand Union prisoners at Camp Sumter in Andersonville, Georgia.<sup>52</sup> When he was arrested on May 7, 1865, Wirz was the last member of the Confederate prison staff at Camp Sumter. The United States prosecuted him under Article 59 of the Lieber Code, which held prisoners of war liable to prosecution for violations of war conducted prior to their imprisonment. The tribunal found him guilty, despite his plea of obedience to superior orders, and sentenced him to death. Wirz was hanged on November 10, 1863 in Washington, D.C. The United States also convened war crimes tribunals after the Spanish-American War and the occupation of the Philippines.<sup>53</sup>

Following the Boer War, British tribunals prosecuted prisoners of war for crimes they had committed prior to their imprisonment.<sup>54</sup> The principle of individual responsibility under the laws of war was also recognized in the Weimar Constitution of 1919 and was included in German military law. Moreover, the German ordinance titled “Usage in Land Warfare” enumerated the violations contained in the 1907 Hague Convention and further provided, “Any person who violates these prohibitions shall be held responsible by his own state. If he is taken prisoner, he shall be punished according to the laws of war.”<sup>55</sup>

The historical record thus evidences states’ slow, but growing recognition that perpetrators of international crimes, including CAH, should be subject to individual criminal responsibility and to national or international prosecution.

## §2. Post-World War I Prosecutions

The Treaty of Versailles was ratified in 1919. It contained provisions for prosecuting German military personnel for war crimes. Article 228 provided, “The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.”<sup>56</sup> Article 227 of the Treaty established the individual responsibility of the Kaiser. It also provided for the Allies’ right to establish national war crimes tribunals to try Germans (Article 229).<sup>57</sup> No war crimes tribunals were established because Germany did not extradite its own nationals. Also, because the conventional and customary law of armed

<sup>52</sup> 8 AMERICAN STATE TRIALS 666 (John D. Lawson ed., 1918). The proceedings of the Military Commission were published in 8 HOUSE EXECUTIVE DOCUMENTS, No. 23, serial No. 1381, 40th Cong. 2d Sess., 764 (1868). See also ALVA C. ROACH, *THE PRISONERS OF WAR AND HOW TREATED* (1865).

<sup>53</sup> In the Samar campaign during the Philippine-American War, General Jacob H. Smith notoriously ordered his soldiers to “kill everyone over the age of ten.” See *Court Martial of General Jacob H. Smith*, Manila, P.I., April 1902, S. Doc. 213, 57th Cong., 2d Sess. at 5–17; *Court Martial of Lt. Preston Brown*, Manila, P.I., June 1902, S. Doc. 213, 57th Cong., 2d Sess. at 48–62. See also STUART CREIGHTON MILLER, *BENEVOLENT ASSIMILATION: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899–1903* (1982).

<sup>54</sup> See HANS-HEINRICH JESCHECK, *DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VÖLKERSTRAFRECHT* 36 (1952); see also V. LeGay Brereton, *The Administration of Justice Among Prisoners of War by Military Courts*, 1 PROCEEDINGS OF THE AUSTRALIAN AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW 143 (1935).

<sup>55</sup> Weimar Constitution of 1919.

<sup>56</sup> Treaty of Versailles, *supra* note 2, at art. 228.

<sup>57</sup> See *id.* at arts. 228–30. Also, the Treaty stipulated the prosecution of Kaiser Wilhelm II by an international tribunal, *id.*, art. 227, for the “supreme offence against international morality and the sanctity of treaties,” i.e., the neutrality of Belgium. The Kaiser was never tried because he sought refuge in Holland, which refused to extradite him on the grounds that the crime with which he was charged was a “political offense” exempt from extradition. See Quincy Wright, *The Legality of the Kaiser*, 8 AM. POL. SCI. REV. 121 (1919). For an earlier precedent, see the decision of the Congress of Aix-La-Chapelle of 1810 on the detention of Napoleon for causing wars that disturbed the peace of the world.

conflicts required the repatriation of prisoners of war after the end of the conflict, some legalistic arguments were raised about the eventual invalidity of prosecuting prisoners of war after the cessation of hostilities. In the final analysis, it was a question of opportunity and political misjudgment that led the Allies to forego international and national prosecutions and to grant Germany the right to prosecute its own nationals before its national court in Leipzig.<sup>58</sup>

Perhaps the greatest development for its time in the area of individual responsibility under international criminal law was the 1919 Report of the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties.<sup>59</sup> This report established an elaborate scheme of international crimes and individual responsibility; it was not accepted by the United States and Japan.<sup>60</sup>

In the report prepared by the Commission on the Responsibilities of the Authors of the War and Enforcement of Penalties,<sup>61</sup> the Allies submitted 895 names of alleged war criminals to Germany.<sup>62</sup> However, for mostly political reasons, and because of Germany's reluctance to hand over accused war criminals, that list dwindled to only forty-five cases ultimately selected for prosecution. Moreover, the Allies consented, as stated above, to let Germany prosecute the alleged war criminals, a concession that the Allies would subsequently regret. Of the short list of forty-five, Germany tried only twelve before the German Supreme Court sitting in Leipzig; six of these twelve were acquitted.<sup>63</sup>

<sup>58</sup> See generally Claud Mullins, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF THE GERMAN MENTALITY* (1921); James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70 (1926); JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982); JACKSON MAOGOTO, *WAR CRIMES & REALPOLITIK: FROM WORLD WAR I INTO THE 21ST CENTURY* (2004); M. Cherif Bassiouni, *World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. & POL'Y 244 (2002); Dirk von Selle, *Prolog zu Nürnberg (Die Leipziger Kriegsverbrecherprozesse vor dem Reichsgericht)*, 19 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 193 (1997). Toward the end of World War II, one commentator called upon the United Nations to learn lessons from Versailles and Leipzig. Specifically, he denounced the Leipzig trials:

Thus ended the tragicomedy of the Leipzig trials, beginning with the German manipulation of the Allied statesmen for two and a half years, while the evidence of atrocities grew cold, accused and witnesses disappeared, and chauvinistic public opinion was whipped up inside Germany; and ending with the patriotic cooperation of those conveniently negligent bloodhounds.

Sheldon Glueck, *War Criminals – Their Prosecution and Punishment*, 5 LAW. GUILD REV. 1, 9 (1945).

<sup>59</sup> Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties (Conference of Paris 1919 Carnegie Endowment for International Peace, Division of International Law), Pamphlet No. 32 (1919), reprinted in 14 AM. J. INT'L L. 95 (1920) (Supp.), 1 FRIEDMAN 842 [hereinafter 1919 Commission Report].

<sup>60</sup> See *Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities*, Annex II, Apr. 4, 1919, reprinted in 14 AM. J. INT'L L. 127, 144–51 (1920); *Reservations by the Japanese Delegation*, Annex III, Apr. 4, 1919, reprinted in 14 AM. J. INT'L L. 151 (1920).

<sup>61</sup> 1919 Commission Report, *supra* note 59.

<sup>62</sup> Sources conflict as to the number of alleged war criminals listed for prosecution. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 17 (1992) (stating that the Allies presented a list of 854 individuals, including political and military figures); Remigiusz Bierzanek, *War Crimes: History and Definition*, in INTERNATIONAL CRIMINAL LAW 29, 36 (vol. 3, M. Cherif Bassiouni ed., 1986) (stating that 901 names appeared on the list).

<sup>63</sup> Glueck, *supra* note 58, at 7. The two major prosecutions were the *Dover Castle Case*, 16 AM. J. INT'L L. 704 (1922) and the *Llandovery Castle Case*, 16 AM. J. INT'L L. 708 (1922). See also *infra* ch. 8; CLAUD MULLINS, *THE LEIPZIG TRIALS* 35 (1921). MULLINS, *id.*, and JAMES F. WILLIS PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982) are

The Allies and Germany had agreed that any of the Allied nations could initiate a prosecution before the Leipzig Court by providing to the German Prosecutor General complete details and evidence of the acts of which a person was accused. To avoid the problem of the ultimate authority to initiate a prosecution, a procedure was established whereby if the German Prosecutor General did not believe that the facts justified an indictment, he was nonetheless under the obligation to request a “mini-trial” in the nature of a preliminary hearing to judicially ascertain the facts on a preliminary basis and, thereafter, to decide whether to continue the prosecution.<sup>64</sup>

Great Britain, France, and Belgium brought a number of cases. The British government initiated and pursued six prosecutions.<sup>65</sup> Three men, Sergeant Karl Heynen, Captain Emil Muller, and Private Robert Neumann, were charged and convicted of brutalizing prisoners of war. Two naval officers, First Lieutenants Ludwig Ditman and John Boldt, were found guilty in *Llandovery Castle* for the sinking of lifeboats carrying survivors of a hospital ship the defendants had just sunk. Another naval officer, Lieutenant-Captain Karl Newmann, was acquitted for his part in the sinking of the *Dover Castle*, also a hospital ship. The German Admiralty issued the order to torpedo hospital ships on the assumption that the British had violated the Red Cross insignia by concealing war vessels as hospital ships. Belgium and France each brought cases mainly regarding the maltreatment of prisoners of war and wounded in the field. Belgium prosecuted Max Randohr, who was acquitted. France prosecuted Lieutenant-General Karl Stenger, Major Benn Crusius, First Lieutenant Adolph Laule, Lieutenant-General Hans von Schack, and Major-General Benno Kruska. Only Major Crusius was convicted.<sup>66</sup>

The trials at Leipzig were held between May 23 and July 16, 1921, almost three years after the Armistice was signed. The delay between the Armistice and the end of the trials played a critical role in determining the number of prosecutions and, in some respects, the small number of convictions. In the Allied countries a public opinion shift against prosecuting German war criminals became noticeable, which, in turn, reduced an already shaky German resolve. German public opinion, as may be expected, favored the accused officers and enlisted men who were brought to trial. Later, the United Nations War Crimes Commission (UNWCC) noted, “the German public showed indignation that German judges could be found to sentence the [German] war criminals and the press brought all possible pressure to the court.”<sup>67</sup> Consequently, the Allies were dissatisfied with the result and decided not to submit any further defendants to the German court and to conduct their own trials according to Article 229 of the Versailles Treaty. The Allies, however, did not request the extradition of any accused German. Only Belgium

the two most authoritative works on that episode. See also James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT’L L. 70 (1926). The court that tried the German war criminals was known as the Criminal Senate of the Imperial Court of Justice. In December 1919, Germany’s Parliament passed a special law to carry out the provisions of the agreement with the Allies. This new law was supplemented by two subsequent acts, March 1920 and May 1921. These laws gave the Imperial Court of Justice special jurisdiction to conduct the prosecutions.

<sup>64</sup> See MULLINS, *supra* note 63, at 35–6.

<sup>65</sup> *Id.* at 51–67.

<sup>66</sup> For the facts described above, see *id.* at 67–189.

<sup>67</sup> UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 51–2 (1948) [hereinafter UNWCC].

and France held a few trials *in absentia*.<sup>68</sup> Thus, the Leipzig Trials resulted in very few convictions due to the *Realpolitik* exercised by the Allied Powers and the impact of German public opinion.

Although the Leipzig trials may be viewed essentially as examples of the difficulty in achieving effective punishment of war criminals through national prosecutions, especially prosecutions by the national courts of a vanquished belligerent, they nevertheless serve as important markers in the history of war crimes trials. Although only a small fraction of the number accused were convicted at Leipzig, the value of these trials lies not with their prosecutorial success but with the principle they helped to establish. As Claud Mullins states, “great principles are often established by minor events. . . . [These trials] undoubtedly established the principle that individual atrocities committed during a war may be punished when the war is over.”<sup>69</sup> Mullins further asserts,

In my view, the object of the War Criminals’ Trials at Leipzig was to establish a principle, to put on record before history that might is not right, and that men whose sole conception of the duty they owe to their country is to inflict torture upon others, may be put on trial.<sup>70</sup>

In light of the pre-World War II prosecutions, it can be concluded, as does one commentator,

[T]here is no exact precedent for the IMT at Nuremberg. Nevertheless, it is evident that the development in international law . . . provided many of the prerequisites for the action taken by the Allies at the London Conference of 1945. The idea of an international tribunal was clearly contained in the punitive provisions of the Versailles Peace Treaty. The principle of individual responsibility for violations of the laws of war had been accepted in the First World War, and was extended to other crimes in the period between the two great wars. Both these conceptions are fundamental to the Charter of the IMT.<sup>71</sup>

By the 1920s there were other sources of individual criminal responsibility under international law, though there is no evidence of their international prosecution. These sources are as follows:

- (1) In 1884, for example, the International Convention for the Protection of Submarine Telegraph Cables<sup>72</sup> established individual responsibility. Article II of the

<sup>68</sup> See WOETZEL, *supra* note 41, at 34; see also 1921 J. DE DROIT INT’L 781–82, 1076–77; Garner, *supra* note 63; M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 19–21 (1997).

<sup>69</sup> MULLINS, *supra* note 63, at 224. In this connection, Mullins quotes Tennyson: “And finding that of fifty seeds/She often brings one to bear.” *Id.* at 231.

<sup>70</sup> *Id.* Similarly, Professor Bert Röling, who was a judge at Tokyo, commenting upon the Nuremberg trials, states:

The purpose was not to punish all cases of criminal guilt, but to give expression to the abhorrence of what had happened. The exemplary punishments served the purpose of restoring the legal order, that is of reassuring the whole community that what they had witnessed for so many years was criminal behavior.

Bernard V.A. Röling, *Aspects of Criminal Responsibility for Violations of the Laws of War*, in THE NEW HUMANITARIAN LAW 199, 206 (Antonio Cassese ed., 1979); see also Bernard V.A. Röling, *The Nuremberg and Tokyo Trials in Retrospect*, in 1 BASSIOUNI & NANDA TREATISE, *supra* note 42, at 590.

<sup>71</sup> WOETZEL, *supra* note 41, at 38.

<sup>72</sup> 11 Martens, 24 Stat. 989, T.S. No. 380. Reprinted in 163 Parry’s 391; 1 BEVANS 89.



Convention provides: "The breaking or injury of a submarine cable, done willfully or through culpable negligence, and resulting in the total or partial interruption or embarrassment of telegraphic communication, shall be a punishable offense, but the punishment inflicted shall be no bar to a civil action for damages."<sup>73</sup>

- (2) Articles I, II, and III of the Agreement for the Suppression of the Circulation of Obscene Publications,<sup>74</sup> signed in 1910, establish a duty to cooperate in prosecution and punishment, including judicial assistance.<sup>75</sup> Similar provisions are found in the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications<sup>76</sup> which entered into force in 1924.<sup>77</sup>
- (3) Drug trafficking is another area in which individual responsibility has been established in seven instruments, prior to the Charter, which criminalized the conduct and established a duty to prohibit, prevent, prosecute, punish, and the like.<sup>78</sup>
- (4) The International Convention for the Suppression of Counterfeiting Currency,<sup>79</sup> signed in 1929, established individual responsibility as well.<sup>80</sup>

National legal systems receptive to the above mentioned international law norms seldom prosecuted domestically other than for drug-related, counterfeiting, and in rare occasional cases for trafficking in obscene material. But the domestication of these international crimes proved successful and is now common, as are domestic prosecutions arising under national law for crimes whose origin is international, such as drug violations and terrorism. The same could occur with CAH, though admittedly the international crimes mentioned above do not, except in rare and unusual cases, have a connection to state action. CAH, whether committed by state actors pursuant to state policy or by nonstate actors pursuant to an organizational policy (the counterpart to state policy), has institutional and political sources, as well as political consequences. Thus, it may be easier for states to prosecute individuals based on individual criminal responsibility for noninstitutionally connected crimes, such as drug offenses, counterfeiting, and other crimes, rather than CAH.

<sup>73</sup> *Id.* at art. II.

<sup>74</sup> 7 Martens (3d) 266, 37 Stat. 1511, T.S. No. 559. *Reprinted in* 211 Parry's 54; 5 AM. J. INT'L L. 167 (1911); 1 BEVANS 748.

<sup>75</sup> See INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS (M. Cherif Bassiouni ed., 1997) [hereinafter BASSIOUNI, ICL CONVENTIONS].

<sup>76</sup> 27 L.N.T.S. 213. *Reprinted in* 7 Martens (3d) 266, 20 AM. J. INT'L L. 178 (1926); 2 HUDSON 1051.

<sup>77</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 75.

<sup>78</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 75. These documents are: International Opium Convention, The Hague 23 January 1912, 8 L.N.T.S. 187, 38 Stat. 1912, T.S. No. 612, *reprinted in* 215 Parry's 297; 6 AM. J. INT'L L. 177 (1912); 1 BEVANS 855; 1914 FOR. REL. 938. Agreement Concerning the Suppression of the Manufacturing of Internal Trade in and Use of, Prepared Opium, Geneva, 11 February 1925, 51 L.N.T.S. 337, *reprinted in* 3 HUDSON 1580. International Opium Convention, Geneva, 19 February 1925, 81 L.N.T.S. 317, *reprinted in* 23 AM. J. INT'L L. 135 (1929); 3 HUDSON 1589. Protocol to the International Opium Convention, Geneva, 19 February 1925, 81 L.N.T.S. 356, *reprinted in* 23 AM. J. INT'L L. 155; 3 HUDSON 1614. Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Geneva, 13 July 1931, 139 L.N.T.S. 301, 48 Stat. 1543, T.S. No. 863, *reprinted in* 28 AM. J. INT'L L. 21 (1934); 3 BEVANS 1; 5 HUDSON 1048. Agreement Concerning the Suppression of Opium-Smoking, Bangkok, 27 November 1931, 177 L.N.T.S. 373, *reprinted in* 5 HUDSON 1149. Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, Geneva, 26 June 1936, 198 L.N.T.S. 299, *reprinted in* 7 HUDSON 359.

<sup>79</sup> 122 L.N.T.S. 371, *reprinted in* 4 HUDSON 2692.

<sup>80</sup> See BASSIOUNI, ICL CONVENTIONS, *supra* note 75.



### §3. National Legislation and National Prosecutions for CAH after World War II

#### §3.1. National Legislation Criminalizing CAH

According to this writer's research, fifty-five states have legislation criminalizing CAH, most of which were developed post-2002. They are Albania (2001);<sup>81</sup> Argentina (2007);<sup>82</sup> Australia (2002);<sup>83</sup> Bangladesh (1973);<sup>84</sup> Belarus (2001);<sup>85</sup> Belgium (2003);<sup>86</sup> Bosnia and Herzegovina (2003);<sup>87</sup> Burkina Faso (2009);<sup>88</sup> Burundi (2003);<sup>89</sup> Canada (2000);<sup>90</sup> Chile (2009);<sup>91</sup> Congo Brazzaville (1998);<sup>92</sup> Costa Rica (2002);<sup>93</sup> Croatia (2003);<sup>94</sup> Cyprus;<sup>95</sup> Democratic Republic of the Congo (2005);<sup>96</sup> El Salvador;<sup>97</sup> Estonia (2002);<sup>98</sup> Ethiopia

<sup>81</sup> Article 74 of the Criminal Code of the Republic of Albania (2001), available at <http://www.legal-tools.org/doc/709ea8>.

<sup>82</sup> Law No. 26200, Dec. 13, 2006, 31.069 B.O. 2, available at [http://www.iccnw.org/documents/Ley-de-implementacion\\_argentina2.pdf](http://www.iccnw.org/documents/Ley-de-implementacion_argentina2.pdf).

<sup>83</sup> Article 7 of the International Criminal Court Act of 2002 criminalizes CAH, available at <http://www.iccnw.org/documents/AustraliaICCActNo42.2002.pdf>.

<sup>84</sup> See Article 3(2)(a) of the International Crimes (Tribunals) Act, 1973 (Act No. XIX of 1973), available at <http://www.bdlaws.gov.bd/print.sections.all.php?id=435> (last visited May 6, 2010).

<sup>85</sup> Article 128 of the Belarussian Penal Code criminalizes CAH. The statute does not provide a definition of the crime or contextual elements. It simply lists the specific acts, which are fewer than the specific acts listed in the ICTY, ICTR, and Rome Statutes. For instance, rape and other forms of sexual violence, enforced disappearances, and persecution are not specifically listed in Article 128. The crime of ecocide, however, is included in Article 131 of the same chapter. See Penal Code of Republic of Belarus art. 128, adopted on 9 July 1999, published in [The Register of the National Assembly of the Republic of Belarus, No. 28, 2000].

<sup>86</sup> Code Pénal [C.Pén] art. 136, available at <http://www.legal-tools.org/doc/3ef303/>.

<sup>87</sup> Article 172 of the Criminal Code of Bosnia and Herzegovina criminalizes CAH, available at [http://iccd.b.webfactional.com/documents/implementations/pdf/Criminal\\_Code\\_of\\_BH\\_eng.pdf](http://iccd.b.webfactional.com/documents/implementations/pdf/Criminal_Code_of_BH_eng.pdf).

<sup>88</sup> Article 7 of Law No. 052-2009/AN criminalizes CAH, available at [http://www.iccnw.org/documents/Decret\\_n2009-894-PRES-promulguant\\_la\\_loi\\_n052-2009-AN.pdf](http://www.iccnw.org/documents/Decret_n2009-894-PRES-promulguant_la_loi_n052-2009-AN.pdf)

<sup>89</sup> Articles 196 and 197 of the Burundi Penal Code criminalize CAH, available at <http://www.legal-tools.org/doc/d2cf87>.

<sup>90</sup> Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, available at <http://www.legal-tools.org/doc/b9b425>.

<sup>91</sup> Law No. 20357, Jul. 18, 2009, Diario Oficial [D.O.], available at <http://www.legal-tools.org/doc/5925e9/>.

<sup>92</sup> See Article 6 of chapter 3 of Law No. 8-98 of 31 October 1998 on the definition and repression of genocide, war crimes and crimes against humanity, available at: [http://www.nottingham.ac.uk/shared/shared\\_hrlcicju/Congo-Brazzaville/Loi\\_No-8-98\\_portant\\_definitions\\_et-repression\\_des\\_crimes\\_.pdf](http://www.nottingham.ac.uk/shared/shared_hrlcicju/Congo-Brazzaville/Loi_No-8-98_portant_definitions_et-repression_des_crimes_.pdf).

<sup>93</sup> Law No. 8272 amended the Costa Rican Penal Code to sanction war crimes and CAH. See Ley N° 4573 y sus reformas, Alcance N° 120 de La Gaceta N° 257, 15 November 1970; "Ley n° 8272: represión penal como castigo por los crímenes de guerra y de lesa humanidad," La Gaceta: Diario Oficial, No. 97, 22 May 2002.

<sup>94</sup> Article 157(a) of the Croatian Criminal Code criminalizes CAH, available at <http://www.legal-tools.org/doc/102d95>.

<sup>95</sup> This author has not been able to find the content; however, the ICC and the Coalition for the ICC have reported this to be the case.

<sup>96</sup> Article 222 of *Loi modifiant et completant certaines dispositions du code penal, du code de l'organisation et de la competence judiciaires, du code penal militaire et du code judiciaire militaire, en application du statut de la cour penale internationale*, available at <http://www.legal-tools.org/doc/aa2b04>.

<sup>97</sup> Title XIX of the El Salvadoran Penal Code, entitled *delitos contra la humanidad*, contains provisions criminalizing genocide, violations of the law and customs of war, forced disappearance of persons, the trade in persons, and human trafficking. See [http://www.cnj.gob.sv/index.php?view=article&catid=42:publicaciones&id=116:codigo-penal-de-el-salvador-comentado-&option=com\\_content&Itemid=12](http://www.cnj.gob.sv/index.php?view=article&catid=42:publicaciones&id=116:codigo-penal-de-el-salvador-comentado-&option=com_content&Itemid=12) (last visited May 8, 2010).

<sup>98</sup> Section 89 of the Estonian Penal Code criminalizes CAH, available at [http://iccdb.webfactional.com/documents/implementations/word/Estonia\\_Criminal\\_Code.doc](http://iccdb.webfactional.com/documents/implementations/word/Estonia_Criminal_Code.doc).

(1957);<sup>99</sup> Fiji (2009);<sup>100</sup> France (1994);<sup>101</sup> Georgia (2003);<sup>102</sup> Germany (2002);<sup>103</sup> Indonesia (2000);<sup>104</sup> Iraq (2005);<sup>105</sup> Ireland (2006);<sup>106</sup> Israel (1950);<sup>107</sup> Kenya (2008);<sup>108</sup> Lithuania (2000);<sup>109</sup> the Former Yugoslav Republic of Macedonia (2003);<sup>110</sup> Mali (2001);<sup>111</sup> Malta (2002);<sup>112</sup> Montenegro (2003);<sup>113</sup> the Netherlands (2003);<sup>114</sup> New Zealand (2000);<sup>115</sup> Niger (2003);<sup>116</sup> Norway (2008);<sup>117</sup> Panama (2007);<sup>118</sup> the Philippines

- <sup>99</sup> The Ethiopian Criminal Code, which entered into effect in 1957, contains a provision for CAH in Article 281.
- <sup>100</sup> Part 12, Division 2 of Decree No 44 prohibits CAH. See Decree No. 44 – Crimes Decree (2009), available at [http://www.fiji.gov.fj/index.php?option=com\\_docman&task=doc\\_download&gid=100&Itemid=158](http://www.fiji.gov.fj/index.php?option=com_docman&task=doc_download&gid=100&Itemid=158) (last visited May 7, 2010).
- <sup>101</sup> Articles 212–1 through 212–3 pertain to the criminalization of CAH in the French Penal Code. See [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_textan.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm). France has not adopted ICC implementing legislation as of the time of the publication of this book.
- <sup>102</sup> Article 408 of the Georgian Criminal Code criminalizes CAH, available at <http://www.legal-tools.org/doc/cf68d2>.
- <sup>103</sup> Section 7 of Germany’s (Act to Introduce the) Code of Crimes against International Law of 26 June 2002, available at: <http://www.iccnw.org/documents/GermanCodeOfInternational4C1.pdf>. Germany’s CAH provision follows Article 7 of the Rome Statute except for apartheid.
- <sup>104</sup> Law No. 26/2000 Establishing the Ad Hoc Human Rights Court in Indonesia to address gross violations of human rights criminalizes CAH in Article 9, available at: <http://indonesia.ahrchk.net/news/mainfile.php?urlaw/18?alt=english> (last visited May 7, 2010).
- <sup>105</sup> Statute of the Iraqi Special Tribunal art. 12, (Dec. 10, 2003), reprinted in C.P.A. Order No. 48, CPA/ORD/9 Dec. 2003/48 (Dec. 10, 2003).
- <sup>106</sup> Article 7 of the International Criminal Court Act 2006 criminalizes CAH. See <http://www.legal-tools.org/doc/196443>.
- <sup>107</sup> As discussed *infra* §3.2.3, Eichmann faced charges including crimes against the Jewish people and CAH directed at the Poles, Yugoslavs, Roma, and Czechs, pursuant to Israel’s Nazis and Nazi Collaborators (Punishment) Law 5710–1950, which punishes crimes against the Jewish people, CAH, and war crimes. See [http://www.mfa.gov.il/MFA/MFAArchive/1950\\_1959/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571](http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571) (last visited May 7, 2010); see also Israel’s Crimes Against Humanity (Abolition and Prescription) Law, 5726–1966 (stating, “There shall be no prescription with regard to offences under the Crime of Genocide (Prevention and Punishment) Law, 5710–1950, or the Nazis and Nazi Collaborators (Punishment) Law, 5710–1950.”).
- <sup>108</sup> Section 6 of Part II of the Kenyan International Crimes Act (2008) follows the definition of CAH provided for in Article 7 of the Rome Statute, available at [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php) (last visited May 7, 2010).
- <sup>109</sup> Lithuania incorporated the Rome Statute crimes, including CAH, in the criminal code it adopted on September 26, 2000. See <http://www.iccnw.org/?mod=country&iduct=101>.
- <sup>110</sup> Article 403-a of the Criminal Code of the Former Yugoslav Republic of Macedonia criminalizes CAH, available at: <http://www.legislationline.org/documents/section/criminal-codes/country/31>.
- <sup>111</sup> Article 29 of the Mali Penal Code criminalizes CAH. Law No. 01–079, Apr. 20, 2001, available at <http://www.justicemali.org/code%20penal.pdf>.
- <sup>112</sup> Part II, Title I, article 54c of the Malta Criminal Code (2002) criminalizes CAH, available at <http://www.legal-tools.org/doc/1d47ef>.
- <sup>113</sup> Article 427 of the Montenegrin Criminal Code criminalizes CAH, available at <http://www.legislationline.org/documents/section/criminal-codes>.
- <sup>114</sup> Section 4 of the International Crimes Act (2003) criminalizes CAH under Dutch law, available at <http://www.legal-tools.org/doc/d98e2b>.
- <sup>115</sup> International Crimes and International Criminal Court Act of 2000, Act. No. 26, 2000, available at <http://www.legal-tools.org/doc/3b0fb6>.
- <sup>116</sup> Article 208.2 of the Penal Code of Niger (2003) criminalizes CAH, available at <http://www.legal-tools.org/doc/53fffi>.
- <sup>117</sup> Section 102 of Chapter 16–1 of the Norwegian Penal Code criminalizes CAH (*Forbrytelse mot Menneskeheten*). General Civil Penal Code, Act No. 4 of 7 March 2008, Chapter 16: Genocide, Crimes Against Humanity and War crimes, § 102: *Forbrytelse mot Menneskeheten* [Crimes Against Humanity], available at <http://www.legal-tools.org/doc/a9b7c1>.
- <sup>118</sup> Articles 431 through 433 of the Panamanian Penal Code (2008) provide for the criminalization of CAH, available at <http://www.gacetaoficial.gob.pa/pdfTemp/25796/4580.pdf>.

(2009);<sup>119</sup> Portugal (2004);<sup>120</sup> Republic of Korea (2007);<sup>121</sup> Romania;<sup>122</sup> Rwanda (2003);<sup>123</sup> Samoa (2007);<sup>124</sup> Senegal (2007);<sup>125</sup> Serbia (2005);<sup>126</sup> Sierra Leone (2002);<sup>127</sup> South Africa (2002);<sup>128</sup> Spain (2004);<sup>129</sup> Sudan (2009);<sup>130</sup> Timor Leste (2009);<sup>131</sup> Trinidad and Tobago (2006);<sup>132</sup> Uganda;<sup>133</sup> United Kingdom (2001);<sup>134</sup> and Uruguay (2006).<sup>135</sup>

<sup>119</sup> Section 6 of Act No. 9851 on Crimes against International Humanitarian Law, Genocide and Other Crimes Against Humanity (2009) tracks the definition of CAH provided by Article 7 of the Rome Statute, available at [http://www.iccnw.org/documents/Republic\\_of\\_the\\_Philippines.pdf](http://www.iccnw.org/documents/Republic_of_the_Philippines.pdf).

<sup>120</sup> See Article 9 of Law No. 31/2004, July 22, 2004, adapting Portuguese criminal legislation to the Statute of the ICC specifying conduct constituting crimes against international humanitarian law – 17<sup>th</sup> amendment to the Criminal Code, available at <http://www.iccnw.org/documents/ImplementationICCPortugal-pt.pdf>.

<sup>121</sup> Article 9 of the Republic of Korea's ICC (Crimes and Punishment) Act, No. 8719 of 2007, available at: <http://www.iccnw.org/documents/KoreaImplementingAct.pdf>.

<sup>122</sup> Article 439 of the Romanian Criminal Code criminalizes CAH, available at <http://www.legal-tools.org/doc/b64ac2>.

<sup>123</sup> See Law No. 33 bis/2003 du 06/09/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes 2003, *Journal Officiel de la République du Rwanda*, No. 21, 1st November 2003, available at <http://www.unhcr.org/refworld/docid/46c4597c2.html>.

<sup>124</sup> Section 6 of the Samoan International Criminal Court Act of 2007 criminalizes CAH according to the definition provided in Article 7 of the Rome Statute. See <http://www.legal-tools.org/doc/46654c>.

<sup>125</sup> Article 431–2 of Law No. 2007–02 amending the Senegalese Criminal Code criminalizes CAH, available at [http://www.iccnw.org/documents/Loi\\_2007\\_02\\_du\\_12\\_Fev\\_2007\\_modifiant\\_le\\_Code\\_penal\\_senegal\\_fr.pdf](http://www.iccnw.org/documents/Loi_2007_02_du_12_Fev_2007_modifiant_le_Code_penal_senegal_fr.pdf).

<sup>126</sup> Article 371 of the Serbian Criminal Code criminalizes CAH, available at <http://www.legal-tools.org/doc/cdb624>.

<sup>127</sup> Statute of the Special Court of Sierra Leone art. 2 (Jun. 16, 2002).

<sup>128</sup> Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, available at <http://www.legal-tools.org/doc/df66f7>.

<sup>129</sup> Article 607bis of Organic Law No 15/2003 modifying the Spanish Penal Code of 1995 criminalizes CAH, available at [http://iccdb.webfactional.com/documents/implementations/word/Spain\\_Implementation\\_Provisions\\_in\\_Criminal\\_Code\\_2003.doc](http://iccdb.webfactional.com/documents/implementations/word/Spain_Implementation_Provisions_in_Criminal_Code_2003.doc).

<sup>130</sup> In 2009 in the wake of the ICC indictment, Sudan amended its Criminal Code to add a new chapter that includes provisions punishing genocide, CAH, and war crimes. See Criminal Act Amendments 2009, ch. 18. Sudan also passed the Criminal Procedures Amendments Act of 2009 as a legal deterrence against any individual or group contemplating cooperation with the ICC. Article 3 of the Criminal Procedures Amendments Act prohibits the investigation or proceedings outside of Sudan against any Sudanese person accused of committing any violation of international humanitarian laws including CAH, genocide, and war crimes. It also prohibits anyone in Sudan from assisting in the extradition of any Sudanese for prosecution for such crimes. The Sudanese regime's goal is not necessarily to fully carry out prosecutorial responsibilities under the ICC principle of complementarity, but to use it as a shield to avoid having to surrender its senior officials. *Id.* Still, one day the law may be fairly and effectively applied. M. Cherif Bassiouni, *Introduction*, in 1 *The Pursuit of International Criminal Law*, *supra* note 6, at xiii, xvi.

<sup>131</sup> Timor Leste adopted a new penal code in 2009 that incorporates CAH into its domestic penal code (Article 124). The definition fails to include the requisite *mens rea*. Decree Law 19–2009, available at <http://www.unmit.org/legal/RDTL-Decree-Laws/Decree-Law-19-2009.pdf>.

<sup>132</sup> Part II of Trinidad and Tobago's International Criminal Court Act of 2006 criminalizes CAH, available at: [http://www.iccnw.org/documents/Trinidad\\_Tobago\\_The\\_International\\_Criminal\\_Court\\_Act\\_2006.pdf](http://www.iccnw.org/documents/Trinidad_Tobago_The_International_Criminal_Court_Act_2006.pdf).

<sup>133</sup> After 4 years, Uganda passed its International Criminal Court bill on March 9, 2010, which will criminalize CAH, available at <http://www.parliament.go.ug/enewsletter/index.php/home/view/59/> (last visited May 5, 2010).

<sup>134</sup> Article 7 of the International Criminal Court Act (2001) implements into the laws of England, Wales, and Northern Ireland the Rome Statute of the ICC, available at <http://www.iccnw.org/?mod=country&iduct=184>. Scotland applies its own criminal laws as part of regional autonomy and therefore Scotland passed its International Criminal Court (Scotland) Act (2001), which must be read in conjunction with the British ICC Act, *supra*.

<sup>135</sup> Uruguay criminalizes CAH pursuant to Law No 18.026 Implementing the ICC Statute, available at [http://www.iccnw.org/documents/newLey\\_18026\\_Implementacion.pdf](http://www.iccnw.org/documents/newLey_18026_Implementacion.pdf).

There are two additional categories of states whose legislation covers CAH in whole or in part but without having specific legislation that labels certain acts as CAH. The first category is those states whose legislation has a label such as genocide or crimes against peace and security that include acts deemed part of CAH under customary international law. Countries in this category include Azerbaijan,<sup>136</sup> Colombia,<sup>137</sup> Hungary,<sup>138</sup> Latvia,<sup>139</sup> Peru,<sup>140</sup> Poland,<sup>141</sup> and Slovenia.<sup>142</sup>

The second category consists of those states that have ratified or acceded to the Rome Statute and enacted a law to that effect but have not adopted specific national legislation.<sup>143</sup> Thus, these states will be able to surrender persons charged with CAH to

<sup>136</sup> The Criminal Code of the Republic of Azerbaijan contains a special part pertaining to “crimes against peace and security of mankind”, which includes Articles 103 and 104 on genocide and incitement to commit genocide, as well as various provisions that take into account several relevant provisions of the Rome Statute. They are: extermination (Article 105); deportation or forcible transfer of population (Article 107); gender violation (Article 108, prohibiting rape, enforced prostitution, enforced sterilization, or any form of sexual violence); persecution (Article 109); enforced disappearance of persons (Article 110); apartheid (Article 111); deprivation of liberty contrary to the norms of international law (Article 112); torture (Article 103); and violations of the norms of international humanitarian law in time of armed conflict (Article 116), available at <http://www.legislationline.org/documents/section/criminal-codes>.

<sup>137</sup> Colombian law penalizes genocide, forced disappearance, forced displacement, and torture, but does not specifically penalize CAH. It could be said that the Convention Against Torture and the International Convention for the Protection of All Persons from Enforced Disappearance already covers forced disappearance and torture. Nevertheless, they could also be said to constitute CAH. See Law 589 of 6 July 2000.

<sup>138</sup> Chapter 11 of the Hungarian Criminal Code, entitled “Crimes Against Humanity,” contains Title I (Crimes Against Peace, including incitement for war, prohibition of recruiting, genocide, crimes against national, ethnic, racial, or religious groups, and apartheid) and Title II (war crimes), but it does not have a specific provision criminalizing CAH. See <http://www.legal-tools.org/doc/70116b>.

<sup>139</sup> Chapter IX of the Special Part of the Criminal Code of the Republic of Latvia is entitled “Crimes against Humanity and Peace, War Crimes and Genocide.” Chapter IX does not contain a specific prohibition against CAH; instead it contains provisions criminalizing genocide, Crimes Against Peace, manufacture, amassment, deployment, and distribution of weapons of mass destruction, war crimes, force against residents in the area of hostilities, pillaging, incitement to war of aggression, violation of national or racial equality and restriction of human rights, and destruction of cultural and national heritage, available at <http://www.legal-tools.org/doc/41d16c>.

<sup>140</sup> See Ley que modifica diversos artículos del Código Penal e incorpora el Título XIV-A, referido a los delitos contra la humanidad, El peruano – diario oficial, 21 February 1998, No. 6450, p. 157/575, available at <http://www.legal-tools.org/doc/50adbo>. Title XIV-A, entitled *delitos contra la humanidad* [crimes against humanity], does not contain a provision specifically criminalizing CAH, but contains provisions criminalizing genocide (art. 319), *desaparición comprobada* [“proven disappearance” – author’s translation] (art. 320), *tortura agravante* [“aggravated torture” – author’s translation] (art. 321), professional cooperation with torture (art. 322), discrimination (art. 323), and *manipulación genética* [“genetic manipulation” – author’s translation].

<sup>141</sup> See Chapter XVI of the Polish Penal Code, entitled “offences against peace, and humanity, and war crimes”, available at <http://www.legal-tools.org/doc/7ff3bd>.

<sup>142</sup> Article 374 of the Slovenian Penal Code criminalizes Crimes Against the Civilian population, available at: [http://www.google.com/url?sa=t&source=web&ct=res&cd=3&ved=0CCMQFjAC&url=http%3A%2F%2Fwww.policija.si%2Fportal\\_en%2Fzakonodaja%2Fpdf%2FPenalCode2007.pdf&ei=bezmS5rzBIH68Ab\\_p-mQDA&usq=AFQjCNH8TMFB6qFU5Hx7p5HGAXc8OvesA&sig=pZsYHNrNGjOooDdn49yTRw](http://www.google.com/url?sa=t&source=web&ct=res&cd=3&ved=0CCMQFjAC&url=http%3A%2F%2Fwww.policija.si%2Fportal_en%2Fzakonodaja%2Fpdf%2FPenalCode2007.pdf&ei=bezmS5rzBIH68Ab_p-mQDA&usq=AFQjCNH8TMFB6qFU5Hx7p5HGAXc8OvesA&sig=pZsYHNrNGjOooDdn49yTRw) (last visited May 8, 2010).

