CRIMES AGAINST HUMANITY

“The accumulated evil of the whole”

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by

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ABSTRACT

Crimes Against Humanity – “The accumulated evil of the whole”

Caroline I. Fournet

This thesis is a study of international ‘core crimes’, namely, crimes against humanity, genocide, war crimes, and crimes against peace. The aim of this work is to demonstrate that all these crimes share striking similarities, not only in respect of their qualifying elements, but also as regards the legal regime of individual responsibility attached to them. While focusing on these similar features, this thesis will highlight the defects of the rules applicable to genocide, war crimes and crimes against peace respectively, defects which might ultimately impede effective punishment of these particular crimes. In order to avoid such a risk, it is here submitted that, in fact, all these crimes should be considered as crimes against humanity. Such a re-qualification, it is argued, would indeed have the advantage of securing appropriate prosecution for these most heinous crimes thanks to the wider scope of application of the concept of ‘crimes against humanity’.

The purpose of this work is certainly not to erase the existence of different international crimes from the legal sphere, as it does not presuppose that the definitions of international crimes are malleable, nor that the notion of ‘crimes against humanity’ is a stretchable one. Rather, it is merely to re-qualify the ‘core crimes’ against international law as ‘crimes against humanity’, notion which would then encompass a wider array of offences, all of which overlap considerably.

This proposal is based on the assumption that prosecutions for international crimes have remained much too rare, and that, accordingly, change and improvement are necessary. The re-qualification of genocide, war crimes, and crimes against peace as crimes against humanity could be a first step towards a better respect of international legal norms.
To my parents, Christian and Marie-Claude
And to my brothers, Antoine and Benjamin
Des saluts font justice de la dignité
Des bottes font justice de nos promenades
Des imbéciles font justice de nos rêves
Des goujats font justice de la liberté
Des privations ont fait justice des enfants
O mon frère on a fait justice de ton frère
Du plomb a fait justice du plus beau visage

La haine a fait justice de notre souffrance
Et nos forces nous seront rendues
Nous ferons justice du mal.

Paul Eluard,
Les Belles Balances de l’Ennemi, 1944
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Caroline J. Fournet
Leicester,
Autumn 2002
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<td>American Journal of International Law</td>
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<td>cass. crim.</td>
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<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950</td>
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| ICC     | International Criminal Court  
| ICJ     | International Court of Justice  
| ICLQ    | International and Comparative Law Quarterly  
| ICRC    | International Committee of the Red Cross  
| ICTR    | International Criminal Tribunal for Rwanda  
| ICTR Statute | Statute of the International Criminal Tribunal for Rwanda, in Security Council Resolution 955  
| ICTY    | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (also referred to as the International Criminal Tribunal for the Former Yugoslavia)  
| ICTY Statute | Statute of the International Criminal Tribunal for the Former Yugoslavia in Security Council Resolution 808  
| ILC     | International Law Commission  

ILM  International Legal Materials
ILR  International Law Reports
ILQ  International Law Quarterly
IMT  International Military Tribunal at Nuremberg
IMT Charter  Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279
IMTFE  International Military Tribunal for the Far East
JDI  Journal du Droit International
Law & Contemp Prob  Law and Contemporary Problems
LJIL  Leiden Journal of International Law
LQR  Law Quarterly Review
National Prosecutions  Post-World War II prosecutions held in different states predicated on the Law of the IMT Charter, but based on national legislation and conducted before military tribunals, special tribunals and ordinary courts
NQHR  Netherlands Quarterly of Human Rights
NILR  Netherlands International Law Review
Nuremberg Principles  Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, [1950] II ILC Yearbook


Nuremberg Judgment  Trials of the Major War Criminals, Nuremberg Judgment, 1 IMT 171. Reprinted in (1947) 41 AJIL
PCIJ  Permanent Court of International Justice
RCADI  Recueil des Cours de l’Académie de Droit International
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<td>RGDIP</td>
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<td>S.C.R.</td>
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<td>Torture Convention</td>
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<td>Universal Declaration of Human Rights, United Nations, 1948</td>
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PREFACE

At a time when terrible wars are raging, when ethnic tensions are at a head, when racism infiltrates all nations, when far-right political parties play an increasing role on the political scene, when human rights are violated each and every day, when innocents are murdered daily in all parts of the world, the urgency to achieve global peace and security is all the more compelling. So far, international law has been absolutely incapable of elaborating a complete system of individual criminal responsibility and too many offenders are not being held accountable for human rights violations.

In 1946, Justice Jackson stated that he was “consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future”.¹ These missteps were mainly due to the fact that international criminal law was not yet widely accepted; but have we learned anything from such errors? As a matter of fact, international crimes are still being committed and, more often than not, in complete impunity.

It is to be hoped that the Rome Statute of the International Criminal Court, which entered into force on 1 July 2002, will be a landmark as regards the acceleration of accountability mechanisms and the prevention of the commission of such crimes as well as the clarification of international criminal law. In this respect, it may be pointed out here that the research of this thesis ends on this crucial date, and the following work thus deals with international criminal law as it stood before the entry into force of this essential instrument.

INTRODUCTION

c’est parce que l’humanité n’est pas suffisamment humaine, qu’il y a encore des actes ignobles qui échappent à la catégorie du crime contre l’humanité : plus s’élargira le domaine couvert par cette infraction, et plus l’espèce se rapprochera de cet état idéal où, unie contre le crime, elle pourra enfin proclamer que tout ce qui est inhumain lui est étranger.

Alain Finkielkraut

If crimes against humanity are said to be as old as humanity itself, the concept only appeared in a legal instrument at the end of the nineteenth century in the first Hague Convention of 1899 on Laws and Customs of War on Land, in which “humanity” was invoked as a norm and “the laws of humanity” were considered as being the mould of “principles of international law”. Subsequently, the notion re-emerged at the beginning of the twentieth century in a declaration made by the Allied Powers during the First World War as regards the Armenian Genocide. Indeed, the term ‘crimes against humanity’ was used long before Nuremberg and its first recorded appearance is in a 1915 joint declaration of the governments of Great Britain, France and Russia describing the Turkish massacres of Armenians as “crimes against humanity and civilization”. On 24 May 1915, the Allies thus condemned “the tolerance and often [...] the support of the Ottoman authorities” in the massacres.

The Allied declaration was, for a large part, an act with political motives, close to the nineteenth century tradition of proclaiming the doctrine of humanitarian intervention to protect oppressed minorities. This declaration, constantly repeated during the war, can be considered as a kind of precursor to the concept of ‘crimes against humanity’, subsequently used by the Nuremberg Charter. Nonetheless, such a precursor remained without any effect and, if it did set forth general principles, it lacked all binding force.

5 See Article 6 (c) of the IMT Charter.
As victors who had obtained from their enemies a surrender with nearly no conditions, the Allies did here let go a unique opportunity to set up, with their declaration, the principle of criminal responsibility for crimes against humanity. Instead, they abandoned all will to prosecute the individuals responsible for the genocide.⁶

In a report to the 1919 Preliminary Peace Conference, the majority of a special fifteen-membered Allied Commission – the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties – found that the Central Powers had committed numerous acts “in violation of the established laws and customs of war and the elementary rules of humanity”.⁷ The Turkish massacre of Armenians then received prominent attention but such an interest was only ephemeral. As a matter of fact, the two American members of the Commission disagreed with such a finding and dismissed the concept of “laws of humanity” as “not the object of punishment by a court of justice” but rather as a question of “moral law” without any “fixed and universal standard”.⁸ They further believed that these horrors were an internal matter not subject to the jurisdiction to other governments, and that, therefore, the Allies could not legitimately punish them.⁹ As a result, the first modern attempt to impute individual criminal responsibility for the commission of crimes against humanity failed. The Sevres Treaty, signed by the representatives of the Ottoman government, was never ratified while it included the lineaments of such a responsibility in its Article 230 which considered as an offence “the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on

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⁶ In the Turkish sphere, it must be emphasised that, in 1919-1920, a Special Turkish Military Tribunal judged the authors of such crimes against humanity. However, these legal proceedings failed as nationalist feelings rose against such trials. See generally Dadrian, Vahakn N., *Autopsie du Génocide Arménien*, Editions Complexe, 1995.


⁸ Ibid., p. 118.

August 1, 1914". Instead, it was replaced by the 1923 Treaty of Lausanne which did not contain a similar provision. On the contrary, it granted amnesty to all the individuals who perpetrated such acts during the period from 1914 to 1922. The victors clearly preferred political benefit to the realisation of their promises and their principles.

At the end of the Second World War, faced with the horrors committed, the Allies were not to repeat their mistakes and, in the Charter of the International Military Tribunal which was set up to try high-ranking Nazis, the concept of crimes against humanity finally emerged in positive international law.

In this respect, the title of this thesis might have seem incongruous for the reader. Indeed, it may have appeared rather inappropriate to use as a legal reference for all international crimes the notion of crimes against humanity, notion which initially struggled to enter in positive international law. Furthermore, this incongruity might have been reinforced by the fact that the quotation used in the title of this thesis originally referred to crimes against peace. Indeed, it may be recalled here that, in 1946, the Nuremberg Tribunal described crimes against peace as "the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole". However, even if the illegality of crimes against peace, understood here as primarily referring to the crime of aggression, is perhaps the most fundamental norm of modern international law and if its prevention is the chief purpose of the United Nations, such a recognition and a general condemnation of these crimes did not come easily. As a matter of fact, the debates surrounding the respect of the principle of legality by the Nuremberg Tribunal clearly showed that the criminal nature of these acts was still controversial at the end of the Second World War. One would have thought

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10 Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sèvres), signed at Sèvres, 10 August 1920, (Supp. 1921) 15 AJIL 235.
12 Nuremberg Judgment 186.
13 See Article 1 of the U.N. Charter.
14 See infra Chapter 6 (A) (1) on the principle of legality as a defence.
the horrors committed following the waging of an aggressive war would have generated a tremendous interest for these crimes, accompanied by a clear and determinate will to prosecute them. Astonishingly, the exact contrary happened: since Nuremberg and Tokyo, there has been no such prosecution. The "supreme crime" against international law clearly seems to have become obsolete.

Following an opposite path, from their emergence at Nuremberg to their broad acceptation within the Rome Statute of the ICC, crimes against humanity gained overwhelming importance and it seems that there are now "the supreme crime" and "the accumulated evil of the whole". Furthermore, the latter expression as regards crimes against humanity expresses the general idea of this thesis, which is to demonstrate that crimes against humanity are broader than the other crimes, broad enough to actually include them...In other words, the aim here is to proceed to an 'accumulation' of acts within the definitional scope of crimes against humanity.

The purpose of this thesis is thus the adoption of a new approach towards what may be referred to as the 'core crimes' against international law, in order to ensure their effective prevention and appropriate punishment. Because such international crimes "can affect more directly the peace and security of humankind or shock human conscience",15 accountability is a primary goal. One must recall that impunity is always seen as an approval, and thus as an incitement, which does nothing but encourages the perpetrator to continue in his/her criminal attitude.

Even if these crimes all have a different denomination, it is obvious that they do overlap and there appears to be no clear-cut distinction between these four different crimes. This thesis will thus show that all these crimes are nothing less than crimes against humanity, while stressing the advantages of a re-qualification of these offences. Such a proposal is not a new idea and could even be traced back to the roots of international criminal law. As a matter of fact, international crimes may also be called delicti jus gentium, which literally means 'crimes against humanity'. The fathers of international

law, among which Grotius, Vattel and Gentili, have also referred to international crimes as "crimes against mankind" and crimes "against the whole world", and their perpetrators as "enemies of the whole human family".\textsuperscript{16}

To consider genocide, crimes against peace, and war crimes as crimes against humanity would greatly improve the accountability mechanisms by erasing any confusion as to the rules applicable to a certain offence. By setting up different rules and by multiplying the different instruments relevant to each of these crimes, application of international criminal law is hardly satisfying. Ultimately, the inclusion of these crimes within the broader definitional scope of 'crimes against humanity' would participate in the more global struggle against impunity. If the rules applicable become clearer, the law will tend to be more respected.

Of course, as this thesis will show, this new approach to international criminal law will widen the scope of the other international crimes. However, it must already be stressed that a broader conception of the crimes studied is only aimed at better prevention and punishment. This issue might be raised notably as regards the crime of genocide which, in the words of Dadrian, "is today widely viewed as the ultimate crime in the evolution of modern human conflict".\textsuperscript{17} Still, the Genocide Convention, which is clearly the authoritative instrument on the subject,\textsuperscript{18} contains serious shortcomings, as this thesis will subsequently highlight. As a matter of fact, despite its widely acknowledged significance and value – Schabas refers to it as the "centrepiece in any discussion of the law of genocide"\textsuperscript{19} –, this Convention has been criticised on a number of grounds. As Markusen rightly points out, definitions by scholars encompass "a wider array of targeted groups, destructive actions and

\textsuperscript{16} Ibid., p. 3.


\textsuperscript{18} Indeed, its definition has been literally reproduced in subsequent major instruments, namely, the Statutes of the ICTY, the ICTR, and the ICC.

actual cases”. Indeed, while Article II of the Genocide Convention contains a definition *stricto sensu* of the crime of genocide, eminent scholars have emphasised the necessity of a broadly based definition, notably due to the fact that “genocide is a composite of different acts of persecution or destruction”, which thus requires a non-limitative definition. The new approach taken by this thesis is thus certainly not aimed at “trivializing the horror of the real crime when it is committed”. As a matter of fact, it is because genocide is one of the most odious crime that its scope of application needs to be widened, that its scope of protection ought to be enlarged. The same reasoning applies to crimes against peace and war crimes respectively. As previously stated, crimes against peace underwent a legal decline so much so that they seem now to have disappear as a legal qualification. As regards war crimes, the thesis will also highlight the legal problems generated by their definition and scope of application.

The purpose here is not to erase the existence of different international crimes from the legal sphere. Rather, it is merely to re-qualify these crimes and to place them all under the general heading ‘crimes against humanity’. This thesis therefore aims at showing how the four ‘core crimes’ do not only share similar features but are in fact identical not only as regards their definitional elements but also as regards their legal regime. Accordingly, this thesis will be divided into two parts, the former dealing with the elements required for a crime to be qualified as a crime against humanity and the latter

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24 See Schabas, William A., *supra* n. 19, p. 114: “Diluting the definition, either by formal amendment of its terms or by extravagant interpretation of the existing text, risks trivializing the horror of the real crime when it is committed”.
considering the issue of the legal regime applicable to such crimes.

In the first part, the four definitional elements of crimes against humanity, namely, the requirement of the connection to other crimes, that of widespread and/or systematic action, that of grounds for commission and that of state action, will be analysed in order to demonstrate that these exact same elements are also required for the three other 'core crimes'. Subsequently, the second part will deal with the legal regime which flows from the qualification of a crime as one against humanity. Thus, both the mental element and the principles of individual criminal responsibility attached to crimes against humanity will be studied. Finally, this part will address the question of universal jurisdiction, the term 'universal' being here understood personally and functionally - universal jurisdiction as opposed to selective jurisdiction depending on the identity of the perpetrator or the sovereign aspect of the act committed -, temporally - universal jurisdiction as opposed to the application of statutes of limitations or to the granting of amnesties -, and geographically - universal jurisdiction as opposed to territorial jurisdiction. To conclude, the focus will be on the existing legal instruments applicable to genocide, crimes against peace and war crimes respectively, in order to highlight their defects and to show how the notion of 'crimes against humanity' would be the remedy to such inadequacy.
Part I: The Elements of Crimes Against Humanity

As previously stated in the introduction, the concept of crimes against humanity emerged in positive international law in the Charter of the Nuremberg Tribunal.\(^1\) The Charter was appended to the London Agreement of 8 August 1945; the Nuremberg Tribunal was thus established by a treaty, originally signed by the four major Allies and subsequently acceded to by nineteen states.\(^2\) It defined the crimes the Allied were to prosecute in its Article 6 while Article 6 (c) gave a definition of the new notion of “crimes against humanity” as being:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.\(^3\)

Even if this definition will remain in History as being the first attempt to define the worst possible crimes, the notion nevertheless evolved and the elements required for a crime to qualify as a ‘crime against humanity’ changed over the course of time. Thus, the four initial elements were modified in the post-Charter legal instruments.

In addition to the trials of the major criminals, the Allies prosecuted – or oversaw German prosecutions – of other Nazi leaders in the zones they occupied under Law N°10 of the Control Council for Germany. Under this law, promulgated on 20 December 1945 by the Control Council of the four Occupying Powers in Germany, twelve more trials of 185 important Nazi

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\(^1\) The Nuremburg Tribunal tried 22 Nazi German officials on three basic charges, namely, conspiring and ultimately launching an “aggressive war”, committing “war crimes” and committing “crimes against humanity”. Various German organisations and businesses were also indicted. As a matter of fact, the Leadership Corps of the Nazi Party, the Gestapo, the S.D., and the S.S. were found guilty, while the S.A., the Reich Cabinet and the General Staff and High Command of the German Armed Forces were acquitted. The trial lasted eleven months, from 4 November 1945 until 1 October 1946.

