Principles of Individual Responsibility for Violations of International Humanitarian Law after the ICTY

This Thesis is submitted in accordance with the requirements of the University of Liverpool for the Degree of Doctor in Philosophy by Ilias Bantekas

1999

Δει τους εν τοις μαθήμασι καταγινόμενους
και τους εν τοις διδασκαλείοις φοιτώντας
τρία ταύτα έχειν,

επί μεν της γνώμης, σωφροσύνην
επί δε της γλώττης, σιγήν
επί δε του προσώπου, αιδώ.

Πλούταρχος

CONTENTS

Acknowledgements

There is no easy way to thank everyone who has supported me financially, physically, emotionally and mentally in my struggle to complete my Doctorate. First of all, the Light that Permeates Creation and Gives Hope and Eternal Life. It is because of Him that I exist, and this work, although important in some way, is a mere speck of dust compared to the Real Knowledge.

I wish, thereafter, to thank my mother and father who have sacrificed their own lives in order to give their children everything in life. For such parents there are no meaningful words of gratitude appropriate enough. I know my father is watching over me with pride from his eternal home.

It is customary for multiple purposes!!! To thank one's supervisor. In my case, this gratitude flows not from the rules of comity (hardly binding under international law!), but rather from the fact he guided me without any of the usual student-supervisor friction (*opinio juris* is much settled on this issue). I have truly benefited from his advice and expertise. However, it was his treating me as a friend and not as a client that was more important. David Turns, co-supervisor of my work, has himself assisted me generously and I am indebted for his continuous support.

This thesis would not have been possible without the generous assistance I received while I was working with the ICTY in The Hague and thereafter upon my return to England. I would particularly wish to thank Mr. Rodney Dixon, William J. Fenrick and Karl Koening, Senior Legal Advisors, Office of the Prosecutor, for their personal assistance, during my work there, as well as with my thesis; collection of material and general advice on international law-related issues. I would also like to thank my good friend and colleague Dr. Danesh Sarooshi (UCL) for his support and encouragement which he displayed throughout and especially in taking time to read my work and make insightful comments. Thanks also to Brian Sheba, Attorney Washington Bar for his help with US law. Thanks for all your emotional support Brian, even though for the past three years our only source of communication has been the internet. Thank you also to Ms Aman Nassar for her kindness and unselfishness. Finally, many thanks to Professor Jon Charney, Editor in Chief of the American Journal of International Law, for his comments and advice on my command responsibility chapters and his belief in my work. Many thanks also to all those who sent me material, translated tonnes of foreign statutes and cases, and took the time to discuss numerous issues arising from this thesis. Their role was paramount in obtaining scarce and inaccessible material; Mr. Mathias Siebert, Legal Advisor OSCE (see you in Kosovo) and Ms Anna-Lena Sjolund, Legal Advisor United Nations OHR.

Finally, but by no means least, all my friends in Liverpool for being there when it all seemed daunting, Dr. Steve (Polski) Terret, Lecturer University of Warsaw, Sotiris, Kostas, Alex, Alamayeuh and Edwin; and my colleagues at Westminster, Mrs. Susan Nash and Dr. John Patterson. LIA GERA ME TSABOUKA!! PAS MI ELLIN VARVAROS. ELA REEEEEEEEEEEEEEEEEE!!!!!!!!!!!!!!!!!!!!!!!!!!!! (Kouroupas kai Zaf kai ta myala sta kangela (brains on the railings). Also many thanks to Haitidis Brothers, 158th km National Road Athens-Lamia for their masterpiece "XAOS".

Abstract

This thesis examines the evolution and current state of international law regarding personal liability for violations of international humanitarian law. It identifies both liability for participation in an inchoate offence, mainly planning or conspiracy, ordering or inciting, hate propaganda and complicity, but it also takes into account liability for omissions recognised in humanitarian law. Hence, the doctrine of command responsibility is analysed and put to the test in relation to the case-law before the ICTY. This analysis has suggested the need for the promulgation of an additional duty, defined herein as a "duty to control".

An assessment of the contemporary law of individual responsibility would not be complete if it failed to take into account the developments since the end of the cold-war. These developments led to an unprecedented international interest and involvement in internal conflicts and have consolidated a norm of criminality irrespective of the nature of the conflict. The process culminating in the creation of this norm has been a unique feature of international co-operation.

The value of international criminalisation and the establishment of two international tribunals and a Permanent International Criminal Court will be greatly enhanced by the formulation of concrete rules. Such rules will also play a deterrent role, but only if they are supplemented with adequate enforcement at the inter-state level.

INTRODUCTION

This study commenced as a result of the author's intention to explore the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). Along the way, an inextricable link was discovered between the proceedings in the Hague and judicial proceedings in criminal courts and tribunals across the world, in that they seemed to supplement each other in enforcing and galvanising established norms. These were also tied to non-judicial processes taking place at both an international institutional level and at the national legislative or executive level. This has gradually led to a criminalisation of international law.

This study examines the criminal elements of international humanitarian law, by tracing historical development and assessing the current state of the law. However, international law lacks a law-making institution, functioning on a horizontal scale of power. Perhaps this is the only solid premise of the science of international law, since not even the rule of consent is absolute in this fluid state of affairs. This necessarily entails a strong appreciation of the sources of international law before endeavouring a description of the law. This study shows, for example, that national judgements and legislation were in some cases as conclusive to creating customary law as has been the consolidation of treaty and state practice combined.

Chapter 1 examines the historical evolution of punishment in warfare and traces early attempts at international codification and enforcement of what was by the early twentieth century an exclusive domestic affair. These fundamental *jus in bello* principles are identified for the purposes of this study. It is, however, the criminal nature of these principles that is of relevance in Chapter 1, since we have endeavoured to identify the rationale and causes of international criminalisation of

the laws of war. The culmination of this attempt concerns the processes through which a legal rule becomes custom; in this case, the international law of non-international armed conflicts and its enforcement in international and national *fora*. As is apparent, this process involves a variety of sources. . Since prosecutorial efforts were first commenced before national tribunals, rather than international ones, and because national criminal law is coherent, it is this body of law that still dominates the international criminal justice system. Nonetheless, because international criminal law is a distinct legal science from its domestic counterpart, it is interesting to view the merging of the two in national and international litigation.

Chapter 2 describes all those forms of personal participation in violations of humanitarian law which are recognised in the major international instruments. These are derived from national concepts. Their adoption in international law has gradually shaped them into creatures distinct from their original predecessors. Hence, is the notion of planning distinct from the notion of conspiracy, and is the latter defined in terms of its common law equivalent? Similarly, is conspiracy under the Genocide Convention a concept applicable to other international offences? Another form of individual responsibility flows from directing others to commit offences, through ordering. Incitement, too, incurs criminal liability and was a major tool in both the Bosnian and Rwandan wars. Related, too, is the concept of hate propaganda. The possibilities of framing such a charge under international law are examined in detail. Finally, complicity in *jus in bello* violations is derived from general principles of criminal law and its more contemporary elements are discerned.

Chapter 3 traces the rules according to which a court may determine whether an individual exercises command functions, in order to apply the doctrine of command responsibility. We argue that superior status is not determined solely from

official appointment, *de jure* command, it is also derived from actual and effective control over subordinates, *de facto* control. This entails a thorough examination of the concept of control and the superior-subordinate relationship contained therein. The Chapter concludes by analysing a set of evidentiary rules through which *de facto* command may be sufficiently discerned.

Chapter 4 explores the foundations of the doctrine of command responsibility and the ambit of its application in contemporary international criminal prosecutions. This entails proof of a duty prescribed by law, whether customary or treaty, since under general principles of criminal law, liability for omissions should be based on a duty to act. Having ascertained the existence of a duty, it is imperative we establish the content of the duties incumbent upon superiors and the action prescribed therein. We have also had to consider whether a superiors duty to act is the same in the context of every type of military or civilian command available. The final issue considered in this Chapter is that of the standard of knowledge required by the doctrine of command responsibility. Does actual knowledge suffice, or does international law provide for a presumption of knowledge under specific circumstances?

Chapter 5 examines the evolution of the doctrine of individual responsibility in the context of non-international armed conflicts. To fully comprehend this concept, the nature of internal conflicts has to be understood in its post-UN Charter era. The classification of contemporary mixed conflicts is considered in the first part of Chapter 5, and particularly the distinction between insurgency and belligerency, the effects of external intervention in internal conflicts, and the role of national and international tribunals and of the Security Council in determining the nature of mixed conflicts. The effect of all these factors explains, in

part, the gradual erosion of article 2(7) of the UN Charter on domestic jurisdiction with regard to human rights and humanitarian law. Hence, the international criminalisation of offences committed in non-international conflicts is premised on these developments, which in turn is the result of inter-state consent since the creation of the International Criminal Tribunal for the former Yugoslavia.

TABLE OF CASES

European Court and Commission of Human Rights

Akdivar et al v. Turkey, 23 EHRR 143 (1997)
Ergi v. Turkey (Preliminary Objections Judgment, 28 July 1998), unreported
Glimmerveen et al v. Netherlands, 18 DR 187 (1979)
Ireland v. United Kingdom, Eur.Ct.HR, Ser. A, No. 25 (1978)
Jersild v. Denmark, Eur.Ct.HR Ser. A, No. 298 (1995)
Marckx case, Eur.Ct.HR, Ser. A, No. 31 (1979)
Tyrer case, Eur.Ct.HR, Ser. A, No. 26 (1978)
Soering v. UK, Eur.Ct.HR Ser. A. No. 161 (1989)
X v. Federal Republic of Germany, 6 DR 114 (1977)

European Court of Justice

Commission v. Council (Re ERTA), [1971] ECR 263
Hoogovens v. High Authority, [1962] ECR 253
IBM v. Commission, [1981] ECR 2639
Marleasing SA v. La Comercial Internacionale de Alimentation SA, [1990] ECR I-4135
N. V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1
Portuguese Republic v. Council, [1996] ECR I- 6177
Van Colson and Kamann v. Land Nordheim- Westfalen, [1984] ECR 1891

Inter-American Court and Commission of Human Rights

Advisory Opinion OC-2/82 (24 Sept. 1982) *Re Effect of Reservations on the Entry into Force of the American Convention*, Ann. R. I/A CHR (1982), 22 ILM 37 (1983)
Advisory Opinion OC-3/83, (8 Sept. 1983) *Re Restrictions to the Death Penalty*, Ann. R. I/A CHR (1983), 23 ILM 320 (1984)
Advisory Opinion OC-14/94 (9 Dec. 1994) *Re International Responsibility for the Promulgation & Enforcement of the Laws in Violation of the Convention*, Ann. R. I/A CHR (1995), 34 ILM 1188 (1995)
Tablada case, I/ACommision HR Report No. 55/97
Velasquez Rodriguez Case, I/A Court HR, (Merits), Judgment of 29 July 1988, 95 ILR 232 (1994)

Human Rights Committee

General Comment No. 20, UN Doc. CCPR/C/21/Rev.1/Add. 3 (7 Apr. 1992)
General Comment No. 24, 107 ILR 64 (1997)

Leipzig Trials

Dover Castle case, 16 AJIL 704 (1922)
Llandovery Castle case, 16 AJIL 708 (1922)
Trial of Emil Mueller, 16 AJIL 684 (1922)
Trial of Karl Heynen, 16 AJIL 674 (1922)

WW II Military Tribunals

Abbaye Ardenne case, LRTWC vol. IV, at 97
Almelo case, LRTWC vol. I, at 35
Belsen Trial, LRTWC vol. II, at 1
Doctors case, LRTWC vol. VII, at 11
Dostler case, LRTWC vol. I, at 22
Einsatzgruppen case, TWC vol. IV, at 21
Essen Lynching case, LRTWC vol. I, at 88
Fulriede case, AD 549 (1949)
Flick case, LRTWC vol. IX, at 1
Hechingen Deportation case, (unreported)
Heering case, LRTWC vol. XI,at 79
High Command case, LRTWC vol. XII, at 1
Hostages case, LRTWC vol. VIII, at 34
IG Farben case, LRTWC vol. X, at 1
Isayama case, LRTWC vol. V, at 60
Jaluit Atoll case, LRTWC vol. I, at 71
Jepsen case, (unreported)
Justice case, LRTWC vol. VI, at 1
Krupp case, LRTWC vol. X, at 69
Kudo case, (unreported)
Masao Baba case, LRTWC vol. XI, 56
Medical case, TWC vol. IV, at 212
Ministries case, TWC vols. XII-XIV
Pohl case, TWC vol. V, at 49
Roechling Enterprises case, TWC vol. XIV, at 1097
Sadaiche Trial, (unreported)
Tokyo Trials, PRITCHARD & MAGBANUA, 22 vols.
Trial of Major War Criminals, UN War Crimes Commission (1946), vols. 1-22
Trial of Awochi, LRTWC vol. VIII, at 122
Trial of Becker, Weber et al, LRTWC vol. VII, at 67
Trial of Falkenhorst, LRTWC vol. XI, at 18
Trial of Golkel et al, LRTWC vol. V, at 45
Trial of Greiser, LRTWC vol. XIII, at 70
Trial of Rauer et al, LRTWC vol. IV, at 113
Trial of Rauter, LRTWC vol. XIV, at 89
Trial of Rohde et al, LRTWC vol. V, at 54
Trials of Mueller & Brauer, (Athens, unreported)
Trial of Sakai, LRTWC vol. XIV, at 1
Trial of Schonfeld et al, LRTWC vol. XI, at 64

Trial of Stadelhofer, TWC vol. VI, at 1
Trial of Koshiro, LRTWC vol. XI, at 1
Trial of Wagner et al, LRTWC vol. III, at 23
*Trial of Weiss et al (*Dachau camp case), LRTWC vol. XI, at 5
Wickman case, (unreported)
Woechler case, TWC vol. XII, at 113
Yamasaki case, (unreported)
Yamashita case, LRTWC vol. IV, at 1
Zyklon B case, LRTWC vol. I, at 93

Various International Tribunals

AMCO v. Republic of Indonesia, 89 ILR 366 (1992)
Arbitration Commission of the European Conference on Yugoslavia
Opinion No. 1, 92 ILR 162 (1993)
Opinion No. 11, 32 ILM 1587 (1993)

Breisach Trial (1474)
French-Italian Conciliation Commission Judgment (1952), 13 UN RIAA, at 398
Mexican-USA Claims Arbitrations of 1868
Sewall Prize Claim (The William P. Faye- 1926), 7 RIAA 311 (1924)
The Kim (No. 1), P. 215 [1915]
Trial of William Wallace (1305)
Venezuelan Arbitrations of 1903, concentrated *in* UN RIAA vols. 9 & 10.

ICTY

Prosecutor v. Blaskic, 1) Decision on Failure to Punish Liability (unreported)
2) Appeals Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997, 1 10 ILR 607 (1998)
Prosecutor v. Tadic, 1) Interlocutory Appeals Decision on Jurisdiction, 105 ILR 453 (1997)
2)Opinion and Judgment, 36 ILM 908 (1997)
3)Decision on the Application of the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Dusko Tadic, 101 ILR 1 (1995)
4) Decision on the Defence Motion to Protect Defence Witnesses (16 Aug. 1996), unreported
5) Decision on Protective Measures for Victims and Witnesses, 105 ILR 599 (1997)
Prosecutor v. Furundzija, Judgment of 10 Dec. 1998, 38 ILM 317 (1999)
Prosecutor v. Martic, Rule 61 Decision, 108 ILR 39 (1998)
Prosecutor v. Erdemovic, Sentencing Judgment(29 Nov. 1996), 108 ILR 180 (1998)
Appeals Judgment, 92 AJIL 282 (1998)
Prosecutor v. Gagovic, Indictment (unreported)
Prosecutor v. Delalic et al (Celebici case), Judgment (16 Nov. 1998), 38 ILM 57

(1998)
Prosecutor v. Karadzic and Mladic, Rule 61 Decision, 108 ILR 86 (1998)
Prosecutor v. Kovacevic, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 (2 July 1998) unreported
Prosecutor v. Mrksic et al (Vukovar Hospital case), Rule 61 Decision, 108 ILR 53 (1998)
Prosecutor v. Rajic, Rule 61 Decision, 108 ILR 141 (1998)
Prosecutor v. Nikolic, Rule 61 Decision, 108 ILR 21 (1998)

ICTR

Prosecutor v. Akayesu, Judgment (2 Sep. 1998), 37 ILM 1399 (1998)
Prosecutor v. Kanyabashi, Decision on Jurisdiction, 92 AJIL 66 (1998)
Prosecutor v. Kambanda, 10 RADIC 836 (1998), & 37 ILM 1411 (1998)

TABLES OF NATIONAL CASES

Australia

Giorgianni v. R., (1985) 156 CLR 473
Proudman v. Dayman, (1941) 67 CLR 536

Belgium

Ministere Public v. Marchal Luc, 36 REV. DR. MIL. DR. GUERRE 85 (1997)

Bosnia and Herzegovina

Prosecutor v. Cancar, (1998, unreported)
Prosecutor v. Pasalic, (1996, unreported)

Canada

Equizabal v. MEI, [1994] FC No. 807
R v. City of Sault Ste Marie, (1988) 45 CCC (3d) 5
R v. Finta, 1 SCR 837 (1994), & 104 ILR 284 (1997)
R. v. Keegstra, (1990) 3 SCR 697
Ramirez v. Canada (Minister of Employment & Immigration, MEI), [1992]1FC 653

Colombia

Constitutional Court Judgment (case name unknown),*No. C-574/92*, unreported
Constitutional Court Judgment (case name unknown),*No. C-225/95*, unreported

Denmark

Prosecutor v. Saric, (unreported)

Federal Republic of Germany

Cases of Albrecht, Kebler & Streletz, 18 HRLJ 65 (1997)
Honecker Prosecution case, 80 ILR 36 (1984); 100 ILR 393 (1995)
Pig-cart parade case, gegen Lua StS 37/48 (Entscheidungen, vol. I)
Public Prosecutor v. Djajic, 92 AJIL 528 (1998)
Synagogue case, gegen K. & A. StS 18/48 (Entscheidungen, vol. I)

France

Barbie case (First case), 78 ILR 124 (1988)
Barbie case (Second case), 100 ILR 330 (1995)
(Case name unknown), Court of Cassation, Judgment of 2 Feb. 1950, Bull. Crim. No. 38
Javor et al v. X, (1996, unreported)
Touvier case, 100 ILR 337 (1995)

Greece

Prefecture of Voiotia v. FRG, 92 AJIL 765 (1998)

Hungary

Decision of the Constitutional Court, No. 5311993 (X. 13) AB, (unreported)
Decision of the Constitutional Court, No. 3611996 (IX.4) AB, (unreported)

Israel

Eichmann v. Attorney General of the Government of Israel, 36 ILR 497 (1968)
Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (Kahan Commission Report), 22 ILM 473 (1983)

Netherlands

Supreme Court Decision of 11 Nov. 1997, (unreported)

Republic of South Aftica

Azanian Peoples Organisation v. President of RSA, 91 AJIL 360 (1997)

Switzerland

Public Prosecutor v. Grabec (Re G), 92 AJIL 78 (1998)

United Kingdom

Al Adsani v. Government of Kuwait, 107 ILR 536 (1996)
Attorney General's Reference (No. 1 of 1975), [1975] 2 All ER 687
Allen v. Whitehead, [1930] 1 KB 211
Anderson, [1985] 2 All ER 961
Arthur, (1981) 12 BMLR 1
Atkinson, (1869) 11 Cox CC 330
Brown, (1841) Car & M 314
Calhaem, [1985] 2 All ER 269
Clarkson, [1971] 3 All ER 344
Coney, (1882) 8 QBD 534
Curr, [1968] 2 QB 944
Director PublicProsecutions for Northem Ireland v. Maxwell, [1978] 3 All ER 1140
Gibbins and Proctor, (1918) 13 Cr. App. R. 134
Jefferson, [1994] 1 All ER 270
Miller, [1983] 1 All ER 978
Most, (1881) 7 QBD 244
Nedrick, [1986] 3 All ER 1
Phillips, (1987) Cr. App. R. 18
Pitwood, (1902) 19 TLR 37
R v. J. F. Alford Transport Ltd., [1997] Crim. L. R. 745
R v. Stone and Dobinson, [1977] 2 All ER 341

USA

State v. Homer, 103 SE 2d 694 (1958)
State v. Lord, 84 P. 2d. 80 (1938)
State v. Parker, 164 NW. 2d. 633 (1969)
State v. Scott, 68 A. 2d 258 (1907)
Underhill v. Hernandez, 168 US 250 (1897)
USA v. Eberhardt, 417 F. 2d. 1009 (1969)
USA v. Goldman, (Courts Martial, *reported* by Bassiouni)
USA v. Kairys, 782 F. 2d. 1374, *cert. denied*, 476 US 1153 (1986)
USA v. Keenan, 14 CMR 742 (1954)
USA v. Kowalchuk, 773 F. 2d. 488 (1985)
USA v. Linnas, 527 F. Supp. 426 (1981)
USA v. Medina, CM 427162, ACMR (1971)
USA v. Noriega, 746 F. Supp. 1506 (1990)
USA v. Osidach, 513 F. Supp. 51 (1981)
USA v. Parfait Powder Puff Co., 163 F. 2d. 1008 (1947)
USA v. Park, 421 US 671 (1974)
USA v. Smith, 13 USCMA 105 (1962)
USA v. Waluski, 6 USCMA 724, 21 CMR 46 (1956)
USA v. Wirz, (Andersonville camp case) HR Exec. Doc. No. 23, 40th Cong. 2d. sess., 1867-68, vol. 8
Workman v. State, 21 NE. 2d. 712 (1939)

TABLE OF NATIONAL LEGISLATION

Canada

1946	War Crimes Regulations	art. 10(4)
	Schedule to War Crimes Act	
1965	Geneva Conventions Act	
1988	Law of Armed Conflict Manual	paras. 1701-1704
	Criminal Code (date unknown)	sec. 318
		sec. 318(l)
		sec. 319
		sec. 319(l)
		sec. 319(2)

Czechoslovakia

1945	Decree No. 16 of the President of the Republic	
1945	Decree No. 33 of the Slovak National Council	
1946	Law No. 22 of the Provisional National Assembly	
1946	Law No. 245 of the Constituent National Assembly	
1946	Decree No. 57 of the Slovak National Council	

China

1946	Law Governing the Trial of War Criminals	art. 11

Croatia

1991	Presidential Decree	arts. 4-6

Denmark

1946	(War Crimes) Law	art. 1
		art. 1(2)
	Penal Code (date unknown)	
	Military Discipline Act (date unknown)	art. 25

Ethiopia

	Penal Code (date unknown)	arts. 281-295

Federal Republic of Germany

1992	Manual of Humanitarian Law	para. 1209
		para. 1213
		art. 138
	Penal Code (date unknown)	art. 6
		art. 6(9)
		art. 89
		art. 248
		art. 257
		art. 759

1991	Criminal Law in Wartime Act	art. 1(3)
	Criminal Code (date unknown)	art. 12 art. 46 art. 46(a) art. 47 art. 134
	Military Criminal Code (date unknown)	art. 147 art. 148 art. 150 art. 150(l) art. 150(2)

New Zealand

1995	International War Crimes Tribunal Act, No. 27	

Nigeria

	Criminal Code (date unknown)	sec. 7

Norway

	Constitution (date unknown)	art. 96
1946	Punishment of Foreign War Criminals Law	art. 1 art. 2
1994	Chemical Weapons Act	sec. 1
	Penal Code (date unknown)	
	Military Penal Code (date unknown)	sec. 65 sec. 77 sec. 78 sec. 108

Russia

1996	Penal Code	art. 12 art. 17 art. 356

Rwanda

1978	Penal Code	art. 91

Slovenia

1994	Penal Code	art. 373 art. 378(4)

Spain

1985	Law on Judiciary	art. 23(4)
1995	Penal Code	art. 608

Sweden

1621	Articles of Military Laws	art. 46

TABLE OF TREATIES

1966 International Covenant on Civil and Political Rights, *999 UNTS 171*
art. 7
art. 14
art. 15(2)
art. 20(2)
International Convention for the Elimination of All Forms of Racial Discrimination, *660 UNTS 195*
art. 4
1969 American Convention on Human Rights, *9 ILM (1970)*
art. 13 (5)
1969 Vienna Convention on the Law of Treaties, *1155 UNTS 331*
art. 2(a)
art. 5
art. 31
art. 31(1)
art. 32
art. 33(4)
art. 3 8
1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 10 ILM 133 (1971)
art. 7
1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 10 ILM 1151 (1971)
art. 5 (2)
art. 7
1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, *13 ILM 50 (1974)*
1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS (1979) 3-608
art. l(l)
art. 1(2)
art. 1(4)
art. 10
art. 20
art. 35
art. 37
art. 40
art. 41
art. 48
art. 49
art. 50(4)
art. 51 (6)
art. 52
art. 56
art. 57
art. 57(3)
art. 85(4)(b)
art. 86
art. 86(1)
art. 86(2)
art. 87
art. 87(1)
art. 87(2)
art. 90

cont. ICC Statute 1998

art. 12(l)
art. 12(2)
art. 13(a)
art. 13(b)
art. 13(c)
art. 14(2)
art. 15(2)
art. 16
art. 17(l)
art. 17(2)
art. 18
art. 21(c)
art. 25
art. 25(3)(b)
art. 25(3)(c)
art. 25(3)(d)
art. 28(l)(a)
art. 28(2)
art. 30
art. 31(D)
art. 58
art. 79
art. 86
art. 87(1)
art. 87(2)
art. 87(5)
art. 87(6)
art. 87(7)
art. 89
art. 93(4)
art. 120
art. 121
art. 123

MISCELLANEOUS DOCUMENTS

ABBREVIATIONS

ABiH	Armed Forces of the Republic of Bosnia and Herzegovina
AD	*Annual Digest of Public International Law Cases*
AJIL	*American Journal of International Law*
AKRON L. REV.	*Akron Law Review*
AFR. J. INT'L. & COMP. L.	*African Journal of International & Comparative Law*
All ER	*All England Reports*
AM. INT'L. L. CAS.	*American International Law Cases*
AM. UNIV. L. REV.	*American University Law Review*
AM. UNIV. J. INT'L. L. & POL'Y	*American University Journal of International Law and Policy*
ANN. CHIN. SOC. INT'L. L.	*Annals of the Chinese Society of International Law*
ANN. REP. IA CT. HUM. RTS.	*Annual Report of the Inter-American Committee of Human Rights*
BiH	Republic of Bosnia and Herzegovina
BMLR	*Butterworth's Medico-Legal Reports*
Br.B	Swedish Penal Code
Bull. Crim.	*Bulletin Criminelle*
BYBIL	*British Yearbook of International Law*
CAL. L. REV.	*California Law Review*
CASE W. RES. J. INT'L. L.	*Case Western Reserve Journal of International Law*
CCC	*Canadian Criminal Cases*
CCL 10	Control Council Law No. IO for Germany
CCW	Convention on Certain Conventional Weapons
CDDH	Conference Diplomatique Droit Humanitaire
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CJTF	Combined Joint Task Force
CLR	*Commonwealth Law Reports*
Cmd.	Command Papers (UK)
CMLR	*Common Market Law Review*
CMR	*Courts Martial Reports* (USA)
Cox C. C.	*Cox Criminal Cases*
CP	Code Penale (Francaise)
CPM	Code Penal Militaire (Swiss)
Cr. App. R.	*Criminal Appeals Report*
Crim. L. R.	*Criminal Law Review*
CSCE	Conference on the Security and Cooperation in Europe
CYBIL	*Canadian Yearbook of International Law*
DICK. J. INT'L. L.	*Dickinson Journal of International Law*
DPP (NI)	Director of Public Prosecutions for Northern Ireland
DR	*Decisions and Reports of the European Commission of Human Rights*
DUKE J. COMP. & INT'L. L.	*Duke Journal of International and Comparative Law*
E.Ct.H.R	European Court of Human Rights
Eur.Comm.HR	European Commission on Human Rights

Eur.Ct.HR Ser.	*European Court of Human Rights, Decisions and Judgments, Series A & B*
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EC	European Community
ECJ	European Court of Justice
ECMM	European Community Monitoring Mission
ECR	European Court Reports
EEC	European Economic Community
EHRR	*European Human Rights Reports*
EJIL	*European Journal of International Law*
EMORY INT'L. L. REV.	*Emory International Law Review*
ESCOR	Economic and Social Council Official Records
EUR. J. CRIM. L. & CRIM. JUS.	*European Journal of Criminal Law and Criminal Justice*
F. 2d.	Federal Reporter (Second Series)
FC	*Federal Court* (Canada)
FCJ	*Federal Court Judgments* (Canada)
FM	Field Manual (USA)
FMLN	Farabudo Marti Liberation Army
FRG	Federal Republic of Germany
F. Supp.	Federal Supplement
GDR	German Democratic Republic
HARV. J. INT'L. L.	*Harvard Journal of International Law*
HQ	Headquarters
HRCee	Human Rights Committee
HRLJ	*Human Rights Law Journal*
HRQ	*Human Rights Quarterly*
HVO	Croatian Defence Council
I/A Comm. H.R.	Inter-American Commission of Human Rights
I/A Court H.R.	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC Prep-Com	International Criminal Court Preparatory Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ REP.	*International Court of Justice Reports*
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ICRC COMMENTARY	International Committee of the Red Cross Commentary to the 1977 Additional Protocols
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
INT'L. J. REF. L.	*International Journal of Refugee Law*
ILC	International Law Commission
ILM	*International Legal Materials*
ILR	*International Law Reports*
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East
IND. J. INT'L. L.	*Indian Journal of International Law*
INS	Immigration and Naturalisation Services (Canada)

INT'L. GENEVA Y'BOOK	*International Geneva Yearbook*
INT'L. LAWYER	*International Lawyer*
INT'L. REV. RED CROSS	*International Review of the Red Cross*
ISR. Y. B. HUM. RTS.	*International Yearbook of Human Rights*
J. INT'L. L. & PRAC.	*Journal of International Law and Practice*
JNA	Yugoslav National Army (SFRY)
J. PUB. L.	*Journal of Public Law (USA)*
J. TRANS. L. & POL.	*Journal of Transnational Law and Policy*
KB	*King's Bench Reports*
LNTS	League of Nations Treaty Series
LRTWC	*Law Reports of Trials of War Criminals*
LS	*Oxford Journal of Legal Studies*
MEI	Minister for Employment and Immigration
MICH. J. INT'L. L.	*Michigan Journal of International Law*
MICH. L. REV.	*Michigan Law Review*
MIL. L. REV.	*Military Law Review*
MLR	*Modern Law Review*
MUP	Republic of Bosnia & Herzegovina Military Police
NATO	North Atlantic Treaty Organisation
NAV. W. C. REV.	*Naval War College Review*
NILR	*Netherlands International Law Review*
N.Y. Supp.	New York Supplement Reporter (USA)
NZLJ	*New Zealand Law Journal*
OJ	Official Journal
OSCE	Organisation for Security and Co-operation in Europe
P.	Probate, Divorce and Admiralty Reports (UK)
PACE INT'L. L. REV.	*Pace International Law Review*
PCIJ	Permanent Court of International Justice
PCIJ REP.	*Permanent Court of International Justice Reports*
PKK	Kurdistan Workers' Party
POW	Prisoners of War
QB	*Queen's Bench Reports (UK)*
QBD	*Queen's Bench Divisional Courts Reports*
RADIC	*Revue Africaine du Droit Intemational et Compare*
REV. DR. MIL. DR. GUERRE	*Revue Droit Militaire et du Droit de la Guerre*
REV. BEL. DR. INT'L.	*Revue Belge du Droit Intemational*
RHDI	*Revue Hellenique Droit Intemational*
RIAA	United Nations Reports of International Arbitral Awards
RPF	Rwandan Patriotic Front
RS	Republika Srpska
RSA	Republic of South Africa
RTB	Radio Television Belgrade
RTS	Radio Television Serbia
RUT. CAM. L. J.	*Rutgers Camden Law Journal*
SCJ	Supreme Court Judgments (Canada)
SCR	*Canada Law Reports, Supreme Court*
S.Ct.	Supreme Court Recorder (USA)
SDS	(Bosnian) Serb Democratic Party
S.E. 2d.	Southeastern Reporter, Second Series (USA)

SFRY	Socialist Federal Republic of Yugoslavia
S.I.	Statutory Instrument (UK)
So	Southern Reporter (USA)
S/RES	Security Council Resolution
Stat.	United States Statutes at Large
St.GB	German Penal Code
TEMP. INT'L. & COMP. L. J.	*Temple International and Comparative Law Journal*
TEU	Treaty on European Union
TEX. INT'L. L. J.	*Texas International Law Journal*
TEX. L. REV.	*Texas Law Review*
TG1	Tactical Group 1 (BiH Army)
TLR	*Times Law Reports*
TRANS. L & CONT. PROB.	*Transnational Law and Contemporary Problems*
T.S	Treaty Series
TUL. L. REV.	*Tulane Law Review*
TWC	*Trials of War Criminals (Reports)*
UCMJ	Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNFICYP	United Nations Force in Cyprus
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNIV. RICH. L. REV.	*University of Richmond Law Review*
UNOSOM	United Nations Operation (Force) in Somalia
UNTS	United Nations Treaty Series
US	United States Reports of the Supreme Court
USLW	United States Law Weekly
USSR	Union of Soviet Socialist Republics
USCMA	United States Courts Martial Appeals
UST	United States Treaties
VALPARAISO U. L. REV.	*Valparaiso University Law Review*
VANDERBILT J. TRANS. L.	*Vanderbilt Journal of Transnational Law*
VJ	Army of the Federal Republic of Yugoslavia
VRS	Bosnian (Serb) Republic Army
WEU	Western European Union
WLR	*Weekly Law Reports*
WWI	World War I
Y.B. INT'L. L. COMM.	*Yearbook International Law Commission*
YALE L. J.	*Yale Law Journal*

CHAPTER I

Punishment in Warfare and the Application of Law

Introduction

Chapter I examines the nature of sanctions applied by nations since antiquity to punish violations of the laws of war. In this regard, it seeks to see how these sanctions became part of customary and treaty law and the way in which individual nations enforced them against offenders. This process inevitably involves an elaboration of the cardinal principles of humanitarian law and the methods through which they evolve into the sphere of customary law. This takes into account the difference in state practice and *opinio juris* required to develop generally rules in the various fields of international law, from those needed in the realm of humanitarian law.

This Chapter explores also the criminal proceedings against persons accused of breaching the laws of war at the national and international level. This analysis seeks to see whether national law has any relevance in international criminal litigation and vice versa. Furthermore, it looks to ascertain the development of international law in its protection of human rights through the imposition of sanctions and the role of national bodies and the Security Council in expanding criminal jurisdiction.

1.1.0 PUNISHMENT IN WARFARE

1.1 *Brief historical survey*

The history of mankind is rich with an abundance of wars, since the time man has been able of organising himself into fighting units against an adversary force.[1] The spark which triggered these wars was inflamed through diverse circumstances, such as hegemonic ambition, territorial expansion, or simply commercial reasons. Based on the frequency of such conflicts, one cannot but be drawn to Clausewitz's assumption that war is a continuation of politics, albeit with other means.[2] However, even though international law only very recently sanctioned the resort to war, other than self-defence, the family of nations has, nonetheless, since antiquity attempted to regulate personal conduct in warfare.[3]

The earliest recorded writings on strategical warfare are those of the Chinese writer Sun Tzu in the sixth century B.C, in his work *The Art of War*. Despite the prescription of numerous humanitarian limitations imposed both on high and low

---

[1] GEOFFREY BEST, WAR AND LAW SINCE 1945, 14 (1997).

[2] CARL VON CLAUSEWITZ, ON WAR (Von Kriege, 1832), (Penguin 1992). Indeed, before the 1648 Peace Treaty of Westphalia, force was the primary method of resolving disputes between states, LESLIE C. GREEN, ESSAYS ON THE MODERN LAWS OF WAR, 15 (1984).

[3] The international legal principle *inter armas silent leges* was never consistently enforced. EMMANUEL ROUKOUNAS, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, 311 (Estia Publishers, Athens, Greek text, 1995); *see* also BEST, *supra* note 1, who points to religion and the preference for non-devastated conquered lands, as a sample of reasons for ancient limitation in warfare, at 1, 15, 25.

ranking belligerents, McCormack rightly argues that there is nothing in Tzu's writings "to suggest a conviction on his part that the limitations he prescribed formed part of a body of law or morality binding on those engaged in armed conflict".[4] Although no such binding laws emanated until about 200 B.C, with the advent of the Code of Manu, ancient states and especially ancient Greeks tried and punished, albeit in inconsistent terms, combatants who treacherously inflicted unnecessary pain or took the life of enemy combatants incapacitated from battle.[5] The Ancient Greeks furthermore condemned the plunder of enemy corpses and the devastation of civilian dwellings.[6] Romans, too, discerned between laws applicable both in time of war and peace and punished severely acts of treachery.[7]

With the promulgation of the Hindu Code of Manu, the vague limitations already recognised in ancient warfare found refuge in written form.[8] This Code prohibited two broad methods of warfare: the use of treacherous weapons and the killing or injuring of those *hors de combat*. Violations of these norms were to be

---

[4] TIMOTHY L. H. MCCORMACK & GERRY J. SIMPSON (eds.), THE LAW OF WAR CRIMES. NATIONAL AND INTERNATIONAL APPROACHES, 33 (1997).

[5] *Ibid*, at 33-35. McCormack cites the trial of Athenian Naval Commander Philocles in 405 B.C who was tried by a multi-national tribunal convened by the Spartan General Lysander, because the former had brutally murdered surrendered Spartan prisoners. Such humanitarian concerns were discussed by Plato in his *Republic*, in relation to excesses in the twenty-four year war between Athens and Sparta.

[6] PLATO, THE REPUBLIC, Translation by Desmond Lee, 197-99 (Penguin, 1987).

[7] CHRISTOPHER PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, 231-32 (191 1), citing Livy and Cicero.

[8] Round about this time, in 257 BC, Emperor Asoka promulgated his "Law of Piety" which contained a great number of humanitarian provisions, as well as a prohibition to the resort to war, *see* George I. Draper, *The Contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal*

adjudicated before courts of law or *ad hoc* military tribunals.[9] Likewise, the Code of Bushido prescribed capital penalties for mistreatment of prisoners of war.[10] Later Roman legislation further added, to obligations arising from the laws of war, the civil liability of its violators. Both the *Strategica* (6th century A.D) and the *Ruffo Leges Militares*, which were compilations of laws containing accepted prescriptions and penalties, recognised the criminal liability of those combatants violating their provisions.[11] Islamic practice, as prescribed in the *Sharia*, since 623 AD, and recorded in the teachings of the eighteenth century scholar Shabayani, condemned certain *jus in bello* violations.[12] There, too, a code of conduct was set out for the jihadist (holy warrior), the violation of which incurred corporal or capital punishment.[13] In turn, the Catholic Church attempted to regulate the conduct of war during the period of the Crusades through several of its Councils. These, also, prohibited the use of certain weapons and sought to protect civilians and those *hors*

---

in Warfare, 305 INT'L. REV. RED. CROSS 192 (1995).

[9] MCCORMACK & SIMPSON, *supra* note 4, at 35.

[10] Sixteenth century B.C, LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT, 277 (1993).

[11] MCCORMACK & SIMPSON, *supra* note 4, at 35, 36. Liability was recognised for outrages upon civilians, including rape and theft, and provocation of the enemy.

[12] CHERIF M. BASSIOUNI (ed.), INTERNATIONAL CRIMINAL LAW, vol. I, 201 (I'ransnational Publishers 1986).

[13] While Muslims were under a legal obligation to respect the rights of non-Muslims, both combatants and civilians, they were allowed, if it was advantageous to kill a prisoner. Under the same circumstances it was permitted to burn an inhabited city. These measures, though, seem to have been

de combat.[14] In African societies, too, before and after the advent of Islam, humanitarian norms were established through custom and sanctions were prescribed.[15] It is evident, hence, that in the majority of ancient societies this elementary *jus in bello* was endowed with a criminal nature, which at times was justiciable before local courts.

By the late thirteenth century a code of behavior between knights had been established, the violation of which brought the culprit before special courts of chivalry, which frequently sentenced the accused to dishonor or death.[16] The first recorded international trial, however, for war crimes is that of Peter von Hagenbach in 1474 at Breisach in Austria, for the atrocities committed by his troops in their attempt to subjugate the city of Breisach. Although arraigned and tried by a multi-state tribunal,[17] and convicted of crimes such as rape, perjury and murder against the

---

allowed only as a means of last resort, GREEN, *supra* note 10, at 20-21; *see* also Karima Bennoune, *As-Salamu-Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L. L. 605 (1994).

[14] BASSIOUNI, INTERNATIONAL CRIMINAL LAW, vol. 1, *supra* note 12, at 201; especially with the Second Lateral Council of 1139 and later with the *Corpus Juris Canonici* in 1500, *see* Gerard I. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 3 INT'L. REV. RED CROSS 19 (1965).

[15] *See* Ly Djibril, *The Bases of Humanitarian Thought in the Pulaar Society of Mauritania and Senegal*, 325 INT'L. REV. RED CROSS 643 (1998); Yolande Diallo, *Humanitarian Law and Traditional African Law*, 179 INT'L. REV. RED CROSS 57 (1976).

[16] MICHAEL H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES, chps. 2 and 3 (1965).

[17] Whereas an ordinary trial would have taken place in a local court, the Allies agreed on an *ad hoc* tribunal consisting of twenty-eight judges from the Allied towns. This notwithstanding, Schwarzenberger doubted whether that tribunal could have been described as an international one, since that would have depended on the date of secession of the Swiss Confederation from the Holy

"laws of God", it has been argued that since at the time a state of war did not exist, the crimes committed cannot be said to constitute war crimes, at least in the contemporary sense.[18] Schwarzenberger contended, nonetheless, that the occupation itself was a military one, recognising thus the existence of a state of war.[19] Despite this and a handful of other trials concerning offences perpetrated during armed conflict, the accused were arraigned and held liable for crimes defined under provisions of national criminal law which was reserved for similar domestic offences. However, it was evident that a corpus of law had emerged since antiquity which, although not international *per se*, transcended national borders establishing a set of minimum binding limitations in warfare.[20] McCoubrey points out that these ideas of humanitarianism in armed conflict have an ancient history which "reflects the basic tension between the innate savagery of combat and the humanitarian inclinations of general human relations".[21]

From the sources revealed so far, this body of law seems to have had the following features:

Roman Empire, GEORGE SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED IN COURTS AND TRIBUNALS (Armed Conflicts), 463 (1968).

[18] *Ibid*, at 465.

[19] *Ibid*, at 466. This would be the case if one were to apply retrospectively the rule found in art. 2(1) of the Geneva Conventions (1949).

[20] ROUKOUNAS, *supra* note 3, at 311 notes, however, that Grotius in his *De Jure Belli ac Pacis*, emphasised expressly that civilians and their property did not enjoy any protection from the excesses of war.

[21] HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW, 6 (1990). This is well reflected in the Old Testament, Book of Numbers, 31:7, 10, 15-19 as well as in the Book of Kings, 6:21, 22; *see* Leslie C. Green, *The Judaic Contribution to Human Rights*, 28 CYBIL 3 (1990).

(i) it emanated from religious or chivalrous concepts,[22] being universal in application.

(ii) provisions regulating warfare were found in compilations or as customary codes of chivalrous conduct, rather than constituting autonomous sources of law;

(iii) these provisions, customary or written, when enforced borrowed the *actus reus* and *mens rea* of equivalent domestic criminal offences.

Based on these chivalrous and natural law notions, European nations promulgated Codes regulating the conduct of armed conflict and imposed punishment by exercising a species of universal jurisdiction.[23] Of these, most prominent were the Dutch Articles of War of 1590 and the Swedish Articles of "Military Lawwes" of 1621. The latter formed the basis for articles of war adopted by both parties during the English Civil War.[24]

1.1.2 *Post-Westphalian developments*

After the Thirty Years War which was terminated with the 1648 Peace Treaty of Westphalia, war became an inter-state affair, rather than, as previously, a

---

[22] *See* Theodor Meron, *Henry the Fifth and the Law of War*, 86 AJIL 1 (I 992); GREEN, *supra* note 10, at 21-23.

[23] Keen states that universality of jurisdiction over breaches of the codes and customs of the *jus militare* has been exercised since medieval times, *in* LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS, 104 (1992).

[24] "Laws and Ordinances of Warre (I 639)", SIMPSON & McCORMACK, *supra* note 4, at 39.

personal feud between princes.[25] By the mid-eighteenth century states recognised personal criminal liability for a specific portion of *jus in bello* violations, not only for the actual perpetrator but also for the superior of the culprit. It was by then well recognised that a military commander had a positive duty to restrain his troops from excesses in conflict. Article 46 of the Swedish "Articles of Military Lawwes", for example, established that a superior who ordered or commanded his troops to excesses would be criminally responsible for their actions, although not equally responsible.

The question then turned to the duties pertaining to military command. For, if states truly opposed atrocities in warfare, they had to adopt and ensure preventive mechanisms. It was believed that strict military obedience, already in force, needed to be utilised in order to deter war crimes. Article 11 of the Massachusetts Articles of War, adopted by the Provisional Congress of Massachusetts in 1775, is viewed by Parks as the first authoritative expression of the doctrine of command responsibility.[26] This provides that persons in superior authority have a duty to prevent and punish the crimes of their subordinates. The doctrine was further developed and applied inconsistently in a number of cases in the nineteenth century.[27]

The first attempt to draw up a modern code was by Professor Francis Lieber, under instructions of Abraham Lincoln for the purposes of the US Civil War. What

---

[25] GREEN, *supra* note 10, at 26-27.

[26] William H. Parks, *Command Responsibility for war crimes*, 62 MIL. L. REV. 5 (1973). This provision was retained and strengthened in the Articles of War of 1806; *see* BASSIOUNI, *supra* note 12, at 202.

[27] *See* Eldbridge Colby, *War Crimes*, 23 MICH. L. REV. 501 (1925). *See* also McCORMACK & SIMPSON, *supra* note 4, at 40-43.

became known as the Lieber Code,[28] although only binding on US Government forces, was based on the accepted laws of war at the time and was envisaged by Lieber as an impetus for similar legislation in other countries. Between 1870 and 1904 a great number of countries promulgated similar codes, and as Green points out they constitute evidence of customary international law, especially since they were not overruled by treaty or expressly rejected by any state.[29]

In conclusion, the existence of a primitive body of norms regulating conduct in warfare through the customary practice of states by the mid-eighteenth century may be confirmed. At the same time it should be understood that this was defined, structured and enforced under domestic law.[30] Up until 1907, it was understood that reprisal was the legal foundation of war crimes jurisdiction.[31] Under customary international law of that time, the exercise of jurisdiction over war criminals was optional in the sense that international law did not postulate punishment, it merely

---

[28] Instructions for the Government of Armies of the US in the Field, General Orders No. 100, 24 April 1863; Robert R. Baxter, *The First Modern Codification of the Law of Armed Conflict*, 29 INT'L. REV. RED CROSS 171 (1963).

[29] GREEN, *supra* note 10, at 27-28.

[30] George Manner, *The Legal* Nature *and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AJIL 414 (1943). Manner noted that even until 1919 the USA delegates to the 1919 Commission argued that the law to be applied with regard to German war criminals was that established by the military law of the country against which the violations were committed. This view, according to USA and Japan, was justified on the absence of an international penal law upon which a criminal indictment of offenders against the rules of warfare could be based.

[31] SCHWARZENBFRGER, *supra* note 17, at 454.

provided for "an extraordinary type of jurisdiction which belligerents may exercise at their discretion".[32]

The sources of this body of rules transcend national borders and cannot be asserted to be the product of any one state. In that sense alone, the sources of the *jus in bello* are of international origin. The gradual amalgamation of these rules was subsequently adapted to accommodate pragmatic needs in domestic *fora*. This in turn was subject to a wide degree of selectivity. For example, while the prohibition of murder against civilians was widely accepted, in practice prosecutions of nationals were less frequent than those of captured enemy combatants. In order to ascertain whether this corpus of prohibitions and restraints, as accepted by nations and being international in origin, was actually considered to be a matter of law, one has, in the absence of a treaty, to discern its customary nature. A retrospective application of the test used by the International Court of Justice (ICJ) in the North Sea Continental Shelf case,[33] through assessment of state practice and evidence of *opinio juris*, would serve to illustrate such an assumption. Hence, consistent state practice in the form of military codes and declarations, supplemented with a relative degree of enforcement, may serve to indicate the existence of a binding international rule, which prohibited the use of certain weapons and the infliction of unnecessary suffering on persons *hors de combat* and civilians. In a number of cases this was accompanied with the imposition of criminal sanctions.[34]

---

[32] *Ibid.*

[33] *Federal Republic of* Germany *v. Denmark* and *Federal Republic of Germany v. Netherlands*, Judgment of 20 Feb. 1969, Merits, ICJ REP. paras. 73-8 1, at 38-41 (1969).

[34] During the American Civil War President Lincoln abrogated any action undertaken by his military commanders which resulted in the seizure of enemy property or even the abolition of slavery, because these actions did not directly contribute to the war effort. Furthermore, he considered that they did not

1.1.3 *Attempts at international codification*

Despite domestic provision, there was no harmonisation of the laws of war in the international forum. Not surprisingly, it was an individual, the Swiss Henri Dunant, who commenced efforts to convene the adoption of a set of rules regulating warfare, which would be endorsed by the international community. The central theme behind the conferences and the texts adopted was to bind states to conduct humanitarian warfare as far as possible. This was achieved through the Geneva Convention of 1864[35] and the Declaration of St. Petersburg of 1868.[36] While neither of these instruments provided for penal sanctions, the Brussels Conference of 1874 and the Oxford Manuals of 1880 and 1913 put forward the proposition that the offences recognised under international law should be repressed and criminalised under domestic criminal law.[37]

---

fall within the purview of military necessity. *See* Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War:The Origins and Limits of the Principle of Military Necessity* , 92 AJIL 223-227 (1998).

[35] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, *signed* at Geneva, 22 August 1864. 18 Martens Nouveau Recueil General de Traites 607, 22 Stat. 940, T.S. No. 377.

[36] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *signed* at St. Petersburg, 11 December 1868. 18 Martens Nouveau Recueil General de Traites 477

[37] The Brussels 1874 Conference led to the International Declaration Concerning the Laws and Customs of War, which was never considered binding. *Adopted* at Brussels, 27 August 1874. 4 Martens Nouveau Recueil (2d) 219; Oxford Session of 1880, *The Laws of War on Land* and Oxford Session of 1913, *The Laws of Naval War Governing the Relations Between Belligerents*. Both published by the Institute of International Law, cited by Yves Sandoz, *Penal Aspects of International Humanitarian Law*, *in* BASSIOUNI, *supra* note 12, at 210-211.

The Hague Peace Conferences of 1899 and 1907 culminated in the adoption of a number of Conventions regulating, *inter alia*, the conduct in land and sea warfare. Despite the detailing of prohibitions and acceptable practices, especially in Hague Convention IV of 1907[38] and the Regulations annexed thereto, no sanctions were expressly prescribed.[39] A number of international agreements adopted in the next two decades failed to impose any penal mechanisms for violations of their provisions. They obliged, instead, states parties to adopt accordingly their criminal legislations,[40] provided new prohibitions,[41] and in one case referred to a limited personal liability through the means of national or universal jurisdiction.[42]

At first sight, these latter conventions seem to contradict the International Military Tribunal's[43] conviction that international law had long before 1945

---

[38] Convention Respecting the Laws and Customs of War on Land, *signed* at the Hague, 18 October 1907. 3 Martens Nouveau Recueil (3d) 437, 36 Stat. 2259, T.S. No. 538.

[39] The Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, *signed* at Geneva on 6 July 1906, introduced two articles for the repression of the Convention's infractions and abuses regarding the Red Cross emblem in the form of injunctions to states in order to adopt the necessary legislation. 2 Martens Nouveau Recueil (3d) 620, 35 Stat. 1885, T.S. No. 464.

[40] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, *signed* at Geneva, 27 July 1929. 118 L.N.T.S. 303, 47 Stat. 2074, T.S. No. 847; Geneva Convention Relative to the Treatment of Prisoners of War, *signed* at Geneva, 27 July 1929. 118 L.N.T.S. 343, 47 Stat. 2021, T.S. No. 846.

[41] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *signed* at Geneva, 17 June 1925. 94 L.N.T.S. 65, 26, U.S.T, 57 I, T.I.A.S. No. 8061.

[42] Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, *signed* at Washington, 6 February 1922. 25 L..N.T.S. 202. This Convention never entered into force.

[43] International Military Tribunal (IMT) or alternatively Nuremberg Tribunal.

recognised duties and liabilities upon individuals.[44] The faulty basis of this statement by the IMT becomes more convincing since these conventions were born from the aftermath of the bloodiest war (World War I) ever, and one would have expected that the international community would thereafter have generated binding rules holding future perpetrators liable. The validity of this dictum will be refuted below. Indeed, at first sight it would seem that the narrowly drafted conventional law was adrift from the enforcement practice of states.

1.1.4 *Attempts to enforce penal sanctions in international law*

At the close of World War I, the Preliminary Peace Conference of Paris created the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Its duties included, *inter alia*, the ascertainment of the means available to incorporate in the peace treaty between the Allies and Germany provisions relating to the punishment of individuals charged with certain offences. In its Report, submitted on 29 March 1919, the Commission claimed that individuals, regardless of rank, were criminally liable for "offences against the laws and customs of war or the laws of humanity."[45] Despite reservations by the USA and Japan, the Commission's Report was unanimously accepted, further endorsed by the 1919 Paris Peace Treaty, and finally formed the basis for a number of provisions in subsequent

---

[44] Cited also by other WW 11 military tribunals such, as for example, in the *Trial of Friedrich Flick and Others (Flick case),* UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (London 1947-49) [LRTWC] vol. IX, at 18.

[45] 14 AJIL 117 (1920).

treaties; articles 228-230 of the Treaty of Versailles of 28 June 1919,[46] article 173 of the Treaty of St. Germain of 10 September 1919,[47] and article 157 of the Treaty of Trianon of 4 June 1920.[48] These treaties recognised the right of the allies to try offenders before military tribunals.[49]

Although the Treaty of Versailles was ratified, the trials envisaged by the Commission never materialised. Instead, Germany succeeded in convincing the victorious Allies to be permitted to stage the proceedings against a handful of those initially indicted before the German Supreme Court in Leipzig.[50] Contrary to popular belief, the *Leipzig Trials* did furnish strong judicial precedent in the field of command responsibility, and in general they affirmed the international community's conviction that individuals may be held criminally liable for offences committed contrary to the laws of war.[51] Despite the absence of direct criminal provisions in any international

---

[46] T.S. No. 4 (1919) (Cmd. 153).

[47] T.S. No. 11 (1919) (Cmd. 400).

[48] T.S. No. 10 (1920) (Cmd. 896).

[49] *See* LRTWC vol. XV, at 23; *see* also Colby, *supra* note 27, at 482, 496-97, who stated that the agreement which ended hostilities in the Boer War granted the right to try enemy combatants who violated the laws of war.

[50] For a summary of the *Leipzig Trials*, *see* 16 AJIL 677-722 (1922).

[51] Despite the popular perception that the *Leipzig Trials* were a mockery because of the very lenient interpretation of the defence of superior orders, it must be said that the construction of this defence was in conformity with then existing German law. The Trials themselves were proceduraly impecable, hence the general argument should be directed against the exclusive application of German law and the impunity granted to the great majority of the accused. *See* CHRISTOPHER MULLINS, THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY, 130 (1921).

jus in bello convention, and the reluctance of the Allies to establish a tribunal throughout and shortly after that war, a substantial number of war crimes trials were conducted by French, Russian, British and US military tribunals against captured German combatants.[52] The offences charged can be distinguished into two broad categories: crimes against civilians and crimes against those *hors de combat*. Attempts through the Treaty of Sevres to prosecute Turkish officials and perpetrators of the Armenian massacres, which commenced before the outbreak of WW I, failed due to lack of ratification.[53]

Despite the lack of sanctions in international instruments, demonstrating initially the international community's approach that individuals were not considered subjects of the international law of war,[54] from the start of WW II this attitude radically altered. Instances such as the genocidal German policy towards Jews and other groups, atrocities committed against internees in concentration camps, and brutal subjugation of occupied territories coupled with monstrosity in warfare, prompted the Allies to reconsider their position on the international criminality of individuals. To this end they initiated a phase of a "warning policy" in the form of declarations, thereby highlighting their intent to punish the culprits of those crimes.[55] Thus, the Declaration of St. James of 13 January 1942 and the Moscow Declaration

---

[52] *See* SIMPSON & MCCORMACK, *supra* note 4, at 44.

[53] The Treaty of Sevres was replaced by the Treaty of Lausanne, *signed* 24 July 1923. 28 L.N.T.S. 11. It granted the perpetrators general amnesty for all WW I crimes.

[54] Manner, *op. cit.*, at 407.

[55] Similar declarations were made at the close of the war, and particularly against Japan. Art. 10 of the July 1945 Potsdam Declaration provided for the punishment of all war criminals, *see* Harold Evans, *The Trial of Major Japanese War Criminals*, NZLJ 9 (1947).

of I November 1943 expressly indicated that war criminals would be collectively punished by the Allies, and that lower ranking offenders would be tried in the *locus* where they committed their crimes. At the same time, expert bodies were entrusted with the task of exploring the legal and practical components of such envisaged prosecutions, culminating in the establishment of the United Nations War Crimes Commission for the Investigation of War Crimes in October 1943.[56] Based on these legal conclusions, article 6 of the London Agreement of 8 August 1945,[57] establishing the International Military Tribunal for the Prosecution of the highest ranking Axis officials, prescribed personal criminal liability for crimes against peace,[58] crimes against humanity[59] and war crimes.[60] These offences were recognised in subsequent legal texts, most notably in Control Council Law No. 10, but not in every national decree or criminal code utilised by allied nations to try war criminals.

The IMT confirmed the existence of the principle of individual responsibility by stating that crimes against international law "are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[61] Thereafter, the General Assembly of

---

[56] U.N WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR (I 948).

[57] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, *signed* 8 August 1945, 59 Stat. 1544, 82 UNTS 279.

[58] IMT Charter, art. 6(a).

[59] IMT Charter, art. 6(c).

[60] IMT Charter, art. 6(b).

the United Nations affirmed the principle of individual responsibility as defined in the Charter and Judgment of the IMT,[62] followed by its reaffirmation in the Nuremberg principles formulated by the International Law Commission (ILC).[63]

Since then the principle of individual responsibility has been elaborated and enhanced by the Geneva Conventions (1949) and subsequent treaties regulating conduct in warfare. While individual responsibility is now acknowledged even in cases of non-international conflicts,[64] it was initially the question of enforcement that made problematic the prosecution of such war crimes in Iraq[65] and Yugoslavia.[66]

---

[61] 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL - NUREMBERG 466 (1948).

[62] UNGA Res. 95 (I) UN Doc. A/64/Add.1, at 188 (1947); *United Nations Declaration on the Principles of the Nuremberg Charter and Judgment*, UNGA Res. 488V, UN GAOR, 5th sess., Supp. No. 12, at 11-14, UN Doc. A/1316 (1950).

[63] 2 Y.B INT'L L. COMM. 374 (1950), UN Doc. A/CN.4/22/1950.

[64] This received general agreement in the 5th session of the UN Preparatory Committee on the Establishment of an International Criminal Court, *reported by* Christopher K. Hall *in* 92 AJIL 335-336 (1998); *see* also *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), Case No. IT-94-1-AR72 [*Tadic Appeals Decision on Jurisdiction*], 105 ILR 453 (1997), paras. 129, 137; the ICC Rome Statute (1998) recognises in art. 8(2)(c)(d)(c) the application of the principle of individual criminal liability in cases of non-international armed conflicts.

[65] *See* the relevant 1991 UK Parliamentary debates, where although the principle of individual liability for violation of international humanitarian law was categorically emphasised, it was the question of enforcement that inhibited prosecutions, 62 BYBIL 661-666 (1991).

1.1.5 *Fundamental Principles of the jus in Bello*

The fundamental tenets of international humanitarian law relate to a strict application of humanitarian norms in armed conflict which, on the one hand, would minimise the suffering of those who are not engaged in battle (civilians and *hors de combat*) and, on the other, would render fighting itself more humane. The former is regulated by the Geneva Conventions (1949), and the latter by Hague Convention IV of 1907.[67] Additional Protocol I to the 1949 Geneva Conventions (1977)[68] converges the aims of both conventions, further supplemented with progressive provisions, into a single instrument. Both the Geneva Conventions (1949) and Hague Convention IV (1907), however, retain their autonomy. A large portion of the principles permeating the laws of war may be considered as reflecting customary law, or even be regarded as *jus cogens*,[69] which is true, at least, for the majority of the norms contained in the Geneva Conventions (1949).[70] These fundamental principles are:

---

[66] 63 BYBIL 798-802, 812-821 (1992).

[67] Hague Convention IV (1907) and the Regulations annexed thereto were expressly declared by the IMT to be declaratory of customary law, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL - NUREMBERG 254 (1947).

[68] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I], *signed* 12 December 1977, 1125 UNTS (1979) 3-608.

[69] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice, 8 July 1996 [*ICJ Nuclear Weapons case*], 35 ILM 809 and 1343 (1996). Although the ICJ determined the basic principles of humanitarian law, such as proportionality, necessity, prohibition of unnecessary suffering and protection of civilians, to be fundamental because they constitute "intransgressible principles of customary international law", it emphasised that this did not constitute a pronouncement of their *jus cogens* character, since the General Assembly's Advisory Request did not raise that issue, paras. 79, 83.

(i) the employment of arms that may cause unnecessary suffering or superfluous injury is prohibited, as is the use of treacherous weapons or means to injure the enemy.[71]

(ii) It is prohibited to make military personnel not engaged in battle (prisoners of war, wounded and shipwrecked, medical personnel and clergy) the object of attack,[72] or in any way to treat them inhumanely.[73]

(iii) it is prohibited to make civilians or civilian objects the target of attacks or reprisals.[74]

---

[70] This has been the opinion of the ILC since at least 1980. *See Report of the ILC on the work of its thirty-second session*, 35 UN GAOR Supp. No. 10, at 98, UN Doc. A/35/10 (1980); Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AJLL 350 (1987); according to a recent Judgment of the Constitutional Court of Colombia (case name unknown) it was declared that both the Geneva Conventions (1949) and the two Protocols (1977) were declaratory of customary law. Judgment Case No. C-574/92, unpublished, Section V, B2c, 28 Oct. 1992, and Judgment Case No. C-225/95, unpublished, Section VD, 18 May 1995, *cited* in *Prosecutor v. Furundzija* [*Furundzija case*] Judgment of 10 December 1998, Case No. IT-95-17/1-T 10, *reprinted* in 38 ILM 317 (1999), para. 137; McCoubrey states that the Geneva Conventions (1949) reflect *jus cogens* norms, McCOUBREY, *supra* note 21, at 195.

[71] Grounded in the Declaration of St. Petersburg of 1868; arts. 22, 23 of the Regulations of Hague Convention IV of 1907; arts. 35, 37 of Additional Protocol I of 1977. *See* also UNGA Res. 3464 (XXV) *Napalm and other Incendiary Weapons and all aspects of their possible use* (11 Dec. 1975), and UNGA Res. 3102 (XXVII) *Respect for Human Rights in Armed Conflict* (12 Dec. 1973); The ICJ in the *Nuclear Weapons case* pointed out that state practice shows that "the illegality of the use of certain weapons as such does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition". It affirmed that the prohibition of causing unnecessary suffering is a fundamental norm of the laws of armed conflict, 35 ILM paras. 52, 78, at 823, 827 (1996).

[72] Arts. 23(c)(d) of the Regulations annexed to Hague Convention IV [Hague Regulations]; arts. 12, 46 of Geneva Convention I (1949); arts. 36, 48 of Geneva Convention II (1949); arts. 20, 41 of Protocol I (1977).

[73] Art. 4 of the Hague Regulations (1907); art. 12 of Geneva Convention I (1949); art. 12 of Geneva

(iv) Parties are obliged to exercise caution in attack through proper identification and discriminate attacks.[75] Any attack should be weighed on the scales of proportionality and military necessity.[76]

The next section examines the evolution of custom in international humanitarian law and the elements which show evidence of state practice and *opinio juris* with regard to criminalisation.

Convention II (1949); arts. 13, 14 of Geneva Convention III (1949); art. 10 of Protocol I (1977).

[74] Art. 46 of the Hague Regulations (1907). This article was found by a Greek court to constitute a norm of *jus cogens*, in *Prefecture of Voiotia and Others v. Federal Republic of Germany*, 92 AJIL 765 (1998), *reported* by Ilias Bantekas; Geneva Convention IV (1949) was solely intended for that purpose; arts. 48, 51(6) of Protocol I (1977). *See* UNGA Res. 2675 (XVV), *Basic Principles for the Protection of Civilian Populations in Armed Conflict* (9 Dec. 1970); affirmed by the ICJ in *the Nuclear Weapons case*, para. 78.

[75] Arts. 25, 27 of the Hague Regulations (1907); arts. 49, 50(4), 57 of Protocol I (1977). *See* also *Prosecutor v. Martic*, Rule 61 Decision, *reprinted* in 108 ILR 39 (1998), paras. 10-11; *ICJ Nuclear Weapons case*, 35 ILM, paras. 39-44, 78, at 822, 827 (1996); and LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT, 330-331 (1993).

[76] Art. 23(g) Hague Regulations (1907); arts. 52, 56, 57(3) of Protocol I (1977). *See* William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982).