<sup>143</sup> They are Afghanistan, Andorra, Antigua and Barbuda, Austria, Barbados, Belize, Benin, Bolivia, Botswana, Brazil, Bulgaria, Cambodia, Central African Republic, Chad, Comoros, Cook Islands, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Finland, Gabon, Gambia, Ghana, Greece, Guinea, Guinea-Bissau, Guyana, Honduras, Iceland, Italy, Japan, Jordan, Lesotho, Liberia, Lichtenstein, Luxembourg, Madagascar, Malawi, Marshall Islands, Mauritius, Mexico, Namibia, Nauru, Nigeria, Paraguay,

the ICC, but they will not be able to prosecute perpetrators of CAH domestically because their criminal codes have not been amended. This means that they will not be able to carry out the principle of complementarity.

### §3.2. *Post-World War II Major National Prosecutions for CAH*

After World War II, almost every country occupied by Nazi Germany during the war proceeded to prosecute its nationals whom it deemed to have collaborated with the foreign occupier.<sup>144</sup> In some cases, the persons who collaborated with the Nazis may have also committed or participated in the commission of international crimes, but this is not easily identifiable from the published research on these cases.<sup>145</sup> For the most part it could be said that these prosecutions were of a political nature. Certainly, they settled accounts with nationals who collaborated with the occupying Nazi regime, but they also proved necessary to consolidate the power of the new post-World War II regimes. This was particularly true in Eastern and Central Europe with the new communist regimes that were established by the Union of Soviet Socialist Republics (USSR). Thus, in certain prosecutions in Hungary, Poland, and Czechoslovakia, nationalist elements of the society who opposed communism were prosecuted under false pretences and executed to eliminate any opposition to the newly established communist regimes that were subservient to the USSR.<sup>146</sup> The period during which these prosecutions took place was limited and there are no reports of them after 1949, except for some exceptional individual cases that surfaced thereafter. A few notorious cases took place several decades later but in the West only. Notable national prosecutions after 1945 involving CAH took place in Germany,<sup>147</sup> Austria,<sup>148</sup> Israel,<sup>149</sup> France,<sup>150</sup> Italy,<sup>151</sup> Canada,<sup>152</sup> Spain,<sup>153</sup> Argentina,<sup>154</sup> Indonesia,<sup>155</sup> and, most recently, Iraq.<sup>156</sup> Their description follows.

Poland, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Slovakia, Suriname, Sweden, Switzerland, Tajikistan, United Republic of Tanzania, Venezuela, and Zambia.

<sup>144</sup> Giuliano Vassalli, *Formula di Radbruch e di diritto penale: note sulla punizione dei delitti di Stato nella Germania postnazista e nella Germania postcomunista* (2001); István Deák, *A Fatal Compromise? The Debate over Collaboration and Resistance in Hungary*, 9 *East Eur. Politics & Societies* 209 (1995); István Deák, *Repression or Retribution? The War Crimes Trials in Post-World War II Hungary* (paper presented at AAASS Convention, Seattle, Nov. 23, 1997, on file with author); John S. Micgiel, *Legal Retribution in Poland, 1944–1946 and Historical Justice Today* (paper presented at the Vienna Conference on Political Justice in the Aftermath of World War II, Vienna, Nov. 2–5, 1995, on file with author); see also Peter Mohacsi & Peter Polt, *War Crimes and Crimes Against Humanity According to the Decision of the Constitutional Court of Hungary*, 67 *RIDP* 333 (1996) (concerning the nonapplicability of statutes of limitation to war crimes and “crimes against humanity” based on the 1993 legislation).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *infra* § 3.2.1.

<sup>148</sup> See *infra* § 3.2.2.

<sup>149</sup> See *infra* § 3.2.3.

<sup>150</sup> See *infra* § 3.2.4.

<sup>151</sup> See *infra* § 3.2.5.

<sup>152</sup> See *infra* § 3.2.6.

<sup>153</sup> See *infra* § 3.2.7.

<sup>154</sup> See *infra* § 3.2.8.

<sup>155</sup> See *infra* § 3.2.9.

<sup>156</sup> See *infra* § 3.2.10.

## §3.2.1. Germany

CCL 10 remained valid in Germany until 1955.<sup>157</sup> When, German law superseded CCL 10 and granted German courts jurisdiction over the crimes committed by the Nazis against German citizens, so long as they were prosecuted according to the CCL 10 definitions of war crimes and CAH.<sup>158</sup> Although jurisdiction was restricted to crimes committed by Germans against Germans, German courts prosecuted sixty-one cases related to the killings of non-German nationals between 1945 and 1950.<sup>159</sup> It has been estimated that the total number of German and Austrian criminals who have been prosecuted in German post-war trials is 60,000.<sup>160</sup> Although Germany appeared to be a willing prosecutor, amnesty, statutes of limitation, poorly drafted legislation, and prosecutions of low-level offenders were noteworthy.<sup>161</sup>

West German national prosecutions of Nazi crimes began in 1946, but the major trials did not commence until the 1950s.<sup>162</sup> Probably the most important of these cases was the Frankfurt Auschwitz trial (*der Auschwitz Prozess*), which lasted twenty months from December 1963 to August 1965, and gained considerable mass media attention despite public hostility and indifference.<sup>163</sup> The Frankfurt Auschwitz trial was the largest and most public of the trials of former Nazis in West Germany. It was actually the second Auschwitz trial; most of the senior officials were tried in Poland in 1947 and sentenced

<sup>157</sup> Fritz Weinschenk, "The Murderers among Them" – German Justice and the Nazis, 3 Hofstra L. & Pol'y Symp. 137, 139 (1999).

<sup>158</sup> Robert A. Monson, *The West German Statute of Limitations on Murder: A Political, Legal, and Historical Exposition*, 30 Am. J. Comp. L. 605, 607 (1982).

<sup>159</sup> Dick De Mildt & Dirk W. De Mildt, In the Name of the People: Perpetrators of Genocide in the Reflection of Their Post-War Prosecution in West Germany: the "Euthanasia" and "Aktion Reinhard" Trial Cases 22 (1996).

<sup>160</sup> *Id.* at 18–19. This estimate includes the prosecutions undertaken by the four main Allies and the formerly occupied countries, but the majority of these were Soviet prosecutions that took place in Eastern Europe. *Id.* The documentary evidence of these prosecutions is poor. Most Soviet proceedings were secretive and many were based on unspecified charges. For instance, at the *Waldheim* trials in 1950, 3,000 individuals were sentenced in less than three months, only some of whom were suspected of Nazi crimes. *Id.* For more on the Soviet post-World War II trials, see Alexander Victor Prusin, "Fascist Criminals in the Gallows!": *The Holocaust and Soviet War Crimes Trials, 1945 – February 1946*, 17 Holocaust and Genocide Studies 1, 6–7 (2003).

<sup>161</sup> De Mildt & De Mildt, *supra* note 159, at 21. Between 1945 and 1992, there were 1,793 cases related to capital crimes committed by the Nazi regime during the war, which resulted in 974 (54%) convictions, with 819 (46%) resulting in acquittals or terminations. *Id.* Many of these were crimes committed at the end of the war, such as judicial executions of German civilians and soldiers or militia members who resisted in the face of an inevitable defeat, which distinguishes these crimes from the crimes of the Third Reich. *Id.* Through 1992, there were 755 (or 7% of total investigations) defendants who were prosecuted for wartime involvement in genocide. *Id.* Of these, 283 were acquitted or dismissed, while 472 (or 7% of total convictions) were convicted and punished. *Id.* Of those 472, one defendant was sentenced to death, 113 received life imprisonment, and 358 received sentences of less than 15 years. *Id.*

<sup>162</sup> David Cohen, *Transitional Justice in Divided Germany After 1945* 3 (U.C. Berkeley War Crimes Studies Center).

<sup>163</sup> Bernd Naumann, *Auschwitz: A report on the proceedings against Robert Karl Ludwig Mulka and others before the court at Frankfurt* (Jean Steinberg, trans., 1966) (trial transcript) [hereinafter *Frankfurt Auschwitz Trial*]; see also Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963–1965: History, Genocide and the Limits of the Law* (2006); Rebecca Wittman, *Beyond Justice: The Auschwitz Trial* (2005); Hermann Langbein, *Der Auschwitz-Prozess: Eine Dokumentation* (2 vols., 2d ed. 1995); Gerhard Werle and Thomas Wandres, *Auschwitz vor Gericht* (1995); Ulrich Schneider, *Auschwitz: Ein Prozess* (1994); Anatomy of the SS State (1968); Devin O. Pendas, "I didn't know what Auschwitz was": *The Frankfurt Auschwitz Trial and the German Press, 1963–1965*, 12 Yale J.L. & Human 397 (2000).



to death. In all, an estimated 6,000 to 8,000 SS worked at Auschwitz and maintained its operation. The judges applied Nazi law (and not the Law of the London Charter), and also limited modes of individual criminal responsibility. Twenty-two persons, mostly lower and mid-level officials of the SS, were charged under German penal law.<sup>164</sup> Six were given life sentences; five were acquitted.

The Majdanek Trial in Düsseldorf followed a decade after the Frankfurt Auschwitz trial, and lasted from 1975 to 1981.<sup>165</sup> Approximately 300,000 victims died at Majdanek.<sup>166</sup> At the trial, sixteen former SS guards at Majdanek were prosecuted in Germany's longest and most expensive trial against the crimes of the Nazi regime.<sup>167</sup> Nine persons were sentenced to imprisonment ranging from three years to life; two more were unfit to stand trial; four were acquitted; and one died during proceedings. German lethargy regarding these national prosecutions greatly contrasts with the manner in which the country severely confronted the domestic terrorism of the *Rote Armee Fraktion* during this same period.

After the fall of the Berlin Wall in 1989, there were a few token prosecutions in Germany directed mostly against East German border guards who had shot East Germans trying to escape to West Germany.<sup>168</sup> Subsequent to these prosecutions, the superiors of these guards were also prosecuted.<sup>169</sup> The conviction of these border guards was greatly criticized, especially because East Germany's communist dictator, Honecker was never prosecuted.

On May 12, 2009, after being pursued by prosecutors for more than thirty years, John Demjanjuk arrived in Germany to face charges that he helped murder at least 29,000 Jews and others at the Sobibor death camp in Poland in 1943.<sup>170</sup> In the late 1970s, investigators from the U.S. Immigration and Naturalization Service first received evidence that Demjanjuk, a 1952 immigrant to the United States and a Ford mechanic, had previously served as a guard at Sobibor. When the INS requested Israeli police to assist its investigation, a number of Treblinka death camp survivors, who were assisting the investigation of an unrelated case, identified Demjanjuk as the operator of the

<sup>164</sup> Persons convicted included Doctor Franz Lucas (three years and three months hard labor for complicity in joint murder on at least four occasions, each involving at least 1,000 persons); Doctor Willie Frank (seven years hard labor for joint murder on at least six occasions, each involving at least 1,000 persons); Doctor Victor Capesius (nine years hard labor for complicity in joint murder on at least four occasions, each involving at least 2,000 persons); Josef Klehr (life and fifteen years hard labor for murder on at least 475 occasions and complicity on at least six occasions, involving in total at least 2,730 persons); Herbert Scherpe (four years and six months hard labor for joint murder of at least 700 persons); and Emil Hantl (three years and six months hard labor (time served) and loss of civil rights for complicity in joint murder on at least 40 occasions and complicity in joint murder on two further occasions each involving 170 persons). Frankfurt Auschwitz Trial, *supra* note 163, at 412–13.

<sup>165</sup> District Court Düsseldorf, *Urteil Hackmann u.a.*, XVII 1/75, v. I, pp. 65f.

<sup>166</sup> See Josef Marszalek, *Majdanek: The Concentration Camp in Lublin* (1986); Elizabeth B. White, *Majdanek: Cornerstone of Himmler's SS Empire in the East*, 7 Simon Wiesenthal Center Annual 1, 3–4 (1990).

<sup>167</sup> *Id.*

<sup>168</sup> See E. M. Ambrosetti, *In margine alle cd. Sentenze del muro di Berlino: note sul problema del « diritto ingiusto »*, Rivista Italiana di Diritto e Procedura Penale 596 (1994); see also 2 *Berlin Wall Guards "Sorry" for '62 Killing*, Chi. Trib., Mar. 4, 1997, at A8; *Berlin Wall Guards Convicted: 1962 Shooting Victim Screamed for Help as He Bled to Death*, Toronto Star, Mar. 6, 1997, at A21.

<sup>169</sup> See *Ex-East German Officers Found Guilty*, San Diego Union-Trib., Mar. 27, 1998, at A16.

<sup>170</sup> See *John Demjanjuk flies in*, Economist, May 14, 2009, at 56.



Treblinka gas chamber – a guard whose cruelty had earned him the moniker “Ivan the Terrible.” After years of further investigation by the Office of Special Investigations of the U.S. Department of Justice, he was stripped of his citizenship and extradited to stand trial in Jerusalem where he was sentenced to death. However, as discussed below, due to a case of mistaken identity, the Israeli Supreme Court courageously voided his conviction. His US citizenship was reinstated. But in 2001, the United States revoked Demjanjuk’s citizenship again, concluding that there was reliable evidence that he had served as an SS guard at Sobibor. His appeal was rejected, and an immigration judge ruled that he should be deported to Ukraine. On January 30, 2008, the Sixth Circuit Court of Appeals confirmed the Board of Immigration Appeals’ December 2006 decision upholding the immigration order. The United States Supreme Court refused to grant Demjanjuk’s application for certiorari on May 19, 2008.<sup>171</sup> The next month, Germany announced its intention to seek Demjanjuk’s extradition to face prosecution for his alleged role at Sobibor. On March 11, 2009, the High Court of Munich issued an arrest warrant charging Demjanjuk with 29,000 counts of accessory to murder at Sobibor, where 260,000 individuals were executed in gas chambers. The newest *Demjanjuk* trial commenced on November 30, 2009, and no final judgment was rendered by the end of 2010.

In July 2010, another suspected Nazi death camp guard, Samuel Kunz, was charged with participating in the murder of 430,000 Jews and other Nazi-era crimes committed at the Belzec death camp in Nazi-occupied Poland.<sup>172</sup> The recent cases of Demjanjuk and Kunz are merely extensions of German national prosecutions of the past. Understandably, as time goes by, most of the senior perpetrators have either been prosecuted or have died. This leaves only lesser perpetrators like prison guards who are in their late eighties or early nineties, which raises questions concerning the social utility of such prosecutions. Maybe what should be done in these cases is to have a trial to establish the historical record and to publicize the event, with an alternative form of punishment than imprisonment for such individuals.

Beyond the context of the crimes of the Nazi regime, Germany has also pursued domestic prosecutions of persons based on genocide and grave breaches of the Geneva Conventions of 1949 in connection with the conflict in the former Yugoslavia (1991–1995). These prosecutions, however, have not included CAH. In the *Jorgić* case, the *Oberlandesgericht Düsseldorf* convicted Nikola Jorgić, a Bosnian Serb who had been residing in Germany, of eleven counts of genocide and thirty counts of murder constituting grave breaches of the Geneva Conventions of 1949. The ICTY, due to its heavy caseload, asked Germany to prosecute him and others captured within German borders.<sup>173</sup> Jorgić was

<sup>171</sup> *Demjanjuk v. Mukasey*, 514 F.3d 616 (6th Cir. 2008), *cert. denied*, 553 U.S. 1061 (2008).

<sup>172</sup> See *Suspected Nazi Indicted in Germany*, NY Times, July 28, 2010.

<sup>173</sup> *Nikola Jorgić*, Oberlandesgericht Düsseldorf [Higher Regional Court at Düsseldorf], Judgment, 26 September 1997. The conviction was upheld on appeal. Bundesgerichtshof, Urteil vom 21 February 2000 – 3 StR 372/00 [Federal Supreme Court], Judgment, 30 April 1999; Bavarian Appeals Court, Judgment, 21 February 2000.

See also *Maksim Sokolovic*, Oberlandesgericht Düsseldorf [Higher Regional Court in Düsseldorf] 29 November 1999 (Sokolovic, a Bosnian Serb, was sentenced to nine years imprisonment for participating in acts of genocide); appeal dismissed: *Maksim Sokolovic*, Bundesgerichtshof [Federal Court of Justice], Third Criminal Senate, 21 February 2001, 3 StR 372/00; *Kjuradj Kusljic*, Bayerisches Oberstes Landesgericht, 15 December 1999, 6 St 1/99; appeal dismissed: *Kjuradj Kusljic*, Bundesgerichtshof [Federal Court of Justice], 21 February 2001, BGH 3 StR 244/00 (convicting Kusljic for genocide and grave breaches of the

sentenced to life imprisonment. The *Oberlandesgericht* found that Jorgić had been the leader of a paramilitary group in the Doboï region that had terrorized the local Bosniaks with the backing of the Serb leaders and with the intention of contributing to their policy of ethnic cleansing.<sup>174</sup>

### §3.2.2. Austria

The Austrian record of prosecution for its citizens who were involved in the commission of crimes as defined in CCL 10, including CAH, is questionable.<sup>175</sup> More particularly, there has never been a public debate in Austria, as was the case in Germany, in order to fully discuss and come to terms with Austrian participation in the Nazi regime of Germany. Austria's forceful inclusion as part of Germany with the Anschluss was something that most Austrians supported and even welcomed. Even though Germany went through an extensive public debate and a large number of trials between the late 1950s and late 1970s, some still ongoing, nothing like that ever occurred in Austria (although some extermination and slave labor camps were located there, and Austrians were part of the Nazi military and political establishment). Only a few critical researchers in the field of law and social sciences have addressed this subject in Austria in the last fifty years.

Between 1945 and 1955, Austria established *Olksgesichte* ("People's Courts"), which consisted of two professional judges and three lay judges selected by the Ministry of Justice, based on a list of nominees preserved by the three political parties. Initially, there was a problem with a shortage of judges, because most of those who had been involved in the Nazi regime had been dismissed. The first legal bases for prosecutions in 1945 were unique and also anachronistic, because they were based on a law that was passed by the then provisional government of the Third Reich, which was presided over by Grand Admiral Dönitz, the successor of Hitler after he had committed suicide in his bunker in Berlin. Admiral Dönitz became Chancellor and formed a provisional government to negotiate with the Allied powers. As a show of good faith, the provisional government, which had both executive and legislative powers, enacted a law in the nature of a decree entitled *Nazi erbotsgesetz* ("The Nazi Prohibition Law"). The provisional government was stationed at the time in the city of Flensburg, which was only a few kilometers away from the city of Rheims, France – General Dwight D. Eisenhower's headquarters. The decree was dated May 8, 1945, just hours before Chancellor Dönitz and his government were asked to come to Eisenhower's headquarters, where they signed Germany's unconditional surrender. As soon as that was completed, they were arrested and their provisional government dissolved.

Geneva Conventions of 1949 for ordering the execution of six Bosniaks to frighten others from attempting to escape); *Novislav Djajic*, Bayerisches Landesgericht, 23 May 1997, 3 St 20/96 (Djajic was charged with genocide and complicity in murder in connection with the killings of fifteen Bosniaks; he was found guilty of complicity in murder but acquitted of genocide). Germany also arrested Dusko Tadic, and charged him with complicity in genocide; however, Germany extradited Tadic to the ICTY, where he was charged with the CAH of persecution and convicted. The *Tadic* case became the first trial before an international war crimes tribunal since Nuremberg. Prosecutor v. Tadic, Case No. IT-94-I-T, Judgment (May 7, 1997).

<sup>174</sup> See William Drozdiak, *Bosnian Serb Gets Life in Massacre of Muslims*, INT'L HERALD TRIB., Sept. 27–28, 1997 at 2.

<sup>175</sup> See Holocaust und Kriegsverbrechen vor Gericht: Der Fall Österreich (T. Albrich, W.R. Garscha, and M.F. Polaschek eds., 2006); C. Kukretsidis-Haider, *Das Volks sitzt zu Gericht: Österreich Justiz und NS-Verbrechen am Beispiel der Engerau-Prozesse 1945–54* (2006).

The *Nazi Erbotzgesetz* was never used in Germany. Ironically, it was the first law under which CAH and war crimes could have been prosecuted in Germany, long before CCL 10 promulgated on December 20, 1945, and even preceding the IMT Statute, which was adopted on August 8, 1945.

The Austrian provisional government passed a war crimes law (*Kriegsverbrechergesetz*) on June 26, 1945, patterned after the *Nazi Verbotsgesetz*. Once again, this law preceded the IMT and CCL 10. Both of these laws dealt with war crimes and were retroactive in effect. They did not specifically use the term “crimes against humanity,” but they included as an extension of war crimes, torture, acts of cruelty, violations of human dignity, expropriation, expulsion, and resettlement. For all practical purposes, all of these were crimes under both the German and Austrian criminal codes, even though not under the same exact rubric.

The Austrian People’s Courts, as stated above, operated for ten years, which is the period during which Austria was under the control of the four Allied powers. Most of the prosecutions, however, took place in the Soviet zone of occupation in August 1945, several months before the IMT was established. The seat for the People’s Court in the Soviet zone was in Vienna. For the British zone, it was in Graz. The American zone was in Linz, and the French zone was in Innsbruck. The Austrian People’s Courts are reported to have initiated investigations against 137,000 suspected persons. It is reported that some 28,000 were brought to trial, and that some 13,000 were sentenced, among them 30 death sentences and 6 life sentences.<sup>176</sup>

On December 20, 1955, the People’s Courts were dissolved after Austria’s independence and the adoption of a new constitution. By then, some 4,700 cases were pending. In 1955, prosecutions were transferred to Austria’s criminal courts, which, between 1955 and 1975, prosecuted forty-six persons. Only eighteen were found guilty. In the interim, in 1957, an amnesty law was passed that specifically addressed acts committed during the Nazi period. This meant that as of 1957, there was no basis for prosecuting anyone in Austria for CAH or the specific acts included in the definition of CAH, namely, war crimes, torture, acts of cruelty, violations of human dignity, expropriation, expulsion, and resettlement. Notwithstanding the 1957 amnesty law, the war crimes law continued to provide that obedience to superior orders was a defense.

The People’s Courts handed down twenty-three verdicts between 1945 and 1955, whereas jury courts entered only thirty-nine verdicts between 1955 and 1975.

Many former Nazis were reintegrated in the political system of Austria’s government in 1948. Although Austria has not pursued domestic prosecutions for CAH, it has prosecuted persons for genocide. In the *Cvjetkovic* case, Dusko Cvjetkovic was accused of genocide against Bosniaks in Kucice.<sup>177</sup> A jury acquitted him for lack of sufficient evidence.

### §3.2.3. Israel

Two major prosecutions in Israel are noteworthy. During World War II, Adolf Eichmann was the *SS-Obersturmbannführer* of the Nazi regime, whose role was primarily the planning and organization of Jewish deportation to concentration and extermination

<sup>176</sup> See Keine “Abrechnung” NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945 (1997).

<sup>177</sup> See *Cvjetkovic*, Oberstergerichtshof, 13 July 1994, available at <http://www.legal-tools.org/doc/a6f56> (holding that Cvjetkovic was lawfully detained and subject to the jurisdiction of Austrian courts).

camps as part of the Nazi's "final solution" against the Jews. Eichmann fled to Austria as the Allied Powers entered Germany. The Americans arrested him in 1945, but he escaped. Eichmann lived for three years under a fake identity in Germany before he was transported to Argentina by a Catholic cleric and an underground organization of former SS members. Eichmann lived openly in Argentina until his whereabouts were discovered by Israel. In 1960, after a three-year chase, Israel's Mossad agents captured him and brought him to Israel to face fifteen criminal charges for crimes including crimes against the Jewish people, CAH directed at the Jewish people, CAH directed at the Poles, Yugoslavs, Roma, and Czechs, and membership in hostile or criminal organizations.<sup>178</sup>

The District Court relied on Israel's Nazis and Nazi Collaborators (Punishment) Law 5710–1950, a retroactive law providing for extraterritorial jurisdiction to prosecute Nazis in Israel for CAH.<sup>179</sup> On December 15, 1961, the Court convicted Eichmann of all charges and sentenced him to death for crimes against the Jewish people, CAH, and war crimes. The Supreme Court rejected his appeal. The District Court referred to universal jurisdiction in its decision, but its holding with respect to the exercise of jurisdiction relied on the protective principle of national jurisdiction.<sup>180</sup> However, the Supreme Court invoked both the District Court's narrower protective principle and universal jurisdiction as grounds for enforcement of international law.<sup>181</sup> Eichmann was hanged on May 30, 1962 in Ramla, Israel. In her account of the *Eichmann* trial, Hannah Arendt made famous her notion on the "banality of evil," which observed that Eichmann was an ordinary man accustomed to following and executing orders, and that, generally, extraordinary evil can be "banal" in the sense that any individual in certain historical circumstances could become a perpetrator and that great evil often masquerades as banality.<sup>182</sup>

The *Eichmann* trial<sup>183</sup> allowed the Jewish people the opportunity to prove the Holocaust and for victims to publicly testify in a significant social drama of Promethean aspirations that an author describes as follows:

By focusing on excruciating personal experiences of the victims, stories calculated to "shock the heart," the prosecutor, Gideon Hausner, "sought to design a national saga

<sup>178</sup> Matthew Lippmann, *The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 Buff. Hum. Rts. L. Rev. 45, 70–71 (2002).

<sup>179</sup> CrimC(Jer) 40/61 Attorney General of the Government of Israel v. Eichmann, IsrDC 45, 3 (1961); CrimA 366/61 Eichmann v. Attorney General 17 IsrSC 2033 [1962]. The law was retroactive, extraterritorial, allowed for circumvention of the laws of evidence, consented to capital punishment, and did not bar prosecution when a case had already been tried by another state. Israel similarly exercised jurisdiction in the case of John Demjanjuk, who was denaturalized and deported from the United States to stand trial in Israel. See *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); CrimC(Jer) 373/86 The State of Israel v. Demjanjuk, [1988]; CrimA(Jer) 347/88 The State of Israel v. Demjanjuk; S.Ct 347/88 Demjanjuk v. The State of Israel, [1993] 47(4) P.D. 221. See also *infra* § 3.2.1.

<sup>180</sup> CrimC(Jer) 40/61 Attorney General of the Government of Israel v. Eichmann, IsrDC 45, 3 (1961).

<sup>181</sup> CrimA 366/61 Eichmann v. Attorney General 17 IsrSC 2033 [1962].

<sup>182</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963). But see Antonio Cassese, *Anthology: Eichmann: Is Evil So Banal?*, 7 J. Int'l Crim. Just. 645, 647 (2009) (stating: while Hannah Arendt "may have been right about the 'banality of evil,' [she] was wrong in maintaining that Eichmann had been a simple cog in the criminal machinery, a robot-like functionary who only obeyed orders. This was the picture of himself that Eichmann astutely projected at trial. It is however belied by some episodes that show that he was a criminal bigot who, after starting off his job for the sake of a rapid career, became a fanatic, bent on the extermination of as many Jews as possible, and deliberately made a conspicuous personal contribution to such extermination.").

<sup>183</sup> See generally A. Papadatos, *The Eichmann Trial* (1964); Gideon Hausner, *Justice in Jerusalem* (1966); Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

that would echo through the generations,” helping to construct Israeli national identity in the process. By highlighting Jewish resistance to the Holocaust, he aimed to help young Israelis overcome “their repugnance for the nation’s past,” a repugnance based on their impression that their grandparents had “allow[ed] themselves to be led like lambs to the slaughter.” To serve these narrative purposes, Eichmann’s trial would fill the “need [for] a massive living re-creation of this national and human disaster.” The trial, one Israeli scholar reports, “compelled an entire nation to undergo a process of self-reckoning and overwhelmed it with a painful search for its identity.” Thus, “the trial served as a sort of national group therapy.”

Although painful, this process was also “poetic,” in the way justice can sometimes be. One poet, who was among thousand Israelis listening in on radio, ably captures this dimension: “The placing of Eichmann before a Jewish court was destined to fill a chaotic, inhuman void that has hidden somewhere in the experience of the Jewish people, its trials and tribulations, from the commencement of its exile until today.” Metaphorically, the trial captured “the duality of our existence, Gouri adds, “the Jews as a murdered people and the story of Israeli as a nation sitting in judgment.”<sup>184</sup>

Israel also conducted a national prosecution of John Demjanjuk, as mentioned above in German prosecutions, who was extradited from the United States to Israel to face charges including CAH and crimes under the Israeli law. In 1988, the Jerusalem District Court convicted and sentenced Demjanjuk to death after witnesses identified him as “Ivan the Terrible,” a notoriously sadistic guard at the Treblinka death camp in Poland.<sup>185</sup> However, on August 18, 1993, the Supreme Court overturned the conviction after new Soviet-era documents cast doubt on Demjanjuk’s identity – he was responsible for crimes committed as a Nazi SS prison guard at Sobibor, but he was not “Ivan the Terrible” at Treblinka.<sup>186</sup> Despite these findings, the Supreme Court ruled that Demjanjuk was unable to properly defend himself because most of the trial concerned the question of his identity as “Ivan the Terrible.” Demjanjuk returned to the United States and his citizenship was restored after the U.S. Court of Appeals for the Sixth Circuit ruled that the prosecution had failed to disclose exculpatory evidentiary during extradition proceedings.<sup>187</sup> As discussed above, sixteen years after Israel quashed Demjanjuk’s death sentence, his case became the most recent Nazi war crimes trial in Germany.<sup>188</sup>

### §3.2.4. France<sup>189</sup>

The French national prosecutions in the aftermath of World War II are unique because of France’s role in the war. Although France participated at the IMT as one of the Allied Powers, it carried out few domestic proceedings for the next twenty years. Then, on December 26, 1964, the French Parliament adopted law number 64–1326, which

<sup>184</sup> Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* 15–17 (1997) [hereinafter Osiel, *Mass Atrocity*] (internal citations omitted).

<sup>185</sup> CrimC(Jer) 373/86 *The State of Israel v. Demjanjuk*, [1988]; CrimA(Jer) 347/88 *The State of Israel v. Demjanjuk*; S.Ct 347/88 *Demjanjuk v. The State of Israel*, [1993] 47(4) P.D. 221.

<sup>186</sup> See *infra* §3.2.1.

<sup>187</sup> *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

<sup>188</sup> *Demjanjuk flies in*, *supra* note 170.

<sup>189</sup> For additional information on these cases and French prosecution of war criminals, see generally Leila Nadya Sadat, *The French Experience*, in *International Criminal Law: International Enforcement* 329 (M. Cherif Bassiouni ed., 3d rev. ed. 2008); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications*, in *ASIL Proceedings* 270–76 (1997); Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat’l L. 289 (1994); Leila Sadat Wexler, *Reflections on*

provided that statutes of limitations were inapplicable to CAH as defined in Article 6(c) of the London Charter. Prior to the Rome Statute, most pre-ICC legislation in Europe failed to codify the prohibition of CAH. Thus, countries like the Netherlands, Denmark, Germany, and Switzerland, among others, only prosecuted for war crimes. France was an exception because it included CAH in its criminal code.<sup>190</sup>

Three cases contributed to the elaboration of the French jurisprudence of CAH. They are the trials of Klaus Barbie,<sup>191</sup> Paul Touvier,<sup>192</sup> and Maurice Papon.<sup>193</sup> The prosecutions of Touvier and Barbie could only proceed for CAH because the statute of limitations had expired for other offenses. Both trials largely focused on the defendants' conduct toward Jews in France who were deported in Germany.<sup>194</sup>

In the *Barbie* trial, SS-*Hauptsturmführer* and Gestapo member Klaus Barbie, a German national, was charged with CAH. Prior to meeting Heinrich Himmler in 1935 and joining

*the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 J. L. & Soc. Inquiry 191 (1995); Leila Sadat Wexler, *Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications* (Working Paper No. 97-4-3, Washington University School of Law, 1997); Jacques Francillon, *Crimes de guerre, Crimes contra l'humanité*, Juris-Classeur, Droit Int'l, Fascicule 410 (1993); Mireille Delmas-Marty, *Le crime contra l'humanité, les droits de l'homme, et l'irréductible humain*, 3 Rev. Sc. Crim. 477 (1994); Catherine Grynfolgel, *Le crime contre l'humanité: notion et régime juridique*, Toulouse-I 727 (1991); Michel Masse, *Les crimes contre l'humanité dans le nouveau code pénal français*, 2 Rev. Sc. Crim. 376 (1994); Claude Lombois, *Un crime international en droit positif français: l'approt de l'affaire Barbie à la théorie française du crime contre l'humanité*, Mélanges Vitu, Cujas 367 (1989); Pierre Truche, *La notion de crime contre l'humanité: bilan et propositions*, 181 Rev. Esprit 67 (1992); Elizabeth Zoller, *La définition des crimes contre l'humanité*, J.D.I. 549 (1993); P. Truche & P. Biriretz, *Crimes de guerre – crimes contra l'humanité*, 2 Enclopedia Dalloz, Droit Pénal (1993).

<sup>190</sup> Belgium also adopted legislation in 1993 that codified the prohibition of CAH.

<sup>191</sup> For the judgments in the *Barbie* case, see Matter of Barbie, Gaz. Pal. Jur. 710 (Cass. Crim. Oct. 6, 1983); Judgment of Oct. 6, 1983, Cass. Crim., 1984 D.S. Jur. 113, Gaz. Pal. Nos. 352–54 (Dec. 18–20, 1983), 1983 J.C.P. II G, No. 20,107, J.D.I. 779 (1983); Judgment of Jan. 26, 1984, Cass. Crim., 1984 J.C.P. II G, No. 20,197 (Note Ruzié), J.D.I. 308 (1984); Judgment of Dec. 20, 1985, Cass. Crim., 1986 J.C.P. II G, No. 20,655, 1986 J.D.I.; Judgment of June 3, 1988, Cass. Crim., 1988 J.C.P. II G, No. 21,149 (Report of Counselor Angevin); see also LADISLAS DE HOYAS, *KLAUS BARBIE* (Nicholas Courtin trans., 1985); BRENDAN MURPHY, *THE BUTCHER OF LYON* (1983).

<sup>192</sup> For the judgments of the *Touvier* case, see Judgment of Feb. 6, 1975, Cass. Crim., 1975 D.S. Jur. 386, 387 (Report of Counselor Chapan), 1975 Gaz. Pal. Nos. 124–26 (May 4–6, 1975); Judgment of Oct. 27, 1975 Chambre d'accusation de la cour d'appel de Paris, 1976 D.S. Jur. 260 (Note Coste-Floret), 1976 Gaz. Pal. Nos. 154–55, at 382; Judgment of June 30, 1976, Cass. Crim., 1977 D.S. Jur. 1, 1976 Gaz. Pal. Nos. 322, 323, 1976 J.C.P. II G, No. 18,435; Judgment of Nov. 27, 1992, Cass. Crim., 1993 J.C.P. II G, No. 21,977; Judgment of Apr. 13, 1992, Cour d'appel de Paris, Première chambre d'accusation, at 133–62, *reprinted in part* in 1992 Gaz. Pal. 387, 387–417; Judgment of June 2, 1993, Cour d'appel de Versailles, Première chambre d'accusation 31; Judgment of June 1, 1995, Cour de Cassation, Bull. crim. N°42, p.113; see also Éric Conan & Henry Rouso, *Vichy, un Passé Qui ne Passe pas* (1994); Alain Jakubowicz & René Raffin, *Touvier Histoire du Procès* (1995); Arno Klarsfeld, *Touvier un crime francais* (1994); Jacques Trémolet de Villers, *L'affaire Touvier, Chronique d'un Procès en idéologie* (1994).

<sup>193</sup> For the judgments of the *Papon* case, see Papon was indicted on September 18, 1996; the indictment was confirmed on January 23, 1997; Judgment of Sept. 18, 1996, Chambre d'accusation de la cour d'appel de Bordeaux (unpublished), affirmed Judgment of Jan. 23, 1997, Cass. Crim., 1997 J.C.P. II G, No. 22,812. See Craig R. Whitney, *Ex-Vichy Aide Is Convicted and Reaction Ranges Wide*, N.Y. TIMES, Apr. 3, 1998, at A1; Craig R. Whitney, *Vichy Official Found Guilty of Helping Deport Jews*, N.Y. TIMES, Apr. 2, 1998, at A8; Charles Trueheart, *Verdict Nears in Trial of Vichy Official*, WASH. POST, Apr. 1, 1998, at A21; see also Laurent Greilsamer, *Maurice Papon, la vie masquée*, LE MONDE, Dec. 19, 1995, available in LEXIS, Nexis Library, Monde File; Barry James, *The Final Trial for Vichy? A Model French Bureaucrat Accused*, INT'L HERALD TRIB., Jan. 6–7, 1996, at 2.

<sup>194</sup> Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, *supra* note 189, at 323–25, 331–33.



the SS, Barbie was an enthusiastic member of the Hitler Youth. In 1942, he was appointed Chief of the Gestapo, or the secret police, in Lyon. The criminal offences that led to his prosecution took place during his time in France. Barbie was accused of being responsible for the torture and deportation of Jews and members of the French Resistance, resulting in his nickname of the “Butcher of Lyon.” Among other crimes, Barbie signed the April 1944 deportation order removing Jewish children from their refuge at an orphanage in Izieu and sending them to Drancy concentration camp and eventually the gas chambers at Auschwitz. In 1952 and 1954, a French military tribunal sentenced Barbie *in absentia* to death for war crimes. He fled to Bolivia and acquired citizenship there.<sup>195</sup> On November 5, 1982, an arrest warrant was issued for him; a few months later he was abducted and extradited to France. He remained in detention until his trial, but he was not indicted for another four years.<sup>196</sup>

The French judiciary faced a problem in deciding whether they had jurisdiction over criminal acts committed by Barbie. Because Barbie had already been convicted and sentenced to death, he could not be tried subsequently for the same acts. If his crimes were characterized as war crimes, they would not be prosecutable under the statute of limitations. Thus, the prosecution focused on Barbie’s acts that could be characterized as CAH.

On October 4, 1985, the Lyon *Cour d’appel* ruled that only crimes against members of a racial or religious community could constitute CAH. As a result, the court declared that the charges against Barbie were invalid due to the statute of limitations. However, on December 20, 1985, the judgment of the Criminal Chamber of the French *Cour de Cassation* rejected the appellate court’s distinction and acknowledged that CAH can be committed against opponents to the hegemonic policy of a state, and not just racial or religious communities.<sup>197</sup> Thus, the prosecution of Barbie for CAH was allowed to continue.

The trial before the Lyon *Cour d’Assises*, which was televised, began in Lyon on May 11, 1987. Jacques Vergès, defense counsel for Barbie, opportunistically used the public platform “to equate the serene confidence of the criminal law, in its judgment against his client, with that of French colonialism, now recognized to have perpetrated grave injustices in the name of lofty principles, those of Western civilization.”<sup>198</sup> Thus, the prosecution competed with the defense over their preferred narratives for the French public, and “an insurmountable conflict arose between the requirements of historical truth and those of social solidarity.”<sup>199</sup>

In the Barbie trial . . . prosecutors rightly believed that “an unpaid debt to the dead bound them to the truth.” Barbie’s defense counsel, “on the other hand, was free. No

<sup>195</sup> The U.S. Attorney General instructed the Office of Special Investigations of the Department of Justice to investigate Barbie’s relationship with the U.S. government. See *Klaus Barbie and the United States Government: A Report to the Attorney General of the United States* (Dep’t of Justice, 1983), available at <http://www.justice.gov/criminal/hrsp/archives/1983/08-02-83-barbie-rpt.pdf>.

<sup>196</sup> The Barbie trial was initiated largely due to the efforts of Serge and Beate Klarsfeld, who sought to publicly demonstrate the degree of French cooperation in the extermination of French Jews. Serge Klarsfeld, *Vichy-Auschwitz* 8 (1983).

<sup>197</sup> *Cour de cassation* (Cass crim.) [highest court of ordinary jurisdiction], Dec. 20, 1985, J.C.P. 1986, II, 20655. For a discussion of the state policy element of CAH, see *infra* ch. 1.

<sup>198</sup> Osiel, *supra* note 184, at 52–3, citing Alain Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes Against Humanity* 32–6 (Roxanne Lapidus & Sima Godfrey trans., 1992).

<sup>199</sup> Osiel, *supra* note 184, at 113.



doubt tied him to the past; he was in a position to plant suspense in the very heart of the ceremony of remembering and to substitute the delicious thrill of the event” – especially the threat to reveal the pro-German complicity of currently prominent figures in French public life – “for the meticulous reassessment of the facts.”

The upshot was that the press and public . . . quickly tired of the prosecution and plaintiffs, (the intervenors, Barbie’s surviving victims), due to “the thirty-nine lawyers whose thirty-nine closing speeches talked the audience into a stupor” over a nine-day period . . .