\(^2\) These were Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia.

criminals were held at Nuremberg from 1946 to 1949. They are known as the ‘Subsequent Proceedings of Nuremberg’. This law, unlike the Nuremberg Charter, was made pursuant to the supreme legislative authority of the Allies over Germany in view of that country’s unconditional surrender.\(^4\) It was not intended to be an international instrument but merely national legislation.\(^5\) This law defined crimes against humanity in its Article II (c) as being:

> Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.\(^6\)

From the reading of this definition, one can notice the differences with Article 6 (c) of the Nuremberg Charter, as it defined crimes against humanity as atrocities and offences, as it contained the very broad expression “included but not limited to” which extended the scope of the definition, and as it expressly provided that rape and imprisonment were unlawful acts, while in the IMT Charter, they were supposedly included in the expression “other inhumane acts”.

The International Military Tribunal for the Far East was established by the military order of General MacArthur pursuant to his authority as Supreme Allied Commander for the Pacific. The 1946 Tokyo Charter was appended to a promulgation by General McArthur and, unlike the Nuremberg Charter, it was not part of a treaty nor of an agreement between the Allied forces.\(^7\) In this instrument, crimes against humanity were defined slightly differently as

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\(^4\) These trials were held by the Military Government of the American Military Tribunals. In the French zone of occupation, several trials of war criminals were also held at Rastatt by virtue of this law. See, e.g., Roechling case, National Prosecutions, in Nuremberg Subsequent Proceedings 1097-1143.

\(^5\) Such legislation was not mandatory in the sense that, in their respective occupied zones, the Allies also applied their own military laws.

\(^6\) Reprinted in Bassiouni, M. Cherif, supra n. 3, p. 35. Emphasis added.

\(^7\) The parties to this agreement were the United States, the Republic of China, the United Kingdom, the USSR, Australia, Canada, France, the Netherlands, New Zealand, India and the Philippines. The trial began in May 1946 and the verdicts were returned 4-12 November 1948. See ‘Editor’s Note – The Tokyo Trials’, in Bassiouni, M. Cherif (ed.), International Criminal Law, Volume III, Enforcement, Transaction Publishers, Inc, 1987, pp. 97-98.
both the phrase “against any civilian population” and the religious grounds for commission of the crimes were omitted from its Article 5 (c):

murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.8

The next step was taken by the ILC which, following a request from the General Assembly, formulated the Nuremberg Principles in a Report entitled “Principles of International Law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal”.9 In its Principle VI (c), intrinsically equivalent to the Nuremberg Charter’s definition, it defined crimes against humanity as:

Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.10

Subsequently, after numerous years of debate, the ILC completed the work on its Draft Code of Crimes which defined crimes against humanity by enumerating a rather broad list of acts and by stating that such crimes were:

any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:
(a) murder;
(b) extermination;
(c) torture;
(d) enslavement;
(e) persecution on political, racial, religious or ethnic grounds;
(f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
(g) arbitrary deportation or forcible transfer of population;
(h) arbitrary imprisonment;
(i) forced disappearance of persons;
(j) rape, enforced prostitution and other forms of sexual abuse;
(k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.11

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8 Bassiouni, M. Cherif, supra n. 3, 1992, p. 34.
9 Reprinted in ibid., p. 40.
10 [1950] II ILC Yearbook.
This disposition inexplicably deleted the requirement that the crimes be committed against a 'civilian population', but the deletion of the requirement of connection to other crimes was a major improvement. However, the ICTY Statute went back to this requirement and defined crimes against humanity in its Article 5 as:

the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
- a) murder;
- b) extermination;
- c) enslavement;
- d) deportation;
- e) imprisonment;
- f) torture;
- g) rape;
- h) persecutions on political, racial and religious grounds;
- i) other inhumane acts.\(^\text{12}\)

Interestingly, the ICTR Statute did not exactly reproduce the definition provided in that of the ICTY, and notably removed the nexus to armed conflict requirement. As a matter of fact, its Article 3 defined crimes against humanity as:

the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape;
- h) Persecutions on political, racial and religious grounds;
- i) Other inhumane acts.\(^\text{13}\)

The most recent development - the ICC Statute - gives a broader definition of crimes against humanity in its Article 7 (1) which reads as follows:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
- (a) Murder;
- (b) Extermination;


\(^{13}\) Ibid., p. 594.
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;\(^{14}\)
(g) Rape, sexual slavery, enforced prostitution, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\(^{15}\)

From this overview of the different legal definitions of the notion of ‘crimes against humanity’, it is obvious that this concept evolved over the course of time. In the post-Charter era, the notion of crimes against humanity was indeed subjected to substantial changes and it must be stressed from the outset that such a concept still bears some ambiguities. The initial relevant legal instruments on the matter, apart from the Nuremberg Charter, were the Tokyo Charter and the Allied Control Council Law No.10. Subsequently, the works of the International Law Commission also proved to be important landmarks in the development of the notion. More recently, the Statutes of the International Criminal Tribunals\(^{16}\) as well as that of the ICC addressed the issue in a decisive manner. Moreover, one must not omit the role played by the national tribunals in the prosecution and punishment of crimes against humanity. Thus, all these instruments and the case-law attached to them will

\(^{14}\) It is to be highly regretted that Article 7 (2) (e) of the Statute mirrors Article 1 of the 1984 Torture’s Convention by expressly recalling that torture does not cover “pain or suffering arising only from, inherent in or incidental to, lawful sanctions”. Clearly, such a questionable formulation is an open-door to the legal practice of torture.


be analysed in order to specify the meaning of crimes against humanity as they stand today.

It is true that one could see in this evolution confusion and wavering of the notion, but the next developments will show how, in fact, the Nuremberg legacy remains a valid precedent, and how, apart from the deletion of the requirement of the connection to other crimes, the notion did not go through radical changes. Furthermore, the study of the elements required for a crime to qualify as a crime against humanity, as well as the legal regime which flows from such a qualification, will also underline the striking similarities crimes against humanity share with the other core international crimes, namely, genocide, crimes against peace and war crimes.
Chapter 1: The Connection to Other Crimes

The requirement of the connection to other crimes is one which only concerns crimes against humanity as they initially could be qualified as such only when committed in connection with war crimes or crimes against peace. Thus, such requirement obviously does not apply – and never did – to these two latter crimes. As regards the crime of genocide, the Genocide Convention made it clear from the outset that such a crime could occur whether in time of peace or in time of war. As a matter of fact, Article I of the Convention reads as follows:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.¹

In this respect, the drafters of the Convention proved realistic as History showed that the existence of a conflict, whether internal or international, could more often than not be a decisive factor in the occurrence of a genocide. In his report on the crime of genocide, Whitaker did indeed acknowledge the fact that “throughout recorded human history, war has been the predominant cause or pretext for massacres of national, ethnic, racial or religious groups”.²

The fact that both the Armenian Genocide and the Shoah occurred during a world war was certainly not a mere coincidence. As a matter of fact, the Turkish Military Tribunal, set up by the Ottoman government during the Armistice in an attempt to punish the authors of the Armenian Genocide, also charged the Ittihad with exploiting the opportunity afforded by the war. In its main indictment, the Tribunal scorned “the vile tricks and deceitful means” through which the Ittihad took Turkey into World War I in order to carry out its hidden objectives while “Europe was preoccupied with that war”, and could never deter nor intervene.³ Concerning the Shoah, as Aly recalls,

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¹ For the full text of the Convention, see The Raoul Wallenberg Compilation, pp. 575-578. Emphasis added.
² Whitaker Report, p. 6, para. 20.
³ Ibid.
as amoral and racist as the anti-Jewish policies already were in 1933, the most important prerequisites to the Holocaust did not emerge until the war began. Far beyond the level reached in the first six years of Nazi dictatorship, the war promoted a non-public atmosphere, atomizing individuals and destroying any ties they still had with religious and legal traditions.4

A number of scholars have indeed noted that warfare – and notably total warfare – provides conditions highly conducive to genocide. Indeed, most of them agree on the fact that the thought of committing large-scale massacres is initially amorphous and tentative. Turning that thought into action depends on developments which are very often crisis situations, such as war, and notably global war, which will serve as a screen, thus facilitating the transformation of these tentative ideas into plans of action. War then becomes the connecting link between the embryonic and implementing stages in the evolution of a genocide. For instance, Kuper stated that “international warfare, whether between “tribal” groups or city states, or other sovereign states and nations, has been a perennial source of genocide”.5 It is clear that the outbreak of World War I was an essential condition for the perpetrating of the Armenian Genocide. Similarly, World War II provided both opportunity and an incentive for the Nazis to attempt to definitely resolve the ‘Jewish Question’.

Markusen identified several aspects of warfare which contribute to genocide.6 Firstly, it does create a sense of direct threat in the states, threat which is then blamed not only on the external enemy, but also on the targeted minority group. Secondly, it increases the vulnerability of the victim group, which becomes “isolated, fragmented and nearly totally emasculated through the control of channel of communication, wartime secrecy, the various sections of the wartime apparatus, police and secret service, and the constant invocation of the principle of national security”.7 Conversely, the perpetrating government and its agents become more powerful thanks to the centralisation

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of power which is necessary in time of war. Thirdly, the perpetrators can also use the mobilised military forces in the killing process, as this occurred in both the Armenian Genocide and the Shoah. Finally, warfare creates a climate of moral and psychological violence, which generates tolerance for brutality, particularly against groups designated by officials as dangerous enemies.

As previously stated, the IMT Charter marked the birth of the modern notion of crimes against humanity as Article 6(c) was the first instance in positive international criminal law in which the specific terms “crimes against humanity” were used. However, a critical compromise was made as crimes against humanity were defined only “in connection with” other crimes. Indeed, the Charter required a nexus with the other crimes over which the Tribunal had jurisdiction, namely crimes against peace and war crimes.

It must be recalled here that, initially, Article 6(c) was written with a semicolon after the word “war” which meant that there were two types of crimes against humanity, some, namely, persecutions, without any relationship with the two other crimes mentioned and some only in relation to them. Nearly two months after the signature of the Charter, a difference was discovered between the Russian text – with a comma after the word “war” – and the English and French ones, which showed a semicolon after this same word. On the basis of the Berlin Protocol of 6 October 1945, it was recognised that the proper version was the one with a comma. Such grammatical technique may seem a detail but, in reality, this substitution was of a great importance as the IMT then used it to give a restrictive interpretation of the notion of crimes against humanity: the requirement that crimes against humanity be connected to some other crime within the jurisdiction of the Tribunal became a limitation on all forms of crimes against humanity, and not only on persecutions. Thus, it became beyond any doubt that the qualification “in execution of or in connection with any crime within the jurisdiction of the Tribunal” applied to the whole paragraph. Consequently, the Charter subjected crimes against humanity to a special condition: unlike crimes against peace and war crimes, both of which had an

7 Ibid., p. 237.
independent existence, crimes against humanity were ‘accompanying’ or ‘accessory’ crimes⁸ to the first two and were punishable only if committed in connection with or in execution of the crimes of aggressive war or violations of the laws and customs of warfare. Furthermore, by negating the Charter’s definition “before or during the war” clause, the Tribunal limited the scope of Article 6 (c), limitation which resulted in the exclusion of all Nazi crimes committed before 1939. Consequently, the Tribunal Judgement stated:

The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter as it has not been satisfactorily proved that they were done in execution of, or in connection with, any crime within the jurisdiction of the Tribunal.⁹

However, Woetzel believed that the Nuremberg definition did not deny this terrible reality but that it did not give the Tribunal jurisdiction over such acts:

The fact that the court only considered crimes committed in the period from 1939 to 1945 does not mean that only acts occurring during wartime can be considered crimes against humanity. It must be concluded that the court merely felt itself generally limited in its jurisdiction to cases occurring in connection with or during the war. It did not mean to qualify the nature of the acts, however, by stating this proviso.¹⁰

Similarly, Röling, who sat as a judge in the Tokyo Tribunal, believed that the requirement of the war nexus was jurisdictional and not definitional. He maintained that it did not narrow the scope of crimes against humanity; it only narrowed the Nuremberg and Tokyo Tribunals’ jurisdiction. He indeed wrote that “the connection did not restrict the scope of the crime, but only the scope of our jurisdiction”.¹¹

It is here worth noting that, at Nuremberg, even if no defendant was convicted solely of crimes against humanity committed before the war, some were convicted of crimes, in connection with the war, but committed before

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it. Indeed, Streicher was convicted of crimes against Jews and against humanity committed before the war, Von Schirach and Seyss-Inquart were both convicted of crimes against humanity committed in connection with the annexation of Austria, while Frick and Von Neurath were convicted of crimes against humanity committed during the invasion of Czechoslovakia.\textsuperscript{12}

The legal inconsistencies of the \textit{stricto jure} definitions and the final judgment at Nuremberg did not remain unobserved.\textsuperscript{13} Public opinion could not accept the fact that crimes against humanity were considered as such only if connected with other international crimes. Consequently, the Allied Control Council Law N°10 did not mention the expression "in execution of or in connection with any crime within the jurisdiction of the Tribunal" and this lack of nexus offers some evidence that the Allies did not regard this link as necessary as a matter of custom. However, it must be noted that the wording of this law dealt with this issue not as fully as it would have been needed. Indeed, the Law was far from being an important landmark in the evolution of the concept of crimes against humanity as, under its Preamble, it was meant to "give effect" to the Charter, while, under its Article I, the London Agreement was made an integral part thereof. As a result, a conflict emerged due to different provisions of the same law. One could have thought that the case-law under the Allied Control Council Law N°10 would have brought comprehensive solutions to this conflict but, in light of the cases analysed below, it is clear that no consensus position was reached.

The two following cases suggest that the nexus requirement was not removed in practice. In the \textit{Flick} case, the Court acquitted the defendant of crimes against humanity for his acquisition of Jewish property before the war, finding itself without jurisdiction.\textsuperscript{14} Similarly, in the \textit{Ministries} case, the Court discussed Bohle's activities against the Haavarah Agreement and stated:

\begin{itemize}
  \item \textsuperscript{12} See David Matas, 'Prosecuting Crimes Against Humanity: The Lessons of World War I', (1989-1990) 13 \textit{Fordham International Law Journal} 93.
  \item \textsuperscript{13} See Robinson, Jacob, \textit{supra} n. 8.
  \item \textsuperscript{14} \textit{United States v. Flick et al.}, Case No. 5, Military Tribunal IV, 6 \textit{Nuremberg Subsequent Proceedings} 1213.
\end{itemize}
We are unable to see [...] that these transactions, which started in 1937, and were concluded in March 1938, were so connected with the aggressive war and crimes against peace as to render it reasonably certain that the measures had this in view.\textsuperscript{15}

In other words, the link was missing. As a result, the Court dismissed the count of crimes against humanity against officials in the Nazi Foreign Ministry and other bureaucracies, noting that the Allied Control Council Law N°10 was not meant to go any further than the Charter itself, which codified international law.\textsuperscript{16}

On the contrary, other cases suggested that the removal of the nexus requirement allowed for prosecutions for crimes not committed during the war. Thus, in the \textit{Einsatzgruppen} case, the Court convicted the defendants for the large-scale execution of Jews in occupied Europe and in the Soviet Union,\textsuperscript{17} without making any distinction as to when the murders occurred and held that:

The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.\textsuperscript{18}

Also, in the \textit{Justice} case, although the defendants were charged only with crimes committed during the war, the Court noted the omission of the nexus language and seemed to suggest in \textit{dicta} that it was legally unnecessary.\textsuperscript{19} Therefore, the legacy of these trials is one of uncertainty. In fact, the Second World War cases do not offer strong evidence of the necessity of the nexus because the Allies chose to prosecute only crimes connected with the war.

In a similar vein, Article 5 of the Tokyo Charter expressly stated that:

\textsuperscript{15} See \textit{United States v. Von Weizsaecker et al.}, Case No. 11, Military Tribunal IV, 12-14 \textit{Nuremberg Subsequent Proceedings} 1-1096. Emphasis added.

\textsuperscript{16} Ibid., pp. 112-17. Emphasis added.

\textsuperscript{17} \textit{United States v. Ohlendorf et al.}, Case No. 9, Military Tribunal II, 4 \textit{Nuremberg Subsequent Proceedings} 499.

\textsuperscript{18} Ibid., p. 664.

\textsuperscript{19} \textit{United States v. Alisoetter et al.}, Case No. 3, Military Tribunal III, 3 \textit{Nuremberg Subsequent Proceedings} 973-974, 979-982.
The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.20

Thus, it made clear that the Tribunal only had jurisdiction if persons were accused of having perpetrated offences which included crimes against peace. This exclusive provision explains why, at Tokyo, crimes against humanity were not explicitly applied. Still, the Tribunal condemned the atrocities which were committed against civilian populations (most particularly in China) and found guilty of crimes against humanity several defendants such as Hirota, Matsui and Muto.21

Subsequently, the ILC’s 1954 Draft Code of Offences22 completely emancipated crimes against humanity from any dependence to “other offences defined in the Draft Code”.23 When the Commission extensively re-examined the issue in 1996 and finally completed consideration on the Draft Code,24 its Article 18 still did not require the nexus to other crimes.