1.2.0 THE CONCEPT OF INDIVIDUAL LIABILITY IN INTERNATIONAL HUMANITARIAN LAW

1.2.1 *The Derivation of Customary Humanitarian Law*

The existence of customary law is assessed through state practice and *opinio juris*.[77] In the case of international humanitarian law, however, the situation is complicated by the fact that if state practice is to be ascertained with regard to the conduct of troops on the battlefield and their compliance with the laws of war, to pinpoint such behavior would in principle be almost impossible.[78] To further add to the confusion, evidence of the customary nature of a norm is difficult to locate in the conduct of states parties to a convention containing the norm, because these parties may be merely acting in the fulfillment of their obligations of the treaty in question.[79] Since, therefore, the vast majority of states are parties to the major humanitarian Conventions, their practice, as Meron notes, may merely indicate compliance with their treaty obligations.[80] In this case, to look exclusively to the conduct of non-parties "in attempting to determine whether the treaty, in its law-creating aspect, was binding on all nations" is fruitless.[81]

---

[77] *North Sea Continental Shelf cases*, Merits, ICJ REP., paras. 73-81, at 42-45 (1969); *see* Michael Akehurst, *Custom as a Source of International Law*, 47 BYBIL 1 (1974-75).

[78] *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), para. 99.

[79] *North Sea Continental Shelf cases*, ICJ REP., para. 76, at 43 (1969).

[80] Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AJIL 354 (1987).

[81] Richard R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 27 (1970).

This deadlock may be broken in two ways. Baxter has argued that the passage of humanitarian law treaties in the sphere of customary law may be justified on the grounds that a new treaty builds upon past conventions in such a way that it implements in more detail a general standard already laid down in an earlier convention.[82] The Appeals Chamber in the *Tadic* Jurisdiction case, on the other hand, followed the path applied in the field of human rights law in its ascertainment of custom. It deduced it, not from the behavior of armies in the battlefield, but on the basis of official pronouncements of states, military manuals and judicial decisions.[83] Through this approach the ICTY came close to reliance on *opinio juris*, "distilled, in part, from the Geneva and Hague Conventions".[84]

The next sections explore the evolution of humanitarian law since the ICTY and intend to show that certain elements, especially the growing notion of international criminality for violations committed in internal conflicts, has been the result of an instant customary process.

---

[82] Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BYBIL 275, 286, (1965-66), noting as an example the relationship between Hague Convention IV (1907) and the Geneva Conventions (1949).

[83] *Tadic* Appeals Decision on Jurisdiction, para. 99; *see* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 239-240 (1996), who states that due to the scarcity of supporting practice in both human rights and humanitarian law, evidence of *opinio juris* is compensated through official statements.

[84] Meron, *ibid*, at 239.

1.2.2 *Individuals and national criminal prosecutions*

As has been observed from the preceding historical analysis, states have punished individuals for violating what they perceived as being breaches of the law of warfare. This practice has shaped a corpus of *jus in bello* rules which has, since the early nineteenth century, been widely considered as being non-punitive under international law. This was due to the traditional positivist concept that individuals were merely objects and not subjects of international law, and so it was states that were held responsible for their actions.[85] That situation changed with the development of the international protection of human rights.[86] Since the end of the last century it has been accepted that individuals can become subjects of international law if states so wish, whether explicitly or implicitly.[87]

The truth is that enemy aliens have traditionally been held criminally liable for violating the laws or usages of war and have been punished in accordance with the law of the captor state.[88] National courts have in the past recognised their jurisdiction

---

[85] *See* generally ROSALLYN HIGGINS, PROBLEMS AND PROCESS. INTERNATIONAL LAW AND HOW WE USE IT, 48-55 (1994).

[86] MALCOLM SHAW, INTERNATIONAL LAW, 182 (4th ed. 1997).

[87] This was the viewpoint of the PCIJ in its Advisory Opinion in the *Jurisdiction of the Courts of Danzig case*, Advisory Opinion No. 15, PCIJ (1928), ser. B, at 17; Menon, cites a number of scholars who argue that individuals have always been subjects of international law. Philip K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANS. L. & POL. 154 (1992).

[88] The prevailing view before 1939 was that individual responsibility was well recognised as a norm of customary international law. *See* MULLINS, *supra* note 51, at 23.

over international crimes,[89] but this was subject to a selective process influenced by the demands of the executive.[90] It only occurred when the accused were in the hands of their captors.[91] Political exigencies have determined that the amelioration of friction between states could best be served through the withholding of penal sanctions against state leaders or other higher officials, either by invoking their sovereign immunity, or by reaching a compromise.[92] Another practice, even in recent international relations, has been to secretly promise impunity from prosecution in order to secure peace.[93] As for lower ranking officials and combatants, practice has

---

[89] *Eichmann case*, 36 ILR 497 (1968); *re Honecker*, 80 ILR 36 (1984); *Demjanjuk case*, 776 F. 2d. 511 (1985), 100 ILR 393 (1995).

[90] For example, the principal participants in the My Lai massacre were prosecuted but received light sentences, *see Calley v. Calloway*, 382 F. Supp. 650 (1974), *rev'd* 519 F. 2d. 184 (1975), *cert. denied* 425 US 911 (1976).

[91] That individuals had always been liable under international law for violations of the law of nations and that US courts had always considered them liable this way was affirmed in *Ex parte Quirin* 317 U.S. 27 (1942).

[92] The 1919 Commission recommended that individuals, irrespective of status or rank, should have been made liable to criminal prosecution, but it was argued that the Kaiser enjoyed sovereign immunity, 14 AJIL 117 (1920); the Pakistani soldiers held by India on charges of war crimes and crimes against humanity during the Bangladeshi War of Independence were the subject of a Pakistani suit before the ICJ, which resulted in the returning of the alleged perpetrators back to Pakistan, *see Pakistan v. India, Trial of Pakistani Prisoners of War Case*, (Request for the Indication of Interim Measures) ICJ REP. 347 (1973).

[93] Anthony D' Amato, *Peace vs Accountability in Bosnia*, 88 AJIL 500 (1994), who argues that such was the case with the Dayton Peace Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina, initialed at Dayton, *signed* in Paris on 14 December 1995, 35 ILM 75 (1996)) and Radovan Karadzic, former leader of the Bosnian Serbs; Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFFAIRS 124 (1993), considers the same with regard to Saddam Hussein, the President of Iraq.

been thought to be inconsistent only because enforcement was rigid.[94] However, it was never doubted that belligerents had a customary right to try enemy personnel who fell in their hands, even if not expressly addressed in Hague Convention IV (1907).[95] Thus, what international law did not prescribe was the jurisdiction to try offenders not in the hands of the requesting state.[96]

The only viable solutions regarding situations of the latter kind were sought either through the *ad hoc* consent of states for the surrender of offenders or the inclusion of other mechanisms in bilateral or multilateral relations extending both prescriptive and judicial jurisdiction. The former was rarely, if ever, used to extradite nationals, since it required the express granting of jurisdiction to another state by that individual's own state. This would seldom be the case even in contemporary international relations.[97] The other option was to provide states with a duty to either prosecute or extradite offenders. This took effect through the insertion of appropriate clauses in multilateral treaties.[98] The most recent trend is the criminalisation of

---

[94] Theodor Meron, *International Criminalisation of Internal Atrocities*, 89 AJIL 555 (1995), cites lack of both resources and political will as reasons for this reluctance.

[95] Gerard I. Draper, *The Modern Pattern of War Criminality*, 6 ISR. Y. B. HUM. RTS. 15 (1976); Meron, *supra* note 94, at 570.

[96] Although not in the realm of humanitarian law, it is interesting to note that after the decision in *Filartiga v. Pena-Irala,* 630 F.2d. 887-888 (1980), the Alien Tort Claims Act (1789) has been construed as giving jurisdiction to US courts to hear civil suits by victims of foreign torture if the alleged culprits are found in the United States.

[97] The extradition of Demjanjuk is an isolated instance. In that case, the accused was stripped of his US citizenship before extradited, on the premise that it had been obtained by false means, *Demjanjuk v.Petrovsky*, 776 F.2d. 571 (6th Cir. 1985).

[98] For example, arts. 49 Geneva I, 50 Geneva II, 129 Geneva III, and 146 Geneva IV (1949).

international law, which is supported by the expansion of jurisdiction to prosecute crimes arising from both international and internal armed conflicts.[99] Hence, while the Geneva Conventions (1949) grant universal jurisdiction in relation to "grave breaches", article 129(3) Geneva III (1949) provides that states shall take measures to suppress violations other than grave breaches, stipulating that all states have a right, but not a duty, to punish violations of common article 3 of the Geneva Conventions (1949).[100] Such practice has been accepted as an indication of recognition by the international community of the principle that individuals are criminally liable for offences designated as such by international law. Ratner and Abrams remark that:

> "... determining the extent to which international law recognises individual liability necessitates an inquiry that takes account of the law's need both to elaborate the crime and to prescribe the role for states... The strategies by which the law provides for individual criminal responsibility can form the basis for various lists of international crimes."[101]

Thus, it would be unrealistic to maintain that the customary body of law regulating human conduct in warfare, and which emerged since antiquity, was not criminal in nature, or that it was reserved merely for nationals. On the contrary, it is apparent that the majority of cases concerned non-nationals, while the penalties imposed expressly intended to sanction criminal offences. While these offences were

---

[99] *See* Theodor Meron, *Is International Law Moving Towards Criminalisation?*, 9 EJIL 18 (1998).

[100] Meron, *supra* note 94, at 569-70, who points out that in contemporary humanitarian law-making a strong criminalisation process exists. He cites as an example, art. I(1) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *signed* 13 Jan. 1993, 32 ILM 800 (1993).

[101] STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, 9, 10 (1997).

provided under domestic criminal law, in the majority of cases it was proclaimed that the violator had breached a supranational law, whether religious, chivalrous, natural, or even the law of nations itself.

It is accepted that criminal liability is, and should be, based on personal guilt.[102] This notwithstanding, war crimes trials through the centuries have been shaped by diverse policy considerations; deterrence, retribution, justice, and more recently international peace and security.[103] Since the end of the Cold-war and the unprecedented agreement in the Security Council the proposals for international prosecutions culminated in the creation of the International Tribunal for the Former Yugoslavia (ICTY),[104] the International Criminal Tribunal for Rwanda (ICTR)[105] and the International Criminal Court (ICC);[106] a positive indication of the international community's resolve.[107] This increased willingness to institute appropriate mechanisms, even non-punitive ones,[108] echoes the calls for putting an end to impunity,[109] which in turn facilitates national reconciliation and reconstruction.[110]

---

[102] Jordan J. Paust, *My Lai and Vietnam. Myths, Norms and Command Responsibility*, 57 MIL. L. REV. 99 (1972).

[103] SIMPSON & McCORMACK, *supra* note 4, at 28.

[104] UN Doc. S/RES/808, annex (1993).

[105] UN Doc. S/RES/955, annex (1994).

[106] ICC Rome Statute, *signed* 17 July 1998, 37 ILM 999 (1998).

[107] Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EJIL 7-8 (1998).

1.2.2.1 *Punishment of Human Rights Violations*

The argument has been advanced that a state obligation exists to punish, besides international humanitarian law violations, also serious human rights breaches committed by a former regime.[111] Despite calls that amnesties, granted after crimes are committed, are generally incompatible with the duty of states to investigate

---

[108] For example, the 1951 Refugee Convention allows states not to grant refugee status where persons are suspected of having violated art. 6 of the IMT Charter. Application of this has been made in *Ramirez v. Canada (MEI),* [19921 FC 653 and *Equizabal v Canada (MEI),* [1994] FCJ No. 807.

[109] *See Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations*, UN Doc. E/CN.4/Sub.2/1993/6; UN Doc. E/CN.4/Sub.2/1995/18 and the *Final Report*, UN Doc. E/CN.4/Sub.2/1996/18; *see* Kai Ambos, *Impunity and International Law*, 18 HRLJ 1-11 (1997), who identifies three forms of impunity; impunity laws, impunity through military justice and impunity granted by declaring a state of emergency.

[110] Payam Akhavan, *The Yugoslav Tribunal at Crossroads: The Dayton Peace Agreement and Beyond*, 18 HRQ 264 (1996), who notes that the ICTY sends the message to potential aggressors and vulnerable minorities that the international community will react; national reconciliation and reconstruction, too, facilitates repatriation of displaced persons and refugees. *See* Ilias Bantekas, *Internationally Organised Elections and Communications: The Reality for Bosnia's Failed Repatriation*, 10 INT'L J. REF. L. 199 (1998), and *Repatriation as a Human Right Under International Law and the Case of Bosnia*, 7 J. INT'L L. & PRAC. 53 (1998).

[111] *See* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 25 37 (1991); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L. L. J 1 (1996); NAOMI ROHT-ARIAZA (ed.), IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (1995).

human rights abuses and provide remedies,[112] state practice is, nonetheless, inconsistent.[113]

The dichotomy between public acts attributed to the state (acts *jure imperii*) and private acts (*jure gestionis*) has, since the 1920s, shaped a rule of restrictive immunity. National courts have consistently held that they have no jurisdiction only over acts *jure imperii*,[114] but the definition of acts *jure gestionis* has proved problematic. How should, for example, an act of torture which is sanctioned by a Head of State be characterised, as a public or private act?[115] US courts have developed the "act of state" doctrine, which has precluded them from exercising jurisdiction in cases where public officials enjoying sovereign immunity act in an official capacity,[116] even when the purported act constitutes a violation of international law.[117]

---

[112] UN HRCommittee, General Comment No. 20, UN Doc. CCPR/C/21/Rev.I/Add.3 (7 April 1992), para. 15, regarding the interpretation of art. 7 ICCPR; *see* also Naomi Roht-Ariaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HRQ 843 (1998).

[113] *Azanian Peoples Organisation v. President of the Republic of South Africa*, Case No. CCT 17/96, Judgment of the RSA Constitutional Court (25 July 1996), where the Court held that international human rights law does not compel domestic criminal prosecution of human rights abuses, *summarised* in 91 AJIL 360 (1997); *see* also Ambos, *supra* note 109, at 7, 8, who states that unlike impunity laws which favour the opposition, laws favouring the state security forces (so called self-amnesties) are incompatible with international standards.

[114] *Underhill v. Hernandez*, 168 US 250 (1897), where the forced labor of a US citizen by Venezuelan revolutionaries, who subsequently came to power, was held to be a public act; for a similar dictum, *see Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812).

[115] In *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993), the US Supreme Court held that torture perpetrated by Saudi police was a sovereign act attributable to that state and did not fall within the justiciable exceptions of the Federal Sovereign Immunities Act [FSIA] 1976, which includes commercial activities in the USA and expropriation of property in violation of international law.

In *Jimenez v. Aristeguieta*, the court found that the alleged financial crimes committed by a former Chief of State were made for his personal benefit and not in pursuance of his official duties.[118] Along the same lines, in *Forti v. Suarez-Mason*, acts of torture and disappearances committed by an Argentine General, who was an official of the military junta, did not *ipso facto* render his actions acts of the Argentine state.[119] Similarly, in *Re Estate of Marcos*[120] and in *USA v. Noriega*,[121] it was held that neither acts of torture and murder in pursuance of personal profit, nor drug trafficking respectively could conceivably constitute public acts.

In contrast to *jus in bello* violations, human rights abuses have until very recently been perceived as an affair exclusive to the state concerned. US courts have attempted to detach human rights violations from the state, but have been willing to do so only in cases where public officials acted independently, either in pursuance of

---

[116] *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1964), concerning unlawful expropriation of US private property in Cuba; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428 (1989), regarding an unlawful attack by an Argentine aircraft during the Falklands conflict which caused damage to a merchant ship.

[117] The only exception is the case of expropriation of property in violation of international legal standards, under the FSIA 1976.

[118] 311 F. 2d. 547 (1962).

[119] 672 F. Supp. 1531 (1987).

[120] 25 F. 3d. 1467 (1994).

[121] 746 F. Supp. 1506 (1990).

their personal interests or, as in *Forti*, beyond the level of abuse authorised by the state they represent.[122]

However, even if the adjudication of the above cases were not precluded by the limitations contained in Sovereign Immunity Statutes, they would have only a tortuous character, since in their majority they do not have any connection with the forum state. It is very important therefore that the *Pinochet case*, following *Princz*,[123] has, at least, put to doubt the theory that a former Head of State may attribute violations of *jus cogens* to the state and also rely on national amnesties.[124]

---

[122] Hence, in *Siderman de Blake v. Republic of Argentina*, 965 F. 2d. 699 (1992), the 9th Circuit Court of Appeals held that although torture had attained the status of *jus cogens*, this did not deprive the defendant charged with acts of torture of his immunity under the FSIA; similarly, in *Al Adsani v. Government of Kuwait*, 107 ILR 536 (1996), the English Court of Appeals rejected civil claims against acts of torture by officials of Kuwait, since no such provision existed in sec. 1(l) of the 1978 State Immunity Act.

[123] *See* Andreas Zimmerman, *Sovereign Immunity and Violations of International Jus Cogens - Some Critical Remarks*, 16 MICH. J. INT'L. L. 433 (1995), who argues that since *Princz v. Federal Republic of Germany*, 813 F. Supp. 22 (1992) and later in US Court of Appeals *Princz v. Federal Republic of Germany*, 26 F. 3d. II 66 (1994), immunity was denied with respect to *jus cogens* violations arising out of Nazi slave labour and other atrocities during World War II; *see* also Craig J. Barker, *State Immunity, Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action.?*, 47 ICLQ 950 (1998); a further development towards this direction has been the adoption of a 1996 Amendment to the FSIA. It is entitled Anti-Terrorism and Death Penalty Act of 1996. Its effect is to deprive foreign nations, in certain cases, of immunity from claims for damages arising from terrorist or similar activities. *See* Monroe Leigh, *1996 Amendments to the Foreign Sovereign Immunities Act with Respect to Terrorist Activities*, 91 AJIL 187 (1997).

[124] *Re Pinochet Ugarte*, Queen's Bench Divisional Court, Judgment of 28 Oct. 1998, *reported* in The Times (3 Nov. 1998), *reported* also in 38 ILM 68 (1999), and Appeal Decision of the House of Lords, Judgment of 25 Nov. 1998, reversing the Divisional Court's ruling that Pinochet, a former head of state, enjoyed immunity for human rights violations committed during his reign. However, in a Judgment of 24 March 1999 which set aside its first one, the House of Lords held that Pinochet did not enjoy immunity for offences allegedly committed after entry into force of the English statutory provision on torture. (1999) 2 All ER 97. *See* Ilias Bantekas, *The Pinochet Affair in International Law*, *forthcoming* in 52 RHDI (1999); in *Prefecture of Voiotia v. FRG*, 92 AJIL 765 (1998), a Greek court

Contemporary litigation evinces a further decline in the value of the "act of state" doctrine.[125] This is reinforced with a commitment to human rights and democratic governance[126] through the compulsory insertion of human rights conditionality clauses in co-operation and investment treaties,[127] and also through unilateral state action, such as, for example, the granting of Most Favoured Nation status.[128]

---

stated that acts of a state that violate *jus cogens* norms do not have the character of sovereign acts, at 766.

[125] In *Doe v. Unocal*, 963 F. Supp. 880 (1997), it was held that the act of state doctrine did not preclude the Court from considering claims based on legal principles, such as slavery and forced labor, on which the international community has reached unambiguous agreement.

[126] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).

[127] On 29 May 1995, the Council of the EU adopted the political guideline to insert into every forthcoming treaty with third states two clauses, one relating to human rights and the other to democratic principles, *see* EU BULL., May 1995, at 1, and Martine Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, 15 NQHR 291 (1997); *see Portuguese Republic v. Council*, Case No. C-268/94, [1996] ECR I - 6177, where the ECJ held that respect for human rights and democratic principles is an essential element of co-operation agreements under art. 130(u) EEC Treaty; both the Foreign Assistance Act 1961, at sec. 602B and the International Security and Development Cooperation Act 1981, at sec. 728, set out the protection of human rights as a US foreign policy objective and put forward a number of conditions prior to the distribution of aid or other forms of assistance.

[128] Jackson - Vanik Amendment to the US Trade Act 1974 and Executive Order 12850, passed by President Clinton in 1993, which has the same effect as the USA China Act 1992 and which was vetoed by the Senate.

1.2.3 *The recognition of individual liability by contemporary humanitarian law*

The IMT stated, and rightly so, that many of the prohibitions contained in Hague Convention IV (1907) had "been enforced long before the date of the Convention", despite the absence of an express designation of such practices as criminal.[129] At the same time, there was neither prescription of penalties nor mention of a court to try offenders.[130] The tribunal in the *Hostages case*, which concerned the illegal execution of civilians from occupied German territories as a means of reprisals against guerilla attacks, noted that the fact that an international agreement did not specify the adoption of penalties or the creation of special tribunals did not in itself signify that the agreement did not lay down punishable rules.[131] Marschik points out, in addition, that the amnesty clauses inserted in the subsequent WW I treaties demonstrated the recognition of personal liability under international law.[132]

Wright, in his comments to the concluding Law Report of the Allied trials of WW II, claimed that the punishment of war criminals had "been recognised by the

---

[129] LRTWC vol. XV, at 11.

[130] As does, for example, art. VI UN Convention on the Prevention and Punishment of the Crime of Genocide (1948), 78 UNTS (1951) 277-323.

[131] *Hostages case*, LRTWC vol. VIII at 53, 54 and LRTWC vol. XV at 11.

[132] Axel Marschik, *The Politics of Prosecution: European National Approaches to War Crimes*, in SIMPSON & McCORMACK, *supra* note 4, at 68.

practice of nations and is part of the traditional law".[133] Arguing the irrelevance of the absence of any criminal sanctions in Hague Convention IV (1907), he stated:

"The principle of individual responsibility is a necessary condition of the establishment of a system of law; what the law does is to define that responsibility. It is not content with the formulation of moral rules. It postulates personal sanctions."[134]

That is not to say that every article of Hague Convention IV (1907) or of the Geneva Conventions (1929)[135] was considered by WW II war crimes tribunals as generating criminal liability. Rather, it was perceived that individual criminal liability was incurred where a breach of the conventions caused "appreciable injury to the persons protected".[136] On the other hand, it is highly likely that an applicable humanitarian law treaty may not contain all those criminal provisions which are recognised as such by the community of nations.[137] This reflects the ever expanding nature of contemporary warfare and the will of the international community to

---

[133] LRTWC vol. XV, at xvi.

[134] *Ibid*, at xv.

[135] Convention for the Protection of the Condition of the Wounded and Sick in Armies in the Field, *signed* 27 July 1929, LNTS, vol. 118, at 303-341; Convention Relative to the Treatment of Prisoners of War, *signed* 27 July 1929, LNTS, vol. 118, at 343-411.

[136] LRTWC vol. XV, at 12.

[137] The ILC in excluding the 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II (1977)], *signed* 12 Dec. 1977, 1125 UNTS (1979) 609-699, from the subject-matter jurisdiction of the then proposed ICC, on the ground that it excluded all those treaties which merely regulated or prohibited conduct at the inter-state level, was concerned with receiving the widest possible agreement on the Statute, *see Report of the ILC on the work of its forty-sixth session*, commentary on art. 20, UN GAOR 49th sess., Supp. No. 10, at 78, UN Doc. A/49/10 (1994).

humanise or even repress it.[138] Thus, the ICRC's commentary on the Geneva Conventions (1949) states that the list of grave breaches therein is not exhaustive, while criminality itself may extend beyond grave breaches.[139]

If, as we have established, there has always existed a definite body of warfare law and an established practice of punishment, the question beckons as to why in the last two centuries there was a denial of criminal liability under international law. Sandoz accurately explains that "penal sanctions have not developed along a regular pattern, but have, rather, been shaped by events".[140] Thus, in the Judgment delivered in the *Justice case*, which concerned the manipulation of the German judicial system by officials in the Department of Justice, the tribunal stated that although it was customary under international law for states to establish tribunals and punish perpetrators who fell into their hands, enforcement of such practice was always subject to practical limitations.[141] It noted:

"The law is universal, but such a state [into whose hands a violator has fallen] reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus, notwithstanding the paramount authority of the substantive rules of common international law, the doctrines of national sovereignty have been preserved through the control of enforcement machinery."[142]

---

[138] The de Martens clause, inserted in the pre-amble to Hague Convention IV (1907), signified that the Convention's list of violations was not exhaustive but amenable to future circumstances.

[139] JEAN S. PICTET, COMMENTARY. IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF ARMED CONFLICT, 305 (1958).

[140] Yves Sandoz, *Penal Aspects of International Humanitarian Law*, in BASSIOUNI, *supra* note 12, at 220.

[141] *Justice case*, LRTWC vol. VI, at 37.

The proposition of this dictum is not simply that states purposely limited their sovereign rights acquired under customary law; rather, individuals were held criminally liable in so far as states could "exercise their right at customary law to try enemy personnel for war crimes".[143] Sandoz's earlier argument is hence justified. Since, as noted above, a tacit or express impunity was reserved for officials in the highest echelons, the existence of a sovereign right under international law was reserved in the majority of cases for the prosecution of direct participants.

1.2.4 *Humanitarian law as the product of instant custom and problems of prescriptive jurisdiction*

The emphasis on long state practice of war crimes litigation by national courts which was emphasised by the IMT and the subsequent WW II tribunals, although correct, only served to justify the proposition that the prosecution of individuals was based on pre-existing international law, despite the absence of a previous express norm.[144] This was also the case with the 1919 Commission set up after WW I. In that

---

[142] *Ibid.*

[143] LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 21 (Martinus Nijhoff 1992). Sunga notes that in every other case, where the individual was not in the hands of the enemy state, responsibility (in the case of the Hague Conventions No. II (1899) and IV (1907) was subsumed by the state in the form of monetary compensation.

[144] It has been contended that the application of the rule against retroactivity has flourished only in well-developed legal systems and not in primitive or immature ones. Individual responsibility was developed on a case-by-case basis, exactly because international law was at the time a primitive legal system itself. *See* Bernard D. Meltzer, *War Crimes: The Nuremberg Trial and the Tribunal for the*

case, however, the non-enforcement of what was perceived as a necessity, if not a rule of law, was due to the prevailing political circumstances, that is the conditional capitulation of Germany. Sandoz is then right in saying that the imposition of international penal sanctions has been shaped by events.

Even though, as was the case in the pre-1939 era, the conscious withholding of penal sanctions from a recognised rule may eradicate the penal sanctions from that rule under customary law, any *opinio juris* to that effect will be significantly weakened where equivalent state practice[145] is aimed to create the opposite legal effects. Hence, it may be contended that breaches of international humanitarian law have on two occasions,[146] since 1939, been shaped by an instant customary process.[147]

Cheng has suggested that prolonged usage is not necessary in the creation of rules of customary law, provided that the *opinio juris* of the states concerned can be

---

former Yugoslavia, 30 VALPARAISO U. L. REV. 899, 900 (1996). Others argue that the IMT rejected the proposition that the validity of international law depends on its positiveness. *See* Louis R. Beres, *After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law*, 24 VANDERBILT J. TRANS. L. 493 (1991); in any case, the law of the IMT Charter and Tribunal have been duly recognised and incorporated in international law, *see* "*Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal*", GA Res. 95(I), UN Doc. A/236 at 1144 (1946).

[145] For example, through prosecution of captured combatants, extradition, transposition of international law into national law, or acceptance of a duty to either prosecute or extradite.

[146] The first was between 1942-46, starting with the St. James and Moscow Declarations and culminating in the IMT Charter. The second period was that from 1993-98, starting with the adoption of the ICTY Statute by the Security Council and ending with the signing of the ICC Rome Statute in 1998.

[147] Both the *Justice* and *Hostages* tribunals regarded as factors contributing to change in the customary laws of war, *inter alia*, the force of circumstance, global interdependence and public opinion. *Hostages case* LRTWC vol. VIII at 49 and *Justice case* LRTWC vol. VI, at 34-35, 45-48, 54.

clearly established.[148] Heed should also be paid to the interests of states whose interests are particularly affected are included.[149] The fortifying effect of this evolving *opinio juris* will be further enhanced if the new rule overpowers the old one.[150] This process is evident in both the Nuremberg and Yugoslav/Rwanda trials. The former by adjudicating over offences which were considered by some as representing *ex post facto* law,[151] while the latter pointed out that individuals are criminally liable for offences committed in non-international armed conflicts.[152]

Advanced communications and constant interaction through the United Nations renders the positions of states on emergent rules of customary law known very rapidly, thus speeding up the development of these rules.[153] The pronouncement

---

[148] Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 IND. J. INT'L. L. 36, 37, 46 (1965). This conclusion is based on Cheng's personal observation that the role of usage in the establishment of rules of custom is purely evidentiary.

[149] *North Sea Continental Shelf cases*, ICJ REP., paras. 73, 74 (1968).

[150] *See* Individual Opinion of Judge Alvarez in *UK v. Norway* [*Anglo-Norwegian Fisheries case*], (Merits), Judgment of 18 Dec. 1951, ICJ REP., at 116, 152 (1951); Akehurst, *supra* note 77, at 19; another example is the refusal of the USA to ratify Protocols I and II (1977) because of the "national liberation" element in art. 1(4) Protocol I (1977), *see* Hans P. Gasser, *The US Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims,* 81 AJIL 910 (1987). This did not stop the USA in extending the criminal provisions of Protocols I and II (1977) to the situation in the former Yugoslavia through their positive vote to S/RES/808 (1993), which in the long run facilitated the inclusion of art. 8(2)(c)(d)(e) in the ICC Rome Statute (1998).

[151] The largest part of which was shortly thereafter incorporated in the Geneva Conventions (1949) and the Genocide Convention (1948).

[152] *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), paras. 129, 137.

[153] Akehurst, *supra* note 77, 47 BYBIL 16 (1974-75).

by the ICTY on criminality in internal conflicts, initiated through a consensus in the Security Council,[154] was further adopted by the Preparatory Committee on the ICC[155] and eventually incorporated in the ICC Statute,[156] even though both common article 3 of the Geneva Conventions (1949) and Protocol II (1977) were not until 1993 regarded as having a criminal nature under international law.[157] At the same time national courts, encouraged by the rapid developments at the international level, willingly accepted the admission of such cases, deeming violations of internal conflicts to be within the ambit of their jurisdiction.[158] Municipal decisions have been an important source of international law in the regulation of war crimes law[159] and, as in the case at hand, they prompted several states in adopting similar legislation. Thus, in a space of only a few years, *opinio juris* had profoundly altered.

---

[154] Provisional Verbatim Record of the 3217th Mtg., UN Doc. S/PV.3217 (25 May 1993).

[155] 92 AJIL 335-336 (1998).

[156] Art. 8(2)(c)(d)(e).

[157] *See* Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 278 INTL. REV. RED CROSS 409, 414 (1990). *See* also Theodor Meron, *The Case for War Crimes Trials in Yugoslavia,* FOREIGN AFFAIRS 124, 127-128 (Summer 1993).

[158] *See* Chapter V.

[159] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 23 (5th ed. 1998), who states also that decisions of domestic courts provide either indirect evidence of the practice of the forum state or, through a free investigation of a point of law and consideration of available resources, they may "result in a careful exposition of the law".

In conclusion, the concept of individual responsibility is a principle of international law.[160] It denotes the competence of international law, through the agreement of states, to prescribe individual punishment, and define when it is applicable. International law norms may also be created customarily through consistent state practice and *opinio juris*, and in that sense, domestic criminal law which is enforced through subsequent trials may trigger the creation of a customary rule.[161] Caution, nonetheless, should be exercised when using national case law in determining whether customary rules of international criminal law have evolved in a particular manner.[162] Individual responsibility has been recognised either when referred to expressly in custom or conventional law (contemporary approach) or when deemed as an inherent consequence of provisions found in any one of these two sources,[163] whether at the time of their adoption or sometime thereafter (Nuremberg approach). In every case the international rule in question must either expressly or

---

[160] The Inter-American Court of Human Rights has emphasised that individual responsibility is reserved only "for violations that are defined in international instruments as crimes under international law". *Intemational Responsibility for the Promulgation and Enforcement of the Laws in Violation of the Convention*, I/A Court HR, Advisory Opinion OC-14/94 of 9 Dec. 1994, 1994 Ann. R. I/A Court HR 89, 100 (1995), *reported* in 34 ILM 1188 (1995).

[161] Art. 15(2) of the International Covenant on Civil and Political Rights emphasised that it is in full accord with the principle *nullum crimen sine lege* to prosecute acts which are "criminal according to the general principles of law recognised by the community of nations." RATNER & ABRAMS, *supra* note 101, at 20-21, suggest that this provision allows international criminality to flow directly "from widely accepted domestic criminality".

[162] *Furundzija case* Judgment, para. 194.

[163] Thus, the fact that for war crimes and crimes against humanity international law recognises the application of universal jurisdiction, enabling any state to try the alleged offender, necessarily entails that the principle of universal jurisdiction contains also a penal rule.

from its very nature be a criminal one. Besides those cases where states exercise their customary right to try enemy personnel, the principle of individual responsibility seems to stress that international law recognises the right of any state, under certain circumstances, to assume jurisdiction over violations of the laws of war. In the case of the *jus in bello* this jurisdiction is universal.[164]

Domestic criminal statutes may be said to invoke the international norm of individual responsibility only where they incorporate relevant international law which recognises, with respect to the specific violation, the individual responsibility of the offender.[165] Therefore, where domestic criminal statutes incorporate relevant international law which in turn does not recognise individual liability, that domestic statute will not, even if it so purports, reflect the original international rule.[166]

---

[164] Meron argues that universal jurisdiction should also be acknowledged in cases where the duty to prosecute or extradite is unclear, but "the right to prosecute when offences are committed by aliens in foreign countries is recognised", *in International Criminalisation of Internal Atrocities*, 89 AJIL 570 (1995).

[165] In conformity with the Geneva Conventions (1949) many states adopted national laws granting universal jurisdiction over war crimes to their own courts. Hence, the Geneva Conventions Act of Australia (1957, as amended in 1991), the Geneva Conventions Act of Canada (1965), the Geneva Conventions Act of India (1960) and the Belgian Law Relative to the Repression of Grave Breaches of the 1949 Geneva Conventions and the Two Additional Protocols (1993). Other states have adopted similar legislation without any reference to the Geneva Conventions, as, for example, art. 23(4) of the Spanish Ley Organica 6/1985; similarly, the Cambodian Genocide Justice Act, 22 U.S.C.A. sec. 2656, adopted by Congress in 1994, and established with a view to bringing to justice members of the Khmer Rouge, is a lawful exercise of jurisdiction, because the universal jurisdiction already existing for crimes committed in international conflicts is gradually perceived as extending also to non-international conflicts, Stuart H. Denning, *War Crimes and International Law*, 28 AKRON L. REV. 422 (1995).

[166] Thus, for example, in US jurisdiction, where an irreconcilable conflict develops between a domestic statute and an international rule, the former prevails because according to *Schroeder v. Bissel*, 5 F.2d 838, 842 (D. Conn. 1925) federal courts may refuse to enforce an act of Congress only when they find it to be unconstitutional, *in* Gary Komarow, *Individual Responsibility Under International Law:The*

National judiciary applying such a statute will incur state responsibility, because of the violation of the international legal principle *nullum crimen sine lege*, unless the theory of "reasonable link" comes into play. This holds that a jurisdictional title is relative insofar as its existence and validity depend upon a sufficiently strong connection between the activity endeavored and the jurisdiction claimed.[167]

It may be argued that the values protected through the regulatory norms of international humanitarian law are such that "all states can be held to have a legal interest in [their] protection; they are obligations *erga omnes*".[168] This, in turn, may justify a right to prosecute all serious offences of the laws or customs of war. While it would be unlawful to expand an international crime through national law,[169] in only one case it would be a lawful exercise of jurisdiction if the national legislator or the judiciary were to expand the application of an international rule. That would be possible only in the case where the rule in question is one of *jus cogens*, to which no persistent objection is available,[170] even though such persistent objection by a non-

---

Nuremberg Principles in Domestic Legal Systems, 29 ICLQ 26 (1980). Although enforcement will be lawful under US law, this action would be a violation of international law.

[167] Robert Kolb, *Universal Criminal Jurisdiction in International Terrorism*, 50 RHDI 85 (1997).

[168] *Belgium v. Spain, Barcelona Traction, Light and Power Co. Ltd.* (Second Phase) ICJ REP. para. 33 (1970), where the Court distinguished between obligations *erga omnes partes* and obligations *erga omnes*, the latter owed to the international community as a whole; an example of *erga omnes* rights and obligations are those arising from the Genocide Convention (1948), *see Republic of Bosnia and Herzegovina v. Federal Republic of Yugoslavia*, Preliminary Objections, Judgment of 11 July 1996, para. 31, *summarised* in 91 AJIL 121 (1997).

[169] For example, by elevating a non-grave breach to a status of a grave breach, or by exercising universal jurisdiction where it is expressly not provided for.

[170] Kenneth C. Randal, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 823 (1988).

party would in any other case be, at least, meritorious.[171] In this sense, national courts have determined that individual responsibility may be incurred also in the context of non-international armed conflicts.[172]

1.2.5 *Brief Synopsis of jurisdictional expansion by the Security Council*

As has already been discussed, contemporary international law recognises individual liability for all serious violations of international humanitarian law, including crimes against humanity and genocide. To this effect it authorises all states to try offenders through the exercise of universal jurisdiction. While universal jurisdiction is provided for in statute for grave breaches,[173] it is customarily accepted for war crimes in general, crimes against humanity and genocide whether committed in armed conflict or not.[174]

The Security Council itself has not only condemned violations of international humanitarian law,[175] but has called for the prosecution of those "individually

---

[171] Jonathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BYBIL 1, 2 (1985).

[172] *See* Chapter V.

[173] Arts. 49 Geneva I (1949), 50 Geneva II (1949), 129 Geneva III (1949), 146 Geneva IV (1949).

[174] *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), paras. 140-4 1.

[175] By S/RES/771 (13 August 1992) the Security Council condemned widespread violations of international humanitarian law, including *inter alia* the practice of ethnic cleansing. It did the same with S/RES/764 (13 July 1992).

responsible" for violations of the grave breaches provisions of the 1949 Geneva Conventions.[176] This represents the relative post Cold-War consensus in the Security Council which has been put to use in addressing the most serious and frequent form of contemporary conflict, civil wars.[177]

Security Council practice with regard to cases of widespread atrocities like the ones in Yugoslavia and Rwanda has been to consolidate universal jurisdiction, as a right of every nation, into a single body which subsumes jurisdiction on behalf of the entirety of the international community.[178] This mechanism is known as international jurisdiction.[179] In the case of the ICTY and ICTR it refers to a limited international jurisdiction framed exclusively within the context of the respective conflicts.[180] This jurisdictional mechanism has come into being with the creation of subsidiary judicial organs under article 29 of the UN Charter[181] when the Security

---

[176] S/RES/764 (13 July 1992).

[177] For the role of the UN in developing international criminal law, *see* OSCAR SCHACHTER & CHRISTOPHER JOYNER (eds.) UNITED NATIONS LEGAL ORDER, vol. II, 993-1023 (1995).

[178] In the case of Somalia, which was of a much smaller atrocity scale than that of Bosnia and Rwanda, the Security Council condemned attacks on UN forces, with a view to prosecuting those responsible in either national or international fora. S/RES/837 (6 June 1993) and S/RES/814 (26 March 1993), in James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AJIL 644 (1993); recent efforts include the international "Campaign to Indict Saddam Hussein and Other Iraqi War Criminals", *The Guardian*, 16 Jan. 1997.

[179] *See* William J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INTL. L. 104 (1995).

[180] *Report of the Secretary-General*, UN Doc. S/25704 (1993), *reprinted* 32 ILM 1159 (1993) para. 12.

[181] *See* Danesh Sarooshi, *The Legal Framework Governing United Nations Subsidiary Organs*, 67 BYBIL 428-31 (1996).

Council determined, under Chapter VII that widespread crimes constituted a threat to international peace and security.[182] These Security Council determinations were based, *inter alia*, on the fact that the judiciary of the states concerned was either unwilling or incapable of functioning due to a complete collapse of state machinery.

The Security Council itself prefers an "open" Charter system as regards its competence in determining what constitutes a threat to the peace under article 39, rather than a "closed" system in strict accordance with article 2(4) of the Charter. Hence, as a politically-oriented body, the Council has applied "threats to the peace" to cover also internal situations.[183] Any action under articles 39, 41 and 42 is exempt from the domestic jurisdiction limitation of article 2(7). There is controversy, however, whether action undertaken by the Security Council under article 25 is mandatory for UN member States. The ICJ clearly thought so in its Advisory Opinion in the *Namibia case*,[184] noting that article 25 is not restricted in its application to Chapter VII since it is not located therein.[185] This, however, is not the standpoint of the "Western" members of the Council.[186] The legal points this divergence raises in the present case relate to possible action by the Security Council in future human

---

[182] S/RES/808 (22 Feb. 1993); S/RES/955 (14 Jan. 1994).

[183] NIGEL D. WHITE, KEEPING THE PEACE, 34 (2nd ed. 1997).

[184] *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970)*, ICJ REP. 16, at para. 126 (1971).

[185] *Ibid*, para. 113; *see* Rosalyn Higgins, *The Advisory Opinion on Namibia. Which UN Resolutions are Binding under Article 25 of the Charter?*, 21 ICLQ 270 (1972).

[186] WHITE, *supra* note 183, at 61-63.

rights or humanitarian crises and its ability or willingness to overcome article 2(7) where Chapter VII action is not possible.

Besides determining the individual liability of offenders, criminal prosecutions help, *inter alia*, to restore confidence in the rule of law.[187] The creation of the ICTY and ICTR prompted eventually the negotiation and signing of the Statute of the International Criminal Court in Rome on 17 July 1999.[188] The assumption of similar prosecutions at the domestic level should again be attributed to Security Council initiative. The next section examines the interplay between domestic and international criminal law in both national and international prosecutorial efforts. It is helpful before this analysis to make a general overview of the ICTY and its Statute and related issues since its establishment. This will further aid in the construction of the Statute of any international criminal tribunal under general rules of interpretation available in international law.

1.2.5.1 *The International Criminal Tribunal for the former Yugoslavia*

The establishment of the ICTY represents a historic breakthrough for the United Nations organisation and the role of the Security Council. For one thing, it expanded the ambit of applicable measures under article 41 of the UN Charter not amounting to the use of force and predicated a quest for international justice rather than a fragile peace.

---

[187] Bernhardt Roling, *Criminal Responsibility for Violations of the Laws of War*, 12 REV. BEL. DR. INTL. 22 (1976).

After determining that the widespread violations of international humanitarian law on the territory of the former Yugoslavia constituted a threat to international peace and security,[189] based in great part on the Interim Reports of the Commission of Experts,[190] which was established on the model laid down in article 90 of Protocol I (1977),[191] the Security Council instructed the Secretary-General to examine whether a Tribunal may be created. The Secretary-General replied in the affirmative[192] and formulated for this purpose a Statute on the premise that it would apply only those portions of international law which were beyond any doubt part of customary law.[193] Based on the Report and a Statute annexed thereto, the Security Council passed Resolution 827 (1993) giving life to the ICTY.[194]

---

[188] For an analysis of the ICC, *see* Chapter V (5.2.5.1) of this thesis.

[189] S/RES/808 (1993).

[190] This Commission, headed by Professor Bassiouni, was established as a result of S/RES/780 (1992). The voluminous annexes attached to the Commission's Final Report exceeded three thousand pages of documented violations, UN Doc. S/1994/674 (27 May 1994); *see* also Cherif M. Bassiouni, *The United Nations Commission of Experts Pursuant to Security Council Resolution 780 (1992),* 88 AJIL 784 (1994).

[191] International Fact-Finding Commissions envisaged under art. 90 Protocol I require the consent of the states involved. Hence, the Security Council departed from this rule in S/RES/780 (1992).

[192] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* UN Doc. S/25704 (1993), *reprinted* 32 ILM 1159 (1993).

[193] *Ibid*, para. 34.

[194] S/RES/827 (1993); for a detailed overview of ICTY's practice, *see* JOHN R. W. D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA (1998).

The subject-matter jurisdiction of the ICTY consists of four core crimes;[195] grave breaches of the Geneva Conventions (1949),[196] violations of the laws or customs of war,[197] genocide[198] and crimes against humanity.[199] Of these, the most controversial has been the interpretation of article 3, which was envisaged to be a residual clause based on the Regulations annexed to Hague Convention IV (1907), Respecting the Laws and Customs of War on Land.[200] The Appeals Chamber, in its Decision on the Interlocutory Appeal on Jurisdiction in the *Tadic case*, explained article 3 of the ICTY Statute to cover also violations perpetrated in non-international armed conflicts.[201] A further innovation of the Statute is the inclusion of "rape" within the definition of crimes against humanity.[202] Further elaborating the ambit of crimes against humanity, the Appeals Chamber in the *Tadic case* noted that under

---

[195] *See* George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AJIL 64 (1996).

[196] Art. 2.

[197] Art. 3.

[198] Art. 4.

[199] Art. 5.

[200] *Report of the Secretary-General, supra* note 191, paras. 41, 43.

[201] *Tadic case*, Appeals Decision on Jurisdiction, 105 ILR 453 (1997), para. 89.

[202] Art. 5(g); in the *Furundzija case* Judgment, *supra* note 70, the Trial Chamber stated that rape may also constitute a war crime as well as an act of torture, paras. 163, 169; *see* also Theodor Meron, *Rape as a Crime Under International Law*, 87 AJIL 424 (1993); Catherine Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HRQ 649 (1995).

customary international law, crimes against humanity may be committed in any type of conflict, and it may also be the case that they require no nexus to an armed conflict at all.[203]

A striking feature of the Statute is that of its concurrent jurisdiction with national courts. Under article 9(1), however, the ICTY has primacy over any other court or tribunal.[204] This allows the ICTY to request deferral of proceedings regardless of the stage at which a judicial proceeding is pending before a national court.[205] Hence, the ICTY requested a court in the Federal Republic of Germany to defer its proceedings against Dusan Tadic to its jurisdiction in The Hague, despite the defendant's pleas to the contrary.[206] On this basis, Croatia and BiH are obliged before they initiate criminal prosecutions against alleged war criminals to inform the ICTY Prosecutor in order for the Office of the Prosecutor to determine whether a case is serious enough to merit deferral. Every other state has such an obligation only upon a formal request by the ICTY.[207]

Another unique feature of the Statute is the discretion of the judges to adopt appropriate rules of procedure and evidence.[208] These rules, revised several times

---

[203] *Tadic case*, Appeals Decision on Jurisdiction, paras. 140-141.

[204] Art. 9(2).

[205] Art. 9(2).

[206] The Request for deferral was made under Rule 10 of the Rules of Procedure. *See Decision of the Trial Chamber on the Application of the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Dusko Tadic*, (8 November 1994), Case No. IT-94-1-D, 101 ILR 1 (1995); *see* also Colin Warbrick, *International Criminal Law*, 44 ICLQ 465 (1995), at 471.

[207] Arts. 9 and 29 ICTY Statute.

[208] Art. 15.

since 1993,[209] are the product of an amalgamation of civil and common law traditions, drawn from their respective systems to satisfy the procedural and evidentiary needs of the Tribunal. Such prominent examples are Rule 61, entitled "Procedure in Case of Failure to Execute a Warrant", and Rules 69, 71(D) and 75. Rule 61 proceedings, used extensively in the first years of the Tribunal's life when there were no cases on its docket, helped the ICTY retain its credibility as an international judicial institution. According to Rule 61, where a warrant of arrest has not been executed, and personal service of the indictment has not been effected despite the sincere efforts of the Prosecutor,[210] a Judge shall order that the Indictment be submitted before a Trial Chamber. Upon obtaining such an order the Prosecutor thereby submits the indictment and relevant evidence before the Judge for confirmation, calling, if it so warranted, witnesses to testify.[211] If thereafter the Trial Chamber has reasonable grounds for believing that the accused has committed all or any of the crimes charged in the Indictment, it shall make a formal declaration to that effect[212] and issue an international arrest warrant. This is transmitted to all states.[213] If any state fails to co-operate with the contents of the arrest warrant the ICTY President may notify the Security Council.[214] It should be emphasised that Rule 61 proceedings

---

[209] *Reprinted* 33 ILM 484 (1994); the most recent amendment to the Rules occurred on 10 July 1998.

[210] Rule 61 (A) of the Rules of Procedure and Evidence [hereinafter "Rule" refers to a provision in the ICTY's Rules].

[211] Rule 61(B).

[212] Rule 61 (C).

[213] Rule 61(D).

were never intended to constitute trials *in absentia*,[215] but a means of international condemnation, a call for co-operation and a halt to impunity.[216]

The framers of the ICTY Statute were very conscious of the fact that due to the monstrous behavior displayed by all belligerent factions, both victims and witnesses would be reluctant to testify.[217] Article 22 of the ICTY Statute, a general protective clause, permitted *in camera* proceedings as well as the protection of the victim's identity.[218] The Rules of Procedure established for this purpose a Victims and Witnesses Unit, which is authorised to recommend protective measures[219] and provide counseling and support, especially in cases of rape and sexual assault.[220] The importance of the Unit and the function of article 22 of the Statute were stressed on numerous occasions by the ICTY President.[221]

---

[214] Rule 61(E).

[215] This is guaranteed in art. 21(d) of the ICTY Statute.

[216] *See*, for examples, paras. 3-5 of *Prosecutor v. Rajic*, Case No. IT-95-12-R61, *reported* in 108 ILR 141 (1998), a Rule 61 Decision of 13 Sep. 1996, and ICTY Press Release CC/PIO/106-E, attached to the Decision regarding the Trial Chamber's findings.

[217] *See* Francoise J. Hampson, *The International Criminal Tribunal for the former Yugoslavia and the Reluctant Witness*, 47 ICLQ 50 (1998).

[218] For example, *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision of Trial Chamber II on the Defence Motion to Protect Defence Witnesses, of 16 Aug. 1996 (on file with author).

[219] Rule 34(A)(i).

[220] Rule 34(A)(ii).

[221] *Address of Antonio Cassese to the General Assembly*, UN Doc. IT/116 (19 Nov. 1996), where he stated that one of the reasons the Rules of Procedure and Evidence are constantly amended was "to help better protect victims and witnesses", at 7; similarly, President Cassese, in his *Annual Report to*

Closely related is the protection of victims and witnesses through an order by a Trial Chamber of non-disclosure of a person's identity.[222] Furthermore, a Trial Chamber, if it so deems appropriate, may prevent public disclosure of a victim's or witness's identity,[223] assign a pseudonym,[224] order closed sessions,[225] or order the giving of testimony through image or voice-altering devices or closed-circuit television[226] or even through video conference link.[227] ICTY Trial Chamber I in the *Tadic case* examined the legal basis of these measures and ruled that they were based on internationally agreed standards.[228] In early 1997 a dispute arose between the Office of the Prosecutor and Defence Counsel in the *Celebici case*,[229] regarding Defence Counsel's inappropriate personal conduct in her cross-examination of victims and witnesses. This prompted the Legal Advisory Section of the Prosecutor's

---

the General Assembly, stressed the importance of the Unit as a necessity before, during and after the end of testimonies, UN Doc. A/51/292, 51st sess., S/665/1996 (16 Aug. 1996), at 31-33.

[222] Rule 69(A); *see* Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AJIL 235 (1996); Christine M. Chinkin, *Due Process and Witness Anonymity*, 91 AJIL 75 (1997); Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 AJIL 80 (1997).

[223] Rules 75(B)(i)(a) and (b).

[224] Rule 75(B)(i)(d).

[225] Rules 75(B)(ii) and 79.

[226] Rule 75(B)(i)(c). This is not a novel conception, since some states in the USA allow it and the Supreme Court held in *Maryland v. Craig*, 497 US 836 (1990) that closed circuit television depositions do not violate the Sixth Amendment right to confrontation when the court finds it necessary to protect a child witness from psychological harm.

[227] Rule 71(D).

[228] *Tadic case*, Decision on Protective Measures for Victims and Witnesses (10 Aug. 1995), 105 ILR 599 (1997).

Office to file a relevant motion seeking to limit harassment and intimidation of vulnerable testifying persons, in accordance with Rule 75(C).[230] This subsequently led to the promulgation of a "Code of Professional Conduct for Defence Counsel Appearing Before the ICTY", drafted by the ICTY Registrar and presented on 12 June 1997.

The greatest challenge for the ICTY is now the enforcement of article 29 of its Statute, relating to an obligation of states to co-operate and offer judicial assistance to the Hague Tribunal. Since the Statute constitutes an enforcement measure under Chapter VII of the UN Charter, any order by a Trial Chamber in accordance with article 29 of the Statute for the surrender or transfer of documents or persons[231] to the custody of the ICTY is binding.[232] A large number of states have passed legislative acts giving domestic effect to their obligation under article 29.[233] Some of these domestic Acts have been criticised for not offering adequate safeguards and of permitting for extradition of offences under the ICTY Statute which are not part of

---

[229] *Prosecutor v. Delalic et al* [*Celebici case*], Case No. IT-96-21-T.

[230] The present author undertook the research and drafting of this Motion. For a thorough analysis of the issue, *see* Ilias Bantekas, *Study on the Minimum Rules of Conduct in Cross-Examination to be Applied by the International Criminal Tr*ibunal *for the former Yugoslavia*, 50 RHDI 205 (1997).

[231] *See* Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AJIL 510 (1996).

[232] *Report of the Secretary-General*, *supra* note 180, paras. 125-126.

[233] For example, the United Nations (International Tribunal for the Former Yugoslavia) Order 1996 (UK), S.I 1996 No. 716; the Australian International War Crimes Tribunals Act No. 18 of 1995; the New Zealand International War Crimes Tribunal Act No. 27 of 1995; French Law No. 95-1 of 2 Jan. 1995; Italian Decree-Law No. 544 of 28 Dec. 1993.

the national criminal law of the extraditing state.[234] These criticisms have no legal basis since, as Warbrick correctly points out, the obligation of states to co-operate with respect to handling of suspects on their territory does not amount to extradition.[235] It is not fully clear, however, what the safeguards against cases of disguised extradition may be.

The Appeals Chamber in the *Blaskic case* stated that article 29 is an obligation *erga omnes*.[236] It further noted that an Order for the production of documents would thus be compelling, but only if it were framed with specificity;[237] similarly, no binding Order may validly be addressed to state officials acting in their official capacity.[238] The Appeals Chamber concluded that since it was not empowered with enforcement powers, its only option in cases of recalcitrant states, was to inform the Security Council.[239] Recent IFOR efforts to capture persons wanted by the ICTY seems to follow the revitalisation of the Tribunal's international credibility, especially

---

[234] Hazel Fox, *The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal*, 46 ICLQ 434 (1997), regarding the UK's S.I 1996 No. 716.

[235] Colin Warbrick, *Co-Operation with the International Criminal Tribunal for Yugoslavia*, 45 ICLQ 945 (1996), at 950.

[236] *Prosecutor v. Blaskic*, Appeals Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 Oct. 1997), 110 ILR 607 (1998), para. 26.

[237] *Ibid*, para. 32.

[238] *Ibid*, para. 45.

[239] *Ibid*, para. 36.

in the eyes of the permanent members of the Security Council and the highest echelons of NATO.[240]

1.3.1 GENERAL RULES OF INTERPRETATION IN INTERNATIONAL LAW

This section is based on an analysis of the general rules of interpretation in international law emanating and submitted before every case by the Legal Advisory Section of the Office of the Prosecutor of the ICTY.[241]

Although the ICTY Statute is not *stricto sensu* an international agreement, there are sufficient grounds for subjecting it to the available rules of interpretation available for treaties,[242] since it is a legal instrument with the attributes of an international agreement as defined by article 2(a) of the Vienna Convention on the Law of Treaties 1969.[243] The applicability of the interpretive rules of the Vienna

---

[240] In a meeting on 19 Jan. 1996 between the ICTY President and the Secretary-General of NATO, it was agreed that, within the limits of its resources and mandate, NATO would not only assist in ICTY investigations, but would also detain any accused whom it came across, *see* ICTY BULLETIN, *The Parties, IFOR and ICTY*, No. 2 22-1-1996.

[241] The author in his capacity as Law Clerk in the Office of the ICTY Prosecutor was involved in the research of this work.

[242] This was also the opinion of Trial Chamber I in the *Tadic case*, Decision on Protective Measures for Victims and Witnesses (10 Aug. 1995), 105 ILR 599 (1997), para. 18, but without any further legal justification.

[243] Vienna Convention on the Law of Treaties 1969, *opened* for signature on 23 May 1969, 1155 UNTS 331, *reported* also in 8 ILM 679 (1969). Art. 2(a) provides that the term

Convention is further supported by the status of the ICTY as a subsidiary organ of the Security Council,[244] directly linked to the constituent instrument of the United Nations, its Charter. Therefore, since article 5 of the Vienna Convention applies to "treat[ies] which [are] the constituent instrument of an international Organisation and, ... treat[ies] adopted within an international Organisation", it would seem appropriate that by extension[245] the rules of treaty interpretation apply also to the ICTY Statute.

The approaches adopted by the Appeals Chamber in the *Tadic* Appeals Decision on Jurisdiction were the "literal", "teleological", and the "logical" and "systematic" methods of interpretation.[246] It proceeded with a literal construction, resorting to other methods secondarily in order to ascertain the meaning of a provision in the Statute,[247] the object behind its enactment,[248] or the intent of the Security Council.[249] Reliance on such a teleological interpretation was placed on the "Security Council's many statements leading up to the establishment" of the ICTY.[250] The meaning of the specific provisions were also interpreted in accordance with "a systematic construction of the Statute" which took account of the "context of the

---

"treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

[244] *See* art. 29 UN Charter.

[245] That is, from the powers vested in the Security Council by the UN Charter as the constitutive instrument of the United Nations.

[246] *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), paras. 71-72, and 79.

[247] *Ibid*, para. 72.

[248] *Ibid*, para. 71.

[249] *Ibid*, para. 75.

[250] *Ibid*, para. 74.

Statute as a whole",[251] including reference to preparatory works of the Statute,[252] as well as a more general perspective through which a specific provision may be appraised in a historical context in terms of general international law.[253]

These interpretative tools correspond to the general rules of construction contained in article 31(1) of the Vienna Convention on the Law of Treaties (1969), which is declaratory of customary law.[254] They are applicable to the ICTY and ICTR Statutes, because they are legal instruments "with the attributes of an international treaty".[255] Humanitarian and human rights instruments warrant an interpretation which ensures their widest possible effectiveness in accordance with their object and purpose.[256]

International proceedings concerning the prosecution of war crimes differ substantially from all other national criminal proceedings, especially as regards the

---

[251] *Ibid*, para. 90.

[252] *Ibid*, para. 82. This is in accordance with art. 32 of the 1969 Vienna Convention which provides for supplementary means of interpretation.

[253] *Ibid*, para. 93.

[254] *Advisory Opinion Concerning Polish Postal Service in Danzig*, PCIJ Ser. B, No. 11, at 39 (1929), *reaffirmed* in *Advisory Opinion Concerning Admission to the United Nations*, ICJ REP., 8 (1950).

[255] Statement of the Chinese representative to the Security Council regarding the adoption of S/RES/808 (1993), UN Doc. S/PV.3217 (1993), at 33.

[256] *See Case Concerning the Question of the Acquisition of Polish Nationality*, PCIJ Ser. B, No. 7, at 17 (1923); *Advisory Opinion Concerning Reservations to the Genocide Convention*, ICJ REP., 23 (1951); *Ireland v. United Kingdom*, Eur.Ct.HR Ser. A, No. 25, para. 239 (1978); *Effect of Reservations on the Entry into Force of the American Convention*, I/A Court H. R., Advisory Opinion OC-2/82, Ser. A, No. 2, para. 29 (24 Sept. 1982), *reported* in 22 ILM 37 (1983); *reaffirmed* in *Restrictions to the Death Penalty, I/A Court H.R.*, Advisory Opinion OC-3/83, Ser. A, No. 3, para. 50 (8 Sept. 1983), r*eported* in 23 ILM 320 (1984).

collection of evidence.[257] This echoes the wording of the Eur.Comm.HR, which noted that while eleven years were a very long time for criminal proceedings, "[t]he exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission's opinion, inapplicable the principles developed in the case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offences".[258] In addition, the ICJ and the European Court of Human Rights (Eur.Ct.H.R) have recognised an "evolutionary" method of interpretation, through which contemporary developments in international law are incorporated into the relevant provisions of human rights and humanitarian instruments.[259] The ICTY seems to have adopted this evolutionary method of interpretation since the *Tadic* Appeals Jurisdiction Decision.[260] This was also evident in the *Tadic* Decision on Protective Measures for Victims and Witness of 10 August 1995, where Trial Chamber I noted that although article 21 of the ICTY Statute, which provides judicial guarantees, reflects the recognised due process standard of article 14 of the ICCPR, article 21 should be interpreted according to the unique characteristics within the object and purpose of the ICTY context.[261]

---

[257] *Prosecutor v. Kovacevic*, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 (2 July 1998), Separate Opinion of Judge Mohammed Shahabudeen, at 3 (on file with author).

[258] *X v. Federal Republic of Germany*, Application No. 6946/75, Decision of 6 July 1976, 6 DR 114 (1977), at 115.

[259] *See Advisory Opinion Concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ REP., para. 53 (1971); *Tyrer case* Judgment, Eur.Ct.H.R. Ser. A, No. 26, para. 31 (1978); *reaffirmed* in *Marckx case* Judgment, Eur.Ct.H.R. Ser. A, No. 31, para. 41 (1979); *see* also DOMINIC McGOLDRICK, THE HUMAN RIGHTS COMMITTEE, 159 (1991).

[260] Para. 97.

[261] 105 ILR 599 (1997), para. 25.

1.3.2 *National criminal law as a source of law before international tribunals*

Although since antiquity enemy belligerents have been customarily entitled to try their adversaries for violations of the laws of war, the charges were always framed on provisions of national criminal law. International law merely qualified the right to stage these trials and discerned the range of acts considered contrary to the usages of war. Since there never existed an international definition of murder or any other crime committed in armed conflict and formulated through international consensus, it was only natural that domestic provisions would be utilised to define both the *mens rea* and *actus reus* of each offence.

While it would only be natural to apply national law to a crime committed internally by an alien, it is not so where national law is applied to an international crime, even if it resembles the equivalent domestic offence. National provisions on murder, for example, were never drafted to consider acts of killing in armed conflicts, because the concept of an armed conflict entails the consideration of special attributes with regard to homicides. Furthermore, it was soon discovered that there was no domestic equivalent for crimes committed on a widespread and systematic scale, as part of or for the purposes of an armed conflict.[262] The attitude of international courts has been to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law.[263] While international criminal

---

[262] This was not even apparent until after World War II with the inclusion of the much debated crimes against peace and crimes against humanity in the IMT Charter. For a discussion of attacks on the IMT Judgment, *see* George A. Finch, *The Nuremberg Trial and International Law*, 41 AJIL 20 (1947).

[263] *Prosecutor v. Erdemovic* [*Erdemovic Appeals Judgment*], Appeals Chamber, Judgment of 7 Oct. 1997, Case No. IT-96-22-A, *reported* in 92 AJIL 282 (1998), Dissenting Opinion of Judge Cassese, para. 3.

procedure is the gradual result of an amalgamation of national criminal procedural concepts, the subject-matter of international law itself has necessitated a cautious approach towards its importation in international adjudication.[264] The reason for this, according to Judge Cassese, is because:

"... international criminal procedure does not originate from a uniform body of law. It substantially results from an amalgamation of two different legal systems [common law and civil law]... [The Statute and Rules of the ICTY] in outlining the criminal proceedings before the Trial and Appeal Chambers, do not refer to a specific national criminal approach, but originally take up the accusatorial system and adapt it to international proceedings, while at the same time upholding some elements of the inquisitorial system. ... It follows that- unless expressly or implicitly commanded by the very provisions of international criminal law - it would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs [etc.] which only belong, and are unique, to a specific group of national legal systems."[265]

The doctrinal basis for the international criminalisation process requires the existence of either an international element, which constitutes an offence *jure gentium*, or a transnational element, which appears whenever the commission of an act affects the interests of more than one states.[266] A third category criminalises conduct, such as torture, which lacks either an international or transnational element, but which the international community has decided to criminalise in order to exercise effective control.[267] When custom and treaty are of no avail, international tribunals

---

[264] *See* Separate Opinion of Judge McNair in the *Advisory Opinion on the International Status of South West Africa case*, Judgment of 11 July 1950, ICJ REP. 148-149 (1950), and Separate Opinion of Judge Firzmaurice in the *Barcelona Traction case*, ICJ REP., at 66-67 (1970).

[265] *Erdemovic* Appeals Judgment, Dissenting Opinion of Judge Cassese, *reported* in 92 AJIL 282 (1998), para. 4.

[266] Cherif M. Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L. L. 28 (1983).

[267] Barbara M. Yarnold, *Doctrinal Basis for the International Criminalisation Process*, 8 TEMPLE INT'L & COMP. L. J. 91 (1994).

must resort to a process of deriving general principles of criminal law from the domestic laws of states. To cover the lack of specific criminal definitions in international law, the tribunal in the *Hostages case* stated that:

> "It is not essential that a crime be specifically defined and charged in accordance with 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*."[268]

General principles of criminal law, international criminal law, and international law are useful in defining elements of offences for which there exist no international definitions. The next section examines how international tribunals use and derive general principles of law.

1.3.2.1 *General principles of criminal law*

General principles of law can be found either in international law or in the domestic legal systems of states.[269] General principles of international law, such as *pacta sunt servanda*, estoppel,[270] and *res judicata*[271] constitute *a priori* principles which underlie both customary and treaty law. On the other hand, general principles

---

[268] *Hostages case*, LRTWC, vol. VIII, at 53.