Accounts of the Barbie trial by even the most scrupulously liberal commentators and scholars have been more deeply drawn into the mental universe of the defense counsel, Jacques Vergès, with “his promise of scandal, his steamy reputation, and his consummate art of mystery,” the qualities for which he came to be “adulated in the media.” Even so discerning an observer as [Tzvetan] Todorov was clearly persuaded by much of Vergès argument against the trial’s rendition of French history. He observes, for instance, “it’s a fact that Barbie tortured Resistance fighters, but they did the same when they got their hands on a Gestapo officer. The French army, moreover, systematically resorted to torture after 1944, in Algeria for example; no one has ever been condemned for crimes against humanity as a result.”<sup>200</sup>

In the end, the Lyon *Cour d’Assises* sentenced Barbie to life imprisonment for CAH without mitigating circumstances.<sup>201</sup> The judgment was affirmed by the *Cour de Cassation* on June 3, 1988.<sup>202</sup> Barbie died in prison of leukemia on September 25, 1991.

The first French citizen to be convicted of CAH was Paul Touvier, a former member of the *Service d’Ordre Legionnaire* and later an official in the *Milice Française* in Lyon. The trial of Touvier was, in the words of Professor Sadat, “the subject of enormous media attention . . . and . . . the vehicle for a debate on the legitimacy and activities of the Vichy Regime, becoming popularly identified as a trial of the Vichy government.”<sup>203</sup> Specifically, Touvier was accused of shooting seven Jews in Rillieux-la-Pape on June 29, 1944 after the death of Phillippe Henriot, a high-ranking Vichy official and member of the *Milice* who was killed by the Resistance.<sup>204</sup> In December 1946, the *Cour de Justice* sentenced Touvier, *in absentia*, to death for treason. He avoided justice by living under a false identity from September 1946 to 1967, when the statute of limitations expired. However, as discussed above, in 1964, France recognized the nonapplicability of statutes of limitations to CAH. Even though a new indictment for CAH was possible, President Georges Pompidou pardoned Touvier in 1972.

Eight years after Touvier was first accused of CAH, a warrant was issued for his arrest. He was arrested in Nice, where he was hiding, and he was charged as an aider and abettor to CAH. The investigating magistrate ordered the transmission of the case to the prosecutor, using the London Charter’s Article 6(c) definition of CAH. The court of appeal in Paris confirmed this order on April 13, 1992, concluding that Touvier had given orders and provided assistance in the commission of the crimes. The court, however,

<sup>200</sup> Osiel, *supra* note 184, at 93–4; see also *infra* §5 for the discussion on Selective Enforcement.

<sup>201</sup> The court rejected Barbie’s argument in defense that he murdered seven French Jews so as to save a larger number of Frenchmen. Sorj Chalandon, *My Colleague Told Me: You Must Choose Seven Jews, in Memory, the Holocaust, and French Justice* 137 (Richard J. Golsan ed., 1996).

<sup>202</sup> Cass crim., June 3, 1988, J.C.P. 1988, II, 21149 (denying motion to quash the conviction on the grounds that it was based on acts for which Barbie was previously convicted).

<sup>203</sup> Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, *supra* note 189, at 191.

<sup>204</sup> See generally Wexler, *From Touvier to Barbie and Back Again*, *supra* note 189, at 292–93.

ruled that the crimes constituted CAH and decided that the statute of limitations had expired.<sup>205</sup> Because Article 6(c) of the London Charter only applied to Axis criminals, Touvier, a French citizen, was subjected to the French definition of CAH, which refers to the concept of a “policy of ideological hegemony”. The judgment of the court of appeals turned on its conclusion that the Vichy regime did not put into practice a “policy of ideological hegemony”. However, on November 27, 1992, the *Cour de Cassation* overturned the judgment of the court of appeals, and adopted its own interpretation of CAH. This interpretation introduced the notion of complicity in CAH for acts committed at the instructions of a leading member of the Gestapo. The court found the Gestapo to be a criminal organization of a state that instituted and practiced a policy of ideological hegemony.<sup>206</sup>

The *Touvier* trial commenced on March 18, 1994. He was sentenced to life in prison for aiding and abetting a CAH by giving instructions and by assisting, with intent, the individuals who murdered the seven Jews. In so ruling, the judges confirmed that the murders were committed pursuant to a state plan that followed a policy of ideological hegemony against people who were targeted based on their race or religion. On the potentially deceptive role of the *Touvier* court’s definition of CAH in molding collective memory after mass atrocity, Professor Osiel writes:

Even when the defendant was unavoidably French, as in the trial of Paul Touvier, the French courts eagerly contributed to national efforts at moral evasion. They did so by interpreting the Nuremberg Charter to require the defendant to have acted in compliance with the orders of an Axis power. Acts motivated by anti-Semitism of purely French inspiration were thereby excluded from the definition of “crimes against humanity.” Touvier was therefore criminally liable, as a matter of law, only to the extent that he was shown to have acted under German hegemony. Again, the story was told in such a way that the Germans became the real culprits, the French merely their long-suffering agents and grudging instruments.<sup>207</sup>

Importantly, in both the *Barbie* and *Touvier* cases, the courts required knowledge of the criminal plan and full intent for the substantive acts.<sup>208</sup>

Another French prosecution was the trial of Maurice Papon, a French civil servant and Gaullist politician who became prefect and then Finance Minister of the French Republic between 1978 and 1981. Papon was convicted of CAH for his role in the deportation of more than 1,600 Jews to the Drancy internment camp during his time as

<sup>205</sup> For a critique of the court of appeals judgment, see Roger Pinto, *L’affaire Touvier: Analyse critique de l’arrêt du 13 avril 1992*, 119 *Journal du Droit International* 607 (1992).

<sup>206</sup> Cass crim., Nov. 27, 1992, J.C.P. 1993, II, 21977; see also J. Merchant, *History, Memory and Justice: The Touvier Trial in France*, 23 *J. Crim. Just.* 5 (1995), at 425–38; Osiel, *supra* note 184, at 120 (arguing, “By packing the most distinctive features of the Nazi Holocaust into the legal definition of [CAH], that offense became harder to apply to the conduct of those not at the epicenter of the German extermination program, such as French collaborators acting under their own, purely French brand of anti-Semitism. In this way, efforts to reconceptualize [CAH] – aimed at redressing the prior problem – began to impede effective prosecution of their perpetrators. Such conceptual narrowing introduced new doctrinal requirements that are exceedingly difficult to meet, as the prosecution of Paul Touvier abundantly revealed.”).

<sup>207</sup> Osiel, *supra* note 184, at 157–58. For commentary concerning this trial and its implications on and in the context of French society, see Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, *supra* note 189.

<sup>208</sup> See Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung* 192–95 (2002).

Secretary General for the Prefecture of Gironde from 1942 to 1944.<sup>209</sup> In this position, Papon was responsible for transports and the “Office of Jew Questions;” he facilitated the deportation of Jews from Bordeaux to Drancy by signing deportation orders.

In 1981, documents from Papon’s past in Vichy France emerged, leading to an investigation that began in 1983. He was accused of aiding and abetting arbitrary arrests and wrongful deprivations of personal liberty inflicted upon adults and minors, the attempted murder of Michel Slitinsky, as well as other murders. These acts were deemed inhumane acts and persecutions that constituted CAH because they formed part of a widespread and systematic attack carried out pursuant to a state policy of ideological hegemony directed against a racial or religious group.

After a long and difficult struggle,<sup>210</sup> the *Papon* trial finally began on October 8, 1997. The trial mostly concerned the question of whether Papon was criminally responsible as a member of the administrative chain of command. In April 1998, Papon was convicted of CAH, stripped of his decorations, and sentenced to ten years imprisonment. After an initial escape, he was sent to prison at La Santé in Paris on October 22, 1999. At the age of 92, Papon was controversially released on September 18, 2002, only three years into his sentence. He died five years later.

The *Papon* trial gave French courts the opportunity to further clarify the concept of aiding and abetting CAH. The courts refused to accept Papon’s defense that he was merely a civil servant of a state that did not practice a policy of ideological hegemony. The *Cour de Cassation* clarified that the London Charter did not require that the accomplice of CAH adhere to the policy of ideological hegemony of the principal perpetrators or that he was a member of one of the organizations that were declared criminal by the IMT.<sup>211</sup> Significantly, the case eventually came before the *Conseil d’État*, which declared that the French state also bore responsibility for the crimes committed by Papon and sentenced it to pay half of the victims’ reparations.<sup>212</sup> This decision confronted “the widely held belief in France that the Vichy regime was only a historical footnote and the French government ceased to exist upon occupation.”<sup>213</sup>

In a prosecution arising from the French Indochina war lasting from 1946 to 1954, George Boudarel, an ex-teacher in French Cochinchine, was charged with torture and other inhumane acts as CAH. Boudarel deserted to join the Vien Minh, who chose him as “political commissioner” in charge of “re-educating” French prisoners of war in Camp 113. In 1966, Boudarel returned to France, where he taught at University of Paris VII, with the protection of a French amnesty law covering the crimes committed during the Indochina war, including the crimes committed during the Vietnamese uprising. In 1991, a former prisoner of war at Camp 113 identified Boudarel and proceedings were

<sup>209</sup> See citations to the *Papon* case, *supra* note 193.

<sup>210</sup> The case reached the European Court of Human Rights when Papon’s attorneys filed a complaint with the court based on Article 6 of the European Convention on Human Rights. The Strasbourg Court ruled that France breached Article 6 because the French *Cour de cassation* had refused to hear his case on October 22, 1999, which was “a particularly grave sanction with regard to the right of access to a court guaranteed by Art. 6.” *Papon v. France*, 2002-VII Eur. Ct. H.R. 90. Nevertheless, the *Cour de cassation* examined Papon’s appeal and confirmed the 1998 decision of the *Cour d’assises*. *Cour de cassation* [Cass. Ass. plén.][plenary assembly of the high court], June 11, 2004, Bull. crim., No. 1.

<sup>211</sup> Cass. crim., Jan. 23, 1997, J.C.P. 1997, II, 22812.

<sup>212</sup> Conseil d’État (CE) [highest administrative court] CE Sect., Apr. 12, 2002, 238689.

<sup>213</sup> Nadia Bernaz and Rémy Prouvèze, *International and Domestic Prosecutions*, in 1 *The Pursuit of International Criminal Justice*, *supra* note 6, at 269.

introduced against him. However, on April 1, 1993, the *Cour de Cassation* ruled that proceedings against Boudarel could not occur because the 1966 amnesty law covered the acts that gave rise to the complaint. The *Cour de cassation* reached this conclusion by finding that the amnesty law on CAH did not conflict with the fact that France usually finds that CAH are not subject to statutes of limitations.<sup>214</sup>

More recently, the *Javor* and *Munyeshyaka* cases both involved prosecutions under the French legislation criminalizing CAH.<sup>215</sup> In *Javor*, Bosnian citizens residing in France as refugees filed a civil action under universal jurisdiction before the *Tribunal de Grande Instance de Paris* (TGI) against undisclosed parties for CAH and other crimes committed by Serb forces pursuant to the policy of ethnic cleansing.<sup>216</sup> Because there was no evidence that the alleged perpetrators were present in French territory at the start,<sup>217</sup> both the Court of Appeals and the Court of Cassation dismissed the case for lack of jurisdiction. Thus, *Javor* affirmed the idea that French universal jurisdiction exists only when the accused perpetrator is on French territory.<sup>218</sup>

However, in the *Munyeshyaka* case, the French judiciary upheld the exercise of universal jurisdiction.<sup>219</sup> In that case, Wenceslas Munyeshyaka was accused of crimes committed during the Rwandan genocide. Unlike the accused in *Javor*, Munyeshyaka was found on French territory at the time the initial complaint was filed.<sup>220</sup> Munyeshyaka stood accused of contributing to the genocide while acting as a priest at the Sainte-Famille parish in Kilgali by depriving Tutsi refugees of food and water, surrendering the refugees to the Hutu militia, participating in the selection of Tutsis to be murdered, and coercing women into having sex with him in exchange for saving their lives.<sup>221</sup> In March 1996, after the lower court determined that it had universal jurisdiction to institute proceedings based on the 1984 U.N. Convention against Torture,<sup>222</sup> the Nimes Court of Appeals ruled that universal jurisdiction could only be established based on genocide, which was the most serious offense.<sup>223</sup> The appellate court ruled that France lacked the competency to prosecute a genocide that was committed abroad (in Rwanda) by a foreign national against other foreign nationals. Two days after this ruling, a new law was adopted that provided for universal jurisdiction over genocide. On January 6, 1998, the *Cour de cassation* reopened proceedings against Munyeshyaka.<sup>224</sup> The slow pace of the investigation resulted in one plaintiff taking a case to the attention of the European Court

<sup>214</sup> Cass. crim., Apr. 1, 1993, Bull. crim., No. 143; see also Yves Beigbeder, Judging War Crimes and Torture: French Justice and International Criminal Tribunals and Commissions (1940–2005) 73–4 (2006).

<sup>215</sup> See also the discussion of these cases *infra* ch. 4, Part B, § 4 on universal jurisdiction.

<sup>216</sup> Tribunal grande instance (TGI) [ordinary court of original jurisdiction] Paris, May 6, 1994, Ordonnance, N. Parquet 94052 2002/7; Cour d'appel (CA) [regional court of appeal] Paris, 4e ch., Nov. 24, 1994, Arrêt, No. A94/02071; Cass crim., Mar. 26, 1996, Arrêt de Rejet, No. 95-81527; see also Rafaëlle Maison, *Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes*, 6 Eur. J. Int'l L. 260, 261 (1995).

<sup>217</sup> Brigitte Stern, *Universal Jurisdiction Over Crimes Against Humanity Under French Law*, 93 Am. J. Int'l L. 525, 527 (1999).

<sup>218</sup> *Id.*; see also Sadat, *The French Experience*, *supra* note 189, at 353.

<sup>219</sup> Cass crim., Jan. 6, 1998, Bull. crim., No. 2, at 3 [hereinafter *In re Munyeshyaka*].

<sup>220</sup> Stern, *supra* note 217, at 527.

<sup>221</sup> *Id.*; see also Sadat, *The French Experience*, *supra* note 189, at 353.

<sup>222</sup> Stern, *supra* note 217, at 528.

<sup>223</sup> *Id.*

<sup>224</sup> *In re Munyeshyaka*, *supra* note 219, at 3 (ruling that the Trial Chamber had erred by taking into account only the charge of genocide when the acts committed could also amount to the crime of torture, which is subject to French universal jurisdiction under Article 689–2 of the French Code of Criminal Procedure).

of Human Rights, which unanimously decided that France had violated the plaintiff's right to be heard promptly as well as her right to compensation.<sup>225</sup>

On November 16, 2006, a Rwandan Military Court in Kigali sentenced Mutesyeka *in absentia*. He was arrested by the French one month after the ICTR unsealed its arrest warrant against him on June 21, 2007.<sup>226</sup> However, the Paris Court of Appeals ordered his immediate release after concluding that the ICTR's warrant was invalid. In September 2007, Mutesyeka was arrested pursuant to a second arrest warrant. On November 20, 2007, the ICTR granted the Prosecutor's Rule 11bis motion to refer the case to the French authorities, which the French judiciary accepted in February 2008.<sup>227</sup>

As mentioned in Chapter 4, both the *Javor* and *Mutesyeka* cases received criticism for imposing a presence limitation on the exercise of universal jurisdiction. Consequently, prosecutors and investigating judges can only investigate crimes abroad if the suspect is living openly in French territory and readily identifiable.<sup>228</sup>

The French national prosecutions for CAH, especially the trials of Barbie, Touvier, and Papon, gave the French judiciary the opportunity to define CAH according to their interpretation of both Article 6(c) of the London Charter and the 1964 French law, which was the country's first legislation to criminalize CAH domestically and which provided that statutes of limitation were inapplicable to the crime. These three prosecutions expanded CAH to include victims of a state practicing a policy of ideological hegemony.<sup>229</sup> This extension included German officers of the Nazi regime, French citizens who were collaborationists acting criminally for or on behalf of the Nazi regime, as well as opponents of the hegemonic policy, including members of the French Resistance.<sup>230</sup> The French approach to CAH influenced the Rome Statute's definition of CAH in Article 7, which contains the element "pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>231</sup> This was the definition contained in the French criminal code in 1994. France amended its criminal law on June 2008 to incorporate the requirements of Article 7 of the Rome Statute, which it ratified in July 1998. However, French courts have restricted universal jurisdiction to apply only to persons who are ordinarily residents of France.<sup>232</sup>

In March 2010, Michèle Alliot-Marie, the French minister of justice, announced a new initiative of the French legislature. The *Tribunal des Armées de Paris* will be replaced by a specialized war crimes and CAH unit that will be part of the *Tribunal de Grande*

<sup>225</sup> Mutimura v. France, App. No. 46621/99 (2004), available at <http://www.echr.coe.int>.

<sup>226</sup> Prosecutor v. Mutesyeka, Case No. ICTR-2005-87-I, Indictment (Jul. 24, 2005).

<sup>227</sup> Prosecutor v. Mutesyeka, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Rule 11bis Request for the Referral of Wenceslas Mutesyeka's Indictment to France (Nov. 20, 2007). At the same time, the French judiciary also agreed to prosecute Laurent Bucyibaruta, the former prefect of Gikongoro, for genocide and CAH. See Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I, Decision on the Prosecutor's Rule 11bis Request for the Referral of Laurent Bucyibaruta's Indictment to France (Nov. 20, 2007). At the time of this book's publication the French trials of Mutesyeka and Bucyibaruta have made little progress.

<sup>228</sup> See, e.g., Claude Lombois, *De la compassion territoriale*, Rev. Sc. Crim. 399 (1995); Brigitte Stern, *La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda*, 40 Ger. Y.B. Int'l L. 280 (1997); Michael Massé, *Ex-Yougoslavie, Rwanda: Une compétence 'virtuelle' des juridictions françaises?* Rev. Sc. Crim 893 (1997); Maison, *supra* note 216.

<sup>229</sup> See David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 Stan. J. Int'l L. 254 (2007).

<sup>230</sup> Bernaz & Prouvèze, *supra* note 213, at 363.

<sup>231</sup> Rome Statute of the International Criminal Court art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 3 (*entered into force* July 1, 2002); see also *infra* ch. 1.

<sup>232</sup> *In re Mutesyeka*, *supra* note 219.

*Instance* in Paris. This new act is expected to enter into force on January 1, 2011. The war crimes and CAH unit will deal specifically with the Rwandan genocide of 1994, and will pursue investigations against persons suspected of complicity in genocide and CAH. It was established in response to the European Court of Human Rights' condemnation of the slow French progress concerning the events in Rwanda in the *Munyeshyaka* case.

Significantly, although France has prosecuted World War II-era crimes, it has not done so with respect to the crimes, including torture, committed by French officials and soldiers during the Algerian war of independence.<sup>233</sup>

### §3.2.5. Italy

Italy, though initially an ally of Germany in WNIL and an occupier of Greece and Yugoslavia, never prosecuted anyone for crimes in these countries. It also did not prosecute anyone for crimes committed in Ethiopia and Libya in the 1930s. Italy prosecuted SS Captain Erich Priebke, SS Lieutenant-Colonel and Chief of Police in Rome Herbert Kappler, and Lieutenant Colonel Karl Hass for the massacre at the Ardeatine Caves near Rome on March 24, 1944. Three hundred thirty-five Italian civilians were killed in the massacre, which took place on Hitler's orders in reprisal for a Resistance bomb attack that killed 33 German soldiers in Rome two days earlier. It is considered the worst atrocity on Italian soil during World War II.<sup>234</sup>

After World War II, in 1947, Italian military judicial authorities issued an arrest warrant for Kappler, who arranged and perpetrated the massacre, and his subordinates, which included Priebke and Hass. The Military Court of Rome sentenced Kappler to life imprisonment for CAH on July 29, 1948.<sup>235</sup> Kappler escaped from a military hospital in 1976 and died two years later in West Germany.

Priebke fled to Argentina in 1948, where he lived under a pseudonym until he was discovered and extradited to Italy on November 2, 1995.<sup>236</sup> He was initially charged with war crimes stemming from the Ardeatine Cave massacre. At trial, Priebke claimed the defenses of obedience to superior orders, duress, and reprisal.<sup>237</sup> On August 1, 1996, the

<sup>233</sup> See Wexler, *From Touvier to Barbie and Back Again*, *supra* note 189; Wexler, *The French Experience*, *supra* note 189; Leila Sadat Wexler, *Prosecutions of Crimes Against Humanity in French Municipal Law: International Implications* 270–76 (1997); *see also* Paul Aussaresses, *Services spéciaux: Algérie 1955–1957* (2001) (contending that the French government backed the repression, including the use of torture and death squads in the Algerian War).

<sup>234</sup> *See generally* Alessandro Portelli, *The Order Has Been Carried Out: History, Memory and Meaning of a Nazi Massacre in Rome* (2003).

<sup>235</sup> Italy, Rome Military Tribunal, *Kappler et al.*, Judgment of 20 July 1948, No. 631, in *Foro penale* 1948, 603–22. The Supreme Military Tribunal confirmed this judgment on appeal. Italy, Supreme Military Tribunal, *Kappler* (Appeal), 25 October 1952, No. 1714, in *RDI* 1953, 193–9.

<sup>236</sup> *Juzgado Federal* (Juzg. Fed.) [lower federal court of Buriloché], 31/5/1995, “*Priebke, Erich v. Argentina / solicitud de extradición*” (federal court granted extradition, stating that there could be no statutory limitations with regard to CAH); *Cámara Federal de Apelaciones General Roca* (CFed.) [federal court of appeals of General Roca], 23/8/1995, “*Priebke, Erich v. Argentina / solicitud de extradición*” (refused extradition because penal action was extinguished due to upholding of statutory limitations); *Corte Suprema de Justicia de la Nación* (CSJN) [highest court on constitutional and federal matters], 2/11/1995, “*Priebke, Erich v. Argentina / solicitud de extradición*” (finding in favor of extradition and that the acts underlying the request for extradition were *prima facie* genocide, adding “the classification of offences as crimes against humanity does not depend on whether the requesting or requested states agrees with the extradition process, but instead of the principles of *jus cogens* of international law.”).



Military Tribunal of Rome opted not to begin legal proceedings against Priebke because prosecution for war crimes was barred by the statute of limitations.<sup>238</sup> The Italian Court of Cassation overturned the decision of the Military Tribunal and ordered a new trial, which began on April 14, 1997 and included Hass as a defendant.<sup>239</sup> In the second trial, the Military Court of Rome rejected the statute of limitations argument and upheld the ruling that Priebke's acts came under the provisions of Articles 13 and 185 of the Military Penal Code.<sup>240</sup> The judgment clearly defined the acts committed as war crimes and CAH.<sup>241</sup> Priebke was sentenced to fifteen years imprisonment and Hass to ten years and eight months.<sup>242</sup> Both the Military Court of Appeals and the Supreme Court of Cassation upheld the judgment, although the sentences were increased to life imprisonment to be served in a military prison.<sup>243</sup> Because of their ages, Priebke and Hass were put under house arrest.<sup>244</sup>

The case was brought before the European Court of Human Rights, which found no manifest irregularities and rejected the appeal.<sup>245</sup> These trials and judgments highlight various issues relevant to international criminal law and international humanitarian law. Importantly, the judgments reaffirms the principle of the nonapplicability of statutes of limitations for war crimes and CAH, despite the fact that Italy is not a party to the UN Convention on the Non-Applicability of Statutes of Limitations for War Crimes and Crimes Against Humanity, while also reaffirming the *jus cogens* nature of such crimes. The July 22, 1997 judgment of the Military Tribunal also rejected Priebke's claim that he was merely obeying superior orders. Thus, the Tribunal confirmed that subordinates could not escape liability by obeying superior orders that were patently illegal.

### §3.2.6. Canada<sup>246</sup>

Canada amended its criminal code in 1987 to allow jurisdiction over CAH and war crimes committed beyond its borders. In 1989, Canada commenced the first and only use of its statute that permits retrospective application of international criminal law for war crimes

<sup>237</sup> At first, the massacre was considered a war crime, yet in the retrial the military prosecutor referred to Priebke's crimes as CAH, and thus urged the nonapplicability of Italy's statute of limitations. The prosecutor's apparent confusion could have been intentional. *See also infra* ch. 8.

<sup>238</sup> Military Court of Rome, Priebke, decision of 1 August 1996, nr. 305.

<sup>239</sup> Corte di cassazione (Cass.) [court of last appeal in civil and criminal matters], Priebke, decision of 15 October 1996. The Allies had captured Karl Hass, but employed him in Italian and American intelligence services, rather than prosecuting him for war crimes. Philip Willan, *Obituary for Karl Hass: Former SS officer sentenced to life imprisonment for his part in the Ardeatine Caves massacre*, *The Independent*, Apr. 24, 2004, available at <http://www.independent.co.uk/news/obituaries/karl-hass-549816.html>. In 1996, Hass received immunity for his testimony in the trial of his commander in the Priebke case. Apparently second-guessing his testimony, Hass, then aged 84, broke his pelvis and damaged his spine in an attempt to flee his hotel to avoid his court appearance. *Id.*

<sup>240</sup> Rome Military Tribunal, *Hass and Priebke*, Judgment of 22 July 1997.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Military Court of Appeal, *Hass and Priebke*, Judgment of 7 March 1998. The Corte di cassazione upheld the Military Court of Appeal on November 16, 1998. Cass., *Priebke*, Judgment of 16 November 1998.

<sup>244</sup> *Priebke*, Judgment of 16 November 1998, *supra* note 243.

<sup>245</sup> *Priebke v. Italy*, App. No. 48799/99 (2001), available at <http://www.echr.coe.int>.

<sup>246</sup> *See generally* Irwin Cotler, *Bringing Nazi War Criminals in Canada to Justice: A Case Study*, in ASIL Proceedings 262–69 (1997); *see also* Sharon A. Williams, *Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada*, in *The Law of War Crimes* 151 (T.L.H. McCormack & G.J. Simpson eds., 1997); Patrick Brode, *Casual Slaughters and Accidental Judgments: Canadian War Crimes Prosecutions, 1944–1948* (1997).



and CAH under the Canadian Criminal Code.<sup>247</sup> The case involved the prosecution of Imre Finta, a Hungarian captain and commander, who directed the collection of the Jewish population in Szeged. After World War II, Finta fled to Canada, where he eventually became a naturalized citizen.<sup>248</sup> In 1987, Canada amended its criminal code to establish jurisdiction over some acts that would constitute war crimes or CAH, especially those committed by former Nazis.<sup>249</sup> Canada defined CAH according to the London Charter; thus, the Canadian definition requires an attack committed against “any civilian population” or “any identifiable group of persons.”<sup>250</sup> In 1988, Finta was charged with unlawful confinement, robbery, kidnapping, and manslaughter; each offense was alleged to constitute a war crime or CAH.<sup>251</sup> Because the structure of the Canadian Criminal Code requires dual criminality under Canadian and international law, Finta was charged with ordinary domestic offenses under Canadian law and alternative offenses under international law. At trial, the jury acquitted him of all charges.<sup>252</sup> The acquittal was upheld on appeal by a three to two margin, and again in 1994 by a plurality opinion of the Supreme Court.<sup>253</sup>

Notably, the judgment of the trial court recognized the existence of CAH under international law prior to 1945.<sup>254</sup> It also stressed the distinctive *mens rea* and *actus reus* of CAH, which augment the underlying requirements of the domestic offenses.<sup>255</sup> With regard to CAH, the trial court required knowledge, including willful blindness, of the broader context in which the perpetrator’s act occurred.<sup>256</sup> Both the Appellate and

<sup>247</sup> See Leslie C. Green, *Canadian Law, War Crimes and Crimes Against Humanity*, 59 BRIT. Y.B. INT’L L. 217 (1988); Michèle Jacquart, *La notion de crime contre l’humanité en droit international contemporain et en droit Canadien*, 21 REVUE GÉNÉRALE DE DROIT 607 (1990); see also Barry H. Dubner, *The Law of International Sea Piracy*, 11 N.Y.U. J. INT’L L. & POLITICS 471 (1979); and *Report of the Commission of Inquiry on War Criminals* (Jules Deschênes ed., 1986).

<sup>248</sup> Finta fled Hungary after World War II and was later tried *in absentia* and convicted by a Hungarian People’s Tribunal. However, he was cleared of these charges in 1970. R. v. Finta, [1989] 61 D.L.R. 85; R. v. Finta, [1992] 92 D.L.R. (4th) 1, 84; R. v. Finta, [1994] 1 S.C.R. 701; see also Christopher A. Amerasinghe, *The Canadian Experience*, in 3 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 243, 270 (M. Cherif Bassiouni ed., 2d ed. 1999); Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems*, 29 CAL. W. INT’L L.J. 1, 28 (1998).

<sup>249</sup> See Bernaz & Prouvêze, *supra* note 213, at 364.

<sup>250</sup> Lippman, *supra* note 248, at 27.

<sup>251</sup> *Id.* at 28.

<sup>252</sup> The judge determined that jurisdiction under the amended Canadian Criminal Code depended upon the prosecution proving Finta’s mental state and intent with respect to the acts in question prior to the jury deciding whether the accused was guilty of the charged domestic offenses. The appellate court approved this basic approach but rejected the trial court’s characterization that the determination of the defendant’s mental state was jurisdictional in nature. Rather, the Canadian Supreme Court held that the amended criminal code created two new substantive offenses under Canadian law: war crimes and CAH. See Amerasinghe, *supra* note 144, at 264. Thus, the necessity of proving Finta’s heightened *mens rea* was explicitly connected to “[t]he degree of moral turpitude that attaches to [CAH] and war crimes, [which] must exceed that of the domestic offenses of manslaughter and robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence.” R. v. Finta, [1989] 61 D.L.R. 85.

<sup>253</sup> R. v. Finta, [1992] 92 D.L.R. (4th) 1, 84.

<sup>254</sup> R. v. Finta, [1989] *supra* note 252.

<sup>255</sup> See Lippman, *supra* note 248, at 29.

<sup>256</sup> “Knowledge of the circumstances or facts which bring an act within the definition of a war crime or [CAH] constitutes the mental component which must coexist with the prohibited acts to establish culpability for those acts.” R. v. Finta, *supra* note 253, 1, 84.

Supreme Court judgments affirmed this approach.<sup>257</sup> The trial court also ruled that duress could operate as a complete defense, when, as in the *Finta* case, it was demonstrated that the accused lacked the culpable intent.<sup>258</sup>

Following *Finta*'s acquittal, Canada did not pursue any more prosecutions under its amended criminal code. Instead, it followed the example of the United States and denaturalized or refused refugee status to individuals charged with World War II-related crimes or found to have concealed their connections with the Nazi regime, or those charged with CAH and other international crimes in other contexts.<sup>259</sup>

Canada's new approach is evident in its prosecution of Leon Mugesera, which originated from the Rwandan genocide. On November 22, 1992 in front of a crowd of 1,000 Rwandans, Mugesera, a Hutu politician, delivered a speech that incited racial hatred of Tutsis. Rwandan authorities issued an arrest warrant against him and he fled to Canada, where he gained status as a permanent resident. Based on his speech, in 1995 Canada commenced deportation proceedings against Mugesera for incitement to murder, genocide, and hatred and CAH. As was the case in *Finta*, Mugesera was prosecuted initially under the definition of CAH provided in section 7(3.76) of the Criminal Code of Canada, which defines CAH without alluding to the element of a "widespread or systematic attack." Instead, it provided:

"crimes against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.<sup>260</sup>

Procedurally, *Mugesera* was an administrative law case because it involved the question of whether the Canadian Minister of Citizenship and Immigration may deport an

<sup>257</sup> *Id. R. v. Finta*, [1994] 1 S.C.R. 701.

<sup>258</sup> *See infra* ch. 8, §2.

<sup>259</sup> *See, e.g., Zazai v. Canada* (Minister of Citizenship and Immigration), [2003] F.C. D-47 (denying refugee status because of sufficient evidence that Afghani applicant knowingly and voluntarily participated and was active for five years as a member in the Afghani Ministry of State Security (known as "KHAD"), which tortured and eliminated government opponents); *Blanco v. Canada* (Minister of Citizenship and Immigration), [2003] 4 F.C. D-57 (concluding that there was no basis in the documentary evidence by which to conclude that the Colombian navy or intelligence services engaged in the commission of CAH, or colluded with the military and armed forces to commit CAH); *Chen v. Canada* (Minister of Citizenship and Immigration), [2001] F.C.T. 564 (denying refugee status for Chinese applicant who was deemed complicit in CAH as a security guard in a hospital that performed forced abortions on women pursuant to the Family Planning Committee); *Guardado v. Canada* (Minister of Citizenship and Immigration), Order of 14 April 1998 by Max Teitelbaum, IMM-1889-97 (Guatemalan applicant denied refugee status because of serious reasons to consider that he had committed CAH as a member of *Guardia de Hacienda*, an organization that committed international offenses as part of its regular operations); *Sivakumar v. Canada* (Minister of Employment and Immigration), [1994] 1 F.C. 433, 434, 444-45 (The Federal Court of Appeal upheld the exclusion from refugee status of applicant, a leader of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, because he committed CAH, concluding that "it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international criminal law. On the contrary, they are now governed by it.").

<sup>260</sup> Section 7(3.76) of the Criminal Code of Canada, RSC, 1985, c-46. Since then, as noted above, in 2000, Canada enacted the Crimes Against Humanity and War Crimes Act, which incorporated into its law the standard definition of CAH as provided for in Article 3 of the ICTR Statute and Article 7 of the Rome Statute of the ICC.

individual who, prior to admission into Canada, made a speech in his country that was said to constitute incitement to genocide and instigation of extermination, murder, and persecution as CAH.<sup>261</sup> After the Canadian Federal Court of Appeals set aside the deportation order,<sup>262</sup> the Canadian Supreme Court allowed the decision to deport Mugesera.<sup>263</sup> The Supreme Court found that the Court of Appeals had exceeded its scope of judicial review of the Immigration and Refugee Board's findings of fact.<sup>264</sup> It further concluded that there were reasonable grounds to believe speech can constitute a CAH.<sup>265</sup> In its ruling, the Canadian Supreme Court also adopted the worrying trend set forth in the *Kunarac et al.* Appeals Judgment of the ICTY that eliminates state policy from the elements required to establish CAH:

The Appeals Chamber of the ICTY held in *Prosecutor v. Kunarac, Kovac and Vukovic* that there was no additional requirement for a state or other policy behind the attack . . . . It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement (see, e.g., art. 7(2)(a) of the Rome Statute . . . ).<sup>266</sup>

Canada was the first state to adopt implementing legislation after its ratification of the Rome Statute. *R. v. Munyaneza* marked Canada's first use of its 2000 Crimes against Humanity and War Crimes Act.<sup>267</sup> Désiré Munyaneza, a shopkeeper and a leader of the Interahamwe militia in Butare, was charged with seven counts of genocide, CAH, and war crimes for acts of murder, sexual violence, and pillage during the Rwandan genocide. It was alleged that Munyaneza distributed arms and uniforms to the Interahamwe militias, participated in meetings, gave instructions to the guards who conducted roadblocks, raped Tutsi women, and looted property. His trial began in Montreal on March 26, 2007. On May 22, 2009, the Quebec Superior Court found Munyaneza guilty on all charges.<sup>268</sup> He was sentenced to life imprisonment; his defense has appealed.<sup>269</sup> Strangely, even though the Act chose to follow the definition of CAH set forth in Article 7 of the Rome Statute, the Court again chose to follow *Kunarac et al.* to eliminate the state policy requirement.<sup>270</sup>

<sup>261</sup> In Canada, a landed immigrant is liable to deportation if he/she falsely declared on his/her application for admission to Canada that he/she had done nothing in the past that may have amounted to CAH or any other international crime.

<sup>262</sup> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.A. 325.

<sup>263</sup> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, [2005] S.C.C. 40 [hereinafter *Mugesera* Supreme Court Judgment].

<sup>264</sup> *Id.* § 39.

<sup>265</sup> *Id.* § 177.

<sup>266</sup> *Id.* §§ 157–58; see also *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, ¶ 98 (Jun. 12, 2002); and ch. 1, § 7. Instead, the Supreme Court concluded the existence of state policy could be useful for evidentiary purposes in establishing that the attack was directed against a civilian population or was widespread or systematic.

<sup>267</sup> The Act allows for universal jurisdiction if the accused is present subsequently on Canadian territory. See Crimes against Humanity and War Crimes Act ch. 24, *supra* note 90.

<sup>268</sup> *R. v. Munyaneza*, [2009] QCCS 2001 [hereinafter *Munyaneza* Judgment].

<sup>269</sup> *R. v. Munyaneza*, [2009] QCCS 4865.

<sup>270</sup> *Munyaneza* Judgment, *supra* note 268, at § 114; see *infra* ch. 1. But see Fannie Lafontaine, *Canada's Crimes against Humanity and War Crimes Act on Trial: An Analysis of the Munyaneza Case*, 8 J. INT'L CRIM. JUST. 269, 281 (2010) (arguing that the reasoning was justified because the conduct at issue took place in 2004, whereas the Act deems the Rome Statute to embody of customary international law as of July 17, 1998).

At the time of the completion of this book, another prosecution arising from the context of the Rwanda genocide had commenced against Jacques Mungwarere.<sup>271</sup>

### §3.2.7. Spain

In 1997, Spain requested the extradition of a group of 45 former Argentine military officials to stand trial for torture and other crimes committed against citizens of Spanish origin during the military dictatorship in Argentina, which lasted from 1976 to 1983, a period known as Argentina's "Dirty War."<sup>272</sup> The prosecution of the ex-Argentine naval officer Adolfo Scilingo marked Spain's first use of its universal jurisdiction statute.<sup>273</sup> The court reasoned that Spain could exercise jurisdiction because Argentina had failed to pursue the case due to its 1986–87 amnesty laws, and because some of the victims were Spanish nationals.<sup>274</sup> The court concluded that the offenses could be characterized as CAH, even though at the time they occurred the Spanish penal code did not include such crimes. In setting forth the elements of CAH, the judgment cited extensively to the jurisprudence of the ICTY. It further recognized that CAH, as violations of customary international law, are not subject to statutes of limitations.<sup>275</sup> On April 19, 2005, Scilingo was sentenced to 640 years imprisonment for CAH (although the applied limit is 30 years), including murder, illegal detention, and torture committed in 1977. Scilingo's sentence includes twenty-one years for each murder of thirty persons who were drugged and thrown alive from planes into the Atlantic Ocean in "death flights."

In recent developments from Spanish courts, Judge Baltasar Garzón<sup>276</sup> indicted Francisco Franco, the deceased former dictator of Spain.<sup>277</sup> Franco and thirty-four of his former generals and ministers, all dead, are charged with committing CAH between 1936 and 1951, despite an amnesty law passed in 1977.<sup>278</sup> The Franco regime resulted in 114,000 killings carried out both during and after the Spanish Civil War. Over the years, volunteers have unearthed mass graves left behind by Francoist death squads and returned

<sup>271</sup> See Lafontaine, *supra* note 270, at note 6.

<sup>272</sup> See *infra* §3.2.8 for a discussion of Argentina's experiences with national prosecutions for CAH and other crimes committed during the Dirty War; see also *infra* §4, which discusses the Chilean experience with national prosecutions for crimes arising from roughly the same period during the dictatorship of General Augustin Pinochet Ugarte. Judge Garzón used this same law in his efforts to prosecute General Pinochet.

<sup>273</sup> Audiencia Nacional (SAN) [national appeals court of ordinary jurisdiction], Sala de lo penal [Criminal chamber], November 4, 1998 (No. 84/98) "Case Scilingo" [Scilingo Case]. The Audiencia convicted Scilingo of CAH, not genocide. STS [Spanish Supreme Court], Sala de lo Penal [Criminal Chamber], Oct. 1, 2007 (No. 798/2007), available at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html>; see also *infra* § 3.2.8. CAH was defined in Organic Law 15/2003, which coordinates Spanish domestic legislation with the ICC regime.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* For the Scilingo case Sentencing Judgment, see <http://www.haguejusticeportal.net/eCache/DEF/7/715.html>.

<sup>276</sup> In 1998, Judge Garzón had Pinochet arrested in London while he tried to extradite him to Spain for similar crimes. See *infra* § 4.

<sup>277</sup> See Mónica Zapico Barbeito, *Investigating the Crimes of the Franco Regime: Legal Possibilities, Obligations of the Spanish State, and Duties Toward the Victims*, 10 INT'L CRIM. L. REV. 243 (2010).