Both Statutes of the International Criminal Tribunals also require the existence of certain conditions in order to qualify a crime as one against humanity. As regards the nexus to armed conflict, the ICTY Statute expressly maintains it by requiring that the acts be “committed in armed conflict, whether international or internal in character”.25 It is nonetheless true that, considering the temporal limitation to which the Tribunal is subjected,26 the Security Council did not have to address a broader definition. As Johnson rightly points out, the nexus

20 Article 5 of the IMTFE Charter. Emphasis added.
21 Among the atrocities blamed on the Japanese officials was the so-called Rape of Nanking when Japanese soldiers slaughtered hundreds of thousands of Chinese civilians in Nanking, in 1937.
25 Article 5 of the ICTY Statute.
26 Article 8 of the ICTY Statute: as it was created by the Security Council as an enforcement measure, the Tribunal’s jurisdiction is limited to the events occurring during the restoration of international peace and security.
was not intended to reflect a general definition of crimes against humanity or alter the fact that such crimes may be committed in time of war or in time of peace. Rather, it was intended to make the crime specific to the Yugoslav context: an armed conflict which could, at different times, be characterized as being international, internal, or a combination of the two.27

Accordingly, the U.N. Secretary-General stressed that crimes against humanity are prohibited “regardless of whether they are committed in an armed conflict, international or internal in character”, thus suggesting that this limitation is not definitional but merely jurisdictional.28 Moreover, in the Tadic case, the ICTY Appeals Chamber adopted the same position and held that:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.29

If one may notice the rather cautious approach of the Appeals Chamber in this ruling as it does not firmly reject the requirement of the connection to an armed conflict, it must be pointed out that the same Appeals Chamber, in the same case, unequivocally found that:

The Prosecution is […] correct in asserting that the armed conflict requirement is a jurisdictional element, not “a substantive element of the mens rea of crimes against humanity” (i.e. not a legal ingredient of the subjective element of the crime).30

Similarly, in the Blaskic case, the Trial Chamber held that “[a]n armed conflict is not a condition for a crime against humanity but is for its punishment by the Tribunal”.31 Such a position is however hardly satisfying

30 Ibid., para. 249.
as it can impede prosecution. For instance, in the *Tadic* case, the Trial Chamber expressly held that it required proof between the motives of the acts and the armed conflict, thus requiring additional elements than the ones expressly stated in its Statute. In fact, it even went further than this and required proof that the defendant acted on the basis of non-personal motives. In other words, “the act and the conflict must be related or, to reverse this proposition, the act must not be unrelated to the armed conflict, must not be done for purely personal motives of the perpetrator”.\(^{32}\) As Van Schaack rightly points out, “the requirement that the defendant act on the basis of other than personal motives threatens to revive the war nexus requirement by repackaging it in terms of the motivational state of the defendant”.\(^{33}\) Fortunately, the Appeals Chamber subsequently held that

there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives [...] except to the extent that this condition is a consequence or a re-statement of the two conditions mentioned [i.e. “that the acts of the accused must comprise part of a pattern of widespread or systematic crimes against a civilian population and that the accused must have known that his acts fit in such a pattern”].\(^{34}\)

The ICTR Statute is totally silent on the matter and the nexus to armed conflict does not appear at all. It is true that this does not necessarily amount to an extension of the prosecutions for crimes against humanity committed outside the conflict as the Tribunal only has jurisdiction over crimes committed in 1994, during which war was incessant.\(^{35}\) Furthermore, as


\(^{33}\) Van Schaack, Beth, *supra* n. 32, p. 840.


\(^{35}\) See Meier Wang, Mariann, ‘The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact’, (1995) 27 *Columbia Human Rights Law Review* 196-197. This author argues that “the Statute’s starting date of January 1, 1994, is artificially late given the explicit goal expressed by the Statute [...] to punish the perpetrators”, even if “the Tribunal may be able to introduce as evidence acts of planning, organization, and even implementation that occurred outside the period of January 1 to December 31, 1994, but that are nonetheless connected to crimes which were perpetrated during the Statute’s designated time period".
Meron rightly recalls, "the Statute for Rwanda is predicated on the assumption that the conflict in Rwanda is a noninternational armed conflict",\(^{36}\) predication which might then explain the absence of the nexus requirement in the Statute. Still, such an 'omission' might also be the sign that crimes against humanity can definitely be committed in time of peace.

The overwhelming majority of the national systems retains the nexus to war crimes. Indeed, the 1946 Chinese Statute criminalises several acts other than war crimes but with the requirement that they be committed "before or during a period of hostilities against the Republic of China", thus suggesting a linkage to the war.\(^{37}\) As for the 1988 Australian War Crimes Statute, it deals specifically with World War Two criminals and also requires that crimes against humanity be connected with an armed conflict to be qualified as such.\(^{38}\) Similarly, the United Kingdom's War Crimes Act of 1991\(^{39}\) maintains the temporal nexus to the second world conflict. Still, the above study of international criminal law suggests that the requirement of the connection to other crimes has now been totally deleted. In other words, it can be safely asserted that international criminal law does recognise crimes against humanity as totally independent.

From this perspective, crimes against humanity now have a wider temporal scope of application than war crimes. Indeed, one of the problems linked to the application of international humanitarian law is its temporal scope of application as it applies only in times of armed conflict. If war crimes were considered as crimes against humanity, their scope of application would \textit{a fortiori} be widened as crimes against humanity are prohibited both in time of war and in time of peace. Nonetheless, it could still be argued that the nexus requirement is implicitly needed as the most recent definitions of

\(^{36}\) See Meron, Theodor, 'International Criminalization of Internal Atrocities', (1995) 89 AJIL 556.

\(^{37}\) Article II (3) of the Chinese Statute.


crimes against humanity refer to "a generalized and systematic attack", even if not to war itself. However, this new requirement does not necessarily imply a linkage to a war but rather refers to the scale – the number of victims – and the method – planned and systematic – in which the crimes are committed.

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40 See Article 7 of the ICC Statute.
Chapter 2: The Widespread and/or Systematic Action

The requirement that the crimes be widespread and/or committed in a systematic manner is not exclusive to crimes against humanity. If it is indeed required for a crime to qualify as such, it is also present in the definition of the crime of genocide, crimes against peace and war crimes. The study here will however focus on crimes against humanity, genocide and war crimes only as the requirement of widespread and systematic action is obviously fulfilled in the context of crimes against peace. Indeed, crimes against peace, understood here as aggression, clearly correspond to the launching of a widespread and systematic action against one’s adversary, and scarcely will such a crime be committed on a small-scale.
A. Crimes Against Humanity

1. The Disjunctive Requirements of Widespread or Systematic Action

The requirement as regards the large-scale or systematic character of crimes against humanity appeared in positive international law quite recently. However, the premises of such a condition lay in the initial phrase “against any civilian population”. According to the Nuremberg Charter, crimes against humanity must be committed against a “population”,1 which means that either their scale or their method qualified the nature of the atrocities. Similarly to the Charter, the Allied Control Council Law required that crimes against humanity, in order to qualify as such, be committed “against any civilian population”.2 Subsequently, the 1996 Draft Code of Crimes expressly employed the terms “in a systematic manner or on a large scale”, thus understanding these requirements as non-cumulative.3

Both Statutes of the International Criminal Tribunals as well as that of the International Criminal Court follow the majority of the legal doctrine by requiring that these crimes are to be committed “against any civilian population”.4 In fact, Trial Chamber I of the ICTY, in the Nikolic case, defined crimes against humanity very narrowly by requiring that each type of crimes against humanity be directed against any civilian population, that each be organised and systematic, and not the work of an isolated individual, and that the crimes, considered as a whole, be of a certain scale and gravity.5 However, in the Tadic case, Trial Chamber II, while interpreting the U.N. Secretary-General’s Report on Article 5 of its Statute,6 held that the

1 Article 6 (c) of the IMT Charter.
2 Article II (c) of CCL No. 10.
4 Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, Article 7 (1) of the ICC Statute.
requirement that acts be directed against a civilian population can be fulfilled if the acts are either widespread or systematic. Subsequently, Trial Chamber II, again reading these requirements disjunctively, specified that the widespread or systematic requirement is to be appreciated on a case-by-case basis:

The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.

Fortunately, the Tadic precedent was ultimately confirmed by Trial Chamber I in the Blaskic case:

The “widespread or systematic” character of the offence does not feature in the provisions of Article 5 of the Statute which mention only acts “directed against any civilian population”. It is appropriate, however, to note that the words “directed against any civilian population” and some of the sub-characterisations set out in the text of the Statute imply, both by their very nature and by law, an element of being widespread or organised, whether as regards the acts or the victims.

It therefore reached the conclusion that

there can be no doubt that inhumane acts constituting a crime against humanity must be part of a systematic or widespread attack against civilians.

In the Krstic case, Trial Chamber I re-confirmed the Tadic ruling and affirmed that the attack must be “widespread or systematic”. Most recently, the ICTY Appeals Chamber specified that “only the attack, not the individual acts of the accused, must be widespread or systematic”. It also reaffirmed that:

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7 Prosecutor v. Tadic, No. IT-94-1-T, Opinion and Judgment, Trial Chamber II, 7 May 1997, para. 646.
10 Ibid. Emphasis added.
The requirement that the attack be "widespread" or "systematic" comes in the alternative. Once it is convinced that either requirement is met, the Trial Chamber is not obliged to consider whether the alternative qualifier is also satisfied.\(^{13}\)

Adopting a more explicit approach than the Yugoslav Statute, the Rwanda Statute expressly provides that the acts be committed "as part of a widespread or systematic attack",\(^{14}\) and, accordingly, the Rwanda Tribunal reads the requirement of widespread or systematic action disjunctively. In the *Akayesu* and *Kayishema and Ruzindana* cases, Trial Chambers I and II of the ICTR made the widespread and/or systematic characteristics essential elements of the offence.\(^{15}\) For instance, in the *Akayesu* case, Trial Chamber I unequivocally stated that it "considers that it is a prerequisite that the act must be committed as part of a widespread or systematic attack and not just a random act of violence".\(^{16}\)

Finally, it may be pointed out that the Rome Statute also requires that the acts be committed "as part of a widespread or systematic attack directed against any civilian population".\(^{17}\) However, the question of the disjunctive reading of the requirements of "widespread" and "systematic" still arises as the Statute subsequently defines the term "attack" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".\(^{18}\) For Schabas, "[i]t seems, therefore, that the term attack has both widespread and systematic aspects".\(^{19}\) The legacy of the Rome Statute on this matter is thus one of uncertainty and the question whether the attack needs to be both widespread and systematic.

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\(^{13}\) Ibid., para. 93.

\(^{14}\) Article 3 of the ICTR Statute.


\(^{17}\) Article 7 (1) of the ICC Statute. Emphasis added.

\(^{18}\) Article 7 (2) (a) of the ICC Statute.

in order for the crime to qualify as one against humanity is as yet not definitely solved.
2. Crimes Against Humanity as Isolated Acts

In the Nuremberg Charter, crimes against humanity consisted of two separate clauses: murders and other acts against any civilian population on one hand, and persecutions on the other. It thus seemed that persecutions against isolated individuals were covered. Still, in the Justice case, the Tribunal interpreted the language of Control Council Law No.10, which was also referring to acts “against any civilian population”, as precluding prosecutions for any isolated crimes.20

However, this dichotomy between the two types of crimes against humanity appears to have vanished now that their definition is merely an enumeration of acts committed in a systematic manner or on a large scale, among which are listed murder and persecutions.21 It thus seems that all the post-Charter developments exclude isolated acts not part of a general policy, even if it may still be maintained that they include large-scale actions regardless of planning as well as small-scale ones if they are committed systematically.

Regarding this particular issue, an incoherence emerged in the case-law of the Yugoslavia Tribunal when the Trial Chamber held that the collective nature of crimes against humanity “exclude[s] single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity”,22 before stating that:

Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual need not commit numerous offenses to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian population and thus “[e]ven an isolated act can constitute a

20 See United States v. Altsoetter et al., Case No. 3, Military Tribunal III, 3 Nuremberg Subsequent Proceedings.

21 See ILC 1996 Draft Code of Crimes, Article 5 of the ICTY Statute, Article 3 of the ICTR Statute and Article 7 (1) of the ICC Statute.

crime against humanity if it is the product of a political system based on terror or persecution.\textsuperscript{23, 24}

This inconsistency seems however to have been solved by the Trial Chamber itself in the same \textit{Tadic} case when it specified that if the perpetrator acted while knowing his acts “were occurring on a widespread or systematic basis […] that is sufficient to hold him liable for crimes against humanity”.\textsuperscript{25} In other words, if the perpetrator has knowledge of the broader pattern of occurrence, a single act may qualify as a crime against humanity.\textsuperscript{26} This formulation clearly increases the burden of proof for the Prosecution which thus has to prove that the perpetrator knew of the widespread or systematic attack on a civilian population while committing his act. However, the Appeal judges in the \textit{Tadic} case lightened this burden of proof by holding that such a knowledge could be inferred from the circumstances. It indeed maintained that it may be inferred from the words “directed against any civilian population” in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread and systematic crimes directed against a civilian population and that the accused must have \textit{known} that his acts fit into such a pattern.\textsuperscript{27}

On this particular point, the case law of the ICTY seems settled as different Trial Chambers followed this path. For instance, in the \textit{Vukovar Hospital} Decision, Trial Chamber I found that “as long as there is a link with

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\textsuperscript{26}As Van Schaack notes, “this two-tiered approach was substantially borrowed from the reasoning of the Canadian courts in \textit{Regina v. Finta}”. In the \textit{Finta} case, the Court of Appeals hold that “knowledge of the circumstances or facts which bring an act within the definition of a war crime or crime against humanity constitutes the mental component which must coexist with the prohibited acts to establish culpability for those acts”. See \textit{Regina v. Finta}, 92 D.L.R. 4\textsuperscript{th} 1, 84 (Ont. C.A. 1992). See Van Schaack, Beth, ‘The Definition of Crimes Against Humanity: Resolving the Incoherence’, (1999) 37 \textit{Columbia Journal of Transnational Law} 835-836.

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the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity". 28 In the same vein, in the Kunarac case, Trial Chamber II specified that

\[\text{only the attack, not the individual acts of the accused, must be "widespread or systematic". A single act could therefore be regarded as a crime against humanity if it takes place in the relevant context.} 29\]

As regards the ICC Statute, this instrument is more explicit as, by adding the requirement that there should be a “multiple commission of acts”, 30 it clearly states that isolated acts are excluded from the definitional scope of crimes against humanity. Furthermore, it may be noted here that the possibility brought out by the Yugoslavia Tribunal of considering crimes against humanity as isolated acts if the perpetrator knew of the wider context of the attack seems to have been rejected by the Rome Statute which equates “knowledge” with “awareness” and which, from the reading of its Article 30 (3), suggests that such a mental element “must be subjectively demonstrated, rather than merely inferable from circumstantial evidence”. 31

As regards national legislation and practice, it must be pointed out that the situation is rather heterogeneous. For instance, the Canadian Statute, by referring to the concepts of “population” or of “group”, does obviously express a requirement as to the scale of such crimes, being understood in terms of the number of victims. However, neither the Chinese nor the Australian Statutes mention large-scale nor systematic acts. 32

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30 See Article 7 (2) (a) of the ICC Statute.


In the *Eichmann* case, the Israeli District Court easily conducted the trial on this matter of pattern of occurrence as the enormity of the defendant's crimes obviously corresponded to the criterion “any civilian population” required by the Israeli Statute relative to crimes against humanity. Consequently, in December 1961, Jerusalem’s Tribunal found Eichmann guilty of the extermination of millions of Jews and he was sentenced to death by hanging. The French case-law is also of interest here as, in the *Touvier* case, the Cour de Cassation hold that even one single act could qualify as a crime against humanity. As Maître Nordmann rightly stated “ce n'est pas le nombre qui fait le crime contre l'humanité mais l'absolue perversion d'un système dont l'objet est de punir par la mort le crime d’être né”.

The issue of the characteristics of crimes against humanity, in terms of their scale or of their systematic aspect, is thus rather uncertain. Still, the previous developments did show that the correct reading of these two requirements is the non-cumulative one. In other words, acts need to be systematic or widespread to qualify as crimes against humanity. If this would appear to exclude isolated acts, the knowledge of the perpetrator of the broader context of commission of crimes against humanity could still qualify his/her own isolated act as a crime against humanity. Furthermore, it could here be argued that this knowledge could be automatically inferred due to the fact that the widespread or systematic commission of such crimes can hardly be disregarded or unknown. Clearly, the perpetrator of an isolated act will know of this wider context, which will also probably encourage him/her to commit his crime.

Finally, it may be noted here that the widespread and/or systematic character of the crime is not a particular feature of crimes against humanity only. As a matter of fact, in the case of genocide, these conditions are always

33 See the Nazi and Nazi Collaborators (Punishment) Law, 5710/1950.
34 Adolf Eichmann was executed on 31 May 1962.
met and it is clearly a case of widespread and systematic attack on a given targeted group.
B. Genocide

The issue of the pattern of occurrence is extremely important as regards genocide. Indeed, the requirement of widespread and/or systematic action is obviously present in the conventional definition of the crime which focuses on the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”.\(^{37}\) The use in this definition of the terms “destroy” may easily be interpreted as referring to a systematic action taken against a “group”, while the very use of this latter expression is a direct reference to the number of victims. What is controversial as regards this definition is the Convention’s exhaustive enumeration of the acts it proscribes as well as its reference to the intent to destroy a group “in whole” or “in part”, without defining the terms nor explaining the purpose of this distinction. Also, the issue of ‘cultural genocide’ is of interest here, and this act should certainly be considered as an act of genocide, if only to serve as proof of the widespread and systematic action. Indeed, if the culture of a whole group is targeted, this is a clear demonstration that the very existence of this group is threatened.