[269] *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953); Arnold D. McNair, *The General Principles of Law Recognised by Civilised Nations*, 33 BYBIL 1 (1957).

[270] *Germany v. Poland*, Chorzow Factory case (Jurisdiction), PCIJ REP. Ser. A, No. 9 (1927), at 31.

[271] *Advisory Opinion, Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ REP. 53 (1954).

of municipal law are "practice[s] or legal provisions common to a number of nations".[272] The most fertile ground for such extraction have been the fields of evidence and procedure,[273] with the adoption, for example, by the ICJ of circumstantial evidence on the basis that it is a legal practice admitted in all systems of law.[274] It was accepted both by WW II military tribunals,[275] but also by contemporary international judicial bodies, such as the European Court of Justice,[276] that for a domestic principle to be regarded as generally accepted it must be recognised by most legal systems, not all. The yardstick should be, however, in all cases that the principle involved be a "fundamental rule of justice".[277] Under customary international law, reliance upon principles deriving from national legal systems[278] is justified either when rules make explicit reference to national laws,[279] or

---

[272] *AMCO v. Republic of Indonesia*, 89 ILR 366, at 461 (1992), decided by the Arbitration Tribunal of the International Centre for the Settlement of Investment Disputes.

[273] *See*, for example, Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L. L. 171 (1993).

[274] *Albania v. UK*, Corfu Channel case (Merits), Judgment of 9 April 1949, ICJ REP. 4, at 14 (1949).

[275] The tribunal in the *Hostages case* noted that "if it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified", *Hostages case*, LRTWC, vol. VIII, at 49.

[276] In the words of the Advocate General Lagrange in *Hoogovens v. High Authority*, Case 14/61, [1962] ECR 253, at 283-284, "[T]he Court is not content to draw on more or less arithmetical common denominators between different national solutions, but chooses from each of the member states those solutions which, having regard to the objects of the Treaty, appear to be the best or... the most progressive." *See* generally, PAUL CRAIG & GRAINNE DE BURCA, EU LAW, TEXTS CASES & MATERIALS, Chp. VII (2nd ed. 1998).

[277] *Hostages case*, LRTWC, vol. VIII, at 49.

[278] The tribunal in the *Hostages case* noted that the acceptance of a fundamental principle of justice rests on judicial or legislative declaration. In this connection, it was stated that military regulations are

when such reference is "necessarily implied by the very content and nature of the concept".[280] This suggests that the practice of international tribunals has been to explore all the means available at the international level before turning to national law.[281]

Judge Cassese noted further that even in the case of international rules embodying national law notions, "an effort must be made to construe those notions in the light of the object and purpose of the international rules or of their general

---

not a "competent source of international law" because they do not constitute legislative or judicial pronouncements; they only play an important role in determining custom or practice. *Hostages case*, LRTWC, vol. VIII, at 51.

[279] As does, for example, art. 24(1) ICTY Statute, which states that in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

[280] *Exchange of Greek and Turkish Populations*, 1925 PCIJ Ser. B., No. 10, at 19-20 (Advisory Opinion of 21 Feb. 1924), cited by Judges McDonald and Vohrah in the *Erdemovic Appeals Judgment*, *summarised* also by Olivia Swaak-Goldman *in* 92 AJIL 283 (1998); a 1952 French-Italian Conciliation Commission, ruling on the meaning of the word "residence" contained in art. 79(6) of the Peace Treaty of 10 February 1947 between the Allied Powers and Italy, stated:

> "As the Peace Treaty does not define expressly what is meant by residence, the interpreter must infer this definition from the purpose the Allied and Associated Powers intended to pursue by article 79(6)".

UN Reports of International Arbitral Awards (UNRIAA), vol. XIII at 398, reported by Judge Cassese in his dissenting opinion in the *Erdemovic* Appeals Judgment, para. 3.

[281] *Furundzija case* Judgment, *supra* note 70, at para. 178; *Erdemovic* Appeals Judgment, Dissenting Opinion of Judge Cassese, para. 2. Judges McDonald and Vohrah agreed with this "last resort" attitude towards national law. They argued that even though the concept of a guilty plea is a product of the adversarial system of common law, the Rules of Procedure and Statute of the ICTY should be examined according to the plain and ordinary meaning of the terms therein (in accordance with art. 31 of the 1969 Vienna Convention on the Law of Treaties), followed by consideration of international law authorities. If these prove insufficient, recourse then may be had to national law. *See Erdemovic* Appeals Judgment, in 92 AJIL 282 (1998), at 283.

spirit".[282] The majority of the Appeals Chamber in the *Erdemovic case*, after stressing the lack of definition of duress under international law, held that civil law criminal codes prescribed duress as a general exculpatory principle to all crimes, while common law penal law did not.[283] Thus, while concluding that a consolidation of the concept in the two legal systems resulted in the general principle that an offence committed under duress is less blameworthy, it was noted that a general principle must be distinguished from a specific rule applicable to the facts of the case.[284] In the case of duress it was found that the precise question of whether duress constituted a complete defence to unlawful killing was inconsistent in the specific rules of the various legal systems.[285] However, instead of applying the general rule on duress in the absence of an international rule, the majority took a policy-oriented approach to duress[286] that was founded on English law.[287] Thereby, it came to the conclusion that duress did not afford a complete defence to unlawful killing. This adaptation was rightly attacked by Judges Cassese and Stephen because, as they asserted, there did exist a general rule of international criminal law permitting duress as a defence,[288] the non-application of which would run contrary to the principle of legality.[289]

---

[282] *Erdemovic* Appeals Judgment, Dissenting Opinion, para. 3.

[283] *Ibid*, 92 AJIL 282 (1998), at 24.

[284] *Ibid.*

[285] *Ibid.*

[286] *Ibid.* They stated that the law "must serve broader normative purposes in light of its social, political and economic role", especially in the case of the ICTY which deals with serious international crimes of "extreme violence and egregious dimensions".

[287] *Erdemovic* Appeals Judgment, Dissenting Opinion of Judge Cassese, para. 11.

[288] This general rule of international law, affording a complete defence in cases of unlawful killing (*see* LRTWC vol. XV, at 174), was based on: the *Trial of Otto Ohlendorf and Others* [*Einsatzgruppen case*] TRIALS OF WAR CRIMINALS [TWC] vol. IV, at 471, 480-481 (1950); *High Command case*, TWC

The correct approach was that taken by ICTY Trial Chamber I in the *Furundzija* Judgment, a case that concerned acts of rape, torture and murder of interned civilians by Bosnian-Croat paramilitaries. In attempting to define "rape" under international law, the Court determined that the sources of international law were of no avail. It, thereafter, attempted to derive a general principle of "rape" from national laws.[290] It came, thus, to the conclusion that the common elements of rape in both common law and civil law systems were that rape was constituted by the forcible sexual penetration of the body by the penis or other object in the vagina or anus.[291] There were considerable variations, however, as regards the treatment of forced oral penetration.[292] Faced with this lack of uniformity the Chamber resorted firstly to general principles of international criminal law and thereafter to general principles of international law. It asserted that the essence of international humanitarian law is

---

vol. XI, at 509; *Trial of Gustav Alfred Jepsen and Others* [*Jepsen case*], Judgment of 24 Aug. 1946, at 357 (unreported); the *Fulriede case*, Judgment of 10 Jan. 1949 of the Dutch Special Court of Cassation, *reported* in ANNUAL DIGEST (AD) 549 (1949); *Eichmann v. Attorney-General of the Government of Israel*, 36 ILR 277, 318 (1968); *R v. Finta*, Judgment of 24 March 1994, 1 SCR 837 [1994] and 104 ILR 284 (1997); The conditions that need to be satisfied, under this general rule of international law, for duress to constitute a complete defence, were found by Judge Cassese to be that: a) the act charged was done under an immediate threat of severe and irreparable harm to life or limb; b) there was no adequate means of averting such evil; c) the crime committed was not disproportionate to the evil threatened; d) the situation leading to duress must not have been voluntarily brought about by the person coerced, *in Erdemovic Appeals Judgment*, Dissenting Opinion of Judge Cassese, para. 16.

[289] Indeed, the minority views of Cassese and Stephen were adopted as art. 31(d) ICC Rome Statute.

[290] *Furundzija case* Judgment, para. 177.

[291] *Ibid*, para. 181.

[292] *Ibid*, para. 182.

focused on the human dignity of every person regardless of gender, and subsequently classified oral penetration as an act of "rape".[293]

While WW II military tribunals relied heavily on national law for their legal terminology and for their definition of terms imported from their national criminal laws,[294] it was clear that such importation was utilised solely for amplification of, and not in substitution for, rules of international law.[295] This, however, did not prevent the drafters of the IMTFE Charter from relying on the domestic laws of all the participating countries, including Japan, for the prescription and definition of the crimes of "murder" and "conspiracy to murder".[296]

Litigation of cases in the ICTY is based on an adversarial system, which does not carry with it all the characteristics of the common law adversarial system. Thus, the absence of a jury is an element in it being characterised as a semi-adversarial adjudicatory procedure. The Statute and the Rules of Procedure constitute an

---

[293] *Ibid*, paras. 182-186.

[294] In two trials held by Australian military courts at Rabaul, certain accused were charged with murder and later found guilty of manslaughter, *Masao Kudo and Others case* (1 April 1946) *and Daijiro Yamasaki case* (4 June 1946), *reported* in LRTWC vol. XV, at 8; *see* also *Arno Heering case*, tried by a British military court at Hanover on 24-26 Jan. 1946, *reported* in LRTWC vol. XI, at 79-80 and LRTWC vol. XV, at 8; *Essen Lynching case*, LRTWC vol I, at 20 and LRTWC vol. VII, at 81; *I G. Farben case*, LRTWC vol. X, at 40 and LRTWC vol. XV, at 9.

[295] The tribunal in the *Jaluit Atoll case*, in which various accused were found guilty of murder, stated:

> "In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in international law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of international law. This is so even if it involves the use of tautology, inherent in some common law definitions..."

LRTWC vol. XI, at 72, 80 and LRTWC vol. XV, at 8. Cited with approval in the *Tadic case*, Judgment and Opinion (7 May 1997), *reported* in 36 ILM 908 (1997), para. 678.

[296] Evans, *supra* note 35, at 23.

international criminal procedural system in as much as they are based, at least in the case of the former, on a Chapter VII Resolution of the Security Council, as well as upon an internal charter of a subsidiary international organ (in relation to the Rules).[297] Since these instruments are drafted in general legal terms and there is little international precedent on international criminal procedural rules, the ICTY may eventually turn to national laws for guidance, bearing in mind however the international character of its subject-matter.[298]

The issue of application of national law as a source of law for the ICC was a controversial one.[299] Article 21(c) of the ICC Statute places general principles of law derived from legal systems of the world in a position of last resort, and then only if they are consistent with international law.[300]

---

[297] Rules of Procedure and Evidence, UN Doc. IT/32/Rev.6, *reprinted* in 33 ILM 484 (1994).

[298] Ilias Bantekas, *Study on the Minimum Rules of Conduct in Cross-Examination to be Applied by the International Criminal Tribunal for the Former Yugoslavia*, 50 RHDI 207 (1997).

[299] Colombia, the Netherlands and the UK were among those who pushed for the elimination of any reference to national laws, so as to avoid even the slightest possibility of confusion over legal jurisdiction. Others, like Canada, proposed the application of national law in cases of incidents not covered by the Statute of the proposed court or by international treaty. In such event, the national law to be applied would be based on common, universal principles derived from the main international legal systems. Others argued, as did Sweden, that the preference in terms of application should be for the law of the state in which the offence was committed, as long as that law could be held to an acceptable international legal standard. Precedent for this can be found in Anglo-American tort law, which allows for the prosecution of civil suits in the jurisdiction in which the tort was committed. *See* UN Press Release L/2767 (28 March 1996).

[300] This formulation was consistent with the *Report of the Prep-Com on the ICC* at the Diplomatic Conference held in Rome (15 June-17 July 1998), UN Doc. A/CONF. 183/2/Add. 1 (14 April 1998), at 46-47.

1.3.3 *Law applied by post-World War II military tribunals*

The Allied states after WW II enacted Laws or Decrees in order to try alleged offenders for wartime crimes. Such enactments were necessary because new categories of offences, such as crimes against peace and crimes against humanity, had never before been covered in national legislation.[301] At the time it was inconceivable, as it is now, that national criminal courts would directly apply international law in pursuance of domestic criminal proceedings. This would have been contrary to Constitutional law.[302] Furthermore, the Moscow Declaration provided that war criminals, other than the major ones, were to be tried in accordance with the laws of the territory where they perpetrated their crimes.

WW II military tribunals can be split into three categories according to the origin of the law applied to identify the liability of the accused before them: thus, there were those that applied solely national law,[303] those that applied international

---

[301] It was soon discovered that national law needed supplementation in order to ensure that its provisions were wide enough to provide for the punishment of crimes, which it was intended to prosecute. Thus, art. 1(2) of the 1944 French Ordinance provided that certain specific war crimes would be treated as violations of specified provisions of the Penal Code and the Code of Military Justice. Similarly, art. 2 of the Luxembourg Law of 1947 provided for the interpretation of provisions of the Penal Code so as to cover various types of war crimes. Art. 2 of the Norwegian Law was passed because of the magnitude of German economic exploitation of Norwegian resources. These crimes, according to the Norwegian Ministry of Justice, could "hardly be assimilated with any particular crime already defined and covered by the law" [emphasis added]. *See* LRTWC vol. III, Annex I, at 95-96, 84-85 and LRTWC vol. XV, at 34.

[302] A Commentary of the Norwegian Ministry of Justice and Police to the Norwegian War Crimes Law, noted that "Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law". This statement was consistent with art. 96 of the Constitution, making an arbitrary application of a provision of international law inadmissible, since incorporation of international law in Norway could only be performed through a special Act, LRTWC vol. XV, at 32.

law, and those that applied a combination of both. Article 1(1) of the French Ordinance of 28 August 1944 stated that persons charged with offences since the beginning of hostilities would be tried

"in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences ... are not justified by the laws and customs of war."[304]

Therefore, French military tribunals first looked at whether a provision of the French Criminal Code had been violated, and only secondly ascertained if the violation was justified by the laws and customs of war.[305] This approach was also followed in the following statutes: article 1 of the Norwegian Law on the Punishment of Foreign War Criminals of 13 December 1946 (No. 14);[306] article 1 of the Danish Law of 12 July 1946;[307] article 1 of the Law on the Suppression of War Crimes of the Grand Duchy of Luxembourg of 2 August 1947;[308] Yugoslav Law of 25 August 1945,[309] and a

---

[303] Concerning the application of municipal law provisions in war crimes trials, *see* an opinion expressed by Professor Brierly at LRTWC vol. X, at x.

[304] Cited in LR'IWC vol. XV, at 31.

[305] *Ibid*, at 32. *See* also LRTWC vol. III, Annex II, at 93-96.

[306] It stated that:

> "Acts which by reason of their character come within the scope of Norwegian criminal legislation are punished according to Norwegian law, if they were committed in violation of the laws or customs of war ... [and committed by aliens] ... in Norway or directed against Norwegian citizens or interests."

LRTWC vol. XV, at 32 and LRTWC vol. III, Annex I, at 81-85.

[307] Applied to non-Danes having "infringed the rules and customs of international law governing occupation and war in Denmark or to the detriment of Danish interests, any deed punishable *per se* in Danish law." Paragraph 2 is also applicable to acts covered by art. 6 of the IMT Charter, LRTWC vol. XV, at 32-33.

[308] It provided that non-nationals who were guilty of crimes committed during the war "and not

series of Czechoslovak Laws and Decrees.[310] While the preceding states provided for the enforcement of both national and international law, it was national law that constituted the legal basis for the charges arraigned.[311]

It was only US and British tribunals that applied solely international law, through Control Council Law No. 10 (CCL 10), the British Royal Warrant and United States Theatre Regulations and Directives. CCL 10 was an international instrument by itself, while the others, although of national origin, upheld the application of international rather than national law. Despite the frequent references to national law analogies, in order to define the scope of the term "war crime", these instruments only required proof of a breach of the laws and usages of war.[312] Greece took the same approach, in contrast to its continental civil law allies, and in accordance with its Constitutional Act 73/1945 provided for the prosecution of offences contrary to article 6 of the IMT Charter or alternatively the Greek Penal Code.[313] In this manner, Greek courts claimed jurisdiction also over crimes against peace and crimes against

---

justified by the laws and customs of war [whether captured in or outside Luxembourg, or secured through extradition] ... shall be prosecuted before a War Crimes Court and tried in accordance with the Luxembourg Laws in force and with the provisions of the present law." LRTWC vol. XV, at 35.

[309] Offences charged were only those under the Act, tried by civil and military courts under art. 14(1)(2), LRTWC vol. XV, at 36.

[310] Decree No. 16 of 19 June 1945 of the President of the Czechoslovak Republic; Law No. 22 of 24 January 1946 of the Provisional National Assembly of the Republic; Law No. 245 of 18 December 1946 of the Constituent National Assembly of the Republic, and Decrees Nos. 33/1945 and 57/1946 of the Slovak National Council, *reported in* LRTWC vol. XV, at 36.

[311] It is interesting to note the invocation by these Laws and Decrees of a number of jurisdictional bases, such as territoriality, passive personality and the protective principle.

[312] LRTWC vol. XV, at 33.

[313] Constitutional Act 73/1945 (Government Gazette at 250), *reported in* LRTWC vol. XV, at 36.

humanity. In was only in a few cases, however, that these tribunals exercised universal jurisdiction, since in their majority they took caution in prosecuting persons alleged to have committed crimes only against their own nationals.

Dutch courts applied law which stood in the middle of the two categories previously enumerated. The Dutch metropolis applied the common Dutch penal law in addition to a number of decrees enacted by the Netherlands Government between 1943 and 1947.[314] On the other hand, the territories belonging to the Netherlands East Indies were regulated by several decrees enacted in 1946 by the Lieutenant Governor-General within his constitutional powers.[315] However, while the East Indies war crimes legislation applied international law directly, metropolitan legislation treated war crimes the same way as did the 1944 French Ordinance. A compromise was later adopted, whereby international law was observed on questions relating to the definition of offences and municipal law to prescribe punishment.[316]

1.3.4 *Applicable law in contemporary domestic criminal adjudication*

Effective enforcement of international humanitarian law can best be achieved through national courts and the exercise of universal jurisdiction. National law can become effective only if it rigorously incorporates the relevant portions of international law and renders them justiciable. Not all WW II military tribunals charged the full gamut of offences similar to those provided in article 6 of the IMT

---

[314] LRTWC vol. XV, at 34, 35.

[315] LRTWC vol. XV, at 36; *Trial of Tanabe Koshiro*, LRTWC vol. XI, at 3-4, and Annex of Dutch Law Concerning Trials of War Criminals, at 86-92; *Trial of Washio Awochi*, LRTWC vol. XIII, at 123-24 and *Trial of Albin Rauter*, LRTWC vol. XIV, at 111- 14.

Charter. In those cases, national law was more restrictive than international law. Contemporary practice shows that national war crimes laws, as far as possible, incorporate current international legal developments.[317] At the same time it is also a fact that national courts interpret their national legislation as progressively as possible in light of such developments.[318] This approach was followed in *Barbie*[319] and *Touvier*,[320] where the French Court of Cassation interpreted national implementing legislation, Law of 26 December 1964, in accordance with the IMT Charter. In a more recent case the Supreme Court of Bavaria supported its legal reasoning, *inter*

---

[316] LRTWC vol. XV, at 36 and LRTWC vol. XI, at 87-88.

[317] For example, art. 109 of the Swiss Military Penal Code (CPM) penalises, *inter alia*, violations of the laws and customs of war, as well as the recognised principles of international humanitarian law, including both the Geneva Conventions (1949) and the two Additional Protocols of 1977. While art. 108(l) of the CPM makes the existence of an international armed conflict the normal prerequisite for applying arts. 109-114, art. 108(2) extends the reach of these provisions to all other cases mentioned in the applicable international treaties and customary law. Thus, it implies that arts. 109-114 may apply to situations of non-international armed conflicts. *Re G*, Military Tribunal, Division 1, Lausanne, Switzerland (18 April 1997), and s*ummarised* by Andreas R. Ziegler *in* 92 AJIL 79 (1998).

[318] *See ibid*, 92 AJIL 79 (1998); also, in a Judgment delivered on 25 November 1994 by the Third Chamber of the Eastern Division of the Danish High Court, in the case of *The Prosecutor v. Saric* (unreported), the Court explicitly acted on the basis of the grave breaches provisions of the Geneva Conventions (1949) and convicted the accused on the basis of those provisions and the relevant clauses in the Danish Penal Code, *reported* in *Tadic* Appeals Decision on Jurisdiction , para. 83.

[319] *Federation Nationale des Deportes et Internes Resistants et Patriotes and Others v. Barbie*, Judgment of 20 December 1985, French Court of Cassation, 78 ILR 124 (1988); *Barbie case* (second case), 100 ILR 393 (1995).

[320] *Touvier case*, Judgment of 27 November 1992, French Court of Cassation, 100 ILR 337 (1995).

alia, on the submissions of the ICTY Prosecutor in the *Gagovic case*,[321] which at the time was *sub judice*.[322]

Domestic tribunals should construe their national implementing legislation in accordance with international law. This is compatible also with the practice of the ECJ in interpreting directives. The European Court has pronounced that directives do not produce horizontal direct effect. Nonetheless, the ECJ has advanced a theory of "indirect effect", whereby it requires national courts to interpret national legislation which implements the directive in accordance with the object and spirit of the directive in question.[323]

---

[321] *Prosecutor v. Gagovic*, Case No. IT-96-23-1, Confirmation of the Indictment (26 June 1996).

[322] This is surprising because German law does not attribute authority to prosecutorial indictments. *See Public Prosecutor v. Djajic*, No. 20/96, 3d Strafsenat, Judgment of 23 May 1997, *summarised* by Christoph J. M. Safferling *in* 92 AJIL 531 (1998).

[323] *Van Colson and Kamann v. Land Nordheim-Westfalen*, Case No. 14/83, [1984] ECR 1891, [1986] 2 CMLR 430; *Marleasing SA v. La Comercial Internacionale de Alimentation SA*, Case No. C- 106/89, [1990] ECR I-4135, [1992] 1 CMLR 305; *see*, for more details, Graine De Burca, *Giving Effect to European Community Directives*, 55 MLR 215 (1992).

CHAPTER II

Forms of Personal Participation in Crime

Introduction

Having examined the nature of humanitarian law and the evolution of sanctions therein, it is time to see the various forms of personal liability. This Chapter explores the various forms of personal liability recognised under international law for holding individuals criminally liable for violations of international humanitarian law. In this regard, it is obvious that international tribunals borrow much from national criminal law. At the same time, however, it is interesting to see to what extent these national definitions are internationalised within the context used.

This Chapter explores the four core forms of criminal liability encountered in international humanitarian law. These are, liability for planning and conspiring to commit offences, liability for ordering offences, liability for inciting and disseminating hate propaganda, and liability for complicity in offences committed by others. Liability for attempts is not treated as a separate form, but is subsumed within each of the above categories.

2.1 *Liability for the Planning of Violations of International Humanitarian Law*

International criminal law has since WW II reserved special treatment for those persons in the highest echelons of military or political hierarchy who, by virtue of their position, are able to influence, formulate and subsequently order the execution of criminal schemes. The inclusion of crimes against humanity and especially crimes against peace in the Charter of the Nuremberg Tribunal illustrates the international community's consensus in the denial of Head of State immunity for such offences. The IMT's Judgment, furthermore, indicated that absent such high-level criminal planning, the war itself or its aims would never have been realised.

Despite the lack of absolute uniformity in national laws, there seems to be an emerging general principle of law favouring criminalisation of preparations,[1] in

---

[1] Such peacetime preparations for the commission of violations of humanitarian law are punishable under art. 8 of the 1952 Dutch War Crimes Act, while art. 2 of that Act makes applicable, for the same offence, the provisions of the Dutch Criminal Code concerning "attempts", "participation" and "preparation". Furthermore, there is a special provision in art. 46 of the Dutch Criminal Code which penalises preparation of criminal acts in general and may supplement art. 2 of the War Crimes Act; they are similarly punished as "attempts" under Turkish law; under English law, preparation can only be made punishable if the relevant rule of international law has been incorporated in the law of this country as a criminal offence providing for preparation as a criminal offence. This is the case with sec. 1(4) of the 1969 Genocide Act and sec. 2(1)(e) of the 1996 Chemical Weapons Act; similarly, for a preparatory act to be punishable under art. 80 of the USA Uniform Code of Military Justice (UCMJ), there must exist an overt act indicating a direct movement towards the commission of the offence. Between the few states that do not make such peacetime preparations amenable to criminal punishment are Sweden and Norway, the latter applying as a general rule of its legal system that preparations are not punishable unless specifically provided. National Responses to Question No. 5 (re: domestic criminalisation of preparatory acts for violation of the laws of war) from XIV International Congress of the International Society for Military Law and the Laws of War, Athens (10- 1 5 May 1997) [1997 Athens Congress].

peacetime, for the commission of violations of the laws of war. This rule is well established when the preparatory acts involve the production, possession, transport or even training[2] in weapons, the use of which would be a violation of the laws of armed conflict.[3] It is obvious that while national laws, too, criminalise participation in the planning of certain criminal acts, relevant international law definitions have departed from domestic confines. This is justified, on the one hand, on the magnitude of the offences in question and, on the other, the high status of the planners, particularly in cases of genocide and crimes against humanity. Lengthy debates have engaged around the issue of whether international law recognises the criminal liability of the planner absent actual perpetration of the crime planned. The planning of crimes is a form of liability set forth in articles 7(1) and 6(1) of the ICTY and ICTR Statutes respectively. Such planning is similar to the notion of "complicity" in civil law or "conspiracy" under common law.[4] The difference between planning under 7(l) and complicity/conspiracy is that the former can be an act committed by

---

[2] The Norwegian representative noted that sec. 1 of his country's 1994 Chemical Weapons Act, which criminalises production and possession, may be construed as punishing training as well. This was also the view of the US delegate. *See* National Responses to Question No. 5, 1997 Athens Congress.

[3] Chapter 22, sec. 6(a) of the Swedish Penal Code makes a sole exception to its non-punishment of preparatory acts in the case of chemical weapons; the Turkish Penal Code punishes illegal production or possession, in arts. 128, 150, 264, 313 and 314; a recent amendment (1 March 1997) to the Austrian Penal Code renders the transportation of weapons to a place where a war is imminent a criminal offence; production and possession of chemical weapons is prohibited under sec. 1 of the 1994 Norwegian Chemical Weapons Act; the UK follows along this line with the adoption of sec. 2(1)(e) of the 1996 Chemical Weapons Act; production, possession and transport of weapons for such purposes is also criminal under US law, despite no express provision. National Responses to Question No. 5, 1997 Athens Congress.

[4] *Akayesu case* Judgment, at 96, <hhtp:www.un.org/ictr/judgements/akayesu/htm> *reported* in 37 ILM 1399 (1998). Reference to this case is from the Internet.

one person, while the latter requires the participation of at least two people.[5] Planning, under international humanitarian law, therefore may be defined as implying that "one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases".[6]

2.2.1 *Conspiracy under international law*

The closest that criminal law has approached in criminalising merely criminal intent has been through prescribing the liability of persons who conspire to commit an offence. Statutory conspiracy,[7] under English law,[8] requires an agreement[9] to embark upon a course of conduct which will necessarily involve the commission of

---

[5] *Ibid.*

[6] *Ibid.* An example of such a criminal plan is the well documented "Red Terror Campaign" designed by the Dergue regime in Ethiopia between 1976-79 against opponents of his so-called "revolution". *See* Theodore S. Engelschion, *Ethiopia, War Crimes and Violations of Human Rights*, 34 REV. DR. MIL. DR. GUERRE 23 (1995).

[7] The basic requirements are common to both statutory and common law conspiracy, the most important element being the need for an agreement between the parties to the conspiracy. *See* JOHN SMITH & BRIAN HOGAN, CRIMINAL LAW, chp. 11.2 (8th ed. 1996).

[8] The offence is to be found in sec. 1 of the Criminal Law Act 1977 (as amended by sec. 5 of the Criminal Attempts Act 1981) which states that where

> "... a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, will necessarily amount to or involve the commission of any offence or offences by one or more parties to the agreement ... he is guilty of conspiracy."

[9] *Phillips*, (1987) Cr. App. R. 18.

an offence with the intention of playing a part in that course of conduct.[10] While participation in a conspiracy under English law may be charged for a variety of offences, the same concept in the subsequent WW II military tribunals was reserved for crimes against peace.[11] Customary international law today attaches personal liability for participation in a conspiracy to commit genocide.[12] Furthermore, draft article 2(3)(e) of the Draft Code of Crimes Against the Peace and Security of Mankind,[13] which refers to conspiracy, covers, besides genocide, crimes against humanity, crimes against UN personnel and war crimes.

WW II military tribunals stipulated the existence of three requirements, under international law, before substantiating a charge of conspiracy: (i) the existence of a concrete plan involving the participation of at least two persons; (ii) clear outlining of the criminal purpose of the plan; (iii) and the requirement that the plan be not too far

---

[10] *Anderson*, [1985] 2 All ER 961 *per* Lord Bridge; *Yip Chiu Cheng v R* [1994] 2 All ER 924.

[11] LRTWC vol. XV, at 90. Following the decision of the IMT by which it was stated that its Charter did not define conspiracy as a separate offence (1 Judgment of the IMT, at 56), WW II US military tribunals refused to recognise participation in conspiracy as a separate offence to commit war crimes or crimes against humanity. *See* for example, *Justice case*, LRTWC vol. VI, at 5. French WW II military tribunals, however, relying on art. 265 of the French Penal Code held in a number of cases that individuals may be liable for conspiring to commit war crimes. *See Trial of Henri Georges Stadelhofer*, TWC vol. VI, at 1. Dutch WW II Laws also contained provisions to that effect. *See* LRTWC vol. XI, at 98 *in* LRTWC vol. XV, at 91.

[12] Enshrined in art. III(b) of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide. 78 U.N.T.S (1951) 277-323. The customary status of the Genocide Convention was confirmed by the ICJ in its Advisory Opinion of 28 May 195 1, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ REP. 23 (1951). The provision on conspiracy has subsequently been inserted as art. 4(3)(b) of the ICTY Statute.

[13] UN Doc. A/46/405, *reprinted* in 18 HRLJ 96 (1997).

removed from the time of decision and action.[14] According to this jurisprudence, liability extended to those who knew of the conspiracy,[15] and who at any time of its existence were either parties to it or knowingly intended to play a part in its execution.[16] These guidelines may be useful even today although contemporary international law extends liability for conspiracy beyond crimes against peace.

WW II case law further formulated a similar concept to that of conspiracy, concerning those cases where the conspiracy was eventually carried out. Where there existed action in furtherance of an established criminal agreement, every person who took a consenting part therein and was connected with such plans or enterprises involving the commission of criminal offences, was held to be equally liable as the actual perpetrator.[17] This latter form of participation was known as "criminal plan" or "criminal design". In order to prove this charge, it was required "(i) that there was a system in force to commit certain offences; (ii) that the accused was aware of the system, and (iii) that the accused participated in operating the system."[18]

---

[14] *Krupp Trial*, LRTWC vol. X, at 110, 113. This and other decisions relied on the following passage from the IMT Judgment.

> "[T]he conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning to be criminal must not rely merely on the declarations of a party program, ... or [in] political affirmations ... The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan."
>
> 1 IMT Judgment, at 225.

[15] *I. G. Farben Trial*, LRTWC vol. X, at 31, 40.

[16] Official Transcript of the *Judgment of the IMTFE*, at 1142-1143.

[17] *Justice Trial*, LRTWC vol. VI, at 3, 4. In this connection, it must be proven that the accused had knowledge of at least one offence and was connected with its commission., at 84. *See* also *Dachau Trial*, LRTWC vol. XI, at 13.

[18] LRTWC vol. XV, at 95.

The IMT demanded a very high threshold of proof and knowledge[19] in order to substantiate a charge of conspiracy. Liability under count 1 (common plan or conspiracy) was limited only to individuals who participated in such preparatory acts which materialised soon thereafter in actual acts of aggression.[20] Accordingly, from the twenty-two defendants tried under Count 1, only Hess's conviction was based on aggressive war or conspiracy to commit it.[21] Since Nuremberg, however, the IMT Charter concept of conspiracy has gradually been abandoned and consolidated into the concept of "common plan", under the term "conspiracy".

2.2.2 *Conspiracy under the Genocide Convention*

During the preparatory conferences on the Genocide Convention, discussions centered around the different meanings of conspiracy in the various legal systems and the lack of common approach. According to the Swedish delegate, the variations in the domestic legal systems need not be an obstacle in the national implementation of the Convention.[22] The delegate from Egypt, on the other hand,

---

[19] The IMT stated that knowledge had to be proven beyond a reasonable doubt by direct evidence rather than inferentially. *See*, for example, the *Schacht case* in 1 Judgment of the IMT, at 140.

[20] GEORGE GINSBURGS & VLADIMIR N. KUDRIAVTSEV, THE NUREMBERG TRIAL IN INTERNATIONAL LAW (eds.), 233 (1990).

[21] I*bid*, at 235.

[22] Sweden argued that the variations in criminal law meant that when the Convention is applied internally, it had to be interpreted according to that specific criminal code. Another delegate pointed

pointed out that the Convention would have to be applied by 58 states and it did not therefore represent law based on the penal code of any particular state.[23] The point of view of the Secretary-General was that genocide could hardly be committed on a large scale without some form of agreement. He opined that conspiracy should be a punishable act even though no preparatory act had taken place. The Secretary-General thus concluded that the grave threat posed to humanity by genocide, dictated that the mere agreement to commit genocide should be made punishable in order to safeguard against the occurrence of such acts.[24] The same view was expressed by the *Ad Hoc* Committee, which noted that conspiracy to commit genocide should be punished "in view of the gravity of the crime of genocide and of the fact that in practice genocide is a collective crime, presupposing the collaboration of a greater or smaller number of persons".[25]

The discussions on whether to include preparatory acts in the Convention indicated that conspiracy was clearly considered as an act at the preparatory level which was not fulfilled. Some delegates proposed to include preparatory acts as punishable acts. This proposal was, however, later deleted since preparatory acts,

---

out that it would be impossible to avoid differences between the texts and that each state should base its views on the principles of its own juridical system. UNGAOR, 3rd Sess. (1947), part. I, at 211.

[23] Consequently, they argued that the concept of conspiracy under the Genocide Convention should be interpreted independently of any particular criminal system, and should be viewed according to its definition under international law. UNGAOR, 3rd Sess. (1947), part I, at 212.

[24] *Draft Convention on the Crime of Genocide, Commentary UN Secretary-General.* UN Doc. E/447 (1947), at 3 1.

[25] The Russian delegate explained that a "criminal conspiracy included agreement to commit genocide, even if no commission of the act had began". UN GAOR *Ad Hoc* Committee on Genocide, 6th Sess., 16th mtg., at 4. UN Doc. E/AC 25/SR 16 (1948).

when committed with intent to commit genocide, were punishable as attempted acts or as forms of complicity to commit genocide.[26] The Secretary-General suggested in his Report the inclusion of preparatory acts to commit genocide, such as genocidal studies, other forms of research for developing techniques for genocide,[27] the establishment of installations and the manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide,[28] and issuing instructions or orders and distributing tasks with the purpose of committing genocide.[29] The *Ad Hoc* Committee made similar proposals.[30]

In the end, the proposals for criminalising mere preparatory acts was dropped. The US delegate, while stressing the importance of providing punishment at all stages preceding the commission of the material act, concluded that the Convention should not move further from the crime itself and punish acts of preparation.[31] The UK was of the opinion that a preparatory act could not be condemned on vague

---

[26] UN GAOR, *Ad Hoc* Committee on Genocide, 6th Sess., 17th mtg., at 3. UN Doc. E/AC 25/SR 17 (1948).

[27] UN Doc. E/447 (1947), *supra* note 24, art. II(i)(2)(a).

[28] *Ibid*, art. II(i)(2)(b).

[29] *Ibid*, art. II(i)(2)(c).

[30] It was considered that in the most serious cases, preparatory acts could be punished as either participation in a conspiracy or as complicity, when for example:

> "killing the occupants with noxious gases were at issue, such acts requiring the co-operation of a certain number of persons, would accordingly come under the heading of "conspiracy to commit genocide" even if genocide were finally not committed, and under the heading of "complicity" if genocide were committed."

Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee, Held at Lake Success, New York (5 April - 10 May 1948). UN ESCOR 7th Sess., Supp. No. 6, at 8, UN Doc. E/794 (1948).

[31] UN GAOR 3rd Sess., part I, at 237.

presumptions. It stressed, nonetheless, that if such presumptions were substantiated, there would be a case for charging conspiracy or attempt.[32]

2.2.3 *Current definition of conspiracy*

Article 2 of the Draft Code of Crimes deals with the individual criminal responsibility of participants in international crimes. Conspiracy is laid down in article 2(3)(e) which provides that a person shall be held responsible if he directly

"participates in planning or conspiring to commit such a crime which in fact occurs."[33]

This paragraph sets forth a principle of individual criminal responsibility with respect to a particular form of participation in a crime, rather than creating a separate and distinct offence. Despite the use of the subjunctive "or" between the words "planning" and "conspiring", it is clear that any reference to these terms in the context of the Draft Code relates to the Nuremberg concept of "common plan",

---

[32] *Ibid*, at 238. The Iranian delegate stated that the rejection of including preparatory acts would not prevent the punishment of the preparatory acts in the most serious cases, under the headings of complicity, attempt, incitement and above all, conspiracy, at 240. The Egyptian representative stressed that the acts enumerated as preparatory acts in the proposal were already included under the punishable acts of conspiracy and complicity. In this manner, the giving of instructions or assigning of tasks would constitute conspiracy.

[33] ILC Draft Code Commentary, at 18.

because article 2(3)(e) requires that the criminal plan is carried out. The contemporary consolidated term is not "common plan", but rather "conspiracy".[34]

The preparatory conferences on the ICC proposed the adoption of a similar approach to that contained in the Draft Code,[35] but it was contemplated that the principle of the criminal liability of the "planner" (absent completion of the crime) should be included in the ICC Statute, because it was part of the Nuremberg legacy.[36] The ICC Statute proposal included two forms of conspiracy relevant to this discussion: one where the conspirators simply plan but do not carry out the conspiracy themselves, and another where the conspirators themselves perpetrate the overt act.[37] Evidently, only the first form constitutes an inchoate act. Article 25(3)(d) of the ICC Statute now provides that where a group of persons are acting with a common purpose, their contribution therein shall be considered criminal:

---

[34] Both a Canadian, a Japanese proposal and the Syracusa draft define conspiracy as an agreement with a clear intention to commit a crime, for which further action to execute is carried out. ICC Prep-Com (25 March - 12 April 1996), UN Doc. A/AC.249/1 (7 May 1996), at 76, 84.

[35] Decision taken by the Prep-Com at its session held from 11 to 21 February 1997. UN Doc. A/AC.249/1997/L (5 March 1997), at 22.

[36] *Report of the ICC Prep-Com*, vol. II, UN GAOR, 51st Sess., Supp. No. 22A (UN Doc. A/51/22 (1996)), at 82-83. The Japanese delegation to the ICC Prep-Com stated that "in the case of exceptionally serious offences, it may be necessary to punish a conduct of plot or preparation before the commencement of the execution of a crime." They noted, however, that the application of this rule should be limited to exceptional cases. ICC Prep-Com, UN Doc. A/AC.249/1 (7 May 1996), at 77.

[37] ICC Prep-Com, *Working Paper Submitted by Canada, Germany, Netherlands and the UK* (11 –21 Feb. 1997) UN Doc. A/AC.249/1997/WG.2/DP.1. The same approach was also taken in the Chairman's Text in the same meeting. *See* UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.2.

"(i) [either when] 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) [when] made in the knowledge of the intention of the group to commit the crime.[38]

In conclusion, a criminal agreement which stays at the planning stage, without any further action towards its implementation, is not recognised by contemporary international law as a punishable act,[39] even though it once was.[40] However, this is a policy issue and not a definitive statement of law.

2.2.4 *Evidence*

In terms of evidence, even though serious crimes, such as genocide and crimes against humanity, are of a magnitude which presupposes the collaboration of several persons, one cannot assume that this collaboration always constitutes conspiracy. It may very well be proof of complicity or incitement instead. If one can establish the common will of the collaborators to commit the crime, according to a common plan which clearly establishes their aim and which includes them as participants, the evidence for conspiracy is immediately much stronger. Such

---

[38] Participation in a common criminal plan under art. 25(3)(d) of the ICC Statute is distinct from aiding and abetting under para. (3)(c), *in Prosecutor v. Furundzija* [*Furundzija case*], Judgment of 10 December 1998, Case No. IT-95-17/1-T 10, *reprinted* in 38 ILM 317 (1999), para. 216.

[39] Art. III(b) Genocide Convention (1948).

[40] Besides the IMT Judgment, it is interesting to note that in the *Krupp Trial*, the tribunal found the mere planning of a crime not to be criminal, unless it amounted to a conspiracy. *See Krupp Trial*, LRTWC vol. X, at 119, 121, 125.

criminal participation must be direct and meaningful in the formulation of the criminal plan or policy, "including endorsing such a plan or policy proposed by another".[41]

In the Nuremberg Trials, some of the defendants were exonerated from Count 1 (common plan or conspiracy) on the basis that they had not participated in the development of Hitler's plan for territorial expansion through aggressive war, even though they were members of the Nazi party and promoted its policy.[42] Knowledge of the criminal plan must be concrete. In the case of genocide, knowledge of the ultimate objective of the criminal conduct is required, rather than knowledge of every detail of a comprehensive plan or policy of genocide.[43] Proof of such knowledge may be deduced from the acts of the accused where they indicate joint action to commit a crime[44] or a common concerted design.[45]

---

[41] ILC Draft Code Commentary, UN Doc. A/51/10 (1996), at 10.

[42] 1 Judgment of the IMT, at 148. Donitz contributed to aggressive war by performing tactical duties in his capacity as line-Officer. He was not, however, present at the important meetings when plans for aggressive war were announced, and there was no evidence that he had been informed of these decisions. He was, therefore, not held liable under Count 1. In the case of Schacht, even though he was a central figure in Germany's rearmament program, he was not held accountable for conspiracy to commit crimes against peace. The reasoning of this decision was based on the ground that it was not shown that Schacht had carried out the rearmament program as part of Nazi plans to wage aggressive war. In respect of Bormann, the IMT held that the evidence failed to show that the accused had knowledge of Hitler's plan, neither could his knowledge be inferred from the position he held. At 140,138-39,171.

[43] ILC Draft Code Commentary, at 89-90.

[44] *Dachau Trial*, LRTWC vol. XI, at 5, 14.

[45] In the *Belsen Trial*, the.elements of the charge revolved around the practice of ill-treatment of Jews in the camp and the common concerted design of the staff to commit the acts. The Prosecutor held that "proof of conspiracy could be deduced from the acts of the accused and could well arise between

2.2.5 *Issues of conspiracy in the ICTY Karadzic and Mladic cases*

Both indictments against former Bosnian Serb leader Radovan Karadzic and former Commander of the Bosnian Serb Army, General Ratko Mladic, contained allegations of violations for the spectrum of offences found in the ICTY Statute. The salient feature of their activities, as the highest ranking officials in the Bosnian Serb administration, relates primarily to the planning and ordering of criminal policies, directed towards the extermination of other ethnic groups.[46] If one is to determine the existence of a conspiracy, as earlier described, then a criminal plan must be ascertained to have been agreed upon, followed by its execution. The ICTY Statute, however, makes no provision for conspiracy, except in the case of genocide.[47] Article 7(1), nonetheless, provides for the criminal liability of the "planner" and since contemporary international law requires the completion of a conspiracy in order to punish the conspirators, the term "planning" in article 7(1) should also be understood

---

persons who had never seen each other and had never corresponded". *Belsen Trial*, LRTWC vol. II, at 1, 139. It was, further, stated that the individual liability of the planner is equal to the person who at a later stage entered the conspiracy.

[46] According to Professor Garde, expert witness at the ICTY, the SDS's (Bosnian Serb Democratic Party) program sought to realise a Greater Serbia in the form of an ethnically homogenous population which, being a utopian vision, could only be achieved through violence. *Prosecutor v. Karadzic & Mladic*. Review of the Indictment Pursuant to Rule 61 (11 July 1996), Case No. IT-95-5R61 [*Karadzic & Mladic case*], *reported* in 108 ILR 86 (1998), para. 48.

[47] Art. 4(3)(b).

in that manner,[48] and in any event the term "planning" is wider than that of "conspiracy".[49]

Trial Chamber I recognised that before hostilities even started, Bosnian Serbs had initiated both institutional and military preparations for taking power in Bosnia. The former was enforced through the constitution of a parallel central institutional structure and the definition of territory,[50] seizure of local control,[51] and through the use of the media and propaganda.[52] The latter was comprised of two types of action: armament and logistical support of the populations of Serbian-held regions, as a preparatory phase to an intervention by the JNA (Yugoslav National Army).[53] The

---

[48] Trial Chamber I in *Prosecutor v. Delalic, Mucic, Delic, Landzo*[*Celebici case*], Judgment of 6 November 1998, Case No. IT-96-21-T, *reported* in 38 ILM 57 (1999), pointed out that if a plan exists, the persons who knowingly participate and directly and substantially contribute to the purpose, are acting with a "common purpose and are liable under art. 7(l) either as principals or aiders and abettors" [emphasis added], para. 328.

[49] *Akayesu case* Judgment, *supra* note 4, at 96.

[50] The Serbs established an "Assembly of the Bosnian Serbs", and further declared Autonomous Regions and Districts which on 9 January 1992 proclaimed to be part of the "Republic of the Serbian People in Bosnia and Herzegovina". *Karadzic and Mladic case*, Decision Review of the Indictment, 108 ILR 86 (1998), paras. 49, 50.

[51] On 19 December 1991, confidential instructions were issued by the SDS to set up local crisis committees. Their task was to form parallel municipal bodies with the aim of exercising absolute control over every municipal function, including the armed forces. Any tasks contained in these instruments could only be applied on the orders of the SDS President. *Ibid*, para. 51.

[52] Mainly by developing nationalist themes and relating them to an international plot against the Serbs, coupled with an alleged Muslim and Croat domination of Bosnia. *Ibid*, para. 52.

[53] Trial Chamber I found the evidence to show that "an institutional structure ensuring the establishment of a cohesive chain of command was put into place by the SDS in 1991 and at the beginning of 1992". *Ibid*, paras. 53-55.

aim of this twofold strategy was, as clearly expressed by Karadzic in his speeches since 1991, to establish a new entity inhabited homogeneously by Serbs.[54] The initial means of implementation were through the intimidation and harassment of other ethnic groups, followed by the destruction of sacred and cultural buildings. Thereafter, deportation, murder and sexual assault followed.[55] In every case, "the same deliberate line of conduct was adopted".[56] This policy finally bore fruits for those who planned it, resulting in some cases in the complete eradication of non-Serb populations.[57] The Security Council, obviously alarmed, described this criminal scheme as "ethnic cleansing",[58] later described in the ICTY as a practice aimed at eliminating members of a given ethnic group from a given territory.[59]

The Tribunal furnished two specific examples of the policy of ethnic cleansing: a) the siege of Sarajevo which, according to Trial Chamber I, was aimed at destroying the peaceful co-existence of its multi-ethnic population;[60]

---

[54] *Ibid*, para. 61.

[55] *Ibid*, paras. 13-41 and paras. 60-62.

[56] *Ibid*, para. 60.

[57] *Ibid*, para. 60.

[58] S/RES/824 (6 May 1993).

[59] *See* definitions by Garde and Rehn, cited by Trial Chamber I in the *Karadzic & Mladic case*, para. 62. For a detailed report of ethnic cleansing in the early days of the conflict, *see* Erica A. Daes, *New Types of War Crimes and Crimes Against Humanity: Violations of International Humanitarian and Human Rights Law*, 7 INTL. GENEVA Y'BOOK, 56-64 (1993).

[60] *Ibid, Karadzic and Mladic case*, para. 63, at 33, 34. The Commission of Experts remarked that from the severity of the daily shelling of Sarajevo, one may impute constructive knowledge of this targeting to "the higher echelon commanders". Annex VI.B, *The Battle of Sarajevo and the Law of Armed Conflict*, UN Doc. S/1994/674/Add.2 (Vol. III) (28 December 1994), para. 46.

and the systematic and widespread rape of Muslim women, which were performed in "an effort to displace civilians and as such to increase the shame and humiliation of the victims and of the community they belonged to in order to force them to leave. [Additionally] ... the aim of many rapes was forced impregnation".[61] The ICTY inferred from Karadzic's authority:[62] proof of orders showing his command and control over those perpetrating the crimes;[63] statements demonstrating his endorsement,[64] and evidence of highest-level decision making[65] that he "participated from the first moment on in the planning of the policy of "ethnic cleansing" in Bosnia; and that he himself was in a position to order the Bosnian Serbs' operations which led to the commission of the offences charged".[66]

The same was held for Mladic. He, as Commander-in-Chief of the VRS, was found to exercise both absolute control over the army,[67] and influence political decision-making.[68] The Tribunal deduced from his statements and by the way he executed his military and political powers that he fully subscribed to the policy of

---

[61] *Karadzic and Mladic case*, Decision Review of Indictment, 108 ILR 86 (1998), para. 64. *See* also a similar content in the *Second Report by the Special Rapporteur of the United Nations Commission on Human Rights*, Mr. T. Mazowiecki, UN Doc. E/CN.4/S- 1/10 (27 October 1992) and a Report by a UN Group of Experts, who described rape as an instrument of ethnic cleansing, UN Doc. E/CN.4/1993/50, Annex II, at 73.

[62] *Karadzic and Mladic case*, Decision Review of the Indictment, paras. 71 and 74.

[63] *Ibid*, para. 72.

[64] *Ibid*, para. 74.

[65] *Ibid*, para. 20.

[66] *Ibid*, para. 74.

[67] *Ibid*, para. 77.

[68] *Ibid*, para. 78.

"ethnic cleansing".[69] From his military position of authority, the ICTY deduced that he planned the crimes committed by his troops.[70] In combination with Karadzic, Trial Chamber I ruled that "the uniform [criminal] methods ..., the movement of prisoners between the various camps, and the tenor of some of the accused's statements" were strong indications of planning or ordering an act of genocide. This is especially so when supplemented with an expressed aggravated criminal intent to assimilate the non-Serbian populations of Bosnia.[71]

2.3.1 ISSUING CRIMINAL ORDERS

Historically, military superiors have been held responsible for both the general conduct and the combat performance of troops under their command. Subordination, therefore, has always featured as the cornerstone of every military formation. This entails strict obedience and adherence to superior orders. Despite popular belief, subordinates are not obliged to adhere to every superior order, even

---

[69] *Ibid*, paras. 80 and 83.

[70] *Ibid*, para. 83.

[71] *Ibid*, paras. 83, 84, 92, 94, 95.

though until recently practice deemed otherwise.[72] Obedience under international law is owed only to lawful and not unlawful orders.[73]

An order is a demand for action or omission, written or oral, addressed either to a specific individual or unknown recipients, which compels its addressees towards the demanded action or omission. This compulsion may be based either on a *de jure* or *de facto* hierarchical obedience or on the binding force of a legislative act. What defines an order is the inherent element of subordination,[74] and an explicit result demanded by a higher authority, by virtue of this superior-subordinate relationship. In this sense, an order may take the form of a binding legislative act or even a binding judicial decision, because they require their addressees to strictly conform with their dictates. As will be seen below, it has been consistently held that criminality attaches not only to the person who first issued the order, but also to those persons who transmitted it through the chain of command. When, therefore, superiors are aware of the illegal substance of the initial order and, nonetheless, transmit it either to their subordinates or through the chain of command, whether as a result of criminal

---

[72] *See* George Finch, *Superior Orders and War Crimes*, 15 AJIL 440 (1921), who argued in 1921 that the then prevailing state practice of requiring strict adherence to superior orders and subsequent amnesties granted to such persons did not help in humanising the law of warfare.

[73] *See* YORAM DINSTEIN, THE DEFENCE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW (1965) *and* LESLIE C. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW, (1976); Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939 (1998).

[74] *Prosecutor v. Akayesu* [*Akayesu case*] Judgment of 2 September 1998, Case No. ICTR-96-4-T, at 97 (citation refers to Internet paging at < http://www.un.org/ictr/judgements/akayesu.htm/>).

negligence or intending its subsequent implementation, they are just as liable as the person who initially issued the order.[75]

An unlawful order in international law is one which is in violation of international humanitarian law, regardless of its legitimacy under national law.[76] He who is in such a position to compel a subordinate to commit a crime and does so, "is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative".[77] The issuance of illegal orders means that a superior has personally directed a prohibited act, not that he failed to prevent or punish the perpetrators under his command. Thus, ordering constitutes a form of complicity through instructions given to the direct perpetrator,[78] and is not therefore a case of command responsibility, but of direct participation in the crime ordered.[79]

Another point of confusion is that of the superior himself. Ordering implies a superior-subordinate relationship between the person giving the order and the person

---

[75] *High Command case*, TWC vol. XI, at 510.

[76] It is doubtful whether contemporary international law recognises as illegal only those orders which compel others to criminal acts. Orders which seek to limit information from reaching individuals, who by virtue of their position are incumbent with specific duties which are inextricably linked to such information, should be viewed as criminal. The "Need to Know Order", for example, issued by Hitler in January 1940, sought to minimise the flow of information only to what was perceived as absolutely necessary. This Order could be criminal only in the terms just described.

[77] *Report of the International Law Commission on the work of its 48h session on the Draft Code of Offences against the Peace and Security of Mankind* [ILC Draft Code Commentary], 6 May-26 July 1996. GAOR 5 1st sess. Supp. No. 10, UN Doc. A/51/10, at 9.

[78] *Akayesu case* Judgment, *supra* note 74, at 97, citing as an example art. 91 of the Rwandan Penal Code.

[79] William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 4, 13 (1982).

executing it.[80] A superior is not simply an individual who *de jure*, under some source of national or insurgent law, has been endowed with authority of command over a certain number of persons. Instead, a superior-subordinate relationship should be defined according to actual control over others, based on *de facto* power.[81] In this sense, one may exercise command over others who *de jure* are of a higher rank than himself.[82] Furthermore, military affiliations may prove to be irrelevant in this regard,[83] since even influential civilians, especially in non-international armed conflicts, are very likely to assume military command, as was the case with several communal leaders in the former Yugoslavia and Rwanda.[84]

Well acknowledged under customary law, the illegality of the giving of unlawful orders was early recognised also under conventional law. Article 23(d) of Hague Convention IV (1907) laid down that: "[i]t is particularly forbidden ... to declare that no quarter be given". Any order to that effect would be unlawful and the superior who issued the order would be held criminally liable.[85] In the *case of Hans*

---

[80] *Akayesu case* Jugment, *supra* note 74, at 97.

[81] *Akayesu case* Judgment, at 97; *Celebici case* Judgment, *supra* note 48, para. 370; The "concept of control" is further supported by ICRC COMMENTARY, para. 3544 and art. 28(1)(a) ICC Rome Statute (1998).

[82] *Sadaiche Trial, reported* in LRTWC vol. XV, at 175.

[83] Government members and other non-military persons may be held responsible as superiors also. *See Celebici case* Judgment, *supra* note 48, para. 356-358; *USA v. Flick*, TWC vol. VI, at 1187, 1202.

[84] *Akayesu case* Judgment, *supra* note 74, at 21.

[85] In the *Abbaye Ardenne case*, Brigadier Kurt Meyer was found guilty of denying quarter to allied troops through inciting and counseling his subordinates to act in such a way. LRTWC vol. IV, at 98, 108. Similar charges were upheld against *Falkenhorst, see* LRTWC vol. XI, at 18, 23 and 29, 30.

Wickman it was held that the giving of an illegal order, in cases of denial of quarter, was a war crime.[86] Thus, he who orders the commission of an offence is guilty of the underlying offence, irrespective of whether he is physically present at the scene of the crime.[87] All four of the 1949 Geneva Conventions expressly provide for the criminal liability of those ordering the commission of grave breaches.[88] The individual responsibility of those ordering a breach of any of the provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict should also be noted.[89] Article 2(3)(b) of the Draft Code of Crimes states that an individual may, *inter alia*, be responsible for a crime (under the Code) if he "orders the commission of such a crime which in fact occurs or is in fact attempted".[90] Thus, under the Code, a superior incurs criminal liability only when the order is carried out, or an attempt to that effect is made. Contemporary state practice in the form of national criminal provisions, however, indicates clearly that an illegal order which has not been complied with renders, nonetheless, the giver criminally liable for either an attempt,[91] incitement,[92] or instigation.[93] WW II military tribunals have held

---

[86] *Hans Wickman case*, (British Mil. Tr. Hamburg, 29 Nov. 1946), cited *in* LRTWC vol. XV, at 133. The same was held in the *Abbaye Ardenne case*, LRTWC vol. IV, at 107.

[87] *Anton Dostler case*, LRTWC vol. I, at 22-34; also, the *cases of Generals Mueller and Brauer* by a Greek Court Martial in Athens, cited *in* LRTWC vol. XV, at 62.

[88] Arts. 49 of Geneva I, 50 of Geneva II, 129 of Geneva III, and 146 of Geneva IV.

[89] 249 UNTS 240-288, *signed* 14 May 1954, art. 28.

[90] The "occurs or attempted" result is followed also in the proposed ICC Statute. ICC Prep-Com (11-21 Feb. 1997), 51st Meeting, UN Doc. A/AC.249/1997/L.5 (12 March 1997). It was finally adopted as such in the ICC Rome Statute (1998) as art. 25(3)(b).

[91] A manifestly illegal order is treated as an attempt in Norwegian and Danish law, even without compliance. *See* National Responses to Question No. 8, *1997 Athens Congress*.

superiors criminally liable where they issued or transmitted an illegal order which was not carried out, on the sole basis that they knew it was illegal, or where it was obviously illegal.[94]

However, while transmittal through the chain of command would constitute direct implementation of an order,[95] the "mere intermediate administrative function" of transmittal to other subordinate units would not amount to such implementation.[96] During WW II, a number of notorious criminal orders were issued by the German Chiefs-of-Staff which were designated for application by the appropriate superiors within their area of command.[97] It was held that where criminal orders were

---

[92] Under English law, a manifestly illegal order which has not been carried out could be punished as incitement. While according to art. 150 of the Dutch Military Criminal Code the giving of an illegal order from a superior to a subordinate would be criminal even in absence of compliance, this is not the case in the context of multinational forces. Under Dutch law, the superior-subordinate relationship under art. 150 is not established unless a Royal Decree provides for it. In this case, if either the person who gave the order or the person who received it is a foreigner, giving the order to commit a crime still amounts to punishable incitement by abuse of authority under arts. 46(a) & 47 of the Dutch Criminal Code, *ibid.*

[93] Sec. 12 of the Austrian Penal Code; arts. 150(l)(2) of the Dutch Military Criminal Code; liable either as a procurer under sec. 1 of the English 1957 Geneva Conventions Act or as ordering offences against military law under sec. 68A of the 1955 Army Act. It is also punishable as incitement; under art. 77 of the UCMJ the giver is punished even if the order was not complied with. The only exception to the non-compliance rule is Turkey. *Ibid.*

[94] *High Command case, in* TWC vol. XI, at 510-511. Also, *Hostages case, Moehle, Schmidt and Falkenhorst cases*, in LRTWC vol, XII, at 118-123.

[95] *High Command case,* TWC vol. XI, at 510.

[96] *Ibid.*

[97] Especially the "Commando Order", requiring the extermination of captured commandos as aboteurs; the "Commissar Order", demanding the execution of Soviet Commissars, and the "Barbarosa Jurisdiction Decree", with which Hitler called for extermination of Soviet civilians.

channeled independent of one's command, a commander would not be liable unless he participated in implementing such orders, either tacitly or by acquiescing in their enforcement.[98] It is no excuse that a commander hopes that criminal orders which area passed down his chain of command will not be implemented.[99] In every case, commanders must unequivocally and clearly repudiate an illegal order.[100] In situations, such as that of Nazi Germany, where superiors cannot directly repudiate an order, they may, after its distribution, acquaint their subordinates with their objections and try to prevent its execution.[101] At the same time it is true that a commander in the field "cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law".[102] Thus, field commanders, because of their far-reaching military duties have the right within reason to presume, where there in no proven specific knowledge to the contrary, that an order is lawful.[103]

---

[98] *High Command case*, TWC vol. XI, at 512. The Court cited art. 11(2) of Control Council Law No. 10, which made it a criminal offence for one to be "... an accessory to the commission of any such crime or [to have] ordered or abetted the same or c*) took a consenting part therein*" [emphasis added].

[99] *High Command case*, TWC vol. XI, at 582.

[100] *Ibid*, at 598.

[101] *Ibid*, at 616; Parks, summarising from the *High Command* Judgment, mentions four alternatives for commanders: issuance of a counter-order, resignation, sabotage of the enforcement of the order, or simply do nothing (i.e avoid its distribution), 62 MIL. L. REV. 41 (1972).

[102] *High Command case*, TWC vol. XI, at 511.

2.3.2 *Evidence of issuing illegal orders*

It is always difficult to trace hand-written orders or produce recordings of oral ones before criminal proceedings. In the *Martic case*, Trial Chamber I felt that there was sufficient proof indicating that the President of the self-proclaimed Serbian Republic of Croatia, Milan Martic, had ordered the shelling of Zagreb, because of his appearance before the media admitting his issuance of the order.[104] In the absence of any direct evidence, a court would have to infer the giving or not of a direct order through circumstantial evidence. The Judge Advocate in the *Abbaye Ardenne case* noted that devoid of direct evidence, the existence of an order may be proven if by a reasonable inference from the accused's temporal and territorial whereabouts, the order could only have been given by him.[105] The relevant legislation at the time, Canadian War Crimes Regulation 10(4),[106] although only discretionary, inferred as *prima facie* evidence the guilt of the commander whose unit perpetrated multiple crimes under his single command. Similarly, in the *Rajic case*, the ICTY held that where there is evidence that a superior knew of an attack perpetrated by a unit which is under his operational command, that superior must have ordered the attack.[107] This

---

[103] *Ibid.*

[104] *Prosecutor v. Martic*, Decision of Trial Chamber I, Review of Indictment pursuant to Rule 61 (8 March 1996), Case No. IT-95-11 -R61 [*Martic case*], *reprinted* in 108 ILR 39 (1998), paras. 25, 26.

[105] *Abbaye Ardenne case*, LRTWC vol. IV, at 108, *in* LRTWC vol. XV, at 64.

[106] Re-enacted as Schedule to War Crimes Act, 10 GEO. VI., Chp. 73 (1946).

[107] *Prosecutor v. Rajic*, Decision of Trial Chamber II, Review of the Indictment pursuant to Rule 61 (13 Sept. 1996), Case No. IT-95-12-R61 [*Rajic case*], para. 59; it is interesting to note, however, that in the *Celebici case* Judgment, Trial Chamber I emphatically stated that no presumption exists under

presumption may be applied to infer that the commander in question issued the illegal order, where crimes are widespread and follow a common pattern.[108]

2.4 INCITEMENT AND HATE PROPAGANDA

2.4.1 *The evolution of the crime of "incitement" in national and international law*

Article 4(3)(c) of the ICTY Statute,[109] taken verbatim from the 1948 Genocide Convention, provides that "direct and public incitement to commit genocide" is a punishable act. Article 7(1) provides for the individual criminal liability for those who "instigate" others to commit crimes set forth in articles 2-5 of the Statute. Unlike article 7(1) which requires actual commission or attempt[110] of the substantive crime alleged, article 4(3)(c) does not require that the underlying criminal act, the genocide, actually occurred. Thus, it is not clear whether article 4(3)(c) provides an independent basis for individual responsibility, separate from the instigation provision of article 7(1).

In common law systems, incitement tends to be viewed as a particular form of criminal participation, and is punishable as such. Similarly, the legislation of several

---

customary international law establishing the knowledge of a superior through the notoriety and widespread occurrence of crimes, in the absence of direct evidence of such knowledge, para. 386.

[108] Official Transcript of the Judgment of the International Military Tribunal for the Far East, at 1001, *in* LRTWC vol. XV, at 65.

[109] Similarly, art. 2(3)(c) ICTR Statute.

[110] As does art. 25 (3)(b) ICC Statute.

civil law countries, especially in Latin America, views provocation, which is similar to incitement, as a specific form of participation in an offence; but in most civil law systems, incitement is treated as a form of complicity.[111] In common law systems, incitement is defined as encouraging or persuading another to commit an offence.[112] Incitement, as a separate offence from an act of hate propaganda, occurs, under English law, when a person intentionally and knowingly (or at least with willful blindness)[113] seeks to influence another to the commission of a crime[114] through suggestion or encouragement.[115] Common law supports the view also that incitement may be perpetrated through threats or other forms of pressure.[116]

Civil law systems punish direct and public incitement which assumes the form of provocation, and which is defined as an act intended to directly provoke another to commit a crime through speeches, shouting or threats, or any other means of audiovisual communication.[117] Such provocation, as defined under civil law, is made up of the same elements as direct and public incitement to commit genocide covered by article 4(3)(b) of the ICTY Statute, that is, both "direct" and "public".[118]

---

[111] *Akayesu case* Judgment, *supra* note 74, at 107-108.