<sup>278</sup> See, e.g., MICHAEL RICHARDS, A TIME OF SILENCE: CIVIL WAR AND THE CULTURE OF REPRESSION IN FRANCO'S SPAIN, 1936–1945 (2006); PAUL PRESTON, THE SPANISH CIVIL WAR: REACTION, REVOLUTION, AND REVENGE (2007); ANTONY BEEVOR, THE SPANISH CIVIL WAR 1936–1939 (2006); HUGH THOMAS, THE SPANISH CIVIL WAR: REVISED EDITION (4th rev. ed., 2003); GABRIEL JACKSON, BURNETT BOLLOTEN, THE SPANISH CIVIL WAR: REVOLUTION AND COUNTERREVOLUTION (1991); SPANISH REPUBLIC AND THE CIVIL WAR, 1931–1939 (1987); see also GEORGE ORWELL, HOMAGE TO CATALONIA (1938).

the bodies to the victims' families for reburial. Garzón reasoned that the 1977 amnesty law did not cover disappearances where the victim's body has never been found because the crime of kidnapping continues in the present day. Garzón further determined that CAH existed as a crime at the time of the Franco era. As an international crime, CAH could not be subject to amnesty or statutes of limitations. Garzón later passed the case down to Spain's provincial courts. On September 9, 2009, a justice from the Spanish Supreme Court questioned him concerning the investigation after allegations that he knowingly distorted the amnesty law to pursue his case.<sup>279</sup> Garzón was temporarily suspended from his post as investigating magistrate while the Supreme Court tries considers whether he distorted the law by opening the investigation into Franco-era crimes.<sup>280</sup>

### §3.2.8. Argentina

National prosecutions in Argentina related to crimes and human rights abuses that occurred during the military dictatorship that held power in that country from 1976 to 1983. This resulted in diverse discussions concerning the prosecution of international crimes, including CAH.<sup>281</sup> These efforts are the result of the long process that began once Argentina became a democratic state in 1984.<sup>282</sup>

By the time Juan Perón returned to power from exile in 1973, Argentina was virtually in a state of civil war. Marxist guerrillas and dissidents kidnapped and publicly executed high-ranking leaders of the government and military and attacked and bombed broadcasting stations and military posts, while the police, military, and extremists, and anti-communists on the right formed death squads tortured, killed, and "disappeared" those deemed

<sup>279</sup> See, e.g., *Judge Garzón in the dock*, *ECONOMIST*, Sept. 9, 2009.

<sup>280</sup> See, *Spain rallies behind Franco judge*, *BBC.COM* (Apr. 24, 2010), <http://news.bbc.co.uk/2/hi/8642272.stm>; *Judge Baltasar Garzón suspended over Franco investigation*, *THE GUARDIAN* (May 14, 2010), <http://www.guardian.co.uk/world/2010/may/14/garzon-suspended-franco-investigation>.

<sup>281</sup> Pablo F. Parenti, *The Prosecution of International Crimes in Argentina*, 10 *INT'L CRIM. L. REV.* 491 (2010) (describing two uses of the "legal category" of CAH in Argentine national jurisprudence: "(a) as a category that defines the antecedent of the rule on non-applicability of statutory limitations, and (b) as a category that, combined with domestic crime definitions, specifies the conditions under which a defendant may be prosecuted, tried, convicted and punished.").

<sup>282</sup> Argentina had nineteen different presidents and 21 governments from the 1930 military coup to the onset of the Dirty War in 1976. For 27 of those 46 years, the Argentine Congress was either dissolved or a compliant tool of the executive. These bloody years were plagued by institutional instability, strict press censorship, and rule by decree according to the dictatorship's *Proceso de Reorganización Nacional* (PRN or "National Reorganization Process") and "National Security Doctrine." At the same time, Argentina had a large number of Marxist urban guerrillas, including those who arrived upon fleeing from Chile, Bolivia, and Uruguay, spurred on by the Cuban Revolution. The left wing guerrilla movement, including groups like the *Ejército Revolucionario Popular* (ERP), grew in strength in the decade prior to the dictatorship and established strong links with the Argentine working class. They too were responsible for crimes of terrorism, torture, and kidnapping. See generally JOHN DINGES, *THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS* (2004); PAUL H. LEWIS, *GUERRILLAS AND GENERALS: THE DIRTY WAR IN ARGENTINA* (2001); MARK OSIEL, *MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR* (2001); Mark Osiel, *Constructing Subversion in Argentina's Dirty War*, 75 *REPRESENTATIONS* 119, 120 (2001) (arguing that the central protagonists in organizing the campaign were "religious zealots, inspired by ultramontane Catholic nationalism" and "neomedievalist theology"); IAIN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (2000); MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* (1999); Juan Pablo Bohoslavsky and Veerle Opgenhaffer, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*, 23 *HARV. HUM. RTS. J.* 157 (2010).

“subversives” and those deemed to be their sympathizers.<sup>283</sup> Civilian paramilitary forces, including the *Alianza Anticomunista Argentina* (“Argentine Anticommunist Alliance” or “Triple A”), which acted with state resources and clandestine acquiescence, joined with police, security, and armed forces in the abductions, tortures, and murders that took place in concert with the military regimes of Chile, Argentina, Uruguay, Paraguay, Bolivia, and later, Brazil, Peru, and Ecuador, in the international state-sponsored terror network known as *Plan Cóndor* (Operation Condor).<sup>284</sup> These crimes often took place in secret detention centers located in army barracks, prisons, and police stations:

All sectors fell into the net: trade union leaders fighting for better wages; youngsters in student unions; journalists who did not support the regime; psychologists and sociologists simply for belonging to suspicious professions; young pacifists, nuns and priests who had taken the teachings of Christ to shanty areas; the friends of these people too, and the friends of friends, plus others whose names were given out of motives of personal vengeance, or by the kidnapped under torture.<sup>285</sup>

The military junta in Argentina, which deposed the elected government in 1976, is accused of an estimated 10,000 to 30,000 *desaparecidos* (“the disappeared”), who were abducted and killed by the Argentine officer corps.<sup>286</sup> Before calling for elections and relinquishing power to the democratic authorities, the fourth junta passed an amnesty law and a secret decree that directed the destruction of much of the evidence of their past crimes.<sup>287</sup> The dictatorship relinquished power in 1983 and, after democratic elections, president elect Raúl Alfonsín created the National Commission on the Disappearance of

<sup>283</sup> The highly repressive dictatorship sought to root out guerrilla leadership and eventually those deemed sympathetic to their cause, including trade union organizers, teachers, lawyers, journalists, psychiatrists, and other liberal professionals. See DONALD HODGES, *ARGENTINA’S DIRTY WAR: AN INTELLECTUAL BIOGRAPHY* (1991); Osiel, *Constructing Subversion in Argentina’s Dirty War*, *supra* note 282; CESAR CAVIEDES, *THE SOUTHERN CONE: REALITIES OF THE AUTHORITARIAN STATE IN SOUTH AMERICA* (1984). On the right, “a strong sense of corporate identity developed” whereby officers “saw themselves as part of a unique elite organization; they often felt contempt for civilians and especially politicians. They had little faith in democracy and regarded political parties as unnecessary.” See ERVIN STAUB, *THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE* 214 (1989). Fascist and Nazi propaganda and anti-Semitic practices especially influenced the Argentine officers corp. *Id.* at 223. The “disappeared” include at least 600 foreigners. See GUEST, *supra* note 282, at 64–65.

<sup>284</sup> For example, Argentine Naval high command openly supported the task force responsible for carrying out abduction and torture, see Argentine National Commission on the Disappearance of Persons (CONADEP), *NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED* 122 (1986). CONADEP published part of their report, *NUNCA MAS*, which describes in detail the methods of abduction, torture, and murder used by the military juntas and the nature and functioning of important social institutions of the society under the dictatorship.

<sup>285</sup> Ernesto Sabato, Prologue, in *NUNCA MAS*, *supra* note 284, at 4.

<sup>286</sup> The officers corps established secret death camps where many of the victims are thought to have died. On the history of the Dirty War, see the texts listed *supra* note 282. See also PATRICIA MARCHAK, *GOD’S ASSASSINS: STATE TERRORISM IN ARGENTINA IN THE 1970S* (1999); MARTIN E. ANDERSEN, *DOSSIER SECRETO: ARGENTINA’S DESAPARECIDOS AND THE MYTH OF THE “DIRTY WAR”* (1993); ALISON BRYSK, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA* (1994); RONALD DWORKIN, *Introduction*, in *NUNCA MÁS*, *supra* note 284.

<sup>287</sup> The “Law of National Pacification” barred criminal prosecution for offenses committed during the “anti-subversive war.” See *de facto* Law No. 22924, published in the Official Bulletin on Sept. 27, 1983. Judges declared this law unconstitutional shortly after it was passed. Upon assuming office, President Alfonsín led the effort to annul the “Law of National Pacification,” and on December 22, 1983, congress passed a law that declared the self-amnesty law to be unconstitutional. See Law No. 23040, published in the Official Bulletin on Dec. 29, 1983.



Persons (CONADEP) with its purpose to collect evidence about Dirty War-era crimes.<sup>288</sup> Three days after his inauguration on December 10, 1983, President Raul Alfonsín passed Decree No. 158, which mandated the initiation of charges and trials against nine officers of the first three military juntas. The 1985 *Juicio a las Juntas Militares* (“Trial of the Military Juntas”) established the dictatorship’s crimes, of which many constitute CAH, including forced disappearance, torture, and murder.<sup>289</sup> The court in the Trial of the Military Juntas found five former military officers guilty, including two former Presidents, Generals Jorge Rafael Videla and Roberto Eduardo Viola, Admiral Emilio Eduardo Massera, Admiral Armando Lambruschini, and Brigadier Orlando Ramón Agosti.<sup>290</sup> Four others were acquitted, including Brigadier Omar Domingo Rubens Graffigna, former President Leopoldo Fortunato Galtieri, Brigadier Basilio Lami Dozo, and Admiral Jorge Isaac Anaya.

In 1986, in the name of social peace and national reconciliation, and under the threat of mutiny, Alfonsín passed amnesty laws, including the *Ley de punto final* (“Full Stop Law”)<sup>291</sup> to limit criminal prosecutions for murder and torture, and the *Ley de obediencia debida* (“Due Obedience Law”)<sup>292</sup> in 1987, which made superior orders an irrefutable defense and had the effect of cancelling the criminal proceedings of the period. Consequently, Argentina “exemplifie[d] the power of entrenched supporters of a prior repressive regime to frustrate efforts to account for past crimes.”<sup>293</sup> But although the Due Obedience Law had the effect of granting impunity for most officers who had committed crimes during the dictatorship, it did not indict the highest military authorities who ordered such crimes; Alfonsín’s successor as president, Carlos Menem, granted a series of pardons with precisely that effect.<sup>294</sup> One such pardon, published Decree 2741/90

<sup>288</sup> See NUNCA MAS, *supra* note 284.

<sup>289</sup> Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de Buenos Aires (CFed.) [federal court of appeals criminal division of Buenos Aires], 9/12/1985, “Causa n° 13/84 (Juicio a las Juntas Militares).” The Supreme Court upheld the judgment of the Trial of the Military Juntas, aside from a six-month reduction in the seventeen-year sentence of Viola and 45 months instead of 54 months for Agosti. CSJN, 30/12/1986, “Causa no. 13/84.”

<sup>290</sup> OSIEL, *supra* note 184, at 107–110. Videla became president after the coup d’état that ousted President Isabel Perón. He now faces charges in at least 50 cases, including kidnapping, torture, and murder. *Forensic science for human rights*, THE GUARDIAN (May 13, 2010), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/may/13/forensic-science-human-rights>.

<sup>291</sup> The “Full Stop Law” prohibited criminal prosecutions of crimes committed by members of the military and security forces between March 24, 1976 and September 26, 1983 in “operations undertaken with the alleged motive to combat terrorism.” The law, however, did not cover the crimes of kidnapping minors or falsifying birth records or adoption papers. Law No. 23492, Dec. 24, 1986, [1986-B] E.D.L.A. 1100–01, translated in 8 HUM. RTS. L.J. 476 (1987); see also Parenti, *supra* note 281, at 493.

<sup>292</sup> The Due Obedience Law provided that “In such cases the persons mentioned shall automatically be deemed to have acted in a state of coercion under the subordination of the superior authority and in compliance with orders, without the power or possibility of inspecting, opposing or resisting them in so far as their timeliness or legitimacy was concerned.” The law did not include the crimes of rape, kidnapping of minors, falsifying the identity of minors, or extortive appropriation of property. Law No. 23521, Jun. 8, 1987, [1987-A] E.D.L.A. 260–61, translated in 8 HUM. RTS. L.J. 477 (1987); see also Parenti, *supra* note 281, at 493. The Supreme Court validated the Due Obedience Law shortly after its enactment. CSJN, 22/6/1987, “Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional.”

<sup>293</sup> Michael Wahid Hanna, *An Historical Overview of National Prosecutions for International Crimes*, in III INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 297, 310 (M. Cherif Bassiouni ed., 3d rev. ed. 2008), at 310.

<sup>294</sup> See Parenti, *supra* note 281, at 494.



on December 29, 1990, after a series of staged army uprisings, pardoned the accused who had been sentenced during the Trial of the Juntas.<sup>295</sup>

In an interview in 1995, Naval Captain Adolfo Scilingo openly admitted to the way the “disappeared” were injected with sedatives and dumped alive from helicopters into the sea in “death flights.”<sup>296</sup> An interview with another Naval officer, Alfredo Ignacio Astiz, surfaced three years later.<sup>297</sup> These interviews reopened the wounds of Argentina’s Dirty War. The officers speaking of their crimes were two of the 1,000 officers benefitting from the “Full Stop Law.”

As discussed above, Spanish courts were the first to act on behalf of the “disappeared” by bringing cases against Scilingo and another Navy officer, Ricardo Miguel Cavallo.<sup>298</sup> The efforts of the Spanish courts led to the eventual reopening of the Dirty War cases in Argentina.<sup>299</sup> In order to reopen and overturn the amnesties and presidential pardons, the courts relied on international jurisprudence that enforced “human rights treaties in cases where victims of crimes have sued States for their failure to investigate and punish such crimes.”<sup>300</sup> The first ruling that overturned the “Full Stop” and “Due Obedience” Laws occurred in 2001 in the case of Julio Héctor Simón, another former member of

<sup>295</sup> On April 25, 2007, a federal court declared decree 2741/90 unconstitutional because the offenses for which the defendants were convicted constituted CAH, which could not be pardoned. Cámara Nacional de Apelaciones en lo Criminal y Correccional de Buenos Aires [national court of appeals of Buenos Aires], 25/4/2007, “Causa no 13/84 / incidente de inconstitucionalidad de los indultos dictados por el decreto 2741/90 del Poder Ejecutivo Nacional”.

<sup>296</sup> Scilingo case, *supra* note 273; see *infra* § 3.2.6.

<sup>297</sup> See *Argentina ‘angel of death’ re-arrested*, BBC.COM (Dec. 28, 2001), <http://news.bbc.co.uk/2/hi/americas/1732776.stm>. Astiz was an Argentine Naval officer at the largest secret detention center in Buenos Aires during the years of the Dirty War, namely the notorious *Escuela de Suboficiales de Mecánica de la Armada* (ESMA or the “Naval Mechanics School”). The ESMA was transformed into one of the junta’s most repressive secret detention centers where an estimated 5,000 persons were unlawfully detained and often tortured and “disappeared.” Argentina refused to extradite Astiz to France, where, in 1990, he was convicted and sentenced *in absentia* to life imprisonment for forced disappearance and torture in relation to the deaths of two French nuns, Alice Domon and Léonie Duquet. Today, he remains free in Argentina. Ricardo Cavallo, who served at ESMA, was extradited to Argentina to stand trial in the ESMA case, which includes some 100 perpetrators. In 2003, the Federal Chamber of Buenos Aires ordered the reopening of the ESMA case after the “Full Stop” and “Due Obedience” Laws were struck down. Cámara Federal de Buenos Aires [Federal Chamber of Buenos Aires], 1/9/2003, “*Hechos denunciados como ocurridos en la E.S.M.A. / Causa n° 761*”.

<sup>298</sup> Scilingo case, *supra* note 273; see also *infra* §3.2.7.

<sup>299</sup> Prior to prosecuting Argentine nationals for crimes during the dictatorship, the Argentine Supreme Court upheld a life sentence for Enrique Lautaro Arancibia Clavel, a former Chilean secret police agent accused of planning the murder of General Carlos Prats, an ex-Chilean army chief and opponent of Pinochet who was assassinated in Buenos Aires in 1974. The sentence declared the nonapplicability of statutes of limitations to CAH in at the time of the assassination despite the fact that at the time Argentina had not become a signatory to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The decision, which was decided by a slim majority consisting of five of the eight judges, was seen to uphold a Congressional decision to annul some amnesty laws that were protecting former members of the dictatorship and a means to successfully prosecute some of the key junta members. CSJN, 24/8/2004, “Arancibia Clavel s/ homicidio calificado y asociación ilícita y otros”; see also CSJN, 11/7/2007, “Recurso de Hecho, Derecho, René Jesús s/ incidente de prescripción de la acción penal, Causa N° 24.079C” (in prosecution of a Uruguayan citizen where torture was proven, the court clarified that it had not been shown that there was a state or organizational policy of widespread or systematic torture in Argentina in 1988).

<sup>300</sup> Parenti, *supra* note 281, at 495. In 2003, the Argentine Congress enacted a law that declared the “unequivocal annulment” of the “Full Stop” and “Due Obedience” Laws. See Law No. 25779, Sept. 3, 2003. Over the next few years, the Argentine courts upheld the law.

the police forces during the dictatorship.<sup>301</sup> Julio Simón was an officer of the Federal Police in Buenos Aires during the Dirty War; he was indicted for unlawful detention, torture, and forced disappearance as CAH. Along with his co-defendant Juan del Cerro, Julio Simón was accused of illegally detaining a couple and abducting their child to give to a military family in 1978, among other crimes, including kidnapping a disabled man, torturing him with electric shocks, and forcing him to perform sexual acts with other prisoners. Both claimed protection under the “Full Stop” and “Due Obedience” laws. In 2005, the Supreme Court affirmed that prosecution for CAH could not be barred by amnesty laws because a 1994 amendment to Argentina’s constitution provided that the human rights treaties it was party to superseded national law.<sup>302</sup> Addressing the principle *nullum crimen sine lege*, the court quoted the *Barrios Altos v. Perú* case from the Inter-American Court of Human Rights:

all amnesty provisions, provisions on prescription and [ . . . ] measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations [ . . . ], [and] violate non-derogable rights recognized by international human rights law.<sup>303</sup>

The Supreme Court judgment in *Simón* meant that those who were the beneficiaries of the “Due Obedience” and “Full Stop” Laws could no longer rely on the principles of legality to avoid prosecutions for the crimes committed during the dictatorship. On August 4, 2006, the *Tribunal Oral en lo Criminal Federal No. 5* convicted Julio Simón for unlawful imprisonment and torture as CAH and sentenced him to 25 years imprisonment.<sup>304</sup> Simón became the first person connected with the dictatorship to be sentenced for its crimes. His trial opened the doors to pretrial investigations and further indictments stemming from the Dirty War.<sup>305</sup>

The trial of Miguel Osvaldo Etchecolatz resulted in the second judgment for CAH against a former Buenos Aires police officer after the amnesty laws were declared unconstitutional.<sup>306</sup> Etchecolatz was the Commissioner General of the Buenos Aires

<sup>301</sup> Juzgado Nacional en lo Criminal y Correccional Federal N° 4 (Juzg. Fed.) [lower federal court], 6/3/2001, “Causa Nro. 8686/2000 caratulada Simón, Julio, Del Cerro, Juan Antonio s/ sustracción de menores de 10 años”.

<sup>302</sup> The court found that the “Full-Stop” and “Due Obedience” laws were aimed at forgetting the human rights violations that took place during the Dirty War. It concluded that the laws violated articles 2 and 9 of the International Covenant on Civil and Political Rights (ICCPR) and articles 1, 2, 8, and 25 of the American Convention on Human Rights, and were also incompatible with the objectives and goals of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. CSJN, 14/6/2005, “Recurso de hecho Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. Causa No. 17-768C.”

<sup>303</sup> *Barrios Altos* case (*Barrios Altos v. Perú*), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001).

<sup>304</sup> On December 18, 2007, Julio Simón was sentenced to a further 23 years in the *Guerrieri y otros (Batallón 601)* case for the kidnapping, torture and forced disappearance of six Peronist Montoneros, an urban guerilla group in opposition to the dictatorship. *Batallón de Inteligencia 601* (Battalion 601) was a special intelligence unit of the Argentine Army whose personnel conducted surveillance of and infiltrated guerilla groups and human rights organizations, as well as coordinating kidnappings, killings, and other human rights violations. Juzg. Fed., 18/12/2007, “Guerrieri, Pascual Oscar y otros / privación ilegal de la libertad personal.”

<sup>305</sup> CSJN, 14/6/2005, “Case of Julio Héctor Simón/recurso de hecho,” No. 17-768.

<sup>306</sup> See *Tribunal Oral Federal de La Plata* (Juzg. Fed.) [Federal Court of La Plata], 19/9/2006, “Estado v. Etchecolatz, Miguel/juzgado penal,” *aff’d* by Cámara Nacional de Casacion Penal (C.N.C.P.) [highest

Provincial Police during the first years of the dictatorship.<sup>307</sup> In that position, Etchecolatz oversaw twenty-one detention camps in Buenos Aires. On September 16, 2006, he was convicted and sentenced to life imprisonment for six counts of murder, six counts of unlawful imprisonment, and seven counts of torture as CAH.<sup>308</sup> He became the first perpetrator to be sentenced since the reopening of proceedings after the Supreme Court's judgment in the *Simón* case. The tribunal concluded that Etchecolatz's crimes were "crimes against humanity in the context of the genocide that took place in Argentina," and affirmed "there was clearly a systematic plan, an act of state terrorism."<sup>309</sup>

The same court in La Plata condemned Christian Federico Von Wernich, a Roman Catholic police chaplain, and sentenced him to life imprisonment for his involvement in CAH, including seven murders, forty-two abductions, and thirty-one instances of torture.<sup>310</sup> Similarly, the court in *Von Wernich* also mistakenly characterized the crimes as CAH that occurred in the framework of the genocide in Argentina. The trial of Von Wernich drew attention to the role of the Catholic Church, which tacitly and occasionally directly approved and participated in the repression.<sup>311</sup>

In addition to striking down the "Full Stop" and "Due Obedience" Laws, Argentine courts have also voided President Menem's pardons that were granted to persons who had been indicted for crimes committed during the dictatorship but had not been convicted.<sup>312</sup> As for pardons issued to persons who were already convicted, the Federal Court of Appeals for Buenos Aires and the *Cámara Nacional de Casación Penal* have both declared that the pardons extended to those convicted during the Trial of the Juntas were unconstitutional.<sup>313</sup>

At the time of this book's completion in December 2010, a special tribunal in Argentina sentenced Reynaldo Benito Bignone, a key figure in the crimes committed by the military

federal court on criminal Court appeals], 18/5/2007, "Etchecolatz, Miguel Osvaldo/recursos de casacion e inconstitucionalidad"; and CSJN, 17/2/2009, "Etchecolatz, Miguel Osvaldo/recurso extraordinario."

Etchecolatz was second-in-command to Ramón Camps, who admitted using torture during interrogations and orchestrating more than 5,000 forced disappearances, as well as justifying the abduction of newborns from imprisoned mothers to be given to military families. Camps died before serving time. Etchecolatz was sentenced initially to 23 years imprisonment for illegal detention and forced disappearances but was protected by the amnesty laws. In 2004, he was prosecuted and sentenced to seven years imprisonment for abducting the babies of two disappeared persons, a crime that was deemed outside the protection of the amnesty laws.

<sup>307</sup> See *Argentina holds 'Dirty War' trial*, BBC.COM (Jun. 21, 2006), <http://news.bbc.co.uk/2/hi/5099028.stm>.

<sup>308</sup> Juzg. Fed. de la Plata, 19/9/2006, "Estado v. Etchecolatz, Miguel/juzgado penal", *aff'd* by C.N.C.P., 18/5/2007, "Etchecolatz, Miguel Osvaldo/recursos de casacion e inconstitucionalidad". The *Etchecolatz* sentencing judgment coincided with the disappearance of a key prosecution witness, Julio Jorge Lopéz.

<sup>309</sup> *Id.*

<sup>310</sup> Juzg. Fed. de la Plata, 1/11/2007, "Von Wernich, Christian F. v. Argentina."

<sup>311</sup> *Human Rights Trials in Chile and the Region*, BULL. N° 8 – July 2010, HUMAN RIGHTS OBSERVATORY (Universidad Diego Portales, 2010), at 12, available at [http://www.icsol.cl/images/Papers/bulletin\\_%208.pdf](http://www.icsol.cl/images/Papers/bulletin_%208.pdf).

<sup>312</sup> See Juzg. Fed., 4/9/2006, "Martínez de Hoz, José Alfredo y otro s/ secuestro extorsivo"; Cámara Nacional Criminal y Correccional Federal sala 1ª [national criminal and correctional chamber 1ª], 15/4/2008, "Causa 23.434 / Martínez de Hoz, José A. y otro" (both decisions declaring the unconstitutionality of decrees 1002/89 and 2745/00, which pardoned José Alfredo Martínez de Hoz and Albano Eduardo Harguindeguy); see also Parenti, *supra* note 281, at 496.

<sup>313</sup> As a result, the lower courts reinstated the defendants' sentences. Cámara Nacional de Apelaciones en lo Criminal y Correccional de Buenos Aires [national court of appeals of Buenos Aires], 25/4/2007, "Causa no 13/84 / incidente de inconstitucionalidad de los indultos dictados por el decreto 2741/90 del Poder Ejecutivo Nacional"; C.N.C.P., 3/6/2009, "Videla, Jorge Rafael y Massera, Emilio Eduardo s/ rec. de casación case no. 8262"; see also Parenti, *supra* note 281, at 497.

dictatorship and the last of the *de facto* presidents from 1982 to 1983, to twenty-five years imprisonment, along with six other former military and police officials, for crimes committed in his earlier role during the presidency of Videla as the director of *Campo de Mayo*.<sup>314</sup> Also, Argentina has now signed and ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,<sup>315</sup> the Inter-American Convention on the Forced Disappearance of Persons in 1996, the International Convention for the Protection of All Persons from Enforced Disappearance in 2007, and, in the same year, the legislature passed law No. 26.200, which provides imprisonment for crimes codified in the Rome Statute, including CAH.<sup>316</sup>

The trials of other military officials for crimes during the Dirty War continue in many Argentine provinces.<sup>317</sup> It is difficult to establish with any degree of certainty the exact number of cases and investigations still outstanding.<sup>318</sup> To this day, some participants in crimes committed by both sides are not yet in custody; others have died.

<sup>314</sup> Bignone was found guilty of eleven illegal raids, six robberies, fifteen illegal deprivations of liberty, twenty-one disappearances, and thirty-eight cases of torture. See *Argentina's last dictator gets 25-year prison sentence*, THE GUARDIAN (Apr. 21, 2010), <http://www.guardian.co.uk/world/2010/apr/21/argentina-dictator-reynaldo-bignone-prison>; *Bignone sentenced to 25 years in prison for human rights violations*, BUENOS AIRES HERALD (Apr. 21, 2010), <http://www.buenosairesherald.com/BreakingNews/View/31208>.

<sup>315</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970. Even though Argentina had not ratified this Convention at the time of the dictatorship's crimes, Argentine judges have concluded that at the time of the commission of the crimes, the rule on the nonapplicability of statutes of limitations was already in force as a matter of customary international law. See generally Parenti, *supra* note 281.

<sup>316</sup> See *supra* note 82.

<sup>317</sup> See, e.g., Tribunal Oral en lo Criminal Federal Posadas [Oral Federal Criminal Tribunal of Posadas], 16/10/2009, "Caggiano Tedesco y Beltrametti v. Argentina s/ privación ilegítima de la libertad, tortura, seguida de muerte" (convicting two former colonels for orders that resulted in torture, deprivation of liberty, and murder in Misiones Province); Tribunal Oral Federal de Mar del Plata [Oral Federal Tribunal of Mar del Plata], 3/7/2009, "Duret y Mansilla v. Argentina" (sentenced former General Pedro Pablo Mansilla to life imprisonment for the kidnapping, torture, and murder of Carlos Labolita; former Colonel Alejandro Duret was absolved); Tribunal Oral en lo Criminal Federal de Tucumán [Federal Criminal Tribunal of Tucumán], 4/9/2008, "Bussi et al v. Argentina, Causa 'Vargas Agnasse Guillermo s/secuestro y desaparición'" (former Army Generals Luciano Benjamín Menéndez and Antonio Domingo Bussi were convicted of CAH and the kidnapping of Guillermo Vargas Agnasse a provincial Senator of Tucumán); Tribunal Oral en lo Criminal Federal Corrientes [Oral Federal Criminal Tribunal of Corrientes], 6/8/2008, "De Marchi et al. s/ tormentos agravados, privación ilegítima de la libertad" (convicting Juan Carlos De Marchi, Rafael Julio Barreiro, Horacio Losito, and Raul Alfredo Reynoso for arbitrary deprivation of liberty and torture, qualifying the crimes as CAH); Tribunal Oral en lo Criminal Federal N° 1 de Córdoba [Córdoba Federal Criminal Oral Tribunal N° 1], 24/7/2008, "Menéndez, Luciano B. et al. v. Argentina, Causa Brandalís, Humberto H. y otros s/ averiguación de ilícito" (General Menéndez was also convicted and sentenced to life imprisonment for CAH, including unlawful detention, torture, and murder that took place in La Perla detention center, which came under his responsibility as official commander of the Third Corps; others receiving life sentences include Luis Alberto Manzanelli, Carlos Alberto Díaz, Valentín Padován Orestes, and Ricardo Alberto Ramón Lardone, while Carlos Alberto Vega, Hermes Oscar Rodríguez, and Jorge Ezequiel Acosta were given sentences of between 18 and 22 years imprisonment.); Tribunal Oral en lo Criminal Federal n° 5 [Federal Criminal Oral Tribunal n° 5], 18/7/2008, "Gallone y otros v. Argentina, Causa No. 1.223" (sentencing two former Heads of Police in Buenos Aires, to life imprisonment for the Fátima massacre, which involved the detention and execution of twenty men and ten women; another defendant, Miguel Angel Tamarichi, was absolved.).

<sup>318</sup> For updated information on these trials, see the Attorney General's web site, available at <http://www.mpf.gov.ar>; see also the website of the Centro de Estudios Legales y Sociales (CELS or "Center of Legal and Social Studies"), which collects and publishes information on Argentina's national prosecutions for the

Through its unique approach to national prosecutions for CAH, Argentina serves as an important historical precedent.<sup>319</sup> According to the Centro de Estudios Legales y Sociales, as of July 2010, 243 criminal proceedings have commenced in relation to the dictatorship; 1,129 persons have been declared suspects for purposes of pretrial investigation.<sup>320</sup> Of these, 419 persons have been charged, 83 cases have lacked probable cause, 176 suspects are deceased, and 12 were declared unfit for trial.<sup>321</sup> So far, 33 persons have been convicted.<sup>322</sup>

Argentina should be commended for its efforts to achieve justice and move beyond its past experiences, when reconciliation was no more than thinly disguised impunity. Argentine society has demonstrated that impunity is something it will no longer accept. Emotions continue to run high, particularly because the families of many of the “disappeared” have been unable to find closure in the absence of the remains of their loved ones. The efforts to trace and identify the remains of the “disappeared” continue. Moreover, many of those who committed or were involved in the crimes of the dictatorship walk around freely throughout the country, frequently crossing paths with the families of the dead, the “disappeared,” and the survivors of torture.

As a result, the temptation, as was the case in the cases of *Etchecolatz* and *Von Wernich*, has been to reflect a greater sense of opprobrium for these crimes by referring to them as genocide instead of or as well as CAH. This may cause some confusion, particularly because genocide does not include a “political group” and because it requires a specific intent to exterminate. The crimes committed by the dictatorship targeted political opponents and therefore it does not fall within the meaning of genocide as defined in the 1948 Convention.<sup>323</sup> Importantly, other judgments have specified that the specific crimes were CAH and not genocide.<sup>324</sup>

### §3.2.9. Indonesia

Nine days after East Timor declared its independence from Portugal on November 28, 1975, Indonesian forces invaded and occupied the country. East Timor was incorporated

crimes of the dictatorship, available at <http://www.cels.org.ar>. Argentina has a special prosecutorial unit tasked with pursuing criminal action against former regime actors.

<sup>319</sup> See, e.g., CARLOS S. NINO, *RADICAL EVIL ON TRIAL* (1996); Luis Moreno-Ocampo, *The Nuremberg Precedent in Argentina*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 357 (1990); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283 (1987); Emilio Fermin Mignone, Cynthia L. Estlund, & Samuel Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118 (1985).

<sup>320</sup> See Prosecutions, CELS (accessed Aug. 10, 2010), available at <http://www.cels.org.ar/wpblogs>.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> Genocide Convention, *supra* note 4; WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 133, 142 (2000) (explaining the decision not to cover political groups in the Genocide Convention, and emphasizing that most states have codified the definition of genocide set forth in the Convention); see also *Legality of Use of Force* (Yugo. v. Belg.), Order, 1999 I.C.J. 124, 138 (June 2) (holding that the bombing of Yugoslavia by the North Atlantic Treaty Organization (NATO) did not constitute genocide because NATO did not target a protected group). But see Howard Shneider, Comment, *Political Genocide in Latin America: The Need for Reconsidering the Current Internationally Accepted Definition of Genocide in Light of Spanish and Latin American Jurisprudence*, 25 AM. U. INT'L L. REV. 313 (2010).

<sup>324</sup> Tribunal Oral en lo Criminal Federal No. 1 de San Martín [Federal Criminal Tribunal de San Martín], 12/8/2009, “Riveros y otros v. Argentina / Causa de Floreal Edgardo Avellaneda y otros” (convicting General Santiago Riveros and five others).

into Indonesia in July 1976. In the two decades that followed, an unsuccessful pacification campaign resulted in an estimated death toll of 100,000 to 250,000 individuals.<sup>325</sup> As discussed in Chapter 4,<sup>326</sup> on August 30, 1999, a United Nations-supervised referendum resulted in an overwhelming majority of the people of Timor-Leste voting for independence from Indonesia. However, between the referendum and the arrival of a multinational peacekeeping force at the end of September 1999, anti-independence Timorese militias organized by the Indonesian military commenced a large-scale “scorched earth” campaign of retribution, killing approximately 1,400 Timorese and forcing 300,000 people into West Timor as refugees.<sup>327</sup> The majority of the country’s infrastructure was destroyed, including homes, irrigation systems, water supply systems, schools, and nearly the entire electrical grid. On September 20, 1999, the Australian-led peacekeeping force of the International Force for East Timor (INTERFET) arrived and brought the violence to an end. Timor-Leste was organized as an independent state on May 20, 2002.<sup>328</sup>

On September 22, 1999, Indonesia’s Komnas HAM established a commission to investigate human rights abuses in East Timor (KPP-HAM) in response to international outrage over the events that occurred in post-ballot East Timor.<sup>329</sup> KPP-HAM was charged with the task of investigating human rights violations in East Timor, particularly the involvement of Indonesian state organs in such violations.<sup>330</sup>

In its report issued on January 31, 2000, the KPP-HAM confirmed the existence of a very close relationship between the TNI (Tentara Nasional Indonesia, Indonesian Military), the police, the civil administration, and the East Timorese militias, stressing that the violence that began in East Timor resulted from a systematic campaign of violence rather than a civil war.<sup>331</sup> The report focused on several notorious massacres,<sup>332</sup> finding evidence of gross human rights violations, and, considering the evidence of systematic planning and perpetration, concluded that these violations constituted CAH, including large-scale, systematic killings directed at specifically identified groups, extensive destruction, a “scorched earth” policy, enslavement, forced deportations and displacement, and other inhumane acts committed against the civilian population.<sup>333</sup>

KPP-HAM insisted that members of the TNI, the police, and the militias they had created and groomed were responsible for the violence. It emphasized the role of senior officials from TNI headquarters in creating the armed militia groups and the ultimate responsibility of the former Commander of the Indonesian Armed Forces (Panglima ABRI), General Wiranto, for failing to provide security in East Timor notwithstanding

<sup>325</sup> See generally Suzannah Linton, *Indonesia and Accountability for Serious Crimes in East Timor*, in 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 399 (M. Cherif Bassiouni ed., 3d ed., 2008).

<sup>326</sup> See *infra* ch. 4, Part A, § 7.4.

<sup>327</sup> Eric Wiebelhaus-Brahm, *Truth Commissions and Other Investigative Bodies*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE 477, *supra* note 6, at 509.

<sup>328</sup> Linton, *supra* note 325, at 399.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> These massacres included (1) the massacre at the Liquiça Church on April 6, 1999; (2) the attack on pro-independence leader Manuel Carrascalão’s home on April 17, 1999; (3) the attack on the Dili Diocese on September 5, 1999; (4) the attack on the house of Bishop Belo on September 6, 1999; (5) the burning of homes in Maliana on September 4, 1999; (6) the attack on the Suai Church complex on September 6, 1999; (7) the murder at the Maliana Police Headquarters on September 8, 1999; (8) the murder of Dutch journalist, Sander Thoenes on September 21, 1999; and (9) the murder of a group of clergy and a journalist in Los Palos on September 25, 1999.

<sup>333</sup> Linton, *supra* note 325, at 399.



Indonesia's international commitment to do so.<sup>334</sup> In all, thirty-three individuals were named, including: the former Governor of East Timor (Abilo Soares); the former Commander of Resort Military Command 164, Wira Dharma/East Timor (Danrem Brig. Gen. Tono Suratman); the former Military Commander of Udayana IX (Pangdam Major General Adam Damiri); and the former Security Advisor to the Indonesian Task Force for the Implementation of the Popular Consultation in East Timor (Major General Zacky Makarim).

On April 17, 2000, the Attorney General selected an eighty-three-member team to focus exclusively on investigating the atrocities in East Timor.<sup>335</sup> His selection controversially included members of the Indonesian police and army. Indonesia was under substantial international pressure, especially in light of the creation of a mixed model tribunal for East Timor.<sup>336</sup>

Under Indonesia's Law 26/2000 on Human Rights Courts promulgated on November 23, 2000, human rights violations<sup>337</sup> (defined as genocide and CAH)<sup>338</sup> perpetrated prior to its coming into force may only be prosecuted at an *ad hoc* human rights court established by Presidential decree upon recommendation by the Indonesian Parliament. On April 24, 2001, President Wahid issued a decree establishing an *ad hoc* human rights court. The court was only given jurisdiction over cases arising after the August 30, 1999 referendum, a time when the majority of the atrocities were allegedly committed by militiamen trained and armed by Indonesia, rather than the TNI, or police.<sup>339</sup> A mere twelve of the suspects identified by the KPP-HAM fell within the court's jurisdiction. Wahid's successor, President Megawati Sukarnoputri, then issued a decree that ostensibly widened the temporal jurisdiction of the court. However, this decree proved to be misleading in that it only opened the month of April 1999 to the court's jurisdiction. After delays due to conflict between NGOs and the Indonesian government,<sup>340</sup> the judges finally took office in January 2002. The first indictments were filed in the following month.

Ultimately, a limited number of Indonesian military and police officials and political leaders were indicted and prosecuted. Only eighteen individuals were brought to trial before the *ad hoc* Human Rights Court for East Timor; all were charged with CAH.<sup>341</sup> The process has concluded, but information concerning them remains elusive. Four Indonesian military officers were convicted at first instance only to be acquitted on appeal. Two East Timorese individuals were convicted at first instance and on appeal, although one was later acquitted by the Supreme Court. The only individual held responsible by the court is Eurico Guterres, the East Timorese leader of the Aitarak militia, who was convicted of CAH and sentenced to ten years' imprisonment

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> See *infra* ch. 4, Part A, §7.4.

<sup>337</sup> Law No. 26/2000 on Human Rights Courts (Undang-Undang Republik Indonesia Nomor 26 Tahun 2000 Tentang Pengadilan Hak Asasi Manusia), November 23, 2000, published in the Official Gazette of the Republic of Indonesia Year 2000 No. 208.

<sup>338</sup> CAH are defined in Article 9 as "... any action perpetrated as a part of a broad or systematic direct attack on civilians, in the form of: a. killing; b. extermination; c. enslavement; d. enforced eviction or movement of civilians; e. arbitrary appropriation of the independence or other physical freedoms in contravention of international law; f. torture; g. rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced sterilization, or other similar forms of sexual assault."

<sup>339</sup> Linton, *supra* note 325, at 401.

<sup>340</sup> See Suzannah Linton, *Unravelling the First Three Trials at the Ad Hoc Court for Human Rights Violations in East Timor*, LEIDEN J. INT'L L. 303, 317 (2004).