\(^{37}\) Article II of the Genocide Convention.
1. The Exhaustive Enumeration of Acts of Genocide

As previously stated, the Genocide Convention proceeds to a restrictive list of acts of genocide. During the drafting of the text and the debates in the Sixth Committee, the question had been raised as whether to adopt an exhaustive or an illustrative definition of acts of genocide. The main argument in favour of the former was the respect of the fundamental principle in criminal law, that of *nulla poena sine lege*. It was thus maintained that no prosecution could occur for a crime not expressly specified. Furthermore, an illustrative list, it was argued, would leave states discretion as to the definition of acts of genocide, thus creating variations among the different countries.

However, it is here argued that, in the case of genocide, an exhaustive enumeration of punishable acts is impossible because necessarily incomplete. History showed that human imagination in criminal behaviour is without limits. Thus, new means of perpetrating genocides might appear but will remain unpunished, because *not punishable*. In fact, these new means could be seen as *legal* as they would fall out of the scope of application of the Convention!

For instance, the issue of rape as an act of genocide has been widely discussed while the Convention does not even mention this crime. It is true that this crime is today addressed as a crime against humanity\(^3\) or as a war crime.\(^3\) Nevertheless, several authors have labelled rape, and notably forced impregnation, as genocide. By an extensive interpretation of Article II (d) of the Convention which incriminates “measures intended to prevent births within the group”, enforced pregnancy could amount to genocide. In fact, Wallimann and Dobkowski referred to the deliberate attacks on Muslim

\(^3\) See Article 5 (g) of the ICTY Statute; Article 3 (g) of the ICTR Statute; Article 7 (1) (g) of the ICC Statute.

\(^3\) See Neier, Aryeh, *War Crimes – Brutality, Genocide, Terror, and the Struggle for Justice*, Times Books, 1998, pp. 179-183 on the crime of rape as a war crime. It is also noticeable that the Statute of the ICC deals with the war crime of rape in its Article 8 (2) (b) (xxii).
women as child bearers in Bosnia as "gynocide". Also considering the 'ethnic cleansing' carried out by Serb forces in Bosnia, Goldstein rightly explained that forced impregnation prevented Bosnian births "at least temporarily and in many cases permanently". Bassiouni and Manikas also identified another side of the problem: in cases of rape, women might be considered unmarriageable and might thus be less likely to procreate and to bear a child of their own ethnicity. It must also be noted here that, in the Akayesu case, the ICTR drew a parallel between rape and torture and emphasised that rape and sexual violence "constitute genocide in the same way as any other act as long as they were committed with the specific intent" required. In the Rutaganda case, it was also recognised that rape accords with "serious bodily and mental harm", as prohibited by Article II (b) of the Convention.

Another issue which is not contemplated in the Genocide Convention is that of 'ecocide', generally defined as the disruption or the destruction of the environment, usually for military purposes. It might appear that this crime should be addressed from the standpoint of war crimes. Nevertheless, it must also be stressed that threats to the integrity of the environment can endanger the survival of a group, and if such a behaviour is adopted in order to destroy the group, then it may well amount to genocide.

41 Cited in Neier, Aryeh, supra n. 39, pp. 187-188.
43 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, para. 731. For the first time, rapes and sexual violences were included among the acts of genocide, while they are not among those crimes listed in Article II of the Genocide Convention.
44 Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, Trial Chamber I, paras 49-53.
Finally, the problem of apartheid as an act of genocide was also debated. As a matter of fact, apartheid was examined in relation to the Genocide Convention by an *Ad Hoc* Working Group of Experts. The Working Group indeed "defined the elements of apartheid which constitute the crime of genocide".\(^{46}\) Its report thus listed different practices of apartheid regarded as elements of genocide, and notably the institution of group areas, the regulations concerning the movement of Africans in urban areas, the deliberate malnutrition policy, the birth control policy, the imprisonment and ill-treatment of non-white prisoners and the killing of the non-white population.\(^{47}\) Subsequently, the adoption of the 1973 Apartheid Convention\(^{48}\) solved the problem, but this means that, during more than twenty-years, there has been a *vide juridique* as to the qualification of this crime because the Genocide Convention did not expressly mention it among its exhaustive list of punishable acts.\(^{49}\)

The problem of the exhaustive enumeration of acts of genocide in the Genocide Convention was also considered by the ILC. As a matter of fact, in its 1954 Draft Code, it incorporated Article II of the Genocide Convention as Article 2 (10) of the Draft Code but with a significant modification. Article 2 (10) reads as follows:

Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including [...]\(^{50}\)

By this definition, the scope of genocide was broadened to include, besides the five acts enumerated by the Convention, other acts which might

\(^{46}\) See the Study concerning the question of apartheid from the point of view of international penal law, U.N. Doc. E/CN.4/1075.


\(^{48}\) See Apartheid Convention. In its Article I, it defines apartheid as a crime against humanity.

destroy a protected group. However, this innovation did not last as the 1996 Draft Code of Crimes went back to the conventional definition in its Article 17. Moreover, because the Statutes of the Ad Hoc Tribunals as well as the Statute of the ICC also reproduced Article II of the Genocide Convention, acts of genocide remain submitted to a restrictive approach. Furthermore, it is here interesting to note that, in analysing the elements of acts of genocide, the ‘Elements of Crimes’ adopted by the Preparatory Commission require that “the conduct took place in the context of a manifest pattern of similar conduct against that group”. This requirement clearly corresponds to that of widespread and/or systematic attack applicable to crimes against humanity. Therefore, the Preparatory Commission has acknowledged the fact that, similarly to crimes against humanity, these acts had to be committed as part of a widespread or systematic attack. Still, crimes against humanity have in this respect a wider scope of application as it seems that the expression used by the Preparatory Commission which requires a “context of a manifest pattern of similar conduct” implies that the context must consist of the same acts of genocide, i.e. killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life calculated to bring about the physical destruction of the group, or imposing measures intended to prevent births, or forcibly transferring children of the group to another group. If the Rome Statute is to be interpreted in this extremely restrictive way, the Court will only have jurisdiction over a genocidal conduct when the acts committed are the same. It is therefore submitted that to consider genocide as a crime against humanity would impede such a limited approach and would allow better prosecution of the crime of genocide itself not only by covering more punishable acts, but also by permitting the prosecution of different acts committed as part of a widespread or systematic attack.

51 [1996] II (2) ILC Yearbook 44.
52 Article 4 of the ICTY Statute, Article 2 of the ICTR Statute.
53 Article 6.
54 See Elements of Crimes, Article 6.
2. The Distinction between Genocide in Whole and Genocide in Part

Not only does the Genocide Convention prohibit a limited number of acts, it also operates a distinction between genocide “in whole” and genocide “in part”, thus raising the question as to what is really meant by genocide “in whole” and genocide “in part”. In a very good commentary on the Convention, Nehemiah Robinson, referring to the travaux préparatoires, wrote that the number of victims had to be substantial, even if it was left to the courts to decide in each case whether “the number was sufficiently large”.\(^5\) Similarly, Whitaker, in his report on the Convention, believed that the term “in part” implies “a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership”.\(^5\) The case-law of the International Criminal Tribunals shows the same inability to define properly the terms of the Convention. Thus, according to the ICTR, there must be a “considerable number” of victims for the crime to qualify as genocide,\(^5\) while the ICTY, adding to the confusion, referred to a “substantial” part, although not necessarily a “very important part”.\(^5\)

It is here submitted that there cannot be genocide “in whole” nor genocide “in part”: either there is a case of genocide, either there is not, but there is certainly no ‘in-between category’. Some authors, such as Melson, found an easy way out and termed ‘genocidal massacre’ the partial destruction of a group. Needless to say that the problem remains the same, ‘genocidal massacres’ being nothing else than genocides “in part”.\(^5\) The Convention


\(^5\) Furthermore, as Smith rightly pointed out, “sooner or later the genocidal is transformed into genocide”. See Smith, Roger W., ‘Human Destructiveness and Politics: The Twentieth Century as an Age of Genocide’, in Wallimann, Isidor and
here created confusion by not defining the terms it employs. As a result, the question may arise as to whether these two types of genocides are submitted to the same legal regime or if they are considered differently. In fact, some have argued that unless the goal was to kill all of a given people, the event was not 'really' genocide, or at the least it was a 'lesser genocide'. This has served for the basis for flagrant denials, such as the Turkish arguments that since many of the Armenians living in Istanbul were not killed, it is proof that there was no intent to kill all Armenians.

It is obvious that this purely artificial distinction between genocide "in whole " and genocide "in part" is also very immoral. Clearly, such a distinction is based on the number of victims needed to qualify the acts as genocide. How many victims will a court need to consider their number "sufficiently large"? What is a "reasonably significant number" which will constitute genocide? In the Krstic case, Trial Chamber I of the ICTY had to determine whether the genocidal intent existed while only men of military age were targeted and murdered. After having found that “the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality” could amount to genocide, the Trial Chamber also found that:

The Bosnian Serb forces could not have failed to know, by the time they decided to kill all the men, that this selective destruction of the group would have a lasting impact upon the entire group. [...] By killing all the military aged men, the Bosnian Serb forces effectively destroyed the community of the Bosnian Muslims in Srebrenica as such and eliminated all likelihood that it could ever re-establish itself on that territory.

It accordingly found that the killings of all military aged men amounted to genocide. However, the case-law on the matter is far from being settled as, only one month after the Krstic judgment, Trial Chamber III of the ICTY reached an opposite conclusion in the Sikirica case. As in Krstic, the Chamber acknowledged the fact that

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60 Prosecutor v. Krstic, Case No. IT-98-33, Judgment, Trial Chamber I, 2 August 2001, para. 589.

61 Ibid., paras 595-597.
the intent to destroy a multitude of persons belonging to a group may amount to genocide, even where these persons constitute only part of a group within a given geographical area: a country or a region or a single community.62

However, it then adopted a mathematical approach to the crimes committed and reached the conclusion that the genocidal intent to destroy Bosnian Muslim or Bosnian Croats could not be inferred from the number of victims. This approach to the crime of genocide is a very shocking one, and counting victims in order to qualify the crime is extremely inappropriate. An act does not qualify as genocide according to the number of victims. Rather, it is the deliberate and planned feature of the act that designates it as such. In this respect, it may be recalled here that, during the drafting of the Convention, France suggested that the definition of genocide should be broad enough to include the murder of a single person.63 Even if this proposal was dismissed, it is still interesting because it points out that the qualification of genocide does not rely on the number of deaths. Also, it has to be noted here that in the ‘Elements of Crimes’ adopted by the Preparatory Commission, it is specified that “one or more persons” may be the victim of the crime of genocide.64 It is true that this hypothesis certainly widens the definition of genocide as envisaged in the Convention and it is most probable that the murder of an individual because of his belonging to a protected group would be qualified as a ‘racist murder’ rather than as genocide. However, all genocides start by a single victim, and the question remains as to the qualification of this first particular murder. If an individual has been murdered as part of a plan of extermination of the group to which he belongs, this act should be considered as genocide, whether this plan fails or not. In

62 Prosecutor v. Sikirica et al., Case No. IT-95-8, Judgment on Defence Motions to Acquit, Trial Chamber III, 3 September 2001, para. 68.

63 U.N. Doc., 3 U.N.GAOR, Sixth Committee (1948), pp. 91-92. See also Bryant, Bunyan, ‘Substantive Scope of the Convention’, in Comment: The United States and the 1948 Genocide Convention, Part I, (1975) 16 HILJ 686-698. During the drafting, the Ad Hoc Committee also expressed the view that the murder of an individual could be considered an act of genocide if it was part of a series of similar acts aimed at the destruction of the group to which the victim belongs. See Robinson, Nehemiah, The Genocide Convention – A Commentary, Institute of Jewish Affairs – World Jewish Congress, 1960, p. 62.

64 See Elements of Crimes, Article 6 (a).
the words of Miller, “[w]e must remind ourselves that the Holocaust was not six million. It was one, plus one, plus one”.

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3. Cultural Genocide

As regards the requirement of widespread or systematic action, cultural genocide is an extremely relevant issue as its occurrence also participates in demonstrating the large scale on which a genocide is committed. It is true that the Genocide Convention excludes cultural genocide from its scope of application, and the only reference to it is in the incrimination of the forced transfer of children, as the cultural identity of the group might then be lost.66

However, the Convention's definition is here again more restrictive than the definitions proposed by the doctrine, and notably by Lemkin. As a matter of fact, he did identify “genocide in the cultural field” which consisted of “the prohibition or the destruction of cultural institutions and cultural activities, of the substitution of education in the liberal arts for vocational education, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking”.67

It must be stressed here that the initial draft of the Convention – that of the Human Rights Division of the Secretariat – included cultural genocide among acts of genocide; it was there defined as the destruction of the specific characteristics of the persecuted groups by various means, such as forced exile, prohibition of the use of the national language, destruction of books, and similar acts.68 The subsequent draft of the Ad Hoc Committee also dealt with cultural genocide in its Article III. The main arguments for the deletion of this article in the Convention was that the concept was too indefinite to be included. Furthermore, the majority of representatives felt that the inclusion of cultural genocide would weaken the Convention, aimed at preventing and punishing mass murder. It is perfectly true that the destruction of schools and churches cannot be compared to the physical destruction and the murder of a whole population. However, History shows that one does not go without the

66 An example of such forced assimilation which may be seen as a genocidal policy is that of the ‘stolen generation’ of Aboriginals in Australia at the beginning of the twentieth century.


other, and that the destruction of cultural institutions is more often than not the first step towards physical genocide.69

One of the most striking examples of cultural genocide occurred – and still does – in Tibet. Temples were designated victims for the Chinese perpetrators: from 1966 until the end of the Cultural Revolution, only thirteen of the 6259 places of Buddhist cult were still functioning. A lot of them had been completely razed and their treasures – including secular manuscripts, frescos, thanka (paintings), statues, and so forth – had been destroyed or stolen, and this in a systematic, methodical, calculated, planned and total way.70 There was also a clear will to eradicate Buddhism and to annihilate Tibetan culture through the attempt, until 1979, to impose Chinese names to new-born Tibetan babies and to give Tibetan children a purely Chinese education. Since, other methods are used by the Chinese government in order to eliminate Tibetan culture. Among other measures, the Chinese language is taught and spoken, names of historical figures and places are re-baptised, and Chinese products are truly invading Tibetan markets. It appears obvious that such attempts aim at denying the existence of the Tibetan culture, culture without which Tibetans as a group will disappear. Like physical genocide, cultural genocide ultimately aims at the destruction of a group and should thus be included in the definition of the crime of genocide. As a matter of fact, the United Nations Sub-Commission on Human Rights adopted a resolution in which the experts, representing 26 countries, expressed their worry as to the persisting violations of human rights in Tibet which “threaten the distinctive identity of the Tibetan people on cultural, religious and national grounds”.71

69 It can be noted here that Cambodia might be the only case where physical genocide was not accompanied by cultural genocide. As a matter of fact, the Khmer Rouge did not destroy the cultural heritage of Phnom Penh. According to Neier, “Pol Pot’s forces were like a neutron bomb, killing the people but leaving the buildings intact”. Neier, Aryeh, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice, Times Books, 1998, pp. 119-120.

70 During a liberalisation period, a Tibetan team found more than 32 tons of religious relics belonging to Tibet in Pekin. See generally Donnet, Pierre-Antoie, Tibet, mort ou vif, Gallimard, Collection Folio Actuel, 1992.

Another example is that of Afghanistan which cultural heritage had already been systematically destroyed by soviet soldiers after their intervention in 1979. The cultural genocide which subsequently took place gave rise to indignation in the international community. In fact, it may be asserted that the world reacted much more to the destruction of cultural institutions and monuments, than to the physical genocide which was taking place against Afghan women. This might be an instance showing how cultural genocide may be a real alert for the international community to act and prevent physical genocide, even if it must be stressed that, in this particular case, the physical genocide had been going on for years, under a complete and total indifference on the part of the international community.

The invasion of East Timor by Indonesia also brought into light the question of cultural genocide. As Dunn pointed out,

> it is very likely that “Indonesation” of the territory, together with ongoing attempts to eliminate support for a separate Timorese state, if successful, will submerge Timorese culture and ultimately destroy it.\(^7\)

As a matter of fact, the Indonesian authorities proceeded to the banning of traditional animistic cults, and attempted to prohibit the use of Portuguese language and of Tetum, the *lingua franca* spoken among the Timorese, as well as to promote Islam.\(^7\) In the words of Dunn, “the distinctive cultural identity of the people of this former Portuguese colony is at risk of being lost forever”.\(^4\)

Dramatically, this list of examples is far from being exhaustive and one may also have in mind the cultural war against Sarajevo which historical heritage was deliberately destroyed. It is thus most likely that physical genocide is accompanied by cultural genocide. Indeed, the perpetrators seek


\(^7\) See Barbedo de Magalhaes, Antonio, *East Timor, Indonesian Occupation and Genocide*, President’s Office, Oporto University, 1992, pp.36-37.