[112] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW, 462 (Clarendon, 1995).

[113] *Curr* [1968] 2 QB 944.

[114] *Whitehouse* [1977] QB 868.

[115] *Most* (1881) 7 QBD 244; *See* SMITH & HOGAN, *op. cit.*, at 388.

[116] ASHWORTH, at 462.

[117] *Akayesu case* Judgment, at 108, citing as example the equivalent provision in the French Penal Code.

[118] *Ibid.*

There were few convictions for instigation or incitement to commit war crimes or crimes against humanity in post-WW II military tribunals. The British practice was to charge being "concerned in" the commission of war crimes, and domestic English law on criminal participation and complicity was used to provide substance and meaning to this term.[119] In the *Essen Lynching case*, where a German private and captain were found guilty of "being concerned in" the killing of three captured British aviators, one of the accused was convicted of instigation to commit murder.[120] On the orders of the captain the three prisoners were marched through the crowded main streets of Essen, and as the crowd started growing bigger it began stoning and assaulting the prisoners, culminating eventually to their deaths. The guilt of the captain was based on his direction to the private escorting the prisoners, and audible to the crowd, not to interfere with the crowd if it molested the prisoners.[121]

The IMT differentiated between hate propaganda which aimed at arousing popular sentiment,[122] and propaganda which provoked hatred calling for the

---

[119] For a discussion of the English war crimes practice on participation, *see* LRTWC vol. XV, at 49, 54.

[120] LRTWC vol. I, at 88-92. The Prosecution's arguments suggest that it did not view any meaningful substantive difference between instigation and incitement. The accused's conduct was interchangeably described as both instigation and incitement.

[121] In the *Trial of Takashi Sakai*, before the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking (LRTWC vol. XIV, at 1), where an army commander was found guilty of inciting his troops to acts of atrocity against civilians; In the *Trial of Artur Greiser*, before the Supreme National Tribunal of Poland, among other acts of incitement and instigation, the accused, a provincial governor, was found guilty of "humiliation of the national dignity" of the Polish people for saying in a public speech: "Colleagues, as political leaders you must adopt in your work the principle that he who is not with us is against us and will be destroyed in our Fatherland. It is my explicit command that you be brutal, hard and again hard", LRTWC vol. XIII, at 113.

[122] This was the case with Hans Fritzche, 14 TRIAL OF MAJOR WAR CRIMINALS, at 582-585.

annihilation of a people.[123] The former did not constitute a crime against humanity nor a war crime, but the latter could if the propaganda occurred in circumstances where the group was being exterminated and the instigator was well aware of that fact.[124] This stress on the policy of extermination suggests that the IMT assumed it necessary to find a causal connection between the propaganda and acts of violence. The Judgment, however, does not appear to have required a direct causal connection to particular acts of violence.[125] It was sufficient that the propaganda occurred in a daily environment of hatred and extermination, and that therefore there was a reasonable likelihood that the propaganda incitement would contribute to unspecified further acts of violence.[126]

2.4.2 *Incitement and Instigation in the ICTR*

"Instigation" to commit a crime under article 6(1) ICTR Statute is translated as *incitation* in the French version. In the English language, Trial Chamber I in the *Akayesu case* noted, the words "incitement" and "instigation" are synonymous.[127]

---

[123] In the case of Julius Streicher, *ibid*, at 547-549.

[124] *See* Mathew Lippman, *The 1948 Genocide Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later*, 8 TEMPLE INT'L & COMP. L. J. 44-45 (1994).

[125] For a different view *see* Jamie Frederic Metzl, *Rwandan Genocide and the Intemational Law of Radio Jamming*, 91 AJIL 637 (1997), where the author argues that incitement, according to the IMT, requires "specificity and a direct link to the actions for which it called".

[126] By stressing Streicher's awareness of the extermination and persecution of the Jews, the Tribunal also suggested that the accused must have foresaw that harm was likely to result from the propaganda.

[127] *Akayesu case* Judgment, *supra* note 74, at 96.

The word "instigation" is used to refer to *incitation* in articles 6 of the Nuremberg Charter, 7(1) ICTY Statute and 2(3)(b) of the Draft Code of Crimes.[128] However, the Chamber pointed out that under civil law systems in particular the two concepts are quite different, and asked itself whether "instigation" under article 6(1) ICTR Statute must include the direct and public elements required for incitement in relation to the crime of genocide, which "in this instance translates *incitation* into English as "incitement" and no longer "instigation".[129] That question was answered in the affirmative, supported further by the ILC's comments on article 2(3)(f) of its Draft Code of Crimes.[130] According to the *Akayesu Judgment*, "instigation" under article 6(1) ICTR Statute involves "prompting another to commit an offence", which is different from "incitement" in that it is punishable "only where it leads to the actual commission of the offence desired by the instigator".[131]

Under the ICTR Statute, direct and public incitement is expressly defined as a specific offence.[132] The "public" element of genocide incitement is best appreciated after consideration of the place where the incitement occurred and whether or not assistance was selective or limited.[133] According to the ILC, public incitement is characterised by a call for criminal action to a number of individuals in a public place

---

[128] *Ibid.*

[129] *Ibid.*

[130] *Ibid. See* also VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 239 (1995).

[131] *Akayesu case* Judgment, *supra* note 74, at 97.

[132] Art. 2(3((c).

or to members of the general public at large by such means as the mass media, for example, radio or television.[134] Reference to *private* incitement was excluded specifically from the Genocide Convention; a view which was applied also in the context of the ICTR Statute.[135]

The "direct" element of incitement was construed by the Chamber as assuming a direct form and thereby "specifically provok[ing] another to engage in a criminal act, and that the more than mere vague or indirect suggestion goes to constitute direct incitement".[136] Although the ILC's construction of "direct" seems to require causation between incitement and offence, the *Akayesu* Judgment was of the opinion that the "direct" element of incitement should be viewed in the light of its cultural and linguistic context, since a particular speech, depending on the audience, may be perceived as "direct" in one country and not so in another.[137] The Chamber noted that since incitement may be direct and yet implicit, acts of incitement should be determined as perceived by their addressees whether direct or not, by focusing on cultural and specific circumstances which would in turn indicate whether the persons

---

[133] The French Court of Cassation, Judgment of 2 Feb. 1950, BULL. CRIM., No. 38, at 61, regarded words as being spoken publicly when spoken aloud in a place which under law was designated as a public place. Cited with approval *in Akayesu case* Judgment, at 108.

[134] Draft Code of Crimes, commentary on art. 2(3)(f), *Report of the ILC to the General Assembly*, 51 UN GAOR, Supp. No, 10, at 26, UN Doc. A/51/10 (1996).

[135] *Akayesu case* Judgment, at 109.

[136] *Ibid*, at 109, citing ILC Draft Code of Crimes Commentary, art. 2(3)(f), at 26.

[137] *Akayesu* case Judgment, at 109.

for whom the message was intended for "immediately grasped the implication thereof".[138]

However, it was pointed out that it was not sufficient simply to establish a possible coincidence between a public statement and the beginning of killings. Rather, there must be proof of "a possible causal link" between the statement and the beginning of the killings.[139] The Chamber was satisfied that the accused clearly called on the population to eliminate the Tutsis and those Hutus who aided them,[140] and also that the gathered crowd construed this message unequivocally.[141] The Court concluded that there did exist a causal link between the accused's public statement of 19 April 1994 and the ensuing killings at Taba commune, where Akayesu made his speech.[142]

Similarly, the former Prime-Minister Kambanda was held liable, *inter alia*, for direct and public incitement to commit genocide,[143] based on the following: encouraging and reinforcing the killing of Tutsis by a Hutu youth Organisation (the Interahamwe) by issuing a Presidential Decree to that effect; using the media as part of a plan to mobilise and incite the population to commit massacres; congratulating

---

[138] *Ibid.*

[139] *Ibid*, at 70.

[140] *Ibid*, at 71. It considered as irrelevant the fact that the accused did not convene the gathering himself.

[141] The Chamber found the terms "Inkotanyi" and "accomplice" uttered by the accused and calling for their annihilation that they were understood by the crowd as referring to Tutsis and sympathetic Hutus, *ibid*, at 72.

[142] *Ibid*, at 71, 128.

[143] *Kambanda case* Judgment, 10 RADIC 836 (1998) & 37 ILM 1411 (1998), para. 40(3).

publicly those who had committed these killings; addressing public meetings with incendiary comments inciting to killings.[144]

For the purposes of article 2(3)(c) ICTR Statute, the *mens rea* of incitement to genocide lies in the intent to directly prompt or provoke another to commit genocide.[145] The *Akayesu* Judgment concluded that while the drafters of the Genocide Convention decided against punishing unsuccessful incitement, the reality is that they simply agreed not to specifically mention that such a form of incitement could be punished.[146]

In contemporary world affairs, and especially after Rwanda[147] and Yugoslavia,[148] it is evident that hate propaganda in civil strife ignites and is responsible for many of the evils of conflict. The next section explores the legal

---

[144] *Ibid*, para. 39.

[145] *Akayesu case* Judgment, *supra* note 74, at 109.

[146] *Ibid*, at 110.

[147] Public broadcasts from Radio Rwanda were early considered by the Special Rapporteur to the UN Commission on Human Rights as "play[ing] a pernicious role in instigating several massacres", UN Doc. E/CN.4/1994/7/Add. 1, at 17.

[148] State-run Radio-TV Serbia (RTS and RTB) and Croatian Radio-TV (HRT) were the most influential media in the former Yugoslavia, and for many the mouthpieces of the Belgrade and Zagreb authorities. It is interesting to note that pursuant to arts. 4-6 of an October 1991 Presidential Decree, Croatian Television and Radio were placed under the direct control of the Croatian government, as well as certain newspapers. *See* FRANCOISE HAMPSON, INCITEMENT IN THE MEDIA: RESPONSIBILITY OF AND FOR THE MEDIA IN THE CONFLICTS IN THE FORMER YUGOSLAVIA. (Human Rights Center, University of Essex, Papers in the Theory and Practice of Human Rights No. 3, 1993). The Serb propaganda campaign was reemphasised by Trial Chamber I, in the *Tadic case*, Opinion and Judgment (7 May 1997), 36 ILM 908 (1997), paras. 87-96.

requirements necessary for bringing a propaganda prosecution, based on relevant international and domestic trends used to prohibit hate speech.

2.4.3 *Responsibility for hate propaganda*

Throughout the drafting process of the Genocide Convention the central debate regarding the incitement provision rotated on whether hate propaganda which, while not directly calling for the commission of acts of genocide, had the potential to provoke genocide should be criminalised. This sort of propaganda was understood by the drafters as constituting "indirect" forms of incitement. In the end, the drafters did not prohibit indirect incitement.

The first reference to hate propaganda was in the Secretary-General's Report. That draft included two general provisions. Article II(ii)(2) prohibited "direct public incitement to any act of genocide whether the incitement be successful or not". This language was very close to the incitement provision that was finally adopted by the General Assembly. The Secretary-General's commentary to the article stated that "direct incitement" referred to "direct appeals to the public by means of speeches, radio or press, inciting it to genocide".[149] Article III of the Secretary-General's draft prohibited "all forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear necessary or a legitimate or excusable act". It was stated that this provision was not intended to cover the "direct incitement to genocide" prohibited by article II, but rather was intended to prohibit:

---

[149] *Draft Convention on the Crime of Genocide*. Commentary, UN Secretary General, UN ESCOR, UN Doc. E/447 (26 June 1947), at 32.

"such *general* propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light [and which would convince people that] the existence of the human group designated as the victim of genocide is a very great evil, that this group represents error and perversion, that it imperils society ... [and] that it is an obstacle to progress."[150] [emphasis added]

Article III was designed to prohibit propaganda which, while not directly calling for the commission of an act of genocide, operated in a more subtle way. It was directed at propaganda that instilled hatred and fear of a group, motivating listeners to commit genocidal acts against that group. The commentary noted that the word "systematic" was used to limit the proposed article III to organised propaganda campaigns where the material was "repeated methodically".[151]

However, despite extensive deliberations on the inclusion of a provision similar to article III of the Secretary-General's draft, it was not included in the *Ad Hoc* Committee's draft.[152] Some delegations believed that the Genocide Convention

---

[150] *Ibid*, at 32.

[151] *Ibid*, at 33.

[152] The Soviet representative proposed to the *Ad Hoc* Committee an amendment that would have prohibited "[all] forms of public propaganda (press, radio, cinema, etc) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide". The text of the Soviet proposal was similar to that of article III of the Secretary-General's draft and appeared to cover a similar range of conduct. The Soviet amendment was finally rejected because a majority of the *Ad Hoc* Committee feared that a prohibition of hate propaganda might be used as a pretext to limit freedom of expression. The same Soviet amendment was later submitted to the Sixth Committee when it was preparing the final draft of the Convention. The proposed amendment was also defeated there. In the voting, the amendment was divided into two parts which were considered separately; one concerning incitement to racial, national or religious hatred, and the other dealing with incitement that "provoked the commission of genocide". The records of the Sixth Committee meetings do not explain the substantive difference between the two parts of the proposed amendment, but it appears that the

should criminalise only those forms of incitement that, as they saw it, had a direct causal relationship to acts of genocide. They argued that direct encouragement to commit genocide is more likely than hate propaganda to cause genocidal acts. Only if, in the words of the Iranian representative, the "immediate purpose" of such propaganda was incitement to the perpetration of genocide, would it fall under the scope of the incitement provision.[153] On the other hand, some members of the Sixth Committee believed that hate propaganda was at the very source of genocide and that it was essential that the Convention prohibit it.[154] They argued that it would be artificial to hold that direct incitement to genocide was more instrumental, and more dangerous, than indirect forms of hate propaganda in causing genocide. According to them, propaganda that skillfully plays on mob psychology by casting suspicion against certain groups, by insinuating that those groups are responsible for social and economic ills, etc. was capable of creating an atmosphere in which genocide was possible.[155] Since the objective of the Genocide Convention was not only to punish, but also to prevent acts of genocide, these members argued that it was essential that hate propaganda be prohibited.

---

distinction related to concerns about causation. *Ad Hoc Committee on Genocide*, 6th Sess. 16th mtg, UN ESCOR, UN Doc. E/AC.25/SR. 16 (1948), at 6-9.

[153] GAOR, 3rd Sess, Part I, Sixth Committee, 87 Mtg., at 248.

[154] The USSR, Polish and Yugoslav representatives were the strongest advocates for a hate propaganda provision. *See*, for example, the statement of the Yugoslav delegate, GAOR, 3rd Sess, Part I, Sixth Committee, 87 Mtg, at 250.

[155] *Ibid*, at 251, statement of the Polish delegate.

The predominant view in the Sixth Committee was that prohibition of incitement to racial, national or religious hatred was beyond the scope of the Genocide Convention. As reprehensible as they found hate speech, they believed that it was not the purpose of the Genocide Convention to criminalise that speech. Instigation of hatred, in their view, was not linked closely enough to the commission of acts of genocide.[156] Several members of the Sixth Committee expressed discomfort with the chilling effect a hate propaganda prohibition might have on rights to free speech and free press. The United States representative was especially insistent on this point. He said:

"Incitement to commit genocide should be punishable only if the incitement created *an imminent* threat of genocide and in such cases this would constitute either an attempt to commit genocide or an overt conspiracy to commit genocide."[157] [emphasis added]

Insistence on a direct causal relationship between the incitement and commission of an act of genocide has been re-emphasised in United States domestic implementing legislation.[158] In this legislation, "incite" is defined as "to urge another to engage *imminently* in conduct in circumstances under which there is a *substantial*

---

[156] *Id*, for the view of the Iranian representative.

[157] *Id*, at 213. By "imminent" the US representative appeared to mean that only incitement resulting in immediate acts of genocide would constitute direct incitement.

[158] The Proxmire Act, *adopted* on 4 November 1988, codified at 18 U.S.C secs. 1091-1093. The US emphasis on imminent causal effect must be understood in light of its First Amendment jurisprudence. The First Amendment has been interpreted by the United States Supreme Court as preserving free speech, unless such speech presents a "clear, imminent and substantial" threat to the peace, *Bradenburg v. Ohio*, 395 US 444 (1969). The incitement must act as a trigger to illegal action. This US free speech jurisprudence is not consistent with trends elsewhere regarding prohibition of hate speech.

likelihood of imminently causing such conduct". In the opinion of the United States, "direct incitement" to genocide is incitement that in the circumstances is likely to cause immediate acts of genocide. On the other hand, Canada has adopted implementing legislation that specifically refers to incitement, by taking a different approach to the causal connection between incitement and acts of genocide.[159]

The Secretary-General's draft incitement provision included a clause that would have punished even "unsuccessful incitement". This clause was dropped at the Sixth Committee stage because of objections by the Belgian representative, who was reluctant to prohibit incitement that had not resulted in acts of genocide.[160] Other representatives argued that "unsuccessful" incitement was an offence in many

---

[159] *See* sec. 318(l) of the Canadian Criminal Code, which prohibits "the advocacy or the promotion of genocide" and does not use the term "incitement" or expressly require substantial likelihood that the advocacy will lead to actual genocidal acts. According to David Watt and Michelle Fuerst in TREMEEAR'S CRIMINAL CODE 506 (1993), to "advocate" in the context of sec. 318 means to "argue in favor or to recommend publicly a particular course of action or conduct". To "promote" is to "further, advance, encourage or actively support a course of action or conduct". Sec. 319(l) of the Canadian Criminal Code, regarding "public incitement to hatred" which requires that such incitement is likely to lead to a breach of the peace, and sec. 319(2) regarding "willful promotion of hatred". In *R v. Keegstra* 3 SCR 697 (1990), the Supreme Court of Canada concluded that in this context "promote" involves an element of specific intent. "The hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group." While proof of causation of hatred was not required, proof of likelihood of harm was. As subsequent state practice, domestic implementing legislation like that of Canada can be used to interpret ambiguous treaty provisions; most states that have passed implementing legislation regarding the incitement to genocide provision of the Genocide Convention simply restate the provision or refer to domestic law provisions concerning incitement or racial hatred, and therefore offer little guidance. However, art. 378(4) (read together with art. 373) of the 1994 Slovenian Penal Code, regarding association and incitement to genocide and war crimes, makes it an offence to "call for or incite" anyone to acts of genocide. The words "call for" echo the commentary of the Secretary-General's Report.

[160] GAOR, 3rd Sess, Part I, Sixth Committee, 87th Mtg, at 222-223.

domestic legal systems.[161] As a compromise, the Sixth Committee decided to leave the causation issue unresolved so that states could implement the Convention according to the principles of their own domestic systems. As stated by the UK representative to the Sixth Committee, and indicative of the consensus view of that Committee, deletion of the words "whether such incitement be successful or not" did not preclude punishment of unsuccessful incitement to genocide.[162]

2.4.4.1 *Hate propaganda and incitement in other international instruments*

Although, as seen, hate propaganda was not considered to fall within the ambit of the Genocide Convention, several international human rights instruments now provide a balance between free expression and the rights of individuals to equality, physical integrity and dignity.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not contain explicit provisions outlawing hate speech.[163] However, article 10, which sets forth the right to freedom of expression, contains a paragraph providing that freedom of expression carries with it duties and responsibilities, and that it may be limited in order to safeguard overriding public interests. Article 17 of the ECHR expressly prohibits acts designed to destroy any

---

[161] *Ibid*, at 216.

[162] UN Doc. A/C.6 /SR.85, at 15.

[163] The 1966 Draft Model Law adopted by the Consultative Assembly of the Council of Europe, provides in art. 1(a): "A person shall be guilty of an offence: (a) if he publicly calls for or incites to hatred, intolerance, discrimination or violence against persons or groups of persons distinguished by colour, race, ethnic or national origin or religion".

rights guaranteed by the Convention, and further denies justification for such acts based on the Convention itself. These two provisions have been interpreted by the European Commission on Human Rights as prohibiting incitement to racial discrimination and hatred.[164]

In 1990, at the Copenhagen Meeting of the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE, now OSCE), the CSCE adopted a human rights statement that set forth a clear undertaking to protect freedom of expression.[165] These provisions illustrate a willingness in Europe to prohibit not only incitement to violence but also incitement to discrimination and hatred. The International Covenant on Civil and Political Rights (ICCPR),[166] and the Convention

---

[164] *Glimmerveen and others v. Netherlands*, Application Nos. D. 8348/78 and 8406/78, 18 DR 187 (1979); in *Jersild v. Denmark*, the Court stated that Denmark's obligations under art. 10 had to be interpreted in conformity with its obligations under the Convention for the Elimination of All Forms of Racial Discrimination, which prohibits propaganda that promotes racial hatred and discrimination, Case No. 36/1993/431/510, Eur.Ct. HR, Ser. A, No. 298 (1995), at 17.

[165] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990, *reproduced* in 29 ILM 1305 (1990). Art. 40 states:

> "The participating states clearly and unequivocally condemn ... racial and ethnic hatred ... and discrimination against anyone as well as persecution on religious and ideological grounds... they declare their firm intention to intensify efforts to combat these phenomena in all their forms and therefore will:
>
> (40. 1) - take effective measures, including the adoption, in conformity with their constitutional systems and their international obligations, of such laws as may be necessary to provide protection against any acts that constitute incitement to violence against persons or groups based on national, racial, ethnic or religious discrimination, hostility or hatred...".

[166] Art. 20(2) of the ICCPR provides that:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

on the Elimination of All Forms of Racial Discrimination (CERD)[167] contain provisions outlawing racist or hate speech. These agreements would prohibit ideas and advocacy that incite hostility, regardless of whether acts of violence follow.[168]

2.4.4.2 *Domestic law definitions*

Domestic laws that prohibit incitement to racial hatred and discrimination are similar to their international counterparts.[169] In some jurisdictions, laws prohibiting hate speech include a strict *mens rea* standard. For example, a 1986 Amendment to the Israeli Penal Code provides that " [a] person who publishes anything with the purpose of stirring up racism is liable to imprisonment for five years". Section 319 of the Canadian Criminal Code, titled "willful promotion of hatred", provides that "[e]veryone who, by communicating statements other than in private conversation,

---

[167] Art. 4 of the CERD provides:

> "State Parties ... shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin..."

[168] J. Ingles, *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. A/CONF. 119/10 (1983); *see* also the more restrictive approach of the American Convention on Human Rights, where art. 13(5) prohibits "any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds, including those of race, colour, religion, language or national origin". This provision has not yet been subject to judicial interpretation.

[169] For an extensive discussion, *see* Dominic McGoldrick & Therese O'Donnell, *Hate-Speech Laws: Consistency with National and International Human Rights Law*, 18 LS 453 (1998).

willfully promotes hatred against any identifiable group is guilty of an indictable offence".[170]

Many jurisdictions require a showing of either causation or specific intent. For example, section 18 of the 1986 English Public Order Act, regarding racial hatred, sets forth causation and specific intent elements in the alternative.[171] Few expressly require both. The domestic hate speech prosecutions that have been reviewed offer little guidance as to how causation and specific intent requirements serve to balance the preventative purpose of hate speech laws against rights of free expression.

The various legal systems contain two kinds of incitement provisions. Those which set out responsibility for various forms of accessory participation in a crime

---

[170] The accused must be shown to have a conscious purpose to promote hatred, *R v. Keegstra*, 61 CCC (3d) 1 (1990).

[171] Sec. 18 provides:

> "A person who uses threatening, abusive or insulting words or behavior, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all circumstances, racial hatred is likely to be stirred up thereby."

Sec. 153A of the Indian Penal Code makes it an offence, *inter alia*, for any person to promote "disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities"; examples from South America include the recently adopted art. 149(2) of the Uruguayan Criminal Code which makes it an offence to "publicly or by any means suitable for dissemination incite any person to hatred or contempt or any form of moral or physical violence against one or more persons by reason of the colour of their skin, their race, religion, or national or ethnic origin". A 1988 Amendment to the Argentine Penal Code provides that:

> "Those who participate in an organisation or spread propaganda based on ideas or theories of superiority of one race or of a group of persons of a particular religion, ethnic origin or colour, for the purpose of justifying or promoting racial or religious discrimination in any form will be punished ... The same punishment will be incurred by anyone who in whatever way encourages or incites to persecution or hatred of a person or group of persons for reasons of their race, religion, nationality or political views".

and require the actual commission of the offence, and those that contain a separate provision which provides that incitement is punishable even if the offence incited does not materialise.[172] Incitement in the latter context constitutes a separate punishable offence and is not regarded as a form of participation as such. The fact that those systems which punish unsuccessful incitement do so through an independent provision, militates against an interpretation of article 7(1) ICTY Statute which would incorporate unsuccessful instigation.

In the absence of a precedent, a rigorous application of causation and specific intent requirements may serve to define the necessary balance for ICTY hate propaganda prosecutions under articles 7(1) and 2-5 of the Statute. In conclusion, in order to substantiate a propaganda charge under article 7(1) of the ICTY Statute, it is necessary that the accused performed an instigating act, by speech or deed,[173] intending (whether through direct knowledge or reasonable foreseeability) thus to

---

[172] For example, sec. 11(2) of the Australian Criminal Code sets out criminal responsibility for "complicity and common purpose". This section provides that "a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly...". Sec. 11(4) goes on to provide that "a person who urges the commission of an offence *is guilty of the offence of incitement*" [emphasis added]; an example of a civil law system which does the same is the Dutch one. The Dutch Criminal Code in its general provisions on participation in offences provides that those who incite the commission of an offence will be punished as perpetrators of the offence. In a separate section dealing with offences against public order, art. 134 *bis* provides that "those who try to induce another person to commit an offence will be punished, in the event that the offence or a punishable attempt thereto has not been committed, with imprisonment for five years ...".

[173] The German Federal Constitutional Court, in the *cases of Albrecht, Kebler & Streletz*, former members of the National Defence Council of the GDR, ruled that although there were no direct written orders, the constant conveyance to the GDR border guards of the term "elimination" by their superiors in training, political education and daily life, met the statutory GDR definition of incitement. *Reported* in 18 HRLJ 68 (1997).

induce or encourage another to commit a crime, which in fact was committed, or at least attempted.[174] In the case of article 4(3)(c) of the ICTY Statute, it is not necessary to prove that the incited genocidal acts occurred.

2.5 COMPLICITY IN VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

2.5.1 *Domestic law*

Complicity is a concept known both to common law and civil law jurisdictions.[175] Although the parameters of accomplice liability are broadly recognisable from one nation to the next, the nuances of the specifics are sufficiently different as to make generalisations redundant. This survey of domestic law will focus on the *actus reus* of complicity which has been found to share many common features in the majority of jurisdictions.

---

[174] Art. 25(3)(b) ICC Rome Statute (1998). The Japanese delegate in the ICC Prep-Com explained that the conspirator or instigator of a crime is punishable only after a principal actually committed a crime based on such instigation (the term used was "criminal solicitation"), UN Doc. A/AC.249/1 (7 May 1996), at 76.

[175] It has been suggested, in English law, that complicitous conduct in the form of aiding, abetting, counseling and or procuring, could be reduced to two consolidated forms, namely "helping and influencing". Aiding and abetting denotes presence at the scene of the crime, while counseling and procuring denotes activity before the commission of the crime, WILSON, CRINIINAL LAW, 583 (1998); even further, the *Akayesu case* Judgment differentiated between "aiding" as giving assistance and "abetting" as facilitating crime by being sympathetic thereto, at 97.

The first form of complicity is through encouraging the principal in his criminal behavior; hence, it does not actually involve the performance of a physical act.[176] Under this definition, threats or promises,[177] words or even gestures,[178] or plans for a crime,[179] without more, suffice for liability.

Encouragement by the accomplice can come long before the commission of an offence,[180] and it may be communicated by a third party.[181] However, even presence at the scene of the crime has been held sufficient for accomplice liability, but only where the accomplice encourages in some way the principal,[182] even if he stands by for possible help,[183] as long as the principal is aware of that fact.[184] The corollary to this is that the accomplice's mental state is irrelevant if the principal is unaware of any potential assistance from the would-be accomplice.[185] Hence, in US law,

---

[176] For example, sec. 8 Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977, speaks in terms of aiding, abetting, counseling and procuring.

[177] *State v. Scott* 68 A. 2d 258 (Conn. 1907); art. 60 French Penal Code providing for threats and promises.

[178] *Alonzi v. People* 597 P. 2d 560 (Col. 1979); *McGhee v. Commonwealth* 270 S.E. 2d. 729 (Va. 1980)

[179] *State V. Haddad* 456 A. 2d 316 (Conn. 1983).

[180] *Workman v. State* 21 N.E. 2d 712 (Ind. 1939).

[181] *People v. Wright* 79 P. 2d 102 (Cal. 1938).

[182] *Clarkson* [1971] 3 All ER 344; *Jefferson* [1994] 1 All ER 270; *Coney* (1882) 8 QBD 534; *Ramirez v. Canada (MEI)*, [1992] FC 653.

[183] *Commonwealth v. Morrow* 296 N.E. 2d 468 (Mass. 1973).

[184] *Hicks v. USA* 150 U.S. 442 (1893); *Giorgianni v. R.* (1985) 156 CLR 473, at 482, 500 (Australia).

[185] *Hicks, ibid.*

presence at the scene of the crime, without more, is sufficient to ground liability,[186] as is merely silent approval of the actor's conduct,[187] unless by law, due to a specific circumstance or relation, the secondary party is bound to oppose the principal.[188] The same is true for Islamic law, where a duty to rescue exists, rendering inactive presence a criminal complicitous act.[189] In English law, however, the question of accomplice liability is decided on the basis of *mens rea* and not on the passive or spectatorial presence of the accused.[190]

A second type of accomplice liability involves the accomplice's actual physical assistance. Hence, supplying guns,[191] money,[192] or insturmentalities for the purpose of the crime,[193] serving as lookout,[194] or preventing a warning from reaching

---

[186] *State v. Grazerro* 420 A. 2d 816 (R.I. 1980); *Atkinson* (1869) 11 Cox CC 330.

[187] *State v. Homer* 103 S.E. 2d 694 (N.C. 1958).

[188] *State v. Parker* 164 N.W. 2d 633 (Minn. 1969); *Brown* (1841) Car & M 314, *in* SMITH & HOGAN, at 134.

[189] This is supported in a *hadith*, a source of Islamic law referring to actions or omissions of Prophet Muhammed, reported by Al-Tabarani. YUSUF AL-QARADAWI, THE LAWFUL AND THE PROHIBITED IN ISLAM, 325 (1994).

[190] In *Clarkson* [1971] 1 WLR 1402-1406, the Court of Appeals quashed a conviction of aiding and abetting of two soldiers who, upon entering a room, found other colleagues raping a woman and watched the event without further involvement. The basis of the Court's reasoning was that the accused had neither the intent to rape nor to facilitate the crime. However, in a later case it was held that turning a blind eye to crime would encourage recurrence, *R v. J. F. Alford Transport Ltd.* [1997] Crim. L. R. 745.

[191] *Commonwealth v. Richards* 293 N.E. 2d 854 (Mass. 1973).

[192] *Malatokofski v. USA* 179 F. 2d 905 (1st Cir. 1950).

[193] *USA v. Eberhardt* 417 F. 2d 1009 (4th Cir. 1969).

the victim,[195] are all sufficient for accomplice liability in the majority of legal systems. In cases such as the latter, unlike in the instances of encouragement, there is no requirement that the principal be aware of the accomplice's actions.[196]

Finally, while there is considerable agreement on the *actus reus* of complicity, there exists substantial divergence on the issues of *mens rea* and causation. In relation to the latter for example, there is a major disagreement between the US and English legal systems, with the former consistently holding that the accomplice's causal role in the crime is irrelevant,[197] while the latter maintains that a causal link must exist between procurement and the commission of the offence.[198]

2.5.2 *The international context*

Complicity has long been recognised as a form of participation in a crime under international humanitarian law.[199] Precedent, however, provides a contradictory guide. The IMT and IMTFE Charters contained identical provisions for the punishment of those acting in "common plan or conspiracy".[200] Provisions on

---

[194] *Clark v. Commonwealth* 108 S.W. 2d 1036 (Ky. 1937).

[195] *State ex rel. Attomey General v. Talley* 15 So. 722 (Ala. 1894).

[196] *State v. Lord* 84 P. 2d 80 (N.M. 1938).

[197] *State ex rel. Attorney General v. Talley, supra* note 195, at 730.

[198] *AG's Reference* (No. 1 of 1975) [1975] 2 All ER 687.

[199] Principle VII of the Nuremberg Principles, formulated by the ILC and adopted by G.A Res. 177(II)(a), 5 GAOR, Supp. No. 12, at 11-14, para. 99, UN Doc. A/1316 (1950).

[200] Arts. 6(a) and 6(c), and 5(a) and 5(c) of the IMT and IMTFE Charters respectively.

complicity applied by other tribunals mirrored those of the domestic law of the nation under whose jurisdiction the proceeding was held. Hence, the approach to complicity varied, depending on the state under whose jurisdiction the proceedings took place.

In the majority of legal systems the accomplice is considered as liable as the principal offender.[201] This reasoning was also adopted in the context of the Genocide Convention,[202] and followed by the post-WW II military tribunals, since national laws on complicity were extensively applied in those proceedings.[203] These tribunals

---

[201] For example, sec. 8, Accessories and Abettors Act 1861 (UK). The effect of treating accessories as principals is illustrated in *D.P.P. (N.I) v. Maxwell* [1978] 3 All ER 1140; similarly, sec. 7 of the Nigerian Criminal Code and art. 59 of the French Penal Code; on the other hand, chp. 23(sec. 4) of the Swedish Penal Code (Br.B 23:4) and art. 17 of the Russian Criminal Code provide that the liability of the accomplice should be assessed according to the degree and character of the participation.

[202] Complicity in art. 2(3)(e) was inserted by adoption of an amendment proposed by the UK. Its aims were, on the one hand, to "show that complicity applied only to material acts of genocide" and not to other inchoate offences and, on the other, it wished to introduce the word "deliberate", corresponding to the French word "*intentionelle*" as distinct from "*premeditee*". The term "deliberate" was finally omitted, since the element of intent was considered as inherent in complicity, *see* GAOR 3d Sess., Part I, 6h Comm. (1948), at 255-258. The concept of complicity was understood as "the rendering of accessory or secondary aid, or simply of facilities, to the perpetrator of an offence". Despite being on the same footing as the principal, accomplices are punished, under the Convention, only if the crime is actually committed, at 254. *See* Israel W. Charny, *Towards a Generic Definition of Genocide*, *in* GEORGE J. ANDREOPOULOS (ed.), GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS 65, 83-84 (Philadelphia, Univ. Pennsylvania Press, 1994), where the author suggests the definition of a new category of accomplices to genocide, namely those individuals who supply the financial and technical means to mass murderers.

[203] *Trial of Franz Schonfeld and Nine Others*, LRTWC vol. XI, at 69-70; art. II of Control Council Law No. 10 equated an accessory to the principal.

had no hesitation in ruling that accomplices to a crime were as guilty as the principal offender for the underlying offence.[204]

2.5.2.1 *Actus reus for complicity under international law*

According to Trial Chamber I in the *Akayesu case*, "aiding" means giving assistance to someone, while "abetting" involves facilitating the commission of an act by being sympathetic thereto.[205] The Chamber was of the opinion that for the purposes of article 6(1) ICTR Statute, either "aiding" or "abetting" alone is sufficient to render the perpetrator criminally liable.[206] Although noting that "aiding" and "abetting" are akin to the constituent elements of complicity, they themselves constitute one of the crimes referred to in articles 2 to 4 ICTR Statute, particularly genocide. Therefore, it opined that when dealing with a person accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that the accused had the specific intent to commit genocide, whereas the same requirement is not needed for simple complicity in genocide.[207]

For a person to be an accomplice to the crime of the principal he must have knowledge of the essential elements of the crime, and be either a participant in its

---

[204] Supplemental Judgment in the *Pohl case*, LRTWC vol. VII, at 49; *Justice case*, LRTWC vol. VI, at 62, and the *Trial of Wagner and Six Others*, LRTWC vol. III, at 24, 40-42, 94-95, where the French tribunal applied art. 59 of the French Penal Code.

[205] *Akayesu case* Judgment, *supra* note 74, at 97.

[206] *Ibid.*

[207] *Ibid.*

execution, or conversely authorise or approve it.[208] It is not necessary that the act of the accomplice be illegal; it is sufficient that he knew of the principal's unlawful intention and knowingly intended to assist him.[209] The concept includes all acts of assistance that lend encouragement or support to the commission of the crime, which may be removed both in time and place from the crime. This assistance need not be only physical, as psychological support through words or physical presence to that effect would suffice.[210]

Complicitous participation must always be direct.[211] Hence, encouragement or physical assistance must not only facilitate but directly contribute to the commission of the crime.[212] Trial Chamber I, in the *Tadic case* Judgment, going even further, and relying on the ILC Draft Code of Crimes which provides for accomplice

---

[208] *I.G Farben Trial*, LRTWC vol. X, at 52; the same *mens* rea standard was adopted in the *Justice case*, which was based on an analysis of the IMT Judgment, LRTWC vol. VI, at 84.

[209] In the case of *Gustav Becker, Wilhelm Weber and 18 Others*, an accused was found guilty of aiding and assisting in the deportation of French youths, by denouncing them for not joining the German Army. The tribunal stated that denunciation was not of itself a crime, unless by giving information the accused knowingly and intentionally became an accomplice to the crime of forceful deportation, LRTWC vol. VII, at 220, *in Tadic case*, Opinion and Judgment (7 May 1997), at para. 687.

[210] *Tadic case*, Opinion and Judgment (7 May 1997), para. 678; *Celebici case* Judgment, *reported* in 38 ILM 57 (1999), para. 327; *Furundzija case* Judgment, *reprinted* in 38 ILM 317 (1999), para. 199, citing *Trial of Schonfeld and Nine Others*, LRTWC vol. XV, at 70, noting that in giving "additional confidence to his companions", the defendant facilitates the commission of the crime, and it is this which constitutes the *actus reus* of the offence.

[211] The requirement of direct involvement was emphasised in the *Dachau camp case*, LRTWC vol. XI, at 8, 12-13.

[212] In the *Trial of Tesch and Two Others* [*Zyklon B case*], the accused were found guilty of war crimes for having supplied the poisonous gas Zyklon B to concentration camps with the knowledge that it was used to exterminate camp inmates, LRTWC vol. I, at 93-94, 101.

liability only when the assistance is direct and substantial,[213] stated that "the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime".[214]

2.5.2.2 *Presence at the scene of the crime*

As noted earlier in the analysis of domestic law, mere inactive presence at the scene of the crime is not considered as being complicitous behaviour. Similarly, under international standards, presence at the scene of the crime when coupled with knowledge and intent may be sufficient to establish guilt,[215] but "the connection between the act contributing to the commission and the act of commission itself can

---

[213] Arts. 2(3)(a) and (d).

[214] *Tadic case*, Opinion and Judgment (7 May 1997), 36 ILM 908 (1997), at para. 688. The ICTY was led to this conclusion based on WW II case law and the definition of "directly" and "substantially" by the Draft Code Commentary as "entail[ing] assistance which facilitates the commission of a crime in some significant way", at 24; this view seems to have been adopted also in the *Trial of Major Rauer and Six Others*, where the tribunal ruled that the crimes charged would never have occurred without the direction and connivance of the commander and his adjutant, LRTWC vol. IV, at 113, 116; approved in *Celebici case* Judgment, para. 326; similarly, lookouts are considered as accomplices, *Trial of Sandrock and Three Others* [*Almelo Trial*], LRTWC vol. I, at 35, as is the burning of bodies a significant facilitating factor, *in Furundzija case* Judgment, paras. 203-204.

[215] *Trial of Otto Sandrock and Three Others*, LRTWC vol. I, at 43, cited with approval in *Tadic case*, Opinion and Judgment (7 May 1997), at para. 685, noting further that ignorant or unwilling presence will not suffice, at para. 689; *Trial of Rohde and Eight Others*, LRTWC vol. V, at 54, *in Furundzija case* Judgment, para. 203.

be geographically and temporally distanced".[216] Similarly, participation as a principal in a crime and immediately thereafter presence, albeit without any participation in another new crime, constitutes encouragement of this latter offence.[217]

The *Furundzija* Judgment, furthermore, pointed out that even intermittent presence at the crime scene will substantiate complicity, only when the person's knowledge of the offence is combined with a high status.[218] In that sense, while any spectator can be said to be encouraging a spectacle, the spectator in the *Synagogue case* was only found to be complicit if his status was such that "his presence had a significant legitimising or encouraging effect on the principals".[219]

On the other hand, silent approval that does not contribute to causing the offence, in no way meets the requirements for criminal liability.[220] According to the *Furundzija* Judgment, one's "insignificant status" brings the effect of his silent approval below the threshold necessary for the *actus reus*.[221] The Chamber concluded from these two German cases that "presence, when combined with authority, can

---

[216] *Tadic case*, *ibid*, para. 687.

[217] *Tadic case*, Opinion and Judgment, 36 ILM 908 (1997), para. 690.

[218] *Furundzija case* Judgment, para. 205, citing the *Synagogue case*, Strafsenat (German Supreme Court), Urteil vom 10 Aug. 1948 gegen K. und A. StS 18/48 (Entscheidungen, vol. I, at 53, 56).

[219] *Furundzija case* Judgment, paras. 207, 232.

[220] *Ibid*, para. 208, citing *Pig-cart parade case*, Strafsenat, Urteil vom 10 Aug. 1948 gegen L.u.a StS. 37/48 (Entsscheidungen, vol. I, at 229, 234).

[221] *Ibid.*

constitute assistance in the form of moral support", hence, assistance need not constitute an indispensable element for the acts of the principal.[222]

2.5.2.3 *Effect of assistance on the act of the principal*

The assistance or encouragement must have a "substantial effect" on the act of the principal in order to qualify as complicity.[223] This substantial effect, however, need not be direct, since if the inactive presence of a high-ranking official at the scene of a crime is considered as legitimising that crime, it follows that indirect assistance or encouragement may suffice to constitute complicitous behaviour.[224] Hence, interpreters have been found to be accomplices where they voluntarily joined a criminal organisation and actively contributed to its cause.[225]

On the other hand, mere employment in a criminal organisation coupled with knowledge of its activities is not sufficient for complicity if the accused in carrying out his duties did not have a substantial effect on the commission of the ensuing

---

[222] *Ibid*, para. 209; for a similar ruling *see also Public Prosecutor v. Djajic*, *summarised* by Christophe J. M. Safferling *in* 92 AJIL 529 (1998).

[223] *Ibid*, para. 217; *Einsatzgruppen case*, TWC vol. IV, at 569.

[224] This explains why the word "direct" was not used in the ICC Statute. *See Furundzija case* Judgment, para. 232.

[225] *Ibid*, para. 217; *USA v. Osidach* 513 F. Supp. 51 (E.D. Pa. 1981) at 1, 45, where the accused's role as an armed, uniformed interpreter for the German and Ukranian occupation police and participation during the interrogation of enemy prisoners was classified as assistance to Nazi crimes under sec. 13 of the Displaced Persons Act 1948 (Holtzman Act).

offence.[226] Thus, in the *Zyklon B case*, it was held that a gassing technician has no influence over the supply of gas for the purposes of execution of civilians and is not therefore complicit.[227] However, a willingness to provide assistance, when made known to the perpetrator, would suffice if the offer of help in fact encouraged or facilitated the commission of the crime by the principal.[228] In any case, the culpability of the accomplice would not be negated by the fact that his assistance could easily have been obtained by another.[229]

If the standard for accessorial liability rested on whether the principal would have committed the offence had it not been for the help or encouragement received, this would in most cases be an almost impossible test to prove.[230] This test may be useful in cases of procurement and instigation,[231] where the role of the suppliers not only facilitates but directly contributes to the commission of the offence. Following

---

[226] *Furundzija case* Judgment, para. 221; similarly, in *Kaleijs v. Immigration and Naturalisation Services (INS)* 10 F. 3d 441 (7th Cir. 1993) and *Laipenieks v. INS* 750 F. 2d 1247 (9th Cir. 1985), *reported* in 46 AM. INT'L. L. CAS. 184, 193 (3d. Ser. 1993), pointed out that assistance in persecution requires "personal active assistance or participation". However, in *USA v. Kairys* 782 F. 2d 1374 (7th Cir.) *cert. denied*, 476 U.S. 1153, 106, S. Ct., 2258, 90 L. Ed. 2d 703 (1986) it was held under the Holtzman Act that voluntary service as a guard at a concentration camp, even without proof of personal involvement in atrocities, qualifies as complicity in persecution.

[227] *Trial of Tesch and Two Others* [*Zyklon B case*], LRTWC vol. I, at 102.

[228] *Furundzija case* Judgment, para. 230.

[229] *Ibid*, para. 224, citing the *Hechingen Deportation case* (unreported).

[230] WILSON, at 590, where *Calhaem* [1985] 2 All ER 269, *per* Parker L. J. is cited in support.

[231] WILSON, *ibid.*

the English view, the *Furundzija* Judgment asserted that causation is not necessary, however, participation must be significant and not marginal.[232]

2.5.2.4 *Complicity in torture*

The *Furundzija Judgment* made a distinction between complicity proper and that for the purposes of torture. It pointed out that if one "does not partake in the purpose behind torture", but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of crime.[233]

2.5.2.5 *Accessory after the fact liability*

The law recognises accessorial liability not only for assistance before or during an offence, but also after its commission.[234] This accessory after the fact liability does not render the perpetrator liable for the offences which preceded his assistance.[235] According to the ILC Commentary, it is a form of complicity if it has

---

[232] *Furundzija case* Judgment, para. 231.

[233] *Ibid*, para. 252.

[234] Recognised also in the context of the Genocide Convention. Lippman, *op. cit*, at 47.

[235] *Pohl case*, cited *in* LRTWC vol. XV, at 53.

been agreed upon prior to the perpetration of the offence.[236] Although *ex post facto* assistance is recognised in the context of the Draft Code,[237] this is not the case with the ICC because it is not considered as being serious enough for prosecution in therein.[238] Accessory after the fact liability constitutes, nonetheless, a general principle of criminal law,[239] and may validly be applied in international adjudication.

2.5.2.6 *Mens rea for complicity in international humanitarian law*

Participation in a crime, for liability to attach, need not be physical, as physical presence without intent would not suffice.[240] In the *Justice case*, where

---

[236] *Report of the ILC* (Draft Code Commentary) on the work of its 48th Sess. GA Supp. No. 10, UN Doc. A/5/10 (1996), at 18.

[237] For a summary of the relevant discussions, *see Report of the ILC*, 43rd sess, (29 April- 19 July 1991), GAOR 46th sess, Supp. No. 10, UN Doc. A/46/10, at 252-253.

[238] *See Draft Code Commentary*, GAOR 51st Sess, Supp. No. 10, UN Doc. A/51 /10, para. 12, and UN Doc. A/AC.249/1997/L.5 (12 March 1997), at 21. There is no reference to *ex post facto* assistance liability in art. 25 of the ICC Statute.

[239] In German law, abetting after the fact is excluded from criminal accessorial liability, and accessory after the fact exists only as a separate crime, e.g, art. 257 STGB. However, the aiding and abetting can follow the beginning of the commission of the crime, but has to occur before its completion, according to arts. 6, 248 of the BGHST and arts. 89, 759 BHG JZ; again, although under art. 121-127 of the French CP (Code Penal) there exists no accessorial liability for aiding and abetting after the fact, there do exist separate provisions for such conduct which constitute autonomous crimes, such as arts. 321 and 434-6, 434-7 CP; in common law jurisdictions accessory after the fact liability is well established, such as the US statutory provision in 18 U.S.C.A. sec. 3.

[240] *Trial of Karl Golkel and 13 Others*, LRTWC vol. V, at 45-47 and 53-55. *See also* BASSIOUNI, INTERNATIONAL CRIMINAL LAW, at 26-29, 50.

actual knowledge could not be proven, the tribunal presumed knowledge on the part of the accused based, on their capacity as employees of the Ministry, on the large scale criminal activity of the Ministry of Justice and the accused's involvement therein from the beginning of the war.[241] In this sense, a "should have known" test was applied where the accused's participation in a criminal scheme was proven, signifying that the accused must have been aware of its criminal features. In *the Dachau concentration camp case*, the knowledge of the gas chamber murders by the 61 accused, low and high-ranking members of that camp, was inferred from circumstantial evidence. This inference was based on the conditions prevailing in the camp and the accused's daily involvement in its affairs therein, making each of them criminally liable.[242]

Hence, whether through actual or circumstantial evidence, mere knowledge that one's actions assist the principal suffice for complicity, as the accomplice need not share the *mens rea* of the principal,[243] nor is there any requirement that he be aware of the principal's precise crime.[244]

---

[241] *Justice case*, LRTWC vol. VI, at 88-89.

[242] *Trial of Weiss and Thirty-nine others*, LRTWC vol. XI, at 15.

[243] *Furundzija case* Judgment, para. 236; similarly, art. 30 of the ICC Rome Statute (1998) establishes complicity if the material elements of the crime are committed with intent and knowledge thereof.

[244] *Ibid*, para. 246.

CHAPTER III

Defining Superior Status under International Humanitarian Law[1]

Introduction

Thus far we have examined various inchoate and direct forms of participation in offences of humanitarian law. The following two Chapters explore the ambit of the doctrine of "command responsibility". Chapter IV examines the legal duties contained therein, while the present Chapter attempts to ascertain the persons falling within the parameters of this doctrine. The question hence is, who is liable for offences committed by others on the basis of his/her failure to take any action? Relevant international law dictates that only superiors are liable for such inaction and then only for the actions of persons under their command. We seek therefore to ascertain who a superior is, and whether the concept of a "superior" is a fixed one, or fluctuates in accordance with certain identifiable parameters. Further, we have to examine whether there is any meaningful difference between the terms "command" and "control", and if so, determine their application in this context.

The fundamental argument of Chapter III is that superiors should be identified based on *de facto* elements of command, rather than pre-determined *de jure* elements. Consonant with this argument, an effort has been made to identify the ambit of this axiom and, hence, assess the recent *Celebici* Judgment before the ICTY.

---

[1] A combination of the material contained in Chapters III and IV of this thesis is contained in 93 AJIL 573 (1999), titled "The Contemporary Law of Superior Responsibility".

3.1 *Discerning command from control*

The majority of offenders pursued by the ICTY and ICTR Prosecutor concern individuals whose involvement in the underlying crimes has been their authority over the principals. This form of liability is known as command or superior responsibility and is explicitly defined in articles 7(3) and 6(3) of the ICTY and ICTR Statutes respectively. These superiors are not, however, held criminally liable for the crimes of their subordinates simply because they happen to occupy such a position. Rather, in order for an individual to become liable under article 7(3) ICTY Statute, the Prosecutor must prove (i) the existence of a superior-subordinate relationship; (ii) that the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators thereof.[2]

The existence of a superior-subordinate relationship may be established in two independent ways, depending on the source from which authority is acquired. The most obvious means of assumption of power is through official delegation of command from a higher authority. Thus, authority emanating from formal official structures is *de jure*, and the power vested over others is one of *de jure* command. A position of command cannot, however, be determined by reference to formal status alone. Instead, another factor that determines command liability is the "actual possession", or non-possession, of powers of control over the actions of

---

[2] *Prosecutor v. Delalic, Mucic, Delic, Landzo* [*Celebici case*] Judgment of 16 Nov. 1998, Case No. IT-96-2 I -T, *summarised* in 38 ILM 57 (1999), para. 346.

subordinates.[3] This two-tier formulation has early been espoused by the ICTY, starting with the *Karadzic and Mladic case*, where, it should be noted, the Trial Chamber declined to apply article 7(3), because the direct participation of the accused under article 7(1) was held to be more pertinent. It stated that superior authority may be determined through (i) the position of the accused "in the overall organisation, with a view to determining [his] institutional functions", and (ii) how one exercises his powers.[4]

The inherent tension in such a wide definition of command is further exacerbated by the fact that in post-WW II conflict situations, such as Yugoslavia, control and command structures may be ambiguous and ill-defined.[5]

3.2.1 *Determination of institutional functions*

Executive structures are based on hierarchical scales through which a portion of power is officially delegated to individuals within that hierarchy. This power determines according to the rules of the structure in question the amount of authority actually devolved upon someone. It is to these rules that the Prosecution must focus in order to determine the *de jure* authority of the accused. These rules are most

---

[3] *Celebici case* Judgment, *supra* note 2, para. 370; art. 28(l)(2) ICC Rome Statute (1998) defines a superior-subordinate relationship as one encompassing "effective command and control, or effective authority and control".

[4] *Prosecutor v. Karadzic and Mladic* [*Karadzic and Mladic case*] Decision of Trial Chamber pursuant to Review of the Indictment under Rule 61 of the Rules and Procedure and Evidence (11 July 1996), 108 ILR 86 (1998), para. 66.

[5] *Celebici case* Judgment, *supra* note 2, para. 354.

commonly laws or decrees passed through an act of a legislative body, or in the case of a revolutionary structure, by the legislative body of that structure.

Thus, in the *Akayesu case* the Trial Chamber adduced from evidence that according to Rwandan law that the position of burgomaster placed one (i) head of the communal administration; (ii) *officier de l'etat civil*; and (iii) responsible for maintaining and or restoring the peace.[6] Similarly, while non-state entities, the factions in the Bosnian conflict promulgated decrees concerning the establishment of revolutionary armed forces and organisation of their overall administration.[7]

De jure power determines one's competence and jurisdiction. In this sense, power to take action or intervene is confined to a pre-defined field, beyond which there is no competency and subsequently no liability.[8] In this respect, the tribunal in the *Ministries case* held that the members of the German Foreign Office were not liable for the persecution of Catholics and priests because they neither initiated that policy, nor had they any control over those who carried it out, the whole matter laying outside their "official competency".[9]

---

[6] *Prosecutor v. Akayesu* [*Akayesu case*], Judgment of 2 September 1998, Case No. ICTR-96-4-T, < http://www.un.org/ictr/judgements/akayesu/htm > at 21 (citation refers to internet paging). *Summarised* also in 37 ILM 1399 (1998).

[7] Decision on the Creation of the Croatian Defence Council (8 April 1992), Statutory Decision on the temporary organisation of the executive authority and administration in the territory of the Croatian Community of Herceg-Bosna (3 July 1992) and Decree on the armed forces of the Croatian Community of Herceg-Bosna (17 October 1992), *in Prosecutor v. Blaskic* [*Blaskic case*], Material in support of the Indictment (on file with author), at 2, 3.

[8] *USA v. von Weizsaecker et al.* [*Ministries case*], TWC vol. XIV, at 526.

[9] *Ibid.*

Official competency is rarely the best determinant of actual authority, especially in military structures engaged in non-intemational armed conflicts. Problems of identification arise where legislation is absent or obscure or even if available it inadequately describes one's actual functions and amount of authority actually exercised.[10]

3.2.2 *National Command Structures*

Both the civilian and military components of every state machinery form an integral structure of national defence or aggression. Evidently, there exists a wide gap between the policy or decision-making bodies and the troops that execute the executive's commands. This gap is covered with the creation of a formal hierarchy comprising four widely defined stages of authority. The first is policy command, which involves the power to commit or withdraw a state's armed forces and determines policy objectives, and is exercised by state leader/s.[11] The second is the phase of strategic command. It is here that the highest military authorities are incumbent to produce a viable military plan to achieve the aim sought by the policy commander. Such decisions are usually taken by the Joint Chiefs of Staff in conjunction with other senior government members. Upon agreement, and prior to

---

[10] General Mladic, for example, although a strategic commander, assumed operational and in some cases even tactical command of VRS forces, *Karadzic and Mladic case*, Decision Review of the Indictment, 108 ILR 86 (1998), para. 78.

[11] David Kaye, *Are There Limits to Military Alliance? Presidential Power to Place American Troops Under Non-American Commanders*, 5 TRANS. L. & CONT. PROB. 408 (1995).

any further implementation, these decisions are brought before the policy commander for authorisation.[12]

When the military plan is finally authorised it is passed down the chain of command to be implemented on the battlefield. This implementation is undertaken at the operational command level, by senior military officers who control mid-level groupings of forces, usually in the form of corps or divisions. They do not issue orders directly to troops, but instead order and direct the commanders of smaller groupings.[13] At the end of every command chain one finds the officers in the field who issue orders directly to troops, thus exercising tactical command, which is limited by the directions of operational and strategic command. At this level, virtually any person of whatever rank may become a tactical commander, since even a private can assume command of a group where all other superiors have been incapacitated.[14]

---

[12] *Ibid.*

[13] *Ibid,* at 409. Armies generally adopt a hierarchical structure, divided horizontally into formations, e.g. Army, Corps, Division, etc. Each formation consists of a number of operational fighting units whose activities are directed and coordinated by a Headquarters (HQ). The formation commander, a General, commands the formation but generally delegates the command of the Headquarters to a deputy or chief of staff. Various sections of the formation HQ assist the commander in making his plans and provide a variety of support to the fighting units in carrying them out. The commander of each of these sections is a member of the "Staff". The "Staff" can have a narrow or broad meaning. The former refers to those senior officers who form the Commanders" "think-tank", whilst the latter covers the much larger group of people who all work in the various departments that these officers head-up. The Staff is therefore the nerve-centre of the HQ.

[14] ICRC COMMENTARY, para. 3553; the *Celebici case* Judgment, supra *note* 2, pointed out that "direct subordination" relates the tactical commander to his troops, para. 371, citing with approval para. 3555 of the ICRC Commentary.

3.2.3 *United Nations and Allied Command structures*

This hierarchical system of command has been applied in the case of United Nations Forces,[15] where authority for both policy and strategic command is vested in and exercised by the Security Council and to a very limited degree by the Secretary-General.[16] Despite their obvious significance, policy and strategic command have been treated in vague terms. Operational command, on the other hand, has been formulated in more detail.[17] A United Nations operation consists of a Force Commander who exercises operational command over a number of contingents provided by member States.[18] Military personnel under the Force Commander, although remaining in their national service are, for the duration and purposes of the specific UN operation, "international personnel" subject to the instructions of the Force Commander, through the subsequent established chain of command.[19] In

---

[15] Under the United Nations Charter, it was envisaged that while the Security Council would exercise policy command, in accordance with art. 47(3)(4), a Military Staff Committee, composed of the Chiefs of Staff of the permanent members of the Security Council or their representatives, under art. 47(2), would be responsible with the "strategic direction of any armed forces placed at the disposal of the Security Council". The Cold war political confrontation proceeding the adoption of the Charter, however, rendered the application of art. 47 inoperative.

[16] See art. 8 of the *11th Report of a Working Group of the United Nations Special Committee on Peacekeeping Operations*, UN Doc. A/32/394/Annex II, Appendix I (2 Dec. 1977), *in* HILAIRE MCCOUBREY & NIGEL D. WHITE, THE BLUE HELMETS: LEGAL REGULATION OF PEACEKEEPING FORCES, 142 (Dartmouth 1996).

[17] Inoperative art. 47(3) of the UN Charter simply notes that "Questions relating to the command of such forces shall be worked out subsequently". Peacekeeping practice, as explained below, established a UN Force Commander with sole authority for designating his chain of command.

[18] United Nations, *The Blue Helmets: A Review of United Nations Peace-Keeping*, 405 (United Nations, 2nd ed., 1990), *in* MCCOUBREY & WHITE, *supra* note 16, at 142.

practice, Force Commanders have been granted "full command authority" of their Forces,[20] and have therefore been held "operationally responsible" for their performance.[21] The Commander has authority to designate the chain of command of the Force through the available staff provided by participating States.[22]

This UN model illustrates current NATO command patterns. The nature of NATO as a permanent military alliance has led to member States retaining their policy command, while at the same time being involved in a NATO policy command. Its joint strategic and operational authority is bifurcated through the allocation of tactical command to national commanders. The forces available to NATO are immediate and rapid reaction forces, main defence forces and augmentation forces.[23] These come under two types of command: "those which come under the operational command or operational control of a Major NATO Commander... and those which nations have agreed to assign to the operational command or operational control of a Major NATO Commander at a future date".[24] The NATO Handbook states that in assigning forces to NATO, "member states assign operational command or operational control", as distinct from full command

---

[19] *Ibid.*

[20] Art. 11 of the Regulations issued to UNFICYP in 1964; art. 12 of these Regulations provided in addition that the Force Commander had "full and exclusive authority with respect to all assignments of members of the Force, including deployment and movement of all contingents in the Force and units thereof"; James M. Boyd has pointed out that, as a guiding principle, "the United Nations Force Commander must have the final word on operational matters", *in* MCCOUBREY & WHITE, *supra* note 16, at 144-145.

[21] Art. 11 of UNFICYP Regulations, *ibid.*

[22] Art. 12, *ibid.*

[23] NATO HANDBOOK, 165 (NATO Publications, October 1995).

over all aspects of the operations and administration of these forces. These latter aspects continue to be a national responsibility and remain under national control.[25] Consistent state practice in the context of military alliances suggests that military discipline rests with national command, thus explaining why tactical command is always a national affair. Furthermore, it is evident that although operational command is multinational, subordinate commanders may appeal any order to their respective national High Commands.[26]

Since the end of the cold war, military alliances have viewed their structures and operations more broadly, in accordance with contemporary peace-keeping or defence requirements,[27] and have not hesitated to disregard traditional military structures, adopting instead those suitable for each specific operation.[28]

---

[24] *Ibid*, at 167.

[25] It is also stated that the terms "command and control" do not have the same implications as they do when used in a national context, *ibid*, at 167.

[26] Kaye, *supra* note 11, at 432-433.

[27] NATO, and after realising the need to seek a more flexible command and control, directed the adoption of a command and control known as Combined Joint Task Force (CJTF). A CJTF is a multinational force consisting of NATO and possible non-NATO forces of rapid deployment to conduct task-tailored duration peace operations beyond alliance borders, under the control of either NATO's integrated military structure or the Western European Union (WEU). According to plans, a CJTF employs a single chain of command leading to Major NATO Command responsibility. *See Declaration of the Heads of State and Government participating in the Meeting of the North Atlantic Council*, held at NATO Headquarters, Brussels, 10-11 January 1994, *in* NATO HANDBOOK, supra note 23, at 269-275; Charles Barry, *Forces in Theory and Practice*, 28 SURVIVAL, 81-82 (1996).

[28] It has also been shown that a multinational or national contingent force, within a multinational operation, may have two chains of command according to the nature of its missions. This was the case with the Quick Reaction Force (QRF) in Somalia, which was comprised solely of US troops and had an American chain of command but, in pre-arranged and emergency situations, was planned to have at the head of its command the UNOSOM II commander, *see* Kaye, *supra* note 11, at 441-442.

3.3.1 *Superior-subordinate relationship*

A position of command is a necessary precondition for the imposition of command responsibility, but such a position cannot be determined by reference to formal status alone.[29] In the absence of formal status, the Prosecution must look to ascertain the existence of actual possession of powers of control over subordinates,[30] since absence of formal legal authority to control the actions of subordinates does not preclude the imposition of command responsibility.[31] Evidence of *de facto* control, requires proof of a superior-subordinate relationship.[32] This subsequently elucidates the connection of the accused with the perpetrators of crime and shows his vertical superior relation to the perpetrators.

Thus, while the *Celebici* Judgment recognised that Delalic, by special authorisation of his local War Presidency, was authorised to negotiate and conclude important contracts and agreements on their behalf, he never acquired any civilian status, which placed him in a hierarchy of authority creating a relationship of superior and subordinate.[33] His function was described as one of "co-ordination", which consisted, *inter alia*, in negotiating agreements concerning the procurement of

---

[29] *Celebici case* Judgment, *supra* note 2, para. 370.

[30] *Ibid.*

[31] *Ibid*, para. 354.

[32] *Celebici case* Judgment, supra note 2, para. 354; *Akayesu case* Judgment, *supra* note 6, at 133, where the ICTR did not consider the accused's liability under art. 6(3) of the ICTR Statute because the Indictment did not refer to a superior-subordinate relationship in connection with the crimes charged to the *Interahamwe*, a youth organisation manipulated into committing the majority of the massacres.

arms and food, which the Trial Chamber insisted that while they rendered him influential they did not create a superior-subordinate relationship.[34]

Persons effectively in control of informal or formal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may be held responsible for their failure to do so.[35] In this sense, a relationship of effective control includes military as well as civilian persons on the basis of *de jure* and *de facto* positions of direct authority.[36]

A superior-subordinate relationship further requires existence of a chain of command.[37] Thus, a tactical commander exercises "direct subordination" over troops assigned to him while an executive commander enjoys "indirect subordination" over an angry civilian mob which he is under a duty to prevent from committing crimes against other civilians in the territory occupied.[38] Since it is a postulate that a chain of command is a prerequisite for the exercise of superior authority, it follows that one cannot be termed a superior without corresponding subordinates.[39] That is why staff officers,[40] who command no forces irrespective of their rank, are only liable where their participation in the delivery and execution of criminal orders is sufficiently

---

[33] *Celebici case* Judgment, para. 658.

[34] *Ibid*, paras. 653-656.

[35] *Celebici case* Judgment, para. 354.

[36] *Ibid.*

[37] *Ibid*, para. 647.

[38] *Ibid*, para. 371.

[39] *Ibid*, para. 647.