<sup>341</sup> Linton, *supra* note 325, at 401.



and released after serving less than half of his sentence.<sup>342</sup> The other East Timorese who remained convicted was former East Timorese Governor Abilio Soares; however, the Supreme Court released him after he had served four months of a three-year sentence.<sup>343</sup> Many experts found deep and fundamental flaws that rendered the court worthless as a means of accountability, or as a remedy for human rights violations that provided a distorted “official” by ignoring the conclusions of numerous groups of experts, including the Indonesian Human Rights Commission, which have all stated categorically that Indonesian authorities are responsible for orchestrating the violence in Timor-Leste in 1999.<sup>344</sup> These commentators have drawn attention a clear bias in favor of the defense.<sup>345</sup>

### §3.2.10. Iraq

Iraq’s case is unique and its value as a historical precedent may be limited due to the circumstances of the Iraqi invasion that enabled the prosecution of Saddam Hussein, the former President of Iraq, and other high-level Ba’athist leaders.<sup>346</sup> Iraq has been the focus of intense international attention in the wake of its tragic history, from the Iran-Iraq War, to the Iraqi invasion of Kuwait, to the First Gulf War, and to the March 2003 U.S.-led invasion and subsequent occupation. The establishment of a judicial mechanism to confront the repressive legacy of the Ba’athist regime, which resulted in an estimated 500,000 deaths and hundreds of thousands of other victims of repression and abuse,<sup>347</sup> has been heatedly contested among expatriate Iraqis, outsiders, and scholars.<sup>348</sup> In the end, a national tribunal was established that would receive international support and assistance. The importance of the prosecutions of Hussein and the senior leaders of the Ba’ath party for genocide, CAH, war crimes, and other crimes under Iraqi law cannot be underestimated. This undertaking must be seen in the context of the history of impunity for such crimes that has long been a feature of the Arab world. Notwithstanding its flaws the trial of Hussein is an achievement that will likely gain significance with the passing of time.

<sup>342</sup> See *Impunity Reigns*, THE ECONOMIST, Apr. 10, 2008.

<sup>343</sup> *Id.*

<sup>344</sup> See *id.*; Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, U.N. Doc. S/2005/458, February 24, 2005.

<sup>345</sup> Ethel Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, at 425, note 50; see also *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (International Center for Transitional Justice, June 2005); *Indonesia: Courts Sanction Impunity for East Timor Abuses* (Human Rights Watch, Aug. 7, 2004); *Indonesia’s Court for East Timor a “Whitewash”* (Human Rights Watch, Dec. 20, 2002); David Cohen, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta* (International Center for Transitional Justice, Aug. 2003).

<sup>346</sup> Hanna, *supra* note 293, at 313.

<sup>347</sup> See *Justice for Iraq: A Human Rights Watch Policy Paper*, HUMAN RTS. WATCH, Dec. 2002, <http://www.hrw.org/background/mena/iraqi217bg.htm> (detailing the atrocities and crimes of the Ba’athist regime, including attacks against Iraqi Kurds, the forced expulsion of ethnic minorities from Kirkuk, repression of the Marsh Arabs and other Shi’a, general repression, large-scale disappearances, and other crimes); see also HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (1993).

<sup>348</sup> For a summary of the evolution of ideas on post-conflict justice in Iraq from the first Gulf War to the March 2003 invasion of Iraq by coalition forces, see M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT’L L.J. 327, 338–45 (2005).

The Statute of the Iraqi Special Tribunal was drafted in 2003 by the Coalition Provisional Authority, which was established to exercise temporarily the powers of government, and the Iraqi Governing Council, a subordinate local governing body operating under the authority of the Coalition Provisional Authority (CPA). The Iraqi Governing Council approved a decree on December 9, 2003, establishing the Iraqi Special Tribunal. On the same day, the Coalition Provisional Authority issued CPA Order No. 48, which contained the Statute of the Iraqi Special Tribunal.<sup>349</sup> On December 10, 2003, CPA Administrator Paul Bremer signed the order and published it in the CPA's Official Gazette, making the Iraqi Special Tribunal an official institution.<sup>350</sup> The Statute granted the Tribunal jurisdiction over all Iraqi citizens for genocide, CAH, war crimes, and other crimes specified under Iraqi law.<sup>351</sup> The Statute further established that the Tribunal had extraterritorial jurisdiction for crimes covered by the Statute committed in Iran and Kuwait, although the Tribunal has not extended its attention beyond Iraqi borders.<sup>352</sup> The Statute was succeeded by the Iraqi High Criminal Court Statute,<sup>353</sup> which the caretaker Iraqi government promulgated after the transfer of sovereignty from the CPA to assuage concerns regarding the establishment of the Iraqi Special Tribunal by an occupying power.<sup>354</sup>

Both Statutes were riddled with technical and substantive shortcomings that undermined the independence and legitimacy of the Iraqi High Tribunal. Moreover, the expansion of the Tribunal's subject matter jurisdiction to include jurisdiction over genocide, war crimes, and CAH, which were not crimes contained in the Iraqi Criminal Code and which have not been separately written into law by an Iraqi legislature, conflict with the strictly positivist nature of the Iraqi legal system and the principles of legality.<sup>355</sup> Because of the Tribunal's scope of temporal jurisdiction, certain aspects of its subject matter jurisdiction over war crimes and CAH also conflict with customary international law.<sup>356</sup> Otherwise, the definition of CAH set forth in Article 12 of the Statutes closely tracks the language of Article 7 of the Rome Statute.

<sup>349</sup> Statute of the Iraqi Special Tribunal art. 38, Dec. 10, 2003, 43 I.L.M. 231, *reprinted in* Coalition Provisional Authority Order No. 48, CPA/ORD/9 Dec. 2003/48, *available at* [www.iraqcoalition.org/regulations/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf).

<sup>350</sup> For a discussion of the Coalition Provisional Authority's authority to establish the Iraqi Special Tribunal, *see* M. Cherif Bassiouni & Michael Wahid Hanna, *Ceding the Higher Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 CASE W. RES. J. INT'L L. 21, 43–50 (2006–2007) (arguing the establishment of the Iraqi Special Tribunal during formal occupation of Iraq by the United States exposed the tribunal to serious questions regarding its legitimacy).

<sup>351</sup> Statute of the Iraqi Special Tribunal arts. 10–14, *supra* note 349. For a critique of the Statute's shortcomings, *see* Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, *supra* note 348, at 363–85.

<sup>352</sup> Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, *supra* note 348, at 363–85.

<sup>353</sup> Qanun al-Mahkama al-Jina'iya al-'Iraqiya al-'Uliya [Statute of the Iraqi High Criminal Court], No. 10 art. 19, Oct. 18, 2005.

<sup>354</sup> However, many of the substantive deficiencies that plagued the Statute of the Iraqi Special Tribunal were not corrected in the Statute of the Iraqi High Criminal Court and certain revisions created new problems. *See* Bassiouni & Hanna, *Ceding the Higher Ground*, *supra* note 350, at 62–88.

<sup>355</sup> *Id.* at 70–81. *See infra* ch. 5.

<sup>356</sup> The definition of CAH in the Statute of the Iraqi High Criminal Court does not include a nexus between the commission of such crimes and the existence of a war, an indefensible position with respect to the entire period covered by the Court's temporal jurisdiction. The definition also includes categories of actions such as sexual slavery and forced prostitution that reflect a progressive version of the crimes that conflicts with the customary international law understanding of CAH during the entire period of the Court's temporal jurisdiction. *Id.* at 74–5, 78–80.

The first trial of the Iraqi High Tribunal was the *Al Dujail* case against former Iraqi President Saddam Hussein and seven former Iraqi officials, which began on October 19, 2005. The trial focused on the massacre of 148 men and boys who were killed or executed in the aftermath of a failed assassination attempt on Hussein by members of the outlawed Da'wa party in 1982. Iraqi gunships attacked the people of Dujail, and their farmland, date palm groves, and water supply were destroyed. Three hundred residents were arrested, interrogated, and tortured. At least 100 victims died at these torture centers. Whole families remained interned at a desert compound for more than four years. The survivors were referred to the Revolutionary Court, which found them guilty without proper trial and sentenced them to death. The *Al Dujail* trial was completed on July 27, 2006, and Hussein and six other Ba'athist officials were found guilty of CAH, including the specific crimes of murder, torture, forcible transfer of persons, imprisonment or severe deprivations of liberty in violation of the fundamental norms of international law, and other inhumane acts. Both Hussein and Awad Hamed al-Bandar, the head of the Revolutionary Court, were sentenced to death by hanging.<sup>357</sup> On December 30, 2006, United States authorities transferred custody of Hussein to the Iraqi National Police, and he was hanged several hours later.

The second trial of the Iraqi High Tribunal was the *al-Anfal* case. The prosecution of Hussein, Ali Hassan al-Majid (alias "Chemical Ali"), Hussein's cousin and the former head of the Northern Bureau of the Ba'ath party, and five other defendants focused on the crimes committed by Hussein's regime in connection with the *al-Anfal* campaign, the 1988–1989 Iraqi military campaign targeting the Kurds of northern Iraq that resulted in approximately 100,000 deaths and the displacement of hundreds of thousands of others.<sup>358</sup> At the start of the trial, Hussein and al-Majid faced charges of genocide, war crimes, and CAH. The case against Hussein was withdrawn after his execution because Iraqi law does not permit convictions *in absentia*. The guilty verdicts in the *al-Anfal* trial were issued on June 24, 2007, and included a death sentence for al-Majid.<sup>359</sup> Unfortunately, the judgment failed to set forth the reasoning of the judges.<sup>360</sup> On January 25, 2010, al-Majid was hanged.

Both the *al-Dujail* and *al-Anfal* cases have been criticized for failing to meet international standards as a result of the alleged political interference, unfair proceedings, and vague charges.

#### §4. Other Recent Developments and National Prosecutions for CAH

As of the time of the writing of this book, further developments of CAH are occurring in the context of various past and ongoing conflicts. Time will tell if each of these situations will give rise to national or international prosecutions for CAH. In some instances, prosecutions have included charges and convictions for CAH. In others, as in the case

<sup>357</sup> Prosecutor v. Saddam Hussein et al. (*Al Dujail* case), Judgment, 1/TC1/2005, available at <http://www.legal-tools.org/doc/520627>.

<sup>358</sup> The Fayli Kurds are Shi'a and live mostly in Baghdad and Diyala province. Some Fayli Kurds also reside in neighboring areas in Iran.

<sup>359</sup> *Trial for Crimes Against Fayli Kurds Begins*, KURDISH GLOBE, January 29, 2009; Hadeel al-Salchi, *Iraq: Ex-Saddam Aide Gets 7 Years in Kurdish Case*, ASSOCIATED PRESS, Aug. 3 2009.

<sup>360</sup> Prosecutor v. Sabir Abd-al-Aziz et al. (*Al Anfal*), Special Verdict Pertaining to 1/TC2/2006, available at <http://www.legal-tools.org/doc/946afb>; Prosecutor v. Sabir Abd-al-Aziz et al. (*Al Anfal*), Appeals Judgment (Sept. 4, 2007), available at <http://www.legal-tools.org/doc/69a0a>.

of the Chilean prosecutions of the crimes of the Pinochet regime, the charges and convictions were for domestic crimes when such crimes also constituted CAH. Although what follows clearly does not account for every national prosecution for CAH or every situation where crimes were committed that warrant characterization as CAH, it suffices to illustrate the different experiences that mark the crime's transnational evolution.

Approximately 3,186 people were killed and "disappeared" in Chile during the seventeen years of military rule under General Augustin Pinochet Ugarte.<sup>361</sup> Pinochet seized power of Chile in 1973, and his brutally repressive regime, including the *Dirección de Inteligencia Nacional* (DINA), Pinochet's secret police and intelligence unit, continued until Chile moved to democracy in 1990.

In 1998, Judge Juan Guzmán Tapia was appointed to investigate the crimes committed by Pinochet and other agents of the Chilean state. Though the regime's crimes are best characterized as CAH, the only way for Judge Guzmán to investigate, indict, and penalize the guilty persons was to apply the national penal code crimes of assassination, torture, and kidnapping, because CAH was not a part of Chilean law. The crime of kidnapping enabled Judge Guzmán to ignore a 1978 amnesty law, taking the view that kidnapping continues until the victim is found, dead or alive, though most of the Chilean *desaparecidos* were never found.<sup>362</sup> Dozens of officers of the armed forces and police and some civilians have been convicted of assassinations, torture, and kidnappings. Pinochet was indicted for assassination and kidnapping, but died before he was prosecuted.

As in the case of other dictatorships of the region in the Pinochet era, including in Argentina, Uruguay, and Bolivia, many families of victims still demand to know the truth about the killings and disappearances. More than 1,000 persons remain listed as missing. In September 2009, a Chilean judge issued arrest warrants for 129 persons for charges related to operations of DINA, whose agents purged Pinochet's critics and opponents.<sup>363</sup> Three specific operations are included in the warrants, including Operation Condor, the aforementioned continent-wide campaign in the mid-1970s with international scope and consequences, as in the case of the assassination of former Chilean foreign minister Orlando Letelier, to purge leftists and Marxists, also supported by the dictatorships of Argentina, Bolivia, Paraguay, and Uruguay (and later, Brazil, Peru, and Ecuador);<sup>364</sup> Operation Colombo, which involved the killings of 119 activists in 1975

<sup>361</sup> HERALDO MUÑOZ, *THE DICTATOR'S SHADOW: LIFE UNDER AUGUSTO PINOCHET* (2008); PETER KORNBLOH, *THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY* (2003); CARLOS HUNEEUS, *EL RÉGIMEN DE PINOCHET* (2001); MARK ENSALACO, *CHILE UNDER PINOCHET: RECOVERING THE TRUTH* (1999); PATRICIA VERDUGO, *CHILE, PINOCHET, AND THE CARAVAN OF DEATH* (2001); PAMELA CONSTABLE AND ARTURO VALENZUELA, *A NATION OF ENEMIES* (1991); Cath Collins, *Human Rights Trials in Chile during and after the 'Pinochet Years'*, 4 INT'L J. TRANSITIONAL JUST. 67 (2009); Frances Webber, *The Pinochet Case: The Struggle for the Realization of Human Rights*, 26 J. L. & SOCIETY 523 (1999); Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

<sup>362</sup> The Chilean Supreme Court had pronounced hundreds of decisions applying the amnesty decree in cases involving forced disappearances, which were called instead *presuntas desgracias* ("alleged misfortunes") to avoid mentioning the specific crime committed.

<sup>363</sup> See *Chile seeks 'Dirty War' arrests*, BBC.COM (Sept. 2, 2009), available at <http://news.bbc.co.uk/2/hi/americas/8232996.stm>.

<sup>364</sup> See DINGES, *supra* note at 282: "As a secret treaty, Condor elevated human rights crimes to the highest level of state policy, under the direct control and manipulation of the heads of state and ministers of government. Its existence as an official policy instrument of six nations made it impossible for those regimes to write off their human rights crimes as isolated acts of aberrant officials or rogue agents."

and 10 communists who disappeared in 1976.<sup>365</sup> On July 8, 2010, the Supreme Court confirmed the sentences of former DINA agents for *asociación ilícita* (“criminal conspiracy”) in the aggravated homicides of former general and rival of Pinochet Carlos Prats and his wife, Sofía Cuthbert, in Buenos Aires on September 30, 1974.<sup>366</sup> The court rejected the application of the 1978 amnesty law, concluding that states were required to investigate and punish perpetrators of grave human rights violations principles of international human rights law.<sup>367</sup> The assassinations of Prats and his wife were characterized as CAH.<sup>368</sup>

As of August 2010, more than 300 cases have commenced involving 800 state actors and 1,000 victims (dead and surviving) for deaths, disappearances, torture, illegal burial, and conspiracy.<sup>369</sup> Between 2000 and June 2010, 292 former state agents were sentenced for crimes of the dictatorship era; 64 are currently imprisoned.<sup>370</sup>

The Chilean Supreme Court confirmed the nonapplicability of statutory limitations for CAH, but this principle has not been consistently followed.<sup>371</sup> Consider the fact that the court has also sanctioned the application of “half prescription,” a provision set forth in Article 203 of the Chilean Penal Code, which allows courts to use “a sliding scale to reduce sentences where more than half the original statute of limitations period for the offence has already expired by the time sentenced has passed.”<sup>372</sup> The Supreme Court has utilized “half prescription” in forty-eight of the most recent seventy-one verdicts in cases arising from human rights abuses of the dictatorship; with respect to ninety-six perpetrators, this resulted in the cancellation of their imprisonment.<sup>373</sup>

In 2009, Chile criminalized CAH and other crimes to incorporate the crimes of the Rome Statute.<sup>374</sup> However, the general understanding seems to be that this law is not applicable to pre-2009 crimes due to Chile’s strict adherence to the principle of non-retroactivity of criminal law. In this regard, the Chilean judicial system’s handling of

<sup>365</sup> See KORNBLUH, *supra* note 361; DINGES, *supra* note 282 (concerning the consequences of U.S. “technical assistance and strategic leadership” of the alliance of Southern Cone military regimes).

<sup>366</sup> Corte Suprema de Justicia (C.S.J.) [Supreme Court], Sala Penal, 8 Julio 2010, “Sentencia definitiva por homicidios de General (R) Prats y Sofía Cuthbert”, Rol. N° 2596–2009, available at [http://www.icso.cl/images/Papers/fallo\\_prats.pdf](http://www.icso.cl/images/Papers/fallo_prats.pdf); and *Human Rights Trials in Chile and the Region*, BULL. N° 8 – July 2010, HUMAN RIGHTS OBSERVATORY (Universidad Diego Portales, 2010), available at [http://www.icso.cl/images/Papers/bulletin\\_%208.pdf](http://www.icso.cl/images/Papers/bulletin_%208.pdf).

<sup>367</sup> *Human Rights Trials in Chile and the Region*, *supra* note 366.

<sup>368</sup> *Id.*

<sup>369</sup> See *id.* (summarizing case activity and judicial developments in Chile and the region). The Human Rights Observatory of the Universidad Diego Portales maps judicial developments in Chile for the human rights violations of the dictatorship lasting from 1973 to 1990. It also provides a database of ongoing cases before Chilean courts, available at <http://www.icso.cl/observatorio-derechos-humanos>.

<sup>370</sup> *Id.*

<sup>371</sup> See C.S.J., Sala Penal, 13 Diciembre 2006, “Caso Molco”, Rol. N° 559–2004; and *Human Rights Trials in Chile and the region*, *supra* note 366.

<sup>372</sup> *Human Rights in Chile*, BULL. N° 6 – May 2010, HUMAN RIGHTS OBSERVATORY (Universidad Diego Portales, 2010), at 1, available at <http://www.icso.cl/images/Papers/bullemayo.pdf>.

<sup>373</sup> *Id.* at 3; see also Karinna Fernández Neira and Prieto Sferazza Taibi, *La aplicación de la prescripción gradual del delito en las causas sobre violaciones de derechos humanos*, 5 ANUARIO DE DERECHOS HUMANOS 183 (in Spanish), available at <http://www.cdh.uchile.cl/publicaciones/anuarios/anuario2009.tpl>.

<sup>374</sup> See *supra* note 91. Unlike Argentina, Chile does not have a special prosecutorial office tasked with pursuing criminal action against perpetrators of crimes during the dictatorship. For the most part, cases were pursued by private criminal complaints of lawyers, victims, and victims’ relatives. See *Human Rights Trials in Chile and the region*, *supra* note 366.

human rights violations under the dictatorship contrasts with the more creative jurisprudence of Argentina. Thus, future prosecutions could be based on these crimes. For now, characterizing the crimes of the dictatorship as CAH has allowed investigating judges and courts to suspend amnesty laws and statutes of limitations, while charges and subsequent convictions have been based exclusively on Chilean law in force at the time of the commission of the crimes (i.e., kidnapping, aggravated homicide, criminal association, and illegal exhumation).<sup>375</sup>

A similar debate to the ongoing discussion in Chile is occurring in Uruguay, which was under military rule from 1973 to 1985.<sup>376</sup> Uruguay is now seeking to prosecute those who committed crimes during the dictatorship. Some Uruguayan state attorneys and judges insist on prosecuting international crimes such as forced disappearance; others insist that because CAH and forced disappearance were only recently incorporated into the national criminal code (in 2006), those crimes cannot be applied retroactively.<sup>377</sup> The Supreme Court is currently considering this issue.<sup>378</sup>

As part of the Uruguayan process, on November 17, 2006, former President Juan Maria Bordaberry and his foreign minister Juan Carlos Blanco were arrested in connection with the killings and disappearances of nine political opponents that occurred during the military rule in 1976.<sup>379</sup> On February 11, 2010, Bordaberry was sentenced to thirty years' imprisonment.<sup>380</sup>

On September 11, 2007, six members of the *Organismo Coordinador de Operaciones Anti-Subversivas* (OCOAS) who worked at *Automotores Orletti*, a clandestine detention center in Buenos Aires, were indicted for deprivation of liberty and "association to commit crime" in the 1976 disappearances of leftist activist Adalberto Waldemar Soba, Alberto Mechoso, Gerardo Gatti, and Leon Duarte, who were members of the *Partido por la Victoria del Pueblo* (PVP or "Party of the People's Victory"), and the 1974 disappearance of Washington Barrios, a member of the Tupamaros. The case indictment ultimately proceeded on the disappearance of Soba, because the *Ley de Caducidad* (the country's 1986 amnesty law) was found to cover the other cases.<sup>381</sup> The accused include colonels Gilberto Vazquez Bisio, Jorge Silveira, and Ernesto Avelino Ramas Pereira; Lieutenant Colonel Jose Niño Gavazzo; Captain Luis Alfredo Maurente Mata; former Captain Jose Ricardo Arab Fernandez; and retired police agents Ricardo Medina and Jose Felipe Sande Lima.<sup>382</sup>

<sup>375</sup> *Human Rights in Chile*, *supra* note 372, at 11.

<sup>376</sup> See Pablo Galain Palermo, *The Prosecution of International Crimes in Uruguay*, 10 INT'L CRIM. L. REV. 601 (2010).

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> See *Uruguay's ex-president arrested*, BBC.CO.UK (Nov. 16, 2006), available at <http://news.bbc.co.uk/2/hi/americas/6157418.stm>. Juez Penal 11 Turno Montevideo [Criminal Judge Montevideo], 16-11-2006, Sentencia del Juez Roberto Timbal a Bordaberry y Blanco," available at <http://www.legal-tools.org/doc/9533ad>; *aff'd* by Tribunal de Segunda Instancia [Second Instance Tribunal], 1-6-2007, Judgment, decision N° 136 "Bordaberry Arocena et al. c. Ministerio Pública," available at <http://www.legal-tools.org/doc/729e99>.

<sup>380</sup> See *Uruguay's ex-ruler Bordaberry jailed for 30 years* BBC.CO.UK (Feb. 11, 2010), available at <http://news.bbc.co.uk/2/hi/americas/8511204.stm>.

<sup>381</sup> Law No. 15848 of December 1986.

<sup>382</sup> Tribunal Segunda Instancia [Second Instance Tribunal], 28/2/2007, Judgment, decision No. 24, "Gavazzo, José Niño et al. v. Ministerio Público," available at <http://www.legal-tools.org/doc/90dd25>; and Juez Penal 19 de Turno [19 Criminal Judge Montevideo], 26-3-2009, Judgment, decision N° 037, "Ministerio Público c. Silveira Quesada, Jorge Alberto et al.," available at <http://www.legal-tools.org/doc/98b2d0>; Retired Colonel Juan Antonio Rodriguez Buratti was also indicted, but committed suicide.



In another case, a judge in Montevideo sentenced former military dictator Gregorio Alvarez Arvellino to twenty-five years imprisonment and former Naval officer Juan Carlos Larcebeau Aguirregaray to twenty years imprisonment for thirty-seven murders and human rights violations committed during the dictatorship.<sup>383</sup> The judge concluded that the crimes at issue were domestic crimes, namely murder, but constituted CAH and thus were not subject to statutory limitations or pardon.<sup>384</sup> Alvarez was initially charged with forced disappearance in 2007; the charges were later modified to domestic offenses.<sup>385</sup>

The *Frente Amplio*, Uruguay's ruling party, approved a legislative process in July 2010 that would annul the *Ley de Caducidad* and allow judges to recommence investigations into crimes of the dictatorship that were previously suspended.<sup>386</sup>

Peru also pursued national prosecutions for CAH. In 1980, after the ruling military regime allowed elections, armed conflict followed for the next twenty years.<sup>387</sup> According to Peru's Truth and Reconciliation Commission, more than 60,000 individuals were killed or "disappeared" during this period.<sup>388</sup> The *Sendero Luminoso* ("Shining Path"), a Maoist guerrilla group, was responsible for an estimated 30,000 of these deaths and disappearances,<sup>389</sup> and an estimated 20,000 resulted from measures taken by the Peruvian government forces to suppress the rebels.<sup>390</sup> Both sides particularly victimized the Peruvian poor.<sup>391</sup> In 1990, one decade after the violence began, Alberto Fujimori was unexpectedly elected president. A former professor of agriculture and mathematics at La Molina National Agrarian University, Fujimori's rise came about without political or military connections.<sup>392</sup> The Fujimori presidency began during the period of armed conflict, and he formed a close alliance with his corrupt informal security advisor, Vladimiro Montesinos.<sup>393</sup>

As the conflict escalated, Fujimori in effect declared a state of emergency in Peru by executing the Government of Emergency and National Reconstruction in 1992.<sup>394</sup> He then dissolved Congress, established a system of interim judges, suspended Peruvian constitutional provisions allowing the police or military to detain individuals without judicial oversight, and censored the press.<sup>395</sup> A system of "faceless" trials, meant for both civilian

<sup>383</sup> See *Uruguay's ex-ruler Alvarez jailed*, BBC.CO.UK (Oct. 22, 2009), available at <http://news.bbc.co.uk/2/hi/americas/8321478.stm>. Alvarez was 82 years old and ill at the time of his conviction. He was arrested in exile in Argentina based on charges of kidnapping political activists.

<sup>384</sup> Juez Penal de Turno Montevideo [19 Criminal Judge Montevideo], 29-10-2009, Judgment, dec. N° 0157, "Ministerio Público c. Alvarez Armellino, Gregorio Conrado y Larcebeau Aguirregaray, Juan Carlos," available at <http://www.legal-tools.org/doc/b60492>.

<sup>385</sup> *Human Rights Trials in Chile and the region*, *supra* note 366, at 14.

<sup>386</sup> *Id.*

<sup>387</sup> See *Peru: Country Summary*, HUMAN RIGHTS WATCH (Jan. 2008), available at <http://www.hrw.org/wk2k6/pdf/peru.pdf>.

<sup>388</sup> *Peru: Prosecutions Should Follow Truth Commission Report*, HUMAN RIGHTS WATCH (Aug. 2003), available at <http://www.hrw.org/en/news/2003/08/28/peru-prosecutions-should-follow-truth-commission-report>.

<sup>389</sup> The other 10,000 deaths and disappearances were attributed to smaller groups of insurgents or were unattributed to a particular group. *Id.*

<sup>390</sup> Bernaz and Prouvèze, *supra* note 213, at 377. An estimated 70,000 died during the leftist Túpac Amaru and Maoist Shining Path insurgencies.

<sup>391</sup> *Peru: Prosecutions Should Follow Truth Commission Report*, *supra* note 388.

<sup>392</sup> See Kent Anderson, *An Asian Pinochet? Not Likely: The Unfulfilled International Law Promise in Japan's Treatment of Former Peruvian President Alberto Fujimori*, 38 STAN. J. INT'L L. 177, 180 (2002); see also JULIO F. CARRION, *THE FUJIMORI LEGACY: THE RISE OF ELECTORAL AUTHORITARIANISM IN PERU* (2006); CATHERINE M. CONAGHAN, *FUJIMORI'S PERU: DECEPTION IN THE PUBLIC SPHERE* (2006).

<sup>393</sup> Anderson, *supra* note 392, at 180.

<sup>394</sup> Bernaz and Prouvèze, *supra* note 213, at 377.

<sup>395</sup> Anderson, *supra* note 392, at 180–81.



and military tribunals stripped the accused of basic protections.<sup>396</sup> Amnesty laws followed in 1995 granting full amnesties for all military, police, or civilians charged with or convicted of a crime committed under the pretense of combating terrorism.<sup>397</sup> In addition to his “state of emergency” institutional reform, Fujimori and his autocratic administration committed murder, forced disappearances, and other human rights violations.<sup>398</sup> At the end of 2000, after he was elected for a third term in violation of constitutional term limits, Fujimori resigned and fled to Japan, where he lived in exile for five years.<sup>399</sup>

After his fall from power, Fujimori was subject to numerous public and private claims for prosecution, as well as congressional investigation.<sup>400</sup> The new Peruvian government charged Fujimori with numerous crimes including CAH, such as the extrajudicial execution of fifteen persons in Lima’s Barrios Altos district in 1991 and the forced disappearances of teachers and students from La Cantuta University in 1992. The Peruvian Supreme Court issued an international warrant for Fujimori’s arrest in September 2001, but Japan refused to extradite him, noting both that Fujimori was a nationalized Japanese citizen and that Japan and Peru were not partners to an extradition treaty.<sup>401</sup> He was arrested in Chile at the request of the Peruvian government in November 2005.<sup>402</sup> The Chilean Supreme Court agreed to Fujimori’s extradition on September 21, 2006.<sup>403</sup> After first being convicted and sentenced to six years imprisonment for ordering an illegal search, Fujimori’s trial began on December 10, 2007 for human rights violations, including CAH committed against the Peruvian population. He was the first democratically elected Latin American leader to be prosecuted on his home soil for human rights abuses. On April 7, 2009, the Special Criminal Chamber of the Supreme Court of Peru found Fujimori guilty of murder and illegal detention as CAH and sentenced him to twenty-five years imprisonment.<sup>404</sup>

A federal court in Brazil recently rejected the request of prosecutors to characterize the torture and murder of a journalist as CAH. The journalist, Vladimir Herzog, was killed

<sup>396</sup> For example, the accused could be detained for up to fifteen days without any form of communication; the accused could be kept from counsel until providing first providing a statement to the government; counsel could only work for limited periods (one month with a twenty-day extension) for pretrial investigation; and defense counsel was not allowed to examine or cross-examine some “secret” witnesses. Bernaz and Prouvêze, *supra* note 213, at 378; see also Brian Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW. J. L. & TRADE AM. 429, 465–66 (2006).

<sup>397</sup> VICTOR RODRIGUEZ, *THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE: A VISION SINCE AND ON THE LATIN-AMERICAN POST-CONFLICT EXPERIENCES* 27 (forthcoming 2010) (discussing Decree Law 26479: the *Ley de Amnistia General al Personal Militar, Policial, y Civil para Diversos Casos*).

<sup>398</sup> Anderson, *supra* note 392, at 181.

<sup>399</sup> The 2000 election was criticized for its lack of fairness, corruption, and irregularities. *Id.* at 182; Tittmore, *supra* note 396, at 466–67. In September 2000, the first of many videos surfaced showing Montesinos bribing a congressmen and election officials for their support in the election. *Id.* at 182. Anderson states the date of resignation as November 20, 2000. *But see* Tittmore, *supra* note 396, at 468 (stating the resignation date was in September before Fujimori fled to Japan). The Peruvian Congress rejected Fujimori’s resignation and instead voted to unseat him, followed by general elections in the spring of 2001. Anderson, *supra* note 392, at 182; Tittmore, *supra* note 396, at 468.

<sup>400</sup> Anderson, *supra* note 392, at 183.

<sup>401</sup> *Id.* at 183–84.

<sup>402</sup> *Fugitive Returned*, THE ECONOMIST, Sept. 26, 2007.

<sup>403</sup> *Id.*

<sup>404</sup> See *Former Peruvian president Alberto Fujimori sentenced to 25 years*, GUARDIAN.CO.UK (Apr. 7, 2009), available at <http://www.guardian.co.uk/world/2009/apr/07/alberto-fujimori-peru>. Fujimori blamed his spy chief, Montesinos, for the excesses of the counterinsurgency.

by the Brazilian intelligence agency, the *Destacamento de Operações de Informações – Centro de Operações de Defesa Interna* (DOI-CODI), during the military dictatorship that ruled the country between 1964 and 1985. The court determined that the crimes could not be prosecuted as CAH because at the time of their commission Brazil did not include such a crime in its penal code.<sup>405</sup> Thus, the investigation was closed because the statute of limitations for murder and torture had expired. Brazil is currently discussing the establishment of an official truth commission and the opening of a secret armed forces archive concerning the estimated 100 persons who disappeared during its dictatorship from 1964 to 1985.<sup>406</sup>

A survey of these efforts to confront crimes of past dictatorships in Latin America raises questions about the role and relationship of state actors within the School of the Americas, the U.S. Department of Defense facility at Fort Benning, Georgia, where more than 61,000 Latin American soldiers and police were trained between 1946 and 2001, including Leopoldo Galtieri and Roberto Viola of Argentina, as well as persons from Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.<sup>407</sup>

Several European countries have undertaken prosecutions involving CAH in their national judicial systems. Belgium amended its law concerning the punishment of grave breaches of international humanitarian law in 1999 to criminalize CAH. After private persons lodged a flurry of complaints under the new law, its scope was substantially amended in 2003.<sup>408</sup> In one of these cases, Belgium took on the prosecution Bernard Ntuyahaga, a former major of the Rwandan Armed Forces accused of genocide, CAH, and other crimes during the Rwandan genocide. Ntuyahaga was accused of CAH for the murders of Rwandan Prime Minister Agathe Uwilingiyimana and ten Belgian peacekeepers of the U.N. Assistance Mission for Rwanda (UNAMIR) that were protecting her in the aftermath of the assassination of Rwandan President Habyarimana. Belgium initially issued an international arrest warrant for Ntuyahaga in May 1995. Ntuyahaga turned himself in to the ICTR in June 1998, where he was indicted for genocide, conspiracy to commit genocide, war crimes, and CAH.<sup>409</sup> The ICTR withdrew the charges, but ruled that it lacked the jurisdiction to deliver the accused to Belgium or any other national authorities and ordered his release.<sup>410</sup> Nearly five years later, Ntuyahaga turned himself in to Belgian authorities. He was indicted for CAH and other international

<sup>405</sup> *Ministério Público Federal* [Office of the Prosecutor], Herzog, Vladimir, *Promogao de arquivamento* n° 1.34.001.001574/2008–17, Proceedings to file case, 12 September 2008.

<sup>406</sup> *Human Rights Trials in Chile and the Region*, *supra* note 366, at 13.

<sup>407</sup> See, e.g., LESLEY GILL, *THE SCHOOL OF THE AMERICAS – MILITARY TRAINING AND POLITICAL VIOLENCE IN THE AMERICAS* (2004); Bill Quigley, *The Case for Closing the School of the Americas*, 20 *BYU J. Pub. L.* 1, 9–17 (2005); Dana Priest, *U.S. Instructed Latins on Executions, Torture; Manuals Used 1982–91, Pentagon Reveals*, *THE WASHINGTON POST*, Sept. 21, 1996, at A01.

<sup>408</sup> In addition to the *Ntuyahaga* case and other cases not discussed herein, complaints were also directed against, the following persons: Hissène Habré, former President of Chad for CAH committed between 1982 and 1990; Ariel Sharon, Prime Minister of Israel, General Amos Yaron, and other Israeli and Lebanese persons for their involvement in the Sabra and Shatila massacre; Saddam Hussein and other Iraqi ministers for CAH committed against the Kurdish population in Iraq; and Fidel Castro, President of Cuba, for alleged CAH in the destruction of two civilian aircraft in 1996.

<sup>409</sup> *Prosecutor v. Ntuyahaga*, Case No. ICTR-98-40-I, Indictment (September 28, 1998).

<sup>410</sup> *Prosecutor v. Ntuyahaga*, Case No. ICTR-98-40-I, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999).

crimes. On July 5, 2007, the Belgian *Cour d'Assises* sentenced Ntuyahaga to twenty years imprisonment.<sup>411</sup>

The Amsterdam Court of Appeal in the Netherlands issued an advisory opinion concerning CAH in the case of Desiré Delano (“Dési”) Bouterse, the commander of the Surinamese military. On December 8 and 9, 1982, fifteen persons were arrested by the Surinamese military authorities and held in Fort Zeelandia in Paramaribo.<sup>412</sup> The detainees were mostly prominent persons whom Bouterse viewed as a threat to his rule, including lawyers, professors, businessmen, journalists, and army officers. These persons were tortured and summarily executed at Bouterse’s orders; fifteen victims were Surinamese and one was Dutch. The advisory opinion provided that the torture and murders appeared to fall within the definition of CAH at the time of the commission of the crimes, but it concluded that there was no obligation for the Dutch to request the extradition of Bouterse. On July 19, 2010, Bouterse was elected president of Surinam.

Switzerland’s trial of Fulgence Niyonteze was the first time its judiciary sentenced an individual for a violation of international humanitarian law. Niyonteze was the mayor of Mushubati in Rwanda. At a town meeting, he encouraged Hutus to pursue and kill surviving Tutsi. Those in attendance acted on his speech. Among other crimes, Niyonteze was alleged to have abused his authority to issue falsified identification to Hutus to assist their escape. After the genocide, he fled to Switzerland, where he was granted asylum until his arrest by Swiss authorities on August 26, 1996. Niyonteze was charged, *inter alia*, with war crimes, genocide, and CAH. His trial began on April 12, 1999. However, because Swiss law did not recognize genocide or CAH at the beginning of proceedings, prosecution for these crimes was barred. At the end of his trial, Niyonteze was found guilty of war crimes and inciting war crimes and sentenced to life imprisonment and fifteen years of exclusion from Swiss territory.<sup>413</sup> The Swiss Supreme Court deported Niyonteze after his release from prison on September 11, 2006.

Hungary prosecuted one of its nationals for CAH committed during the 1956 Hungarian Revolution.<sup>414</sup> János Korbely, a retired Hungarian military officer, was charged *inter alia* with murder as a CAH due to his participation in the quelling of an uprising in the town of Tata early in the early days of the Revolution. Korbely was captain of a group alleged to have killed a number of insurgents. The European Court of Human Rights eventually heard the case and ruled that Hungary had violated Article 7 of the Convention because it was not foreseeable that Korbely’s acts would constitute CAH and be statute-barred in 1956.<sup>415</sup>

<sup>411</sup> Cour d’Assises (Cour. ass.) [court of original jurisdiction for very serious crimes], Jul. 5, 2007, Prosecutor v. Ntuyahaga, available at <http://www.legal-tools.org/doc/cd823>. The Belgian *Cour de cassation* affirmed the judgment on appeal.

<sup>412</sup> Advisory Opinion of C.J.R. Dugard regarding the Bouterse case, Amsterdam Court of Appeal, 7 Jul. 2000.

<sup>413</sup> Tribunal militaire de division 2, Apr. 30, 1999, Prosecutor v. Niyonteze. The prison sentence was decreased by one year but otherwise affirmed on appeal. Tribunal militaire d’appel 1A, May 26, 2000, Appeals Judgment, Prosecutor v. Niyonteze, available at <http://www.legal-tools.org/doc/fe2edc>. The *Tribunal militaire de cassation* affirmed. Niyonteze and Military Prosecutor of the Military Tribunal of First Instance 2 v. Military Appeals Tribunal 1A, Cassation Judgment, ILDC 349 (CH 2001); 12(21) Decisions of the Military Supreme Court, 27 April 2001, available at <http://www.legal-tools.org/doc/3f84e1>.

<sup>414</sup> VICTOR SEBESTYEN, TWELVE DAYS: THE STORY OF THE 1956 HUNGARIAN REVOLUTION (2007).

<sup>415</sup> Korbely v. Hungary, App. No. 9174/02, ¶¶ 58, 95 (2008), available at <http://www.echr.coe.int>. While the opinion in *Korbely* is confusing at times, importantly, the court recognized the state policy requirement for CAH: “the [Hungarian] Supreme Court did not address the question whether the particular act

After the conflict of the former Yugoslavia, the post-Yugoslavian countries of Croatia, Serbia, Kosovo, Bosnia and Herzegovina, Montenegro, and the Former Yugoslav Republic of Macedonia undertook prosecutions mostly for war crimes, but also CAH. The Croatian prosecutions have involved war crimes; more than 600 persons have been convicted, and another 600 persons have been indicted. A particular problem of the Croatian prosecutions has been the country's widespread use of trial *in absentia*. Pursuant to such trials, some 400 persons, nearly all Serbs, stand convicted of war crimes. In Bosnia and Herzegovina, different case law has developed in different jurisdictions due to the application of distinct laws and differing legal positions. This is primarily a consequence of the fact that the Republika Srpska has continued to apply the criminal code of the former Yugoslavia, whereas the Court of Bosnia and Herzegovina applies the new criminal code adopted in 2003. The exact number of perpetrators, the identity and ethnicity of the victims, potential witnesses, and the number of ongoing investigations and indictments all remain unknown. Likewise, empirical data concerning the prosecutions in Serbia, Montenegro, and the Former Yugoslav Republic of Macedonia are lacking. Overall, in recent years cooperation among the post-Yugoslav countries has improved, but obstacles still remain to the extradition of suspects accused of war crimes and CAH.