\(^4\) Dunn, James, ‘East Timor : A Case of Cultural Genocide ?’, in Andreopoulos George J. (ed.), *Genocide : Conceptual and Historical Dimensions*, University of Pennsylvania Press, 1994, p. 187. As East Timor became independent on 19 May 2002, it may be asserted that this genocide thus came to an end.
to eradicate a group, to deny its existence, both physical and cultural. Genocide is, from the point of view of its perpetrators, the solution to annihilate a population and to eliminate its right to existence. Killing does not suffice, all the traces of the group’s existence also have to be erased. Its incrimination in the Convention would have thus allowed for better prevention, as it could have served as a warning, but also as a tool for effective punishment. According to the ICTY, the proof of attacks directed against cultural institutions and monuments, committed in association with killing, may prove important in establishing the existence of a genocidal intent:

The Trial Chamber is aware that it must interpret the Convention with due regard for the principle *nullum crimen sine lege*. It therefore recognises that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. [...] The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.75

Thus, even if it maintained that “an enterprise attacking only the cultural or sociological characteristics of a human group [...] would not fall under the definition of genocide”,76 the Trial Chamber still recognised the existence of “recent developments” towards the recognition of the crime of cultural genocide. In this respect, a recent German holding went in contradiction with international law by interpreting the term ‘genocide’ broadly. Indeed, the Federal Constitutional Court of Germany stated that:

[T]he statutory definition of genocide defends a supra-individual object of legal protection, i.e., the social existence of the group [...] the intent to destroy the group [...] extends beyond physical and biological extermination [...] The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of the members of the group.77

76 Ibid.
Also, it might be noted here that some scholars have considered interpreting the term “to destroy” in the conventional definition of genocide so as to include cultural genocide. According to Schabas,

it can be argued that a contemporary interpreter of the definition of genocide should not be bound by the intent of the drafters back in 1948. The words ‘to destroy’ can readily bear the concept of cultural as well as physical and biological genocide, and bold judges might be tempted to adopt such progressive constructions.78

As a concluding remark, it might be asserted here that, whether there is a distinction between genocide “in whole” and genocide “in part”, and whether cultural genocide is or is not recognised as proof of the widespread and systematic aspect of the action, the crime of genocide remains in any case one which is essentially both widespread and systematic. It is in fact its width and its ‘systematicity’ which gives it its specific meaning.

C. War Crimes: The Distinction between International and Non-International Armed Conflicts

The requirement of large scale and systematic action is logically fulfilled in the case of war crimes as war is *per se* a widespread and systematic action against one's enemy. Still, a few remarks need to be made as regards international humanitarian law, and notably as regards the categorical—though often artificial—distinction it draws between international and internal armed conflicts. These remarks do not affect the fact that all types of conflicts are widespread and systematic actions, but they do highlight some serious shortcomings of international humanitarian law, and thus the need for change. Indeed, it must be pointed out here that the four Geneva Conventions of 1949 apply only to international conflicts. In other words, they are not applicable in the majority of conflicts which occurred since their entry into force. As Aldrich wrote,

> reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories—international and noninternational—into which international humanitarian law is divided.79

The study of such a distinction is far from being of a purely theoretical interest as the legal consequences of characterising a conflict as international or internal are of great significance.

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1. The 1949 Geneva Conventions

The Geneva Conventions form part of what are generally known as the laws and customs of war, breaches of which are commonly called ‘war crimes’. In the history of the laws and customs of war, the Geneva Conventions were the first instruments to incorporate a coherent system of rules for the repression of violations of its provisions. It must be noted from the outset that the 1949 Geneva Conventions create criminal liability only for violations committed in international armed conflicts. Unequivocally, the ICRC stated that “according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict”.80

Indeed, even if common Article 1 requires the respect of the Conventions “in all circumstances”, it is clear that it was not the intention behind these words to refer to non-international conflicts.81 Rather, they refer to just and unjust wars, to aggressive wars and to wars of self-defence, and mean that the application of the Conventions does not depend on the character of the conflict.82 Practically, this means that, in cases of non-international armed conflicts, only common Article 3 and Additional Protocol II, which only provide for very basic protections, will be applicable.

Still, common Article 3 is referred to as “the guiding principle common to all the Geneva Conventions”, from which “each of them derives the essential provision on which it centres”.83 As it ensures the application of the rules of humanity, common Article 3 is often referred to as a “Convention in


81 See Commentary to Geneva Convention I 26-27.

82 It may be noted here that the same expression is repeated in Article 1 (1) of Additional Protocol I.

83 See Commentary to Geneva Convention I 23. The essential provisions referred to are the following: Article 12 in Convention I, Article of Convention II, Part II (Articles 12-16) of Convention III, and Article 27 of Convention IV.
minature"; it does indeed set forth a number of minimum standards which are to be respected in conflicts of a non-international nature. Among those acts which "are and shall remain prohibited at any time and in any place whatsoever" are "violence to life and person, in particular murder of all kinds" and "the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized nations". The former U.N. Assistant Secretary-General for Human Rights has noted that these "fundamental prescriptions" have "universal validity". Interestingly, in the Nicaragua case, the International Court of Justice held in its ruling that common Article 3 was compulsory for all states, whether or not they had ratified or adhered to the 1949 Geneva Conventions. It also found that common Article 3, even if only applicable to non-international armed conflicts, also states customary law applicable to international armed conflicts. It thus considered that certain rules stated therein constitute a minimum yardstick, in addition to more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary consideration of humanity'.

Nonetheless, in spite of its extreme importance, it should be recalled that common Article 3 does not offer a clear definition of the notion of non-international armed conflict, even if there are some distinctive features to

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84 Ibid., p. 48.
88 Ibid.
these conflicts compared to international ones, such as the legal status of the entities opposing each other. According to Torrelli,

It is true that a definition of internal armed conflicts appears in Article 1 of Additional Protocol II, but the difficulties of reaching a compromise during the Diplomatic Conference of 1974-1977 led to certain ambiguities. Indeed, the necessity to ‘reassure’ states, which were required to give increased humanitarian guarantees, led to the narrowing of the scope of application of Additional Protocol II. The result was a restrictive definition which covers only conflicts of major importance, as only these can fulfil the conditions set up by this definition. Firstly, the conflict has to occur on the territory of a State Party. Secondly, it has to oppose the armed forces of the state to dissident armed forces or to organised armed groups which must fulfil three cumulative conditions: to have a responsible commandment, to control a part of the territory and to be able to lead military, continuous and concerted operations and to apply the Additional Protocol. If the requirement of a commandment is normal as it allows to establish the distinction with acts of sporadic and unorganised violence, the adjunction of the other conditions marks a step back to the old concept of ‘belligerency’: the adversary of the state must indeed reunite all the elements constitutive of the state, i.e. organisation, territory and population. Thus, the rules of the Additional Protocol may only apply to conflicts which have the features of an inter-state conflict.

Practically, this means that there are situations of non-international armed conflicts in which only common Article 3 will apply, the level of organisation of the dissident groups being insufficient for Additional Protocol II to operate. A perfect example of this absurd situation was given by the ICJ in the Nicaragua case, as it contrasted the conflict between the contras and the

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Sandinista Government with that between the United States and Nicaragua. The first, as internal, was governed by common Article 3 only, while the second, as international, fell under the rules of international conflicts.\(^9\)

Furthermore, as Meier Wang rightly notes,

> the protections [provided for by common Article 3 and Protocol II] only become applicable to a situation once it is categorized as a non-international armed conflict, and getting to that point of applicability can prove close to impossible. On the one hand, opinions vary greatly as to when an internal strife reaches a grave enough level for the provisions of Common Article 3 or Protocol II to apply. Protocol II has been interpreted to demand a conflict with a higher degree of violence than Article 3 demands, but even Common Article 3’s commentary has suggested a “high threshold of violence” before it necessarily applies. On the other hand, states have predictably been unwilling to acknowledge that events in their own countries might fit the description of “non-international armed conflict.”\(^9\)

Finally, it may be pointed out here that, according to Article 1 (2) of Additional Protocol II, international humanitarian law is not applicable in situations of internal violence and tensions,\(^9\) which are thus not governed by any rules.\(^9\) It seems therefore that, due to the artificial distinction drawn by international humanitarian law between internal and international conflicts, the former are left with little rules and regulations, and the crimes which might be committed during these conflicts will more often than not be left unpunished. Indeed, one of the legal advisers of the ICRC wrote that international humanitarian law “applicable to non-international armed conflicts does not provide for international penal responsibility of persons

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\(^9\) The ICTR applied the criteria of the intensity of the conflict and of sufficient organisation of the parties to the conflict in order to distinguish between internal armed conflicts and internal disturbances and tensions, but with little precision as to the definition of such criteria. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, paras 620-621. Also, the ICTY has used the criterion of ‘aim and objective’ of the parties to a conflict, but failed to elaborate on its substance. See Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment, Trial Chamber II quater, 16 November 1998, para. 224.
It has also been asserted that the normative customary law rules applicable in non-international armed conflicts do not encompass the criminal element of war crimes. In its final Report, the U.N. War Crimes Commission for Yugoslavia was categorical on this matter:

The content of customary law applicable to internal armed conflict is debatable. As a result, in general [...] the only offences committed in internal armed conflicts for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification.\(^{96}\)

Nevertheless, recent developments have shown the possibility of prosecuting war crimes in internal conflicts, without having to find some sort of linkage to an international war, through reliance on special statutes and customary international law. As noted by Meron,

> Until very recently, the accepted wisdom was that neither common Article 3 [...] nor Protocol II [...] provided a basis for universal jurisdiction, and that they constituted, at least on an international plane, an uncertain basis for individual criminal responsibility. Moreover, it has been asserted that the normative customary law rules applicable in noninternational armed conflicts do not encompass the criminal element of war crimes.\(^{97}\)

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2. The International Criminal Tribunals and their Case-Law

The similarities between the Statutes of the two International Tribunals do not exclude some differences, and notably as regards their material jurisdiction, both Tribunals having to deal with crimes committed in two conflicts of a different nature, one being internal and the other international, and thus subject to different legal principles. In other words, even if facts are similar, the applicable legal rules are different. Indeed, the crimes committed in Rwanda are subject to common Article 3 and to Additional Protocol II, while those perpetrated in the Former Yugoslavia are subject to the provisions of the 1949 Geneva Conventions, Additional Protocol I, and the laws and customs of war.

a. The Statute of the ICTR

In contrast to that of the ICTY, the Statute of the ICTR was drafted on the assumption that the conflict in Rwanda was non-international. Thus, it explicitly gives the Tribunal jurisdiction over serious violations of common Article 3 of the Geneva Conventions and of Additional Protocol II. Indeed, by allowing the Tribunal to prosecute persons who have committed serious violations of common Article 3 of the Geneva Conventions and of Additional Protocol II, Article 4 of the Statute provides a safety net which is seen as the Statute’s greatest innovation. A report by the U.N. Secretary-General recognised that:

Article 4 of the Statute includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common Article 3... 

Furthermore, Article 4 of the ICTR Statute draws a non-exclusive list of violations which derives both from Article 4 of Additional Protocol II\textsuperscript{99} and from common Article 3. Because this list is merely illustrative, the Tribunal is empowered to apply other provisions of Protocol II as well.\textsuperscript{100}

As previously studied, neither common Article 3 nor Additional Protocol II are generally found to apply to conflict situations, and are therefore often not considered effective international humanitarian standards. Furthermore, none of these provisions specifically provide for the international criminal responsibility of a person who commits the acts listed as prohibited. However, in light of the atrocities committed in Rwanda, the trend to regard these instruments as bases for individual criminal responsibility was accentuated. Indeed, after having determined that the conflict in Rwanda constituted a non-international armed conflict, the Independent Commission of Experts on Rwanda asserted that common Article 3 and Additional Protocol II,\textsuperscript{101} as well as the principle of individual criminal responsibility in international law,\textsuperscript{102} were applicable.\textsuperscript{103} Accordingly, the ICTR Statute considered violations of common Article 3 and of Additional Protocol II as criminal offences. Still, as Meron rightly notes,

\[ \text{[t]he Rwanda Statute contains no provisions paralleling Article 3 of the Yugoslavia Statute, which grants the Tribunal jurisdiction over violations of the Fourth Hague Convention and annexed Regulations. This omission reflects the accepted wisdom, which unfortunately denies war crimes a place in internal conflicts.} \text{\textsuperscript{104}}\]

\textit{b. The Statute of the ICTY}

As regards war crimes, the ICTY’s subject matter jurisdiction covers rules of international humanitarian law which are applicable to international armed conflicts and are declaratory of customary law. As a matter of fact, there were valid reasons to consider the entire Yugoslavian conflict as international, and

\textsuperscript{99} The “Fundamental guarantees” clause.
\textsuperscript{100} See Meron, Theodor, \textit{supra} n. 97, pp. 558-559.
\textsuperscript{102} See ibid., paras 125-128.
\textsuperscript{103} Meron, Theodor, \textit{supra} n. 97, p. 561.
\textsuperscript{104} Ibid., p. 574.
therefore subject to the rules on international wars. In fact, according to Meron, "the statute of the tribunal constitutes a determination that the conflicts in Yugoslavia are international in character".\textsuperscript{105} Also, the U.N. War Crimes Commission shared the view that the conflicts in Yugoslavia were international and thus that all the laws of war, including the rules governing war crimes, were applicable:

\begin{quote}
[T]he character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.\textsuperscript{106}
\end{quote}

Furthermore, the fact that the U.N. Secretary-General emphasised that the Tribunal should apply "only those rules of international customary law applicable to international armed conflicts"\textsuperscript{107} could be seen as an indication that the facts pertain to the field covered by the rules on such conflicts. Finally, another element demonstrating the international character of this conflict is the fact that foreign states recognised Slovenia, Croatia and Bosnia-Herzegovina, which were also admitted to the United Nations.

However, the facts and the case-law of the ICTY showed that the situation in the Balkan region was not as easily qualified. Indeed, the conflicts in Yugoslavia, and especially in Bosnia-Herzegovina, were in fact mixed internal-international conflicts.\textsuperscript{108} In this respect, the approaches taken in the \textit{Tadic} and \textit{Celebici} cases should be analysed here as they were diametrically opposed. In \textit{Tadic}, the Trial Chamber held that the civilian victims (Bosnian Muslims and Bosnian Croats) could not be regarded as protected persons within the meaning of the Fourth Geneva Convention, because they were not in the hands of a party – of which they were not nationals – to an armed conflict: they were in the hands of Bosnian (Serb) nationals. Furthermore, it

\textsuperscript{105} Meron, Theodor, 'War Crimes in Yugoslavia and the Development of International Law', (1994) 88 AJIL 81-82.


\textsuperscript{108} Meron, Theodor, \textit{supra} n. 105, p. 81.
found that the \textit{de facto} agent standard applied to trigger the Geneva Conventions and that, as the Bosnian Serb army was not a \textit{de facto} agent of Serbia, Serbia was not a party to the conflict. As a consequence, the grave breaches provisions of the Geneva Conventions recognised in Article 2 of the ICTY Statute did not apply.\textsuperscript{109}

However, in the \textit{Celebici} case, addressing incidents that occurred in 1992 and involved Bosnian Serb victims and perpetrators linked to the Bosnian government, the Trial Chamber held that

should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts, unrelated to the larger international armed conflict.\textsuperscript{110}

Having found that the conflict was international,\textsuperscript{111} the Trial Chamber asserted that Article 2 of the ICTY Statute, which covers ‘grave breaches’ of the Geneva Conventions, was applicable and held that the victim group (Bosnian Serbs) should be regarded as protected persons who did not share the nationality of their Bosnian Muslim and Bosnian Croat captors.\textsuperscript{112}

Fortunately, the ICTY case-law now seems settled as, in the final \textit{Tadic} Appeals Judgment, the Appeals Chamber, applying the “overall control” test, held that there was an international conflict and thus that the ‘grave breaches’ regime of the 1949 Geneva Conventions applied.\textsuperscript{113} It also specified that the victims were ‘protected persons’ under the meaning of the Fourth Geneva Convention.

In any case, the issue of conflicts qualification had already become less significant with the crucial decision reached by the Appeals Chamber in the


\textsuperscript{111} \textit{Prosecutor v. Delalic et al.}, Case No. IT-96-21-T, Judgment, Trial Chamber II quater, 16 November 1998, para. 214.

\textsuperscript{112} Ibid., para. 265.