[40] A. P. V. ROGERS, LAW ON THE BATTLEFIELD, 137 (1996), defines a staff officer as "an officer on the staff of a commander who assists the commander in carrying out his duties".

demonstrated.[41] The sole exception to the subordination requirement is the case of executive commanders of occupied territory.[42] Their responsibility is co-extensive with their area of command[43] and not on the persons they command or control. They are therefore liable not only for the behaviour of the occupant forces but also for that of the occupied civilian population.[44]

3.3.2 *The concept of control*

Officially appointed (*de jure*) commanders have a duty, under international law, to act simply because they have been given some authority over subordinates and the law demands they make use of such authority to prevent and punish crime. If the criterion for command liability is the element of authority over subordinates, it follows that mere existence of such authority, whether *de jure* or *de facto*, renders one a superior for the purposes of article 7(3) ICTY Statute. While *de facto*

---

[41] *USA v. von Leeb* [*High Command case*], LRTWC vol. XII, at 81 and TWC vol. XI, at 684, similar rulings were made in *USA v. List* [*Hostages case*] TWC vol. XI, at 1286; *Woechler case*, LRTWC vol. XII, at 113-118; *Isayama case*, LRTWC vol. V, at 60; *see* James Douglas, *High Command Case: A Study in Staff and Command Responsibility*, 6 INT'L. LAWYER, 713-714 (1974).

[42] *Hostages case*, TWC vol. XI, at 1260.

[43] *Hostages case*, LRTWC vol. VIII, at 70 and TWC vol. XI, at 1272.

[44] This is based on art. 43 of the Regulations annexed to Hague Convention IV (1907); *see Hostages case*, LRTWC vol. VIII, at 69-71 and ICRC COMMENTARY, para. 3555.

assumption of authority in formal military structures would constitute a rare event, this is the norm in the case of contemporary paramilitary groups.

The existence of instances of *de facto* command was even contemplated in post-WW II tribunals, but in the majority of cases it was raised in relation to the defence of superior orders. The tribunal in the *Sadaiche Trial* pointed out that:

> "superior means superior in capacity and power to force a certain act. It does not mean superiority only in rank. It could easily happen in an illegal enterprise that the captain guides the major, in which case the captain could not be heard to plead superior orders."[45]

The accused, a commanding officer of a prisoner of war camp, was held liable because he was led to acquiescence by his "more powerful adjutant".[46] "Power to force a certain act" inevitably involves a power to demand or order, and an actual capacity to impose obeisance. Therefore, usurpation of authority contrary to national law renders, nonetheless, an individual liable under the international law of command responsibility.

This view was upheld during the Preparatory Conferences of Protocol I (1977), where reference to "commanders" in article 87 encompassed persons in authority "at the highest level to leaders with only a few men under their command".[47] This consistent irrelevance of rank in attributing superior responsibility indicates that the international law-making institutions look to actual and effective control,[48] rather

---

[45] LRTWC vol. XV, at 175; a similar statement was made in the *Einsatzgruppen case*, TWC vol. IV, at 480, *in* MYRES S. McDOUGAL & FIORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR. TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER (1961).

[46] *Sadaiche Trial*, LRTWC vol. XV, at 175.

[47] ICRC COMMENTARY, para. 3553.

than formalism.[49] The preference for reality over appearances has been shared by prize courts, applying the so-called "control test", as well as by the PCIJ in its examination of equality afforded to minorities.[50] Hence, in the *Sewall Prize claim* (The William P. Faye-1926), concerning the seizure and sinking during US neutrality in World War I of a US merchant ship by a German cruiser, the Umpire dismissed the claimant's argument that upon seizure Germany had accepted full delivery of the cargo. He held that under the Peace Treaty between Germany and USA there was "no room for the legal fiction that Germany accepted the delivery of the cargo ... Her liability is fixed by the terms of the Treaty as applied to the actual facts, not to legal fictions".[51] Similarly, the PCIJ in the *Mavromatis Palestine Concessions case*, between Great Britain and Greece, stated that "the court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might otherwise possess in municipal law".[52] This resembles the procedure under article 230 EC whereby Community acts may be challenged where

---

[48] Art. 28 ICC Statute (1998).

[49] *Celebici case* Judgment, *supra* note 2, para. 377.

[50] GEORGE SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, vol. II, 365 (1968).

[51] 7 RIAA 311 (1924), at 318; similarly, in *The Kim* (No. 1), P. 215 [1915], at 250-251, it was held that prize courts are not bound or limited by the strict rules of evidence which govern other national courts, *ibid*, at 366.

[52] *Mavromatis Palestine Concessions case*, (Jurisdiction), PCIJ REP. Ser. A, No. 2, 12 (1924), at 34, *ibid*, at 366.

they create legal effects. The ECJ has determined that the criteria for ascertaining acts that create legal effects should relate to substance rather than form.[53]

Article 87 of Protocol I (1977) extends the legal obligations of commanders beyond troops under their command to cover additionally "other persons under their control".[54] This obligation is applicable to superiors at all levels of command.[55] If the case were different, superiors with ample means to intervene in crimes committed by troops under their control but not under their command, would be fully justified in being passive. Accordingly, the concept of "command" is not the only operative term for ascribing command liability, as the text of article 87 extends a commander's obligations to troops under his control.[56] The concept of "superiority" is therefore a broad one and should be viewed in terms of a hierarchy encompassing the concept of control.[57]

Control in this sense, for the purposes of command responsibility, must be effective, otherwise a superior cannot be expected to intervene. However, partial control will suffice where superiors have not exercised their potential for full control,

---

[53] *Commission v. Council (Re European Road Transport Agreement),* Case 22/70, [1971] ECR 263; *IBM v. Commission*, Case 60/81, [1981] ECR 2639.

[54] ICRC COMMENTARY, para. 3544.

[55] Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 142-43 (1985).

[56] ICRC COMMENTARY, para. 3544.

[57] *Ibid*, para. 3544; ROGERS, *supra* note 40, at 140, disagrees with the Commentary that the concept of "superior" should be seen in terms of a hierarchy encompassing the concept of control, noting that if it were so, there would be no need for "persons under his control" to be specifically included in the text of art. 87(3) Protocol I (1977).

in which case they may be trying to evade their personal liability.[58] Similarly, when troops not normally under one's command are augmented to that person's forces, they too are considered to be forces under his command.[59]

3.3.2.1 *Threshold of control*

The Trial Chamber in the *Celebici case* pointed out that there is a threshold after which persons, who possess some authority, cease to possess power of control over others and cannot for the purposes of command responsibility be termed superiors.[60] According to the Trial Chamber, for example, a capacity to influence others does not in itself indicate effective control over subordinates and accordingly does not generate criminal liability for failure to act.[61]

Effective control over subordinates, for the application of the law of command responsibility, requires "the material ability to prevent and punish" such crimes.[62] The *Celebici* Judgment affirms that material ability may be borne *de jure* or *de facto*,[63] and further shares the view of the ILC[64] that command responsibility

---

[58] *Yamashita case*, LRTWC vol. IV, at 94-95 and *High Command case*, TWC vol. XI, at 543-44.

[59] ICRC COMMENTARY, para. 1019; William G. Eckhardt, *Command Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 17 (1982).

[60] *Celebici case* Judgment, *supra* note 2, para. 377.

[61] *Ibid*, para. 376.

[62] *Ibid*, para. 378.

[63] *Ibid.*

[64] ILC Draft Code Commentary, at 37.

extends also to civilians only to the extent that they exercise such a degree of control similar to that of military commanders.[65]

3.3.3.1 *Civilians as Superiors*

It is unambiguous that civilians may too be charged with failure to act if, like military commanders, are in effective command or control of subordinate persons.[66] This has long been recognised since the post-WW II military tribunals. The Tokyo tribunal declared that Foreign Minister Hirota had incurred criminal negligence for not insisting before the Cabinet, as was his duty, that crimes be stopped.[67] Similarly, Prime Minister Tojo and Foreign Minister Shigemitsu were held liable because, as the tribunal noted, "as members of the government they bore overhead responsibility" for the welfare of prisoners.[68]

While these persons were held liable for acts of subordinates relating directly to the armed conflict, other tribunals did not hesitate to attach liability to civilians for acts of subordinates not directly related to the armed conflict. In the *Industrialists case*, the liability of industrialist Flick was grounded upon his knowledge and

---

[65] *Celebici case* Judgment, para. 378. This particular phrasing has been taken from art. 28(1) ICC Rome Statute (1998), *reprinted* in 37 ILM 999 (1998).

[66] Art. 28(1) of the ICC Statute (1998).

[67] *Tokyo Trials* (Official Transcript), at 49,816.

[68] *Ibid*, at 49,831.

approval of the acts of the person running his enterprise.[69] His failure to act could not be excused because civilian industrial leaders were found to possess *de facto* powers of control.[70]

The *Akayesu* Judgment pointed out that the application of the doctrine of command responsibility to civilians is contentious, and that this should depend on the "power of authority actually devolved upon the accused, in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent and punish".[71] Indeed, clear-cut cases such as that of Prime Minister Kambanda's *de jure* functions will be hard to come by, and even then it is more likely that the accused's liability will be derived from evidence of his personal participation.[72]

Yet, despite the irrelevance of civilian or military status in the presence of effective command or control, a plea of acting in a civilian capacity requires the cumbersome task of establishing subordination. In the case of Delalic, in the *Celebici case*, the Prosecution failed to convince the Court that the accused was a civilian superior for the purposes of command responsibility.

---

[69] *USA v. Flick* [*Flick case*], TWC vol. VI, at 1187, 1202. A similar finding of guilt was made in *Government Commissioner of the General Tribunal of the Military Government of the French Zone of Occupation in Germany v. Roechling* [*Roechling case*], TWC vol. XIV(App. B), at 1097, 1136.

[70] *Celebici case* Judgment, *supra* note 2, para. 376.

[71] *Akayesu case* Judgment, *supra* note 6, at 98.

[72] *Prosecutor v. Kambanda* [*Kambanda case*], Judgment of 4 Sep. 1998, Case No. ICTR-97-23-S, *reprinted* in 10 RADIC 836 (1998), paras. 39, 40.

3.3.3.2 *The case of Delalic Before the ICTY*

According to the evidence, Delalic occupied a number of posts during the Bosnian conflict. His most important function was his appointment as coordinator of the Konjic Municipality Defence Forces on 18 May 1992.[73] This appointment was made by the Konjic War Presidency which was a civilian institution of which Delalic was at no time a member.[74] Rather, he had a "special authorisation" by the War Presidency to negotiate and conclude important contracts and agreements on its behalf, such as arms and food procurement agreements.[75] These, the Trial Chamber surprisingly noted were made in a civilian function,[76] resembling a power of attorney.[77] As the Appeals Chamber stated in the *Tadic case* on Jurisdiction, an armed conflict extends beyond the theatre of actual hostilities,[78] rendering therein the procurement of arms and food to active combatants a military act. His status as a superior did not depend on whether his functions were military or civilian but, as the Trial Chamber correctly stated, on the fact of subordination, which he did not exercise.[79]

The Trial Chamber rightly drew its attention on the lack of subordination, noting that the term "coordinator" implies mediation and conciliation and not

---

[73] *Celebici case* Judgment, para. 659.

[74] *Ibid*, para. 653.

[75] *Ibid*, paras. 653-656.

[76] *Ibid*, para. 655.

[77] *Ibid*, para. 656.

[78] *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), paras. 67, 70.

[79] *Celebici case* Judgment, paras. 656, 658.

command authority.[80] That this position was not provided for in the military structure of the SFRY[81] is also irrelevant, since the determining criterion is that of subordination. Therefore, Delalic's presence, under this function, in a military operation did not render him a commander, because he was responsible solely for the logistical and technical planning of that operation.[82]

Delalic's function was assessed in relation to the element of subordination, which could not be proven. Furthermore, several of his *de facto* actions, such as the signing of certain orders, were found to be influential rather than conferring upon him some authority.[83] It is therefore apparent that where, through official promulgation, the attributes of a certain function can be either precisely ascertained or presumed from internal state practice, liability under article 7(3) ICTY Statute will be more easily pursued. The case of Karadzic, former leader of the Bosnian Serbs, best represents this argument.

3.3.3.3 *The case of Karadzic before the ICTY*

Radovan Karadzic was the President of the Serbian Democratic Party (SDS)[84] since it was founded in 1990, and was vested with executive power of the party's

---

[80] *Ibid*, para. 660.

[81] *Ibid*, para. 661.

[82] *Ibid*, para. 668.

[83] *Ibid*, paras. 671-673.

[84] *Karadzic case*, Deferral Hearing, Bosnian Serb Leadership Investigation (15 May 1995, on file with author). The Prosecution emphasised the fact that Karadzic was one of the party's main architects in its political programme "involving extreme nationalist and ethnic policies and objectives", para.2.5. 1.

activities.[85] As President of the SDS, Karadzic possessed extensive powers of party policy-making and implementation.[86]

The SDS was built upon a "vast organisational spread", based on regional, sub-regional, municipal and local community level. Although the local organs were allowed to exercise a certain degree of autonomy, mainly in their internal affairs, the President retained the party's political power, exercising it by "adopting decisions and dispatching orders or instructions to subordinates".[87] Besides the maintenance of vertical authority, Karadzic also held a "central position" in the parallel power structure of the SDS in BiH,[88] through being consistently appointed to a number of influential positions from which he was designated and authorised to fulfil functions pertaining to the highest form of political authority.[89]

On 12 May 1991 Karadzic was elected President of the 3-man Presidency of the self-proclaimed Serbian Republic of Bosnia and Herzegovina, (hereinafter

---

[85] *Karadzic case*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (11 July 1996), Case Nos. IT-95-5-R61 and IT-95-18-R61, 108 ILR 86 (1998), para. 67.

[86] *Ibid.*

[87] *Ibid.* The Court further referred to an Order by Karadzic which sought to establish ten Regionalisation Headquarters whereby "the principles of discipline, co-operation and co-ordination were deemed necessary for the SDS's functioning", para. 67.

[88] *Ibid*, para. 68.

[89] On 13 October 1990 the First Decision by the Serbian National Council of Bosnia and Herzegovina, adopted by the Serbian Assembly of Bosnia and Herzegovina, appointed Karadzic as its President, *ibid*, para. 68. With the *Decision on Delegating Authority to Represent and Protect the Interests of the Serbian People in Bosnia and Herzegovina*, of 24 October 1991, Karadzic was given such authority, *vis-a-vis* the Yugoslav Presidency, *ibid*, para. 68.

Republika Srpska or RS).[90] In such a capacity, and consistent with the Constitution of that entity, he assumed "functions typical of a Head of State, including representing the Republic".[91] On 12 May 1991, following an amendment to the Constitution, he became the Commander-in-Chief of the Army, which gave him power to appoint, promote and recall his officers.[92] These constitutional powers became even more extensive in the event of war,[93] or of immediate danger of war, at which time the President could legislate by decree.[94]

The Trial Chamber noted, however, that the President's dominating position should not be limited solely to the Republika Srpska (RS) Constitution, but should also be assessed through other legislative instruments granting considerable political and military power.

---

[90] *Decision on the election of members of the Presidency of the Serbian Republic of Bosnia and Herzegovina*, adopted by the Assembly of the Serbian People of Bosnia and Herzegovina in Banja Luka, 12 May, 1991, *ibid.*

[91] *Ibid*, para. 69, art. 80 of the Republika Srpska Constitution.

[92] *Decision on proclaiming the amendments I-IV to the Constitution of the Serb Republic of Bosnia and Herzegovina* (Amendment III), art. 111 of the RS Constitution, *ibid.*

[93] Art. 6 of the Bosnian Serb *Act on People's Defence* vested in him, among other powers, the authority to supervise the Territorial Defence both in peace and war, and the authority to issue orders for the utilisation of the police in case of war, immediate threat or other emergencies. Art. 39 of the same Act empowered him under such circumstances to deploy Territorial Defence units. Karadzic's powers were further augmented, according to the Prosecutor, through art. 33 of the Bosnian *Serb Act on Internal Affairs* authorising him to activate reserve police in emergency, *Karadzic case*, Indictment (25 July 1995), paras. 5, 6.

[94] Art. 81 of the RS Constitution. *Karadzic case*, Decision on the Review of the Indictment, para. 69.

"He presides *ex officio* over the National Security Council ... with extensive powers over questions of interest for the security of the Serbian people of BiH. The Bosnian Serb "Act on People's Defence" of 28 February 1992 grants him the role of ensuring the unity and indivisibility of the national defence system; in the event of war or any other emergency, he directs the use of the police forces (article 6) and the deployment of territorial defence units (article 39). Pursuant to the "Act on Internal Affairs" ... in the event of an emergency the mobilisation of the reserve police forces may be ordered by the President of the Republic as well (article 33)".[95]

The Prosecutor submitted that these legal instruments in conjunction with the Constitution gave Karadzic "complete authority and control" over all the official Bosnian Serb forces in time of war. By creating a unified command for both the RS Army and Police, eight days after becoming President, all aspects of the conflict flowed directly up and down the chain of command.[96]

The Trial Chamber concluded that Karadzic, as President of SDS and the Republika Srpska, "acceded to broad institutional powers" making him the head of a political organisation and of the armed forces of the RS within Serb-held territory of BiH.[97]

The Trial Chamber accepted the Prosecution's assertion of Karadzic's dual status of authority; that of political and also military leader of the Bosnian Serbs.[98] This was deduced through Karadzic's public speeches[99] and documents signed by

---

[95] *Ibid.*

[96] *Karadzic case*, Rule 61 Hearing, Prosecutor's Closing Statement (8 July 1996, on file with author), at 7.

[97] *Karadzic case*, Decision on the Review of the Indictment, para. 70.

[98] *Ibid*, para. 71.

[99] The Prosecution believed that Karadzic's power, both as Head of the SDS and as President of the RS, had been pervasive, quoting from an interview given by Karadzic on 12 February 1996, saying

him.[100] These documents contained orders or instructions to various SDS bodies stressing the need for centrality of control.[101] He, further, assumed the role of representing the Bosnian Serb State *vis-a-vis* Bosnian and foreign authorities.[102] This evidence was adduced in proving Karadzic's political authority to the extent it constituted an effective exercise of power. According to the Trial Chamber, Karadzic exercised his powers as Commander-in-Chief of the Bosnian Serb Army in full by:

> "... placing the army and police under a unified command, promoting officers who had carried out victorious operations during the war, and supporting the actions of his military subordinates in public."[103]

It should also be noted that following an order for general mobilisation of the territorial defence system, by the Yugoslav interim Presidency on 15 April 1992, Karadzic found himself, by virtue of his institutional powers, in control of the exceptional measures taken.[104] In addition, he himself declared that he was the head of the Bosnian Serb Administration,[105] was in fact treated as such by his officers and

---

that "I am absolutely fully involved. Everything concerning the Serb Republic is in my hands", *Karadzic case*, Rule 61 Hearing, Prosecutor's Closing Statement (on file with author), at 8.

[100] *Karadzic case*, Decision on the Review of the Indictment, para. 71.

[101] *Ibid.* In October 1991 Karadzic declared a state of emergency for all party organs, to which he daily addressed instructions.

[102] *Ibid.*

[103] *Ibid.*

[104] *Ibid.*

[105] *Ibid.* This was evidenced by an affidavit given by Karadzic to US authorities, 3 May 1993.

other parties to the conflict, and signed agreements binding the RS which were subsequently executed by RS authorities.[106]

Based on such evidence of both *de jure* and *de facto* command, the Trial Chamber reached the conclusion that Karadzic had, since July 1990, been "the unchallenged leader of the Bosnian Serbs".[107] His liability under article 7(3) ICTY Statute is that of any policy commander who is able to prevent crimes by his subordinates and knowingly fails to do so.

3.4.1 EVIDENCE OF *DE FACTO* CONTROL

In the absence of official appointment the Prosecution must prove beyond a reasonable doubt, if it pursues a charge of command responsibility, that the accused nonetheless exercised effective control over some persons that rendered him their commander. Early on the ICTY indicated that one's superiority may be assessed through an analysis of the distribution of tasks within a specific unit or prisoner camp.[108]

---

[106] *Ibid.* Agreement of 5 June 1992 on the re-opening of Sarajevo airport for humanitarian purposes; Instructions to the Serbian forces around Gorazde for an immediate unilateral cease-fire, London, 16 July 1992; Declaration for humanitarian assistance, Geneva, 18 November 1993; Agreement on complete cessation of hostilities, 31 December 1994.

[107] *Ibid*, at para. 74.

[108] *Prosecutor v. Nikolic* [*Nikolic case*], Decision, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (20 October 1995), Case No. IT-94-2-R61, *reprinted* in 108 ILR 21 (1998), para. 24.

To this end, various tribunals have had to evaluate the significance of influential powers, or of authority evidenced through the capacity to sign official or quasi-official documents. The variations in the rulings demonstrate the complexity and lack of clarity involved. However, the underlying and uncontentious presumption is that command liability requires subordination and a material capacity to take some action.

3.4.2 *Capacity to influence*

In the *Ministries case*, the tribunal asked itself whether the defendants, high-ranking officials in the Reich government, were vested with responsibility for the execution of a programme of plunder and spoliation, and if in such positions of responsibility they influenced or played a directing role therein.[109] The apparent logic behind the tribunal's query reflects the notion that being able to influence decision-making renders that person in the eyes of others a source of authority.

Trial Chamber I in the *Celebici case* decided that Delalic's involvement both in the local effort of his municipality to contribute to the defence of BiH,[110] and his persuasion in the release of POWs,[111] were merely aspects of the character of a highly influential individual and did not render him a superior. The truth is, however, that the accused cannot be characterised as a commander because he did not have under his control any subordinates, despite his indisputable authority, because his

---

[109] *Ministries case*, TWC vol. XIV, at 684.

[110] *Celebici case* Judgment, *supra* note 2, at paras. 658.

function was to operate beyond any chain of command, his primary duty being to provide logistical support.[112] Therefore, if a person exerts some influence over others upon whom he exercises effective control, he may be held liable for their actions where he fails to act. The *Celebici* Judgment failed to recognise this reasoning and in the case of Delic, sub-commander of Celebici camp, it erroneously established that his influence over some abuses was merely attributed to the fear of other guards towards him and did not demonstrate his superior status.[113] Delic's influence over the Celebici guards was the culmination of his intimidating and overwhelming character in that establishment which resulted in him issuing and enforcing his own orders,[114] while viewed by all others as second in command.[115] It is remarkable that the ICTY could not from this evidence infer Delic's *de facto* command of the Celebici compound, ignoring even the *Nikolic* test.[116]

Being feared by others and subsequently enforcing one's might effectively over such persons suffices to render that overwhelming individual in a state of superiority upon those whom he wields his power. It is not the capacity to influence that generates command liability, but the establishment or not of effective subordination as a result of the exercise of one's influence.

---

[111] *Ibid*, para. 669.

[112] *Ibid*, para. 664.

[113] *Ibid*, para. 806.

[114] *Ibid*, paras. 804-805.

[115] *Ibid*, para. 803.

[116] *Nikolic case*, Rule 61 Decision, 108 ILR 21 (1998), para. 24.

3.4.3 *Capacity to issue orders*

Signing of orders is obviously an indication of some authority.[117] If the source of this authority is a formal one, the person exercising it is not necessarily a commander for the purposes of command responsibility, but nonetheless his powers of enforcement may be precisely ascertained. The *Celebici* Judgment correctly distinguished between command and other forms of authority accruing from the signing of orders.[118]

In the case of informal insurgent structures, the authority to issue orders may very well be assumed *de facto*, according to the circumstances. Although Trial Chamber I in the *Celebici case* accepted that Delalic had no military command,[119] nor any membership rights in the Konjic War Presidency,[120] it was faced with deciding the value of orders signed by him. It ruled that the release orders signed by him were signed "for the Head of the Investigations Body" and not as "coordinator", his *de jure* post, thereby indicating that he had no authority to release.[121] This is consistent with the ruling in the *Ministries case* where it was pointed out that the mere appearance of an official's name on a distribution list attached to an official document could simply provide evidence that it was intended he be provided with the

---

[117] *USA v. Linnas* 527 F. Supp. 426 (E. D. N. Y 1981), *reported* in 7 AM. INT'L. L. CAS. 568 (1979-86, 2d Ser.). The Court pointed out that the signing of documents showed the accused's superior authority and position in the Tarku prisoner camp.

[118] *Celebici case* Judgment, para. 672.

[119] *Ibid*, para. 668.

[120] *Ibid*, para. 663.

[121] *Ibid*, para. 684.

relevant information.[122] It cannot itself be taken to mean that "those whose names appear on such distribution list have responsibility for, or power and right of decision with respect to the subject matter of such document"[123] On the other hand, direct signing of release orders demonstrates authority to release, and thus Mucic's command status in the Celebici camp was amply established.[124]

Since a person is liable as a superior only when a superior-subordinate relationship is established, signed documents and orders will substantiate a charge of command liability only when they provide evidence of such a relationship, no matter how important the order may have been. Thus, Delalic's signature on an order reopening a railway line was intended solely as a formal acknowledgement of the involvement of the coordinator, and not for the purposes of making the order valid.[125] The Court pointed out that, in any case, the accused had no authority as coordinator to issue orders, nor any power to appoint the personnel of the Celebici camp.[126] Whether or not one has been vested with authority to issue orders or take some form of enforcement action is irrelevant, since power may have been assumed *de facto*. In this case, Delalic's signature on a number of important documents did not establish a hierarchy of control but an intermediate implementor. Had he issued the orders on his own behalf, and assuming they were illegal, he would have incurred direct liability.

The Prosecutor, failing to link Delalic to Celebici camp through his post as coordinator, attempted to do so via his appointment by the Main Staff of the Armed

---

[122] *Ministries case*, TWC vol. XIV, at 693.

[123] *Ibid.*

[124] *Celebici case* Judgment, para. 764.

[125] *Ibid*, para. 671.

[126] *Ibid*, paras. 673, 686.

Forces of BiH (ABiH) to the post of commander of Tactical Group 1 (TG1). This was one of three similar formations established to assist the lift of the Sarajevo siege and was strictly a combat group.[127] Although Delalic was appointed commander of "all formations" of ABiH between the areas of Dreznica and Igman, expert witnesses convinced the Court that that the term "all formations" was imprecise.[128] This was because according to the BiH Law of Defence of May 1992, the army of BiH comprised three components: ABiH, the Croatian Defence Council (HVO) and the Military Police (MUP), making it apparent that the order for Delalic's appointment could not have meant to place "all formations" of the three components of the BiH armed forces, from Dreznica-Igman, under his command.[129] Trial Chamber I examined the nature of TG1 and found it to be a temporary body, the authority of its commander being limited only to the units assigned to it.[130] The assignment of specific tasks or missions to the commander of TG1 over and above his usual authority, by order of the Supreme Command, were specific to the mission and did not expand the authority of the commander beyond the terms of the specific order.[131] Thus, a TG commander exercised command over specific units assigned to him (tactical command) and not command over a geographical area (executive command).[132] The only link, thereafter, between Delalic's TG1 and the Celebici camp was the passing of orders from BiH Supreme Command to the commander of Celebici. This, the Court ruled, was part of a ministerial function which did not prove

---

[127] *Ibid*, para. 687-688.

[128] *Ibid*, para. 689.

[129] *Ibid.*

[130] *Ibid*, para. 693.

[131] *Ibid.*

command authority over the camp.[133] While such circulation of orders through the chain of command cannot provide evidence of *de facto* control, it may establish the liability of the distributor if the orders were illegal and he was either aware of that fact or neglected to inform himself of their content.[134]

3.4.4 *Evidence from the distribution of tasks*

The *Nikolic*[135] principle of identification of superior status through evidence deduced from the distribution of tasks within a unit can be applied to ascertain the precise authority of both operational and POW camp commanders. This principle may help discern both *de facto* and *de jure* command, where documentation of appointment to the latter is not found. Application of this principle indicates the actual allocation of authority between a group of persons, mainly from the perspective of either independent observers, detained persons under the captivity of the group, or even individual members of the group under investigation.

In the case of prisoner camps this information is derived from the testimony of persons themselves detained there. The most obvious characteristics of subordination are subjugation to orders,[136] and an aura of authority which is respected by all camp personnel. The two are usually interconnected and attract the attention of detainees who by identifying the camp superiors are trying to adapt to their demands, as it is they that ultimately decide their fate. In the *Furundzija case*,

---

[132] *Ibid*, para. 694.

[133] *Ibid*, para. 696.

[134] *High Command case*, TWC vol. XI, at 510-511.

[135] *Nikolic case*, Rule 61 Decision, 108 ILR 21 (1998), para. 24.

Trial Chamber I accepted that the accused was the commander of a local HVO unit, the Jokers, because he was in charge of interrogations and was called "boss" by members of his unit.[137] It is doubtful, however, that the mere calling of "boss" or equivalent epithets is alone sufficient to infer subordination in the absence of evidence of the accused's overall behaviour towards the camp personnel and the duties related to the camp in general.[138] It is the cumulating effect of evidence showing both subjugation to orders and respect for the authority of the accused that will convince a tribunal of the existence of a superior-subordinate relationship.

In the case of operational and tactical commanders the observing eye of detainees is absent, and reliance is placed on independent observers. In the *Vukovar Hospital case* there was some confusion as to whom actually commanded the Guards Brigade of the JNA which was responsible for apprehending the 261 male civilians form Vukovar hospital and subsequently executing them. Although the ranks of the three accused were known to the ICTY, it was not the more senior of them, a Colonel, that was deemed to be in charge of the "direct operational command" of the

---

[136] *Ibid.*

[137] *Prosecutor v. Furundzija* [*Furundzija case*], Judgment of 10 December 1998, Case No. IT-95-17/1-T 10, *reprinted* in 38 ILM 317 (1999), paras. 65, 130.

[138] In *Prosecutor v. Cancar*, Case No. K: 186/96, Judgment of 19 Jan. 1998 (Cantonal Court of Sarajevo, on file with author), at 7, the Court inferred the superior status of the accused, cumulatively from him being called "boss", his own presentation as such, his authoritarian attitude towards the guards, his issuance of orders to them and from his organisational leadership in the transfer of prisoners; it should be noted that neither in the *Furundzija case* nor in *Cancar* were the accused charged with failure to act, despite references to their superior status.

operation, instead it was a Major.[139] Trial Chamber I came to this conclusion from witness statements given by ICRC and ECMM staff[140] who negotiated with Major Sljivancanin regarding the release of the Vukovar civilians. The statements indicated that the accused was omnipresent in decision-making, ordering and heading the negotiations with the international staff, and the Court had no hesitation in concluding that "he behaved like a commander and took the decisions".[141] The Trial Chamber made no appraisal of the *de jure* commander of the Guards Brigade, Colonel Mrksic, and assumed his superiority as being above that of Sljivancanin. The liability of the Colonel is no less simply because he was overpowered by his inferior. Rather, their liability is on the same footing, the Colonel as *de jure* superior, while the Major as *de facto*.

In the same case, the authority of Captain Radic was elucidated through evidence of his briefing a special infantry unit of the Guards Brigade before an attack within the Vukovar area.[142] This convinced the Court that the members of the said infantry unit were directly subordinate to Radic.[143]

Similarly, in the *Rajic case*, the accused, a member of the HVO, was held by Trial Chamber II to be the commander of the attack on the village of Stupni Do. The evidence adduced from international observers showed Rajic to proclaim himself Brigade Commander of the HVO troops in and around the area of Stupni Do, being

---

[139] *Prosecutor v. Mrksic, Sljivancanin, Radic* [*Vukovar Hospital case*], Decision on the Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (3 April 1996), 108 ILR 53 (1998), para. 16.

[140] European Community Monitoring Mission.

[141] *Vukovar Hospital case*, *supra* note 139, at para. 17.

[142] *Vukovar Hospital case*, para. 16.

[143] *Ibid.*

acknowledged as such by HVO troops, and effectively controlling passage through HVO check-points.[144] Further proof of Rajic's operational control of HVO troops in the Stupni Do area was provided by a hand-written note by him authorising the recipient to retain his weapons while going through HVO check-points in and around Stupni-Do.[145] The Court, rather hastily, although recognising that the attack on Stupni-Do was carried out by troops "acting under Rajic's control",[146] stated in the final part of its Judgment that the troops which attacked Stupni-Do were acting "with Rajic's aid and assistance or on his orders".[147] If they were acting with his aid and assistance it is likely that they were not subordinate to him and he cannot therefore be considered responsible for their actions under article 7(3) ICTY Statute, but possibly under 7(1). Only if they were acting under his orders would he be liable under both article 7(1) and (3).

3.5 *Concurrence of de jure and de facto command in the same person*

When charging for failure to act the Prosecutor, in the case of both the ICTY and ICTR, tries to establish also actual control of subordinate persons, even if there exists overwhelming evidence of the accused's official appointment. This is done

---

[144] *Prosecutor v. Rajic* [*Rajic case*], Decision on the Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (13 Sep. 1996) Case No. IT-95-12-R61, paras. 58-59, 61. The case is *summarised* by Olivia Swaak-Goldman *in* 91 AJIL 523 (1997), *reported* also in 108 ILR 141 (1998).

[145] *Ibid*, para. 60.

[146] *Ibid*, para. 60.

because, especially in traditional societies where the majority of civil wars occur, *de jure* command paints only half the picture of authority. In such situations the traditional communal leaders are endowed customarily with excess authority far above from that which was initially granted to them by virtue of their official appointment. Therefore, in similar cases, both *de jure* command and *de facto* control are sought in order to assess the precise quantity of power which the accused enjoys.

In the gruesome context of the Rwandan conflict, the local political scene and cultural background of this country were meticulously scrutinised by both Prosecution and Chambers. Although it was well known, through official documentation, that Akayesu was burgomaster of his commune, the Court accepted the validity of the Prosecutor's assertion that the *de facto* authority of the burgomaster in Rwanda was significantly greater than that which was conferred upon him de *jure*.[148] The Trial Chamber noted that even though with the advent of multipartyism, the bourgomaster's functions were reduced, they still remained the most important local representatives of power at the local level.[149] The Court reached the conclusion, despite the official reduction of powers, that the bourgomaster was the "parent" of the people, whose every order, whether legal or illegal, was always obeyed without question.[150]

Similarly, it was well documented that General Mladic was appointed General Staff Commander-in-Chief of the Bosnian Serb Army (VRS) on 12 May 1992.[151] Mladic, as the most senior army officer of the VRS, laid down its overall

---

[147] *Ibid*, para. 71.

[148] *Akayesu case* Judgment, *supra* note 6, at 4.

[149] *Ibid*, at 20.

[150] *Ibid*, at 23.

military strategy together with its Commander-in-Chief, Radovan Karadzic.[152] This indicates that Mladic's liability is that of a strategic commander alone. However, further evidence showed that he effectively exercised policy command by personally negotiating and subsequently implementing military and non-military agreements on behalf of the Serbian entity.[153] On the opposite scale, Mladic went so far as to conduct operational military planning and actively command tactical operations, such as the execution of the civilian population at Srebrenica.[154] This concurrence of *de jure* and *de facto* command in Mladic's hands renders him liable as a policy, strategic, operational and tactical commander, albeit, in the last two cases, only in those operations in which he personally participated or had knowledge thereof.

---

[151] Art. 3 of *the Decision on the Establishment of the Serbian Republic of Bosnia and Herzegovina* (12 May 1992) *in Karadzic and Mladic case*, Decision Review of Indictment, 108 ILR 86 (1998), para. 77.

[152] *Ibid.*

[153] *Ibid*, para. 78.

[154] *Ibid.*

CHAPTER IV

The Doctrine of Command Responsibility

Introduction

In the last Chapter we examined under what circumstances a person may be termed to be a superior for the purposes of attributing to him/her the actions of his/her subordinates. This Chapter considers under what circumstances a superior incurs liability for the acts of others. Hence, we must first seek the existence of a binding legal duty and thereafter ascertain whether or not it is exhaustive or indicative. International law recognises two distinct duties; the duties to prevent and punish. What kind of action absolves a commander from liability and how is the issue of causation relevant in this regard? A fundamental question posed in this Chapter is whether all types of superiors are liable under the same criteria, or whether this depends upon *de facto* or *de jure* status.

Finally, we examine the applicable standard of *mens rea* required under the doctrine of command responsibility. What should that be, and can we draw any rebuttable presumptions of knowledge from certain distinguishable criteria? This Chapter concludes with the elaboration of a legal theoretical model, defined as the "duty to control", and which attempts to difuse the gap identified within a specific form of causation.

4.1 HISTORICAL SURVEY OF COMMAND RESPONSIBILITY

4.1.1 *Antiquity*

From the days of Sun Tzu[1] it was generally accepted that a military commander is the key factor in determining the successful fate of any military campaign. Commanders were responsible for military training during peacetime as well as for strategic planning. For a General to achieve both ends, subordination of troops was critical, since it was the effective functioning of this commander-subordinate relationship that was viewed as determining both effective training and battle strategy.

In the days of Sun Tzu, however, subordination did not encompass the notion of personal liability for the acts of one's own troops. Instead, its utility was relevant to military effectiveness in terms of satisfying the demands of the ulterior subordinate relationship between the leader of the land and the leaders of the army. A successful campaign and a handsome booty was indeed the sovereign's delight, but it inevitably drove military commanders to the limits of their emotional and physical endurance in order to succeed. Thus, the early rules of warfare evolved on the basis of each commander's personal ethical level, and not from ground rules stemming from some international source.[2] That by no means implies that barbarity in ancient

---

[1] Sun Tzu wrote in 500 B.C:

> "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".

Sun Tzu further noted the General's responsibility for the clarity and the comprehensiveness of his orders, *in* William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 3, 4 (1973). However, it was nowhere stated that these conditions entailed the criminal liability of the General for offences committed, as a result, by his troops.

warfare was the norm. In Ancient Greece, for example, a notion of humanised warfare developed because armies were comprised of civilians who took arms only to protect their personal and communal interests.[3]

Nonetheless, quite often, barbarity in battle was not simply tolerated but encouraged. Looting was in many a cases the standard means of payment for standing or make-shift armies, and a commander in charge of an army amenable to little or no humanitarian restraint could go about fighting a war completely disregarding the means pursued to achieve his purpose.

After the 11th century AD, although generally agreed rules of warfare were never expressly promulgated, several reported trials encompassing the criminal liability of military commanders did emerge. At the same time, humanitarian principles were applied by most religious Orders in accord with their religious beliefs.[4] Sir William Wallace of Scotland was tried in England in 1305 for alleged war-time murder of civilians, including women, children and clergy.[5] In 1439, Charles VII of France issued an Ordinance at Orleans to the effect that military commanders of his army were to be held criminally responsible for offences

---

[2] Gerard I. Draper, *The Contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal in Warfare*, 305 INT'L. REV. RED CROSS 192 (1995).

[3] As is reported by the ancient historians Herodotus, Plutarch and Xenophon, there were no phenomena of scorched earth policy, rape or murder in Hellenic antiquity, until only the final stages of the Pelopponesian war (431 – 404 BC). *See* MICHAEL SAGE, WARFARE IN ANCIENT GREECE, (1996); MICHAEL GARLAN, WARFARE IN THE ANCIENT WORLD (1975).

[4] *See* ALAN FOREY, THE MILITARY ORDERS : FROM THE TWELFTH TO THE EARLY FOURTEENTH CENTURIES (1992).

[5] George Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329 (1947).

committed by troops under their command, where commanders were at fault in preventing, covering, or failing to punish the perpetrators.[6]

Violation of the customary code of conduct of the feudal knights resulted in the staging of chivalry courts.[7] At that time, the rules of chivalry did not apply to foot-soldiers, who were fell under the regime established under their national military codes.[8] Nonetheless, knights were not always arraigned for offences committed by them personally, but also for breaches perpetrated by their subordinates, which they failed to prevent or countermand. In 1474, Peter von Hagenbach was brought to trial by the Archduke of Austria on several charges or murder, rape and other crimes against the "*laws of God and Man*".[9] Although tried by an international tribunal and executed for failing to fulfil his duty to prevent the offences committed, such offences were not perpetrated in time of war.[10] Command responsibility was also found the "Articles of Military Lawwes to be observed in the Warres", promulgated by King Gustavus Adolphus of Sweden in 1621, which ascribed to military commanders criminal liability for acts committed by their subordinates.[11] Although unsure as to whether a prince could be held criminally responsible, Grotius maintained that responsibility did exist for failure to prevent or

---

[6] *See* Leslie Green, *Command Responsibility in International Humanitarian Law*, 5 TRANS. L. & CONT. PROB. 321 (1995).

[7] MICHAEL H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES, 27 (1965).

[8] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT, 22 (1993).

[9] GEORGE SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED IN INTERNATIONAL COURTS AND TRIBUNALS (Armed Conflicts), 465 (1968).

[10] Parks, *supra* note 1, at 5.

[11] Green, *supra* note 6, at 321.

punish the unlawful criminal acts of one's subjects.[12] The existence of this liability is also confirmed from Shakespeare's work.[13]

Although these cases do not necessarily represent a general rule, they are nonetheless indicative of a stance that military commanders carried personal liability for recognised offences perpetrated by their troops. In these situations, disciplinary or penal action against commanders seems to have emanated from the savagery or the non-chivalry of the acts in question. During this period it is evident that a rule was gradually emerging, concerning the inviolability of civilian persons in time of war and of a subsequent duty of military commanders to prevent their troops from violating this norm. This was not, however, an emerging rule of international law *per se*, but an expression of national law accepted by the majority of nations.

It is important to note that offences may not always have been subject to the principle of legality for a commander to be criminally responsible. In several instances, criminal charges were not based on a decree or other legislation, but on the dictates of an *ad hoc* indictment.[14] Decrees establishing command responsibility, as already seen, referred to military commanders of the state concerned and not to enemy commanders; this did not prevent the latter from being tried after capture.

---

[12] *Ibid.* Although he maintained that liability was personal, he recognised that "a community, or its rulers, may be held responsible for the crime of a subject if they know or it and do not prevent it when they could and should prevent it". Hugo de Groot, *De Jure Belli ac Pacis*, cited *in* Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 175 (1972).

[13] While in Henry V's time the prevailing legal attitude favoured against holding kings to account for the acts of their troops (*respondere non sovereign*), Shakespeare argued that leaders should be held accountable because they are in commander of their troops and have the authority to declare war. *See* Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 AJIL 8-11 (1998).

[14] Hence, Peter von Hagenbach was convicted for having committed crimes against the "Laws of God and Man", *in* SCHWARZENBERGER, *supra* note 9, at 465.

During this period, the concept of military subordination developed to cover not only military effectiveness, but also minimum humanitarian concerns. In that sense, it reinfornced the duty of commanders to exercise control over their subordinates, beneath which underlay a positive duty to discipline one's troops in order to prevent atrocities committed against the accepted laws of war.

4.1.2 *1774 AD – 1907 AD*

The 18th century saw the birth of notions and ideals that were drastically to change global politics and internal government, in relation to the status of the individual. The former was achieved with the American War of Independence, while the latter was shaped by the French Revolution. What this meant for the laws of war was that they stopped signifying a vague, *ad hoc*, and at times political will of states to hold any person responsible for war-related offences. The emergence of a notion of respect for every human being was apparent. This was a revolutionary ideal which finally took its place in a political and binding legal context with its embodiment in constitutional instruments.

This primitive humanitarian notion was inevitably followed with a shift to total warfare, starting with the American War of Independence. This involved the participation, in one way or the other, of the totality of the civilian population of the territory where fighting was taking place, hence making its protection imperative if humanitarian norms were to be respected. In this context, these primitive domestic humanitarian ideals were for the first time transplanted onto the battlefield. The drafters of the 1775 Massachusetts Articles of War provided, in article 11, for the

responsibility of military commanders for "*knowing and omitting to punish or prevent*" their subordinates for offences committed against any person or inhabitants of the continent.[15]

With American independence and the adoption of the United States Constitution, two things were abundantly clear with regard to military commanders:

(i) that as the acknowledged leaders of their troops they carried sufficient weight to control them and should do so at all times; and

(ii) they were liable under written or customary domestic law for specific misconduct of their forces that they were able to prevent.

That by the mid-19th century commanders faced an internal disciplinary liability for war crimes, as opposed to what was usually a liability for captured military enemy officers, is unambiguous from article 71 of the United States Army General Order 100, promulgated in 1863, and better known as the Lieber Code. This provided for the:

"punishment of any commander ordering or encouraging the intentional wounding or killing of an already wholly disabled enemy, whether that commander belonged to the Army of the United States, or is an enemy captured after having committed his misdeed."[16]

---

[15] Adopted by the Provisional Congress of Massachusetts on April 5, 1775. The same approach, with respect to command responsibility, was taken in the Articles of War of 1806 (art. 33), cited *in* Parks, *supra* note 1, at 5, 6; *see* also George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. (1978).

[16] Parks, *ibid*, at 7. In 1865 Captain Henry Wirz, a former Confederate Officer and Commandant of the Andersonville prisoner of war camp, was convicted by a Federal Military Tribunal for murdering and conspiring to ill-treat Federal prisoners of war. *US v. Wirz* (1865) H.R. Exec. Doc. No. 23, 40th Cong., 2d Sess., 1867-68, vol. 8, *in* Lewis L. Laska & James M. Smith, *Hell and Devil: Andersonville and the Trial of Captain Henry Wirz*, 68 MIL. L. REV. 77 (1975).

One author believes that the part of the 1815 Declaration at the Vienna Congress which charged Napoleon as having "incurred liability to public vengeance" for violating the agreement which sent him into exile to Elba, "would seem that he was regarded as an enemy of humanity … completely unconcerned with the niceties of humanitarian or other law".[17] A clear expression of the "humanitarian duty of commanders" that had by the that time developed was stated in an order by General Dufour in 1847 in the course of the Sonderbund war in Switzerland. In his order, Dufour commanded his higher officers to inculcate certain humanitarian principles down the line of command so that the "Army does not resemble a crowd of barbarians".[18]

While this period saw the growth of internationally agreed rules of humanitarian law,[19] it did not create an equivalent international body of rules providing for individual responsibility. Such rules were provided for at the national level through military manuals and decrees. This uneven evolution – that is, rules prescribing specific conduct, albeit without attaching criminal liability – a seeming paradox perhaps, reflected political considerations more than any legal conviction limiting the subjects of international law.[20]

---

[17] Green, *supra* note 6, at 322.

[18] Maurice Aubert, *The Question of Superior Orders and the Responsibility of Commanding Officers in Protocol I of the Geneva Conventions of 1949*, 262 INT'L. REV. RED CROSS 113 (1988).

[19] For example, the 1864 First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, *signed* in Geneva, 22 August 1864.

[20] The inclusion of amnesty clauses in 18th and 19th century peace treaties has been said to explain the lack of international trials and individual responsibility; thus, it should not be attributed solely to the theory that only states were subjects of international law. *See* Oren Gross, *The Punishment of War Criminals*, 2 NILR 356 (1955), *in* Paust, *supra* note 10, at 111.

However, it was well established by the late 19th century that international law did prescribe specific restraints in the waging of war and it was also clear that under this set of rules there was provision for the responsibility of the perpetrators of these acts. Offences such as pillage were recognised as generating only state responsibility. In the *Mexican-United States Claims Arbitrations* of 1868 and the *Venezuelan Arbitrations* of 1903, it was established that even where pillage took place through negligence of a commander, it was the state which would incur liability, pillage being treated as an offence under municipal criminal or military law.[21] At the same time, national law (military manuals and decrees), by punishing military superiors for failing to punish or prevent a wide range of offences, was building up momentum until such practice was ready to become part of the law of nations.[22]

4.1.3 *1907 – 1991*

It was not until the Hague Peace Conferences of 1907 that the concept of *responsible command* was incorporated, without any attached criminal liability, in an

---

[21] SCHWARZENBERGER, *supra* note 9, at 443-447.

[22] At times states hesitated to pass heavy or even light, in some instances, sentences on military commanders for failing to exercise effective control. The case of Brigadier-General Jacob H. Smith during the US military campaign in the Philippines in the early 1900s is indicative. While he gave his Major orders to kill anyone over the age of ten and burn everything they came across, the court-martial, which was established to try him in 1902, merely admonished him and sent the General to retirement. President T. Roosevelt upheld this light conviction, but affirmed the responsibility of military commanders to control their troops, *see* Green, *supra* note 6, at 326, 327. Punishment in such

international legal instrument. The Regulations annexed to Hague Convention IV (1907) provided in article 1 that in order for a party to a conflict to be afforded lawful belligerent status, it had to be "commanded by a person responsible for his subordinates". Moreover, article 43 of these Regulations required of military superiors, in command of occupied territory, to:

> "take all measures in [their] 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."

Similarly, article 19 of Hague Convention X (1907) provided that naval commanders have a task of overseeing the "execution of ... the general principles of the Convention".

The end of World War I (WW I) shed light on the realities of the enforcement of the international law of armed conflict. Following the end of that war, the Allied and Associated Powers established the Commission on the Responsibility of the Authors of the War and Enforcement of Penalties,[23] which concluded that any person that violated the laws of war or of humanity was liable to criminal prosecution.[24] In respect of criminal omissions it stated that a tribunal be established to prosecute those:

---

cases does not reflect the evolution of international law and should not be seen as such. Rather, political exigencies were the sole cause for such policy.

[23] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties – Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, *reprinted* in 14 AJIL 95 (1920).

[24] "All persons belonging to enemy countries, however high their position may have been, without distinction or rank, including Chiefs of Staff, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."

"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."[25]

Despite Japanese[26] and American dissent,[27] the Treaty of Versailles which terminated the war, provided in article 227 for the arraignment of the German Emperor, William II, for "supreme offence against international morality and the sanctity of treaties". In addition to the attempt to try the Head of the German State, the Allies sought to bring to trial other Germans accused of war crimes. This was provided for by article 228 of the Versailles Treaty, but never came to fruition.

This notwithstanding, the Versailles Peace Treaty was truly innovative. It is the first recorded instance of individuals being proclaimed liable as a result of international law. Superior or command responsibility was not explicitly advocated. Instead, indirect superior liability can be inferred in both articles 227 and 228. Because there had been no precedent in treaty or customary law concerning offences committed by a Head of State, the Kaiser was arraigned for non war-related infractions. The Germans proposed to hold trials themselves in accordance with German law, and so instituted a series of trials in Leipzig.[28] Only a handful of those initially charged were indicted by the German authorities, the majority of whom were

---

[25] 14 AJIL 95 (1920), *ibid.*

[26] Japan dissented on the fact that high-ranking officials could be held liable under international law for war crimes, on the basis of the abstention theory of responsibility, *ibid*, at 152; Green, *supra* note 6, at 323.

[27] The USA opposed references to the term "laws of humanity" and the vagueness with which the abstention theory was worded. In addition, it was unwilling to form an international commission unless it applied the law of one specific nation. 14 AJIL 143-147 (1920); *see* also Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 82 (1985).

either acquitted or given light sentences. The reason for this was not the impartiality of the judiciary, but the justification of excesses on a German law interpretation, rather than an international one, of the defence of "superior orders".[29] Contrary to popular belief, the *Leipzig trials* were not a complete mockery and did uphold a command responsibility standard. This concerned both high-ranking superiors who were beyond the actual battlefield,[30] as well as battlefield commanders for their failure to prevent or punish violations of the laws of war.[31]

The Geneva Red Cross Convention of 1929 called upon the "Commanders-in-Chief of the belligerent armies" to provide for the fulfilment of the humanitarian requirements of that Convention relating to the sick and wounded in battle.[32] It would be accurate to say that by the late 1930s, Hague Conventions IV and X, in combination with the 1929 Geneva Red Cross Convention, reflected what was

---

[28] *See* 16 AJIL 674-723 (1922).

[29] In the *Trial of Karl Neumann* [*Dover Castle case*] the court emphatically stated that where the execution of an order involves a criminal offence, it is the superior giving the order who is alone responsible. The court, in the *Trial of Dithmar and Boldt* [*Llandovery Castle case*] noted that the sole exception to the above defence, although rare, would be if the order was unambiguous and universally acknowledged as illegal. Current Notes, 16 AJIL 707, 722 (1922)

[30] In the *Trial of Emil Mueller*, a camp commander was acquitted for poor camp conditions, because he reported the situation and made some improvement, liability thereafter resting with his superiors, at 16 AJIL 635, 682, 684 (1922).

[31] *Ibid*, at 639, 668, for examples of "failure to punish liability" in the *Llandovery Castle case* and the *Trial of Emil Mueller*. In the three prisoner or war camp cases before it, the court also advocated a humanitarian standard of treatment for prisoners, noting in particular a duty to protect the welfare of prisoners and avoid their ill-treatment.

[32] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (not in force), 118 LNTS 343.

considered to be customary law;[33] that is, minimum humanitarian concerns regarding military and leadership doctrine.[34]

After a series of declarations issued by the Allied Nations (also known as the United Nations) during World War II, most notably the 1942 Declaration of St. James,[35] it was not surprising that the International Military Tribunal at Nuremberg proclaimed that criminal responsibility accrued from existing international legal instruments, irrespective of whether such liability was expressly referred to.[36] Article 7 of the London Agreement, establishing the IMT, proclaimed again the irrelevance of Head of State or Government function as an exonerating defence. Nonetheless, the IMT did not concern itself with the concept of "command responsibility",[37] in the sense of an imputed liability for the acts of subordinates which the commander was under a legal duty to prevent or punish.[38]

---

[33] Parks notes that "Hague Convention IV ... is a manifestation and codification of that which was custom among the signatory nations, giving early recognition to the duties and responsibilities of the commander". Parks, *supra* note 1, at 11.

[34] Crowe believes that these Conventions created an affirmative duty for commanders in relation to the lawful conduct of persons under their command and that "the doctrine of command responsibility was thus born from a fusion of these conventions' particular articles". Christopher N. Crowe, *Command Responsibility in the former Yugoslavia: The Chances for Successful Prosecution*, 29 UNIV. RICH. L. REV. 197 (1994).

[35] With it the Allies placed "among their principal war aims the punishment, through the channel of organised justice, of those guilty of these crimes, whether they have ordered them, perpetrated them or participated in them".

[36] *See* LRTWC vol. XV, at 11.

[37] Green, *supra* note 6, at 328, remarks that the London Agreement "introduce[d] command responsibility in relation to the crime against peace".

The next section explores the legal basis of the doctrine of superior responsibility and examines what is expected of superiors under international law, ending with a critique of the standards of knowledge applied since 1945 by domestic and international tribunals.

4.2 LEGAL NATURE OF COMMAND RESPONSIBILITY DOCTRINE

4.2.1 *Existence of a legal duty*

The scope of the doctrine of command responsibility has, since the end of World War II, been the subject of fierce debate.[39] According to this doctrine, military and civilian superiors are criminally liable for the crimes of their subordinates where they have either failed to prevent or punish them for these crimes. This phrasing, however, leaves certain questions unanswered. It attaches criminal liability not for an act but an omission. In the majority of common law systems there is no recognition of a general criminal liability for omissions, however severe their consequences may be, unless there exists a formal duty under law prescribing a compulsory form of positive action. Such duties, developed through judicial creativity, are now well

---

[38] The International Military Tribunal for the Far East [IMTFE or Tokyo Tribunal], on the other hand, did consider in great detail issues of command responsibility. *See* JOHN R. PRITCHARD & SONIA Z. MAGBANUA (eds.), THE TOKYO WAR CRIMES TRIAL, 22 vols. (1981-1988), and also BERNHARDT ROLING & CHRISTOPHER F. RUTER (eds.), THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (1977).

[39] *See* the Agora on the connection of superior orders to the concept of command responsibility, where D'Amato, *inter alia*, confuses the mental and actual elements of the latter concept with those of the offence or ordering the commission of a crime. Anthony D'Amato, *Superior Orders vs. Command Responsibility*, 80 AJIL 604 (1986), and Howard S. Levie, *Some Comments on Professor D'Amato's "Paradox"*, 80 AJIL 608 (1986).

established both in statute and under common law. They are, in the majority of legal systems, limited to duties arising either from family relationships,[40] contracts,[41] doctor-patient,[42] voluntary assumption of care,[43] or from a duty to avert injurious consequences arising from previous own fault.[44] On the other hand, civil law jurisdictions recognise a general duty of rescue, whether through personal action or by calling for help, where it does not cause any peril to the rescuer or to third persons.[45]

The discrepancy in the criminal laws of nations depicts a policy consideration based on the minimal harm posed by a general failure to act, in contrast to the major evidentiary difficulties regarding prosecutions. In the case of military law it is unambiguous that the harm which results from lack of discipline by military or civilian superiors is far greater than if they were bound with a duty to act.[46] This rationale is based on the doctrine of subordination and discipline which underlies every military formation in the world. The first express recognition of command duties under international law was proclaimed in article 86 of Protocol I (1977). Therein, commanders were assigned with the duty to prevent and/or punish any

---

[40] Sec. 1(1) Children and Young Persons Act 1933; *Gibbins and Proctor* (1918) 13 Cr App. R 134.

[41] *Pitwood* (1902) 19 TLR 37.

[42] *Arthur* (1981) 12 BMLR 1.

[43] *R. v. Stone and Dobinson* [1977] 2 All ER 341.

[44] *Miller* [1983] 1 All ER 978.

[45] Arts. 223-226 of the French Penal Code. For a comprehensive survey of both systems, *see* Martin Vranken, *Duty to Rescue in Civil Law and Common Law: Les Extremes Se Touchent?*, 47 ILCQ 937 (1998).

subordinate who was about to or had committed a violation of the laws of war.[47] More recent formulations include articles 6 of the ILC Draft Code of Crimes Against the Peace and Security of Mankind,[48] 7(3) of the ICTY Statute,[49] and 28(2) of the Rome Statute of the International Criminal Court,[50] all containing these two duties. The sources of such contemporary conventional law are found in the pronouncements of national legislation following WW II, and it is to them that we now turn.

4.2.2 Sources of command duties

Neither the IMT nor the Tokyo Charters contained provisions relating to criminal omissions, even though the latter invoked the criminality of command omissions as a sound legal basis for individual liability.[51] An express provision of this nature was not incorporated in Control Council Law No. 10 either. It was only through the inter-dependent sources of national criminal legislation and judiciary that

---

[46] In *USA v. Waluski*, 6 USCMA 724, 733, 21 CMR 46, 55 (1956), the Court of Military Appeals stated that military law "recognises no principle which is more firmly fixed than the rule that a military superior is responsible for the proper performance by his subordinates of their duties".

[47] According to the ICRC COMMENTARY, para. 3550, this broad duty placed on commanders is in place exactly because their role is crucial and decisive in the application of the laws of war.

[48] *Reprinted* in 18 HRLJ 96 (1997).

[49] *Reprinted* in 32 ILM (1993).

[50] *Reprinted* in 37 ILM 999 (1998).

[51] In *USA v. Toyoda*, the court emphatically stated that commanders have a duty to prevent and punish their subordinates' crimes, in Official Transcript of Trial at IMTFE, at 5006.

specific command duties were recognised as incurring liability for an omission to act.

The following may be cited:

1. Article IX of the *Chinese Law of 24 October 1946 Governing the Trial of War Criminals*: "Persons who occupy a supervisory or commanding position in relation to war criminals and [who] in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the *accomplices* of such war criminals".[52]

2. Article 4 of the *French Ordinance of 28 August 1944 Concerning the Suppression of War Crimes*: "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as *accomplices* insofar as they have organised or tolerated the criminal acts of their subordinates.[53]

3. Article 3 of the *Law of 2 August 1947 of the Duchy of Luxembourg on the Suppression of War Crimes*: "... the following may be charged , according to the circumstances, as co-authors or as *accomplices* in the crimes and delicts set out in article 1 of the present Law: superiors in rank who have tolerated the criminal activities of their subordinates".[54]

Military tribunals established to prosecute alleged war criminals after WW II found the existence of these duties to be an inseparable imperative of the command function. In the *Medical case* the tribunal stated that the "law of war imposes on a military officer in a position of command an affirmative duty to take 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 laws of war".[55] Similarly, in the *Hostages case*, a commander was found to be criminally responsible

---

[52] Cited in *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila (8 Oct – 7 Dec. 1945), [*Yamashita Trial*], LRTWC vol. IV, at 88, and the Supreme Court of the United States (Judgments delivered on 4 Feb. 1946), [*Re Yamashita*], 327 US 1 (1946).

[53] Cited *in* LRTWC vol. IV, at 87.

[54] *Ibid.*

[55] *USA v. Brandt* [*Medical case*] TWC vol. IV, at 212.

for violations committed by his subordinate commanders.[56] In the *High Command case*, although the tribunal spoke in terms of a "moral obligation", it nonetheless held the defendants liable for criminal offences.[57]

The contemporary formulation of positive command duties in article 87 of Protocol I[58] was uncontested during the 1977 deliberations. The majority of delegates even expressed the view that both articles 86 and 87 were in conformity with pre-existing law.[59] Hence, military and civilian commanders have broad and far-reaching duties, entrusted to them on the basis of their authority, the aim of which is to ensure their troops' compliance with the laws of war.[60]

---

[56] *USA v. List* [*Hostages case*] TWC vol. XI, at 1230.

[57] *USA v. von Leeb* [*High Command case*] TWC vol. XI, at 462.

[58] Art. 87 appeared as art. 76 *bis* of Draft Protocol I.

[59] The Yugoslav representative offered the view that command duties were accepted in "military codes of all countries". CDDH/I/SR.71, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts [*Official Records*] (Swiss Federal Political Department, Bern, 1978), vol. IX, at 399, para. 2. A similar view was expressed by the Swedish representative, *Official Records*, CDDH/I/SR.64, vol. IV, at 315, para. 61.

[60] In his charge to the jury in the *Medina Trial*, Howard J. noted that as a general principle of military law and custom, commanders have a duty to properly supervise their subordinates, *USA v. Medina*,

4.2.3 *Legal nature of "command responsibility"*

All three of the post-WW II national laws previously presented (Chinese, French and Luxembourg) defined "command responsibility" as a species of accomplice liability. The ICTY Prosecutor has noted, further, that it is a species of accomplice liability peculiar to international law.[61] Since accomplices are liable as principals, failure of commanders to discharge their duty to act entails their liability for the underlying crime committed by their subordinates.[62] More specifically, then, it constitutes a form of complicity through omission.[63] This is to be differentiated from any inchoate positive participation in crime; the latter renders a commander directly liable as a direct participant, also termed as "direct command responsibility".[64] Liability for failure to act, most precisely describes the doctrine of "command responsibility".

C.M 427162 (A.C.M.R 1971), *in* Roger S. Clark, Medina: *An Essay on the Principles of Criminal Liability for Homicide*, 5 RUTGERS CAM. L. J. 68 (1973).

[61] *Prosecutor v. Blaskic*, Response of the Prosecutor regarding *mens rea* for command responsibility (on file with author), at 14.

[62] ILC Draft Code Commentary on article 6. Report of the ILC on the work of its 48th session, GAOR, 51st sess., Supp. No. 10, UN Doc. A/51/10 (1996), at 38. The Commentary notes that a commander who has failed in his duty to act "may be considered to be an accomplice under general principles of criminal law relating to complicity".

[63] Note, *Command Responsibility for War Crimes*, 82 YALE L. J. 1276 (1973); in some circumstances, however, acts of commission may suffice, *see* William J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L. L. 110 (1995); in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 Sept. 1998, <http://www.un.org/ictr/judgements/akayesu/htm > (citation refers to Internet paging), *summarised* also in 37 ILM 1399 (1998), the Trial Chamber stated that command responsibility was a form of liability through omission or abstention, at 96.

As in criminal complicity it is required that the accomplice wilfully contributed substantially to the commission of the offence by the principal, it follows that command responsibility, as a form of complicity, should have the same effect. It is incurred, thus, where there exists either actual knowledge or gross negligence of the commission of crimes, coupled with a failure to act. It is obvious, therefore, that "command responsibility" refers to "imputed liability",[65] and not, as erroneously stated in the *Celebici* Judgment, to "vicarious liability".[66] Commanders are not liable solely because they are in a position of authority, neither does such a function carry burdens of vicarious or strict liability. Under general principles of criminal law the impact of vicarious liability is limited to offences of strict liability.[67] This result is affirmed by the three elements required for the application of this doctrine: subordination, knowledge (actual or constructive), or negligence, and a failure to act.[68]

---

[64] As in the case of art. 7(1) of the ICTY Statute; the Secretary-General differentiated between liability for giving an unlawful order and that of failing "to prevent a crime or to deter the unlawful behaviour of his subordinates", *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, *reprinted* in 32 ILM 1159 (1993), para. 56.

[65] *Ibid*, para. 56; it has wrongly been suggested that because "command responsibility" requires personal involvement and a degree of knowledge it is not a case of "imputed liability", William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 5 (1982).

[66] *Prosecutor v. Delalic, Mucic, Delic, Landzo* [*Celebici case*], Case No. IT-96-21-T, Judgment of 16 Nov. 1998, *reported* in 38 ILM 57 (1998), at para. 645; that the basis of command responsibility is not "vicarious liability" is also confirmed by Timothy Wu, *The Doctrine of Command Responsibility*, 38 HARV. J. INT'L. L. 282 (1997).

[67] WILLIAM WILSON, CRIMINAL LAW, 178 (1998).

[68] ICRC COMMENTARY, para. 3543, at 1012-1013; *Celebici case* Judgment, *supra* note 66, para. 346.

Article 7(3) ICTY Statute[69] reflects this approach by expressly demanding the fulfilment of these three requirements. It reads:

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

4.3.1 *Command responsibility as customary law*

In the years proceeding the post-WW II trials, although few attempts were made to adopt an acceptable international command responsibility definition, individual state practice has witnessed an impressive legal growth. The "duty to act" doctrine has been recognised in national jurisdictions either expressly through legislative enactment in national manuals and criminal codes,[70] or as a binding source of law applicable directly from the relevant international treaty or custom by

---

[69] Art. 6(3) ICTR Statute is identical with art. 7(3) ICTY Statute.