Estonia prosecuted one of its nationals and a Russian national for CAH under Article 61–1 § 1 of the Estonian Criminal Code. In March 1949, August Kolk and Petr Kislyiy participated at the bureaucratic and organizational levels that prepared and executed operation “Priboi,” which involved the deportation of the civilian population of the Soviet-occupied Republic of Estonia to remote areas of the USSR. On October 10, 2003, the Estonian County Court ruled that CAH were not subject to statutes of limitations under Article 6 § 4 of the Estonian Criminal Code and Article 5 § 4 of the Estonian Penal Code. The judgment was upheld on appeal.<sup>416</sup> The case was taken to the European Court of Human Rights on grounds that the convictions were based on the retroactive application of criminal law in violation of Article 7 of the European Convention on Human Rights.<sup>417</sup> On January 17, 2006, the European Court of Human Rights declared the application inadmissible.<sup>418</sup> The Strasbourg Court held that even if the acts were

committed by the applicant was to be regarded as forming part of this State policy, such as to bring it within the sphere of CAH, as the notion was to be understood in 1956.” *Id.* ¶ 84.

<sup>416</sup> The Court of Appeal reasoned that the applicants’ prosecution and punishment was not in violation of the principle of nonretroactivity in criminal law because, in 1949, CAH were punishable under Article 6(c) of the London Charter and the affirmation in 1946 of the “Nuremberg Principles” by the U.N. General Assembly. *Principles of the Nuremberg Tribunal 1950, Report of the ILC, (Principles of International Law Recognized in the Tribunal)*, July 29, 1950, U.N. Doc. A/1316 (1950), reprinted in 4 AM. J. INT’L L. 126 (1950) (Supp.); 2 Ferencz 235.

<sup>417</sup> Earlier cases before the European Court of Human Rights related to the trials for CAH of perpetrators of World War II-era crimes. See *X. v. Belgique*, App. No. 268/57, in 1 Y.B. EUR. CONV. ON H.R. 239, at 239–41 (European Commission on Human Rights); *Touvier v. France*, App. No. 29420/95 (1997), available at <http://www.echr.coe.int>; *Papon v. France* (No. 2), 2001-XII Eur. Ct. H.R. 235. The Estonian prosecutions, however, involved crimes committed after the war, in 1949, during peacetime; see also Antonio Cassese, *Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case Before the ECHR*, 4 J. INT’L CRIM. JUST. 410, 411 (2006); see also European Convention on Human Rights art. 7(2) (providing “the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.”).

<sup>418</sup> *Kolk & Kislyiy v. Estonia*, App. Nos. 23052/04 & 24018/04 (2006), available at <http://www.echr.coe.int>.

lawful under Soviet law at the time of commission, CAH were already criminalized and prohibited in 1949 by “general principles of law recognized by civilized nations.”<sup>419</sup>

In 2005, Latvia prosecuted Nikolay Tess, a Russian citizen in the Ministry for State Security, who was one of several Soviet officials charged for CAH pursuant to Latvian Criminal Law Article 68.1, in relation to mass deportations from Latvia that occurred between 1941 and 1949.<sup>420</sup> Tess completed and signed the orders for the deportations of 138 persons, who were forced to settle in the remote regions of the USSR; he claimed that his acts were not criminal at the time of their commission. Tess was convicted of CAH and sentenced to five years’ imprisonment.<sup>421</sup>

The first prosecution under Norwegian legislation prohibiting CAH and war crimes concerned crimes that occurred in the context of the conflict in the former Yugoslavia.<sup>422</sup> Mirsad Repak was a Bosnian citizen and lieutenant of the Croatian Defence Forces (HOS) militia group that operated the Dretelj detention camp. The interned Serbian civilians at the camp were subject to physical and psychological abuse, inhumane conditions, torture, and rape; at least two were murdered.<sup>423</sup> After the war, Repak fled from Croatia to Norway, where he was granted citizenship. At trial, the Oslo District Court was asked whether prosecution for CAH was barred by the principles of legality, which are recognized under the Norwegian Constitution.<sup>424</sup> The court dismissed the counts for CAH under section 102 of the Criminal Code because the code in force in 1992 lacked a provision criminalizing CAH.<sup>425</sup> The prosecution was allowed to continue for war crimes in the unlawful deprivation of liberty of eleven civilians in the Dretelj camp. The court found Repak guilty, sentenced him to five years’ imprisonment and ordered him to pay compensation to the families of the victims.<sup>426</sup> Repak may yet appeal to the Supreme Court.

In Africa, Ethiopia undertook the national prosecution for CAH and other international crimes committed during the Mengistu regime, which controlled the country in the aftermath of the 1974 Revolution.<sup>427</sup> The initially peaceful revolution toppled the longstanding monarchy and its feudal order and resulted in a profound transformation in

<sup>419</sup> *Id.* at 9.

<sup>420</sup> *N.T. v. Latvia*, Latvijas Republikas Augstākās tiesas Senāta Kriminālīetu departaments [Department of Criminal Affairs of the Supreme Court of the Senate], SKK-01-162/05, 19 April 2005.

<sup>421</sup> *N.T. v. Latvia*, Latvijas Republikas Augstākās tiesas Senāta Kriminālīetu departaments [Department of Criminal Affairs of the Supreme Court of the Senate], SKK-96/06, 16 Feb. 2006. The case was appealed to the European Court of Human Rights, which found the complaint partly inadmissible. *Tess v. Latvia* (dec.), no. 34854/02, 12 Dec. 2002, available at <http://www.echr.coe.int>.

<sup>422</sup> *The Public Prosecutor v. Mirsad Repak*, Case No. 08-108985MED-OTIR/08, Judgment (Dec. 2, 2008), available at <http://www.icrc.org/ihl-natnsfWebCASE!OpenView>. See Section 102 of the Norwegian Criminal Code Adopted in March 2008.

<sup>423</sup> *Repak* Judgment, *supra* note 422, ¶ 15.

<sup>424</sup> *Id.* ¶ 6. The Norwegian Constitution proscribes the retroactive application of the law unless similar legislation existed at the time of the alleged criminal acts: “No law must be given retroactive effect.” See Article 97 of the Norwegian Constitution; see also *infra* ch. 5.

<sup>425</sup> *Repak* Judgment, *supra* note 422, ¶¶ 7, 9.

<sup>426</sup> The Appeal Court in Oslo affirmed on April 12, 2010 on the same grounds and could possibly be appealed to the Supreme Court. *The Public Prosecutor v. Mirsad Repak*, LB-2009-24039 (Apr. 12, 2010), available at <http://www.lovdato.no/lr/lrb/lb-2009-0240039.html>.

<sup>427</sup> See GEBRU TAREKE, *THE ETHIOPIAN REVOLUTION: WAR IN THE HORN OF AFRICA* (2009); THEODORE M. VESTAL, *ETHIOPIA: A POST-COLD WAR AFRICAN STATE* (1999); DONALD L. DONHAM, *MARXIST MODERN: AN ETHNOGRAPHIC HISTORY OF THE ETHIOPIAN REVOLUTION* (1999).

Ethiopia's social and property classes.<sup>428,429</sup> The revolution shifted from peaceful action to brutality under the command of Mengistu Haile Mariam and the Derg, a Marxist-Leninist military group.<sup>430</sup> At first, the Derg victimized the former ruling class of the monarchy, including the Emperor, members of the royal family, ministers, army officials, the clergy, and the aristocracy.<sup>431</sup> Ethiopia then entered the period known as the "Red Terror," in which the Derg started to target political dissidents including individuals and groups it deemed likely to pose a threat to its rule.<sup>432</sup> In the end, the Mengistu regime was responsible for the killing of tens of thousands of Ethiopia's most highly educated persons, the forcible relocating of its peasantry, and hundreds of thousands of deaths caused by malnutrition and disease.<sup>433</sup> It is estimated that the period of Derg rule in Ethiopia from 1974 to 1991 resulted in approximately 500,000 deaths.<sup>434</sup>

On May 21, 1991, the Ethiopian People's Revolutionary Democratic Front entered Addis Ababa and overthrew the Mengistu military government.<sup>435</sup> Mengistu fled Ethiopia to Zimbabwe, but many of his advisors and officials were detained.<sup>436</sup> On August 8, 1992, the Ethiopian government established a Special Prosecutor's Office to investigate the human rights violations that occurred during the seventeen years of Derg rule, while compiling a historical record of the offenses and bringing the perpetrators to justice.<sup>437</sup> Because of funding constraints and shortfalls, charges did not materialize until nearly two years after the investigation began.<sup>438</sup> On December 6, 2006, the Federal High Court First Criminal Division convicted Mengistu and other individuals who were part of his regime for genocide, CAH, and willful bodily injury pursuant to Article 281 of the 1957 Ethiopian Penal Code.<sup>439</sup> In all, the Ethiopian court has convicted more than 1,018 individuals for

<sup>428</sup> See FRED HALLIDAY AND MAXINE MOLYNEUX, *THE ETHIOPIAN REVOLUTION* (1981).

<sup>429</sup> *Id.* at 52–96; see also Prádraig McAuliffe, *The Ethiopian Red Terror Trials: Transitional Justice Challenged*, 10 INT'L CRIM. L. REV. 294 (2010); Wondwoosen L. Kidane, *The Ethiopian "Red Terror" Trials*, in POST-CONFLICT JUSTICE 668 (M. Cherif Bassiouni ed., 2002); and Julie V. Mayfield, Notes and Comments, *The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act*, 9 EMORY INT'L L. REV. 553, 557–59 (1995).

<sup>430</sup> Mayfield, *supra* note 429, at 557–59.

<sup>431</sup> At the end of the popular uprising, the Derg, a Marxist-Leninist military group, established a provisional military government and jailed Emperor Haile Sellassie. *Id.* at 52–96; see also Kidane, *supra* note 429; and Julie V. Mayfield, Notes and Comments, *The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act*, 9 EMORY INT'L L. REV. 553, 557–59 (1995); see also Firew Kebede Tiba, Notes and Comments, *The Mengistu Genocide Trial in Ethiopia*, 5 J. INT'L CRIM. JUST. 513, 515 (2007). One particular incident on November 23, 1974 involved the execution of 60 prominent individuals. *Id.* at 515.

<sup>432</sup> *Id.* at 513, 515; see also Mayfield, *supra* note 429. The Ethiopian Peoples' Revolutionary Party was particularly targeted because of their opposition political views, but the Derg increasingly broadened the scope of whom it deemed to be counterrevolutionaries. See DAWIT WOLDE GIORGIS, *RED TEARS: WAR, FAMINE AND REVOLUTION IN ETHIOPIA* 6 (1989).

<sup>433</sup> Kidane, *supra* note 429.

<sup>434</sup> See Symposium, 1945–1995: *Critical Perspectives on the Nuremberg Trials and State Accountability*, 12 N.Y.L. SCH. J. HUM. RTS. 545 (1995).

<sup>435</sup> Kidane, *supra* note 429, at 669.

<sup>436</sup> *Id.* at 668.

<sup>437</sup> Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT'L & COMP. L. REV. 667, 689 (1999); Kidane, *supra* note 429, at 668; Tiba, *supra* note 431, at 515.

<sup>438</sup> Kidane, *supra* note 429, at 668.

<sup>439</sup> Special Prosecutor v. Col. Mengistu Hailamariam et al., File No. 1/87, Ethiopian Federal High Court, Dec. 6, 2006. Ethiopia's Penal Code incorporates customary international law regarding the rules that pertain to genocide, CAH, and grave breaches of the Geneva Conventions. Penal Code of the Empire



participating in the “Red Terror,” while it is estimated that 6,426 individuals still await prosecution; more than 3,000 of these individuals, including Mengistu, live in exile.<sup>440</sup> These prosecutions have been criticized for lacking fairness and efficiency.<sup>441</sup> Regional and national courts conducting these prosecutions have been criticized for handing down inconsistent sentences, which have ranged from five years to capital punishment for genocide.<sup>442</sup>

On August 15, 2008, a court in Chad sentenced its former ruler, Hissène Habré, to death *in absentia*. Habré ruled Chad from June 7, 1982 to December 1, 1990. His reign included widespread human rights violations and persecution against Chadians, mass arrests, disappearances, and murders against those he saw as threats to his power.<sup>443</sup> After Habré was overthrown in 1990, Chad’s new President Idriss Déby Itno established by decree a Commission of Inquiry of the Chadian Justice Ministry. The Commission accused Habré’s government of the politically-motivated murders of 40,000 persons, as well as systematic torture.<sup>444</sup> Habré was eventually deposed and fled to Senegal, where he still lives in exile.<sup>445</sup> The Commission recommended the prosecution of those responsible for committing the atrocities.<sup>446</sup> The new government had ties to the previous regime and bore responsibility for its own crimes, so it dragged its feet and did not seek Habré’s extradition from Senegal.<sup>447</sup> On January 25, 2000, a group of victims, human rights organizations, and NGOs filed a complaint against Habré in Dakar, Senegal. Days later, Habré was indicted in a Senegalese court for CAH, among other crimes, and placed under house arrest. That proceeding was cancelled when the Dakar Court of Appeal concluded that Senegal had not yet adopted a new law that introduced the necessary reforms to implement the Convention Against Torture.<sup>448</sup>

of Ethiopia of 1957, arts. 281–92 (Negarit Gazeta, Extraordinary Issue No. 1 of 1957). Significantly, Article 281, which defines genocide, expands the scope of the offense to include political groups and allows prosecution for such offenses whether committed during a time of war or peace. See Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348, 358–60 (1987).

<sup>440</sup> Tiba, *supra* note 431, at 514.

<sup>441</sup> Bernaz and Prouvèze, *supra* note 213, at 390; Kidane, *supra* note 429, at 691.

<sup>442</sup> Bernaz and Prouvèze, *supra* note 213, at 390; Tiba, *supra* note 431, at 521. While regional courts sentenced lower level officials of the Mengistu regime to death, the major actors have received no more than life sentences in the national courts. Tiba, *supra* note 431, at 525.

<sup>443</sup> See *Chad – The Habré Legacy*, AFR 20/004/2001 (Amnesty International, Oct. 2001).

<sup>444</sup> *Id.* Habré’s police, the *Direction de la Documentation et de la Sécurité (DDS)*, which reported directly to Habré, was responsible for most of the abuses. See also BBC.com, *Profile: Chad’s Hissene Habre*, available at: <http://news.bbc.co.uk/2/hi/africa/5140818.stm> (last visited May 6, 2010).

<sup>445</sup> Tanaz Moghadam, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré*, 39 COLUM. HUM. RTS. L. REV. 471, 495 (2008).

<sup>446</sup> See *Chad, The Habré Legacy*, *supra* note 443, at 7.

<sup>447</sup> *Id.* at 7, 32–37.

<sup>448</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/57 (1984), entered into force June 26, 1987, draft reprinted in 23 ILM 1027 (1985), with final changes in 24 ILM 1027. Because the Convention against Torture was not implemented, torture was subject to a ten-year statute of limitations according to the Senegalese Code of Criminal Procedure. However, this case decision is dubious because under Article 79 of the Senegalese Constitution, international treaties become part of domestic law upon ratification, without any further action required. See Bernaz and Prouvèze, *supra* note 213, at 371.

The Senegalese *Cour de cassation* affirmed on appeal. See *Cour de cassation, 1ère chambre pénale*, Mar. 20, 2001, “Arrêt n° 14, Souleymane Guengueng et autres c. Hissène Habré,” available at [http://www.hrw.org/french/themes/habre-cour\\_de\\_cass.html](http://www.hrw.org/french/themes/habre-cour_de_cass.html).



While the proceedings against Habré continued in Senegal, another group of victims brought a complaint against him before Belgian tribunals based on that country's universal jurisdiction law.<sup>449</sup> However, the Dakar Court of Appeal affirmed that it lacked jurisdiction to rule on that request.<sup>450</sup> The court seemed to rely on Habré's immunity as a head of state, though Chad revoked his immunity in 2002.<sup>451</sup> Senegal finally sent the case to the African Union, which denied Belgium's extradition request.<sup>452</sup> Instead, the Committee of Eminent African Jurists recommended the prosecution of Habré in Senegal or Chad and not Belgium.<sup>453</sup> Following the opinion of the Committee, the African Union chose to locate Habré's trial in Senegal.<sup>454</sup> Senegal adopted a new law on January 31, 2007, which allows the prosecution of cases of genocide, CAH, war crimes, and torture, even when these crimes are committed outside of Senegal.<sup>455</sup> Months later, the National Assembly of Senegal amended the Senegalese Constitution to permit an exception to the principle of nonretroactivity for genocide, war crimes, and CAH.<sup>456</sup> Nonetheless, as of the publication of this book, the Senegalese tribunals had not commenced proceedings against Habré for CAH or other crimes.

At the Hague in December 2001, international human rights and women's groups established the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, a people's tribunal to prosecute the crimes committed by the Japanese military during the 1930s and 1940s, particularly Japan's system of "comfort women" which was designed to facilitate rape and sexual violence of women and girls, who were often forced into prostitution and sexual slavery.<sup>457</sup> These crimes were not prosecuted at the IMTFE. The tribunal, which lacked legal authority, condemned the system of "comfort women" as "state-sanctioned rape and enslavement" that was "conceived, established, regulated, maintained, and facilitated by the Japanese government and military."<sup>458</sup> Emperor Hirohito and eight other senior military and government officials were "found guilty" of rape and sexual slavery as CAH. Despite lacking the power to enforce its judgment, the tribunal made recommendations to the Japanese government, the governments of the former Allied Powers, and the United Nations.

<sup>449</sup> See also *infra* ch. 4, Part B, § 4 on universal jurisdiction. The law, however, did not affect the trial of Habré because Belgian nationals lodged the complaints. Thus, Belgium exercised jurisdiction based on the principle of passive personality.

<sup>450</sup> Bernaz and Prouvèze, *supra* note 213, at 374.

<sup>451</sup> *Id.*

<sup>452</sup> African Union, *Declaration on the Hissène Habré Case and the African Union* (Jan. 24, 2006), available at <http://hrw.org/french/docs/2005/11/26/chad12091.htm> (last visited May 2, 2010).

<sup>453</sup> The Committee reasoned that Senegal "(...) is under an obligation to comply with all [the] provisions" of the Convention Against Torture. African Union, *Report of the Committee of the Eminent African Jurists on the Case of Hissène Habré*, at § 17, available at <http://www.hrw.org/justice/habre/CEJA-Report0506.pdf> (last visited May 2, 2010). Chad was at least an African state that had ratified the Convention Against Torture. *Id.* at § 20–21.

<sup>454</sup> See *Decision On The Hissène Habré Case And The African Union*, Doc. Assembly/Au/3 (Vii) (Human Rights Watch, July 2, 2006).

<sup>455</sup> See Moghadam, *supra* note 445, at 505–6.

<sup>456</sup> Bernaz and Prouvèze, *supra* note 213, at 375.

<sup>457</sup> The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, Prosecutors and the People of the Asia-Pacific Region v. Hirohito Emperor Showa (et al.) and the Government of Japan, Case No. PT-2000-1-T (Jan. 31, 2000). For the Hague Final Judgment, see <http://www.jca.apc.org/vaww-net-japan/english/womenstribunal2000/Judgement.pdf> (last visited May 3, 2010).

See generally GEORGE L. HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* (1997); YUKI TANAKA, *JAPAN'S COMFORT WOMEN* (2001).

<sup>458</sup> *Id.*

CAH are actionable in the courts of the United States only for civil cases, pursuant to the Alien Tort Statute, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>459</sup> The law has been used successfully in cases involving CAH, torture, extrajudicial killing, war crimes, genocide, and arbitrary detention arising from various conflicts including those in Haiti,<sup>460</sup> Iraq,<sup>461</sup> Bolivia,<sup>462</sup> Sudan,<sup>463</sup> South Africa,<sup>464</sup> and Nigeria.<sup>465</sup> United States courts have also concluded that CAH are beyond

<sup>459</sup> 28 U.S.C. § 1350; see also *U.S. v. Yousef*, 327 F.3d 56, 105 (2d Cir. 2003) ("Following the Second World War, the United States and other nations recognized war crimes and crimes against humanity, including genocide, as crimes for which international law permits the exercise of universal jurisdiction"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring) (recognizing that international law views CAH as universally condemned behavior that is subject to prosecution).

<sup>460</sup> Haitian Colonel Carl Dorélien was sued in a federal court in Florida for torture, extrajudicial killing, and murder and torture as CAH committed during the military dictatorship in Haiti, a period in which the civilian population was subject to widespread repression and violence after the overthrow of democratically elected President Jean Bertrand Aristide. See [http://www.haguejusticeportal.net/Docs/NLP/US/Dorelien\\_Verdict\\_23-2-2007.pdf](http://www.haguejusticeportal.net/Docs/NLP/US/Dorelien_Verdict_23-2-2007.pdf) (copy of Federal Jury Verdict); [http://www.haguejusticeportal.net/Docs/NLP/US/Dorelien\\_FinalJudgment\\_16-8-2007.pdf](http://www.haguejusticeportal.net/Docs/NLP/US/Dorelien_FinalJudgment_16-8-2007.pdf) (Final Judgment Awarding Damages) (last visited May 3, 2010); see also Susan H. Lin, *Aliens Beware: Recent U.S. Legislative Efforts to Exclude and Remove Alien Human Rights Abusers*, 15 EMORY INT'L L. REV. 733 (2001). For more information on the trial of the Raboteau Massacre, see *Massacre witness hearings open in Haiti*, BBC.CO.UK (October 4, 2000), available at <http://news.bbc.co.uk/2/hi/americas/955744.stm>.

<sup>461</sup> American nationals sued Iraq for CAH, including torture and inhumane acts, for crimes under the regime of Saddam Hussein, but the Supreme Court held that Iraq was immune from suit in U.S. federal courts. *Republic of Iraq v. Beatty et al.*, 556 U.S. \_\_\_\_ (2009).

<sup>462</sup> Two cases were filed in federal courts charging both former President of Bolivia Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante and his former Minister of Defense Juan Carlos Sánchez Berzain with murder as CAH for their roles in the extrajudicial killings between September and October 2003 of 67 unarmed Bolivian civilians, mostly of the Aymara indigenous group who were protesting the Bolivian government. See [http://www.haguejusticeportal.net/Docs/NLP/US/Mamani\\_Amended\\_Complaint\\_Consolidated\\_16-5-2008.pdf](http://www.haguejusticeportal.net/Docs/NLP/US/Mamani_Amended_Complaint_Consolidated_16-5-2008.pdf) (Amended Complaint Consolidated) (last visited May 3, 2010).

<sup>463</sup> The First Presbyterian Church of Sudan unsuccessfully sued Talisman Energy, a Canadian oil and gas production company, claiming that Talisman collaborated with the Sudanese government in the commission of genocide, CAH, and war crimes when it allegedly worked with the government to create buffer zones around the oil fields. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 635 (SDNY 2006); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 263, 265–66 (2d Cir. 2009). See also Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855 (2008).

<sup>464</sup> In the *South African Apartheid Litigation* case, three classes of plaintiffs sued 50 corporate defendants for, *inter alia*, CAH in the form of the specific acts of murder, apartheid, and torture. Plaintiffs alleged that the defendant corporations aided and abetted the apartheid regime by providing, *inter alia*, computers (IBM), money (Barclays), and vehicles (Daimler-Chrysler, Ford, and General Motors), which in turn supported the regime's institutionalized abuses. For the order of the U.S. District Court in the Southern District of New York, see [http://www.haguejusticeportal.net/Docs/NLP/US/Khulmani\\_DistrictCourtOrder\\_11-2004.pdf](http://www.haguejusticeportal.net/Docs/NLP/US/Khulmani_DistrictCourtOrder_11-2004.pdf) (last visited May 3, 2010); *Khulumani et al. v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (holding that aiding and abetting liability was not recognized under customary international law to state a claim under the Alien Tort Statute); *S. African Apartheid Litig. v. Daimler AG, et al.*, 617 F. Supp. 2d 228, 251–52 (SDNY 2009) (partially denying defendants' motion to dismiss the claim and dismissing the claims against the companies against whom plaintiffs sought liability for *apartheid*, recognizing the uncertain status of nonstate actors in international law). The claims have been allowed to proceed against IBM, Daimler-Chrysler, Ford, General Motors, and Rheinmetall Group).

<sup>465</sup> Lawsuits on behalf of nine Nigerian environmental activists who were tortured and hanged by the Nigerian military regime in the country's Ogoni region claimed that, by providing funds and logistical support, including weapons, to the regime, Royal Dutch Petroleum Co., Shall Transport and Trading Co., and the head of its Nigerian subsidiary, were complicit in CAH, including the specific acts of torture, murder,

the scope of the political offense exception to extradition.<sup>466</sup> For example, in *Quinn v. Robinson*, the Ninth Circuit Court of Appeals concluded that CAH “violate international law and constitute an ‘abuse of sovereignty’ because, by definition, they are carried out by or with the toleration of authorities of a state.”<sup>467</sup>

On June 24, 2009, the Crimes Against Humanity Act of 2009 was introduced to the United State Senate.<sup>468</sup> At the time of the publication of this book, the bill which was offered by the Senate Committee on the Judiciary is to be considered by the Senate as a whole. The most recent version of the bill reads as follows:

Sec. 519 Crimes against Humanity

- (a) Offense – it shall be unlawful to commit or engage in, as part of a widespread and systematic attack directed against any civilian population, and with knowledge of the attack –
  - (1) conduct that, if it occurred in the United States, would violate –
    - (A) section 1581(a) of this title (relating to peonage);
    - (B) section 1583(a)(1) of this title (relating to kidnapping or carrying away individuals for involuntary servitude or slavery);
    - (C) section 1584(a) of this title (relating to sale into involuntary servitude);
    - (D) section 1589(a) of this title (relating to forced labor);
    - (E) section 1590(a) of this title (relating to trafficking with respect to peonage, slavery, involuntary servitude, or forced labor);
  - (2) conduct that, if it occurred in the special maritime and territorial jurisdiction of the United States, would violate –
    - (A) section 1111 of this title (relating to murder).
    - (B) section 1591(a) of this title (relating to sex trafficking of children or by force, fraud, or coercion);
    - (C) section 2241(a) of this title (relating to aggravated sexual abuse by force or threat); or
    - (D) section 2242 of this title (relating to sexual abuse);
  - (3) conduct that, if it occurred in the special maritime and territorial jurisdiction of the United States, and without regard to whether the offender is the parent of the victim, would violate section 1203(a) of this title (relating to kidnapping);
  - (4) conduct that, if it occurred in the United States, would violate section 1203(a) of this title (relating to hostage taking), notwithstanding any exception under subsection (b) of section 1203;
  - (5) conduct that would violate section 2340A of this title (relating to torture);
  - (6) extermination;
  - (7) national, ethnic, racial, or religious cleansing; or

inhumane acts, and unlawful imprisonment. See Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations and the Human Right to a Healthy Environment*, 15 B. U. INT’L L.J. 261 (1997). The Supreme Court allowed the suit to move forward. *Royal Dutch Petroleum Co. v. Wiwa*, 532 U.S. 941 (2001) (denying petition for writ of certiorari to the Second Circuit). The parties settled in 2009. *Shell settles Nigerian deaths case*, BBC.CO.UK (Jun. 9, 2009), available at <http://news.bbc.co.uk/2/hi/africa/8090493.stm>.

See also Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in United States Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321 (2008).

<sup>466</sup> *Quinn v. Robinson*, 783 F.2d 776, 799 (9th Cir. 1986), cert. denied, 479 U.S. 882 (1986).

<sup>467</sup> *Id.* at 799–800.

<sup>468</sup> S. 1346, 111th Cong. (2009).

- (8) imposed measures intended to prevent births;
- (b) Penalty – Any person who violates subsection (a), or attempts or conspires to violate subsection (a) –
  - (1) shall be fined under this title, imprisoned not more than 20 years, or both; and
  - (2) if the death of any person results from the violation of subsection (a), shall be fined under this title and imprisoned for any term of years.
- (c) Jurisdiction – There is jurisdiction over a violation of subsection (a), and any attempt or conspiracy to commit a violation of subsection (a), if –
  - (1) the alleged offender is a national of the United States or an alien residing in the United States, regardless of whether the alien is lawfully admitted for permanent residence;
  - (2) the alleged offender is a stateless person whose habitual residence is in the United States; or
  - (3) the offense is committed in whole or in part within the United States.
- (d) Nonapplicability of Certain Limitations – Notwithstanding section 3282 of this title, in the case of an offense under this section, an indictment may be found, or information instituted, at any time without limitation.
- (e) Limitation on Prosecution –
  - (1) IN GENERAL – A prosecution for an offense described in this section may not be undertaken by the United States unless –
    - (A) the Attorney General certifies in writing –
      - (i) after consultation with the Secretary of State and the Secretary of Homeland Security, that there is no foreign jurisdiction that is prepared to undertake a prosecution for the conduct that forms the basis for the offense; and
      - (ii) that a prosecution by the United States is in the public interest and necessary to secure substantial justice; and
    - (B) the Secretary of State, the Secretary of Defense, and the Director of National Intelligence do not object to the prosecution.
  - (2) NONDELEGATION – The certification under paragraph (1)(A) may not be delegated.
  - (3) NO JUDICIAL REVIEW – A certification by the Attorney General under this subsection is not subject to judicial review.
- (f) No Limitation on Conduct Pursuant to the Laws of War – Nothing in this section shall be construed to make unlawful conduct pursuant to the laws of war.
- (g) No Limitation on Defenses or Immunities – Nothing in this section shall be construed to limit or extinguish any defense or immunity otherwise available to any person or entity.
- (h) International Criminal Court and American Servicemembers’ Protection Act of 2002 – Nothing in this section shall be construed as support for ratification of, or participation by the United States in, the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002, or to repeal or limit the applicability of the American Servicemembers’ Protection Act of 2002 (22 U.S.C. 7421 *et seq.*).
- (i) Definitions – In this section:
  - (1) ARMED GROUP – The term ‘armed group’ means any army, militia, or other military organization, whether or not it is state-sponsored, excluding any group assembled solely for nonviolent political association.

- (2) **ATTACK DIRECTED AGAINST ANY CIVILIAN POPULATION** – The term ‘attack directed against any civilian population’ means a course of conduct in which the country or armed group carrying out the attack intends a civilian population as such to be a primary rather than an incidental target.
- (3) **ETHNIC GROUP; NATIONAL GROUP; RACIAL GROUP; RELIGIOUS GROUP** – The terms ‘ethnic group’, ‘national group’, ‘racial group’, and ‘religious group’ have the meanings given those terms in section 1093 of this title.
- (4) **EXTERMINATION** – The term ‘extermination’ means subjecting a civilian population to conditions of life that are intended to cause the physical destruction of the group in whole or in part.
- (5) **LAWFULLY ADMITTED FOR PERMANENT RESIDENCE; NATIONAL OF THE UNITED STATES** – The terms ‘lawfully admitted for permanent residence’ and ‘national of the United States’ have the meaning given those terms in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).
- (6) **NATIONAL, ETHNIC, RACIAL, OR RELIGIOUS CLEANSING** – The term ‘national, ethnic, racial, or religious cleansing’ means the intentional and forced displacement from 1 country to another or within a country of any national group, ethnic group, racial group, or religious group in whole or in part, by expulsion or other coercive acts intended to displace such group from the area in which they are lawfully present, except when the displacement is in accordance with applicable laws of armed conflict that permit involuntary and temporary displacement of a population to ensure its security or when imperative military reasons so demand.
- (7) **SYSTEMATIC** – The term ‘systematic’ means pursuant to or in furtherance of the policy of a country or armed group. To constitute a policy, the country or armed group must have actively promoted the policy.
- (8) **WIDESPREAD** – The term ‘widespread’ means involving not less than 50 victims.<sup>469</sup>

The provision contained in the bill could potentially apply to the policy of institutionalized torture under the Bush regime, though there is a strong argument that these crimes were not “widespread and systematic,” but were more limited in scope and application.<sup>470</sup> Thus, such crimes likely constitute the crime of torture and not CAH. Notably, the current adopts the “widespread and systematic” language in the conjunctive. Also, there are noticeable differences in the listed specific acts and their corresponding definitions, which refer to provisions of U.S. law for definition.

This discussion would be incomplete without mention of the ongoing situation in Gaza. Since the end of the Arab-Israeli war of 1967, the people living in the Occupied Palestinian Territories, comprised of the West Bank and the Gaza Strip, have been coping with a continuous state of economic and political turmoil as well as humanitarian crisis. The air, sea, and land blockade enforced by Israel through military means, as well as “Operation Cast Lead” from December 27, 2008 to January 18, 2009 have deteriorated the living conditions of the Palestinians even more. At the same time, the Israeli civilians living in southern Israel have been coping with the constant threat from Hamas and

<sup>469</sup> *Id.*

<sup>470</sup> M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE IN THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE?* (forthcoming 2011).

Palestinian armed groups due to rocket and mortar attacks since 2001. According to the report of the U.N. Commission headed by Justice Richard Goldstone<sup>471</sup> and backed by the United Nations Human Rights Council (UNHRC) released on September 15, 2009, both Israel and Palestinian militants committed serious violations of international human rights law, international humanitarian law actions amounting to war crimes, possibly [CAH].”

The Goldstone Report concluded that Israel used disproportionate force, deliberately targeted civilians, used Palestinians as human shields, and destroyed the civilian infrastructure in its Gaza offensive. The report also found evidence that Palestinian militant groups, including Hamas, which controls Gaza, had committed war crimes and possibly CAH arising from their repeated, indiscriminate rocket and mortar attacks into Israel. Israel has claimed that the mission is trying to harness the international community in its political campaign against Israel.<sup>472</sup> It further alleged that Hamas fighters endangered Palestinian civilians by basing themselves around schools, mosques, and hospitals. Israel claims it is pursuing twenty-three criminal investigations into its Gaza operations. The members of the mission further recommended the establishment of an independent committee of experts to monitor and report on the proceedings conducted by Israel. Should the independent committee of experts report that domestic proceedings failed due to the absence of good-faith investigations, the mission recommended the Security Council to refer the situation in Gaza to the ICC Prosecutor pursuant to Article 13(b) of the Rome Statute. With respect to the accountability for violations of international human rights law and international humanitarian law, the mission also addressed the international community and recommended the commencement of criminal investigations in national courts, using universal jurisdiction, where sufficient evidence of a violation of the Geneva Conventions of 1949 is available. Simultaneously, the mission recommended that the independent committee of experts should monitor and report on any proceedings conducted by the relevant authorities in the Gaza Strip. If the responsible Palestinian authorities fail to undertake good faith investigations, the Security Council should likewise refer the situation in Gaza to the ICC Prosecutor pursuant to Article 13(b).<sup>473</sup>

In the words of Richard Falk, the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, the “Israeli security and the realization of the Palestinian right of self-determination are fundamentally connected.”<sup>474</sup> When all parties to the conflict act in accordance with international law, international human rights law and humanitarian law, and only if Israel withdraws from the Occupied Palestinian Territory as requested by the Security Council Resolution 242 of 1967,<sup>475</sup> the

<sup>471</sup> Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

<sup>472</sup> Israel Ministry of Foreign Affairs, *Initial Response to the Report of the Fact Finding Mission on Gaza established pursuant to resolution S/9-1 of the Human Rights Council* ¶ 7 (Sep. 24, 2009), available at <http://www.mfa.gov.il/NR/rdonlyres/FC985702-61C4-41C9-8B72-E3876FEF0ACA/o/GoldstoneReportInitialResponse240909.pdf> (last visited Oct. 5, 2009).

<sup>473</sup> *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, *supra* note 471, ¶ 1075 (a).

<sup>474</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, *Human Rights Situation in Palestine and other occupied Palestinian territories*, Tenth Session, U.N. Doc. A/HRC/10/20 (Feb. 11, 2009).

<sup>475</sup> S.C. Res. 242, ¶ 1, U.N. Doc. S/RES/242 (Nov. 22, 1967).

Palestinian resistance and the Israeli security policy will become compatible, allowing an opportunity for the cessation of the ongoing cycle of violence.

## §5. Selective Enforcement

Although this century has seen some individuals held responsible under international criminal law, there have been all too many instances where prosecution never took place. In some instances, such as the Stalinist purges of the 1950s, no efforts were made toward prosecuting the perpetrators.<sup>476</sup> In other instances, for example, after the Bangladesh war of independence and the Iraqi occupation of Kuwait,<sup>477</sup> prosecutions were considered, but dropped. Tyrannical regimes seldom, if ever, are interested in holding tyrants answerable for their crimes, and democratic states likewise are often unwilling to make their domestic legal regime subservient to international law. The most powerful states tend to avoid accountability by favoring the line “everybody but us.”<sup>478</sup>

Among the most notable examples of selective enforcement were the cases of accused Italian war criminals of the 1930s and 1940s and the accused Pakistani war criminals from the 1971 Cessation War between East and West Pakistan, which produced India’s intervention and resulted in independence for Bangladesh.

After World War II, the UNWCC listed 750 Italian war criminals, accusing them, *inter alia*, of using poison and mustard gas against the Ethiopians during that aggressive war in 1936 in violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.<sup>479</sup> The accused also were charged with killing prisoners of war, bombarding hospitals, and committing other violations of the customary law of armed conflicts.<sup>480</sup> Several war crimes violations were also documented by Yugoslavia and Greece against their Italian occupiers relating to the mistreatment of prisoners of war, the killing of innocent civilians, and the destruction of civilian property.<sup>481</sup> Libya advanced similar claims during the Italian occupation of that country. The 1943 Moscow Declaration provided that countries in which such violations were committed had the right to prosecute offenders. The Instrument of Surrender of Italy provided that Italy had a duty to extradite any one of its nationals charged with

<sup>476</sup> Nicolas Werth, *A State Against Its People: Violence, Repression, and Terror in the Soviet Union*, in *THE BLACK BOOK OF COMMUNISM* 71–107, 184–202 (Stéphane Courtois et al. eds., 1999); ROBERT CONQUEST, *THE GREAT TERROR: STALIN’S PURGE OF THE THIRTIES* (1968).

<sup>477</sup> See generally Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 *TEX. INT’L L.J.* 1, 36 n.247 (1996); David A. Martin, *Reluctance to Prosecute War Crimes: Of Causes and Cures*, 34 *VA. J. INT’L L.* 255 (1994); Thomas R. Kleinberger, *The Iraqi Conflict: An Assessment of Possible War Crimes and the Call for Adoption of an International Criminal Code, and Permanent International Criminal Tribunal*, 14 *N.Y.L.S. J. INT’L & COMP. L.* 69 (1993); Diana Vincent-Daviss & Radu Popa, *The International Legal Implications of Iraq’s Invasion of Kuwait: A Research Guide*, 23 *N.Y.U. J. INT’L & POL.* 231 (1990).

<sup>478</sup> Richard Falk, *Accountability for War Crimes and the Legacy of Nuremberg*, in *WAR CRIMES AND COLLECTIVE WRONGDOING: A READER* 113, 115 (Aleksandar Jokic ed., 2001). Falk especially criticizes the “reluctance of major states, especially the United States and China, to participate in this process [of accountability] if it includes the risk that their leaders might stand accused at some future point.” *Id.* at 130. He continues, “the central point that American leadership was never prepared to accept . . . a framework of restraint as seriously applicable to its future diplomacy.” *Id.* at 131.

<sup>479</sup> 94 *L.N.T.S.* 65, 26 *U.S.T.* 571, *T.I.A.S.* No. 8061, Geneva, 17 June 1925.

<sup>480</sup> See UNWCC, *supra* note 67, at 51–2.

<sup>481</sup> *Id.* at 179, n. 138.



war crimes.<sup>482</sup> Yugoslavia, Ethiopia, and Greece repeatedly requested extradition of a number of Italian war criminals, including Marshall Badoglio and General Graziani, for war crimes committed in Ethiopia, and Generals Roata and Ambrosio, for crimes committed in the Balkans. Libya also asked for Badoglio and Graziani, but Italy turned a deaf ear, with United States and British assent, and never surrendered anyone accused of war crimes.