Tadic case, as it found that leading principles of international humanitarian law apply to both sorts of conflicts.\textsuperscript{114} It is true that these specific principles and rules for international armed conflicts are not transposed \textit{verbatim} into the laws of internal armed conflicts. Thus, it is unclear whether certain provisions apply to both. As Meron rightly notes,

[whether the conflicts in Yugoslavia are characterized as internal or international is critically important. The fourth Hague Convention of 1907, which codified the principal laws of war and served as the normative core for the post-World War II war crimes prosecutions, applies to international wars only. The other principal prong of the penal laws of war, the grave breaches provisions of the Geneva Conventions and Protocol I, is also directed to international wars. Violations of common Article 3 of the Geneva Conventions, which concerns internal wars, do not constitute grave breaches giving rise to universal criminal jurisdiction. Were any part of the conflict deemed internal rather than international, the perpetrators of even the worst atrocities might try to challenge prosecutions for war crimes or grave breaches, but not for genocide or crimes against humanity.\textsuperscript{115}

Nonetheless, in Tadic, the Appeals Chamber ruled that some atrocities committed in internal conflicts were universal crimes, i.e. crimes for which an international court can summon individuals to account. Indeed, while it reluctantly held that Article 2 of the ICTY Statute could only apply within the framework of international armed conflicts since the Geneva Conventions themselves were so limited, the Appeals Chamber nonetheless indicated that a change in customary law may be occurring so that the grave breaches system may eventually operate regardless of whether the armed conflict is international or internal.\textsuperscript{116} As a matter of fact, the Celebici Trial Chamber had opined that there was a possibility that customary law had already reached the stage of development referred to by the Appeals Chamber.\textsuperscript{117} Furthermore, in the Kordic and Cerkez case, Trial Chamber III took note of

\begin{itemize}
  \item \textsuperscript{114} See \textit{Prosecutor v. Tadic}, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 91.
  \item \textsuperscript{115} Meron, Theodor, \textit{supra} n. 105, p. 80.
  \item \textsuperscript{116} \textit{Prosecutor v. Tadic}, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, paras 83-84.
  \item \textsuperscript{117} \textit{Prosecutor v. Delalic et al.}, Case No. IT-96-21-T, Judgment, Trial Chamber II quater, 16 November 1998, para. 202.
\end{itemize}
the *dicta* of the Appeals Chamber and the *Celebici* Trial Chamber on this question.\footnote{118}

Most importantly, in the same *Tadic* case, the Appeals Chamber held that Article 3 of the Statute, which deals with violations of the law or customs of war, did apply to internal armed conflicts, as it functions “as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal”.\footnote{119} It accordingly stated that:

> A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value so far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.\footnote{120}

Furthermore, even if it was argued on behalf of Tadic that the Tribunal’s jurisdiction was confined under Article 3 of its Statute to war crimes committed during international armed conflicts and that the Balkan conflict was purely internal, the Tribunal’s broad definition of ‘armed conflict’ extended customary law to cover the treatment of rebels, at least when they are both ‘armed’ and ‘organized’:

> An armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the duration of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in

\footnote{118} *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Trial Chamber III, 2 March 1999, para. 15.

\footnote{119} *Prosecutor v. Tadic*, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 91.

\footnote{120} Ibid., para. 97.
the case of internal conflicts, the whole territory under the control of a party, whether
or not actual combat takes place there.\footnote{Ibid., para. 70.}

In the words of Orentlicher, the Appeals Chamber of the ICTY hereby
"rendered one of the most important rulings on war crimes since the
some principles of the Hague Law to non-international armed conflicts as
well as the criminalization of violations of common Article 3 of the Geneva
Conventions in such conflicts. As a matter of fact, the Chamber
unequivocally stressed that "customary international law imposes criminal
liability for serious violations of Common Article 3".\footnote{Prosecutor \textit{v. Tadic}, Case No. IT-94-1-AR72, Decision on the Defense Motion
for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para.
134. See Meron, Theodor, ‘War Crimes Law Comes of Age’, (1998) 92 AJIL 464.}
For Aldrich, the
Tribunal thus "explosively expanded the customary law applicable to

Clearly, the \textit{Tadic} case blurred the distinction between the distinctive
features of international and non-international conflicts respectively, and such
a conclusion is to be welcomed as perpetrators of atrocities in internal wars
should not be treated more leniently than those engaged in international wars.
In the words of Robertson,

\begin{quote}
[t]he individuals responsible for any widespread pattern of barbarity […] should be
indictable and the charges against them should not depend on technical legal
characterization of the nature of the background conflict.\footnote{Robertson, Geoffrey, QC, \textit{Crimes Against Humanity – The Struggle for Global
\end{quote}

Still, notwithstanding this great step forward in the prosecution of crimes
committed in internal armed conflicts, it might be noted that the scope of
application of common Article 3 of the Geneva Conventions might be
reduced due to the addition of a new requirement. Indeed, in the recent
*Kunarac* case, Trial Chamber II, while enumerating the general requirements for the application of common Article 3, held that:

It would appear to the Trial Chamber that common Article 3 would also require some relationship to exist between a perpetrator and a party to the conflict. Since, in the present case, the three accused fought on behalf of one of the parties to the conflict, the Trial Chamber does not need to determine whether such a relationship is required, and if so, what the required relationship should be.\(^{126}\)

It is true that the Trial Chamber is here very cautious in its finding and raises the question of such a relationship between a perpetrator and a party to the conflict without answering it. It is to be hoped that, if re-considered, the question will be answered in the negative; if not, there is a real danger to see the prosecution and punishment of violations of common Article 3 greatly restricted, as, in times of mixed conflicts, proving this particular relationship might be a difficult task.

\(^{126}\) *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1, Judgment, Trial Chamber II, 22 February 2001, para. 407. Emphasis added. It can be noted here that, subsequently, the Appeals Chamber remained silent on this particular point and merely reiterated the well-settled requirement that the acts be closely related to the armed conflict. *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002, paras 55-65.
3. The Rome Statute of the International Criminal Court

It may be noted from the outset that the Rome Statute considers that the widespread or systematic action requirements are not inherent elements of war crimes but rather "factors which should be taken into account by the Prosecutor in determining whether or not to commence investigations against particular potential accused".127 This disposition seems unnecessary as, as previously mentioned, war crimes are always part of a widespread or systematic action as they are committed during war, which is itself a widespread and systematic action.

The Rome Statute of the ICC "expands the traditional definition of war crimes to include crimes committed in internal conflicts".128 Still, it operates a distinction between war crimes perpetrated in international conflicts and in internal ones. As a matter of fact, there are 34 crimes listed for international conflicts and only sixteen for internal ones. In other words, this means that the eighteen other crimes 'omitted' in the Statute are not considered serious enough to be prosecuted by the Court as war crimes. Furthermore, the ICRC noted that, as regards internal conflicts, some crimes remain absent from Article 8 (2) (c), among which the crimes consisting in deliberately hungering the civilian population, in using certain weapons, in deliberately causing extended, durable and grave damages to the natural environment, slavery, as well as in executing minors and pregnant women. In the words of Spieker, these gaps "weaken the system of individual criminal responsibility in non-international armed conflicts considerably".129

Also, it may be noted that Article (2) (f) limits the Court's jurisdiction as regards situations of internal armed conflicts by requiring that such conflicts be "protracted between the governmental authorities and organized armed

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127 Article 8 of the ICC Statute. It may also be noted that the ILC 1996 Draft Code of Crimes established a questionable hierarchy of gravity between 'ordinary war crimes and war crimes committed in a systematic manner or on a large scale, only the latter being considered as a crime against the peace and security of mankind.


groups or between such groups". In this respect, Cassese analysed Article 8 of the Rome Statute in a very pertinent manner. He indeed pointed out that

Certain of the substantive provisions may be considered retrogressive in the light of existing law. These include: the distinction between international and internal armed conflicts, needlessly perpetuated in Article 8; an insufficient prohibition of the use in armed conflict of weapons that cause unnecessary suffering or are inherently indiscriminate; the excessively cautious criminalization of war crimes offences.130

Notwithstanding the inherent weaknesses of the Rome Statute, it is to be hoped that the trend towards effective prosecution and punishment of crimes committed in internal conflicts will continue. In the words of Aldrich,

At the close of the twentieth century, we see – remarkably – in the context of criminal prosecution, an astounding growth of the law applicable to noninternational armed conflicts.131


131 See Aldrich, George H., supra n. 124, pp. 60-61.
Chapter 3: Grounds for Commission

Il y a crime contre l’humanité lorsque l’on tue quelqu’un sous prétexte qu’il est né.
André Frossard¹

Closely linked to the previous notion of systematic or mass action, is the question of the reasons for the commission of the crime or, in other words, whether the perpetrator acted because of some special characteristics of the victim. Obviously, this requirement is always fulfilled in the case of crimes against humanity as well as in the case of genocide, even if, as we will now see, grounds for commission are only restrictively defined in the conventional definition of the latter. As regards war crimes, they are also committed against precisely targeted people, namely, the people belonging to the enemy camp and the discussion will focus here on whether the distinction drawn by international humanitarian law between combatants and civilians is coherent or if a uniform standard of protection should be applied. Finally, in the case of crimes against peace, it might be argued that these crimes are perpetrated against the people of the targeted state and that therefore, more often than not, the civilian population will be under attack. The issue of grounds for commission in the case of crimes against peace is more implicit than in the other ‘core crimes’ against international law. Like in the case of war crimes, the ground for commission here is the individual’s belonging to the enemy camp. Indeed, when an act of aggression is carried out, it clearly targets a particular population, that of the enemy camp. As a matter of fact, the horrifying events of 11 September 2001 highlighted the fact that an act of aggression, under the form of terrorist attacks, had obvious grounds for commission: the destruction of an entire people.

A. Crimes Against Humanity

The Nuremberg Charter listed two sets of crimes – murders and persecutions – and it appears that if the motive is relevant in the case of persecutions, this is not the case as regards murders and the other enumerated acts. This ‘bifurcation’ makes sense in the way that some acts are so heinous and destructive that they *per se* are crimes while other acts are crimes because the perpetrator acted against the victim based on political, racial or religious grounds. However, at Nuremberg, the evidence showed overwhelmingly the Nazis’ motives for all their crimes and the cases would have satisfied even a definition requiring specific motives for all acts. The definition of crimes against humanity enshrined in the Tokyo Charter was substantially the same as the one given by the Nuremberg Charter. Nevertheless, at least one aspect was different. Indeed, Article 5 (c) did not make persecutions subject to religious grounds, certainly because the Nazi crimes against the Jews did not have a counterpart during the Asian conflict.

The ILC’s position on the matter evolved. As a matter of fact, while the 1954 Draft Code made clear that grounds for commission were highly relevant, the 1996 Draft Code referred to the ‘bifurcation’ contained in the Nuremberg Charter and thus eliminated this requirement except for “persecutions” and “institutionalized discrimination”.

The Statute of the Yugoslavia Tribunal makes grounds for commission relevant only for persecutions and not for the other acts listed such as murder or extermination. Nevertheless, the Trial Chamber in the *Tadic* case held that the term “population” implied that all the acts enumerated – and not only persecutions – be committed on discriminatory grounds, while neither international customary law nor the Statute of the Tribunal itself require this. The requirement is a new one which was not recognised in the Nuremberg Charter, the Tokyo Charter, nor in the ILC’s Draft Codes. In fact, it was

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2 See Article I of the 1954 Draft Code of Offenses.

3 [1996] II (2) *ILC Yearbook* 47.

imposed by a decision of the Security Council as a limitation upon the jurisdiction of the Tribunal which states that:

Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.5

The Tribunal itself recognised that it was departing from customary law, which did not require such intent. As Meron rightly notes,

[t]here was no reason for the Tribunal to regard the more restrictive Report of the Secretary-General as gospel. This holding unnecessarily limits the scope of crimes against humanity; a decision to follow the Nuremberg jurisprudence would have been better.6

The risk contained by such a holding is that acts involving motives not expressly enumerated be excluded from the definitional scope of crimes against humanity. However, the Appeals Chamber overruled this decision and held that:

The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely “persecutions” provided for in Article 5 (h).7

Nonetheless, when the Statute of the Rwanda Tribunal was drafted, the definition of crimes against humanity was modified so as specifically to require that there be discrimination in the form of an “attack against any civilian population on national, political, ethnic, racial or religious grounds”.8 It thus greatly reduced the scope of crimes against humanity by requiring grounds for commissions for all offences and not only for persecutions. Such a narrow jurisdiction will definitely be an obstacle to the efficiency of the

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8 Article 3 of the ICTY Statute.
Tribunal because, in the words of Meron, this addition will make “the burden of proving crimes against humanity more difficult to meet”.

Fortunately, the ICC Statute went back to the Nuremberg ‘bifurcation’ and requires grounds for commission only in the case of persecutions. Thus, all the other acts listed can be deemed crimes against humanity even if they are committed without any specific intent. However, it must be stressed that Article 7 (1) (h) marks a step backwards in the definition of persecutions as it requires that persecutions be made “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”, thus adding a requirement which did not previously exist. With this formulation, the Court will thus not be able to prosecute persecution per se, as it is not considered in its Statute as a crime against humanity in itself.

As regards domestic legislation, it can be noted that, here again, practice differs from one state to another. Thus, the 1946 Chinese Statute requires some motivational element for all the acts while the Australian Statute states that crimes against humanity must be committed “in the course of political, racial or religious persecution”, thus also making grounds for commission relevant for all offences. However, the 1987 Canadian War Crimes Statute merely declares that the crimes be committed “against any civilian population or any identifiable group of persons”, expression which might imply a motivation against the “identifiable group” but this requirement is far from being explicit. However, the Israeli Statute also uses

10 Article II (3) of the Statute.
the bifurcated strategy of the Nuremberg Charter and therefore requires motivational elements only for persecutions.13

In the Barbie case, by its decision of 20 December 1985, the French Cour de Cassation found that Barbie had acted with the element of intent necessary for the qualification of crimes against humanity and thus highlighted the importance of grounds for commission by explicitly including political motivation among them.14 Such a finding was most probably due to practical considerations as, if not considered crimes against humanity, crimes against members of the Résistance would have been qualified as war crimes, and therefore subject to statutory limitations. This case perfectly illustrated the dangers of emphasising the importance of grounds for commission: had the Court refused to extend the notion of crimes against humanity, and thus the pre-existing law, such crimes would have gone unpunished, just because they were committed for other motives than those expressly specified.

Another danger of this limitation as to the qualification of crimes against humanity is that some actions done regardless of some characteristics of the victims would not be of international concern. Thus, the persecution of a group chosen arbitrarily without the existence of any common characteristics shared by the members of such a group will not qualify as a crime against humanity. Because of the inherent dangers of requiring specific grounds for commission for all crimes against humanity, it is to be hoped that the Rome Statute’s definition will be seen as definitely stating the law on this issue.

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13 Article 1 (b) of the Nazi and Nazi Collaborators (Punishment) Law, Israel, 1950, 5710/1950.

14 It can be noted here that the lower court had dismissed the case by arguing that crimes against humanity could not be directed against members of the Résistance since they did not form a racial nor a religious group.
**B. Genocide: The Selective Protection of Groups**

The requirement of grounds for commission is omnipresent in the definition of the crime of genocide, this crime being perpetrated in order to destroy "groups as such". However, the Genocide Convention is selective among the groups it would protect in whole or in part. As a matter of fact, the Convention affords protection to "national, ethnical, racial [and] religious" groups. The first problem with this is that the Convention does not provide for a definition of these groups. Thus, one can wonder what the differences are between a national, an ethnical and a racial group. In fact, during the drafting of the Convention, some representatives argued that the terms "racial" and "ethnic" covered the same reality, as did the terms "ethnic" and "national". There was also a serious debate over the inclusion of religious groups, the Soviet representative arguing that these groups should be considered as subgroups of national groups. Moreover, the use of the term "racial" is ambiguous as it is obvious that the concept of 'race' is nothing less than a fantasy inherited from the previous centuries. According to Margolin, the concept of race only exists from the point of view of those who intend to define it, as, in reality, there is no race.

In the Akayesu case, the Tribunal acknowledged such a shortcoming of the Genocide Convention as it had to resort to a most improbable interpretation of the Convention and found that the conventional scope of protection was

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15 Article II of the Genocide Convention.
16 See 3 U.N. GAOR C.6 (75th meeting), pp. 115-116, U.N. Doc. A/633 (1948). *Cited in* Leblanc, Lawrence J., ‘The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?’, (1988) 13 YJIL 271. In this respect, Trial Chamber II of the ICTR gave a rather large definition of "ethnic group", definition which could actually apply to the other groups enumerated in Convention: it was defined as a group “whose members share a common language and culture; or, a group which distinguishes itself, a such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)”. *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, Trial Chamber II, 21 May 1999, para. 98.
meant to apply to "permanent and stable" groups. Indeed, Tutsis did not fit in any of the groups described as they were not really a different ethni
cal group compared to the Hutus: they shared the same language, and probably the same culture. According to Destexhe, there were certainly distinguishable social categories in existence before the arrival of the colonisers, but the difference between them were not based on ethnic or racial divisions. He believes that the colonisers reinforced the antagonism between Hutus and Tutsis which "has since become absorbed by the people themselves". Chrétien described this phenomenon as 'tribalism without tribes'. Nevertheless, the Trial Chamber forced an interpretation in order to qualify the facts as genocide; had it not, the Rwanda mass killings would not have qualified as genocide!