[70] For example, Chapter 22 sec. 6 of the Swedish Penal Code; sec. 2 of the Austrian Penal Code, which upholds guilt based on a failure to act only if the default is equivalent to the actual perpetration of the substantive offence; sec. 65 of the Norwegian Military Penal Code penalises failure to report or punish war crimes, while sec. 77 penalises passivity; art. 9 of the Dutch 1952 War Crimes Act prescribes liability to military superiors for failure to act. In addition, failure to prevent or punished is penalised as an accessory, under arts. 147 and 148 of the Dutch Military Criminal Code; although there is no binding legal rule in English law which expressly regulates the concept of the duty to act, a defaulting commander may be held liable under general principles of criminal law as an accessory, or under sec. 69 of the 1955 Army Act for omission to prevent violations against military law; finally, it is a well recognised legal doctrine in the USA, prescribed for in para. 501(a)(b) of FM 27-10. XIV International Congress of the International Society for Military Law and the Law of War, Athens (10-15 May 1997) [Athens Congress], National Responses to Question No. 8.

the national judge.[71] In addition, other analogies to the concept of imputed criminal liability for commanders have been used in the recent past by domestic jurisdictions in diverse legal fields.[72]

It is undisputed that consistent state practice both at the national and international level has rendered the doctrine of "imputed command responsibility" a norm of customary law.[73] The evidence shows this to be the case even before the establishment of the ICTY.

4.4 FAILURE TO PREVENT AND PUNISH WAR CRIMES

We have thus far established the existence under international law of two duties incumbent upon superiors, which independently generate criminal liability where their discharge is either wilfully omitted or negligently performed. The ICTY has not treated this form of liability as a new concept.[74] We now move to examine in

---

[71] Although most states also accept the international definition in amplification or in interpretation of their own, some choose to transpose directly the applicable international law one, in the form of either conventional or customary law. This is expressly stated in art. 25 of the Danish Military Act, while Turkey follows the contemporary standard of Protocol I (1977), even though it has not ratified that instrument. *See*, *ibid*, Athens Congress, National Responses to Question 8.

[72] *USA v. Park*, US 671 (1974) concerned the limits of the criminal liability of senior corporate managers under the Federal Foods and Drugs Act, which imposed liability not only on the actual perpetrators, but also on those senior officers who had failed to act when they had the power to prevent the offence; similarly, in *USA v. Goldman*, a Captain in Vietnam was convicted under art. 92 UCMJ, for dereliction of duty when he had been afforded ample notice of criminal activity, *in* CHERIF M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW, 42 (1996).

[73] *Celebici case* Judgment, *supra* note 66, at para. 343.

detail the elements of the duties to prevent and or punish. As stated, they constitute distinct legal obligations.[75] This is affirmed by the use of the disjunctive "or" in article 86(2) of Protocol I (1977). This reads:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them 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."[76] [emphasis added]

4.4.1 *The duty to prevent*

4.4.1.1 *Essential elements*

Draft article 82, submitted as a proposal by France, for the purposes of the ICC Draft Statute,[77] adequately describes the material elements of a superior's failure to discharge his/her duty to prevent. It reads that:

"A person shall be regarded as the perpetrator of a crime when, acting as a superior and having effective control over his subordinates, he knew or could not have been

---

[74] *Prosecutor v. Nikolic*, Rule 61 Decision, *reported* in 108 ILR 21 (1998), para. 24; *see* Christopher J. Greenwood, *Command and the Laws of Armed Conflict*, Strategic and Combat Studies Institute, Army Staff College, Camberley (1993), at 35, *in* A. P. V. ROGERS, LAW ON THE BATTLEFIELD, 135 (1996).

[75] *Prosecutor v. Blaskic*, Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging "Failure to Punish" Liability (4 April 1997, on file with author), paras. 12-16.

[76] Art. 87(1)(2) imposes on member states an obligation to uphold the doctrine of command responsibility in their national instruments. The obligation to ensure the observance and execution of the doctrine is further guaranteed through art. 80(2).

[77] Prep-Com 12-30 August 1996, *Draft Statute of the International Criminal Court. Working Paper Submitted by France.* UN Doc. A/AC.249/L.3 (6 Aug. 1996). Draft Art. 82, at 60; early explicit recognition of the duty to prevent is also found in Count 55 of the IMTFE Indictment.

unaware that his subordinates were preparing to commit a crime and when he did not take, although he had the possibility of doing so, the necessary reasonable measures to prevent the commission of the crime".

Articles 86(2) and 87(2) of Protocol I approach this definition by linking a commander's "duty to prevent" to the factual element of "*are going to commit*" a crime. The same link is apparent in article 7(3) of the ICTY Statute, where the duty to prevent is initiated the moment a subordinate "*was about to commit*" the offences contained in articles 2-5.[78] The common elements of the breadth of the duty to prevent are abundantly clear in these three instruments. The existence of a duty to prevent commences only when a superior's subordinates are in the phases of preparation, planning, or during the perpetration of an offence which has not been completed. The crimes must not be completed, otherwise reference to a duty to prevent would be meaningless. Blameworthiness exists because of intentional,[79] or negligent inaction when under a legal duty to act.[80] This duty arises with the first signs of behaviour that could potentially lead to the commission of offences. Such

---

[78] The same wording is found in the *Report of the Secretary-General*, *supra* note 64, at para. 56.

[79] In the *Trial of Emil Mueller*, it was assumed by the court that the accused "tolerated and approved" the ill-treatment of a prisoner, because he saw the incident and did nothing about it, 16 AJIL 691 (1922).

[80] In the *Essen Lynching case*, a German captain was found guilty of such inaction because although he was escorting a group of prisoners through a crowded and hostile street, he let the crowd murder them without interfering, LRTWC vol. I, at 88-92; in the *Trial of Emil Mueller*, the accused, while being the commanding officer of a military detachment, allowed one of his officers to strike a prisoner. The court held that the accused "with knowledge permitted the committing of a criminal act, which he could have prevented, and which *he was officially bound to prevent*". [emphasis added], 16 AJIL 694 (1922).

signs include, for example, associations of usually insubordinate troops, which raise, hence, suspicion of future criminality.[81]

In the *Akayesu case*, Trial Chamber I pointed out that whether a superior had the power to prevent the crimes of his/her subordinates is irrelevant if he/she did not attempt to do so.[82] However, failure to condemn incendiary statements uttered at an already formed gathering would not be tantamount to approval.[83] This last statement of the Court should be approached with caution and viewed as applying only in the explosive circumstances of the Rwandan massacres. It certainly cannot constitute a general statement of international humanitarian law,[84] but may pertain to civilian superiors where command is difficult to ascertain.

4.4.1.2 *Instances of failure to prevent in post-WW II case law*

In the *Abbaye-Ardenne case*, a Canadian military court acknowledged a commander's duty to prevent his/her subordinates from violating the laws of war. Major-General Meyer was charged "[with violations] of the laws and usages of war"

---

[81] In the *Trial of Schonfeld and Others*, the tribunal found the defendant commander liable on account of having failed to take suitable measures to prevent war crimes for which he had reasonable grounds for suspecting that men under his command were going to commit, *in* LRTWC vol. XV, at 69.

[82] *Akayesu case* Judgment, *supra* note 63, at 46

[83] *Ibid*, at 71.

[84] Field Marshall List was held liable, *inter alia*, for failing to condemn criminal acts against civilians within his territory of authority, *Hostages case*, TWC vol. XI, at 1272.

for inciting and ordering his troops to deny quarter to allied soldiers.[85] The tribunal noted that commanders are liable for their failure to prevent acts of their subordinates if they fail to take into consideration certain factors such as the age, training, or the experience of their men; factors which point to obvious conclusions.[86]

Abundance of information which clearly indicates an imminent massacre has been held to be an essential element in attributing criminal liability to both civilian and military superiors, in cases where they failed to take adequate averting measures. Hence, Phalangist entry in the Palestinian refugee camps of Shatila and Sabra, under the supervision of the Israeli Chief of Staff and Defence Minister, should have been anticipated by both as very probably resulting in large-scale massacres.[87] The Commission of Inquiry, headed by the President of the Supreme Court of Israel, noted that these officials were "indirectly responsible", on the basis of a test of anticipated foreseeability, lacking direct intent.[88] In strictly criminal law terms, this may held to be either oblique intent or some form of recklessness.

The duty to prevent was found by the Commission to be a continuous duty, in the sense that it is in existence before violations are committed, up until the time they are terminated. During this period, superiors have a duty to "do everything within

---

[85] Green, *supra* note 6, at 336-337.

[86] *Canada v. Meyer* [*Abbaye-Ardenne case*], TWC vol. IV. This extract is cited by Green, *ibid*, from the unpublished transcripts of the trial.

[87] *Report of the Kahan Commission* [Kahan Report], *reprinted* in 22 ILM 496 (1983). Phalangist animosity towards Palestinians should have been more than apparent to the Israeli officials because the leader of the Phalangists, Bashir Jemayel, had been recently assassinated by Palestinian militants. They should, therefore, have themselves led the operation, or at least closely supervised it in conjunction with the Phalangists.

their power to stop them".[89] Thus, the Israeli Defence Minister was held liable for failing to prevent the massacres, on the basis that: (i) he disregarded the danger of vengeance, failing to consider it when he allowed the Phalangists to enter the camps, and (ii) because when he acquired knowledge of the ongoing massacres he failed to order appropriate measures for their termination.[90] The Kahan Report did not materialise into judicial criminal proceedings, but is, nonetheless, an official affirmation of the liability of high-ranking military and political superiors.[91]

4.4.1.3 *Necessary and reasonable action*

The existence of a duty to prevent must be accompanied by the obligatory performance of positive action. In *USA v. Ernst von Weiszaecker et al*, most of its twenty-one defendants were high-ranking officials in the Reich Government, the Nazi party and its affiliated organisations, as well as members of specialised government agencies during Hitler's reign. Hence, the case became subsequently known as the *Ministries case*, and the charges against the accused related to planning of aggressive war, murder and ill-treatment of prisoners of war and civilian internees,

---

[88] *Ibid*, at 496.

[89] *Ibid*, at 496.

[90] *Ibid*, at 503.

[91] At the time of the massacre the Israeli Defence Minister was also a member of the Reserve and, as Green notes, "by his actions indicated that he considered himself competent to take decisions as if he were a commander in the field", *supra* note 6, at 362.

plunder, spoliation and the use of slave labour.[92] In considering von Weiszaecker's role, State Secretary in the Reich Foreign Office, in the aggression against Poland, the tribunal found the accused to be "an implementor and not an originator", who could oppose and object, but not in a position to override superior orders.[93] It acquitted him, because it was proven that he had employed every means in his power, albeit unsuccessfully, to prevent the implementation of his superiors' orders.[94]

Furthermore, the tribunal by *inter alia* failing to establish the guilt of the accused Meissner, State Minister and Chief of the Presidential Chancellery, and the Foreign Office in connection with a programme of persecution,[95] indicated that agencies such as the Foreign Office, which are involved in the preparation of a criminal plan, are under a duty to point out objections in order to avoid charges of criminal participation.[96]

---

[92] The case was tried by the Military Tribunal IV, established pursuant to CCL 10 and the US Military Government Ordinance No. 7, *reported* in TWC vols. XII-XIV.

[93] *Ministries case*, TWC vol. XIV, at 356.

[94] *Ibid*, at 369.

"... the defendant used every means in his power to prevent the catastrophe. He was not master of the situation; he had no decisive voice, but he did not sit idly by and stolidly follow the dictates of either Hitler and von Ribbentrop, but sought to avert it. Although these efforts proved futile, his luck of success is not the criteria. Personalities, hesitation, lack of vision and the tide of events over which he had no control swept away his efforts. But for this he is not at fault."

[95] The tribunal stated that the defendant "... insofar and as often as he could, used his position to prevent or to soften the harsh measures of the man he served, sometimes at considerable risk to himself', *ibid*, at 609.

[96] *Ibid*, at 496, 498.

In cases where a superior's knowledge of the criminal acts of his/her subordinates was not in question, the tribunal examined the extent of the superior's authority to intervene in the particular acts, as it did with his/her *mens rea*. In discussing the liability of von Moyland, State Secretary in the Foreign Office, for the actions of Best, who as plenipotentiary to Denmark was personally responsible for the evacuation of Danish Jews, the tribunal pointed out that von Moyland's responsibility arose from his inaction in taking any steps to prevent "what was obviously a flagrant and unsupportable violation of international law".[97]

Detailed reference to a preventive duty has been scant, especially in early ICTY cases.[98] The various Trial Chambers have consistently indicated that where the accused's participation fell clearly under article 7(1) ICTY Statute, failure to act liability would be less pertinent.[99] The Office of the Prosecutor has, nonetheless, been charging the accused in the alternative. In the *Nikolic case*, however, Trial Chamber I emphasised that failure to prevent liability had long been recognised under international law and subsequently reaffirmed by article 7(3) ICTY Statute. The Court further noted that by virtue of the accused's command position at Susica POW camp, his responsibility could arise from his failure to prevent crimes against internees.[100]

---

[97] The tribunal, however, noted that Best was not acting on von Moyland's orders, but probably on those of Hitler and Himmler, which von Moyland "could not overcome", *ibid*, at 518.

[98] Both in the *Martic case* and the *Rajic case*, where the accused had been charged in the alternative under arts. 7(1) and (3) of the ICTY Statute, the Trial Chambers did not dedicate a single line to analyse their liability under art. 7(3).

[99] This statement was phrased in the *Karadzic and Mladic case*, Review of the Indictment Decision, 108 ILR 86 (1998), para. 83.

Where superiors have demonstrated complete disregard for their command duties, the ICTY and ICTR have shown that they are prepared to find liability under article 7(3) without differentiating between prevention and punishment.[101] The basis for a prosecution regarding failure to prevent requires knowledge or indifference on the part of the superior, coupled with a lack of prevention.[102] An attempt to prevent will negate liability only when it constitutes a "serious effort".[103]

4.4.2 The duty to punish

4.4.2.1 *Essential Elements*

A superior's "duty to punish" arises after the commission of an offence. When commanders are held liable for their failure to punish, "[they are] held culpable for offences which have already occurred, not for future offences".[104] In this sense, punishment is intended to deter the commission of future offences.[105] This

---

[100] *Nikolic case*, Decision Review of Indictment, 108 ILR 21 (1998), para. 24.

[101] *Celebici case* Judgment, *supra* note 66, paras. 773-775; *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment of 4 Sept. 1998, *reprinted* in 37 ILM 1411 (1998), paras. 40(1)-(6).

[102] *Akayesu case* Judgment, *supra* note 63, at 46.

[103] Mucic's orders prohibiting POW abuse were held by Trial Chamber I to be insufficient because he never made serious efforts to see them through and was regularly absent from the camp, thus being neglectful in his duties, *Celebici case* Judgment, *supra* note 66, paras. 773-774.

[104] *Blaskic case*, Prosecutor's Response Regarding: Failure to Punish Liability (20 Jan. 1997, on file with author), at 14.

[105] *Ibid.*

form of liability is distinct from a commander's preventive liability.[106] It does not constitute a contemporary norm, but existing law, as evidenced by the Secretary-General's Report, and further affirmed in the *Blaskic case*.[107] The duty to "prevent recurrence of future crimes" is but another definition of the "duty to prevent".[108] Therefore, when the commission of an offence is ongoing, the most effective way of restricting its continuation is by halting the action of the principal offenders.[109]

As already stated, failure to punish, as a form of command responsibility, is a species of imputed liability for an omission. Therefore, failure to punish is neither akin to the common law doctrines of "accessory after the fact liability",[110] nor to "misprision of felony".[111] The duty to punish does not require a pre-existing

---

[106] *Blaskic case*, Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging "Failure to Punish" Liability (4 April 1997, on file with author), para. 6.

[107] *Ibid*, para. 7, 8; Report of the Secretary-General, *supra* note 64, paras. 53-54, 56, 29.

[108] *High Command case*, TWC vol. XI, at 623; Hostages case, vol. XI, at 1279-1280; *Blaskic case*, Decision on Failure to Punish, *supra* note 106, para. 10, where Trial Chamber I stated that "failing to punish subordinates *inevitably* means failing to prevent the recurrence of crimes, whereas by punishing subordinates such recurrence is naturally prevented, with the result that failure to punish alone is sufficient grounds for command responsibility".

[109] This was the reasoning adopted in the case of Lieutenant-General von Roques in the *High Command Case*, TWC vol. XI, at 632.

[110] *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L. J. 609, 633 (1984). This doctrine holds that he who aided the principal after the completion of the offence could be convicted of the substantive offence committed by the principal. This doctrine is now largely obsolete in Anglo-American law on the legal basis that the accessory neither caused the primary offence nor formed *mens rea* with respect to it, but is merely an obstructor of justice.

[111] This consists of a failure to report or prosecute a known felon. This doctrine is also largely obsolete.

relationship to the persons that perpetrated the offences, as this would have been part of the preventive duty of the incumbent superior at the time the offences took place. Rather, superiors who assume command after such offences have ceased are under a duty to investigate and punish the offenders. This will depend on their knowledge of crimes, which is in turn based on their efforts to either investigate or inquire.

4.4.2.2 *Necessary and reasonable action*

Punitive action necessarily takes two forms. It is not always feasible to initiate judicial proceedings against the perpetrators of crime, especially in the midst of military operations. When this option is not available, or when a commander is physically unable to do so, the only available possibility is to commence adequate investigations and report any findings to his/her superiors. These alternatives conform to the aims of punishment under article 7(3) ICTY Statute.

Field Marshall von Kuechler was held criminally liable for his failure to take corrective action after having been adequately informed of illegal executions of Soviet troops.[112] Knowledge of the implementation of Hitler's Commissar Order without any effort to punish the implementing troops was held to be a breach of

---

[112] "These reports must be presumed in substance to have been brought to his attention. In fact, his own testimony indicates he was aware of these reports. *There is no evidence tending to show any corrective action on his part.* It appears from the evidence therefore that he not only tolerated but approved the execution of these orders. He must, therefore, be held criminally responsible for the acts committed by his subordinates in their illegal execution of Red Army soldiers and escaped prisoners of war." *High Command case*, TWC vol. IX, at 568 [emphasis added].

duty.[113] Furthermore, permitting or tolerating criminal conduct through abstention of punishment is tantamount to acquiescence.[114]

The most obvious way of discharging a duty to punish is through prompt and adequate punishment of the offenders.[115] Punishment may be thus imposed on junior officers who ordered the commission of an offence, as was the case with Tojo, for his failure to punish those who ordered the Bataan death march.[116] Since this is a duty recognised under international law, incumbent commanders must adhere even if in defiance of other superiors.[117] For POW camp commanders and corresponding superiors, the duty to punish guards mistreating prisoners is an essential element in the effective functioning of the duty to safeguard prisoner welfare.[118] Similarly, in

---

[113] *Ibid*, at 632.

[114] *Hostages case*, TWC vol. XI, at 1311, 1289-1299; para. 631 of the British Military Manual notes that failure to punish raises the presumption of, *inter alia*, authorisation and encouragement of criminal acts.

[115] Para. 507(b) of the US DEP'T OF THE ARMY FIELD MANUAL, FM 27-10 (1956), *The Law of Land Warfare*.

[116] *Tokyo* Judgment, vol. I, at 29-31.

[117] In the *Llandovery Castle case*, the two sub-commanders of a German U-Boat that intentionally sank a hospital ship were held guilty by the court, because they could have prevented that action by refusing to pledge themselves to secrecy and declaring their intention of reporting the incident upon their return. 16 AJIL 639 (1922).

[118] *Tokyo* Judgment, vol. I, at 29-31. The tribunal stated that Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners.
"If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed, of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes."

the *Celebici case*, camp commander Mucic was held criminally liable for not enforcing any form of discipline upon camp guards and for not taking any measures in punishing anyone mistreating prisoners.[119]

Where superiors are physically unable to prosecute, arrest, incarcerate, or in any way discipline a subordinate, they must try to discover crimes committed and, if they are ongoing, stop them.[120] When this is done, they should refer the case to the appropriate judicial authorities or any other superior authorities within their chain of command. The contemporary expression of this duty is found in article 28(1)(b) and 2(c) of the ICC Rome Statute, para. 1213 of the German Military Manual,[121] and also in other national instruments.[122]

Major-General Koster was found responsible for the inadequacy of criminal investigations into the My Lai incident, on the basis that he had ample resources and information to prevent such impunity.[123] Sanctions were imposed on Koster although he was not prosecuted, but the case should be seen as a more authoritative statement of the recognition of the doctrine under question.[124]

---

[119] *Celebici case* Judgment, *supra* note 66, at para. 772.

[120] US DEP'T OF NAVY, *Law of Naval Warfare*, para. 330(b)(4) established a duty to "discover and stop offences already perpetrated".

[121] The German Manual was drafted reflecting provisions of Protocol I (1977). Art. 138 stipulates a duty to either suppress or "report to competent authorities breaches of international law".

[122] Para. 501(b) FM 27-10; sec. 65 of the Norwegian Penal Code; arts. 147 and 148 of the Dutch Military Penal Code; art. 21 of the SFRY Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY.

[123] *Memorandum of Explanation to Secretary of Defence from Secretary of the Army* (23 March 1971), *reprinted* in *Koster v. USA*, 685 F. 2d (Ct. Cl. 1982), 407, 410, 414, *in* Green, *supra* note 6, at 335.

In conclusion, it should be said that a superior should be held responsible for failing to take such measures as are "within his material possibility".[125] Trial Chamber I in the *Celebici case* correctly disagreed with the ILC's view, which demanded both legal and material possibility to take appropriate measures, noting that only the latter is required.[126] It would be absurd for a superior to claim that he/she was not legally entitled to prevent an act of genocide when he/she was materially capable of doing so.

4.4.2.3 Causation

Under the doctrine of command responsibility superiors are responsible for offences committed by subordinates, where they failed in their duty to prevent or punish them. Under general principles of criminal law, a person is liable for an offence if that person's action caused the consequence of the offence to occur. Trial Chamber I in the *Celebici case* found no support for the existence of a requirement of causation as a separate element of command responsibility.[127] It nonetheless recognised a necessary causal nexus as inherent for a superior's failure to prevent crimes,[128] but no such causation requirement between an offence committed by a

---

[124] Green, *ibid.*

[125] *Celebici case* Judgment, *supra* note 66, at para. 395.

[126] ILC Draft Code Commentary, *supra* note 62, at 38, 39, *in Celebici case* Judgment, *ibid*, at para. 395.

[127] *Celebici case* Judgment, ibid, at para. 398.

subordinate and the subsequent failure of a superior to punish the perpetrator of that crime.[129]

4.5 THE APPLICATION OF THE DUTY TO ACT IN SPECIFIC CONTEXTS

A necessary element of command authority is that of the existence of a chain of command.[130] This applies equally to the two general forms of command, whether civilian or military, which depend on the magnitude of the element of control; that is, operational and tactical command. The former implies vested command authority over units, which are linked with the operational superior through each unit's leader, while tactical command refers to actual control (or also vested authority) over a specified number of subordinates. Command and control are thus not the same things, but are obviously inter-related.[131]

Next, follows a study a study of the necessary and reasonable measures required and expected of superiors in specific command or control contexts. These include those of the operational, tactical and POW camp commanders.

---

[128] *Ibid*, para. 309.

[129] *Ibid*, para. 400.

[130] *Ibid*, para. 647.

[131] Para. 3.1 of the US ARMY FIELD MANUAL (FM 100-5), *Operations of Armed Forces in the Field*, provides that "the authority vested in an individual to direct, co-ordinate and control military forces is termed "command"".

4.5.1 *Operational commanders*

After the notorious "rape of Manila" by the armed forces of the Imperial Japanese Army, a military commission established by General McArthur in the Philippines was entrusted with assessing the liability of General Tomoyuki Yamashita.[132] He, as *de jure* Supreme Military Commander of the 14th Area Army, Japan's fighting force on the island, and as its Governor, was held accountable for atrocities perpetrated against civilians and US prisoners of war. The Commission held Yamashita responsible for these acts of Japanese troops because, as was pointed out, he failed to provide effective control over them although knowing full well, based on the notoriety and magnitude of the offences, that they were being committed.[133] The case was submitted before the US Supreme Court on procedural grounds but, discussing substantive issues, the majority reaffirmed Yamashita's liability on grounds of breach of his "duty to control", therefore permitting his troops to commit crimes.[134]

Yamashita has been described as a scapegoat. It is worth mentioning that he assumed his post eleven days before the US invasion, inheriting a disorganised army of untrained soldiers, while being burdened to plan the defence of the Philippines.[135] Furthermore, he never ordered full defence of the island. Instead, he call for partial

---

[132] *See* Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995); Franklin A. Hart, *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised,* 25 NAVAL W. C. REV. 19 (1972).

[133] *USA v. Yamashita* [*Yamashita case*] LRTWC vol. IV, at 94.

[134] *Re Yamashita*, 327 US 1, 16 (1946).

Japanese evacuation and split the remainder of the 14th Area Army into three separate fighting units, ceding full command of the remaining two units to Generals Tsukada and Yokoyama.[136] However, the troops ordered to be evacuated not only remained there, but were the ones who whilst on Manila performed the vast majority of what became known as the rape of Manila. At the same time, it should be noted, Yamashita was isolated in a remote mountainous location, apparently lacking adequate communication with headquarters, the Manila troops and his two commanders.[137]

Yamashita's conviction seems to have been upheld for acts of troops who were beyond his *de facto* control, under the axiom that the responsibility arising from operational command cannot be ceded, even though the military aspects of such command may.[138] This postulate, known as the "delegation principle", is increasingly recognised as a general principle of criminal law.[139] It strains the mind to consider the possibility of liability where both *de facto* control is missing and *de jure* command has already been ceded for purely military purposes and not for the avoidance of criminal liability.[140] Such liability could credibly be sustained where

---

[135] Landrum, *supra* note 132, at 293.

[136] Crowe, *supra* note 34, at 201-202.

[137] Crowe, *ibid*, at 195, 202; Yamashita's sector of command saw the least criminal activity, *see* Landrum, *supra* note 132, at 294.

[138] In terms of military law this axiom is found in para. 3.1 FM 100-5, *in* Parks, *supra* note 1, at 42.

[139] *Allen v. Whitehead* [1930] 1 KB 211; WILSON, CRIMINAL LAW, 178 (1998); *USA v. Parfait Powder Puff Co.*, 163 F. 2d. 137 (6th. Cir. 1947); *Carolene Products Co. v. USA*, 140 F. 2d. 61 (4th Cir. 1944)

delegation of authority was performed for evading one's responsibility, thus raising unacceptable risks of crime.[141]

The test followed in later cases seems to strike a reasonable balance between knowledge of subordinate offences and material capacity to act. Thus, the murderous onslaught of Japanese forces on the Chinese city of Nanking, under the command of General Matsui, rendered him liable even though he issued lukewarm instructions to the contrary, because he had every opportunity and ability to act.[142] It is now well established that operational commanders must exercise the full potential of their authority to avert war crimes, and will therefore not be exonerated in cases of non-assertive orders or failure to check their implementation.[143] Where operational commanders take every punitive or preventive measure materially possible in the circumstances, they will not be liable for crimes committed despite their care.

---

[140] Trial Chamber I in the *Celebici case* Judgment stated that a superior is under a duty to take necessary and reasonable measures which are within his "material possibility", *supra* note 66, at para. 395; Landrum, *supra* note 132, notes that Yamashita's isolation and cession of command could not even have made him aware of those facts raising a duty to infer that crimes were being committed; Parks, *supra* note 1, at 37, while agreeing both with the reasoning of the Military Commission and the Judgment of the US Supreme Court, stated that the value of the *Yamashita case* was the recognition of duties incumbent on commanders as were "within [their] powers and appropriate in the circumstances..."

[141] *See* Note, *Command Responsibility for War Crimes*, 82 YALE L. J. 1283 (1973).

[142] *Tokyo Trials*, Official Transcripts, at 49,816, *in* Parks, *supra* note 1, at 68-69.

[143] In the *Trial of Kimura*, the latter was held criminally liable for his inactivity in punishing crimes, even though he knew of their commission and issued only feeble deterring orders, although he could have taken a stronger stance, *Tokyo Trial* Judgment, at 1181 (1948); a similar conclusion was reached in the *Trial of Hata*, where intentional inactivity, coupled with notoriety of crimes was found to be a solid basis for holding the accused criminally liable for the acts of his subordinates, *Tokyo Trial* Judgment, at 1155, *in* BASSIOUNI, INTERNATIONAL CRIMINAL LAW, 40-41 (1996).

This proposition is strongly supported by the Judgment in the *High Command case*.[144] There, General Field Marshall von Leeb was charged, *inter alia*, with implementation, by troops under his operational command, of illegal orders issued by his junior and senior officers, despite his explicit dictates to the contrary. The military tribunal declared that the application of the doctrine of command responsibility required a "personal dereliction",[145] and did not therefore constitute a form of vicarious or strict liability. Personal dereliction in this sense would amount to a failure to supervise. However, this duty to supervise was found to be commensurate with the exercise of actual control in the given circumstances. Thus, an operational commander, as was the case with von Leeb, who was engaged heavily in military operations, was not expected to be either completely informed of all military operations of subordinates, nor with every administrative measure taken.[146] Apparently, it must have seemed good law to the court that operational commanders may lawfully presume that "details entrusted to subordinates will be legally executed".[147] Such a presumption must, however, be within reason.[148] Commanders may not rely on this presumption if their failure to supervise was intentional or criminally negligent.[149]

---

[144] *USA v. von Leeb and Others* [*High Command case*], TWC vols. X and XI.

[145] *Ibid*, vol. XI, at 543-544.

[146] *Ibid.* Thus, von Leeb had the right to presume that the care of POWs which was entrusted to his subordinate officers would be diligently discharged in his absence, TWC vol. XI, at 533.

[147] *Ibid.*

[148] Parks, *supra* note 1, at 46.

The *Toyoda* Judgment, which argued that formal divisions between different forms of authority, including operational and administrative authority, do not create control problems,[150] should be interpreted in accordance with the *High Command* presumption. Command responsibility cannot be artificially delineated through formal divisions of authority in cases where superiors are able to exercise *de jure* command or *de facto* control.

4.5.2 *Executive commanders*

Executive or operational commanders are those individuals who are vested by the occupying state with supreme authority in the occupied territory. Notwithstanding the legitimacy of the occupation itself, the mere fact of occupation entails certain responsibilities for the occupying power.[151] The occupying state must not only give full effect to the provisions of the Geneva Civilians Convention IV (1949), it must also provide penal sanctions in respect of any grave breaches in violation of that instrument.[152] Administration of such territory is usually undertaken by high-ranking military personnel. Alternatively, such duties may be entrusted to a combination of military persons and a collaborating civilian puppet regime. It must

---

[149] *High Command case*, TWC vol. XI, at 544.

[150] *USA v. Toyoda* (Official Transcript of Trial), at 5001; Parks, *supra* note 1, at 71.

[151] In *re Yamashita* 327 US 1, 16 (1946), the US Supreme Court ruled that arts. 1 and 49 of the Regulations annexed to Hague Convention IV (1907), art. 19 of Hague Convention X (1907), as well as art. 26 of the Geneva Prisoner of War Red Cross Convention (1929) imposed on executive commanders an affirmative duty to protect prisoners and civilians.

be presumed, however, that in all cases of military subjugation it is the military occupier which maintains actual authority over all aspects of the territory in question, and not the local puppet regime.

The material difference between the duties of operational commanders and those of executive commanders is that while the former are responsible for persons under their command or control, the latter are accountable not for subordinates *per se*, but in terms of territory. In the case of executive commanders subordination is unimportant, their responsibility being co-extensive with their appointed area of command.[153] It follows from this reasoning that since executive commanders have absolute civilian and military command over the occupied territory, the element of control is irrelevant. Furthermore, while the occupying state may limit the exercise of sovereign powers by a military commander, his/her responsibilities to the civilian population cannot be ignored by reason of his/her state's activities in the designated area of command.[154]

An executive commander's duty, under international law, is one of protection and welfare of the resident occupied civilian population and its property.[155] Because subordination is irrelevant, executive commanders have a duty to prevent and punish crime, even when it involves auxiliary or allied forces stationed within their area of

---

[152] Art. 146.

[153] *USA v. List* [*Hostages case*] TWC vol. XI, at 1260, and LRTWC vol. VIII, at 70; a similar ruling to that effect was made in the *High Command case* in relation to von Roques, TWC vol. XI, at 692.

[154] *High Command case*, TWC vol. XI, at 544.

[155] *Ibid*, at 632, where the tribunal described an occupying commander's duty as one of "maintaining peace and order and prevent[ing] crime".

command.[156] A similar duty exists in all cases of inter-communal rivalry,[157] and commanders are obliged to enforce discipline in such situations in order to protect both majorities and minorities. While this duty would be incumbent upon any lawfully governing regime which controls national territory, only the occupying authority would be individually responsible under international criminal law. An occupying authority, therefore, incurs personal liability under international law because it is exacerbated by the element of occupation.

The rule seems to be that executive commanders are not burdened also with large-scale military operations. However, this seems to be a recent military approach and is not supported by WW II practice, since both Yamashita and the German High Command exercised both operational and executive functions. The relevance of this observation is crucial for determining command vigilance in discharge of the duty to supervise territory. Ignorance or wanton neglect of crimes is no excuse.[158] Executive commanders are obliged to be aware of any occurrences within their territory, even if they are not present therein on account of other operational demands.[159] In this respect, executive commanders are under a duty to be informed of all occurrences within their sector of command.[160] Acquisition of information can be achieved

---

[156] *High Command case*, TWC vol. XI, at 632.

[157] *Ibid.*

[158] *Ibid.*

[159] *Hostages case*, LRTWC vol. VIII, at 70; TWC vol. XI, at 1272; *Tokyo Trials* (Official Records of Trial), at 48,442-48,447.

[160] *Hostages case*, LRTWC vol. VIII, at 71.

through constantly demanding reliable and ample apprisal of pertinent facts.[161] This will generally involve the establishment of an effective reporting system. Therefore, failure to either initiate a reporting system, or to acquaint oneself with the content of relevant reports and supplement inadequate ones constitutes gross dereliction of duty.[162] Neither will commanders be excused if their authority is overriden to the detriment of civilians,[163] which would be made possible, *inter alia*, by the passing and execution of illegal orders within one's command. The only possible excuse available to executives commander would arise where, being concerned also with the exigencies of conflict, they are unable to supervise properly every aspect of their administration.[164]

The duty to protect and care for the welfare of civilians seems to be a strict liability element in the *actus reus* definition of command responsibility applicable to executive commanders. This is so because it is apparent that no *mens rea* is required. Since the 1940s, judicial and legislative innovation have developed a defence of particular to strict liability offences, namely a defence of "due diligence".[165] Although there exists substantial difference in magnitude of both duty and authority between national strict liability crimes and executive command responsibility, the

---

[161] *Ibid*, at 70.

[162] *Ibid.*

[163] *High Command case*, TWC vol. XI, at 544-545.

[164] *Hostages case*, TWC vol. XI, at 1260.

[165] *R v. City of Sault Ste Marie* (1988) 45 CCC (3d) 5; *Proudman v. Dayman* (1941) 67 CLR 536. Due diligence defences have been incorporated into a number of statutory offences, such as sec. 28 Misuse of Drugs Act (1971).

underlying notion for advancing a defence of due diligence is that to punish under such circumstances would be an unnecessary violation of the principle of individual autonomy.[166]

4.5.3 *Persons entrusted with the care of prisoners*

During the first part of the Middle Ages, prisoners of war could either be killed or made slaves. In the second part, as a rule, prisoners were not killed. With the disappearance of slavery from Europe the practice of enslavement ceased, but prisoners were often exchanged for ransom. Since the seventeenth century, however, POWs have been considered not as being in the hands of their captor troops, but instead in the power of the sovereign by whose forces they were apprehended. Thereafter, captivity of enemy personnel was recognised merely as a means of preventing enemy combatants from pursuing further combat, thus requiring that prisoners be afforded treatment analogous to that of the captor's troops.[167]

Under customary and treaty law, the denial of quarter is considered as a war crime incurring criminal liability.[168] Once in captivity, as a principle of military practice and law, the prisoner becomes a subordinate of the captor commander,

---

[166] WILSON, CRIMINAL LAW, 174-175 (1998).

[167] The Treaty of Friendship (1785) between the USA and Prussia is amongst the earliest agreements stipulating humane treatment of prisoners of war, Andrew Lee, *Individual Responsibility for Mistreatment of Prisoners of War*, 10 ANN. CHIN. SOC. INT'L. L. 34 (1973).

without, however, being conscripted in the enemy forces.[169] According to the Tokyo tribunal, the obligation to offer humane treatment to prisoners and assure their safe repatriation at the close of hostilities had long been recognised under customary law, receiving written recognition in Hague Convention IV (1907)[170] and the Geneva Prisoners of War Convention (1929).[171]

This body of law reposed responsibility for the care and prevention of mistreatment of POWs and civilian internees to the government of the captor, on the basis that upon captivity they were deemed to be in the hands of that state.[172] The *Tokyo* Judgment concluded that liability for prisoners and other internees rested with members of the government, military or naval officers in command of formations who were holding prisoners, officials in departments concerned with prisoner welfare, as well as with any other civilian or military official being in direct and immediate control of prisoner affairs.[173] Liability for government members is justified because international law places the care of prisoners in their hands. Military and naval officers, who are in command or formations holding prisoners, are responsible just like any other operational commander. Both government members

---

[168] Hague Regs. (1907), art. 23(d); Protocol I (1977), art. 40. As a corollary, it is also forbidden to conduct operations on the basis that quarter will not be afforded, such as placing a price on one's head, as was done by the USA against Noriega, *see* GREEN, *supra* note 8, at 137, 140.

[169] *Trial of Karl Heynen*, 16 AJIL 676 (1922).

[170] Art. 4.

[171] In *USA v. Keenan* 14 CMR 742 (1954), a soldier was convicted for committing crimes against prisoners or war during the Korean campaign.

[172] *Tokyo Trials* (Official Transcripts), at 48,442, *in* Parks, *supra* note 1, at 65.

[173] *Tokyo* Judgment, *in* Parks, *ibid*, at 65-66.

and operational commanders must diligently exercise their duty to be adequately and amply informed. It has been argued that to assume the liability of every government member is far-reaching.[174] A more suitable proposition would be to require knowledge, some kind of protest and a capacity to act.[175] It seems correct to hold, however, that the Head of Government and appropriate Minister responsible for prisoner affairs are liable for any violations, since they are under a duty to acquire knowledge and act accordingly.[176] This is consistent with the *Tokyo* Judgment where Prime Minister Tojo and Foreign Minister Shigemitsu, "as members of the government bore overhead responsibility" for prisoner welfare.[177] While the responsibility of commanding officers of POW camps is based on direct subordination and the concept of actual control,[178] it is difficult to ascertain which principle creates criminal liability for departmental officials charged with prisoner

---

[174] Jordan J. Paust, *Individual, State and Other Responsibilities*, *in* BASSIOUNI, INTERNATIONAL CRIMINAL LAW, 34 (1996).

[175] Trial Chamber I in the *Akayesu case* noted that the issue of government liability for the acts of the military was contentious. This, it emphasised, would depend on the "power of authority actually devolved upon the accused, in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent and punish", Judgment, *supra* note 63, at 98.

[176] Mummenthey, commander of a POW and labour camp during WW II, was not excused in pleading ignorance of crimes in the camp, because as the tribunal pointed out, "it was his duty to know", *USA v. Pohl,* TWC vol. V, at 1055.

[177] *Tokyo Trials* (Official Transcript), at 49,831. Similarly, Foreign Secretary Hirota was found derelict in not insisting before the Cabinet that crimes be stopped, instead relying on assurances, and thereby incurring liability through criminal negligence, at 49,816; this is consistent with ICTR jurisprudence, where former Prime Minister Kambanda incurred superior liability through inaction to repress massacres, even though he had been amply informed, *Kambanda case* Judgment, *supra* note 101, at para. 39.

affairs. Their responsibility resembles that of staff officers, who exercise neither command nor control, and hence do not incur liability, unless there is proof of direct participation.[179] This corresponds to US claims that responsibility for the treatment of civilian detainees and POWs in Iraqi hands "clearly lay with the Government of Iraq and its senior officials".[180]

Therefore, the law of command responsibility in respect of prisoners establishes a two-tier system. Government members and appropriate military officials have the duties accruing from operational command, while camp commanders operate under an analogy of the rules applicable to executive superiors. For such operational commanders, the duty to act entails the establishment of a prison system whereby prisoner welfare is safeguarded and abuses are reported and adequately repressed.[181] Operational commanders do not discharge their duties by merely establishing this system; instead, they are under an obligation to ensure its continued and efficient working.[182] Camp commanders face a dual task. On the one

---

[178] *Hostages case*, TWC vol. XI, at 1260.

[179] *High Command case*, TWC vol. XI, at 684; similarly, in the *Hostages case* it was held that knowledge of criminal acts by staff officers is not sufficient for criminal liability to attach, since they must be linked to an overt or passive act committed by persons over whom they exercised control, TWC vol. XI, at 1286; *see* also *Woechler case*, TWC vol. XII, at 113-118; *Isayama case*, LRTWC vol. V, at 60, *in* A. P. V. ROGERS, LAW ON THE BATTLEFIELD, 137 (1996).

[180] *United States: Department of Defence Report to Congress on the Conduct of the Persian Gulf War-Appendix on the Role of the Law of War* (10 April 1992), *reprinted* in 31 ILM 612 (1992). The Report further noted that "[c]riminal responsibility for violations of the laws of war rests with a commander, including the national leadership, if he (or she), [*inter alia*]: permits an offence to be committed, or knew or should have known of the offence(s), had the means to prevent or halt them, and failed to do all which he was capable of doing to prevent the offences or their recurrence", at 635-636.

[181] *Tokyo* Judgment, *in* Parks, *supra* note 1, at 66.

hand they must ensure that the camp constantly meets all safety and welfare requirements[183] and, on the other, they are under a duty to safeguard prisoners from the excesses of guards or other hostile elements threatening their physical and psychological integrity. To this effect, their authority and responsibility extends over the institution and its personnel.[184] In this sense, and in the case of camp commanders, subordination is irrelevant because their duty is owed to their prisoners. They must, therefore, prevent and punish any individuals abusing or threatening to abuse prisoner rights, even if under their national military hierarchy they possess no authority over them.

Camp commanders are under an obligation to do everything in their material power to discharge their duties. If in doing so, and subsequently reporting the situation, things fail to improve it is with the commander's superiors that liability lies.[185] Trial Chamber I in the *Celebici case* held camp commander Mucic liable for the acts of the camp guards, on the ground that although he was aware of substantial criminal activity against internees he never disciplined nor punished any of the culprits.[186]

---

[182] *Ibid.*

[183] After WW II the USA enacted Public Law No. 896 which provided for the payment of claims filed by any POW, on the basis of any violations committed by enemy governments with regard to their obligation to furnish prisoners with the quantity or quality of food to which as POWs they were entitled under the terms of the Geneva POW Convention (1929). *See* Lee, *supra* note 167, at 38

[184] *Celebici case* Judgment, *supra* note 66, at para. 763.

[185] *Trial of Emil Mueller*, 16 AJIL 628, 684 (1922).

[186] *Celebici case* Judgment, *supra* note 66, at paras. 772-775. Similarly, in the *Nikolic case* Decision, 108 ILR 21 (1998), para. 24, Trial Chamber I stated that a camp commander who does not prevent crimes against prisoners is liable under art. 7(3) ICTY Statute.

4.6 STANDARDS OF KNOWLEDGE APPLICABLE TO ARTICLE 7(3) ICTY STATUTE

4.6.1 *Actual knowledge*

The term "knowledge" denotes awareness as to the existence of a circumstance, or awareness of it occurring.[187] According to the *Celebici* Judgment, "actual knowledge" in article 7(3) ICTY Statute may be established through direct or circumstantial evidence where one's subordinates were committing or were about to commit any crimes under articles 2-5 of the ICTY Statute.[188] Actual knowledge may also be imputed to commanders where it is proven that they had "in [their] possession information of a nature, which at least, would put [them] on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by [their] subordinates".[189] When a commander personally witnesses an offence or is thereafter informed of it, that commander possesses actual knowledge as a result of direct evidence.[190] In the absence of direct evidence, it is possible to build a commander's constructive knowledge through circumstantial evidence. Circumstantial evidence indicates that on the basis of several indisputable, striking

---

[187] ICC Prep-Com (11-21 Feb. 1997), Decisions Taken by the Preparatory Committee, UN Doc. A/AC.249/1997/L.5 (12 March 1997), art. H.

[188] *Celebici case* Judgment, *supra* note 66, at para. 383.

[189] *Ibid.*

[190] *USA v. Toyoda* (Official Transcript), at 5005-5006.

and notorious features of criminal activity,[191] which were committed within a superior's command, a reasonable person may only arrive at the inference that the superior in question was fully aware of the existence of these crimes.[192]

Imputation or inference of knowledge through circumstantial evidence may be established in a number of ways. The *Celebici* Judgment, applying the criteria raised by the UN Commission of Experts, noted that commanders "must have known" about the criminal activities of their subordinates on account of "the number, type and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time".[193]

Thus, Karadzic's direct knowledge of UN peacekeepers taken as hostages was demonstrated through his statements whereby he indicated that those acts were carried out in compliance to his orders.[194] Constructive knowledge was confirmed where UN resolutions had been issued,[195] and evidence of presence in the vicinity of

---

[191] Or otherwise, reasoning by accumulating the many pieces of circumstantial evidence.

[192] *USA v. Toyoda*, at 5005-5006. The Toyoda tribunal made reference simply to "a great number of offences".

[193] *Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992)*, UN SCOR, Annex, UN Doc. S/1994/674 (27 May 1994), para. 58, at 17; *Celebici case* Judgment, *supra* note 66, at para. 386; *see* ICRC COMMENTARY, at 1013-1014.

[194] *Karadzic & Mladic case* Decision, 108 ILR 86 (1998), para. 72. In the case of General Mladic, the ICTY Trial Chamber could only deduce his knowledge through circumstantial evidence, at paras. 79, 80.

crime had been adduced.[196] In another case, constructive knowledge was also imputed on the basis of confirmed presence of both telephone and radio at the accused's headquarters shortly before an attack on a civilian compound.[197] In the *Celebici* Judgment, Trial Chamber I stated that camp commander Mucic was aware not only of his sub-commander's "penchant and proclivity for mistreating detainees", but also of the frequence and notoriety of crimes, that there is no way that he could not have known or heard about them.[198]

In conclusion, a superior's knowledge of subordinate criminality may be established through direct or circumstantial evidence. In the latter case inference of knowledge can be imputed to a superior where the existence of sufficient indication to that effect would have been apparent to a reasonable person.

4.6.2 *Presumption of knowledge*

It has been well established that the accumulation of every piece of circumstantial evidence facilitates the proof of existence of actual knowledge. Going one step further, could it be said that under international law, indicia of circumstantial evidence, such as those described in the Report of the UN

---

[195] *Ibid*, para. 72, in relation to Karadzic.

[196] *Ibid*, para. 80; the presence of the three accused in Vukovar Hospital when the victims were apprehended and even later at the scene of the alleged mass execution site, was held by Trial Chamber I as sufficient to infer the knowledge of the accused, *Vukovar Hospital case* Decision, 108 ILR 53 (1998), at paras. 13, 17.

[197] *Rajic case* Decision, 108 ILR 141 (1998), at para. 59.

Commission of Experts, creates a presumption of actual knowledge? There seems to be ample support for this presumption.

The tribunal in the *Yamashita case* emphasised that the widespread nature and notoriety of the crimes perpetrated by Yamashita's troops, rendered inescapable the conclusion that he "either knew or had the means of knowing of the widespread commission of atrocities by members and units of his command".[199] The United Nations War Crimes Commission, commenting on *Yamashita*, noted that the widespread occurrence of crimes, both in space and time, provided either *prima facie* evidence of actual knowledge or evidence of gross negligence.[200] Similarly, in the *Trial of Sakai*, the Chinese war crimes tribunal affirmed that on account of the notoriety of crimes committed by the accused's subordinates it would have been "inconceivable that he should not have been aware" of those crimes during his two year tenure in the region.[201] *Prima facie* evidence of knowledge, or a "must have known" standard was subsequently reaffirmed, not on the basis of notoriety and widespread occurrence as in *Yamashita*, but for failure to "require and obtain complete information".[202]

Furthermore, a number of post-WW II regulations formulated a standard of *prima facie* evidence, by imputing knowledge to persons belonging to a unit whose members were responsible for the perpetration of crimes. Regulation 8(ii) of the

---

[198] *Celebici case* Judgment, *supra* note 66, at para. 770.

[199] *Yamashita case*, LRTWC vol. IV, at 34, 94.

[200] *Blaskic case*, Response of the Prosecutor Regarding *mens rea* for command responsibility, *supra* note 61, at 20.

[201] Cited in *Yamashita case*, LRTWC, vol. IV, at 88.

British Royal Warrant, which it should be noted was cited with approval in the *Yamashita case*, provided that:

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime".[203]

Regulation 8(ii) was subsequently construed by the United Nations War Crimes Commission as referring to a matter of evidence and not of substantive law.[204] A similar provision, Canadian War Crimes Regulation 10(4), stated that:

"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".[205]

The effect of Regulation 10(4) was the shifting of the burden of proof to the accused, but the existence of this evidentiary burden was a matter for the courts to decide.[206] Arguably, the application of Regulation 10(4), in conjunction with the rulings of military tribunals, clearly established a presumption of knowledge where crimes under one's command are widespread and notorious, albeit a rebuttable one.[207]

---

[202] *Hostages case*, LRTWC vol. VIII, at 70-71.

[203] *Yamashita case*, LRTWC vol. IV, at 85.

[204] *Trial of Joseph Dramer and 44 Others* [*Belsen Trials*], LRTWC vol. II, at 141.

[205] LRTWC vol. IV, at 128.

[206] *Abbaye-Ardenne case*, LRTWC vol. IV, at 128-129.

[207] William H. Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 76 (1995).

Despite the weight of precedent, Trial Chamber I in the *Celebici case* refused to accept such a presumption of knowledge.[208] This presumption, it rebuffed, was obvious neither in the *Yamashita case*,[209] nor in the *High Command case*.[210] In the latter, even though that tribunal stated that the accused's knowledge "must be presumed" through numerous reports received at his headquarters,[211] Trial Chamber I rejected the argument that a presumption had been affirmed, holding that the *High Command* tribunal decided the question of knowledge on an individual basis by striking a balance between the magnitude of atrocities and the lack of communications.[212] It declared, thus, that in the absence of direct evidence, knowledge may be established through circumstantial evidence, and that no presumption of knowledge may be advanced.[213]

4.6.2.1 *Presumption of knowledge in Protocol I (1977)*

The imputed knowledge element in article 86 of Protocol I (1977) was the only portion of the article which was amended from the first draft and subsequently

---

[208] *Celebici case* Judgment, *supra* note 66, at para. 384.

[209] *Ibid.*

[210] *Ibid*, para. 385.

[211] *High Command case*, TWC vol. XI, at 462, 568.

[212] *Ibid*, at 547-549; *Celebici case* Judgment, *supra* note 66, at para. 385.

[213] *Celebici case* Judgment, *ibid*, para. 386.

revised five times before attaining its current form. The intention of the "should have known" standard in article 86(2) of Protocol I was highlighted by the Swedish representative at the Diplomatic Conference, who noted that the reason was a practical one.[214] He went on to say that in practice it would prove impossible to prove a commander's actual knowledge, and this would deprive the provision of its deterrent effects.[215] It would have been desirable, he concluded, if commanders were held liable for acts which, as commanders, they "should know are taking place", hence providing them with an inducement to ensure that they are kept fully informed at all time, thereby enabling them to prevent breaches.[216]

However, not all delegations were willing to accept the formulation of this "should have known" standard. The Dutch and Syrian delegations did not approve of this phrasing, deeming it to be unclear and obscure in application by national and international tribunals.[217] The Argentine representative, similarly, claimed that the "should have known" standard introduced a lack of clarity regarding the conduct of superiors, stating that such wording would be tantamount to reversing the burden of proof, which in itself was incompatible with the presumption of innocence common to Latin American legal systems.[218] The Japanese delegate found the "should have

---

[214] *Official Records, supra* note 59, CDDH/I/AR.64, at 310.

[215] *Ibid.*

[216] *Ibid.*

[217] *Official Records*, CDDH/I/AR.64, at 307.

[218] *Ibid.* He commented that a superior should always have knowledge of any breach committed by subordinates in order to prevent them.

known" standard unclear as to whether it expressly referred to liability arising from negligence of assigned duties, or not.[219]

This lack of clarity, formulated as duty to be aware of information and subsequently concluding from it, was finally dissolved through the successful inclusion of article 87, after a US proposal, which derives its meaning only when read in conjunction with article 86 of Protocol I. And while the ICRC commented that article 86 was concerned with delicate questions which had not been satisfactorily dealt with in international law,[220] its official commentary affirms that where breaches are of widespread and public notoriety, numerous and geographically and temporally spread, they "should be taken into consideration in reaching a presumption that the persons responsible could not be ignorant of them".[221] The same implicit presumption is traced in article 28(1)(a) of the ICC Rome Statute (1998), applicable where "the circumstances at the time" should have enabled the commander to know his/her troops' behaviour. The *Celebici* Judgment misinterpreted the object of the Draft Protocol debate, stating that the "should have known" standard was rejected.[222] As noted, the ICRC Commentary rebukes that argument,[223] as the Draft Protocol debates centred on the initial lack of clarity of the

---

[219] *Ibid.*

[220] *Official Records*, CDDH/I/AR.64, at 303.

[221] ICRC COMMENTARY, para. 3548, at 1015-1016, citing with approval the precedent established in Yamashita. During the ICC Prep-Com (11-21 Feb. 1997), "should have known" was linked to either "widespread commission of offences", "the circumstances at the time", or both, UN Doc. A/AC.249/1997/WG.2/CRP.3.

[222] *Celebici case* Judgment, *supra* note 66, at para. 391.

term and not on its substance. Hence, the delegates sought to induce greater command vigilance, clarifying the provision through the adoption of article 87.

In total, the express formulation of article 28(1)(a) of the ICC Rome Statute, the explicit commentary of the ICRC, both viewed in the light of a consensus-driven approach, in addition to the unambiguous post-WW II case law, confirm the existence under international law of a rebuttable presumption of knowledge on the basis of indisputable circumstances that commanders must have known of crimes committed by their subordinates.[224] Despite its obvious existence as a general principle of international criminal law,[225] on account of the present situation, it would be inappropriate to postulate this presumption as a rule of customary law.

4.6.3 *"Had reason to know" standard*

Understandably, the ICTY is eager to apply that part of international law which is beyond doubt part of customary law. The "should have known" standard does not appear in article 7(3) ICTY Statute, and would not therefore be applicable to the ICTY context[226]. Besides actual knowledge, article 7(3) stipulates liability for failure to act through information which a commander "had reason to know". This

---

[223] ICRC COMMENTARY, para. 3548, at 1015-1016.

[224] In *USA v. Kowalchuk* 773 F. 2d. 488 (3rd Cir. 1985), the accused, a member of the clerical staff of the German police in occupied Ukraine during WW II, was held liable under a presumption of "must have knowledge" with regard to cruel and inhumane German measures against civilians, *in* AM. INT'L. L. CAS. (2nd Ser. 1979-1986), at 482.

[225] CHERIF M. BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW, 372 (1992).

should be understood as having the same meaning with the phrase "had information enabling them to conclude", used in Protocol I.[227] This interpretation is furnished by the ILC's Commentary to the Draft Code of Crimes regarding draft article 6, which is itself taken from the Statutes of the two *ad hoc* international tribunals.[228]

"The reason to know" standard stipulates that a commander who is in possession of information of sufficient quantity and quality so as to be put on notice of subordinate criminal activity, cannot escape liability by declaring his ignorance, even if such ignorance is amply established. A superior must remain wilfully blind to criminal acts, nor ignore information concerning offences that have been committed or are about to be committed.[229] This standard, thus, creates an objective test of negligence on the basis of the reasonable person, and taking full account of the circumstances at the time.[230]

Absence of knowledge is not a defence if the superior was at fault in acquiring such knowledge.[231] Lack of knowledge is the result of criminal negligence,

---

[226] Although applicable in the ICC Rome Statute (1998), through art. 28(1)(a).

[227] Art. 86(2).

[228] Art. 7(3) ICTY Statute and art. 6(3) ICTR Statute, *Report of the ILC on the work of its forty-eighth session*, 6 May – 26 July 1996, GAOR 51st Sess., supp. No. 10, UN Doc. A/51/10 [ILC Draft Code Commentary], found also on the Internet at <http://www.un.org/law/ilc/chap02.htm>, at 38.

[229] *Celebici case* Judgment, *supra* note 66, at para. 387.

[230] *See Maryland v. Chapman* 101 F. Supp. 335 (D. Md. 1951), and *Commonwealth v. Welansky* 316 Mass. 383, 55 N.E 2d. 902 (1944), where it was held that knowing the facts that would cause a reasonable man to know the danger is equivalent to knowing the danger.

[231] *Celebici case* Judgment, *supra* note 66, at para. 388, citing *Tokyo Trials* (Official Transcripts), at 48,445, and *Hostages case*, TWC vol. XI, at 1230, 1271.

and does not constitute a defence.[232] The commander has reason to know if he exercises due diligence.[233] Evidently, the "reason to know" standard is a less stricter version of the "must have known" test, by avoiding to render the standard a rebuttable presumption. It too constitutes an objective test despite requiring observance of the circumstances available to the specific commander in question. And although it rejects a presumption of knowledge, it nonetheless refuses to accept pleas of ignorance, even when they are genuine. This inevitably raises a duty to know,[234] rebuttable only through evidence of due diligence, since it is a commander's duty to be apprised of events within his/her command.[235] While criminal negligence, defined as the inadvertent taking of an unjustifiable risk, establishes liability, it is more obvious when information is wantonly disregarded.[236]

Therefore, the applicable *mens rea* in the definition of article 7(3) ICTY Statute are direct intention, indirect intention (otherwise known as oblique intention or *dolus eventualis*) and gross negligence. Indirect intention, defined as foreseeing a certain unlawful consequence as possible and yet proceeding with some action towards it, is accepted in virtually every all legal systems. However, there is

---

[232] *The Government Commissioner of the General Tribunal for the French Zone of Occupation in Germany v. Directors of the Roechling Enterpises* [*Roechling case*], TWC vol. XIV, at 1106.

[233] *USA v. Toyoda* (Official Transcripts), at 5006, *in Celebici case* Judgment, para. 388.

[234] Recognised explicitly in *USA v. Pohl*, TWC vol. V, at 1055, and *Roechling case*, *supra* note 232, TWC vol. XIV (App. B), at 1097, 1106, *in Celebici case* Judgment, *ibid.*

[235] *Yamashita case*, LRTWC vol. IV, at 94-95; *Doctors' case*, LRTWC vol. VII, at 63, *Pohl case*, LRTWC vol. VII, at 63.

[236] *Masao case*, LRTWC vol. XI, at 60, and *Trial of Schonfeld and nine others*, LRTWC vol. XI, at 70.

divergence on whether foreseeability as to the consequence should be merely possible or virtually certain.[237] The proper approach would be the latter since it is the more reconciliatory view.[238] The degree of negligence for failure to act should only be "gross", as the accompanying liability is prescribed for the most serious of offences. While Trial Chamber I took cognisance of the standard contained in article 28(1)(a) of the ICC Statute, it pointed out that the test in article 86(2) of Protocol I was customary law at the time the offences were perpetrated, and were therefore applicable in the context of article 7(3) ICTY Statute. As to the discrepancy in the French and English versions of the text in article 86(2) of Protocol I, the difference is not considered to be one of substance, even though the former text embraces an objective and a subjective requirement, while the latter only an objective one.[239] In any event, according to the Vienna Convention on the Law of Treaties (1969),[240] priority must be given to the version that best reconciles the two divergent texts,

---

[237] For example, secs. 2 of the Austrian Penal Code and 78 of the Norwegian Military Penal Code require foresseability of the consequence to be possible and not just probable; on the other hand, arts. 25 of the Danish Military Discipline Act and 9 of the Dutch War Crimes Act (1952) equate *dolus eventualis* to direct intent; in English law, oblique intent is not considered to be a form of *mens rea* which independently establishes criminal liability. Instead, it may provide the jury with evidence of direct intent, *see Nedrick* [1986] 3 All ER 1; in a recent Belgian case, *Le Ministere Public v. Marchal Luc*, Military Court of Brussels, Judgment of 4 July 1996, a Belgian officer was charged under arts. 418-419 of the Penal Code for negligence and lack of foresight as a result of the murder of several Belgian soldiers serving in Rwanda. The accused was acquitted because he exercised due diligence and could not have foreseen the circumstances of the tragic event, *reported* in 35 REV. DR. MIL. DR. GUERRE 67 (1997).

[238] A Canadian proposal during the ICC Prep-Coms defined foreseeability in terms of "a substantial likelihood". UN Doc. A/AC.249/1 (7 May 1996), at 81.

[239] *Official Records*, CDDH/I/SR.61, paras. 56, 57, cited with approval *in Celebici case* Judgment, *supra* note 66, at para. 392.

[240] Opened for signature 23 May 1969, 1155 UNTS 331.

having regard to the purpose and object of the treaty.[241] Recklessness, defined as either giving no thought to the existence of a risk, or considering the risk but going ahead with it nonetheless, has not been applied as a *mens rea* element of the doctrine of command responsibility.

4.7 THE DUTY TO CONTROL

It has beyond doubt been established thus far that article 7(3) ICTY Statute reflects the customary duty to act, incumbent on military and civilian superiors, which comprises a duty to prevent and a duty to punish. The required *mens rea* for holding commanders liable for such omissions is one of the following: direct intention, indirect intention or gross negligence. This would falsely indicate that international law accepts that commanders are under no duty to either discover or predict the conduct of their troops, unless it is clear that crimes are, at least, likely to occur. This argument cannot be supported. The editor of the concluding Law Report of the Trials of War Criminals (1948) stated that there was some support for the view "that a commander has a duty, not only to prevent crimes of which he has knowledge or which seem to him likely to occur, *but also to take reasonable steps to discover the standard of conduct of his troops, and it may be that this view will gain*

---

[241] Art. 33(4).

ground".[242] Even further, it is well established that international law intends to bar not only actual breaches of its norms, but also potential breaches.[243]

While the duty to prevent commences at such time as a commander has reasonable grounds for suspecting that troops under his/her command are going to commit some crime, case law suggests that a commander cannot escape liability if he/she fails to control his/her troops before his/her duty to prevent commences. Thus, in the *Abbaye-Ardenne case*, the tribunal pointed out that commanders may be held accountable for the conduct of their troops where they fail to take into consideration the age, training, or experience of their men, through which they would be led to obvious conclusions.[244] Reference to a "duty to control" by the US Supreme Court, in relation to operations of a commander's troops in *re Yamashita*,[245] makes sense only if read in conjunction with the Judgment of the Military Commission, which based Yamashita's "failure to control" liability upon his lack of personal inspections and independent checks on his forces.[246] If this was not conceived as an established norm of law it must have seemed, at least, an inescapable argument to post-WW II tribunals. This inescapable conclusion is further evident in the Judgment delivered in

---

[242] LRTWC vol. XV, at 71 [emphasis added].

[243] *Soering v. UK*, Judgment of 7 July 1989, Eur.Ct.H.R., Ser. A, No. 161, para. 90, cited with approval *in Prosecutor v. Furundzija* [*Furundzija case*], Judgment of 10 December 1998, Case No. IT-95-17/1-T 10, *reprinted* in 38 ILM 57 (1999), para. 148, where in relation to the crime of torture, the Trial Chamber noted that states are under an obligation to "put in place all those measures that may pre-empt its perpetration".

[244] Green, *supra* note 6, at 337, excerpting an extract from the unpublished transcripts of the trial.

[245] *Re Yamashita* 327 US 1, 16 (1946).

[246] *Yamashita case*, LRTWC vol. IV, at 35.

the *Toyoda trial* which explicitly recognised that commanders have "[a] duty to control, to take necessary steps to prevent commission … of atrocities, and to punish offenders".[247] Remarkably, the tribunal elaborated the doctrine of command responsibility in terms of three distinct duties.

This, nonetheless, fails to answer why a commander should be held liable at a time when no crimes are occurring and no such reasonable indication exists. Surely some form of *mens rea* must be present in order to impute liability. Such a criminal law approach suggests, further complicating the issue, that it would be unreasonable to require *mens rea* where no *actus reus* is involved. For any liability to attach, the concept of command responsibility requires that crimes have occurred, or are likely to occur, an that no action is taken to prevent or punish them. While humanitarian law acts in advance, envisaging and expecting that commanders will uphold and respect its norms, international criminal law intervenes when breaches have occurred, and therefore attaches liability when crimes have taken place and not merely when behaviour is undesirable but not criminal. Thus Meyer, in the *Abbaye-Ardenne case*, was reckless as to the qualities of his men because he gave no thought to the risk involved in ignoring such a factor. This recklessness, *inter alia*, led to the commission of a number of breaches by his subordinates. Similarly, the Israeli Defence Minister was found to be reckless because he disregarded the danger of possible acts of vengeance by the Phalangists, failing to take this danger into account when he decided to have them enter the refugee camps.[248]

---

[247] *USA v. Toyoda* (Official Records of Trial), at 5006.

[248] Kahan Report, *supra* note 87, at 503.

International law requires commanders to discipline their troops, but attaches criminal liability for such failure only when subordinate behaviour is likely to produce crime, or where it has already occurred. Let us take a hypothetical case where a commander wilfully fails to discipline his subordinates, and despite the complete lack of discipline during that commander's tenure his troops never indulge in criminal activity. Upon the arrival of a new commander crimes immediately or shortly thereafter do take place, in all likelihood as a result of the former commander's deliberate inactivity. In such a case the Prosecuting authorities must look both at the new commander's possible liability as well as at the issue of causation. If the breaches would not have occurred but for the failure of the former commander to control and discipline his subordinates, then his liability should be provided for, unless the existence of a *novus actus interveniens* (intervening act) can be established. Presumably, the applicable *mens rea* should be that contained in the doctrine of command responsibility; that is, direct or indirect intention and gross negligence.