The UNWCC specifically referred to the use of prohibited gas in Ethiopia and to the bombardment of Red Cross hospitals by troops under the commands of Badoglio and Graziani, as well as eight other officers. At first, the United States and the United Kingdom, as the Allies in control of Italy, ignored the extradition requests and repeated protests of Yugoslavia, Greece, and Ethiopia. Thus, the United States and the United Kingdom violated the terms of the 1943 Moscow Declaration and the provisions of the Italian Armistice Agreement. Thereafter, the U.S. and U.K. formally renounced their rights to try Italian war criminals under the Armistice Agreement. Italian governments since 1946 have also refused to extradite to these same requesting countries. Only one Italian officer, General Bellomo, was prosecuted for war crimes committed outside of Italy. He was convicted and sentenced to death; however, he was not a fascist. None of Italy's fascist generals were ever prosecuted for war crimes committed outside of Italy. It is commonly assumed that this benign attitude toward Italian fascist war criminals was due to the fact that, in 1943, Marshall Badoglio headed a provisional government for Italy while it was still occupied by Germany. He made a separate Armistice with the Allies who were particularly eager to neutralize the Italian navy in the Mediterranean and wanted to attract as many as possible from the Italian military to fight alongside the Allies against Germany. Thereafter, it was the belief of United States and United Kingdom senior officials that the future stability of Italy required the cooptation of the fascists into the democratic process to oppose what they feared was a communist onslaught in that country.

Prosecution was also forsaken after the Bangladesh war of independence. In 1971, Pakistan fought a civil war in East Pakistan, resulting in the independence of that region, which renamed itself Bangladesh. During that conflict, West Pakistan troops reportedly killed approximately one million East Pakistanis and caused ten million to flee to India.<sup>483</sup> On November 21, 1971, India intervened militarily on the basis of the international law doctrine of humanitarian intervention. Three weeks later, the Pakistani army's eastern command surrendered to the Indian armed forces, with both parties agreeing to the application of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. At that time, India had detained more than 92,000 Pakistanis, both military personnel and civilians.<sup>484</sup>

In 1972, the president of Bangladesh issued an order that established special tribunals to prosecute Bangladeshi citizens who had collaborated with the Pakistani armed forces during 1971. Thereafter, India and Bangladesh agreed to bring criminal charges against

<sup>482</sup> 4 BEVANS 311, 326 (1970).

<sup>483</sup> Trial of Pakistani Prisoners of War (Pakistan v. India), 1973 ICJ Pleadings 3-7 (Jul. 13); see also Niall MacDermot, *Crimes Against Humanity in Bangladesh*, 7 INT'L LAW. 476 (1973).

<sup>484</sup> Pakistan v. India, *supra* note 483, at 6. Howard Levie, *The Indo-Pakistani Agreement of August 28, 1973*, 68 AM. J. INT'L L. 95 (1974) (breaking down the figure to 82,000 prisoners of war and some 10,000 civilian internees).

certain Pakistani prisoners of war held by India. In anticipation of these trials, Bangladesh published Act No. XIX of 1973,<sup>485</sup> which was entitled “An Act to provide for the detention, prosecution and punishment of persons for genocide, [CAH], war crimes and other crimes under international law.” The Act contains a provision, which follows to some extent Article 6 of the London Charter. In particular, the provision on CAH declares:

The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely:

- (a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;<sup>486</sup>

As Bangladesh prepared for the prosecution, Pakistan filed an action before the ICJ.<sup>487</sup> The basis of Pakistan’s action against India was predicated on the grounds that India had detained 92,000 Pakistani prisoners of war and civilian internees in violation of the third and fourth Geneva Conventions of 1949. Pakistan claimed that pursuant to these conventions, India had the duty to repatriate these persons at the conclusion of the conflict, which had ceased on December 21, 1971. However, India did not continue the repatriation of detainees that it had begun in 1972 because it claimed that it had agreed with Bangladesh to surrender to that country those persons whose number exceeded 10,000, and who were to be charged with genocide or other international crimes. By 1973, the exact number was fixed at 195.

Pakistan maintained that pursuant to Article VI of the Genocide Convention, there could be no “competent tribunal” in Bangladesh because of the “extreme emotionally charged situation that prevails there.”<sup>488</sup> Pakistan further claimed that it had jurisdiction to try the 195 persons accused of genocide in its own tribunals.

Both India and Bangladesh focused more specifically on genocide than on war crimes or CAH. Also, Pakistan was particularly opposed to the notion of war crimes because it considered the conflict an internal one. In a sense, Pakistan could politically accept – at that time – a charge of individual atrocities, but it could not accept the legitimacy of East Pakistan’s insurrection or India’s intervention.

The dispute finally ended in 1973 as the parties came to a political agreement<sup>489</sup> and the ICJ, by consent of the parties, removed the case from its docket. Notwithstanding the enormous victimization and the apparent efforts of Bangladesh, abetted by India, to prosecute such violations, political considerations prevailed and Bangladesh did not carry out its intentions. It did so in exchange for political recognition by Pakistan and once this recognition was given, India returned the Pakistani detainees and accused war criminals who thus avoided individual criminal responsibility.

<sup>485</sup> THE BANGLADESH GAZETTE 5987 (July 20, 1973); see also Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT’L L. 1 (1978).

<sup>486</sup> THE BANGLADESH GAZETTE, *supra* note 485, at 5988.

<sup>487</sup> Pakistan v. India, *supra* note 483; see also Howard Levie, *Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India*, 67 AM. J. INT’L L. 512 (1973).

<sup>488</sup> Pakistan v. India, *supra* note 483, at 6–7.

<sup>489</sup> See generally Levie, *supra* note 487.

In 2009, the Parliament of Bangladesh amended long-standing legislation to address violations of international humanitarian law by the Pakistani military and their collaborators during the war of independence. The amendment was the first step of the newly elected government to fulfill campaign promises to investigate and prosecute war crimes, CAH, genocide, and other violations of international humanitarian law arising from the war. The amendment also removed the provision of the legislation that allowed these cases to be prosecuted before a military tribunal and inserted a provision that “the [International Crimes Tribunal] shall be independent in the exercise of its judicial functions and shall ensure fair trial.” At the time of the publication of this book, the Bangladesh International Crimes Tribunal had issued four arrest warrants for the leaders of the Islamist group Jamaat e Islami for genocide and CAH in the form of murder and torture committed during the 1971 war of independence.<sup>490</sup>

It will not escape the reader that the aggressive occupation of Kuwait by Iraq as of August 3, 1990 was accompanied by the commission of war crimes and CAH against Kuwaiti and non-Kuwaiti civilians during the occupation. Iraq used civilian hostages of different nationalities as “human shields” and caused environmental damage resulting from an oil spill and the setting afire of Kuwaiti oilfields. All of these acts constituted war crimes and the coalition forces, including Kuwait, had proclaimed that Iraqi President Saddam Hussein and those perpetrators in the military and occupation forces would be prosecuted.<sup>491</sup> However, no prosecution of Iraqis has ensued.<sup>492</sup> Furthermore, the coalition forces, mostly the United States, engaged in some indiscriminate bombing of civilian targets. Investigation of these bombings could have produced evidence of additional war crimes, but none took place. Once again, political considerations prevailed over considerations of justice.<sup>493</sup> However, as discussed in Chapter 4, the Extraordinary Chambers in the Courts of Cambodia (ECCC) have undertaken the prosecutions of select surviving Khmers Rouges.<sup>494</sup>

Perhaps the most tragic and disgraceful omission was the failure to prosecute former Cambodian dictator Pol Pot, who was responsible for the killing of an estimated 1,000,000 persons. When he was captured in 1997, the five permanent members of the Security Council simply failed to bring him to justice.<sup>495</sup>

<sup>490</sup> The leaders are Motiur Rahman Nizami, Secretary General Ali Ahsan Muhammad Mojahid, and senior assistant secretaries general Muhammad Kamaruzzaman and Abdul Quader Molla. See *Arrest Order for 1971 Genocide*, THE DAILY STAR (Jul. 27, 2010), available at <http://www.thedailystar.net/newDesign/news-details.php?nid=148383>.

<sup>491</sup> These violations have been reported by the world media and in a report by Amnesty International (October 1989). Other human rights organizations like Human Rights Watch have issued several reports. See *Hearings Before the Committee on the Judiciary, United States House of Representatives, 102nd Congress (1st Session) March 13, 1991, (Serial No. 3, 1991)* and in particular the testimony and prepared statement of M. Cherif Bassiouni at 21–44. See also *Indictment and Prosecution of Saddam Hussein*, S. Con. Res. 78, 105th Cong. (March 13, 1998).

<sup>492</sup> See *supra* note 477.

<sup>493</sup> Kuwait, however, prosecuted what it called “collaborators” in special courts that lacked every semblance of justice and that meted out disproportionate and unjust sentences. These trials were widely reported by the world media and by human rights organizations like Amnesty International and Human Rights Watch.

<sup>494</sup> See *infra* ch. 4, part A, § 7.5.

<sup>495</sup> See *Cambodia’s Pol Pot Seen in Rebel Town, Writer Says*, CHI. TRIB., July 28, 1997, at A4; Elizabeth Becker, *Khmer Rouge Lets World Know of “Trial” for Pol Pot*, CHI. TRIB., July 29, 1997, at A1. For a time line of Cambodia’s troubled history and an archive of stories available at <http://www.chicago.tribune.com/>

The proposition that a person accused of CAH or other international crimes should answer the accusation and stand trial if reasonable evidence exists comports with the concept of *aut dedere aut judicare*.<sup>496</sup> The use of the word *judicare* removes the implication that the concept is purely retributive. Furthermore, this concept upholds the principle of equal and impartial application of the law, reinforces the effectiveness of general deterrence, provides general prevention, vindicates victim's rights, and permits the accused to atone for his crime. Above all, it confirms the will of the international community to uphold the international rule of law. With respect to these goals, this concept is no more than the extension of national criminal justice to the international level, and is central to a process that has evolved for centuries, beginning with the customary prohibitions against piracy.

That said, however, it will not surely escape notice that the many precedents discussed above involve prosecutions of the defeated by the victorious. Thus, when the judgments of the IMT, the IMTFE, and the Subsequent Proceedings are referred to as "victor's vengeance," it is not without merit to claim that this means one-sided justice. Nevertheless, these prosecutions were justified. The fact that only a few prosecutions of personnel belonging to victorious powers occurred (mostly by their own courts martial), does not diminish the legal validity of the prosecutions that did take place. But, more importantly, the concept of one-sided justice reveals the still arbitrary, *ad hoc* nature of the international legal system. Germany, during World War I and World War II, had records of Allied violations of the very laws and rules that the Allies charged Germany of violating.<sup>497</sup> The German documentation of the World War I Allies' violations against Germany even escaped public attention and no significant trace of World War II Allied violations against Germany and against Germans and others appears in the recollection of world public opinion. Some exceptions exist, however, such as the dreadful firebombing of Dresden, a city of no strategic importance, in December 1944, after the war had been won. This event remains in the world's consciousness as a symbol of the terrible and unnecessary suffering inflicted upon the German civilian population. It is also shocking that the wholesale violation of conventional and customary rules of war against German prisoners of war by the USSR have escaped international public attention. An equal disregard applies to the Allies' violations against the Japanese, the worst example of which is the world community's apparent approval of the use of two atomic bombs in 1945 against the cities of Hiroshima and Nagasaki, killing and injuring an estimated 225,000 innocent civilians.<sup>498</sup> It is noteworthy in the year that marks the sixty-fifth anniversary of these bombings that the only case against one of the World War II Allies for war crimes was brought by Japanese citizens for the use by the United States

[news/polpot/chron.htm](http://news/polpot/chron.htm). See also Seth Mydans, *Death of Pol Pot: Pol Pot, Brutal Dictator Who Forced Cambodians to Killing Fields, Dies at 73*, N.Y. TIMES, Apr. 17, 1998, at A14.

<sup>496</sup> See *infra* ch. 4, Part B, §1.

<sup>497</sup> See ALFRED M. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU, 1939–1945* (1989). Earlier in 1941 Germany had filed with the International Committee of the Red Cross a Report entitled, "Russian Crimes Against the Laws of War and Humanity," in which they documented such violations. At the IMT, the report was presented on behalf of the defense. See IX PROCEEDINGS at 684–88. It is noteworthy that in this 1941 Report, Germany had acknowledged the applicability of 1907 Hague Convention provisions on the "laws of humanity," but at the IMT the prosecution did not seem to have caught the importance of that fact as a form of waiver or estoppel argument to oppose the defense claim that crimes against the "laws of humanity" did not exist.

<sup>498</sup> 29 THE NEW ENCYCLOPEDIA BRITANNICA 1022 (1990).

of atomic weapons against Hiroshima and Nagasaki, but the Supreme Court of Japan rejected it on technical jurisdictional grounds.<sup>499</sup> Had Japan or Germany so bombed an Allied power, there is no doubt that its perpetrators, from the decision makers to the crews of the planes that dropped the bombs, would have been tried and convicted of war crimes. These horrible events deserve the same equally forceful condemnation as that visited upon the perpetrators of similar acts performed by the defeated.

In the midst of two cities in ruins by Allied hands, Nuremberg and Tokyo, Allied tribunals sat in legal, moral, and ethical judgment. These prosecutions and judgments became a beacon of higher values, standards, and rules of conduct for those entrusted with the power to govern (and potentially to harm) others. Lamentably, the light they produced was not that of a beacon that spreads widely and evenly. Instead, the light was narrow, as though emitted through a tunnel. The moral tunnel condemned the Germans and the Japanese, but ignored Italian and Allied violations.<sup>500</sup> Nuremberg and Tokyo, like the Leipzig trials after World War I, left many unanswered questions but they did, at least, provide partial answers. To be sure, the post-World War I and World War II prosecutions were not unjust, nor were the prosecutions, in the main, unfair, considering the crimes committed and the legal standards of the time. It is more the missed opportunities to advance a more permanent and a more universal rule of law that one cannot help but deeply regret, as the search for solutions continues. Future national prosecutions for CAH and other international crimes would be wise to account for past experiences as they play their part in the search for a solution.

## Conclusion

Prosecutions for CAH never came easy, whether before international or national tribunals. They did not occur after World War I for reasons discussed in [Chapter 3](#). The Leipzig national prosecution of twelve German defendants were symbolic. After World War II, at the IMT, IMTFE, and Subsequent Proceedings, the victorious Allies simply imposed their will on the defeated, while absolving themselves of any responsibility for war crimes and CAH. This is not to say that those who were prosecuted did not deserve it, but rather that on the Allies' side there were similar crimes that warranted prosecution, but were conveniently overlooked. By 1954 almost all of those who were convicted and sentenced in the Far East trials (which spanned the period 1946–1951) were released.

Between 1945 and 1998 some 313 conflicts took place, and along with tyrannical regime victimization, these have caused an estimated 92 to 101 million casualties.<sup>501</sup> Yet almost all the perpetrators of these crimes have benefited from impunity. Since 1948, the international and mixed model tribunals have indicted only. They include: the ICC, 12; the ICTY, 161; the ICTR, 79; the Special Court for Sierra Leone (SCSL), 13; the Extraordinary Chambers in the Courts of Cambodia, 5; the *ad Hoc* Tribunal for East Timor, nearly 400; the “Regulation 64 Panels” of Kosovo, more than 24; and the Court of

<sup>499</sup> *Shimoda v. The State*, 355 Hanrel Jiho (Supreme Court of Japan 7 December 1963); *quoted in part in 2 FRIEDMAN* at 1688; *see also* Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759 (1965). The claim in that case was against the U.S. for dropping the atomic bombs on Nagasaki and Hiroshima in violation of the laws and customs of war.

<sup>500</sup> BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: A DOCUMENTARY RECORD* 1–73 (1982).

<sup>501</sup> *See supra* note 6.

Bosnia-Herzegovina, 128.<sup>502</sup> At the time of the publication of this book, the indictments of 115 persons before the ICTY included charges for CAH, and 57 of those persons were convicted of CAH. Likewise, at the ICTR, the indictments of 83 persons included charges for CAH; of these, 27 were convicted and six more convictions are currently on appeal. Thus far, the prosecution of Kaing Guek Eav (alias “Duch”) is the only prosecution and conviction for CAH before the ECCC. Defendant Nuon Chea is charged with CAH, but the trial has yet to begin. At the SCSL, the indictments of ten persons include charges for CAH; eight of these persons were convicted of CAH and other crimes.

Sixty-five years after the London Charter, there is still no international convention on CAH. The adoption of a specialized CAH convention is a need supported by the facts, and it is a need whose time has come to be fulfilled.<sup>503</sup> The project of the Washington University’s Whitney R. Harris World Law Institute not only is a laudable academic exercise, it also is a politically needed action.<sup>504</sup> But it is only the first step. The proposed convention prepared under the auspices of the Harris Institute by a group of experts has now reached its final stage. There is nothing more that experts can do to advance the goal of a specialized CAH convention. The experts’ work is as good as it could ever be, and it is also mindful of the political realities of the ensuing diplomatic negotiating processes.

The proposed CAH convention uses the same definition as the ICC’s Article 7, notwithstanding the issue presented by its applicability to nonstate actors as well as the absence of a clear understanding of what categories of nonstate actor groups are to be included. This is necessary to separate groups engaging in organized crime and other criminal activities from those whose organizational policy is to target civilian populations. Otherwise, the danger is for CAH to become a catchall international criminal law convention that encompasses all types of large-scale criminality, and thus transforming domestic crimes into international ones without an international jurisdictional element.<sup>505</sup> The drafters of the proposed CAH convention made a policy choice designed to induce the ICC’s 113 State Parties to become State Parties to the proposed convention. The trade-off for the 113 State Parties’ support for the draft convention was deemed more significant than the benefit of clarifying these two issues.

The added value of the draft CAH convention is to establish for ICC state parties a horizontal relationship between them that complements the ICC’s statutory scheme. In addition, the draft CAH convention establishes a horizontal relationship between its own state parties, and is expected to include nonstate parties. In so doing, it also establishes a connecting link between nonstate parties and the ICC through the new comprehensive mechanisms of international cooperation in the prevention, investigation, prosecution, and punishment of alleged and convicted perpetrators of CAH. In short, such a specialized convention completes the missing links of a universal scheme designed to enhance accountability for CAH violations and reduce the gap of impunity that now exists. However, based on the record of national prosecutions, even if we did have a CAH Convention, such prosecutions would remain few. There may be political

<sup>502</sup> See Bernaz, *supra* note 12.

<sup>503</sup> M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, Address of March 11, 2010, Brookings Institution, Washington, D.C. (forthcoming WASH U. GLOB. STUD. L. REV.); FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note 18.

<sup>504</sup> Information about the Crimes Against Humanity Initiative of the Whitney R. Harris World Law Institute, Washington University School of Law, available at <http://law.wustl.edu/crimesagainsthumanity>.

<sup>505</sup> See *infra* ch. 1, §2.



reasons for this reluctance. In the case of Uganda,<sup>506</sup> Darfur,<sup>507</sup> and the D.R. Congo,<sup>508</sup> states have proven unlikely to prosecute their own leaders. For complementarity to work, often a regime change is required.

The pursuit of international criminal justice requires the cooperation of international and national legal systems. Complementarity is the basis of this cooperation, but systems that complement each other depend on a high degree of international cooperation in penal matters,<sup>509</sup> and that, so far, is lacking. Furthermore, the assumption that national legal systems will assume the larger part of the task of prosecuting perpetrators of international crimes is questionable in light of the contemporary experience of national prosecutions for CAH.

The international criminal justice system of the future must be viewed as a constellation of national legal systems complemented by international institutions and the ICC. Nevertheless, what binds them all is certain modalities of international cooperation, particularly, jurisdictional mechanisms that have not proven effective in the absence of the political will of governments to work in an internationally cooperative mode.

On July 18, 1998 at the Rome ceremony opening for signature the U.N. Treaty establishing the ICC, this writer, in his capacity as chairman of the Diplomatic Conference's Drafting Committee, made the following speech expressing the significance of this historical journey:

The world will never be the same after the establishment of the International Criminal Court. Yesterday's adoption of the Final Act of the United Nations Diplomatic Conference and today's opening of the Convention for signature marks both the end of a historical process that started after World War I, as well as the beginning of a new phase in the history of international criminal justice.

The establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world and is, therefore, a triumph for all peoples of the world. The ICC reminds governments that *Realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted. It asserts that impunity for the perpetrators of "genocide," "crimes against humanity" and "war crimes" is no longer tolerated. In that respect it fulfils what Prophet Mohammad said, that "wrongs must be righted." It affirms that justice is an integral part of peace and thus reflects what Pope Paul VI once said, "If you want peace, work for justice." These values are clearly reflected in the ICC's Preamble.

The ICC will not be a panacea for all the ills of humankind. It will not eliminate conflicts, nor return victims to life, nor restore survivors to their prior conditions of well-being and it will not bring all perpetrators of major crimes to justice. But it can help avoid some conflicts, prevent some victimization and bring to justice some of the perpetrators of these crimes. In so doing, the ICC will strengthen world order and contribute to

<sup>506</sup> Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen, Case No. ICC-02/04-01/05.

<sup>507</sup> Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kuhayb"), Case No. ICC-02/05-01/07; Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09; The Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09.

<sup>508</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06; The Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07.

<sup>509</sup> 2 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 3d ed., 2008), at chapter 4.



world peace and security. As such, the ICC, like other international and national legal institutions, will add its contribution to the humanization of our civilization.

The ICC also symbolizes human solidarity, for as John Donne so eloquently stated, “No man is an island, entire of itself; each man is a piece of the continent, a part of the main . . . Any man’s death diminishes me because I am involved in mankind.”

Lastly, the ICC will remind us not to forget these terrible crimes so that we can heed the admonishment so aptly recorded by George Santayana, that those who forget the lessons of the past are condemned to repeat their mistakes.

Ultimately, if the ICC saves but one life, as it is said in the *Talmud* and the *Qur’ān*, it will be as if it saved the whole of humanity.

From Versailles to Rwanda, and now to the “Treaty of Rome,” many have arduously labored for the establishment of a system of international criminal justice. Today our generation proudly, yet humbly, passes that torch on to future generations. Thus, the long relay of history goes on, with each generation incrementally adding on to the accomplishments of its predecessors. But today, I can say to those who brought about this historic result, the government delegates in Rome, those who preceded them in New York since 1995, the United Nations staff, members of the Legal Office, the non-governmental organizations and here in Rome the staff of the Italian Ministry of Foreign Affairs, what Winston Churchill once said about heroes of another time, “Never have so many, owed so much, to so few.”<sup>510</sup>

<sup>510</sup> Ceremony for the Opening for Signature of the Convention on the Establishment of an International Criminal Court, Rome, “Il Campidoglio,” 18 July 1998 Statement of Professor M. Cherif Bassiouni Chairman, Drafting Committee United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998.

## 10 Concluding Assessment: The Need for an International Convention

Rabban Simeon ben Gamaliel said: “The world rests on three pillars: on truth, on justice and peace” (Abot 1, 18).

A Talmudic commentary adds to this saying: “The three are really one. If justice is realized, truth is vindicated and peace results.”

Until the advent of World War II, history had never witnessed the criminal conduct defined in Article 6(c) of the London Charter on such a scale. These crimes were unimaginably horrific to the international community. The law was, therefore, lagging behind the facts, and ultimately, the facts drove the law. Even though the facts superseded the law’s anticipation, a general prohibition existed under the rubric of the “laws of humanity.”<sup>1</sup> But its legal sufficiency raised questions of legality.<sup>2</sup> International law had not been permeated with the values of human rights protection of individuals. The Law of the Charter laid the foundation of international criminal justice, which developed after the end of the Cold War, after which the international community developed the ICTY, the ICTR, the ICC, and the mixed-model tribunals.<sup>3</sup> Whether the Charter was declarative of extant international law or innovative is now a moot point. However, the Charter’s method is still relevant to contemporary processes that rely on the interplay between conventions, customs, and general principles of law, and whether the applicable law constitutes a legally sufficient source of ICL to satisfy the principles of legality.<sup>4</sup> These questions were at the forefront of the ICTY, ICTR, ICC, and mixed-model tribunals established between 1993 and 2003, and occupied an important place in the jurisprudence of these tribunals.<sup>5</sup>

The Charter’s extrapolation of CAH from war crimes may well prove to be the model for the extended application of CAH to nonstate actors by interpreting the state policy requirement for state actors to the organizational policy of nonstate actor groups.<sup>6</sup> Considering the changing nature of conflicts since World War II, and the predominant

<sup>1</sup> See generally *infra* ch. 3, §2.

<sup>2</sup> See generally *infra* ch. 5, §4.

<sup>3</sup> See *infra* ch. 4. See also M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT’L L. 269 (2010).

<sup>4</sup> See generally *infra* ch. 5 §4.

<sup>5</sup> See *infra* ch. 4.

<sup>6</sup> See *infra* ch. 1, §7.

role of nonstate actors in post-World War II conflicts,<sup>7</sup> this extension is needed. Once again, the facts are driving the law, and the legal method that gave birth to CAH in the Law of the Charter is being replayed in the method of giving birth to nonstate actors' organizational policy as a prerequisite to extending CAH to such actors. The historic antecedent of that extrapolation method and the legal questions it raised are historically and methodologically relevant to contemporary issues.

The mere existence of prescriptive international law does not mean that such a prescription can be deemed to criminally proscribe certain conduct, no matter how abhorrent it may be. And this leads to the question of whether the Article 6(c) formulation satisfied the minimum requirements of the principles of legality.<sup>8</sup> The answers to these questions ultimately depend upon the choice of an underlying theory of legal philosophy.<sup>9</sup> Thus, strict positivism would conclude in the negative, naturalism would conclude in the affirmative, and utilitarianism would, in this case, conclude in the affirmative.<sup>10</sup>

The London Charter was the first international instrument that dealt specifically with CAH as a distinct category of international crimes,<sup>11</sup> even though the contents of the Charter's Article 6(c) definition substantially incorporates similar conduct previously prohibited under the conventional and customary regulation of armed conflicts. Indeed, the conduct prohibited by Article 6(c) constitutes war crimes if committed by a member of the belligerent forces of one state against a member of the civilian population of another state, but not when that same conduct was perpetrated by the public agents of a given state against its own nationals.<sup>12</sup> Thus, the Charter extended these violations to encompass the protection of the civilian population of the same state as that of the perpetrators, because the two categories of crimes, war crimes and CAH, are predicated on the same values and seek to achieve the same protections for civilians during the course of armed conflicts. Nevertheless, the respective legal elements of these two crimes differ.

A war crime contains four elements that convert the conduct into an international crime. They are referred to as international elements. They are (1) the conduct<sup>13</sup> is committed by a member of the armed forces of one state against a member of the armed forces or a civilian of another state in the context of an armed conflict; (2) it involves a transnational activity; (3) it affects more than one state; and (4) it is contrary to the international regulation of armed conflicts (which embodies the "laws of humanity").<sup>14</sup> CAH, as formulated in the London Charter's Article 6(c), extends individual criminal responsibility to encompass persons who do not have a different nationality than the victims, and to conduct that is not transnational. Thus, it does not have the first two international elements of war crimes. However, the two other international elements of

<sup>7</sup> For a survey of post-World War II conflicts and the role of nonstate actors, see M. CHERIF BASSIOUNI, *THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE* (2 vols., M. Cherif Bassiouni ed., 2010).

<sup>8</sup> See *infra* ch. 5.

<sup>9</sup> *Id.*

<sup>10</sup> Similarly, the question of selective enforcement throughout all post-World War II proceedings hinged on the choice of the applicable theory of law.

<sup>11</sup> See *infra* ch. 3, §3.

<sup>12</sup> *Id.*

<sup>13</sup> See 1 *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 1–13 (M. Cherif Bassiouni ed., 3d rev ed. 2008).

<sup>14</sup> See *infra* ch. 3, §2.

war crimes are present in CAH insofar as the conduct may affect more than one state and is contrary to the basic “laws of humanity.” Another international element exists in CAH, but is not necessary for war crimes, namely, that the conduct must be the product of state policy.<sup>15</sup> State policy is the essential international element of CAH that converts that which is a domestic crime into an international crime. The existence of a state policy is the essential difference in the nature of these two categories of international crimes. Another distinction between war crimes and CAH is that the regulation of armed conflicts applies to the context of war, distinguishing between conflicts of an international character and conflicts of a noninternational character, while CAH, which at first applied to a war-related context, as required in Article 6(c), gradually extended to any type of conflict and to peacetime contexts. Thus, CAH, unlike war crimes, applies in times of war and peace.<sup>16,17</sup>

The London Charter’s formulation of CAH can be viewed as a jurisdictional extension of the international protection of civilian populations from the crimes of state actors (of the same nationality) in connection with war. This conception of CAH arises from the overarching concept of the “laws of humanity” contained in the preamble of the 1907 Hague Convention, as reinforced by the Versailles Treaty, the 1919 Commission Report, post-World War I prosecutions, and other international instruments developed since then.<sup>18</sup> Thus, it can be argued that CAH is a jurisdictional extension of war crimes and as such that it was declarative of international law and not innovative. This declarative theory also relies on the cumulative weight of pre-1945 conventional and customary law and general principles of law<sup>19</sup> that made CAH, at the time, an emerging customary international law crime.<sup>20</sup> Justice Jackson, aptly argued that the “institution [of the new] customs [ . . . ] [would] themselves becomes sources of a newer and strengthened international law.”<sup>21</sup> But to reach this conclusion requires the rejection of rigid positivism in international law,<sup>22</sup> and the acceptance of general principles of law as a source of ICL subject to the requirements of the principles of legality.<sup>23</sup> It can be argued that the very nature of international law necessarily requires freedom from the limitations of domestic legal positivism because international law is a discipline that “is not static, but a continual adaptation which follows the needs of a changing world.”<sup>24</sup> Thus, Jackson stated in his opening statement before the IMT,

It is true, of course, that we have no judicial precedent for the Charter. But International Law is more than a scholarly collection of abstract and immutable principles. It is an

<sup>15</sup> See generally *infra* ch. 1.

<sup>16</sup> See ch. 3, §7. See also M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in *INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS* 493 (M. Cherif Bassiouni ed., 3d rev. ed. 2008).

<sup>17</sup> See generally M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* (1998).

<sup>18</sup> See *infra* ch. 3, §1.

<sup>19</sup> See generally *infra* ch. 3, §8.

<sup>20</sup> See M. Cherif Bassiouni, *International Law and the Holocaust*, 9 *CAL. W. INT’L L. J.* 202 (1978).

<sup>21</sup> REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 50 (U.S. Gov’t Print. Off. 1945) [hereinafter JACKSON’S REPORT].

<sup>22</sup> See *infra* ch. 5, §1.

<sup>23</sup> *Id.*

<sup>24</sup> 1 IMT 221.

outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by the normal process of legislation for there is no continuing international legislative authority. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common Law, through decisions reached from time to time in adapting settled principles to new situations. The fact is that when the law evolves by the case method, as did the Common Law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The Law, so far as international law can be decreed, has been clearly pronounced when these acts took place. Hence, I am not disturbed by the lack of judicial precedent for the inquiry we propose to conduct.<sup>25</sup>

These views led the IMT to conclude that the London Charter did not represent “an arbitrary exercise of power on the part of the victorious nations but was the expression of international law existing at the time of its creation.”<sup>26</sup> The IMTFE accepted this basic proposition, as did the CCL 10 Proceedings and judgments of national tribunals since then.<sup>27</sup> Critics of this position, however, argue that subsequent reiteration, no matter how frequent, does not necessarily add to the validity of an otherwise flawed premise. The flaw, in the opinion of these critics, is based essentially on three considerations: (1) the violation of the principles of legality; (2) the setting aside of positive national law by *ad hoc* promulgation made by the victors after the fact; and (3) the double standard of applying the newly enacted norms exclusively to the vanquished.

Critics of the London Charter also deem CAH to be *lex desiderata*, since its formulation was not based on preexisting positive law but represents the embodiment of morality as a substitute for any positive law.<sup>28</sup> The words of Lord Coolidge in *The Queen v. Dudley and Stephens* (1884), though unrelated to the Charter, nonetheless eloquently answer that critique:

Though Law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence.<sup>29</sup>

<sup>25</sup> 2 IMT 147.

<sup>26</sup> 1 IMT 218.

<sup>27</sup> See generally *infra* ch. 3, §§9, 10, ch. 4, §3 and ch. 9, §3.2.

<sup>28</sup> See Anthony A. D’Amato, *The Moral Dilemma of Positivism*, 20 VAL. U. L. REV. 43 (1985) wherein at 43, he states: “Not only do positivists insist upon separating law from morality, but they also appear to be unable to deal with moral questions raised by law once the two are separated. This inability stems, I believe, from their simultaneous attempt to assert and to prove that law and morality are separate; the argument reduces to a vicious circle.” See also ANTHONY A. D’AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 294–302 (1984); see *contra*, Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 624–29 (1958); and Professor L. Fuller’s response, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

<sup>29</sup> 19 Q.B.D. 273, at 287 (1884).

International law, like the common law and other legal systems, develops gradually on the basis of states' practices,<sup>30</sup> treaties, and other sources of law and on the basis of the international community's needs in light of new or emerging threats to peace and security and to fundamental human values. These needs, depending on their pressing nature and perceived interest to the international community, either become part of positive international law or progress to lower stages of enforceability, as in the case of emerging customary international law or "soft law." But that does not necessarily mean that from the inception of a given custom to its recognition as a general custom, or its embodiment into a treaty, its emerging norms are unenforceable. Thus, the analogy to the common law as a legal system is valid and persuasive. In that context, Sir James Stephen, in 1877, described the evolution of case law as follows:

[it is] like an art or a science, the principles of which are first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances.<sup>31</sup>

Consequently, the requirements of legality in a customary international law system are necessarily different from those of a positivistic legal system, which uses codification as its method.<sup>32</sup> Therefore, it was no accident that James Stephen's definition of the common law's evolution was relied upon by Mr. Justice Robert Jackson in his opening address at the IMT at Nuremberg in 1945.<sup>33</sup> In the same vein, Professor Quincy Wright, a supporter of the declarative nature of the London Charter, described it as follows:

Considering international law as a progressive system, the rules and principles of which are to be determined at any moment by examining all its sources "general principles of law," "international customs" and the "teachings of the most highly qualified publicity" no less than "international conventions" and "judicial decisions," there can be little doubt that international law had designated as crimes ["crimes against humanity"] the acts so specified in the Charter long before the acts charged against the defendants were committed.<sup>34</sup>

<sup>30</sup> Henri Donnedieu de Vabres, a judge at the IMT, recognized this trait of international law when he stated in his incisive analysis of the Nuremberg Trial: "*Il est de l'essence du droit international d'être, en fait, un droit coutumier.*" See Henri Donnedieu de Vabres, *Le Procès Nuremberg devant les Principes du Droit Pénal International*, 70 RECUEIL DES COURS 481, 575 (1947).

<sup>31</sup> See JAMES F. STEPHEN, A DIGEST OF THE CRIMINAL LAW § 160 (1877), quoted by FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW (8th ed. 1880). For the history of the common law of crimes and juridically created crimes see also JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 359–60 (1883). For the nature of common law misdemeanors, see *Rex v. Manley* (1933) K.B. 529 (1932) commented upon in W.T.S. Stallybrass, *Public Mischief*, 49 L.Q. REV. 183 (1933); and R.M. Jackson, *Common Law Misdemeanors*, 6 CAMBRIDGE L.J. 193 (1937); *Shaw v. Director of Public Prosecutions*, A.C. 220 (1960) discussed in Ian Brownlie & D.G.T. Williams, *Judicial Legislation in Criminal Law*, 42 CAN. B. REV. 561 (1964). For the proposition that the international law is part of the common law, see CYRIL M. PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES 75 *et seq.* (1915).

<sup>32</sup> See *infra* ch. 5, §1.

<sup>33</sup> 2 IMT 147.

<sup>34</sup> Quincy Wright, *The Law of the Nuremberg Trial*, in INTERNATIONAL LAW IN THE TWENTIETH CENTURY 623, 641 (Leo Gross ed. 1969) (emphasis added); EUGÈNE ARONÉANU, LE CRIME CONTRE L'HUMANITÉ (1961); PIETER N. DROST, THE CRIME OF THE STATE (2 vols. 1959); ANTONIO QUINTANO RIPOLLÉS, TRATADO DE DERECHO PÉNAL INTERNACIONAL Y INTERNACIONAL PENAL 607 *et seq.* (1955); See also Jean S. Graven, *Les Crimes Contre l'Humanité*, in 1 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, 443 (1950); André Boissarie, *Rapport sur la Définition du Crime Contre l'Humanité*, 18 RIDP 201 (1947); Joseph Y. Dautricourt, *La Définition du Crime Contre l'Humanité*, in REVUE DE DROIT PÉNAL ET

The formulation of Article 6(c) was the work of the London Charter's drafters. But, as discussed in [Chapter 3](#), the drafters relied on pre-existing texts, though nothing in the scant negotiating history of the London Charter can attest to the fact that such intellectual legal analysis was in fact undertaken.<sup>35</sup> Nevertheless, the drafters probably concluded that political prudence argued in favor of keeping such legal arguments out of the record, fearing their use by the defense during the judicial proceedings. Political prudence notwithstanding, the requirements of justice, if nothing else, would have required a forthright explanation of the legal bases relied upon by the drafters.

The position that Article 6(c) did not innovate a new type of violation in ICL follows from the assumption that the new normative proscription only extended pre-existing violations to the same category of victims, but in a different context. Thus, the substance of the legal prohibition remained the same, as did the basic principles of law upon which it was predicated. One can therefore conclude that the London Charter's "crimes against humanity" was a progressive codification of a declaratory nature.<sup>36</sup> But the nagging question remains as to whether the undisputed wrongs committed against innocent civilians, hitherto outside the limited contextual application of war crimes, did constitute a new crime under international law that satisfied the requirements of legality in ICL.<sup>37</sup> Because the basic values embodied in the protection of these victims in ICL have never been at issue (only whether they can be embodied in a normative proscription formulated after the fact), is the assumption that notice of the violation can be found in other legal sources sufficient to satisfy the requirements of legality in ICL? Once again the answer can be found in the common law of crimes, as expressed with such foresight by Sir Francis Wharton in 1880:

The presumption of knowledge of the unlawfulness of crimes *mala in se* is not limited by state boundaries. The unlawfulness of such crimes is assumed wherever civilization exists.<sup>38</sup>

The same rationale of the *mala in se* common law crimes holds true for CAH, as defined in the London Charter, because the same acts are unlawful under general principles of law.<sup>39</sup> Indeed, murder, manslaughter, battery, rape, torture, and the like are

DE CRIMONOLOGIE 47 (1947); Henri Donnedieu de Vabres, *Le Procès de Nuremberg devant les Principes du Droit Pénal International*, 70 RECUEIL DES COURS 481 (1947). The author was one of the four chief judges at Nuremberg. His earlier work, *LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL* (1928), also supports this view.

<sup>35</sup> I am grateful to historian David Irving for giving me a copy of the unpublished notes of Justice Robert Jackson that he had obtained from the later President Philip Kurland of the University of Chicago Law School, and who was a friend of Robert Jackson. These notes lead me to conclude that the American drafters thought about these questions, but not as much as they should have. It was probably Dr. Jacob Robinson who set Jackson on the legal track that he and his colleagues followed. In fact, I am convinced that they all acted on the basis of their common law instincts without much regard for, or knowledge of, other legal systems. As is the case with so many historic legal instruments, those who interpret them subsequently tend to see in such instruments much more wisdom and insight than the drafters themselves ever imagined.

<sup>36</sup> See *infra* ch. 3, §8.

<sup>37</sup> See *infra* ch. 5, §4.

<sup>38</sup> WHARTON, *infra* note 31, at 311, § 285.

<sup>39</sup> See *infra* ch. 6, §2.



crimes in every legal system of the world, and that may be why.<sup>40</sup> Sir James Stephen, in 1877, postulated that

In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstances that he acts in obedience to orders given him by a civil or military superior [ . . . ].<sup>41</sup>

The framers of the London Charter and the members of the IMT recognized the valid legal existence of CAH under international law on the basis of the cumulative effect of all three sources of international law, namely conventional, customary, and general principles. But arguments challenging the legality of the Charter's enunciation of CAH were consistently raised at the Nuremberg<sup>42</sup> and Tokyo trials,<sup>43</sup> the post-Nuremberg prosecutions under CCL 10,<sup>44</sup> before the proceedings conducted by the Allies in their occupation zones,<sup>45</sup> and in the special military tribunals set up by the United States in the Far East.<sup>46</sup> Similar claims were also raised in national tribunals, such as in the *Eichmann* case in Israel, the *Touvier*, *Barbie*, and *Papon* cases in France, and the *Finta* case in Canada.<sup>47</sup> But they have always been rejected.