The case of Cambodia is also perfectly illustrative of the ambiguities of the conventional definition of the crime of genocide. As Van Schaack points out, "a close reading of the Genocide Convention leads to a surprising and worrisome conclusion". Indeed, although the Cambodia massacre perpetrated by the Khmer Rouge (1975-1978) is widely defined as genocide, most of the acts committed are in reality not covered by the Convention. Thus, some of the crimes committed by the Khmer Rouge would

20 See Destexhe, Alain, Rwanda and Genocide in the Twentieth Century, Translated by Alison Marschner, Pluto Press, 1995, p. 36: "The Hutu and the Tutsi cannot even correctly be described as ethnic groups for they both speak the same language and respect the same traditions and taboos. It would be extremely difficult to find any kind of cultural or folkloric custom that was specifically Hutu or Tutsi".
21 Ibid. Emphasis added.
22 Ibid.
25 See e.g. the opinion of Beres who sees, among the instances of genocide committed since the Second World War, the Cambodian case as "being, perhaps, the most far-reaching and abhorrent", Beres, Louis René, "Justice and Realpolitik: International Law and the Prevention of Genocide", (1988) 33 American Journal of Jurisprudence 133.
fall in the scope of the Convention\textsuperscript{26} while others would not, because the victims did not constitute a national, ethnic, racial, or religious group.\textsuperscript{27} As a matter of fact, some authors argue that "confusing mass killing of the members of the perpetrator's own group with genocide is inconsistent with the purpose of the Convention, which was to protect national minorities from crimes based on ethnic hatred".\textsuperscript{28} In this case, what some refer to as "autogenocide"\textsuperscript{29} falls out of the scope of the Convention.\textsuperscript{30} If this is so, the atrocities committed by the Khmer Rouge in Cambodia against members of their own group does not amount to genocide. Indeed, in its 1999 Report, the Group of Experts for Cambodia stated that

whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretative issues, especially concerning the Khmer Rouge's intent with respect to its non-minority-group victims.\textsuperscript{31}

\textsuperscript{26} The Khmer Rouge did indeed commit genocide against a religious group – the Buddhists –, and against ethnic groups: the Vietnamese community was entirely eradicated, while members of the Chinese and of the Muslim Cham communities were massacred.

\textsuperscript{27} For an analysis of the Cambodian massacre, see Van Schaack, Beth, \textit{supra} n. 24, pp. 2269-2272.

\textsuperscript{28} See Schabas, William A., \textit{Genocide in International Law – the Crimes of Crimes}, Cambridge University Press, 2000, p. 120.

\textsuperscript{29} See U.N. Doc. E/CN.4/SR.1510: A report to the U.N. Human Rights Commission noted that the mass murder which had occurred in Cambodia was comparable to the depradations of the Nazis and that it represented "nothing less than autogenocide". The term "autogenocide" has also been used by some scholars. However, it might be confusing as it could imply a suicidal attitude.

\textsuperscript{30} In this respect, crimes against humanity have a far wider scope of application as the requirement is that they be committed "against any civilian population" In the Tadic case, the Trial Chamber explained that "[t]he inclusion of the word 'any' makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrators or those who are stateless, as well as those of a different nationality". \textit{Prosecutor v. Tadic}. Case No. IT-94-1-T, Opinion and Judgment, Trial Chamber II, 7 May 1997, para. 939. As regards war crimes, it seems that, although their scope extends to victims of the same nationality than the perpetrators, there are however some restrictive conditions. For instance, the Tadic Appeals Chamber held that "even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 [of Geneva Convention IV] would still be applicable. Indeed, \textit{the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY)} on whose behalf the Bosnian Serb armed forces had been fighting". \textit{Prosecutor v. Tadic}, Case No. IT-94-1, Judgment, Appeals Chamber, 15 July 1999, para. 169. Emphasis added.

As a result, the Group of Experts did not take position on the issue, and considered that the matter should be dealt with by the courts if Khmer Rouge officials were charged with genocide against the Khmer national group.\(^3\)\(^2\) Such an interpretation of the Convention thus leads to absurd results.

Nevertheless, it is arguable that this position is wrong according to the Convention itself, which expressly confers protection to “national” groups, thus including cases of “auto-genocide”.\(^3\)\(^3\) Furthermore, such a reading of the text omits the fact that the majority of a population might also be a victim of genocide. In his report, Whitaker observed that a victim group can constitute either a minority or a majority.\(^3\)\(^4\) He thus concluded that “the definition does not exclude cases where the victims are part of the violator’s own group” and that, accordingly, the Cambodian massacres were a clear case of genocide “even under the most restricted definition”.\(^3\)\(^5\) According to Schabas, “the label “group” is flexible, enabling the Convention to apply without question to the destruction of entities that may not qualify as “minorities””.\(^3\)\(^6\)

Ultimately, as the Convention does not provide for detailed definitions in its provisions, it leaves the states parties significant discretion as to the groups which are protected. As a matter of fact, “defining the groups more precisely was presumably left to the implementing legislation which parties to the Convention are to adopt in accordance with Article V”.\(^3\)\(^7\) As a result,\(^3\)\(^2\)

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\(^3\)\(^3\) See also Hannum, Hurst, ‘International Law and Cambodian Genocide: The Sounds of Silence’, (1989) 11 HRQ 107: “nothing in the travaux préparatoires is contrary to or incompatible with the proposition that the Khmer people of Kampuchea constitute a national group within the meaning of Article II” (p.107).

\(^3\)\(^4\) Whitaker Report, p. 16, para. 29.

\(^3\)\(^5\) Ibid., p. 16, para. 31.

\(^3\)\(^6\) Schabas, William A., supra n. 28, p.108.

“different states have varying definitions of protected groups and problems could arise in interpreting and applying the Convention”.38

Because the Convention proceeds to a limitative list of the groups which deserve protection, it implies that genocide against groups other than those enumerated is acceptable...and legal. Furthermore, the fact that the Convention protects the enumerated groups “as such” also gives rise to serious problems. Indeed, genocidal actions may be taken against any national, ethnical, racial, or religious group, but the application of the Convention to them can easily be impeded by the claim that they are not being proceeded against as members of one of these groups “as such”, but as members of other groups which are not protected by the Convention. In other words, perpetrators are here provided with a defence to a charge of genocide, as they could use the pretext of oppressing other groups to persecute groups conventionally protected. In this respect, Nehemiah Robinson rightly believes that “the destruction of ethnic, racial, or religious groups under the guise of “political groups” would be an obvious violation of the Convention”.39 Such an assertion is perfectly true but remains completely theoretical. Indeed, such a manipulation of truth will be impossible to prove. Furthermore, it is arguable that the international community of states will find this very convenient as it will give them a perfect excuse not to condemn the mass killings, let alone to intervene.

The travaux préparatoires of the Convention show that the exclusion of political and social groups from Article II provoked more debate than any other aspect of the text. At the time of the drafting, pressure was being brought to bear for the speedy ratification of the Convention on the ground that genocide was being committed behind the Iron Curtain, even if the Genocide Convention would not apply to such cases! Indeed, the Soviet Union and its Communist satellites only had to invoke the fact that their victims were political enemies in order to avoid punishment. Thus, the religious persecutions which took place in Czechoslovakia, Hungary and

38 Ibid.

Bulgaria on the ground that the clergy were enemies of the state would be a clear example of the meaninglessness of the Convention in such cases. Van Schaack explains this contradiction by the “imperative to avoid having the Convention inculpate Stalin’s purges” of the Kulaks during the late 1920s and early 1930s. Dramatically, such an imperative was respected as, under this exclusion, for many years Stalin’s extensive mass-murders of ethnic groups in the Soviet Union were not acknowledged as genocide.

During the drafting, delegates suggested that, where acts fell outside the scope of the definition because the victims did not belong to one of the groups enumerated, the offence “could also constitute crimes against humanity when committed against members of other groups, including social and political groups”. In other words, the delegates did acknowledge the fact that genocide was indeed possible against other groups than those expressly cited, but estimated that these groups did not deserve the protection of the Genocide Convention, which was then more efficient than the one offered by the concept of crimes against humanity. One has to remember that, at the time, it was not clear whether crimes against humanity could be qualified as such if they were committed in time of peace, the IMT having ruled that crimes against humanity had to be connected with war. As a result, the numerous groups excluded from the conventional scope of application were left without any protection, and the drafters of the Convention proved very hypocritical in suggesting that they could be protected through the apparently broader concept of crimes against humanity. One could argue that this problem is now completely solved due to the fact that it has been recognised that crimes against humanity could also occur in time of peace, and that this latter concept now definitely has a wider scope of application. In this respect, it might be noted that the ICTR Statute indirectly acknowledged the reality of genocide committed on political

40 For a description of these purges, see Kuper, Leo, *Genocide : Its Political Use in the Twentieth Century*, Yale University Press, 1981, pp. 146-140.


42 See *supra* Chapter 1.

43 Ibid.
grounds, as such grounds were actually added in its definition of crimes against humanity, in order to allow for the prosecution of acts against hutu opponents, which are not covered by the Convention.\(^{44}\)

In any case, this distinction among groups is still highly questionable as there is no reason why genocide against some groups should be considered as a crime against humanity, and not as genocide. If genocide is happening, then the adequate term must be used to describe the criminal acts. In the words of Donnedieu de Vabres,

> genocide is an odious crime, regardless of the group which falls victim to it […], the exclusion of political groups might be regarded as justifying genocide in the case of such groups.\(^{45}\)

It has been argued that the exclusion of ‘political groups’ from the scope of the Convention was due to the fact that such groups were neither stable nor permanent.\(^{46}\) For instance, LeBlanc accepts the exclusion of political groups because of the “difficulty inherent in selecting criteria for determining what constitutes a political group” and because of “their instability over time”.\(^{47}\) However, such an argument is far from being convincing. Indeed, apart from the so-called racial groups, the other groups enumerated in the Convention do not appear to be stable nor permanent.\(^{48}\) In fact, one day after the adoption of the Genocide Convention, the General Assembly adopted the UDHR which Articles 15 (2) and 18 expressly recognise the rights to change nationality as

\(^{44}\) See Article 3 of the ICTR Statute.


\(^{46}\) During the \textit{Ad Hoc} Committee's debates, Lebanon’s representative argued that political groups were far less stable in character than the other groups mentioned (U.N. Doc. E/AC.25/SR.4, p. 10), while China’s representative questioned the fact that political groups “had neither the stability nor the homogeneity of an ethnical group”. He further stated that “there was a risk of bringing about a confusion between the idea of political crime and that of genocide” (U.N. Doc. E/AC.25/SR.3, pp. 5-6).

\(^{47}\) LeBlanc, Lawrence J., \textit{supra} n. 37, p. 292.

\(^{48}\) This is certainly why the ICTR has been seen as giving a wrong interpretation of the Convention in the \textit{Akayesu} case by resorting to the “stable and permanent group” concept. \textit{Prosecutor v. Akayesu}, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, para. 515.
well as religion respectively. Furthermore, History showed that political opinion or belonging to a social group could be seen as a permanent feature of a given individual. Thus, if we take the example of Cambodia, the Khmer Rouge believed that some social groups were globally criminal, that they were criminal by nature, *per se*, and that this ‘crime’ was transmitted to spouses as well as to descendants, through a ‘hereditarisation’ of the acquired social features. Kuper also notes that “past political affiliation can be as ineradicable a stigma, and as irrevocable a warrant for murder as racial or ethnic origin”.

Another reason given in order to justify the exclusion of political groups from the Convention’s scope of application was the “right of the State to protect itself”, to respond to disturbing elements in its own country. Such an argument is obviously highly immoral as it expressly recognises the possibility for the state to commit genocide in order to repress political opposition and to take action against subversive elements. Should it be recalled that genocide is never justifiable nor admissible? What the Convention does is to legitimate violence against political groups. Its Article II is nothing less than an open-door enabling states to commit genocide in complete legality! As Lane rightly points out the elimination of political groups from the Convention creates a serious loophole in the Convention’s scheme, for not only does it leave unprotected political groups *per se*, but also suggests that the mass killing of protected groups may be justifiable for political reasons. This is of particular concern in the Cambodian setting, where the alleged mass killing had been directed to a large extent at the regime’s middle-class constituency.

Other authors also assert that “through the dropping of political groups from the victim list, the most severe form of discrimination currently

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49 Article 15 (2) provides that “No one shall be [...] denied the right to change his nationality” and Article 18 that “Everyone has the right to [...] freedom to change his religion”.

50 Children were deemed to be ‘dangerous’ until the third generation.


52 LeBlanc, Lawrence J., *supra* n. 37, p. 292.

practiced is, in effect, tolerated and, in a sense, "legalized" by omission".\textsuperscript{54} It
appears clear that none of these reasons are valid. As a matter of fact, political groups are excluded from the conventional sphere of protection on
the grounds that they are not stable nor permanent, and that they may represent a threat to a government's authority. If this was so, why would entire families be completely eradicated?\textsuperscript{55} Why would children be murdered? How can someone honestly believe that a child can have so strong a political opinion that he should be killed for it?\textsuperscript{56} The worst is that the international community of states apparently does believe so.

From the travaux préparatoires of the Convention, it is obvious that such a shortfall is due to political reasons, notably the desire to insulate political leaders from scrutiny and liability. As Kuper rightly notes, "the real issue was the freedom of governments to dispose of political opposition without interference from the outside world".\textsuperscript{57} As Van Schaack points out, the exclusion of political groups in the Convention results "in a legal regime that insulates political leaders from being charged with the very crime that they may be most likely to commit: the extermination of politically threatening groups".\textsuperscript{58}

Once again, the argument of state sovereignty had the lead over that of Justice. Indeed, it can easily be argued that most states would never had ratified the Convention had it extended protection to political groups, even if it can

\begin{itemize}
\item \textsuperscript{55} Whole families were indeed executed during the Indonesian anti-communist genocide, as well as in Soviet Russia under the Stalinist regime, in Cambodia under Pol Pot's regime or in Equatorial Guinea under Macias. In this respect, it might be noted here that the exclusion of political groups from the conventional definition of genocide led the International Commission of Jurists to rule that the killings in Equatorial Guinea were not genocide. See International Commission of Jurists, 	extit{The Trial of Macias in Equatorial Guinea: The Story of a Dictatorship}, Report submitted by Alejandro Artucio, International Commission of Jurists, 1978.
\item \textsuperscript{56} There was in fact a Jewish child imprisoned in Drancy in May 1944 under this mention: "Boy, 18 months, terrorist". The horror of genocide clearly has no limit. See de Fontette, François, 	extit{Histoire de l'Antisémitisme}, Presses Universitaires de France, Collection Que Sais-Je?, p. 111.
\item \textsuperscript{57} Kuper, Leo, 	extit{supra} n. 51, p. 16.
\end{itemize}
already be pointed out that some national laws do recognise genocide committed on political grounds.\(^{59}\) Nonetheless, during the drafting, some representatives feared that the inclusion of political groups in Article II might jeopardise support for the Convention in many states. In other words, states wanted to keep a possibility to commit genocide against their own citizens. As a result, Article II of the Genocide Convention embodies what Dworkin called the classic “checkerboard”\(^{60}\) regime, meaning a regime which ensures disparate protection to victims of genocide on completely arbitrary grounds. In the words of Chalk, the exclusion of political and social groups from the protection of the Genocide Convention means

ignoring the 15 to 20 million Soviet civilians liquidated as “class enemies” and “enemies of the people” between 1920 and 1939; […] neglecting the roughly 300,000 mentally impaired and mentally ill Germans and others murdered by the Nazis as “life unworthy of life”; […] overlooking the thousands of homosexuals killed by the Nazis because of their sexual orientation; […] disregarding the million of more Khmer murdered by the State and the Communist party of Kampuchea in the years from 1975 and 1978.\(^{61}\)

Genocide against political and social groups should be included in the scope of the Convention, if only to acknowledge the fact that it takes a great toll of human lives. As Chalk recalls, “membership to social categories had proven lethal to millions of human beings”.\(^{62}\) Some scholars tried to resolve this situation by introducing the notion of ‘politicide’, meaning genocide on a political basis and thus covering the killings of members of political groups.\(^{63}\) The term ‘sociocide’ could also be used to designate genocide on a social

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\(^{59}\) See infra p. 80.


basis. However, this is not a proper solution as it does not answer the question whether these killings are or are not genocide. In the affirmative, then the word ‘genocide’ should be employed. Furthermore, the introduction of new words only complicates existing international law by creating numerous distinctions which completely empty the notion of its meaning.