A duty to control subordinates has never expressly been framed as a legal duty. Whether as a theoretical model or an inevitable creation of the case law, it seeks to accommodate the need to enhance a duty to foresee by punishing either reckless behaviour, or all those cases where the intentional or negligent inactivity of the commander caused crimes to occur.

CHAPTER V

Individual Responsibility for violations of the laws and customs of war in internal armed conflicts

Introduction

Thus far we have examined the inter-relation between national and international law in defining and enforcing criminal rules. Until very recently, these rules were perceived as governing only situations of international armed conflicts. This Chapter, read in conjunction with Chapter I, traces the evolution of humanitarian law in the context of non-international armed conflicts, with the aim of determining the efficacy of humanitarian norms therein. This necessarily involves consideration of the mechanism known as "conflict classification". This determines when a mixed conflict has reached the international conflict threshold. As will be evident, it is a complex procedure whose utility is much doubted, especially since there is a growing consensus as to applicability of individual liability in all situations of internal conflict.

This Chapter argues that the concept of individual responsibility for offences committed in non-international armed conflicts has evolved through an instant customary process, from 1992 until 1998. The problem remains, however, especially since the signing of the Statute of the International Criminal Court, as to which parts of international humanitarian law apply to internal conflicts.

5. 1 CLASSIFICATION OF ARMED CONFLICTS

The existing distinction between international and internal armed conflicts is not a contemporary creation. The difference lies not in the nature of the actual hostilities themselves but, as Socrates asserted, in that people of the same land are naturally friends, their land being sick and torn by faction.[1] Socrates eloquently attempted the earliest recorded armed conflict classification:

> "I think the two words "war" and "civil strife" reflect a real difference between two types of dispute. And the two types I mean are the one internal and domestic, the other external and foreign; and we call a domestic dispute "civil strife" and an external one "war"".[2]

Until very recently international law had no place in domestic disputes. Traditional international law was conceived as governing solely inter-state relations, and therefore was seen as unfit to regulate internal affairs such as civil wars.[3] Two factors contributed to the alteration of this stance. Firstly, global political re-organisation after WW II, although avoiding a direct involvement, took a humanitarian interest in civil disputes, mainly through the constitutive organs of the United Nations.[4] At the same time, common article 3 of the Geneva Conventions

---

[1] PLATO, THE REPUBLIC (trans. by Desmond Lee) 198 (1987).

[2] *Ibid*; similarly, chp. 47, verse 20 of the Qur'An condemns civil wars. It reads: "Would you by any chance, if you assumed power cause havoc on earth and fight with your own flesh and blood? Those are the ones whom God has cursed", THE QUR'AN, THE NOBLE READING, (trans. By Al Hajj Ta'lim Ali) (1993).

[3] Charles N. Nier, *The Yugoslavia Civil War: An Analysis of the Applicability of the Laws of War Governing Non-international Armed Conflicts in the Modern World*, 10 DICK. J. INT'L. L. 323 (1992).

(1949) laid down the minimum humanitarian standards governing non-international conflicts. Secondly, the cold-war era brought about a sharp decline in inter-state conflict and a surge of civil wars.[5] This interplay of power politics between East and West led to widespread armed intervention on behalf of both insurgents and established governments in the majority of internal conflicts.[6]

Traditionally, international armed conflicts have been defined either as armed disputes between states or as declarations of armed force between states without an armed dispute ever taking place.[7] The distinguishing feature of civil conflicts is the element of domestic unrest.[8] This may take the form of either a low intensity unrest,[9]

---

[4] For example, S/RES/435 (9 Sep. 1978) regarding Namibia and GA Res. 44/22 (16 Nov. 1989); more significantly, on 3 Dec. 1992, the Security Council unanimously adopted Resolution 794, which not only welcomed a US offer to establish a humanitarian assistance operation in Somalia but, acting under Chapter VII of the UN Charter, authorised participating states "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations..."; similarly, on 5 April 1991, the Security Council had adopted Resolution 688 where, *inter alia*, it condemned the repression of the Iraqi civilian population which led to a massive flow of refugees across international frontiers. This, according to the Security Council, threatened international peace and security and demanded that Iraq end such repression, ordering it further to allow access to humanitarian organisations. On April 18 the Iraqi Foreign Minister signed a Memorandum of Understanding accepting these demands. *Reprinted* in 30 ILM 860 (1991); *see* also Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond*, 15 MICH. J. INT'L. L.

[5] *See* ADAM ROBERTS & BENEDICT KINGSBURY (eds.), UNITED NATIONS, DIVIDED WORLD, chp. 1 (1993).

[6] *See* Louise Doswald Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BYBIL 198-252 (1985).

[7] Art. 2(1) Geneva Conventions (1949). A military occupation would also have the same effect under art. 2(2). *See* JEAN S. PICTET (ed.), COMMENTARY OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 32-33 (1952).

[8] ANTHONY C. AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE, 81 (1993).

or a civil war. It is only the latter which constitutes an armed conflict upon which certain international humanitarian norms apply.[10] The "absolute" international norm of non-interference in domestic disputes[11] did eventually relax, especially in cases where either the dissident groups showed strength which warranted international attention, or widespread human rights abuses were occurring.

5.1.2 *Insurgency and Belligerency*

At its most basic, a civil war is an armed dispute waged by dissident group(s) against the authority of the ruling government, within a state, with the aim of establishing itself in the latter's place. Depending on the severity of the conflict, the organisation and level of international legitimacy enjoyed by the dissidents, two stages of civil conflict have traditionally been recognised: insurgency and belligerency.

Insurgency refers to a state of conflict where the dissident group, even though of considerable strength, does not receive international recognition as being a legal entity under international law.[12] Belligerency, on the other hand, exists when an

---

[9] *See* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION, 71-102 (1987) who defines the pathology of internal strife.

[10] MERON, *ibid*, at 46.

[11] Grounded also in art. 2(7) UN Charter.

[12] Although in *Kadic v. Karadzic*, 70 F. 3d 232, *cert. denied*, 64 USLW 3832 (18 June 1996), US Court of Appeals, 2d Cir. (13 Oct. 1995), *summarised by* Theodore Rosner *in* 90 AJIL 658 (1996),the

armed conflict is internationally recognised as taking place between two legal entities.[13] Having established a set of criteria for recognition of a belligerency,[14] it was well established by the end of the nineteenth century that it was looked upon as a question of fact rather than as one of law.[15] It essentially accorded its addressees a *de facto* state status, in relation to rights assumed during a war.[16] However, by the mid twentieth century it had become an obsolete doctrine.[17]

Humanitarian law is always *ipso facto* applicable in both a state of insurgency and belligerency, irrespective of foreign recognition afforded to the rebels. The doctrine of belligerency prompts one to conclude that an internal affair may warrant the attention of the international community with subsequent expansion of the application of international law, without necessarily altering the legal status of the conflict.

Court made a judicial determination of the status of the Bosnian Serbs, and while it is true that judicial decisions may reflect evidence of *opinio juris*, such recognition is only determined by the competent executive authorities.

[13] AREND & BECK, *supra* note 8, at 81-82.

[14] These were the existence of a generalised armed conflict, occupation and administration of a substantial portion of territory, organised armed forces under a responsible leadership and circumstances justifying recognition, HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, 176 (1948).

[15] Lindsay Moir, *The Historical Development of the Application of Humanitarian Law in Non-international Armed Conflicts to 1949*, 47 ICLQ 347 (1998).

[16] Nier, *supra* note 3, at 325.

5.1.3 *Common article 3 and Protocol II (1977)*

Common article 3 of the Geneva Conventions (1949) calls into application a set of humanitarian standards in all cases of armed conflicts "not of an international character".[18] The obligatory character of such limitations is in no way determined or judged in accordance with belligerency criteria. The norms prescribed constitute minimum considerations of humanity,[19] and are indicative of the immediate post-WW II ethos regarding warfare rules, despite their penetrative effect into domestic affairs.[20] Hence, any armed dispute reaching the threshold of an armed conflict automatically triggers the humanitarian provisions of common article 3.[21]

---

[17] Moir, *supra* note 15, at 352.

[18] These are:

(1) 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, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for.

[19] *Nicaragua v. USA*, Military and Paramilitary Activities in and against Nicaragua, (Merits), ICJ REP. para. 218 (1986); Affirmed in *Tadic case*, Decision on Interlocutory Appeal on Jurisdiction, 105 ILR 453 (1997), para. 98; similarly in *Tadic case*, Opinion and Judgment, (7 May 1997), para. 612.

[20] For the drafting history of common article 3, *see* David E. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE W. RES. J. INT'L. L. 37 (1979).

Calls for improving the scope of international humanitarian law in situations of non-international conflicts met with resistance, as a result of the reluctance of newly independent states to legitimise local insurgent movements. Thus, despite the internationalisation, through article 1(4) of Protocol I (1977), of armed conflicts aimed at both internal and external self-determination, the Organisation of African Unity (OAU) has made it adamantly clear that the principle of self-determination has no relevance in the post-colonial era.[22] In light of this approach, contemporary African conflicts cannot be classified as national liberation wars, that is, as international armed conflicts.

The application of common article 3 and Protocol II is excluded only in cases of internal disturbances and mere riots.[23] But even in such situations there is a growing movement to extend some sort of international protection.[24] Although the

---

[21] Despite the requirements discussed at the 1949 Diplomatic Conferences of Geneva and reiterated in the ICRC Commentary regarding the recognition of belligerency by the government under attack, the ICTR has noted that where an armed conflict is shown to exist, these requirements are deemed to have been satisfied, s*ee Prosecutor v. Akayesu*, Judgment of 2 Sep. 1998, Case No. ICTR-96-4-T, *reported* in 37 ILM 1399 (1998), [*Akayesu case*], at 121-22 (citation in this case refers to Internet paging at <http://www.un.org/ictr/english/judgements/akayesu.htm>).

[22] This attitude has been endorsed by the OAU in art. III of its Charter and its 1964 Resolution on Border Disputes, s*ee* John Baloro, *International Humanitarian Law and Situations of Internal Armed Conflict in Africa*, 4 AFR. J. INT'L. & COMP. L. 456, 458 (1992).

[23] Protocol II (1977), art. 1(2). Affirmed also in the context of the ICC Statute (1998), art. 8.

[24] The Turku Declaration (*reprinted in* 89 AJIL 215 (1995)) has culminated in the *Report of the Secretary -General submitted pursuant to Commission on Human Rights resolution 1997/21*, UN Doc. E/CN.4/1998/87 & Add. 1; *see* Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589 (1983); Asbjorn Eide, Allan Rosas & Theodor Meron, *Combating Lawlessness in Gray Zone Conflicts Through Minimum*

doctrine of belligerency is deemed to be abandoned, the requirements listed in article 1(1) of Protocol II and concerning the organisation of the rebels, territorial occupation and intensity of hostilities,[25] in fact reflect that very doctrine. Contemporary international law distinguishes, despite their similarity, between common article 3 conflicts and those under Protocol II. Establishing the application of one does not *ipso facto* establish the application of the other.[26]

5.1.4 *The effects of external intervention in internal conflicts*

Cold war rivalry was a struggle for global domination. Both covertly and overtly, the superpowers provided assistance of all kinds to groups or persons sympathetic to their causes. While logistic or political aid suggests the existence of some form of alliance, military intervention results logically in a change of the nature of an internal armed conflict. It constitutes an external element which penetrates a conflict's civil nature and renders it thereafter a "mixed conflict".

A question frequently raised, especially in the recent past, is which parts of international law are applicable in situations of "mixed conflicts". To answer this

---

Humanitarian Standards, 89 AJIL 215 (1995); David Petrasek, *Moving Forward on the Development of Minimum Humanitarian Standards*, 92 AJIL 557 (1998).

[25] The Trial Chamber in the *Akayesu case* Judgment deduced that all three of these requirements had been met by the Rwandan Patriotic Front (RPF) and therefore Protocol II (1977) would come into operation, *supra* note 21, at 123.

[26] *Akayesu case* Judgment, *ibid*, at 119.

question, however, one should first determine the nature of the conflict once mixed.[27] In 1971 and 1972 the ICRC submitted to the Conference of Government Experts for the Reaffirmation and Development of International Law proposals suggesting that upon foreign intervention the whole corpus of international humanitarian law apply.[28] Both proposals were finally rejected and the ICRC subsequently stopped pursuing the matter further. These proposals sought to solve the question of applicable law and thus failed to address the central question relating to the character of a mixed conflict.

The matter was eventually clarified through the *Nicaragua case* brought before the ICJ. There the World Court distinguished between the US's direct involvement against the Nicaraguan government and its intervention on behalf of the contra rebels. It found that the direct responsibility of the USA flowed from the mining of Nicaraguan ports and from attacks against other national installations.[29] The determining factor of direct involvement was found to lie in the status of the persons carrying out these activities,[30] i.e. that they were agents of the intervening

---

[27] Scholars early conceived this problem, especially after US participation in the Viet-Nam war; s*ee* John N. Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AJIL 1 (1967); Richard Falk, *International Law and the Role of the United States in the Viet-Nam war*, 75 YALE L. J. (1967).

[28] Hans. P. Gasser, *International Non-international Armed Conflicts. Case Studies of Afghanistan, Kampuchea and Lebanon*, 31 AM. UNIV. L. REV. 912 (1982).

[29] *Nicaragua case*, Merits, ICJ REP. (1986), *supra* note 19, para. 219.

[30] Although these persons were not US nationals, the ICJ held them to be acting on the instructions, supervision and logistical support of a specific US government agency, *ibid*, para. 80.

state. It was this direct involvement against the government of Nicaragua that constituted an international armed conflict.[31]

The crucial issue, however, centred around the question of the amount and intensity of external participation on behalf of either party to an internal conflict, in order to render it an international one. The test, a strict one as it turned out, was one of equating the aided group, for legal purposes, with an organ of the intervening state or as acting on its behalf.[32] The requirements for the existence of such an agency relationship, for the purposes of equating an insurgent force to an extension of a third state, were held to be: the giving of "direct and critical combat support",[33] and the reflection of insurgent operations to "strategy and tactics wholly devised" by the intervening state.[34] It is clear that alongside direct combat support, the dependence which results in the direction of the strategy and tactics of an insurgent force will be tantamount to "agency" where the intervening state has "made use of the potential for control inherent in that dependence".[35] It is, furthermore, imperative that the insurgent force be dependent *in toto* on the intervening state.[36] This strict test is more

---

[31] *Ibid*, para. 219.

[32] *Ibid*, para. 106.

[33] *Ibid*, para. 108.

[34] *Id.* Reisman has advocated the existence of an international conflict in all cases of armed intervention and engagement even in limited hostilities, which is further followed by an installation of a new compliant government, Michael W. Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AJIL 483 (1988).

[35] *Nicaragua case*, Merits, ICJ REP., para. 110 (1986).

[36] *Ibid*, para. 111.

likely to apply in cases of intervention on behalf of rebels, rather than in cases dealing with assistance to governments, since the latter, in principle at least, enjoy far greater resources than rebel groups.

It has been argued, however, that the *Nicaragua* principles refer to cases of state responsibility and therefore have no application in cases before the ICTY, which deals only with individual responsibility.[37] This line of thought, supported mainly by Meron, was affirmed subsequently in the *Celebici case*.[38] The confusion over the applicable legal test for the internationalisation of armed conflicts through external intervention is more evident in the judgments of the various ICTY Chambers. Hence, the Trial Chamber in the *Martic case* made no reference to the *Nicaragua* test. It simply stated that during the Zagreb attack by Croatian Serbs in May 1995 "the armed forces of the Federal Republic of Yugoslavia supported the self-proclaimed Republic of Serbian Krajina".[39] Another case of relaxation of the *Nicaragua* test took place in the *Vukovar Hospital case*, where the Chamber accepted that the JNA was acting in the interests of the Serbian Republic and thus asserted that the international character of the conflict between Croatia and FRY had been established.[40] This line of reasoning found support in the influential *Tadic* Appeals Decision on Jurisdiction,

---

[37] Theodor Meron, *Classification of Armed Conflicts in the Former Yugoslavia: Nicaragua's Fallout*, 92 AJIL 237 (1998).

[38] *Prosecutor v. Delalic, Mucic, Delic, Landzo* [*Celebici case*] Judgment of 16 Nov. 1998, Case No. IT-96-21-T, *reported* in 38 ILM 57 (1999), paras. 228, 230-33.

[39] *Prosecutor v. Martic*, Decision of Trial Chamber I, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (8 March 1996), *reported* in 108 ILR 39 (1998), Case No. IT-95-11-R61, para. 24.

[40] Para. 25.

where the ICTY Appeals Chamber stated that the conflict in Croatia had become international through the involvement of the JNA in the hostilities, noting that the clashes between the Croatian government and the Croatian Serbs were part of an internal conflict, "unless direct involvement of FRY could be proven".[41]

ICTY rulings concerning the nature of the Bosnian conflict have been inconsistent. In the *Karadzic and Mladic case*, again absent elaboration on the existence or not of an agency relationship, the Trial Chamber stated that the conflict had become international because the JNA permitted the establishment of the Bosnian Serb Army (VRS) and exercised control over it thereafter.[42]

Trial Chamber I in the *Tadic* Judgment, while accepting VRS and JNA co-operation in 1991 and 1992 "under the command and within the framework of the JNA",[43] asked itself whether through such establishment, staffing, equipping and maintenance of the VRS the FRY exercised effective control over the latter's operations after the JNA's withdrawal from Bosnia.[44] It found no proof of a link between the headquarters of the JNA/ FRY Army (VJ) and the VRS, which would have served as evidence of a single chain of command emanating from Belgrade.[45]

---

[41] *Tadic case*, Appeals Decision on Jurisdiction, 105 ILR 453 (1997), para. 72.

[42] *Karadzic & Mladic case*, Decision Review of the Indictment, 108 ILR 86 (1998), para. 88. The Court stated also that the presence of a Serb-dominated JNA in an independent Bosnia and its control of the self-proclaimed Serbian Republic of Bosnia (*Republika Srpska*) amounted to an intervention and thus an international armed conflict between FRY and BiH.

[43] *Tadic case*, Opinion and Judgment (7 May 1997), *reported* in 36 ILM 908 (1997), para. 593.

[44] *Ibid*, para. 595.

Neither did financing, according to the Court, prove control,[46] and although through the material and financial dependence of the VRS on the FRY the latter had the capacity to exercise control, there was insufficient evidence to show either use of the potential for control or the granting of effective control.[47] Although the Court viewed the officers of non-Bosnian Serb extraction as agents of FRY,[48] charged to commit specific acts, it held that without evidence that orders received from Belgrade circumvented or overrode the authority of the VRS Corps Commander, those acts cannot be said to have been carried out on behalf of FRY.[49] Therefore, in its view,

---

[45] *Ibid*, para. 598. Trial Chamber I discovered traces of co-ordination but stated that this was not the same as command and control. The fact that a daily communication link between the two headquarters was existent was treated by the Chamber as insignificant in relation to proving a single chain of command. Likewise, its argument followed, it could not be said that Bosnian Serb authorities were installed and controlled by Belgrade, since they had been popularly elected by the Bosnian Serb people, para. 599.

[46] It stated that financing in general "establishe[s] nothing more than the potential for control inherent in the relationship of dependency which such financing produce[s]", *ibid*, para. 602.

[47] *Ibid*, para. 605. On the contrary, the Trial Chamber pointed out that the VJ did not direct or "even felt the need to attempt to direct the actual military operations of the VRS, or to influence those operations beyond that which would have flowed naturally from the co-ordination of military objectives and activities of the VRS and VJ at the highest levels".

[48] *Ibid*, para. 601, citing art. 8 of the Draft Articles on State Responsibility which states that:
"The conduct of a person or groups of persons shall also be considered as an act of the state under international law if:
(a) it is established that such person or group of persons was in fact acting on behalf of that state; or
(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority."
Report of the ILC, 32nd Sess. (5 May-25 July 1980) GAOR 35th Sess., supp. No. 10, UN Doc. A/35/10, at 61; for a detailed commentary *see, Report of the ILC on the work of its Twenty-sixth session.* Y'BOOK ILC (1974), vol. II, part 1, at 283-86, UN Doc. A/96/10/Rev. 1.

the relationship of the Bosnian Serbs and FRY was merely one of a highly dependent alliance.[50] In her Dissenting Opinion in the same case Judge McDonald, taking the opposite view, argued that the *Nicaragua* test requires showing of effective control, only when no agency relationship has been found to impute liability to a state.[51]

In an earlier case, against *Rajic*, Trial Chamber II noted that the Appeals Chamber in the *Tadic* Jurisdiction case had "not set out the quantum of involvement by a third state that is needed to convert a domestic conflict into an international one".[52] Following the Prosecutor's submissions it pointed out the two independent avenues of internationalising an internal conflict: through either direct military intervention or establishment of an agency relationship.[53] The Court ruled that "significant and continuous military action" by Croatian armed forces on BiH

---

[49] *Ibid*, referring to the Separate Opinion of Judge Ago in the *Nicaragua case*, who noted: "Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the USA, would it be possible so to regard them". *Nicaragua case*, Separate Opinion of Judge Ago. Merits, ICJ REP. (1986), para. 16, *in Tadic case*, *ibid*, para. 601.

[50] *Tadic case*, *ibid*, para. 606.

[51] *Tadic case*, Opinion and Judgment (7 May 1997). Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, para. 34. She stated that the evidence clearly showed that the VRS was an FRY agent, while, in her opinion, it was also proven that effective control was in fact exercised. The application of the *Nicaragua* test and Trial Chamber's conclusion were heavily criticised by Meron, *Classification of the Yugoslav conflicts*, *supra* note 37, at 237.

[52] *Prosecutor v. Rajic*, Decision of Trial Chamber II, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence (13 Sep. 1996), *reported* in 108 ILR 141 (1998), Case No. IT-95-12-R61, para. 12.

[53] *Ibid*, para. 12.

territory were enough to render international a conflict between Croatia and BiH.[54] Basing its Judgment on article 8 of the Draft Articles on State Responsibility and the ICJ test,[55] Trial Chamber II concluded that Croatia exercised such "a high degree of control over both the military and political institutions of Bosnian Croats"[56] that allows them to be "regarded as agents of Croatia in respect of discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Conventions".[57]

After the *Celebici* Judgment which, agreeing with Meron and McDonald, ruled that the VRS were an organ of FRY,[58] the future of the *Nicaragua* test seems uncertain. This will depend on future ICTY case law until the amalgamation of a concrete precedent.

5.1.5 *The nature of the Bosnian conflict through decisions of national courts*

Two significant national judgments have considered the Bosnian conflicts as being of an international nature. In *Re G*, a Swiss military tribunal stated that Serbian

---

[54] *Ibid*, paras. 12, 21.

[55] It indicated, however, that it was not addressing the issue of agency from the same angle as the ICJ, but in order to establish subject-matter jurisdiction. For this reason it focused on "the general political and military control exercised by Croatia over the Bosnian Croats", *ibid*, para. 25.

[56] *Ibid*, para. 25.

[57] *Ibid*, para. 32.

[58] Para. 232.

assistance to the VRS, which in its opinion acted on its behalf, rendered that conflict international.[59] Similarly, in *Public Prosecutor v. Djajic*, the Supreme Court of Bavaria ruled that the control of the Bosnian Serb forces through troops, weapons, ammunitions and payment of salaries directly from Belgrade, was such that rendered the Muslim population of the town of Foca as being in the hands of FRY.[60]

In *Prosecutor v. Cancar*, before the Sarajevo Cantonal Court, it was pointed out that the conflict in Bosnia was international because of JNA/FRY aggression, which in turn, as noted by the Court, justified the application of Protocol I (1977).[61] Although these cases are merely indicative, it is evident that national courts are prepared to go beyond simply proving internationality through intervention, but attempt also to establish the existence, if any, of a possible agency relationship. It is a bold effort, because besides evidentiary difficulties, this task involves sensitive factual and political considerations before reaching a definite conclusion on the existence of an agency.

---

[59] *Public Prosecutor v. Grabec* [*Re G*], Military Tribunal, Division 1, Lausanne, Switzerland (18 April 1997), *summarised by* Andreas R. Ziegler *in* 92 AJIL 82 (1998). The tribunal's reasoning was further supported by the presence of Serb militia on the territory of BiH. This conclusion was based on the dissenting opinion of Judge McDonald.

[60] Case No. 20/96, Supreme Court of Bavaria, 3d Strafsenat, 23 May 1997, *summarised by* Christoph J. M. Safferling *in* 92 AJIL 530-31 (1998).

[61] Case No. K: 186/96, Cantonal Court of Sarajevo (19 Jan. 1998, unreported, on file with author). Oddly enough, despite the Court's finding of an international armed conflict it declared the applicability of common article 3.

5.1.6 *Classification and the role of the Security Council*

From an early stage in the Yugoslav hostilities, when the situation could clearly have been described as an internal conflict, the Security Council demonstrated its concern, affirming in resolution 713 that "the continuation of the situation constitute[d] a threat to international peace and security".[62] The same pattern of references was followed when the fighting spread to Bosnia.[63] The Security Council, rather than expressing itself directly on the nature of the conflicts, condemned intervention by FRY[64] and Croatia,[65] but Croatian interference was not seriously criticised due to strong US and German support. The Security Council acknowledged Croat influence over the Bosnian Croats, through UN reports, when it addressed them a statement calling upon them to exert their influence over the Bosnian Croat leadership in order to effectuate a cease-fire on BiH territory[66]. .

Nonetheless, by the time resolution 827, creating the ICTY, was passed the Security Council had never expressly determined what it deemed the nature of the

---

[62] S/RES/713 (25 Sep. 1991).

[63] S/RES/757 (30 May 1992); S/RES/770 (13 Aug. 1992); S/RES/827 (25 May 1993).

[64] S/RES/752 (15 May 1992); S/RES/787 (6 Nov. 1992).

[65] In S/RES/787 (6 Nov. 1992)

[66] UN Doc. S/25746. In another statement the Security Council condemned Croatia for deploying its army in BiH and demanded its immediate withdrawal. *See* UN Doc. S/PV 3333 and S/PRST/1994/6, *cited in* Christine Gray, *Bosnia and Herzegovina: Civil War or Inter-State Conflict ? Characterisation and Consequences*, 67 BYBIL 171 (1996).

conflict to be.[67] This involved delicate political determinations with repercussions for the ICTY's subject-matter jurisdiction and beyond.[68] It did indicate, however, that its call for suppressing criminal activity was based not only on the "grave breaches" provisions, but also on "other violations of international humanitarian law".[69] According to the Appeals Chamber in the *Tadic* Jurisdiction Decision, this demonstrated the Security Council's determination to include within the ambit of ICTY's jurisdiction crimes committed in non-international armed conflicts.[70]

Although it has been suggested that UN intervention in internal conflicts in the form of penetrative resolutions and authorisation of forceful measures may internationalise a conflict,[71] this represents a misconception of the elements that internationalise a conflict. UN intervention influences only a state's external affairs *vis-a-vis* the rest of the world, and does not affect the internal elements of armed conflicts.

---

[67] Trial Chamber I in the *Akayesu case* Judgment noted that although the Security Council never explicitly determined the Yugoslav nor the Rwandan conflicts, its reference to the four Geneva Conventions (1949) in the former case, and Protocol II (1977) in the latter, suggested that it viewed the Yugoslav conflict as being international and the Rwandan as internal, at 119.

[68] Gray, *supra* note 66, at 178-79, argues that while Security Council resolutions reflected a civil war and accused neither FRY nor Croatia of aggression or an armed attack, the General Assembly adopted a completely opposing policy. It accused FRY of aggressive acts and equated the Bosnian Serbs as its surrogates, thus coming closer to determining an inter-state conflict.

[69] *Tadic case*, Appeals Decision on Jurisdiction, 105 ILR 453 (1997), para. 74.

[70] *Ibid*, para. 74. This was also stressed in *Prosecutor v. Kanyabashi*, Decision on Jurisdiction (18 June 1997), Case No. ICTR-96-15-T, *summarised by* Virginia Morris, 92 AJIL 69 (1998).

[71] Jordan J. Paust, *Applicability of International Criminal Law to Events in the Former Yugoslavia*, 9 AM. UNIV. J. INT'L. L. & POL'Y 507 (1994).

5.1.7 *The contemporary relevance of the declaratory theory of recognition in conflict classification*

A crucial factor in complex cases of armed conflict classification lies in the exact determination of acquisition of statehood by break-away belligerent entities. In terms solely of application of humanitarian law, at least, state and judicial practice are in consistent harmony on this issue. The adoption of the declaratory theory of recognition for these purposes is a well established legal precedent, only in those situations, however, where self-determination is sought through a plebiscite, rather than forceful secession.[72]

The Badinter Commission, established by the EC to investigate and set out, *inter alia*, the legal requirements for EC recognition of the Yugoslav Republics,[73] upheld for these purposes the application of the declaratory theory of recognition[74], relying on the traditional requirements of article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.[75] This approach was followed by the majority of ICTY Chambers.[76] Trial Chamber I in the *Vukovar Hospital case*

---

[72] This is recognised in the context of the Helsinki Final Act; *reprinted* in 14 ILM (1975); *see* LAURA SILBER & ALAN LITTLE, THE DEATH OF YUGOSLAVIA 163 (Penguin 1995).

[73] Formally known as European Community Arbitration Commission on Yugoslavia, *see* Mathew C. R Craven, *The European Community Arbitration Commission for Yugoslavia*, 66 BYBIL 333 (1995).

[74] Badinter Opinion No. 1, *reprinted in* 31 ILM 1494 (1992); *see* Colin Warbrick, *Recognition of States, Part II*, 42 ICLQ 433-442 (1993).

[75] 165 LNTS 19.

accepted that Croatian statehood commenced soon after its declaration of independence took effect on 8 October 1991.[77] Similarly, Trial Chamber I in the *Tadic* Opinion and Judgment tacitly applied the declaratory theory by suggesting that from early 1992 an international armed conflict existed on the territory of BiH, thereby admitting its declared statehood.[78]

National courts, on the other hand, have been much more explicit. In *Re G* the tribunal claimed that an international armed conflict existed in the former Yugoslavia since 8 October 1991, the date Croat and Slovene declarations of independence took effect.[79] Similarly, in *Public Prosecutor v. Djajic*, the Supreme Court of Bavaria noted that an international armed conflict took place in Bosnia after its declaration of independence.[80]

5.1.8 *Appropriate choice of International Humanitarian Law in mixed conflicts*

The Yugoslav conflicts presented a unique challenge of assessing the application of humanitarian law in situations of mixed conflicts. The underlying

---

[76] Despite its progressive character in general terms, the *Celebici* Judgment tacitly applied the constitutive theory, supra note 38, para. 2.

[77] *Vukovar Hospital case*, Decision Review of the Indictment, 108 ILR 53 (1998), para. 25; similarly the case with Badinter Opinion No. 11, *reprinted* in 31 ILM 1587 (1992).

[78] Para. 569

[79] 92 AJIL 80 (1998).

[80] 92 AJIL 531 (1998).

question is whether to split the various conflicts and subsequently apply either the international law relating to international conflicts or to internal ones, or simply consider all the various conflicts as part of a wider international conflict. The latter, a simplifying solution, has been advanced by a number of jurists[81] and by several ICTY Chambers.[82] Although now, through the widespread acceptance that individuals are criminally liable under international law for crimes committed in non-international armed conflicts, the application of humanitarian law to those situations is not problematic, relevant issues of sovereignty are still largely unresolved. Mixed conflicts are exactly what the term connotes. While it is easy to integrate, for example, the actions of the Bosnian Serbs to those of the JNA, it stretches the imagination to find any connection in the ensuing conflict between the BiH government and the Bosnian Serbs with the belligerent aims of the Bosnian Croats. It is evident that an internal conflict retains its non-international character so long as it is not diluted by any international elements. Proponents of this approach have advanced the "doctrine of differentiation". According to this, the various relations between the parties require distinct solutions and thus internationalised civil wars

---

[81] James C. O'Brien, *The International Tribunal for Violations of International Law in the Former Yugoslavia*, 87 AJIL 645 (1993), while admitting the mixed character of the Yugoslav conflicts considers that they be treated as a single larger international one; Meron also favours this approach, *supra* note 37, at 238; Georges Abi-Saab effectively asserts the same when proposing the application of the "grave breaches" provisions to non-international armed conflicts, *in Tadic case* Appeals Decision on Jurisdiction, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, at 5-6; similarly, *Final Report of the Commission of Experts*, UN Doc. S/1994/674 (27 May 1994), para. 44.

[82] *Nikolic case*, Decision Review of the Indictment, 108 ILR 21 (1998), para. 30; *Vukovar Hospital case*, Decision Review of the Indictment, 108 ILR 53 (1998), para. 25; *Karadzic & Mladic case*, Decision Review of the Indictment, 108 ILR 86 (1998), para. 88.

must be fragmented to their international and non-international components.[83] This view was also explicitly adopted in the *Tadic* Appeals Decision on Jurisdiction,[84] and the *Celebici* Judgment.[85]

Earlier jurisprudence stemming from the *Nicaragua case* suggests that it is possible for international and non-international armed conflicts to co-exist alongside each other.[86] This is by no means an obsolete viewpoint in international law, but rather a product of logical and legal reasoning. Scholarly opinion, through the writings of Professor Meron, has been the primary influence of Judge McDonald's Dissenting Opinion in the *Tadic* Judgment of 7 May 1997 and also of the *Celebici* Judgment of 16 November 1998. It should be noted, however, that jurists do not make the law; hence, international judicial organs should exercise extreme caution when depending solely on this subsidiary source of international law in their judgments.

---

[83] Gasser, *supra* note 28, at 913.

[84] Para. 76.

[85] Para. 209; endorsed also by Professor Rowe, who rejected the UN Commission of Experts' view that the Yugoslav conflicts should be seen as one larger international conflict, Peter Rowe, *Liability for "War Crimes" During a Non-international Armed Conflict*, 34 REV. DR. MIL. DR. GUERRE 153 (1995).

[86] Para. 219.

5.2 INDIVIDUAL RESPONSIBILITY IN NON-INTERNATIONAL ARMED CONFLICTS

5.2.1 *Definition and Consequences*

International criminal law traditionally distinguishes between two kinds of individual behaviour; forbidden (or wrongful) and criminal. A wrongful act gives rise only to civil liability. Where an act is described as criminal, the violation contained therein is called an international crime,[87] thus making an offender liable under international law.

An act or omission becomes an international crime when it is so defined by a competent source of international law. The traditional sources of international law have failed to provide express affirmation of criminal liability in situations of internal armed conflicts. Neither common article 3 nor Protocol II (1977) contain express criminal provisions, and until recently there was no indication that such intent was even implied by contemporary construction at the international level.[88] The only

---

[87] For this reason it was believed that the different language of the law governing internal and international armed conflicts led to a belief that violations of the laws of war in a non-international armed conflict were wrongful but not criminal. Hence, the reservation of the term "war crimes" for international conflicts, Luc Reydams, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 4 EUR. J. CRIM. L. & CRIM. JUS. 20, 26 (1996).

[88] By 1994 there was no such consensus at the inter-state level. This view is common in the writings of scholars who explored the reach of the law at the time. *See* for example, Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 30 INT'L REV. RED CROSS 414 (1990); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFFAIRS 124, 128 (Summer 1993); *Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council*, UN Doc. S/1994/674, para. 52, which

instrument drafted explicitly with such intent was the ICC Rome Statute, which is not yet in force.[89] Similarly, there was never any evidence of a customary rule to that effect, especially since both common article 3 and Protocol II (1977) were drafted purposively; as minimum humanitarian norms, albeit with criminal ramifications which would be solely incumbent on the concerned state.[90]

Security Council resolutions under Chapter VII of the UN Charter, although not a source of international law, have penetrated the internal domain only after the traditional sources had proven inadequate.[91] The ICTY Statute is a result of such contemporary law-making. It prompted a series of judicial pronouncements by itself and other national courts, upholding personal criminal liability in non-international conflicts. This was accompanied by subsequent international acceptance of a legal belief regarding the existence of such a norm. In the absence of treaty or custom, the recognition of individual responsibility in internal conflicts is now a well established rule.[92]

---

reads: "It must be observed that the violations of the law or customs of war ... are offences when committed in international, but not in internal armed conflicts", *in* Julie V. Mayfield, *The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act*, 9 EMORY INT'L. L. REV. 573 (1995).)

[89] UN Doc. A/CONF.183/9 (17 July 1998), *reprinted* in 37 ILM 999 (1998).

[90] It is, however, true that since the Geneva Conventions (1949) do not provide as punishable only "grave breaches", any other violation of those Conventions, including common article 3, could be subject to criminal prosecution too, s*ee Celebici case* Judgment, *supra* note 38, para. 308.

[91] ROBERTS & KINGSBURY, *supra* note 5, at 91, acknowledge that in situations of internal armed conflicts the Security Council is treading in unchartered territory and so its only approach can only be an *ad hoc* one in accordance with the requirements of each specific case.

When we accept that specific behaviour becomes a crime under international law, that behaviour seizes thereafter to be a matter of purely domestic concern. Rendered an international crime, such violations fall under the prescriptive and judicial jurisdiction of other states. Absent treaty or custom, the jurisdictional basis of newly evolved international crimes becomes problematic. Is this issue to be left to the discretion of individual states or should the *aut dedere aut punire* principle be extended to cover also new types of crimes ?[93]

Finally, and if we accept the emergence of a norm on individual responsibility in internal conflicts, has this evolved on the basis of an expansive interpretation of existing treaties,[94] or has it emerged as a new distinct concept as a result of "popular demand"? These issues will be explored further in greater detail.

5.2.2 *The non-penal elements of international humanitarian law in internal conflicts*

5.2.2.1 *The Protection of Civilians*

---

[92] *See*, for example, S/RES/1198 (23 Sep. 1998) calling upon all parties to the Kosovo conflict to co-operate fully with the ICTY Prosecutor, and subsequent Press Statements from the ICTY Prosecutor Regarding the Kosovo Investigations, CC/PIU/379-E (20 Jan. 1999) and CC/PIU/378-E (16 Jan. 1999). This was further strongly reaffirmed with the indictment issued against the President of FRY and some of his ministers for atrocities perpetrated against Kosovar Albanians from March-June 1999.

[93] Currently, the *aut dedere aut punire* principle is observed only under treaty law, such as the Geneva Conventions (1949) and various multilateral anti-terrorism treaties, such as art. 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, *reprinted* in 10 ILM 133 (1971).

[94] Common article 3 and Protocol II (1977).

As seen earlier, traditional international law was conceived as a regulator merely of inter-state affairs. Evidently, any attempt at that stage of its development to impose international sanctions in situations of internal armed conflicts would have not met with a friendly response. If international humanitarian law was to provide any sort of alleviation of suffering to war victims, that had to be achieved via an independent body and only through the form of material aid or advice, and certainly without external imposition of rules or sanctions.

This role was assumed by the ICRC. During its 1912 Conference it proposed the adoption of a Draft Convention offering relief in civil wars. This proposal was, however, rejected. At the 10th ICRC Conference, nonetheless, in 1921, it managed to pass a resolution affirming the right of all civil war victims to humanitarian relief. This resolution found application in the 1921 civil war of Upper Silesia and the Spanish civil war.[95] Through the recognition of belligerency, international humanitarian law was customarily applied to internal conflicts.[96] However, the non-penal application of humanitarian law in internal conflicts was limited exclusively to the protection of civilians and those persons no longer taking part in hostilities.[97]

The bombing of civilians and civilian objects in the Spanish civil war was strongly condemned as contrary to international law by the international community

---

[95] Elder, *supra* note 20, at 41.

[96] Moir, *supra* note 15, at 352.

[97] The Appeals Chamber in the *Tadic* Appeals Jurisdiction Decision stated that since the Universal Declaration of Human Rights (UDHR) "a state-sovereignty-oriented approach has been gradually supplanted by a human-being -oriented approach", para. 97.

and the League of Nations.[98] After WW II and despite the adoption of the Geneva Conventions (1949), internal conflicts were less prone to humanitarian regulation than before. Nonetheless, during both the Congolese and Nigerian civil wars, the governments of both issued declarations of respect of international humanitarian law,[99] as did the FMLN guerrillas in El Salvador, despite their government's refusal to do the same.[100] In 1970 the General Assembly unanimously passed resolution 2675 by which it affirmed as a legally binding customary rule the protection of civilians and their property[101] from attack also in internal conflicts.[102] Of even more political and legal significance are recent Security Council Resolutions calling for compliance with humanitarian law by parties to civil wars,[103] followed by similar

---

[98] The League of Nations specifically recognised these principles unanimously again in the case of the Sino-Japanese war and adopted a relevant resolution. League of Nations, O.J. Spec. Supp. 183, at 135-36 (30 Oct. 1938) *in Tadic* Appeals Decision on Jurisdiction , 105 ILR 453 (1997), paras. 100-101.

[99] *Ibid, Tadic case*, paras. 105-6.

[100] *Ibid,* para. 107.

[101] Art. 19, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), 249 UNTS 240-88, was viewed by the Appeals Chamber as being declaratory of customary law, *ibid*, para. 98.

[102] *Tadic* Appeals Decision on Jurisdiction, para. 111. Resolution 2675, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028(1970), elaborated on the principles laid down in GA Res. 2444, UN GAOR, 23rd Sess, Supp., No. 18, UN Doc. A/7218 (1968) titled *Respect for Human Rights in Armed Conflict* which was described as declaratory of existing international law.

[103] *Ibid*, para. 114. Mainly, S/RES/788 (19 Nov. 1992)and S/RES/972 (13 Jan. 1995) with respect of the situation in Liberia; S/RES/794 (3 Dec. 1992) and S/RES/814 (26 March 1993) both regarding Somalia; S/RES/993 (12 May 1993) regarding Georgia.

declarations issued by the Council of the European Union.[104] The Appeals Chamber concluded that the absence of any reference by the Security Council and the Council of the European Union to common article 3 implied the existence of a body of principles wider than simply that provision,[105] extending also to certain norms contained in Protocol II (1977). These, according to the Chamber, are either "declaratory of existing rules or as having crystallised [into] emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles".[106]

5.2.2.2 *Means and Methods of warfare*

With the gradual evolution of international human rights law, increased attention was paid to humanising warfare on the battlefield also in civil wars. Since the end of WW II new weaponry had been introduced, whose use in international conflicts ran contrary to basic customary humanitarian principles such as the prohibition of unnecessary suffering and that relating to indiscriminate attacks. The extension of that protective body of law was missing from civil wars.

---

[104] With respect to Liberia, *see* 6 European Political Co-operation Documentation Bulletin, at 295 (1990) and regarding Chechnya, *see* Council of the European Union-General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 Jan. 1995) and again Press Release 4385/95 (Presse 24), at 1 (23 Jan. 1995) *in Tadic* Appeals Decision on Jurisdiction, paras. 113, 115.

[105] *Ibid*, para. 116.

[106] *Ibid*, para. 117. This latter proposition, the Appeals Chamber noted, was confirmed by the views expressed by a number of states.

The general principle of limitation with regard to the adoption of means designed to injure the enemy was adopted in article 5 of the Turku Declaration of Minimum Humanitarian Standards (1990), as revised in 1994.[107] Significantly, this Declaration was endorsed by the CSCE (now OSCE) in 1994,[108] and by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[109] It is indeed a sad and preposterous argument to prohibit the use of certain weapons in inter-state conflicts and allow them against a state's own nationals. The extension of the prohibitory rule applicable in international armed conflicts is beyond any doubt a binding norm in civil conflicts.[110] The use of chemical weapons, for example, by Iraq against Iraqi Kurds has been viewed by the international community as a serious breach of international law,[111] where the 1925 Geneva Gas Protocol[112] would be fully

---

[107] *Ibid*, para. 119, *reprinted* in *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session*, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, UN Doc. E/CN.4/1995/116 (1995) *in* 89 AJIL 215 (1995).

[108] *Tadic* Appeals Decision on Jurisdiction, para. 119. CSCE, Budapest Document 1994: *Towards Genuine Partnership in a New Era*, para. 34 (1994).

[109] *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session*, Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, UN Doc. E/CN.4/1995/L.33 (1995), *ibid*, para. 119.

[110] *Ibid*, *Tadic* Appeals Decision on Jurisdiction, paras. 120, 124.

[111] *Ibid*, paras. 120-24. The Council of the European Union made a Declaration to this effect on 7 September 1988. *See* 4 European Political Co-operation Documentation Bulletin (1988), at 12; also United States, Department of State Statement, Press Guidance (9 Sep. 1988); in addition, GA meetings, especially UN GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, UN Doc. A/C.1/43/PV.4 (1998), Statement of 18 Oct. 1988; similarly, the UN Special Rapporteur on Iraq stated that attacks against civilians with chemical weapons constituted a crime against humanity, committed in an internal conflict, UN Doc. E/CN.4/1994/58, paras. 112, 189; *see* Daniel O'Donnel, *Trends in the Application*

applicable. Similarly, article 1(1) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction,[113] makes the Convention applicable "under any circumstances". This has been interpreted as including internal conflicts.[114] The amended Protocol II to the 1980 Conventional Weapons Convention[115] expressly extends its scope in article 2 to non-international armed conflicts.

Such state practice, the Appeals Chamber in the *Tadic* Jurisdiction case concluded, shows that customary rules governing internal strife have developed to cover also the protection of civilians and their property as well as prescribe certain limitations on a number of means and methods of warfare.[116] The application of this

---

of International Humanitarian Law by United Nations Human Rights Mechanisms, 324 INT'L. REV RED CROSS 500 (1998).

[112] 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, XCIV LNTS (1929) 65-74, *signed* 17 June 1925.

[113] *Signed* 13 Jan. 1993, 32 ILM 800 (1993).

[114] *See* Theodor Meron, *International Criminalisation of Internal Atrocities*, 89 AJIL 575 (1995), reporting an analysis by the US State Department.

[115] Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices (*signed* 3 May 1996, 35 ILM 1206 (1996)) to 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 (*signed* 10 Oct. 1980, 19 ILM 1523-36 (1980)) *in* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 91 AJIL 329 (1997); In December 1997 the representatives of 121 states signed the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, *signed* 18 Dec. 1997, *reprinted* in 320 INT'L. REV. RED CROSS 563 (1997). *See* Stuart Maslen & Peter Herby, *An International Ban on Anti-Personnel Mines: History and Negotiation of the "Ottawa Treaty"*, 325 INT'L. REV. RED CROSS 693 (1998).

[116] *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), para. 127.

rule is apparent also in the context of the European Convention of Human Rights, where the Court pointed out that Turkey was not unrestricted in its choice of means in combating the Kurdish Workers' Party (PKK).[117] This is not to say, however, that international law governing international armed conflicts is applicable *ipso facto* in internal conflicts. Rather, "the essence" of those rules has become applicable to internal conflicts, and not the detailed regulation they contain.[118]

5.2.3 *When does international law establish criminal liability ?*

Arguably, neither common article 3 nor Protocol II (1977) have before 1994 been considered as instruments generating criminal liability. This was unequivocally stated by the Secretary-General in his Report on the ICTR,[119] and by the Appeals Chamber in the *Kanyabashi case*.[120] Is then this "sudden" change in interpretation contrary to established principles of international law ?

---

[117] Thus, the burning of civilian homes was an illegal interference with the right to respect of family lifes and homes, under art. 8 ECHR. *Akdivar and Others v. Turkey*, Judgment of 16 Sep. 1996, REP. JUDG. & DEC., 1996-IV, 23 EHRR 143 (1997), at para. 88. This war reiterated very recently in *Ergi v. Turkey*, Preliminary Objections Judgment of 28 July 1998, para. 79., regarding the lack of precautions in security operations, *in* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L. REV. RED CROSS 526 (1998).

[118] *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), para. 126.

[119] UN Doc. S/1995/134 (1995), para. 12.

[120] Decision on Jurisdiction (18 June 1997), *reported in* 92 AJIL 69 (1998).

The Nuremberg Tribunal, faced with criticism in respect of its Charter and other international *jus in bello* conventions forming the basis of its subject-matter jurisdiction, concluded that the absence of explicit treaty provisions regarding punishment did not in itself bar criminal liability. It noted, nonetheless, that for such an interpretation to be valid the existence of a clear and unequivocal recognition of rules of warfare in international law and state practice needed to be substantiated, evidenced through official statements and judicial pronouncements, thereby indicating an intention to criminalise a specific prohibition.[121] The Appeals Chamber in the *Tadic* Jurisdiction case although agreeing with this theory, remarkably stated that these criteria had been satisfied in relation to common article 3.[122] Therefore, it erroneously implied two unfounded assertions: that the Secretary-General, the ICTR and scholarly opinion were wrong regarding the criminal nature of common article 3. On this basis it concluded that the recognition of the criminal nature of common article 3 had already passed in the sphere of customary law.

An analogous problem was presented to the European Court of Justice (ECJ) in the seminal case of *Van Gend en Loos*.[123] There, the ECJ examined whether an EEC Treaty provision, in particular article 12, was capable of "direct application",

---

[121] 22 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG, 445, 467 (1950), cited with approval in the *Tadic* Appeals Decision on Jurisdiction, para. 128.

[122] *Tadic case*, *ibid*, para. 134; Trial Chamber I in the *Akayesu case* Judgment concurred with this ruling in the *Tadic* Appeals Jurisdiction Decision that common article 3 was also customarily criminal in nature, at 119; the same was expressed in *Tadic case*, Opinion and Judgment (7 May 1997), 36 ILM 908 (1997), para. 613.

[123] *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1; [1963] CMLR 105.

that is, capable of being relied on directly by the member states as well as by individuals before their national courts. This could only be done, according to the ECJ, if the provision in question was "clear, negative, unconditional and containing no reservation on the part of the member state...".[124] In the clear and obvious absence of any criminal liability creating-norm contained in common article 3 the ICTY could have very well relied on similar interpretative principles. Because, even if there was any reservation on the part of the contracting states to common article 3, these reservations had been lifted through the express or tacit acquiescence of states with the adoption of the ICTY and ICTR Statutes.

Custom is difficult to ascertain where the creation of a separate norm outside a multilateral treaty takes place. It would then appear that only non-parties can create such custom. The *Celebici* Judgment pointed out that this is the current position with the Geneva Conventions (1949) in relation to common article 3.[125] It is possible, however, for custom and treaty to exist along-side each other, both having the same substantive content.[126] It is true that common article 3 may now be read as generating individual responsibility because of a recent surge in similar provisions in national criminal laws and judgments.[127]

The better view in this respect has been provided by Meron. He writes that whether international law creates individual responsibility depends primarily upon

---

[124] [1963] ECR 13.

[125] Noting that this is a paradox identified by Robert R. Baxter, *Treaties and Custom*, 129 RECUEILS DES COURS 64 (1970), *in Celibici case* Judgment (16 Nov. 1998), para. 302.

[126] *Nicaragua case*, Merits, ICJ REP., paras. 172-190 (1986).

[127] *Celebici case* Judgment, para. 307.

the intended addressees of the prohibitory norm in question. If the prohibitory norm is addressed to individuals, then the factors through which it may establish criminal liability are: "whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community ...".[128] However, even if the obligation is addressed to governments, individuals may still be held responsible if it is clear under the convention that they must carry out the obligation.[129]

The concept of individual responsibility in non-international armed conflicts has evolved as a result of a consensual (whether tacit or express) expansive construction of existing international law provisions, namely common article 3 and parts of Protocol II (1977). Evidently, the criminal nature of a treaty or customary norm, as does the whole corpus of international law, depends on the prevailing political will and subsequent consensus adopted to interpret it. If the criminal aspects of common article 3 have since the ICTY become customary law, this would constitute a case of "instant custom", which would have to be assessed by ICTY Chambers on the basis of the current state of the law.[130] The possibility of such a development should be seen as highly probable.

---

[128] Meron, *International Criminalisation of Internal Atrocities*, 89 AJIL 562 (1995).

[129] *Ibid*, at 562.

[130] The *Celebici case* Judgment stated that the ICTY applies and identifies customary law independent of an express recognition in the Statute of the content of that custom, para. 310.

5.2.4 *Criminalisation of acts in internal conflicts at the inter-state level*

It is no secret that extraterritorial war crimes prosecutions by national judicial authorities are rare. To explain this, three reasons are usually given: lack of resources, evidentiary problems, and lack of political will.[131] Any arguments in favour of consistent state practice in this field are therefore severely undermined. Any efforts to criminalise international humanitarian law violations perpetrated in internal conflicts must commence by securing broad agreement at the international level. This avoids the possible friction caused by individual state practice, enforced through implementation of national measures.

At best, common article 3, as confirmed by the ICJ, reflected "elementary considerations of humanity".[132] Sadly, the process of holding individuals criminally liable under international law for violations of international humanitarian law committed in internal conflicts seems to have began as late as 1992 in El Salvador. There, the UN Truth Commission for El Salvador determined that serious violations of common article 3 and Protocol II (1977) had occurred since 1980, and by calling for the punishment of the perpetrators ascribed a criminal character to these legal provisions.[133]

The passing of resolutions 808 (1993)[134] and 827 (1993)[135] and the subsequent creation of the ICTY and ICTR by the Security Council triggered an

---

[131] *Ibid*, at 555-56.

[132] *Nicaragua case*, Merits, ICJ REP, para. 218 (1986).

[133] *Report of the Commission on the Truth for El Salvador*, UN Doc. S/25500 (1 April 1993).

unprecedented impetus to a then dormant international humanitarian law. The "untouchable" world of internal conflicts felt for the first time the punitive hand of the United Nations and that of the whole international community united. A very determined Security Council declared that "the king was naked" to an awaiting, mature and disgusted community of nations. Since then, an avalanche of developments took effect,[136] calling or materialsing criminal sanctions under international law in cases of violations of humanitarian law in internal conflicts, most notably the ICC Rome Statute (1998). This process was driven in large part by Security Council resolutions and statements, and secondly by specific clauses in international agreements and through the exercise of prescriptive and judicial jurisdiction by individual states.

5.2.5 *The role of the Security Council*

After receiving reports regarding the alarming situation in Rwanda,[137] the Security Council determined under Chapter VII of the UN Charter that the situation

---

[134] S/RES/808 (22 Feb. 1993).

[135] S/RES/827 (25 May 1993), *reprinted* in 32 ILM 1203 (1993).

[136] The Inter-American Commission on Human Rights (IACHR) applied international humanitarian law directly in the *Tablada case*, even though this is not provided for within its Statute or jurisdiction, *IACHR Report No. 55/97, Case No. 11. 137, Argentina*, OEA/Ser/L/V/II.97, Doc. 38 (30 Oct. 1997). *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada case*, 324 INT'L. REV. RED CROSS 505-507 (1998).

[137] *Preliminary Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994),* UN Doc. S/1994/1125; *Final Report of the Commission of Experts*, UN Doc.

constituted a threat to international peace and security. Subsequently, it passed resolution 955[138] and established the ICTR. The ICTR Statute extends the jurisdiction of that Tribunal, in article 4, to cover violations contained both in common article 3 and Protocol II (1977). Unlike the ICTY Statute, article 4 of the ICTR Statute expressly criminalises violations of these two instruments.

Earlier, resolutions 794[139] and 814[140] unanimously condemned violations of international humanitarian law in the Somalian civil strife and stated that the authors of such violations as well as those who ordered them would be held "individually responsible". During the Haitian crisis in 1994, the President of the Security Council emphatically pointed out that the Council would hold personally responsible persons who interfered with the delivery and distribution of humanitarian assistance, endangered the personal security of humanitarian aid personnel or those who although incumbent with these duties failed to do so.[141] The Haitian strife probably never reached the stage of a non-international armed conflict, and therefore these Statements are even more penetrative in internal affairs than what they first appear to be. Again, in response to violations in the Afghan civil war, the Security Council

---

S/1994/1405; *Reports of the Special Rapporteur for Rwanda of the UN Commission of Human Rights*, UN Doc. S/1994/1157, annexes I and II.

[138] S/RES/955 (8 Nov. 1994).

[139] S/RES/794 (3 Dec. 1992).

[140] S/RES/814 (26 March 1993). The Appeals Chamber in the *Tadic* Appeals Decision on Jurisdiction stated that such resolutions are of great relevance to the formation of *opinio juris*, para. 133.

[141] *Note By the President of the Security Council, "The Question Concerning Haiti"*, UN Doc. S/PRST/1994/2 (10 Jan. 1994); reiterated again in another *Statement By the President of the Security Council on the Haitian Question*, UN Doc. S/PRST/1994/32 (12 July 1994).

President stated that violations of international humanitarian law entail the individual responsibility of the perpetrators.[142] Before passing resolution 955, the Security Council President issued a statement by which it held individually responsible all persons who perpetrated, participated or instigated breaches of humanitarian law against the civilian population of Rwanda.[143]

The cornerstone for all these developments remains, however, the Security Council's unanimous vote on resolution 827 (1993) by which it approved the Report of the Secretary-General on the establishment of the ICTY.[144] The extensive debates prior to the adoption of that resolution, and the vehement US assertion that the term "laws and customs of war" in article 3 of the ICTY Statute covers also common article 3 and Protocol II (1977),[145] marked a turning point in the growth of international criminal law. At the same time, in relation to Yugoslavia, the European Union, prompted by Security Council involvement, affirmed, although not explicitly, the individual responsibility of persons violating international humanitarian law applicable to internal conflicts,[146] doing so explicitly in the case of Rwanda.[147]

---

[142] *Statement By the President of the Security Council, "The Situation in Afghanistan"*, UN Doc. S/PRST/1994/12 (23 March 1994).

[143] *Statement By the President of the Security Council, "The Situation Concerning Rwanda"*, UN Doc. S/PRST/1994/21 (30 April 1994).

[144] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 (1993).

[145] *Statement By Mrs. Albright (USA) during the 3217th Mtg. of the Security Council*, UN Doc. S/PV.3217 (25 May 1993), at 15.

Next we will consider the promulgation of rules of liability in the Statute of the International Criminal Court as well as other contemporary instruments. To fully understand the value of these developments, it is useful to first evaluate the newly established International Criminal Court.

5.2.4.2 *An Examination of the International Criminal Court*

Following the adoption of the 1948 UN Genocide Convention by the General Assembly through Resolution 260 (1948),[148] the Assembly also invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide...".[149] The ILC studied this question at its 1949 and 1950 sessions and concluded that a court of that nature was both desirable and possible.[150] Following the ILC's Report, the General Assembly established a Committee to prepare proposals relating to the establishment of such a court. The Committee first prepared

---

[146] *Joint Statement of 6 August 1992*. Official Journal of the European Communities (OJ), Commission, No. 7/8 (1992), at 108-109; *Joint Statement of 5 October 1992*, OJ No. 10 (1992), at 91; *Joint Statement of 2 Nov. 1992*, OJ No. 11 (1992), at 102.

[147] Council Decision 94/697/CFSP relating to the common position adopted under art. J.2 of the Treaty on European Union (TEU) *vis-a-vis* Rwanda, OJ, No. 10 (24 Oct. 1994), at 48.

[148] GA Res. 260 (II), adopted 9 Dec. 1948.

[149] This was in accordance with art. VI of the Genocide Convention, which provided for the establishment of an international penal tribunal with jurisdiction over acts of genocide.

a draft Statute in 1951[151] and a revised draft Statute in 1953,[152] but the General Assembly decided to postpone consideration of the matter, pending the adoption of a definition on aggression.

Despite periodical consideration of the issue since 1953, it was in December 1989, in response to a request by Trinidad and Tobago, that the General Assembly asked the ILC to resume work on the establishment of a Court with jurisdiction over drug-trafficking offences. However, after the shocking first reports from the conflicts in the former Yugoslavia and the establishment of the *ad hoc* tribunal and calls for action from the international community,[153] the ILC stepped up its work. This culminated in the production of a draft Statute in 1994.[154] In order to consider major substantive issues arising from the draft Statute, the General Assembly established the *Ad Hoc* Committee on the Establishment of an International Criminal Court, which met twice in 1995.[155] After consideration of the *Ad Hoc* Committee's work,

---

[150] *Report of the ILC on the Work of its Second Session* (5 June - 29 July 1950), UN GAOR, 5th Sess., Supp. No. 12, para. 140, UN Doc. A/1316 (1950).

[151] UN GAOR, 7th Sess., Supp. No. 11, UN Doc. A/2136 (1952).

[152] UN GAOR, 9th Sess., Supp. No. 12, UN Doc. A/2625 (1954).

[153] *See* in general, Christopher Blakesley, *The Need for an International Criminal Court in the New World Order*, 25 VANDERBILT J. INT'L. L. 151 (1992); Symposium, *Should There Be an International Tribunal for Crimes Against Humanity*, 6 PACE INT'L. L. REV. 87 (1994).

[154] The Draft Statute and ILC Commentary are contained in the *Report of the ILC on the work of its forty-sixth session from 2 May - 22 July 1994*, UN GAOR, 49 Sess., Supp. No. 10, UN Doc. A/49/10 (1994); *see* James Crawford, *The ILC's Draft Statute for an International Criminal Court*, 88 AJIL 140 (1994); James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AJIL 404 (1995).

the General Assembly created the Preparatory Committee (Prep-Com) on the Establishment of an International Criminal Court.[156] Its task was to prepare a generally acceptable draft Statute for submission to a Diplomatic Conference. After concluding its work the Preparatory Committee, which met six times since 1996,[157] asked the General Assembly to convene a Diplomatic Conference in order to finalise and adopt the Statute as a Treaty. This took place in July 1998 in Rome, where the International Criminal Court Statute was signed on 17 July 1998.[158]

Unlike the two *ad hoc* tribunals, the ICC is a permanent international criminal court established by treaty.[159] It has jurisdiction over four core crimes;[160] genocide,[161]

---

[155] *See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995). *See* also Virginia Morris & Christianne M. Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly*, 90 AJIL 491 (1996).

[156] GA Res. 50/46 (Dec. 11, 1995).

[157] For a thorough analysis of the climate and content of all six sessions, *see* Christopher K. Hall, *The First Two Sessions of the Preparatory Committee on the Establishment of an International Criminal Court*, 91 AJIL 177 (1997); *The Third and Fourth Sessions of the Preparatory Committee on the Establishment of an International Criminal Court*, 92 AJIL 124 (1998); *The Fifth Session of the Preparatory Committee on the Establishment of an International Criminal Court*, 92 AJIL 331 (1998); *The Sixth Session of the Preparatory Committee on the Establishment of an International Criminal Court*, 92 AJIL 548 (1998).

[158] *Reprinted* in 37 ILM 999 (1998). *See* CHERIF M. BASSIOUNI (eds.), THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (1998).

[159] Art. 1 ICC Statute.

[160] Art. 5.

[161] Art. 6.

crimes against humanity,[162] war crimes[163] and aggression. The crime of aggression will become justiciable before the Court once an accepted definition is agreed upon by the States parties[164] in accordance with articles 121 and 123 which regulate the amendment and reviewing mechanisms of the Court's Statute by the Assembly of States. The controversy over the crime of aggression was linked to the question of its consistency with the relevant provisions of the UN Charter and the relationship between the ICC and the Security Council in the determination of aggression.[165] While the definition of genocide does not depart from the 1948 Genocide Convention, the definition of "crimes against humanity" incorporates relevant developments from the ICTY. Hence, article 8(g) of the ICC Statute includes "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity".[166] This clearly draws on ICTY

---

[162] Art. 7.

[163] Art. 8.

[164] Art. 5(2).

[165] The EU, Germany and Russia favoured the inclusion of the crime of aggression, while the USA was critical, especially as regards its inter-relation with the function of the Security Council. A large number of delegations also expressed the view that since aggression was a crime committed only by states, a definition of individual liability would create unsurpassed political and legal problems. These considerations were based also on the fact that art. 6(a) of the IMT Statute concerning crimes against peace was not only controversial amongst the Allies at the time adopted, but its scope was severely limited by the IMT itself. Regarding possible disagreements between obligations imposed by the ICC Statute and the Security Council, these would be resolved in favour of the Security Council on the basis of arts. 25 and 103 of the UN Charter. *See Libya v. USA, Libya v. UK, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Interim Measures), Order of 14 April 1992, ICJ REP. para. 39, at 15 (1992).

findings on the various methods utilised to bring about "ethnic cleansing". Another innovation is the inclusion of "enforced disappearances"[167] and "apartheid".[168] The inclusion of the former is influenced by the universal condemnation of enforced disappearances in Latin America,[169] while the latter stems from the practice of racial segregation of prior South African regimes and the adoption of the 1973 Apartheid Convention.[170] In addition, the ambit of the definition of "persecution" is expanded, containing political, racial, national, ethnic, cultural, religious and gender groups or collectivities.[171]

The major accomplishment of article 8 is the inclusion, despite resistance, of a lengthy paragraph on war crimes committed during non-international armed conflicts.[172] As regards particular international armed conflict offences, it is worth mentioning the prohibition of the conscription of children under the age of fifteen

---

[166] The relevant ICTY provision, art. 5(g), merely states "rape" as one of its crimes against humanity components.

[167] Art. 7(1)(i).

[168] Art. 7(1)(j).