Justice Jackson dealt with these arguments in his closing address before the IMT:

The defendants complain that our pace is too fast. In drawing the Charter of this Tribunal, we thought we were recording an accomplished advance in International Law. But they say that we have outrun our times, that we have anticipated an advance that should be, but has not yet been made. The Agreement of London, whether it originates or merely records, at all events marks a transition in International Law which roughly corresponds to that in the evolution of local law when men ceased to punish local crime by "hue and cry" and began to let reason and inquiry govern punishment. The society of nations has emerged from the primitive "hue and cry," the law of "catch and kill." It seeks to apply sanctions to enforce International Law, but to guide their application by evidence, law, and reason instead of outcry. The defendants denounce

<sup>40</sup> *Id.*

<sup>41</sup> STEPHEN, A DIGEST OF THE CRIMINAL LAW, *supra* note 31, at art. 202, *quoted in* WHARTON, *supra* note 31, at 130.

<sup>42</sup> See *infra* ch. 3, §9, and ch. 5, §3.

<sup>43</sup> See generally YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II (1996); THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM (C. Hosouya et al. eds., 1986); JOHN MENDELSON, WAR CRIMES TRIALS AND CLEMENCY IN GERMANY AND JAPAN, in AMERICANS AS PROCONSULS: UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944–1952, 226 (Robert Wolfe ed., 1984); LAWRENCE TAYLOR, A TRIAL OF GENERALS (1981); PHILIP R. PICCAIGALLO, THE JAPANESE ON TRIAL (1979); SABURO SHIROYAMA, WAR CRIMINAL: THE LIFE AND DEATH OF HIROTA KOKI (1977); RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971). See also R. John Pritchard, *The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1947*, 7 CRIM. L. F. 15 (1996).

<sup>44</sup> See HENRI MEYROWITZ, LA RÉPRESSION PAR LES TRIBUNAUX ALLEMANDS DES CRIMES CONTRE L'HUMANITÉ ET DE L'APPARTENANCE À UNE ORGANISATION CRIMINELLE (1960).

<sup>45</sup> See JEAN PIERRE MAUNOIR, LA RÉPRESSION DES CRIMES DE GUERRE DEVANT LES TRIBUNAUX FRANÇAIS ET ALLIÉS (1956).

<sup>46</sup> See also *In re Yamashita*, 327 U.S. 1 (1946); *Homma v. United States*, 327 U.S. 759 (1946). Both cases have been criticized because they established an unprecedented criteria for command responsibility: the two generals in question should have known or should have prevented the war crimes committed by soldiers under their command and the great dissents of Justices Murphy and Rutledge, *id.* at 26 *et seq*; see also A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949); and *infra* ch. 7.

<sup>47</sup> For a more citations to these cases, and for a more detailed discussion of national prosecutions for CAH, see generally *infra* ch. 9.

the law under which their accounting is asked. Their dislike for the law which condemns them is not original. It has been remarked before [quoting Shakespeare] “that no man e’er felt the halter draw, With good opinion of the law.”<sup>48</sup>

History has an uncanny way of repeating itself. The arguments discussed above that pertain to the legality of CAH criminalization in the Law of the London Charter are now being revisited with the elimination of the requirement of state policy for state actors by substituting it with the elements of “widespread or systematic” contained in the Statutes of the ICTY and ICTR, and the extension of CAH to nonstate actors.<sup>49</sup>

Concern for legality is never to be taken lightly, no matter how atrocious the violation or how abhorrent the violator.<sup>50</sup> The observance of the rule of law is far more important than the prosecution or punishment of any offender or group of offenders. We should never forget that if it were not for such offenders’ transgression of the rule of law, violations embodied in CAH may not have occurred. To disregard legality and the due process of the law in both its substantive and procedural meanings and applications reduces us to arguing that better reasons or higher motives justify or excuse the absence of proper legal action, and that would be no different than the rationalizations offered

<sup>48</sup> 19 IMT 398.

<sup>49</sup> As argued throughout this book, the crime must have been committed by state actors pursuant to a state policy for a crime to constitute CAH. It is this distinction that separates CAH as an international crime from domestic crimes, such as the crimes of serial killers or organized crime groups. See *infra* ch. 1; M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 244, 247 (1992); VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 79–80 (1995); William A. Schabas, *Crimes Against Humanity: The State Plan or Policy Element*, in *THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI* 347–48, 358, 360, 362–63 (Leila Nadya Sadat & Michael P. Scharf, eds., 2008) (arguing that CAH can only be committed by state actors pursuant to a state plan or policy under customary international law); William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 972–74 (2008).

However, the jurisprudence of the ICTY, the ICTR, and the SCSL has held that the existence of a state plan or policy is not a requirement under customary international law. For the ICTY, see, e.g., *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, ¶ 223 (Apr. 19, 2004) (holding that in the case of customary CAH, no plan or policy is required); *Prosecutor v. Kunarac et al.*, Case No. IT-96-23/1-A, Judgment, ¶¶ 89, 98 (Jun. 12, 2002). For the ICTR, see, e.g., *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgment, ¶ 269 (May 20, 2005). For the SCSL, see *Prosecutor v. Sesay, Kallon, and Gbao*, Case No. SCSL-04-15-T, Judgment, ¶¶ 78–9 (Mar. 2, 2009) (stating, “existence of a policy or plan, or that the crimes were supported by a policy or plan to carry them out, . . . is not a separate legal requirement” to prove CAH).

See also Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT’L L. 1229, 1237–45 (2004) (arguing that human rights are violated when CAH are committed and that human rights violations can occur at the hands of private actors, with or without a state plan or policy and regardless of whether the violations are “widespread or systematic”); Jennifer L. Smith, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 GEO. L.J. 1111, 1126–28 (2009) (stating that national courts and the ICTY have both recognized that private actors could commit CAH, and that state policy is not required); John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT’L L. 1, 19 (2008) (stating that “private actors have duties . . . not to commit . . . [CAH], or genocide”); Naomi Roht-Arriaza, *The Complex Architecture of International Justice*, 10 GONZ. J. INT’L L. 38 (2007) (stating that private actors can be liable as aiders or abettors for genocide or CAH); Beth Stephens, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 538 (2004) (stating that private corporations can be held responsible for “violations that do not require state action, such as [CAH]”).

<sup>50</sup> See *infra* ch. 5.

by the transgressors of the law. Competing values should not be the only distinction between those who sit in judgment and those who stand accused. History has all too frequently recorded that ends do not justify the means, Machiavelli's advice to the Prince notwithstanding.<sup>51</sup>

In the celebrated dissents of Justices Murphy and Rutledge in the *Yamashita* case,<sup>52</sup> we find admonitions that should always be remembered. Justice Rutledge said,

At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace. We must not act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit. The fires of nationalism can be further kindled. And the hearts of all mankind can be embittered and filled with hatred, leaving forlorn and impoverished the noble ideal of malice toward none and charity to all. These are the reasons that lead me to dissent in these terms.<sup>53</sup>

And Justice Murphy said,

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.<sup>54</sup>

The London Charter, its weaknesses notwithstanding, stands against the proposition that *inter arma silent leges*. The law should never be silent in time of war, though regrettably that is not usually the case.<sup>55</sup>

Presumably, the contentious questions concerning the validity of CAH under the London Charter should have been settled with respect to violations committed after 1946 when the IMT rendered its judgment, but that was not the case. Moreover, new legal issues arose that have also remained pending. As discussed in [Chapter 9](#), only fifty-five states have incorporated CAH in their domestic legislation, most of these however since 2002.<sup>56</sup> National prosecutions, which evidence state practice, have been increasing. Since 1947, there have been twelve different formulations of CAH in various international

<sup>51</sup> M. Cherif Bassiouni, *Policy Perspectives Favoring the Establishment of the International Criminal Court*, 52(2) COLUM. J. INT'L AFF. 795 (1999).

<sup>52</sup> *In re Yamashita*, *supra* note 46.

<sup>53</sup> *Id.* at 41.

<sup>54</sup> *Id.* at 29.

<sup>55</sup> See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998), in which the author retraces the suspension and evolution of civil rights guaranteed by the United States Constitution in times of war, from the Civil War to World War II.

<sup>56</sup> See *infra* ch. 9, §3.1.

instruments, some perfected and others imperfect. <sup>57</sup> But as yet, there is no specialized convention on CAH.

Since World War II, the world community has settled into complacency, leaving the post-World War II experiences in international criminal adjudication to become part of the baggage of an unpleasant phase of history that the world community seems to deem as best forgotten. In the post-World War II period, a “moving on” syndrome infected the international community, which failed to address the new atrocities in the wars of decolonization in the late 1950s and the 1960s and the Cold War’s surrogate wars by states controlled or supported by the United States and the USSR at a time when the world was divided between Eastern and Western blocs. <sup>58</sup> Despite some breakthrough as of late 1980s in Latin America with the postconflict justice of truth commissions and some prosecutions for crimes committed by some country’s ruling military dictatorships, it was not until 1992 with the establishment of the ICTY that the world reawakened to the notion of postconflict justice with the Security Council’s establishment of the 780 Commission. <sup>59</sup>

Since 1945 there has not been a comprehensive CAH convention as this writer has been calling for since 1994. <sup>60</sup> But there have been twelve different formulations of CAH and they all differ, albeit slightly. <sup>61</sup> This raises the simple, yet frustratingly unanswered question: why do we not have an international convention on CAH that encompasses nonstate actors? <sup>62</sup> The reason, I submit, is simply the timidity of government officials

<sup>57</sup> Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, art. 6(c); Charter for the International Military Tribunal for the Far East, *approved* Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 BEVANS 27, at art. 5(c); Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50–55 (1946), art. II; *Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission on its forty-eight session*, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), *rev’d* by U.N. Doc. A/CN.4L.532/Corr.1 and U.N. Doc. A/CN.4L.532/Corr.3; Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1–2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159, art. 5; Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994), art. 3; Rome Statute of the International Criminal Court (ICC), 17 July 1998, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998), art. 7; UNMIK Regulation 2003/25 (July 6, 2003); Criminal Code of Bosnia and Herzegovina, Article 172 (January 24, 2003); Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 2; UNTAET Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses (June 6, 2000); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 5.

<sup>58</sup> THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3; Christopher Mullins, *Conflict Victimization and Post-Conflict Justice: 1945–2008*, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 67.

<sup>59</sup> M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT’L L. 784 (1992); VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2 vols. 1995); M. CHERIF BASSIOUNI (WITH THE COLLABORATION OF PETER MANIKAS), THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996); JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL (2003).

<sup>60</sup> M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT’L L. 457 (1994).

<sup>61</sup> See generally *infra* ch. 4, Part A.

<sup>62</sup> Moreover, any international CAH convention must contain specific provisions concerning nonstate actors.

who steadfastly avoid that prospect, much as they avoid amending the 1948 Genocide Convention, which excludes social and political groups from its protection.<sup>63</sup> In one word, it is politics, the politics of furthering impunity for the perpetrators of such crimes – perpetrators who are, after all, the leaders of governments and military, police, and intelligence service establishments.

The legislative history of the Rome Statute<sup>64</sup> reveals very little of the governmental concerns among State Parties and nonstate Parties with Articles 7 and 27. But, nonstate Parties have refrained from acceding to the treaty essentially because of these two articles, which place their political, military, and police leaders at risk of prosecution for their CAH actions. After the ICC issued a warrant of arrest for Sudan President Al-Bashir for war crimes and CAH in Darfur, the Organization of African Unity denounced the ICC for double standards. At Nuremberg and Tokyo, the claim was also the double standard of prosecuting the defeated and not the victorious. The critics of the ICC argue that the Court is only prosecuting those from weaker and poorer countries and not those from stronger and richer ones. This is a valid argument. After World War II, only the defeated were prosecuted. So far, the ICC has only indicted individuals from African states. However, while this is clearly not fair or even-handed, it does not detract from the fact that those who were tried after World War II and those who are being prosecuted now before the ICC deserve to be prosecuted. Their victims deserve justice. The fact that all who deserve to be prosecuted do not always wind up before the bar of justice does not diminish the merits of bringing at least some of the perpetrators to justice. The same is true of domestic systems where the argument arises. But even though all criminals are not brought to justice, this does not invalidate bringing to justice those the system can reach.

The Charter and its related post-Charter instruments legitimize the selective transmission of norms that are occasionally and selectively enforced.<sup>65</sup> This does not make for sound international criminal justice policy, but it is the best that the international community can do at this time.<sup>66</sup>

The Genocide Convention of 1948<sup>67</sup> – which was to serve as the legal instrument *par excellence* to address the deficiencies of the London Charter – is of limited use to counteract the arguments presented above because it fails to cover all the depredations that are included in Article 6(c) of the Charter and subsequent iterations of CAH. Indeed genocide applies only to instances where the killing is done with the “intent to eliminate” a narrowly defined group “in whole or in part.”<sup>68</sup> Thus, “murder, extermination, enslavement, deportation, and other inhumane acts,” as stated in Article 6(c) of the Charter, when committed without the intent to eliminate a group in whole or in part

<sup>63</sup> See Bassiouni, *supra* note 17.

<sup>64</sup> M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT* (2005).

<sup>65</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

<sup>66</sup> Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 3.

<sup>67</sup> See Genocide Convention and generally *infra* ch. 4 for its discussion in connection with post-Charter legal developments. See generally WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (2000); Matthew Lippman, *The Convention on the Prevention and Suppression of the Crime of Genocide*, in BASSIOUNI, *ICL* (M. Cherif Bassiouni ed., 2d ed. 1998); L'HISTOIRE INHUMAINE: MASSACRES ET GÉNOCIDES DES ORIGINES À NOS JOURS (Guy Richard ed. 1992); and CENTURY OF GENOCIDE (Samuel Totten et al. eds., 1997).

<sup>68</sup> *Id.*

on the basis of race or religion, remain outside the scope of the Genocide Convention. Consequently, the Genocide Convention is less encompassing than CAH,<sup>69</sup> particularly in its expanded formulation in Article 7 of the Rome Statute.

The scattered and inconclusive post-Charter legal developments of CAH<sup>70</sup> leave many unresolved questions, made more evident by the numerous tragic events that have occurred since World War II.<sup>71</sup> Whereas the number of conflicts of an international character declined after World War II, as did their harmful impact, other types of conflicts and their harmful consequences increased.<sup>72</sup> Indeed, the occurrence of conflicts of a noninternational character and purely internal conflicts has dramatically increased in number, intensity, and victimization far exceeding quantitatively and qualitatively the harmful results generated by all other types of conflicts.<sup>73</sup>

Conflicts of a noninternational character, purely internal conflicts, and tyrannical regime victimization have occurred all over the world. That victimization has included genocide, CAH, and war crimes, along with, *inter alia*, extrajudicial executions, disappearances, torture, sexual violence, and arbitrary arrest and detention, all of which constitute serious violations of fundamental human rights protected by international humanitarian law and international human rights law.<sup>74</sup>

Between 1945 and 2008, it is estimated that 313 conflicts have taken place, causing an estimated 92 to 101 million people killed, or twice the number of victims in World Wars I and II combined.<sup>75</sup> These conflicts were of an international and noninternational

<sup>69</sup> *Id.*

<sup>70</sup> See ICTY Statute at Art. 5; ICTR Statute at Art. 3; and ICC Statute at Art. 7. See also generally *supra* ch. 4.

<sup>71</sup> THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*; Bassiouni, *supra* note 17; GENOCIDE AND DEMOCRACY IN CAMBODIA (Ben Kiernan ed. 1993); POL POT PLANS THE FUTURE (DAVID P. CHANDLER ET AL., EDs., 1988); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE (1995); VAHAKN N. DADRAN, THE HISTORY OF THE ARMENIAN GENOCIDE (1995); FRANCIS A. BOYLE, THE BOSNIAN PEOPLE CHARGE GENOCIDE (1996); DICK DE MILDT, IN THE NAME OF THE PEOPLE: PERPETRATORS OF GENOCIDE IN THE REFLECTION OF THEIR POST-WAR PROSECUTION IN WEST GERMANY (1996); LEO KUPER, GENOCIDE (1981); ROY GUTMAN, A WITNESS TO GENOCIDE (1993); DANIEL CHIROT, MODERN TYRANTS: THE POWER AND PREVALENCE OF EVIL IN OUR AGE (1994); PIERRE HASSNER, VIOLENCE AND PEACE: FROM THE ATOMIC BOMB TO ETHNIC CLEANSING (1995); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (1994); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (2D ED. 2001); MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007); SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2003).

<sup>74</sup> See THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989). See also, e.g., RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE (1991); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS (1990); HENRY J. STEINER, INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS (1996).

<sup>75</sup> See *supra* note 3; see also ERIK HOBBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914–1991 (1995). The figure used by Mr. Hobsbawm is 187 million “people killed or allowed to die by human decision” for the “short century” that he examines. Hobsbawm notes that this accounts for about 10 percent of the global population at the year 1900. The category “by human decision” includes nonwartime politically caused deaths such as those in the Soviet Union (1930s Ukrainian starvation and the “Gulag”) and in China between 1949 and 1975 (the massive starvation of the “Great Leap Forward” and various “repression campaigns”). However, likely deaths in those two countries for political government-decided reasons are on the order of 35 million and 45 million respectively, or 80 million, for a total of around 205 million, rather than Hobsbawm’s figure of 187 million. See SIPRI YEARBOOKS 1975–96. There were two reported studies in the PIOOM newsletter and progress report in 1994 and 1995: A.J. Jongman & A.P. Schmid,



character as defined in international humanitarian law, as well as purely internal conflicts, civil wars, and regime victimization. The following are some illustrations of situations producing a high level of victimization (estimated conflict deaths), including genocide, CAH, and war crimes for which there has been no accountability: (a) *Conflicts of a noninternational character*: Afghanistan (1989–2001) 1.5m; Vietnam (1945–1987) 3.7m. (b) *Conflicts of a noninternational character*: Angola (1975–1994) 1.5m; Bangladesh (1971–1973) 500,000; Burundi (1972) 250,000; Cambodia (1975–1985) 1.5m; Ethiopia (1961–1991) 300,000; Mozambique (1978–1992) 1m; Rwanda (1994) 500,000; Somalia (1991–1993) 400,000; Yemen (1962–1965) 100,000. (c) *Purely internal conflicts*: Argentina (1976–1983) 25,000; Chile (1973–1990) 30,000; El Salvador (1979–1992) 70,000; Guatemala (1965–1996) 60,000; Indonesia (1965) 450,000 and (1980–1995) 150,000; Lebanon (1975–1990) 150,000; Liberia (1989–1996) 150,000; Peru (1980–1996) 50,000; Philippines (1968–1986) 50,000. (d) *Tyrannical regime victimization*: China (1945–1975) 35m; Iraq (1980–1996) 300,000; North Korea (1948–1987) 1.6m; Uganda (1971–1986) 600,000; USSR (1917–1989) 30m; Yugoslavia (1943–1945) 500,000 and (1991–1995) 250,000.<sup>76</sup>

Most of these deaths fall within the meaning of CAH. Sadly, these events have become historical footnotes, their tragic lessons relegated to memories of unpleasant events. But there are also significant forgotten events, such as: the Stalinist purges of the 1950s, which resulted in the estimable number in the millions of persons killed;<sup>77</sup> the 1960s civil war of Nigeria where an estimated 1 million Nigerian Biafrans were killed;<sup>78</sup> the 1970s war of secession between East and West Pakistan that resulted in 1 million Bangladeshi deaths before the creation of the independent state of Bangladesh;<sup>79</sup> and to a large extent the estimated 2 million Cambodians (40 percent of the population) killed by the Khmer Rouge between 1975 and 1982.<sup>80</sup> There have also been countless other tragedies of lesser magnitude, though nonetheless noteworthy. These, and so many other similar tragic

*Contemporary Conflicts: A Global Survey of High- and Lower Intensity Conflicts and Serious Disputes*, 7 PIOOM NEWSLETTER AND PROGRESS REPORT 14 (Winter 1995) (Interdisciplinary Research Program on Causes of Human Rights Violations, Leiden, Netherlands), and *Study*, 6 PIOOM NEWSLETTER 17 (1994); Alex P. Schmid, *Early Warnings of Violent Conflicts: Causal Approaches*, in *Violent Crime & Conflicts* 47 (ISPAC 1997); *PIOOM World Conflict Map 1997–1998* and the *PIOOM website* <[http://www.fsw.leidenuniv.nl/w3\\_liswo/pioom.htm](http://www.fsw.leidenuniv.nl/w3_liswo/pioom.htm)>.

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

<sup>77</sup> See ROBERT CONQUEST, *THE GREAT TERROR: STALIN'S PURGE OF THE THIRTIES* (1973); see also STÉPHANE COURTOIS ET AL., *LE LIVRE NOIR DU COMMUNISME: CRIMES, TERREUR, RÉPRESSION* (1997). For the intentionally induced famine in the Ukraine, see MIRON DOLOT, *EXECUTION BY HUNGER: THE HIDDEN HOLOCAUST* (1985).

<sup>78</sup> See JOHN J. STREMLAU, *THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967–70* (1977).

<sup>79</sup> See LEO KUPER, *GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY* (1981), who cites three million Bangladeshi deaths, though by most accounts that number is estimated at one million; see also Niall MacDermot, *Crimes Against Humanity in Bangladesh*, 7 INT'L L. J. 476 (1973).

<sup>80</sup> See Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989); REPORT OF THE CAMBODIAN GENOCIDE PROJECT (1984); Nancy Blodgett, *Cambodia Case: Lawyer Wants Genocide Trial*, 71 A.B.A. J. 31 (1985); I.C.J. *Report on Democratic Kampuchea*, 20 I.C.J. REV. 19 (1978); KAMPUCHEA: DECADE OF THE GENOCIDE (Kimmo Kiljunen ed. 1984); Jordan J. Paust, *Political Oppression in the Name of National Security: Authority, Participation, and the Necessity Within Democratic Limits Test*, 9 YALE J. WORLD PUB. ORD. 178 (1982); Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547 (1987); Gregory H. Stanton, *Kampuchean Genocide and The World Court*, 2 CONN. J. INT'L L. 341 (1987); GENOCIDE AND DEMOCRACY IN CAMBODIA (Ben Kiernan ed. 1993); and ROY GUTMAN, *A WITNESS TO GENOCIDE* (1993).



events affecting large and small groups of people in all regions of the world, have regrettably elicited only the most superficial reactions from the international community, and failed to give rise to new institutions or measures to prevent, control, and suppress such occurrences. Instead, the Khmer Rouge, who are responsible for what is probably the worst national mass killing since what happened to the Jews in World War II, were dignified in October 1991 with signing an agreement for the end of the civil war that gave them the legitimacy of being part of the new government. Then, when its architect Pol Pot was seized, no one wanted to prosecute him and the international community simply ignored the fact.<sup>81</sup> Instead a token mixed-model tribunal was established in 1997; its first indictments only occurred in 2007. It has completed the trial of one person, Kaing Guek Eav (alias Duch), who admitted guilt but contended he only acted on the orders of others. Duch was convicted in July 2010. The Extraordinary Chambers in the Courts of Cambodia's (ECCC) entire prospective caseload is five defendants. No greater sham of international criminal justice has ever been perpetrated, yet human rights advocates see this as another brick in the foundation of international criminal justice. But when time and again *Realpolitik* imposes Potemkin institutions on the international community to camouflage the unwillingness of major powers and the inability of lesser ones to bring about a better international criminal justice system, reaction is needed.

To underscore the indifference, and at times politically-motivated disregard of these historical experiences, we must recall the words Hitler is reported to have said in briefings to his senior unit of commanders in 1939 before embarking on a war of aggression that lasted six years and devastated Europe: "Who after all is today speaking about the destruction of the Armenians?"<sup>82</sup> Perhaps, if the world community had remembered or had shown more concern for these victims, the Gypsies, the Slavs, the mentally ill, and so many others, and particularly the Jews, the horrors that befell them and so many would not have occurred. And perhaps, if the world community had learned the lesson of World War II, the many atrocities that have since occurred may have also been avoided, if not in whole, at least in part. How telling are the almost identical words of the *Talmud* and the *Qu'ran* that he who saves one life is the same as having saved all of humankind. But even that low threshold seems difficult to reach, and yesterday's atrocities are repeated time and again while we all vow that we should prevent them. Not only do we fail to do that, but over and over again we compromise international criminal justice by not filling legislative gaps, such as the failure to have a comprehensive CAH convention, and by using bureaucratic and financial techniques to politically manipulate international criminal justice institutions in the interests of *Realpolitik*.

<sup>81</sup> See *Cambodia's Pol Pot Seen in Rebel Town, Writer Says*, CHICAGO TRIBUNE, July 28, 1997, at sec. 1, p. 4; Elizabeth Becker, *Khmer Rouge Lets World Know of "Trial" for Pol Pot*, CHICAGO TRIBUNE, July 29, 1997, at sec. 1, p. 1. For a time line of Cambodia's troubled history and an archive of stories see the Chicago Tribune website, <http://www.chicagotribune.com/news/polpot/chron.htm>; see also Seth Mydans, *Death of Pol Pot: Pol Pot, Brutal Dictator Who Forced Cambodians to Killing Fields, Dies at 73*, NEW YORK TIMES, Apr. 17, 1998, at sec. A, p. 14.

<sup>82</sup> See JAMES F. WILLIS, PROLOGUE TO NUREMBERG 173 (1982) citing to Sir George Ogilvie-Forbes report of 25 August 1939, with enclosures of Hitler's speech to Chief Commanders and Commanding Generals, 22 August 1939, Great Britain, Foreign Office, DOCUMENTS ON BRITISH FOREIGN POLICY, 1919-1939 (Edward L. Woodward et al., 3d series, 9 vols., 1949-55), 7:258. For an analysis of the various versions of Hitler's speech, see Winfried Baumgart, *Zür Ansprache Hitlers vor den Führen der Wehrmacht am 22 August 1939: Eine Quellenkritische Untersuchung*, VIERTELJAHRSSHEFT FÜR ZEITGESCHICHTE 16 (April 1968), 120-49.

The viability of CAH as an international crime separate and apart from genocide and from war crimes is a legal reality that no one can deny.<sup>83</sup> Its legal vulnerability is clearly owed to the shameful inattention given to this subject by those in a position to shape the development and evolution of ICL. We only need to recall, after World War I, the opportunity to establish the international crime of “Crimes Against the Laws of Humanity” in positive international law was foregone for political reasons.<sup>84</sup> At that time, pragmatic United States policymakers and others probably saw it as merely foregoing the prosecution of Turkish nationals for the estimated killing of several hundred thousand Armenians (some estimate the number killed at more than 1 million) in exchange for a new political ally.<sup>85</sup> But when World War II began to empty its horrors, the lack of a solid precedent was significantly felt, and the Allies had to rely upon the 1919 Commission Report for support, despite explicit rejection of the Report’s use of the terms “laws of humanity” by the United States.<sup>86</sup>

As a consolation, however, the veneer of ICL has thickened since 1945 through the ICTY, ICTR, the mixed-model tribunals, and the ICC. The advances of human rights have also added their notable contribution to the thickening of the veneer of civilization. In the post-Charter era, the continuum in the legal reinforcement of CAH as an international crime has been consistently evidenced by international legal norms and principles. Also, some states – notably France and Canada – have enacted specific national legislation.<sup>87</sup> But after one case resulting in an acquittal, Canada regrettably

<sup>83</sup> See *infra* ch. 1, § 3.

<sup>84</sup> See *infra* ch. 3, § 1.

<sup>85</sup> See generally ARNOLD J. TOYNBEE, *ARMENIAN ATROCITIES: THE MURDER OF A NATION* (1915); and Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Ramifications*, 14 YALE J. INT’L L. 221 (1989). See also VAHAKN N. DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* (1995). Turkey argues that these numbers are inflated and that the violence against Armenians was popular and spontaneous because the Armenians collaborated with the Russians during a war in which the latter were the enemies of Turkey. The ultimate truth in these competing allegations has never been established, but the number of Armenian casualties and the support of Turkish officials for what happened to them clearly show that the Armenians were victims.

<sup>86</sup> The Dissenting Report of the United States and Japan are found in Annex II and III respectively of the 1919 Commission Report.

<sup>87</sup> See *infra* ch. 9 § 3.1; see also Cite to French Law. MARTIN’S CRIMINAL CODE 1989 (Edward L. Greenspan ed.) § 7 (3.71) provides that

Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

- (a) at the time of the act or omission
  - (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
  - (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or
  - (iii) the victim of the act or omission is a Canadian citizen of a state that is allied with Canada in an armed conflict or
- (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person’s presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada

See Leslie C. Green, *Canadian Law, War Crimes and Crimes Against Humanity*, 59 BRIT. Y.B. INT’L L. 217 (1988); Leslie C. Green, *Canadian Law and The Punishment of War Crimes*, 28 CHITTY’S LAW J. 249 (1980); Michèle Jacquot, *La Notion de crime contre l’humanité en droit international contemporain et en*

gave up on prosecution and so did France after three cases.<sup>88</sup> The record of national prosecutions is modest but also adds to the fabric of international criminal justice.<sup>89</sup> Surely, the awareness and concern of peoples all over the world have become more acute, as evidenced by the increasing reference and usage of the CAH to address a variety of human rights depredations, even though frequently in a legally inaccurate way, and the fact that fifty-five states have by now enacted domestic legislation criminalizing CAH. Nevertheless, considering the volume of victimization caused by CAH since World War II,<sup>90</sup> post-conflict prosecutions for these crimes is at best symbolic.<sup>91</sup> Instead, post-conflict justice for different conflicts has resulted in different modalities that push in every direction, from truth commissions to the mixed-model tribunals.<sup>92</sup> Once again, the practice of states has not been equal to the mandate of the law and the expectations of humankind.

Law is part of history, and history, like a river, occasionally runs sluggishly and stagnates in the pools of time, or it may run deep and forcefully, rushing toward unpredictable destinations. The London Charter was a deep and forceful thrust cutting across legal hurdles and creating a new course for history. It opened a new channel for ICL and provided a means to strengthen the international legal process and the international Rule of Law. Between 1945 and 1993, the current was sluggish and stagnant, even in the face of the great need for its constant thrusts in the direction that had been outlined since the 1919 Peace Treaty of Versailles, and for which the London Charter opened a new course. That stagnation has clogged the course of CAH with the debris of history, and threatened it with *désuétude*.<sup>93</sup> To a large extent, the London Charter is unsatisfactory,

*droit canadien*, 21 REVUE GÉNÉRALE DE DROIT 607 (1990); REPORT OF COMMISSION OF INQUIRY ON WAR CRIMINALS: PUBLIC (Jules Deschênes ed. 1986); Sharon A. Williams, *The Criminal Law Amendment Act 1985: Implications for International Criminal Law*, 23 CAN. Y.B. INT'L L. 226 (1985). See also *R. v. Finta*, [1989] 61 D.L.R. 85 (4th). For the opposite approach, see *Lithuania Exonerating People Accused as Nazis*, CHICAGO TRIBUNE, sec. 1, p. 4, col. 1, September 5, 1991.

<sup>88</sup> See the *Finta Case*, *supra* note 87. Like the United States, it seeks to denaturalize and expel persons accused of such crimes in the hope that other states will prosecute them. See also *infra* ch. 9, §3.2 for the national prosecutions of France and Canada.

<sup>89</sup> Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 3.

<sup>90</sup> Mullins, *supra* note 58.

<sup>91</sup> See *infra* ch. 9.

<sup>92</sup> See Anja Matwijkiw, *Justice Versus Revenge: The Philosophical Underpinnings of the Chicago Principles on Post-Conflict Justice*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 173; Simon Caney, *Political Philosophy and Global Principles of Justice*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 243; Nadia Bernaz and Rémy Prouvêze, *International and Domestic Prosecutions*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 269; Christopher W. Mullins, *The International Criminal Court*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 399; M. Cherif Bassiouni, *Mixed Models of International Criminal Justice*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 423; Eric Wiebelhaus-Brahm, *Truth Commissions and Other Investigative Bodies*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 477; M. Cherif Bassiouni, *Victim's Rights: International Recognition*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 575; Naomi Roht-Arriaza, *Victim's Rights: Reparations in International Law and Practice*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 655; Antonio Buti, *Victim's Rights: Restorative Justice*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 699; J.D. Bindenagel, *Victim's Rights: The German Experience*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 709; Monika Nalepa, *Lustration*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 735; Mark Gibney, *Apologies*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 779; and Louise Mallinder, *Amnesties*, in 1 THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE, *supra* note 3, at 793.

<sup>93</sup> See Bassiouni, *supra* note 60.

and for this writer, so are the post-Charter legal developments. But while the former may be explained by the exigencies of that time, the subsequent neglect cannot be excused. Professor Henri Donnedieu de Vabres, a judge at the IMT, commented in 1947:

*Il serait étrange qu'après l'expérience récente et les critiques en partie justifiées qu'elle a fait naître, cette lacune ne fût pas comblée. Il serait étrange qu'à chaque manifestation de la criminalité internationale dût succéder la fondation d'un tribunal d'occasion. L'affirmation des principes de Nuremberg est illusoire, s'il n'existe pas d'organe préconstitué et permanent, digne de les sanctionner. Or il se manifeste, à cet égard, au sein de l'Organisation des Nations Unies elle-même, d'inquiétantes hésitations.*

*Les années qui viennent marqueraont sans doute un moment critique de l'histoire, qui a vu s'entremêler jusqu'ici les agressions de la violence et les triomphes du droit. Si la violence prévaut, le jugement de Nuremberg restera comme un fait historique caractéristique d'une tendance, à un moment donné de l'évolution; mais il ne sera rien de plus. Sinon, il sera un précédent, d'une portée incomparable. Seules, une saine compréhension de l'intérêt humain, un sursaut de la conscience universelle peuvent conjurer le péril [ . . . ].*<sup>94</sup>

A historical parallel thus exists between the complacency of governments after World War I in formulating norms of positive ICL, and the post-World War II complacency that left us with a similarly weak normative framework.<sup>95</sup> It is in this context that I must express my dual concern. The first concern is with the absence of a specialized convention on CAH, which I have lamented throughout this book. The second concern is with the Rome Statute's Article 7 formulation, which I discussed throughout Chapters 1 and 4.<sup>96</sup>

Can the new era of human rights of the next century prevent the recurrence of horrible and senseless violence by man against man, as we have witnessed during World War II and thereafter? Perhaps it can.<sup>97</sup> But if it cannot, then we must at the very least express our reprobation and affirm our values in opposition to these practices.<sup>98</sup> Our historical

<sup>94</sup> See Donnedieu de Vabres, *supra* note 30, at 577.

<sup>95</sup> *Id.*; see also *infra* ch. 6, §6.

<sup>96</sup> My fear at the time was that many governments would not ratify the ICC Statute, in part, because of the way that Article 7 was formulated. Because that Article was part of the "political package" of Part 2, it was not, like all other articles of the Statute, submitted to the Drafting Committee of the Rome Diplomatic Conference, which I had the honor of chairing. See M. Cherif Bassiouni, *Historical Survey: 1919 to 1998*, in *COMPILATION OF UNITED NATIONS DOCUMENTS AND STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (M. Cherif Bassiouni ed., 1998).

<sup>97</sup> For a contemporary perspective on Universal Application, see J. DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989); see also *THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS* (A. Aide & J. Helgesen eds., 1991). As eloquently stated by Thomas Paine: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself." THOMAS PAINE, 2 *THE COMPLETE WRITINGS OF THOMAS PAINE* 588 (Foner ed., 1945).

<sup>98</sup> See M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Searching for Peace and Achieving Justice: The Need for Accountability*, 9 *LAW & CONTEMP. PROB.* 9, 22 (1996). "Human nature also has its darker side, and while evil can emerge on its own without external inducement, it no doubt tends to emerge more harmfully when external controls are reduced and inducements offered. Impunity is certainly one of these inducements, as is the prospect of indifference and the expectation that the worse deeds may be characterized as justified, reasonable, acceptable, or normal.

Victimization frequently involves the dehumanization of the prospective victims, frequently after a stage of psychological preparation by the perpetrators. Anyone "less than human" can therefore be dealt with as an animal or an object to which anything can be done, without fear or risk of legal or moral consequences. Another approach is for the perpetrators to characterize the victims as being the perceived threats, thus providing a rationalized justification for the ensuing victimization. Such characterization can even rise to

legacy must include more than our unequivocal condemnation of such grave human depredations. It must include effective enforcement.<sup>99</sup>

Thus, to neglect the codification of CAH in a legally sufficient and enforceable way and to forego the prosecution of its perpetrators is to negate the bond of faith we must maintain with our humanity. As the Prophet Muhammad said in a *hadith*: “If you see a wrong you must redress it, with your hand [action] if you can, otherwise with your tongue [vocal condemnation], otherwise with your eyes [reprobation], otherwise in your heart and that is the weakest manifestation of your faith [condemnation].”

We clearly need an effective ICC that can express the higher values of our legal civilization in the fair and impartial adjudication of international crimes – an institution which, to paraphrase Aristotle, would offer the same law whether in Athens or Rome, and apply equally to all peoples of the world, not only because it is law, but because, as Aristotle also said, it is “the right reason.” As experience teaches us, that will take time, effort, and vigilance, lest the ICC becomes discredited by the manipulation of political interests. Yesterday’s international criminal justice gains are never to be taken for granted for they can easily be lost. Like Sisyphus, we keep pushing the boulder uphill and it keeps sliding back down, but unlike Sisyphus, we either learned how to push it back up faster or the downhill slide is lessened every time.

Justice Robert Jackson in the last sentence of his report to the President of the United States on the Nuremberg trials stated: “I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future.”<sup>100</sup> Impunity for international crimes and for systematic and widespread violations of fundamental human rights betrays our solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation. To remember and to bring perpetrators to justice is a

the level of self-defense against individuals or a group of individuals who are portrayed or perceived as constituting a threat or danger of some degree of plausibility and immediacy. Thus, the victims can be portrayed and perceived as being responsible for the victimization inflicted upon them as if they had done something to justify it or had called for it by their conduct, or for that matter, as in the case of the Holocaust, for their very being. [See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (3 vols. 1985)]. This rationalization can even reach the point where the perpetrators can perceive themselves as forced to inflict the victimization. That reasoning can reach the absurd, of the perpetrators becoming the victims in their being ‘forced’ by the actual victims to engage in victimizing conduct.

Such distorted intellectual processes may be the product of inherent evil. But they are most frequently the product of evil manipulation by the few of the many. From the days of Goebbels’s and Streicher’s propaganda to the 1994 Rwanda Hutu incitements to kill the Tutsis, the use of propaganda has been the main instrument of group violence. Obviously the less educated or the more gullible a society is, the more it is likely to be induced in such false beliefs. But there are many other factors that influence the credibility of such techniques, which use the accumulation of uncontradicted falsehood over time to produce their deleterious effect. And it is during that time that the international community should mobilize on the basis of certain early warning signals that group victimization is about to occur. Thus, the prevention of such forms of victimization must be developed.” *Id.* at 22–3.

<sup>99</sup> See Bassiouni, *supra* note 51.

<sup>100</sup> JACKSON’S REPORT, *supra* note 21, at 440. Also as one author stated:

This task must, if it is to have permanent value, be performed without any preconceived ideas, in the spirit of law and of justice, which cannot be the task of a single people, or of individual power groups, but it must be the concern of the whole human race.

Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AJIL 224 (1949); see also Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent*, 1 Int’l L.Q. 167 (1947).

duty we also owe to our own humanity and to the prevention of future victimization.<sup>101</sup> To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences. The human underpinning for our commitment to this goal finds expression in the eloquent words of John Donne:

No man is an island, entire of itself; every man is a piece of the continent, a part of the main [ . . . ]. Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee [ . . . ].<sup>102</sup>

Indeed, that is why Pope Paul VI said: "If you want peace, work for justice."<sup>103</sup>

<sup>101</sup> In the classic and profoundly insightful characterization of George Orwell, "Who controls the past, controls the future. Who controls the present, controls the past." Thus, to record the truth, educate the public, preserve the memory, and try the accused, it is possible to prevent abuses in the future. See Stanley Chohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L. & SOC. INQUIRY 7, 49 (1995). See also Bassiouni, *supra* note 92; RATNER & ABRAMS, *supra* note 73; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 3 vols., 1995).

<sup>102</sup> John Donne, *Devotions upon Emergent Occasions* XVII (1624). I quoted these lines in my speech at the ceremony for the opening of signature of the Convention of the Establishment of an ICC, held at "Il Campidoglio" in Rome on July 18, 1998.

<sup>103</sup> Pope Paul VI, Celebration of the World Day of Peace, January 1, 1972, in *WAYS OF PEACE: PAPAL MESSAGES FOR THE WORLD DAYS OF PEACE* (1968–86).

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