[169] *Velasquez Rodriguez case*, I/A Court H.R., Merits 29 July 1988, *reported* in 95 ILR 232 (1994); UN HRCee, *General Comment No. 20*, regarding art. 7 of the ICCPR, at para. 15, UN Doc. CCPR/C/21/Rev. 1/Add.3 (7 April 1992); *see* GA Res. 47/133 (18 Dec. 1992), GAOR, 47th sess., No. 49, UN Doc. A/47/49, at 207, entitled *Declaration on the Protection of all Persons from Enforced Disappearances*; *see* also *Report of the UN Working Group on Disappearances*, UN Doc. CN.4/1997/34.

[170] International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, *reprinted* in 13 ILM 50 (1974).

[171] Art. 7(1)(h).

[172] Art. 8(2)(c) and (e).

years,[173] rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation.[174] Some well established offences are regrettably missing, such as the unjustifiable delay in the repatriation of prisoners of war and civilians,[175] as well the launching of indiscriminate attacks against civilians or civilian objects.[176] No consensus was reached on the prohibition of nuclear weapons, nor biological or blinding laser weapons, nor anti-personnel mines.[177] Hence, the provision on the use of particularly cruel weapons was kept to a minimum.[178] Rather dissapointing, however, is the fact that, in accordance with article 124, a state may declare that it does not accept the jurisdiction of the Court for a period of seven years after the entry into force of the Statute, with respect to war crimes committed by its nationals or on its territory.

---

[173] Art. 8(2)(b)(xxvi).

[174] Art. 8(2)(b)(xxii).

[175] Arts. 14 and 20 of the Hague Regulations annexed to Hague Convention IV (1907); art. 118 of Geneva Convention III (1949); art. 85(4)(b) of Protocol I (1977).

[176] Only art. 8(2)(b)(iv) comes close, by prohibiting, *inter alia*, intentional attacks which knowingly will cause incidental loss of life or damage to property. In its *Advisory Opinion on the Legality of the Use or Threat of Use of Nuclear Weapons* of 8 July 1996 [*Nuclear Weapons Advisory Opinion*], para. 78, the ICJ stated that the prohibition of indiscriminate attacks against civilians and civilian objects was a cardinal principle of international humanitarian law, *reprinted* in 10 ILM 1151 (1971).

[177] The ICJ stated in its *Nuclear Weapons Advisory Opinion* that arts. 2(4), 51 and 42 of the UN Charter do not refer to specific weapons, noting that a weapon that is unlawful by treaty or custom does not become lawful by reason of it being used for a legitimate purpose under the Charter. It concluded that the illegality of a certain weapon, in accordance with state practice, depends not on an absence of authorisation, "but is formulated in terms of prohibition", paras. 39-44, 52.

Despite the absence of other crimes from the ICC Statute, the Court may in the future be empowered with jurisdiction over other international crimes adopted in later review conferences. The question of jurisdiction was agreed after intense debates. Upon becoming a party to the Statute a state automatically accepts the jurisdiction of the Court with respect to the four core crimes.[179] This applies to states parties on whose territory the offence was perpetrated or of which the accused is a national. Non states parties must make a declaration accepting the Court's jurisdiction, as a precondition to the exercise of jurisdiction.[180] A case thereafter may be brought before the Court in one of three ways: through referral by a state party,[181] referral by the Security Council acting under Chapter VII of the UN Charter,[182] or independently by the Prosecutor.[183]

While it is encouraging that the Prosecutor may also seek information from non-governmental organisations or "other reliable sources that he or she deems appropriate",[184] the Security Council acting under Chapter VII may request the Prosecutor to defer investigation or prosecution of a case to a later time.[185] Unlike the

---

[178] Art. 8(2)(b)(xx). *See* Marie-Claude Roberge, *The New International Criminal Court: A Preliminary Assessment*, 325 INT'L. REV. RED CROSS 671 (1998).

[179] Art. 12(1).

[180] Art. 12(2) and (3).

[181] Art. 13(a).

[182] Art. 13(b)

[183] Art. 13(c).

[184] Art. 15(2).

ICTY Statute,[186] the ICC does not enjoy primacy over national courts.[187] Exceptionally, it is empowered to do so only where a state is either shielding an accused,[188] or where it is genuinely unable to carry out an investigation or prosecution.[189] The former case echoes the *Lockerbie* affair and Libyan refusal to extradite the alleged offenders by contending that it had already executed its obligation to try them.[190] The latter case reflects the situation in Rwanda and Somalia, where state machinery is inexistent, and more recently Liberia and Sierra Leone. Regrettably, the proposal to give the Court automatic jurisdiction if the custodial state is bound by the Statute was not accepted.[191] In any case, the

---

[185] Art. 16. This is in accordance with arts. 12(1) and 25 of the UN Charter.

[186] Art. 9(2).

[187] Art. 17.

[188] Art. 17(1)(a)(b) and 2(a).

[189] Art. 17(1)(a)(b).

[190] Under art. 17(2)(c), if the national judicial proceedings were not conducted independently or impartially and are inconsistent with an intent to bring the person concerned to justice, the Court may exercise jurisdiction. In the *Lockerbie case*, Libya, in its Application Instituting Proceedings (3 March 1992), pointed to the ICJ that it had taken measures to establish its jurisdiction over the offences charged, in accordance with art. 5(2) of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *signed* 23 Sep. 1971, *reprinted* in 10 ILM 1151 (1971). Libya also claimed that it had discharged its duty to either prosecute or extradite under art. 7 of the Montreal Convention, by initiating criminal investigations, and was not therefore obliged to extradite the two suspects.

[191] *See* Roberge, *supra* note 178, at 675.

Prosecutor is further bound by the supervisory role played by the Pre-Trial Chamber, which must first authorise an investigation before commencement.[192]

Conscious of the problems faced by the ICTY in securing the presence of the accused and other relevant material evidence, the binding co-operation of states was exhaustively sought for the efficient functioning of the ICC. Article 86 lays down a general obligation to co-operate, extending not only to involved states *per se*, but also to any state which may be able to provide assistance of any kind.[193] A request for co-operation to states parties must be adhered to,[194] the same as a request to a non-party which has agreed to do so on an *ad hoc* basis with the Court.[195] The language used in article 87(6), relating to requests for information to NGOs, indicates a non-binding character.[196] The ICTY, as a matter of policy, has asked and gained the co-operation of NGOs in many crucial areas of its work, including the taking of depositions, affidavits and for the collection of other forms of evidence.[197] In cases of non-

---

[192] Arts. 18(2) and 53.

[193] This follows the Appeals Judgment in the *Blaskic case* on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 Oct. 1997) [*Blaskic Subpoena Judgment*], *reported* in 110 ILR 607 (1998), at para. 61, that art. 29 of the ICTY Statute constitutes an obligation *erga omnes*.

[194] Art. 87(1).

[195] Art. 87(5).

[196] In any event, NGOs are not parties to the Statute. In cases where the ICRC was summoned to present evidence or other testimony before the ICTY and ICTR, it has pointed out to both institutions that its impartial humanitarian function will be seriously hampered if it breached its pledge of confidentiality. *See* Jacques Stroun, *International Criminal Jurisdiction, International Humanitarian Law and Humanitarian Action*, 321 INT'L. REV. RED CROSS 623 (1997).

compliance the Court may refer the matter to the General Assembly of states parties and the Security Council.[198] While the Court may order either the surrender of persons before it,[199] or a warrant of arrest or a summons to appear,[200] it cannot order the disclosure of documentation containing national security information.[201] Nonetheless, while article 72 envisages a complex co-operation procedure which could lead to *ex parte* or *in camera* proceedings,[202] a loophole in 72(7)(b) authorises the Court "[i]n all other circumstances" to order disclosure.[203] The politically sensitive Appeals Chamber Decision on *Subpoenas Duces Tecum* in the *Blaskic case*, although noting that where a binding obligation for disclosure exists, such as in the case of article 29 of the ICTY Statute, states cannot invoke national security

---

[197] ICTY BULLETIN, *The ICTY and NGOs*, No. 4 15-III-1996.

[198] Art. 87(7). The President of the ICTY has on various occasions addressed complaints of non-compliance and non-cooperation, especially as regards Croatia and FRY, to the Security Council. *See* ICTY Press Releases, CC/PIO/075-E and CC/PIO/030-E of 6 Feb. 1996.

[199] Art. 89.

[200] Art. 58. Support for this provision may be found in the *Blaskic Subpoena Judgment*, 110 ILR 607 (1998), at para. 31, where it was stated that the obligation to co-operate with the ICTY, contained in art. 29 of its Statute, was mandatory because it was promulgated under Chapter VII of the UN Charter.

[201] Arts. 72 and 93(4) ICC Statute.

[202] Art. 72(4)(5)(6). *In camera* proceedings in the ICTY regarding sensitive information, such as satellite photographs of the Srebrenica mass grave sites which compared the ground before and after the burials, have helped unravel a number of cases. While such material may be excluded from evidence following official requests, states may allow for it to be made available. *See* ICTY BULLETIN, *Special: Exhumations*, No. 8 19-VII-1996.

[203] Art. 72(7)(b)(i).

interests,[204] there should exist possible modalities making allowances for national security concerns.[205] These allowances are apparent in the complex co-operation mechanism contained in article 72 of the ICC Statute.

Finally, it should be noted that a Trust Fund is established is established under article 79 for the benefit of victims and their families. A very encouraging development is also the prohibition of reservations.[206] This echoes a series of recent developments in human rights[207] and humanitarian instruments[208] where reservations where excluded. The ICC Statute will come into force after the sixtieth instrument of ratification has been deposited. It is disappointing, however, that the USA and six

---

[204] *Blaskic Subpoena Judgment*, paras. 61-66.

[205] *Ibid*, paras. 67-69.

[206] Art. 120

[207] The HRCee at its 52nd session adopted General Comment No. 24, entitled " *General Comment on Issues Relating to Reservations Made upon Ratification of Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*", UN Doc. CCPR/C/21/Rev.1/Add. 6 (2 Nov. 1994), 107 ILR 64 (1997). The Committee stated that because human rights treaties are not a web of inter-state exchanges of mutual obligations, reservations should not lead "to a perpetual non-attainment of international human rights standards", at paras. 17, 19; *see* Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 ICLQ 390 (1997).

[208] In its *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of Genocide*, the ICJ noted that the Convention was adopted for a humanitarian purpose, and hence states do not have any personal interests. This, according to the ICJ, rendered reservations a frustrating factor in the attainment of the Convention's objectives. ICJ REP. 15 (1951); much like the 1993 Chemical Weapons Convention, *reprinted* in 32 ILM 800 (1993), art. 19 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *signed* 18 Sep. 1997, *reprinted* in 320 INT'L. REV. RED CROSS 563 (1997) prohibits

other states voted against the Statute. The USA disagreed, *inter alia*, with the *proprio motu* power given to the Prosecutor and the referral capability of each member state, arguing instead for a pivotal role bestowed on the Security Council, fearing potential exposure of its military personnel and officials to the jurisdiction of the ICC.[209]

5.2.6 *Individual Responsibility in Contemporary Treaties*

The most significant extension of criminal sanctions to internal conflicts has been brought about through the broadening of the scope of international crimes.[210] In 1994 the ILC had decided to exclude from the jurisdiction of the proposed International Criminal Court Protocol II (1977), based on its criteria, according to which treaties which merely regulated or prohibited conduct instead of containing criminal enforcement provisions would be excluded.[211] This, however, left open the question of including a clause based on common article 3. The treatment of Protocol II (1977), as Meron notes, reflected merely the ILC's concerns with the prospects of

---

reservations; *see* Stuart Maslen & Peter Herby, *An International Ban on Anti-Personnel Mines: History and Negotiation of the "Ottowa Treaty"*, 325 INT'L. REV. RED CROSS 693 (1998).

[209] *See* Michael P. Scharf, *Rome Diplomatic Conference for an International Criminal Court*, ASIL Flash Insight (June 1998); John Washburn, *UN Preparatory Commission for the International Criminal Court to Begin in February*, ASIL Newsletter (Jan-Feb. 1999).

[210] For example, the application of the crime of genocide also in peace time, John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L. REV. RED CROSS 448 (1998).

[211] *Report of the ILC on the work of its forty-sixth session* (2 May-22 July 1994), UN Doc. A/49/10, at 78.

an ICC acceptance, rather than "with the broader question of criminality of offences committed in internal conflicts".[212] Such consensus for liability in internal conflicts had been secured by December 1997. The 5th session of the ICC Preparatory Conference considered that certain provisions from common article 3 and Protocol II (1977) should be viewed as entailing individual liability.[213] The relevant Protocol II (1977) articles were 13(2), 17(1)(2), but it was stated that other norms relating to international armed conflicts which were fundamental would be applicable in all cases of internal conflicts. There was also overwhelming support for including a separate prohibition for sexual related crimes which would also constitute a serious violation of common article 3. Furthermore, it was decided that a number of articles contained in Protocol II (1977) should not be included in the ICC Statute, such as arts. 4(2)(b) and 6(4), as well as other breaches committed in internal conflicts.

The ICC Rome Conference in 1998 produced a Statute[214] which vindicated the attempts of governmental and non-governmental institutions in criminalising atrocities committed in internal conflicts. Article 8(2)(c) and (e) included an extensive array of provisions contained in both common article 3 and Protocol II (1977) as well as in other international humanitarian law instruments, but this time applicable also in internal conflicts.[215] The ICC Statute, influenced by a variety of

---

[212] Meron, *International Criminalisation of Internal Atrocities*, 89 AJIL 560 (1995).

[213] Christopher K. Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AJIL 335-36 (1998).

[214] UN Doc. A/CONF.138/9, adopted 17 July 1998, *reprinted in* 37 ILM 998 (1998).

[215] Art. 8(2)(c). In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following

acts committed against 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:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

8(2)(d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

8(2)(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault;

(vii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilisation, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(viii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or

international instruments, is in itself an influence to both the ICTY and ICTR and to future developments in the field.

Finally, there is a growing trend to include provisions with criminal sanctions, in relation to internal conflicts, in very recent humanitarian instruments. This view was significantly echoed through a US proposal during the Conference for the Amendment of the Mines Protocol (Protocol II) of the 1980 Conventional Weapons Convention (CCW).[216] This proposal was inserted in the amended Mines Protocol as article 3 and it is applicable in situations where mines are used against civilians, in the form of reprisals, causing unnecessary suffering or where they have an indiscriminate effect in non-international armed conflicts under article 2.[217]

These Conventions indicate the international community's adamant conviction that contemporary international law recognises the concept of individual responsibility in internal conflicts in terms of both the protection of civilians and *hors de combat*, as well as in relation to methods and means employed in warfare.

---

hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

8(2)(f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is a protracted armed conflict between governmental authorities and organised armed groups or between such groups.

[216] Mathew J. Matheson, *The Revision of the Mines Protocol*, 91 AJIL 165 (1997).

[217] Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 91 AJIL 329, 334-36 (1997). Art. 14(2) requires parties to impose penal sanctions and apply the *aut dedere aut punire* principle, at 344.

5.2.7 *International Criminalisation at the Domestic Level*

Since the advent of the ICTY, and especially after the *Tadic* Appeals Decision on Jurisdiction, national courts have been less reluctant to prosecute alleged war criminals through the exercise of extraterritorial jurisdiction. This has inevitably coincided with state practice endorsing the ICTY's function. State adherence, particularly as regards the obligation to co-operate and offer judicial assistance,[218] as well as compliance with the supremacy of the ICTY,[219] has materialised either through *ad hoc* measures or with the passing of implementing legislation.

Furthermore, the progressive nature of military manuals has recently been carried over to national criminal legislation. In a few instances states have adopted laws prescribing judicial jurisdiction and outlawing violations committed in non-international conflicts. In the majority of cases, however, existing criminal legislation has been construed expansively, thereby fully adopting contemporary developments. This new construction has occurred at both the government and judicial level.

5.2.7.1 *Prescriptive State Practice*

Military Manuals constitute a source of internal military discipline, but do not serve as a legal basis of war crimes prosecutions, that is, their provisions are not justiciable before national military tribunals. They are indicative, nonetheless, of a set

---

[218] Art. 29 ICTY Statute.

[219] Art. 9(2) ICTY Statute.

of rules governing the conduct of national troops on the battlefield, and, therefore, of state practice in an area of law where such state practice is not easily discernible.[220]

While the 1958 UK Manual terms all violations of the laws of armed conflict which are not grave breaches as "war crimes",[221] leaving room for an expansive interpretation which may include common article 3-type violations, the 1956 US Manual explicitly criminalises common article 3 breaches.[222] The 1992 German Manual describes some violations of common article 3 and Protocol II (1977) as grave breaches.[223] Other Manuals either criminalise common article 3 or Protocol II (1977) violations without express reference to these instruments,[224] or argue against the exercise of universal jurisdiction but advocate recognition of their criminality.[225]

---

[220] In *USA v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 46 55 (1962), the Court of Military Appeals pointed out that US Field Manuals announce the policies of the United States in the exercise of its military functions and have the force of law, unless in derogation of the Constitution, statute or treaty.

[221] UK WAR OFFICE, MANUAL OF MILITARY LAW, Part III *The Law of War on Land*, para. 626 (1958).

[222] US DEP'T OF THE ARMY, *The Law of Land Warfare*, para. 1, Field Manual No. 27-10 (1956).

[223] FRG, FEDERAL MINISTRY OF DEFENCE, MANUAL OF HUMANITARIAN LAW IN ARMED CONFLICT, para. 1209 (1992); for a commentary on this Manual, *see* DIETER FLECK (ed.) HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS (1995).

[224] ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP9(Rev.A)/FM 1-10, para. 6.2.5 (1989) which makes references to Protocol II (1977) when providing examples of war crimes; similarly with the Italian MANUALE DI DIRITTO UMANITARIO, vol. I, *Usi e Conventioni di Guerra*, para. 85 (1991), *in* Thomas Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts*, 38 INT'L REV. RED CROSS 37 (1998).)

[225] CANADIAN FORCES, LAW OF ARMED CONFLICT MANUAL, Second Draft, paras. 1701-1704 (1988), *in* Graditzky, *ibid*, at 37 and Meron, *supra* note 113, 89 AJIL 565 (1995).

Let us now turn to developments accruing from Parliamentary legislation. The world's major powers, with the exception of the UK,[226] have expressly or implicitly extended their judicial jurisdiction by criminalising extraterritorial violations committed in internal armed conflicts. A 1997 amendment to the 1996 US War Crimes Act classifies common article 3 violations as "war crimes" while at the same time ascribing judicial jurisdiction to US courts.[227] Article 356 of the new Russian Penal Code of 1996 refers in general terms to conduct prohibited by agreements to which Russia is a party, without specification of conflict. This provision should be read in conjunction with article 12, which allows for extraterritorial judicial jurisdiction where the interests of Russia are affected when such jurisdiction is provided for in the relevant instrument.[228] The German Penal Code, on the other hand, makes no special provision for crimes committed in armed conflict at all. The only possibility of extending its application to acts committed abroad is where "they are made punishable by the terms of an international treaty binding on the FRG".[229]

---

[226] According to the 1957 Geneva Conventions Act, only "grave breaches" are punishable, thus violations of common article 3 are not enforceable. This situation will only be reversed if the Geneva Conventions Amendment Bill passes from Parliament. It will make the commission, aiding, abetting, or procuring of a breach of common article 3 an offence. Under the Bill, the issue of whether or not an armed conflict is of an international character shall be determined by a certificate signed by the Secretary of State.

[227] War Crimes Act of 1996, Public Law 104-192 (21 Aug. 1996). For the 1997 Amendment, *see* Congressional Record-Senate, Nov. 9, 1997, at S12362, and Congressional Record-House, Nov. 12, 1997, at H10728, *in* Graditzky, *supra* note 161., at 41-42.

[228] Criminal Code of the Russian Federation, No. 63-FZ of 13 June 1996, Garant-Service, 1996, *in* Graditzky, *supra* note 161, at 42-43.

[229] Penal Code of FRG, vol. 28, art. 6(9), *in* Graditzky, *ibid*, at 42.

The Scandinavian countries have extended the ambit of their criminal legislation to encompass violations of both common article 3 and Protocol II (1977), and in some cases article 4 of the Cultural Property Convention (1954).[230] The vast majority of European States have either, as in the case of Belgium,[231] passed laws specifically criminalising such acts or have incorporated them under the general term "war crimes".[232] This grants them latitude to exercise universal jurisdiction. This

---

[230] Hence, violations of common art. 3 and Protocol II (1977) are covered in the Norwegian Penal Code and in sec. 108 of the Military Penal Code. Violations of the laws and customs of war in internal conflicts which constitute war crimes are punishable under chp. 22 secs. 6 and 11 of the Swedish Penal Code (1986). Chp. 22 sec.3(2) grants Swedish courts universal jurisdiction over such acts. Violations, however, of art. 4 of the Cultural Property Convention (1954) are not intended to be punished as war crimes, but merely as criminal injuries under chp. 12 of the Swedish Penal Code; Chp. 1, art. 3(2.1) of the Finnish Penal Code encompasses violations committed in internal armed conflicts, while chp. 13, arts. 1 and 2 prescribe universal jurisdiction for such acts. This information is contained in the National Responses to Question No. 2 Relating to the applicability of national legislation and criminalisation of acts committed in internal armed conflicts, presented in XIV Athens Congress (10-15 May 1997).

[231] *Loi Relative a la repression des infractions graves aux Conventions de Geneve du 12 Aout 1949 et aux Protocoles I et II du 8 Juin 1977 (16 June 1993),* art. 1, paras. 1-20. Art. 7 provides for universal jurisdiction, *in* Graditzky, *supra* note 161, at 38; similarly, art. 108 of the 1927 Swiss Military Penal Code criminalises all violations provided for in international agreement, thus excluding customary law. Art. 2(9) grants military courts universal jurisdiction; the recent Spanish Penal Code, Law 10/1995 (23 Nov. 1995), included as protected persons in armed conflict, under art. 608, persons protected by virtue of Protocol II (1977). Universal jurisdiction is prescribed according to art. 23(4) of the *Ley Organica* (Law on Judiciary) No. 6/1985 (1 July 1985), *in* Graditzky, *supra* note 161, at 39-40.

[232] Art. 8 of the 1952 Dutch War Crimes Act, referring to violations of the laws and customs of war, is interpreted expansively so as to include violations of common article 3, Protocol II and art. 4 of the Cultural Property Convention (1954). Similarly, art. 1(3) of the 1991 Dutch Criminal Law in Wartime Act reiterates the rule found in art. 8 of the 1952 Act, while art. 12 of the 1991 Act grants universal jurisdiction. Under Austrian and Turkish law, violations of common article 3 and Protocol II (1977) are covered by the general provisions of the respective Penal Codes, in XIV Athens Congress, National Responses to Question No. 2.

jurisdiction, however, is not always a practical possibility. Prosecutions will still be dependent on availability of resources and sufficient political will.

On the other hand, countries like Ethiopia which have to face the reality of mass war crimes prosecutions have had to keep things simple. This country's Penal Code does not differentiate between international and internal armed conflicts, despite the appearance of some international elements in the Ethiopian strife during the reign of the Dergue regime.[233] Articles 281-295 adopt the major rules of the Geneva Conventions (1949), and it is this body of law that the Prosecution has been instructed to apply regardless of the classification of the conflict.[234]

These inevitable practicalities should not stand in the way of recognising the possible emergence of an instant customary rule, through this strong indication of state practice. Indeed, both the ICTY[235] and ICTR[236] have relied on this legislation in order to frame their assertion on international criminal liability of individuals for acts committed in internal conflicts.

---

[233] *See* Theodor S. Engelschion, *Ethiopia, War Crimes and Violations of Human Rights*, 34 REV. DR. MIL. DR. GUERRE 17 (1995); *see* also David Turns, *War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts*, 7 RADIC 804 (1995).

[234] *Ibid*, at 14. If a criminal act is not covered by the Penal Code the Prosecution may apply international law only to the extent it is compatible with the Penal Code.

[235] *Tadic* Appeals Decision on Jurisdiction, paras. 99, 132.

[236] *Akayesu case* Judgment, at 119.

5.2.7.2 *The results of national judicial activity*

Navigating national criminal law through a criminalisation process requires two essential ingredients to fully accomplish its purpose. In the case of "internal armed conflict violations", the granting of universal jurisdiction and its exercise by the judiciary are merely prerequisites for implementing such national laws. On the other hand, judicial assistance and inter-state co-operation, which are important tools for national prosecutions, are possible only if international sensitivity and national legislations coincide.

In the case of *Linder v. Calero Portocarrero*, concerning the murder of a US citizen, who was working for the Nicaraguan government, by contra rebels, the plaintiff's charges were based, *inter alia*, on a violation of common article 3. the plaintiff's charges were based, *inter alia*, on a violation of common article 3.[237] The Court found this provision inapplicable before US courts, even as an incidental issue in a civil suit claim. Since the creation of the ICTY, however, national courts have taken a more positive stance towards extraterritorial violations committed in non-international conflicts. Thus, five years after *Portocarrero*, the US Court of Appeal for the Second Circuit ruled that violations of common article 3 were "war crimes" under international law, hence generating the individual responsibility of the perpetrator.[238] The Court considered further that such violations were within the reach of the principle of universal jurisdiction. There was no question of course of the Appeals Court exercising criminal jurisdiction. Its consideration of the criminal

---

[237] 747 F. Supp. 1452 (S. D. Fla. 1990) *reported in* 4 AM. INT'L L. CAS (1990-91) 3rd Ser., at 323.

[238] *Kadic v. Karadzic*, Decision of 13 Oct. 1995, *reported in* 34 ILM 1601 (1995).

character of common article 3 was an incidental issue in a case brought and based on the 1789 Aliens Tort Claims Act.

National prosecutors will be far more inclined to initiate such criminal proceedings where the proximity of the *loci delicti commissi* and relevant evidence does not create substantial problems. This, in part, explains the post-*Tadic* zeal of European courts. However, even before *Tadic*, European courts did much to expand the reach of their national legislation, thus giving impetus to the judicial proceedings before the ICTY Chambers. Hence, the Eastern Division of the Danish High Court passed a guilty verdict upon a Bosnian Serb, on the basis of the "grave breaches" provisions of the Third and Fourth Geneva Conventions (1949) as well as on the general articles of the Danish Penal Code, without considering that the nature of the Bosnian conflict was a pertinent issue in the determination of the applicable law.[239] The same construction was applied as regards the criminal nature of the Geneva Conventions (1949) by the French Court of Cassation, which refused, nonetheless, to apply the provisions invoked because their wording rendered them inapplicable for direct adoption by French courts and also because there existed no implementing legislation.[240]

After the *Tadic* Appeals Decision on Jurisdiction, national courts began interpreting national legislation more expansively in light of these developments at the international level. A Swiss military tribunal recognised that article 109 of the

---

[239] *Prosecutor v. Saric*, Eastern Division of the Danish High Court, 3rd Chamber, Decision of 25 November 1994, *in* Graditzky, *supra* note 161, at 46; cited with approval in *Tadic* Appeals Decision on Jurisdiction, 105 ILR 453 (1997), para. 47.

[240] The case was initially brought before the High Court of Paris and thereafter to the Paris Court of Appeal. The latter's ruling was re-confirmed by the Criminal Division of the Court of Cassation, *Javor and Others v. X*, Decision of 26 March 1996, *in* Graditzky, *ibid*, at 46, 47.

Swiss Military Penal Code penalises violations of the laws and customs of war, as well as the Geneva Conventions (1949) and Protocols I and II (1977). While holding that article 108(1) extended the reach of article 109 only to international armed conflicts, it affirmed that article 108(2) implicitly provides that if a norm of humanitarian law, whether treaty or custom, is recognised by Switzerland, the courts of that country were bound to apply it even in cases of internal conflicts.[241] In another recent case, the Netherlands Supreme Court ruled that article 3 of the Criminal Law in Wartime Act of that country did not impose territorial or nationality restrictions in the exercise of criminal jurisdiction by Dutch courts.[242]

Bosnian courts have upheld charges against alleged perpetrators on the basis of both the BiH Criminal Code and international law, including common article 3.[243] However, not all courts, such as the Hungarian Constitutional Court, are willing to accept that common article 3 violations are "grave breaches",[244] despite the fact that government officials of that same state have declared before the Security Council on

---

[241] *Judge Advocate v. Grabec* [*Re G*], Military Tribunal, Division 1, Lausanne, Judgment of 18 April 1997, *summarised by* Andreas R. Ziegler *in* 92 AJIL 79 (1998).

[242] Netherlands Supreme Court, Decision of 11 Nov. 1997, *in* Graditzky, *op. cit.*, at 45.

[243] In *Prosecutor v. Cancar*, Judgment of 19 Jan. 1998, Cantonal Court of Sarajevo, Case No. K: 186/96, the accused was found guilty of a war crime against civilians under art. 142(1) of the BiH Criminal Code and under art. 3(1)(a) of IV Geneva Convention (1949), at 1, 10, 12 (copy on file with author); similarly, in *Prosecutor v. Pasalic*, the accused was held to be liable under the same provisions, at 1 (copy on file with author).

[244] Constitutional Court of the Republic of Hungary, Decision No. 53/1993 (X.13) AB and Decision No. 36/1996 (IX.4) AB, *in* Graditzky, *supra* note 161, at 47, 48.

a previous occasion that violations of internal conflicts are crimes under international law.[245]

5.2.8 *Jurisdiction*

Judicial jurisdiction is inextricably linked to the prescriptive jurisdiction of creating binding legislation criminalising violations committed in internal armed conflicts. National legislation can only be effective, as it has proved thus far, if it grants its national judiciary the power to enforce national law which stems from a wide international consensus. It is only logical that such national laws be enforced with universal jurisdiction, otherwise they remain mere academic texts. It is evident, therefore, that non-reinforcement of such statutes with universal jurisdiction would seriously hamper efforts to provide evidence of *opinio juris* of individual responsibility for violations of humanitarian law in internal armed conflicts. For this reason, each one of these Laws, Penal Codes or Statutes has either express or implied provision regarding universal jurisdiction.

Indeed, many scholars suggest that since there is an emerging rule of criminal liability for acts committed in internal armed conflicts, states may extend the reach of their judiciary to cover them.[246] The rationale behind the application of this jurisdictional principle should be, however, that which underlies in its recognition as

---

[245] *Statement by the Hungarian Representative during the 3217th Mtg. of the Security Council* on the adoption of S/RES/827/1993, UN Doc. S/PV. 3217 (25 May 1993), at 20.

[246] Reydams, *supra* note 87, at 27.

regards "war crimes" generally; its universal condemnation and concern because of their heinous character. Meron rightly suggests that regardless of a clear statement of *aut dedere aut punire*, universal jurisdiction is recognised where the right to try offences committed by aliens abroad is acknowledged.[247] In any case, states have always had the right under article 129(3) of Geneva III (1949) to suppress all acts contrary to the Convention, other than "grave breaches". Therefore, they were always entitled to exercise universal jurisdiction in order to punish common article 3 violations.[248]

The debate though is far from reaching a definite conclusion.[249] It is this author's opinion that only an amalgamation of national practice and ratification of the ICC's Statute in the near future will determine the fate of individual liability in internal armed conflicts.

---

[247] Meron, *International Criminalisation of Internal Atrocities*, 89 AJIL 570 (1995).

[248] Meron, *ibid*, at 569.

[249] *See* John Dugard, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L. REV. RED CROSS 452 (1998), who argues that there does not exist a rule of universal jurisdiction applicable to violations in internal conflicts.

CHAPTER VI

Conclusions

There is a lot to be said about the inconsistency in the evolution of humanitarian law, let alone any evidence of criminal aspects in its legal nature. Nonetheless, it is unambiguous that the development of criminal sanctions in the laws of war has been shaped by events; that is, armed conflicts have themselves necessitated a retributive approach in order to purge and avoid future violations. This approach was, however, selective, based on the each state's optional right to assume jurisdiction over war crimes. The concept "laws of war" was not borne as a result of international agreements, but rather as a matter, initially, of domestic custom, and later of domestic legislation. Whatever this law entailed it was enforced mainly when perpetrators where in the hands of their captors. Amalgamation of local custom and legislation in a consistent manner across the major global powers crystallised into a corpus of rules which prohibited certain conduct, but left judicial jurisdiction to the dictates of each nation. This continued even after the first international codifications of the laws of war in the mid-nineteenth century. Customary law is thought to have recognised the exercise of universal jurisdiction in relation to the prosecution of war crimes by 1907, but even express recognition would not have made any significant difference. The national executives and judiciaries were reluctant to interfere in foreign conflicts; international justice was not on the top of the agenda for the pre-United Nations world. Humanitarian law was developed, codified and enforced until 1907 in accordance with domestic law and practice.

Since the International Military Tribunal at Nuremberg, however, the criminalisation process of humanitarian law has ceased to originate from national legislation; instead, it is exercised collectively by the family of nations. Despite the adoption of the Geneva Conventions (1949) and a series of humanitarian treaties thereafter, enforcement Nuremberg-style did not re-materialise, even though numerous large-scale atrocities surfaced. It was not until the end of the Cold-War that the Security Council managed to escape from its long hibernation and adopt Resolution 808 (1993), establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). Developments followed in avalanche motion, with the creation of the Rwanda Tribunal (ICTR), the recognition of individual liability for crimes committed in internal conflicts by both the ICTY/ICTR and national courts, culminating in the much awaited agreement on the International Criminal Court (ICC) in 1998. The dormant wheels of the criminal enforcement of international humanitarian law were finally put in action, at both the inter-state and domestic levels.

Despite the elaborate *jus in bello* conventions, adjudication of such international offences poses legal difficulties, not least because international law does not address in the same detail the various forms of participation in crime. Hence, the international judge looks first to general principles of international criminal law and if that is of no avail to general principles of criminal law. The underlying notion of interpretation demands that even general principles of criminal law be construed in accordance with international law.

International law recognises both conspiracy and planning to commit offences, not as separate offences, but as forms of participation in crime. The latter may involve only one person, while the former at least two. Notwithstanding the

Nuremberg legacy, contemporary instruments, such as the Draft Code of Crimes, ICTY/ICTR Statutes, and ICC Statute, require execution of the plan or conspiracy for liability to follow. However, as this appears to be simply a policy choice, it would not be contrary to the principle of legality if national laws demanded otherwise, or relevant international provisions were amended in the future.

International humanitarian law recognises the seminal role of military or civilian superiors in its implementation and enforcement. In this respect it views ordering the commission of violations as a cardinal offence for which no national law can validly extinguish the liability of the superior. This study has shown that since an order is a compelling demand for an act or omission directed to known or unknown addressees, an order may take also the form of a binding legislative act or even a binding judicial decision.

Incitement, is viewed in common law jurisdictions as a particular form of criminal participation, while in the majority of civil law systems it is considered as a separate offence. Incitement, as a form of participation in genocide, has been well defined under international law, in contrast to other modes of criminal participation. Although during the Genocide Convention (1948) deliberations it was decided that unsuccessful incitement would not be punished, the Rwandan massacres prompted the ICTR to conclude that the drafters of that Convention agreed not to specifically mention that such a form of incitement could be punished. This is only possible if there is a direct causal link between the incitement and the crime committed.

Hate propaganda, as an indirect form of incitement was excluded from the ambit of the Genocide Convention. The contemporary trend in the field of human rights law is to provide a balance between free expression and the rights of individuals to equality, physical integrity and dignity. The various legal systems

contain two kinds of incitement provisions; those which set out responsibility for different forms of accessory participation and require the actual commission of the offence, and those which contain a separate provision which provides that incitement is punishable even if the offence incited does not occur. In order to substantiate a propaganda charge under article 7(1) ICTY Statute, it is necessary to prove that the accused performed an instigating act, intending to induce or encourage another to commit an offence, which in fact was committed or at least occurred. On the other hand, in the case of genocide, it is not necessary to prove that the incited genocidal acts occurred.

The elements of complicitous behaviour in the various legal systems are as varied as the systems themselves. In fact, general principles of criminal law may only be deduced from some commonalities in the *actus reus*. It is accepted, however, that the accomplice is, or should be, as liable as the principal. Complicity requires facilitation or encouragement which directly contributes to the commission of the crime. Inactive presence at the scene of the crime that does not contribute to causing the offence is not considered as complicity. The assistance or encouragement must have a substantial effect on the act of the principal and the accused's participation therein must be substantial and not marginal. In every case, it must be proven that the accused was aware that through his actions he was assisting or encouraging the principal.

The doctrine of command responsibility is a much debated one. It denotes the liability of a superior for crimes committed by subordinates, where there was no action to prevent or punish these crimes. This entails the existence of a superior-subordinate relationship and a chain of command. This may be established either *de jure* or *de facto*. *De facto* command is discerned through the concept of control,

which implies that a superior is one who has the capacity and power to force a certain act. Such control must be effective, otherwise a superior cannot be expected to intervene. Evidence of *de facto* command may be sought through powers of influence, a capacity to issue orders, and from evidence accruing from the distribution of tasks within a given organisational structure. Although the *Celebici* Judgement pointed out that powers of influence do not provide evidence of *de facto* command, it is submitted that being feared and enforcing such might over others must suffice to render an overwhelming individual a superior for the purposes of command responsibility. It is not the capacity to influence that may generate command liability, but the establishment or not of an effective subordination as a result of the exercise of one's influence.

Operational commanders have in some cases been held liable under stringent standards of command liability. Contemporary law seems to strike a reasonable balance between knowledge of subordinate offences and a material capacity to act. Operational commanders must, in this case, establish an adequate reporting system in order to acquaint themselves with events. On the other hand, executive or operational commanders are liable in terms of the territory they control, and not on the basis of a superior-subordinate relationship. This, the only case of strict command liability, should pay due heed to the defence of "due diligence", advanced by domestic courts and applied to cases of strict liability. The liability of persons entrusted with the care of prisoners should be judged in accordance with their duty towards prisoners and their ability to act. Hence, members of government incumbent with prisoner affairs bear responsibility as the ultimate guarantor of prisoner rights if they know or should have demanded information and did nothing about it. On the other hand, the liability

of camp commanders is based on direct subordination of camp guards and ability to prevent or repress abuses.

Knowledge of the crimes of subordinates is another complicated issue. Knowledge may be actual, established through direct or circumstantial evidence. Imputation or inference of circumstantial evidence can be established from a variety of sources, such as the number, type and scope of illegal acts, notoriety, location of the commander, etc., thus showing that the commander "must have known" about the criminal activity of his/her subordinates. The *Celebici* Judgement ruled that such indicia do not provide a rebuttable presumption of knowledge under customary international law, but are merely elements of circumstantial evidence. Even if this ruling is correct, it is submitted that there does exist a long precedent in both postWW II case law and Protocol I (1977) confirming the recognition under international law of a rebuttable presumption of knowledge where crimes are widespread and notorious and the commander is within a reasonable proximity to the events. At the same time, it is well accepted that commanders cannot escape liability where they were either in possession of sufficient information as to be put on notice of crimes, or simply refused to acknowledge such information. This negligent behaviour constitutes the "reason to know" test.

The duty to act is successfully discharged when a superior either prevents subordinate crimes or subsequently punishes the perpetrators. This study has identified the need for another duty incumbent upon superiors, and has named it "duty to control". This duty is based on the premise that a superior's intentional or grossly negligent inertia resulting in a lack of training or discipline can cause criminal activity at some future point during which time the incompetent superior has left that unit. In such a case, the eruption of criminal activity would less likely be

caused solely by the new commander, hence an examination of factual causation should assist in assessing liability.

The vast majority of contemporary conflicts are non-international ones. Until recently the application of humanitarian law in internal conflicts was perceived as being a matter of domestic enforcement, but at the same time of world-wide concern. Post cold-war international relations seem to show that even enforcement is a matter of international concern. Although, under this cloud, the classification of armed conflicts seems to be all the more irrelevant for the purposes of humanitarian law, logic seems to suggest that no two conflicts, even within the same state, are identical; hence, each conflict must be classified on its own merits. To this end, international practice points consistently towards the utilisation of the declaratory theory of recognition, but there does exist considerable variation on whether the test of foreign intervention, as defined in the *Nicaragua case*, should cover also classification of conflicts for the purposes of assessing individual responsibility.

Finally, this study has shown that since 1993 and the establishment of the ICTY by the Security Council, the antiquated notion of non-individual liability for crimes committed in non-intemational armed conflicts has vanished. This has occurred within a period of five years, with the aid of national and international prosecutions and the adoption of progressive legislation, culminating in the adoption of the ICC Statute in 1998. Virtually all agree that this represents not only good law, but solid law founded on the will of the majority of states, expressing a deep desire to combat future disasters such as those of Bosnia and Rwanda. The evolution of this principle in this study has been identified as an instant customary rule.

It is hoped that the exposition of these principles will progress in further elaboration in the future. As the title of this thesis denotes, it only identifies

principles of criminal liability in international humanitarian law. At the same time, it proposes the application of certain theoretical legal models and in some cases it supports the further enforcement of others. If contemporary international law truly strives for both peace and justice, the principles elaborated in this study envisage to serve the latter, while at the same time promoting the former.

BIBLIOGRAPHY

Books

ANDREOPOULOS, GEORGE J. (ed.), GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS, University of Pennsylvania Press, Philadelphia (1994)

ARENDT, ANTHONY C. & BECK, ROBERT J., INTERNATIONAL LAW AND THE USE OF FORCE, Routledge, London (1993)

ASHWORTH, ANDREW, PRINCIPLES OF CRIMINAL LAW, Clarendon, Oxford (1995)

BASSIOUNI, CHERIF M, INTERNATIONAL CRIMINAL LAW (2 vols.), Transnational Publishers, Dobbs Ferry, New York, (1986)

BASSIOUNI, CHERIF M., PAUST, JORDAN J., WILLIAMS, SHARON A., SCHARF, MICHAEL P., GURULE, JIMMY, ZAGARIS, BRUCE, INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS, Carolina Academic Press, North Carolina (1996)

BASSIOUNI, CHERIF M., CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW, Nijhoff, Dordrecht (1992)

BASSIOUNI, CHERIF M. (eds.), THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY, Transnational Publishers, New York (1998)

BEST, GEOFFREY, WAR AND LAW SINCE 1945, Clarendon Press, Oxford (1997)

BROWNLIE, IAN, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, Oxford University Press, Oxford (5th ed. 1998)

CHENG, BIN, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Stevens and Sons, London (1953)

CLAUSEWITZ, CARL, ON WAR (Vom Kriege, 1832) Penguin, London (1992)

CRAIG, PAUL, & DE BURCA, GRAINNE, EU LAW, TEXTS CASES AND MATERIALS, Oxford University Press, Oxford (2nd ed. 1998)

DINSTEIN, YORAM, THE DEFENCE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW, Sijthoff, Leyden (1965)

FLECK, DIETER (ed.), HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT, Oxford University Press, Oxford (1995)

FOREY, ALAN, THE MILITARY ORDERS: FROM THE TWELFTH TO THE EARLY FOURTEENTH CENTURY, University of Toronto Press, Buffalo (1992)

GARLAN, MICHAEL, WARFARE IN THE ANCIENT WORLD, Chatto & Windus, London (1975)

GINSBURGS, GEORGE & KUDRIAVTSEV, VLADIMIR N., THE NUREMBERG TRIAL IN INTERNATIONAL LAW, Nijhoff, Dordrecht (1990)

GREEN, LESLIE C., ESSAYS ON THE MODERN LAWS OF WAR, Transnational Publishers, Dobbs Ferry, New York (1984)

GREEN, LESLIE C., THE CONTEMPORARY LAW OF ARMED CONFLICT, Manchester University Press, Manchester (1993)

GREEN, LESLIE C., SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW, Sijthoff, Leyden (1976)

HAMPSON, FRANCOISE, INCITEMENT IN THE MEDIA: RESPONSIBILITY OF AND FOR THE MEDIA IN THE CONFLICTS IN THE FORMER YUGOSLAVIA, University of Essex, (1993)

HIGGINS, ROSALYN, PROBLEMS AND PROCESS. INTERNATIONAL LAW AND HOW WE USE IT, Clarendon, Oxford (1994)

JONES, JOHN, R. W., THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Transnational Publishers, New York (1998)

KEEN, MICHAEL H, THE LAWS OF WAR IN THE LATE MIDDLE AGES, Routledge, London(1965)

LAUTERPACHT, HERSCH, RECOGNITION IN INTERNATIONAL LAW, Cambridge University Press, Cambridge (1948)

McCORMACK, TIMOTHY L. H & SIMPSON, GERRY J., THE LAW OF WAR CRIMES. NATIONAL AND INTERNATIONAL APPROACHES, Sijthoff, Leyden (1997)

McCOUBREY, HILAIRE, INTERNATIONAL HUMANITARIAN LAW, Dartmouth Publishing Co., Hants (1990)

McCOUBREY, HILAIRE & WHITE, NIGEL D., THE BLUE HELMETS: LEGAL REGULATION OF PEACEKEEPING FORCES, Dartmouth Press, London (1996)

McDOUGAL, MYRES & FELICIANO, FIORENTINO P., THE INTERNATIONAL LAW OF WAR. TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER, Yale University Press, New Haven (1961)

McGOLDRICK, DOMINIC, THE HUMAN RIGHTS COMMITTEE, Clarendon Press, Oxford (1991)

MERON, THEODOR, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION, Clarendon Press, Oxford (1987)

MORRIS, VIRGINIA & SCHARF, MICHAEL P., AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, Martinus Nijhoff, Leyden (1995)

MULLINS, CHRISTOPHER, THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY, Witherby, London (1921)

NATO HANDBOOK, Nato Publications, Brussels (1995)

PHILLIPSON, CHRISTOPHER, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, Macmillan, London (1911)

PLATO, THE REPUBLIC (trans. by Desmond Lee), Penguin, London (1987)

PICTET, JEAN S. (ed.), COMMENTARY OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949, International Committee of the Red Cross, Geneva (1952)

PRITCHARD, JOHN R., & MAGBANUA Z. SONIA (eds.), THE TOKYO WAR CRIMES TRIAL, 22 vols. Garland, New York (1981-1988)

QARADAWI, YUSUF AL, THE LAWFUL AND THE PROHIBITED IN ISLAM, American Trust Publications, Indiana (1994)

RATNER, STEVEN R. & ABRAMS, JASON S., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, Oxford University Press, Oxford (1997)

ROBERTS, ADAM & KINGSBURY, BENEDICT (eds.), UNITED NATIONS: DIVIDED WORLD, Clarendon Press, Oxford (1993)

ROGERS, A. P. V., LAW ON THE BATTLEFIELD, Manchester University Press, Manchester (1996)

ROHT-ARRIAZA, NAOMI (eds.), IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, Oxford University Press, New York (1995)

ROLING, BERNHARDT & RUTER, CHRISTOPHER F., (eds.), THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, APA-University Press Amsterdam BV, Amsterdam (1977).

ROUKOUNAS, EMMANUEL, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, Estia Publishers, Athens (Greek text, 1995)

SAGE, MICHAEL, WARFARE IN ANCIENT GREECE, Routledge, London (1996)

SCHACHTER, OSCAR & JOYNER, CHRISTOPHER (eds.), UNITED NATIONS LEGAL ORDER (2 vols.), Cambridge University Press, Cambridge (1995)

SCHWARZENBERGER, GEORGE, INTERNATIONAL LAW AS APPLIED IN INTERNATIONAL COURTS AND TRIBUNALS (Armed Conflicts), Stevens & Sons Ltd., London (1968)

SHAW, MALCOLM, INTERNATIONAL LAW, Cambridge University Press, Cambridge (4th ed. 1997)

SILBER, LAURA & LITTLE, ALAN, THE DEATH OF YUGOSLAVIA, Penguin, London (1995)

SMITH, JOHN C. & HOGAN, BRIAN, CRIMINAL LAW, Butterworths, London, 8th ed. (1996)

SUNGA, LYAL S., INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS, Martinus Nijhoff, Leyden (1992)

THE QURAN, THE NOBLE READING (Trans. by Al Hajj Ta'Lim Ali), Mother Mosque Foundation Publications, Iowa, (1993)

UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING OPERATIONS, United Nations editions, (2nd. 1990)

WHITE, NIGEL D., KEEPING THE PEACE, Manchester University Press, Manchester (2nd ed. 1997)

WILSON, WILLIAM, CRIMINAL LAW, Longman, London (1998)

Articles

Akehurst, Michael, *Custom as a Source of International Law*, 47 BYBIL 1 (1974-75)

Akhavan, Payam, *The Yugoslav Tribunal at Crossroads: The Dayton Peace Agreement and Beyond*, 18 HRQ 259 (1996)

Akhavan, Payam, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AJIL 501 (1996)

Aldrich, George H., *Jurisdiction of the International Criminal Tribunal for the Fortner Yugoslavia*, 90 AJIL 64 (1996)

Ambos, Kai, *Impunity and International Law*, 18 HRLJ 1 (1997)

Aptel, Cecile, *The International Criminal Tribunal for Rwanda*, 321 INT'L. REV. RED CROSS 675 (1997).

Aubert, Maurice, *The Question of Superior Orders and the Responsibility of Commanding Officers in Protocol I of the Geneva Conventions of 1949*, 262 INT'L. REV. RED CROSS 105 (1988)

Baloro, John, *International Humanitarian Law and Situations of Internal Armed Conflict in Africa*, 4 AFR. J. INT'L. & COMP. L. 449 (1992)

Bantekas, Ilias, *The Contemporary Law of Superior Responsibility*, 93 AJIL 573 (1999)

Bantekas, Ilias, *Prefecture of Voiotia v. Federal Republic of Germany*, 92 AJIL 764 (1998)

Bantekas, Ilias, *The Pinochet Affair in International Law*, forthcoming 52 RHDI (1999)

Bantekas, Ilias, *Study on the Minimum Rules of Conduct in Cross-Examination to be Applied by the International Criminal Tribunal for the Former Yugoslavia*, 50 RHDI 205 (1997)

Bantekas, Ilias, *Internationally Organised Elections and Communications: The Realityfor Bosnia's Failed Repatriation,* 10 INT'L. J. REF. L. 199 (1998)

Bantekas, Ilias, *Repatriation as a Human Right Under International Law and the Case of Bosnia*, 7 J. INT'L. L. & PRAC. 53 (1998)

Barker, Craig J., *State Immunity, Diplomatic Immunity and Act of State: A Triple Protection Against Legal Action?,* 47 ICLQ 950 (1998)

Barry, Charles, *Forces in Theory and Practice*, 38 SURVIVAL 81 (1996)

Bassiouni, Cherif M., *The Penal Characteristics of Conventional International Law*, 15 CASE W. RES. J. INT'L. L. 27 (1983)

Bassiouni, Cherif M., *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AJIL 784 (1994)

Baxter, Richard R., *The Modern Codification of the Law of Armed Conflict*, 29 INT'L. REV. RED CROSS 171 (1963)

Baxter, Richard R., *Treaties and Custom*, 129 RECUEIL DES COURS 25 (1970)

Baxter, Richard R., *Multilateral Treaties as Evidence of Customary International Law*, 41 BYBIL 275 (1965-66)

Beck-Doswald, Louise, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BYBIL 198 (1985)

Bennoune, Karima, *As-Salamn-Alaykum? Humanitarian Law in Islamic Jurisprudence*, 15 MICH. J. INT'L. L. 605 (1994)

Beres, Louis R., *After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law*, 24 VANDERBILT J. TRANS. L. (1991)

Blakesley, Christopher, *The Need for an International Criminal Court in the New World Order*, 25 VANDERBILT J. TRANS. L. 151 (1992)

Bradley, Craig M., *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L. L. 171 (1993)

Burnett, Weston D., *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV 71 (1985)

Cassese, Antonio, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EJIL 2 (1998)

Carnahan Burrus M., *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AJIL 213 (1998)

Charney, Jonathan, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BYBIL 1 (1985)

Cheng, Bin, *United Nations Resolutions on Outer Space: "Instant" Customary Law?*, 5 IND. J. INT'L. L. 23 (1965)

Chinkin, Christine M., *Due Process and Witness Anonymity*, 91 AJIL 75 (1997)

Clark Roger S., *Medina: An Essay on the Principles of Criminal Liability for Homicide*, 5 RUTGERS CAM. L. J. (1973)

Coil, George L., *War Crimes of the American Revolution*, 82 MIL. L. REV. (1978)

Colby, Eldbridge, *War Crimes*, 23 MICH. L. REV. 501 (1925)

Craven, Mathew C. R., *The European Community Arbitration Commission for Yugoslavia*, 66 BYBIL 333 (1995)

Crawford, James, *The ILC's Draft Statute for an International Criminal Court*, 88 AJIL 140 (1994)

Crawford, James, *The ILC Adopts a Statute for an International Criminal Court*, 89 AJIL 404 (1995)

Crowe, Christopher N., *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 UNIV. RICH. L. REV. 191 (1994)

Daes, Erica A., *New Types of War Crimes and Crimes Against Humanity: Violations of International Humanitarian and Human Rights Law*, 7 INT'L. GENEVA Y'BOOK 55 (1993)

D'Amato, Anthony, *Superior Orders vs. Command Responsibility*, 80 AJIL 604 (1986)

D'Amato, Anthony, *Peace vs Accountability in Bosnia*, 88 AJIL 500 (1994)

De Burca, Grainne, *Giving Effect to European Community Directives*, 55 MLR 215 (1992)

Denning, Stuart H., *War Crimes and International Law*, 28 AKRON L. REV. 418 (1995)

Diallo, Yolande, *Humanitarian Law and Traditional African Law*, 179 INT'L. REV. RED CROSS 57 (1976)

Djibril, Ly, *The Bases of Humanitarian Thought in the Pulaar Society of Mauritania and Senegal*, 325 INT'L. REV. RED CROSS 643 (1998)

Douglas, James, *High Command Case: A Study in Staff and Command Responsibility*, 6 INT'L. LAWYER 713 (1974)

Draper, Gerard I., *The Contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal in Warfare*, 305 INT'L. REV. RED CROSS 192 (1995)

Draper, Gerard I., *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 3 INT'L. REV. RED CROSS 19 (1965)

Draper, Gerard I., *The Modern Pattern of War Criminality*, 6 ISR. Y. B. HUM. RTS. 15 (1976)

Dubois, Olivier, *Rwanda's National Criminal Courts and the International Tribunal*, 321 INT'L. REV. RED CROSS 717 (1997)

Dugard, John, *Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders*, 324 INT'L. REV. RED CROSS 445 (1998)

Eckhardt, William G., *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1 (1982)

Elder, David E., *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE W. RES. J. INT'L. L. 37 (1979)

Engelschion, Theodore S., *Ethiopia, War Crimes and Violations of Human Rights*, 34 REV. DR. MIL. DR. GUERRE, 9 (1995)

Evans, Harold, *The Trial of Major Japanese War Criminals*, NZLJ 9 (1947)

Falk, Richard, *International Law and the Role of the United States in the Viet-Nam War*, 75 YALE L. J. (1967)

Fenrick, William J., *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L. L. 103 (1995)

Fenrick, William J., *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982)

Finch, George A., *Superior Orders and War Crimes*, 15 AJIL 440 (1921)

Finch, George A., *The Nuremberg Trial and International Law*, 41 AJIL 20 (1947)

Fouwels, Martine, *The European Union's Common Foreign and Security Policy and Human Rights*, 15 NQHR 291 (1997)

Franck, Thomas M., *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992)

Gasser, Hans P., *International Non-International Armed Conflicts. Case Studies of Afghanistan, Kampuchea and Lebanon*, 31 AM. UNIV. L. REV. 911 (1982)

Gasser, Hans P., *The US Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of Victims of War*, 81 AJIL 910 (1987)

Gordon, Ruth, *United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond*, 15 MICH. J. INT'L. L. 519 (1994)

Graditzky, Thomas, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts*, 322 INT'L. REV. RED CROSS 29 (1998)

Gray, Christine, *Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterisation and Consequences*, 67 BYBIL 155 (1996)

Green, Leslie C., *Command Responsibility in International Humanitarian Law*, 5 TRANS. L. & CONT. PROB. 319 (1995)

Green, Leslie C., *The Judaic Contribution to Human Rights*, 28 CYBIL 3 (1990)

Gross, Oren, *The Punishment of War Criminals*, 2 NILR 356 (1955)

Hall, Christopher K., *The First Two Sessions of the Preparatory Committee on the Establishment of an International Criminal Court*, 91 AJIL 177 (1997)

Hall, Christopher K., *The Third and Fourth Sessions of the Preparatory Committee on the Establishment of an International Criminal Court*, 92 AJIL 124 (1998)

Hall, Christopher K., *The Fifth Session of the Preparatory Committee on the Establishment of an International Criminal Court*, 92 AJIL 331 (1998)

Hall, Christopher K., *The Sixth Session of the Preparatory Committee on the Establishment of an International Criminal Court*, 92 AJIL 548 (1998).

Hampson, Francoise J., *The International Criminal Tribunal for Yugoslavia and the Reluctant Witness*, 47 ICLQ 56 (1998)

Harhoff, Frederic, *The Rwanda Tribunal: A Presentation of Some Legal Aspects*, 321 INT'L. REV. RED CROSS 665 (1997)

Hart, Franklin A., *Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised*, 25 NAV. W. C. REV. 19 (1972)

Higgins, Rosalyn, *The Advisory Opinion on Namibia. Which UN Resolutions are Binding under Article 25 of the Charter?*, 21 ICLQ 270 (1972)

Howard, Kenneth A., *Command Responsibility for War Crimes*, 21 J. PUB. L. 5 (1972)

Ingles, James, *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. A/CONF. 119/10 (1983)

Kaye, David, Are *There Limits to Military Alliance? Presidential Power to Place American Troops Under Non-American Commanders, 5* TRANS. L. & CONT. PROB. 400 (1995)

Kolb, Robert, *Universal Criminal Jurisdiction in Matters of International Terrorism*, 50 RHDI 43 (1997)

Komarow, Gary, *Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems*, 29 ICLQ 21 (1980)

Kushen, Robert & Harris, Kenneth J., *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AJIL 510 (1996)

Landrum, Bruce D., *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995)

Laska, Lewis L. & Smith James M., *Hell and Devil: Andersonville and the Trial of Captain Henry Wirz*, 68 MIL. L. REV. 77 (1975)

Lee, Andrew, *Individual Responsibility for Mistreatment of Prisoners of War*, 10 ANN. CHIN. SOC. INT'L. L (1973)

Leich, Nash Marian, *Contemporary Practice of the United States Relating to International Law*, 91 AJIL 93 (1997)

Leigh, Monroe, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AJIL 235 (1996)

Leigh, Monroe, *Witness Anonymity is Inconsistent with Due Process*, 91 AJIL 80 (1997)

Leigh, Monroe, *1996 Amendments to the Foreign Sovereign Immunities Act with Respect to Terrorist Activities*, 91 AJIL 187 (1997)

Levie, Howard S., *Some Comments on Professor D'Amato's "Paradox"*, 80 AJIL 608 (1986)

Lippman, Mathew, *The 1948 Genocide Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later*, 8 TEMPLE INT'L. & COMP. L. J. 1 (I 994)

Manner, George, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AJIL 414 (1943)

Maslen, Stuart & Herby, Peter, *An International Ban on Anti-Personnel Mines: History and Negotiation of the "Ottawa Treaty"*, 325 INT'L. REV. RED CROSS 693 (1998)

Matheson, Mathew J., *The Revision of the Mines Protocol*, 91 AJIL 158 (1997)

Mayfield, Julie, The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act, 9 EMORY INT'L. L. REV. 553 (1995)

McGoldrick, Dominic & O'Donnell, Therese, *Hate-speech Laws: Consistency with National and International Human Rights Law*, 18 LS 453 (1998)

McNair, Arnold D., *The General Principles of Law Recognised by Civilised Nations*, 33 BYBIIL 1 (1957)

Meindersma, Christa, *Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia*, XLII NILR 375 (1995)

Meltz, Jamie F., *Rwandan Genocide and the International Law of Radio Jamming*, 91 AJIL 628 (1997)

Meltzer, Bernard D., *War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VALPARAISO U. L. REV. 899 (1996)

Menon, Phillip K., *The International Personality of Individuals in International Law; A Broadening of the Traditional Doctrine,* 1 J. TRANS. L. & POL'Y 150 (1992)

Meron, Theodor, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589 (1983)

Meron, Theodor, *International Criminalisation of Internal Atrocities*, 89 AJIL 554 (1995)

Meron, Theodor, Asbjorn Eide & Rosas Allan, *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 AJIL 215 (1995)

Meron, Theodor, *Crimes and Accountability in Shakespeare*, 92 AJIL 1 (1998)

Meron, Theodor, *Henry the Fifth and the Law of War*, 86 AJIL 1 (1992)

Meron, Theodor, *Classification of Armed Conflicts in the Former Yugoslavia: Nicaragua's Fallout*, 92 AJIL 236 (1998)

Meron, Theodor, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFFAIRS 122 (1993)

Meron, Theodor, *The Geneva Conventions as Customary Law*, 81 AJIL 348 (1987)

Meron, Theodor, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238 (1996)

Meron, Theodor, *Is International Law Moving Towards Criminalisation?,* 9 EJIL 18 (1998)

Meron, Theodor, *Rape as a Crime Under International Humanitarian Law*, 87 AJIL 424 (1993)

Moir, Lindsay, *The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949*, 47 ICLQ 337 (1998)

Moore, John N., *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AJIL 1 (1967)

Morris, Virginia & Bourloyannis-Vrailas, Christiane M., *The Work of the Sixth Committee at the Fiftieth Session of the United Nations General Assembly*, 90 AJIL 491 (1996)

Niarchos, Catherine, *Women, War and Rape: Challenges Facing the International Criminal Tribunal for the Former Yugoslavia*, 17 HRQ 649 (1995)

Nier, Charles N., *The Yugoslavia Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World*, 10 DICK. J. INT'L. L. 303 (1992)

Note (Hessler, C. A.), *Command Responsibility for War Crimes*, 82 YALE L. J. 1274 (1973)

O' Donnel, Daniel, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 INT'L. REV. RED CROSS 481 (1998)

O'Brien, James C., *The International Tribunal for Violations of International Law in the Former Yugoslavia*, 87 AJIL 639 (1993)

Orentlicher, Diane F., *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991)

Osiel, Mark J., *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939 (1998)

Parks, William H., *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973)

Parks, William H., *A Few Tools in the Prosecution of War Crimes*, 149 MIL. L. REV. 72 (1995)

Paust, Jordan J., *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972)

Paust, Jordan J., *Applicability of International Criminal Law to Events in the former Yugoslavia*, 9 AM. UNIV. J. INT'L. L. & POL'Y. 499 (1994)

Petrasek, David, *Moving Forward on the Development of Minimum Humanitarian Standards*, 92 AJIL 557 (1998)

Plattner, Denise, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts*, 278 INT'L. REV. RED CROSS 409 (1990)

Randal, Kenneth C., *Universal Jurisdiction Under International Law*, 66 TEX. L. REV.785 (1988)

Redgwell, Catherine J., *Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)*, 46 ICLQ 390 (1997)

Reidy, Aisling, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L. REV. RED CROSS 513 (1998)

Reisman, Michael W. & Silk, James, *Which Law Applies to the Afghan Conflict?*, 82 AJIL 481 (1988)

Reydams, Luc, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 4 EUR. J. CRIM. L. & CRIM. JUS. 18 (1996)

Roberge, Marie-Claude, *The New International Criminal Court: A Preliminary Assessment*, 325 INT'L. REV. RED CROSS 671 (1998)

Robinson, Paul H., *Imputed Criminal Liability*, 93 YALE L. J. 609 (1984)

Roht-Ariazza, Naomi & Gibson, Lauren, *The Developing Jurisprudence on Amnesty*, 20 HRQ 843 (1998)

Roling, Bernhardt, *Criminal Responsibility for Violations of the Laws of War*, 12 REV. BEL. DR. INT'L. 1 (1976)

Rowe, Peter, *Liability for "War Crimes" During a Non-International Armed Conflict*, 34 REV. DR. MIL. DR. GUERRE 319 (1995)

Sarooshi, Danesh, *The Legal Framework Governing United Nations Subsidiary Organs*, 67 BYBIL 413 (1996)

Scharf, Michael P., *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L. L. J. 1 (1996)

Scharf, Michael P., *Rome Diplomatic Conference for an International Criminal Court*, ASIL Flash Insight (June 1998)

Schwarzenberger George, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329 (1947)

Stroun, Jacques, *International Criminal Jurisdiction, International Humanitarian Law and Humanitarian Action*, 321 INT'L. REV. RED CROSS 623 (1997)

Symposium, *Should There Be an International Tribunal for Crimes Against Humanity?*, 6 PACE INT'L. L. REV. 87 (1994)

Turns, David, *War Crimes Without War? The Applicability of International Humanitarian Law to Atrocities in Non-International Armed Conflicts*, 7 RADIC 804 (1995)

Vranken Martin, *Duty to Rescue in Civil Law and Common Law: Les Extremes Se Touchent?*, 47 ICLQ 934 (1998)

Warbrick Colin, *Recognition of States, Part I*, 42 ICLQ 433 (1993)

Warbrick, *Colin, Co-Operation with the International Criminal Tribunal for Yugoslavia*, 45 ICLQ 947 (1996)

Warbrick, Colin, *International Criminal Law*, 44 ICLQ 465 (1995)

Washburn, John, *UN Preparatory Commission for the International Criminal Court to Begin in February*, ASIL Newsletter (Jan-Feb. 1999)

Wu Timothy, *The Doctrine of Command Responsibility*, 38 HARV. J. INT'L. L. 274 (1997)

Yarnold, Barbara M., *Doctrinal Basis for the International Criminalisation Process*, 8 TEMPLE INT'L. & COMP. L. J. 85 (1994)

Zegveld, Liesbeth, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INT'L. REV. RED CROSS 505 (1998)

Zimmerman, Andreas, *Sovereign Immunity and Violations of International Jus Cogens - Some Critical Remarks*, 16 MICH. J. INT'L. L. 433 (1995)