Moreover, one can really wonder why the Convention does not include political groups while the other major instruments include the category of political groups among the protected ones. Indeed, the prohibition of crimes against humanity as defined by Article 6 (c) of the IMT Charter prohibits persecutions on “political, racial or religious grounds”.\textsuperscript{64} Article I of the Convention relating to the Status of Refugees provides for protection of individuals from persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion”.\textsuperscript{65} In other words, the Genocide Convention here creates “an internally inconsistent human rights regime”.\textsuperscript{66} The prohibition of genocide against political groups is also expressed in various national legislation, thus allowing prosecutions in this case. This is expressly the case in Ethiopia\textsuperscript{67} and in Costa Rica.\textsuperscript{68} In Peru, the prohibition includes ‘social groups’, and, by extension, political ones.\textsuperscript{69} Finally, in France and in Romania, the protection is broader and the definition provides a ‘catch all’ category: while the French Penal Code refers to “un groupe déterminé à partir de tout autre critère arbitraire”,\textsuperscript{70} the Romanian one prohibits the destruction of a “collectivity”.\textsuperscript{71}

\textsuperscript{64} Emphasis added.
\textsuperscript{66} Van Schaack, Beth, \textit{supra} n. 58, p. 2283.
\textsuperscript{67} Article 281 of the Ethiopian Penal Code (1957).
\textsuperscript{68} Article 373 of the Costa Rican Penal Code. Also, Article 127 of the Costa Rican Penal Code Project (1998) offers an extremely wide protection as the definition of genocide covers gender, age, political, sexual, social, economic, and civil groups.
\textsuperscript{69} Article 319 of the Peruvian Penal Code (1998).
\textsuperscript{70} Article 211-1 of the Nouveau Code Pénal.
\textsuperscript{71} Article 356 of the Romanian Socialist Republic Penal Code (1976).
According to Chalk and Jonassohn, “the wording of the Convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it”.72 In fact, it could also be held that not one of the genocides committed is covered by the Convention. As a matter of fact, it could be argued that the Armenians, seen as a political threat in the Ottoman Empire, were a political group, and thus that their extermination was not genocide. In fact, such an absurd conclusion could also be drawn from the Shoah itself, as the Jews were considered as ‘enemies of the Reich’.73 Moreover, it is not entirely sure that Jews could be seen as an ethnic, racial, religious or national group. As Sartre stated,

la communauté juive n’est ni nationale, ni internationale, ni religieuse, ni ethnique, ni politique: c’est une communauté quasi historique [...] Ce corps quasi historique ne saurait être considéré comme un élément étranger dans la société.74

Furthermore, in the words of Drost,

a convention on genocide cannot effectively contribute to the protection of certain described minorities when it is limited to particular defined groups [...] it serves no purpose to restrict international legal protection to some groups; firstly, because the protected members always belong at the same time to other unprotected groups.75

Dramatically, the opinion of the French representative during the drafting of the Convention proved to be prophetic. He indeed warned that “whereas in the past crimes of genocide had been committed on racial or religious


75 Drost, Pieter N., The Crime of State – Penal Protection for Fundamental Freedoms of Persons and Peoples, Book II: Genocide – United Nations Legislation on International Criminal Law, A.W. Sythoff, 1959, pp. 122-123. Kuper also noted this interweaving of the political with the racial, ethnic, or religious massacres, notably due to the fact that “in situations of group conflict, the internal divisions become politicized, and political division tends more and more to coincide with ethnic (or racial and religious) origin. Thus political mass murders and the ethnic factor become interwoven, raising difficult problems of classification”. See Kuper, Leo, The Prevention of Genocide, Yale University Press, 1985, p.127. However, the expressions ‘political mass murder’ and ‘political genocide’ do not seem appropriate
grounds, it was clear that in the future they would be committed mainly on political grounds". Events since the adoption of the Genocide Convention did show that political groups are targeted for mass murders in many countries. As a matter of fact, the Whitaker Report acknowledged the importance of such killings and proposed to include them in an additional optional protocol. This would already be a first step towards the protection of other groups than those expressly cited in Article II of the Convention.

Political and social groups are not the only groups ‘omitted’ in the Genocide Convention. Indeed, while the atrocities of the Second World War provided the stimulus for the Convention, nothing is said about the mentally-ill who were exterminated by the Nazis, or about the homosexuals who were also victims of persecutions and murders. Maybe at the time of the drafting these subject matters were taboos... but in the twenty-first century, it is about time to recognise these genocides as well as the need for protection of these groups.

The Convention also fails to consider gender-based genocide. Indeed, in some instances men or women are the targets of physical destruction. For instance, in Afghanistan, women have been the victims of physical genocide as their right to existence is being denied by the Talibans. According to the strict wording of the Convention, such acts are not genocide because women are not among the groups listed in Article II. However, even those who still contend that such a case is not genocide will have to admit that, for obvious biological reasons, a group can only live and survive only if both genders exist. Thus, the systematic mass killing of women – or men – amounts to genocide, in the sense that its long-term result will be the elimination of the group.

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77 See Whitaker Report, p. 19, para. 37.

78 In this respect, see Prosecutor v. Krstic, Case No. IT-98-33, Judgment, Trial Chamber I, 2 August 2001, paras 595-597. Trial Chamber I here recognised
Ultimately, as Schabas rightly states, “determining the meaning of the groups protected by the Convention seems to dictate a degree of subjectivity. It is the offender who defines the individual victim’s status as a member of a group protected by the Convention”.79 Thus, it is in fact the perpetrator of the genocide himself/herself who identifies the group as such, often by giving it a false identity to the group, and who then may, or may not, decide to afford the group he/she aims at annihilating the protection of the Convention…as well as the possibility to be himself/herself prosecuted! Needless to say that, in such circumstances, the perpetrator will do everything to avoid punishment, simply by arguing that the targeted group is not among those enumerated in the Convention. According to Chalk and Jonassohn, “potential perpetrators have taken care to victimize only those groups that are not covered by the Convention’s definition”.80 As Kunz rightly notes, “governments less stupid than the Nazi Party will never admit their intent to destroy a group as such but will tell the world that they are acting against traitors, as a measure of national security policy”.81 As a result, the Convention is more pertinent as a retrospective condemnation of the Shoah82 than as a “forward-looking guide for the application of the full international prohibition of genocide”.83

We will here conclude by regretting the fact that the absence of several groups from the Genocide Convention’s sphere of protection

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80 Ibid.


82 Even if some could still argue that the Jewish population represented a political threat for Nazi Germany.

has unfortunately had the effect of diverting discussion from what to do to deter or remedy a concrete situation of mass killings into a debilitating, confusing debate over the question of whether a situation is “legally” genocide.84

Ultimately, it must be acknowledged that “[t]he world cannot afford to ignore this form of genocide simply because most of its victims were not selected as members of racial, religious, or ethnic groups”.85 Thus, considering genocide as a crime against humanity would obviously remedy to this unacceptable situation. Indeed, grounds for commission being seen more extensively in the case of crimes against humanity, applying these same grounds to genocide will broaden its scope and thus permit better protection and effective punishment.


C. War Crimes: The Distinction between Combatants and Civilians

*War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger.*
Max Huber 86

In the context of war crimes, as in the case of crimes against peace, the requirement of grounds for commission is also fulfilled. Indeed, the crimes committed are clearly directed at certain particular targets, namely, the military adversaries. Nonetheless, the case of war crimes needs to be studied in more depth as the *jus in bello* – the laws of warfare – draws a fundamental distinction between combatants and civilians (i.e. non-combatants). In essence, under international law, war is supposed to be waged exclusively between combatants, while injury to civilians ought to be kept to a minimum. Thus, Article 48 of Additional Protocol I confirmed as a ‘basic rule’, pertaining to international customary law, the duty to differentiate at all times between civilians and combatants. Still, such a distinction is blurred in practice and

[i]t is reported that in World War I, five percent of casualties were civilian. Today, eighty percent of casualties are civilian, and these are mostly women and children who are often deliberately targeted as a terror tactic.87

Still, no matter which category an individual will fall into, the requirement of grounds for commission is fulfilled. Whether combatants or non-combatants, the victims of war were targeted because of their belonging to the enemy camp. In practice, the distinction made by international humanitarian law means that the level of protection of an individual will vary. Thus, the protection of combatants require that they enjoy certain rights as prisoners of war once they have been captured and disarmed, that they are to be safeguarded against execution or deliberate injury when they are *hors de combat* because they have been wounded or they have surrendered, that certain weapons, such as poisonous gases, may not be used against them.

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86 Commentary to Geneva Convention IV 5.

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However, next to this category of 'privileged' combatants, the *fus in bello* establishes that of unlawful (or 'unprivileged') combatants,\(^{88}\) who are denied the privileges of prisoners of war. Practically, this means that they may be prosecuted and punished for any act defined as criminal by the enemy’s domestic penal code, if committed by them prior to capture.\(^{89}\) This distinction is an artificial one as, in practice, no clear distinction is possible.\(^{90}\) As a matter of fact, under Article 4 (A) (2) of Geneva Convention III, to qualify as lawful combatants, members of organised resistance movements and other irregular forces must fulfil the condition of “having a fixed distinctive sign recognizable at a distance”, which is however a requirement not always easy to respect. For instance, it seems clear that, during the Second World War, no such distinctive sign could have been adopted by the freedom fighters.

As regards non-combatants, their protection became of international concern with the 1949 Fourth Geneva Convention which provides that they should be protected against deliberate or indiscriminate attacks, reprisal killings, seizure as hostages, starvation or deportation, destruction of their cultural objects and places of worship. Before 1949, in the words of Lemkin, “[t]he Hague Regulations deal[t] with the sovereignty of a State, but [were] silent regarding the preservation of the integrity of a people”.\(^{91}\) However, according to eminent commentators, Convention IV is above all concerned with the protection of civilians against arbitrary action by the enemy, and not

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89 Ibid., p. 104.
90 This was recently illustrated by the case of Taliban fighters and members of Al Qaeda detained by the Americans in Guantanamo Bay, none of whom were granted the status of ‘prisoners of war’ as they were seen as ‘irregular combatants’. Still, a distinction was drawn between Taliban prisoners, to whom the Geneva Conventions apply, and Al Qaeda members, to whom these do not, Al Qaeda being a terrorist organisation and not a state. See Murphy, Sean D. (ed.), ‘Decision Not to Regard Persons Detained in Afghanistan as POWs’, (2002) 96 AJIL 475-480.
against the whole series of dangers which threaten them in wartime. Furthermore, its Article 4, which deals with protected persons, provides for some noticeable exceptions in its paragraph 2 and excludes from the conventional scope of protection "nationals of a State which is not bound by the Convention", "nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent States". The most regrettable provision still remains its Article 5 which expressly allows for derogations in the case of individuals "suspected of or engaged in activities hostile to the security of the State", or "detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power". It is true that this disposition also provides that "in each case, such persons shall nevertheless be treated with humanity", but Article 5 still bears the danger of having a category of civilian internees who will not receive the normal conventional treatment and whose conditions of detention will be almost impossible to supervise.

In the context of the Rome Statute, it is to be deplored that Article 8 (2) (b) (iv) poses some new conditions for the repression of indiscriminate attacks against civilians, civilian goods, or the environment. Firstly, the attack must be deliberate. Secondly, its author must know that it will cause excessive damages regarding the military advantage. Furthermore, the use of the expression "overall military advantage" implies that it will most probably be appreciated more in function of the general armed context than in function of the losses and damages of the given attack.

The major problem with these distinctions is that they leave an in-between category, the freedom fighters, with hybrid protection, even if it might be stated here that several General Assembly Resolutions declared that they

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92 See *Commentary to Geneva Convention IV* 11.
93 See Article 4 (2) of Geneva Convention IV.
94 Article 5 (1) of Geneva Convention IV.
95 Article 5 (2) of Geneva Convention IV.
96 Article 5 (3) of Geneva Convention IV.
97 See *Commentary to Geneva Convention I* 58.
should benefit from the status of prisoners of war. Still, it seems extremely
artificial to draw such a clear-cut distinction. This situation is perfectly
illustrated by the case of the Jewish freedom fighter during the Second World
War as the question arises whether he was persecuted, and ultimately
murdered, because he was a Jew or because he was a freedom fighter. The
French Cour de Cassation was faced with this issue in the Barberi case, where
it admitted that crimes committed against members of the Résistance were
crimes against humanity. Thus, the crime was defined no longer by the
nature of the victim but by the nature of the act and the ideological identity of
its author. This finding led to the fortunate recognition that crimes committed
against members of the Résistance were also crimes against humanity and not
merely war crimes. Indeed, had this not been the case, the crimes committed
against Résistants could not have been punished, war crimes being submitted
to statutory limitations in French domestic law.

In the Vukovar Hospital Decision, the ICTY used the definition of crimes
against humanity set forth in the Barberi case so as to find that crimes against
humanity applied equally whether the victims were members of a resistance
movement or civilians:

Although according to the terms of Article 5 of the Statute of this Tribunal
combatants in the traditional sense of the term cannot be victims of a crime against
humanity, this does not apply to individuals who, at one particular point in time,
carried out acts of resistance. As the Commission of Experts, established pursuant to
Security Council Resolution 780, noted "it seems obvious that Article 5 applies first
and foremost to civilians, meaning people who are not combatants. This, however,
should not lead to any quick conclusions concerning people who at one particular
point in time did bear arms [...] Information of the overall circumstances is relevant
for the interpretation of the provision in a spirit consistent with its purpose."

98 Res 2383 (XXIII), 7 Nov 1968; Res 2508 (XXIV), 21 Nov 1969; Res 2547
(XXIV), 11 Dec 1969; Res 2652 (XXV), 3 Dec 1970; Res 2678 (XXV), 9 Dec
1970; Res 2707 (XXV), 14 Dec 1970; Res 2795 (XXVI); Res. 2796 (XXVI) 10

99 See Barberi case, Fédération Nationale des Déportés et Internés Résistants et
RGDIP 1024.

100 Prosecutor v. Msksic et al., Case No. IT-95-13-R61, Review of the Indictment
Pursuant to Rule 61 of the Rules of Procedure and Evidence, Trial Chamber I, 3 April
1996, para. 29. For the report of the Commission of Experts, see U.N. Doc
S/1994/674, para. 78.
As regards the position of the ICTY on this particular matter, it might be pointed out that if, in the *Tadic* judgment, it made it clear that crimes against humanity could be committed only against a “civilian population”, it nonetheless construed broadly this expression and stated that:

The presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.  

However, this finding is extremely cautious. Not only did the Trial Chamber seem to suggest, rather than to affirm, that crimes against humanity can be committed against members of a resistant movement, but it also further restricted this possibility by holding that “although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity”.  

It is not because a combatant accepts to engage in a war, being an official soldier or a freedom fighter belonging to an unofficial army, that he accepts to be tortured, persecuted and murdered in the most horrible conditions. Combatants are human beings before being anything else and the prohibition of crimes against humanity should also apply to them. The commentators of the First Geneva Convention accordingly stated that:

The principle of respect for human personality, which is at the root of all the Geneva Conventions […] is concerned with persons, not as soldiers but as human beings.

If international humanitarian law really is concerned by human beings, it seems logical that all human beings, whether combatants or civilians, be awarded the exact same standard of protection, and this may only be achieved through the inclusion of war crimes within the broader scope of application of crimes against humanity.

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102 Ibid. Emphasis added.

Chapter 4: State Action

The final element required, which is often critical, is the governmental involvement in the commission of the acts. As Bassiouni rightly points out, international crimes are either “the product of “state-action” or the result of a “state-favoring policy” by commission, or as a result of a lack of state enforcement, that ranges from permissiveness to purposeful omission”. However, he also states, and rightly so, that:

In all cases, individuals commit crimes. What is called “state action” and “state-favoring policy” does not alter the fact that one or more individual authors are involved. The characterizations of “state action” and “state-favoring policy” refer to collective decision-making and actions by individuals who develop a policy or who execute a policy or carry out acts which constitute international crimes under color of legal authority. Decision-makers are usually few in comparison to the entire apparatus of government, let alone to the entire population of a state […] The invocation of the concept of state responsibility is, however, a symbolic act by the international community to stigmatize regimes that engage in internationally proscribed policies and conduct, irrespective of the effective results of the stigmatization in altering the internationally proscribed behavior.

The idea that only individuals can commit crimes can be found as early as 1923, when the PCIJ held that “States can act only by and through their agents and representatives”. In the same vein, Justice Jackson, in his opening statement at Nuremberg, stated:

While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.

At Nuremberg, the Tribunal also famously stated that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of

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2 Ibid., pp. 27-28.
international law be enforced". The Tribunal neither denied nor admitted the criminal responsibility of states, but based itself on the principle of individual responsibility. Still, as Friedlander rightly observes, "[t]he victorious allies in both world wars treated the defeated states as criminal entities". He further explains that:

Despite the impossibility of placing the German state in the dock at Nuremberg, Germany was on trial with its major war criminals. There can be no doubt that the allies intended to punish the German nation as well as its captured leaders. The Yalta Conference meetings, declarations, and documents are replete with references to the "dismemberment of Germany", sizeable reparations, and enforced disarmament.

It is true that state responsibility is a highly political issue which was thus eluded by the Nuremberg Tribunal which instead concentrated on individual criminal responsibility. In the words of Bassiouni,

"Nuremberg" focused on individual criminal responsibility for conduct that was the product of state policy and for which collective responsibility and state responsibility could have been assessed. Those who established the IMT were careful to avoid the notions of state and collective responsibility, except with respect to criminal organization, namely the S.S., S.D., and S.A. The simple reason is that these governments did not want to establish a principle that could one day be applied to them.

However, in the Eichmann case, the Court was less cautious and unequivocally stated that "[a] State that plans and implements a 'final solution' cannot be treated as par in parem, but only as a gang of criminals".

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5 Nuremberg Judgment 565-566.
7 Ibid.
As regards the crimes studied in this thesis, it seems clear that they all are the product of state policy. They all rely on the state apparatus, or on an organisation which has the same features than the state apparatus, in order to be committed. History showed that crimes against humanity and genocide needed an organisational policy in order to be perpetrated while crimes against peace and war crimes, because directly linked to a war, also need the state apparatus in order to be committed.
A. Crimes Against Humanity

The definition of crimes against humanity requires state policy or some form of organisational policy in order to qualify a crime as such. State practice acknowledged the fact that crimes against humanity were primarily committed by the state apparatus. Thus, already in their joint declaration of 1915, the Allies condemned the "new crimes of Turkey", and stated that members of the government or their agents responsible would be tried.\(^\text{10}\) Also, one has only to recall that the Nazis relied on the state apparatus and bureaucracy to achieve their horrendous crimes. Indeed, as soon as he obtained dictatorial powers over Germany, Hitler focused his attention on what he would do about the Jews and, in 1935, the violence of the Nazi antisemitism was channeled into law. A series of laws were unanimously adopted at the annual Congress at Nuremberg. These laws, termed the 'Nuremberg Laws', made antisemitism legal. In other words, persecutions against Jews became legal, and this was the policy of the German Nazi State.

In this respect, it may be recalled here that the IMT Charter gave the Tribunal the authority to punish persons "acting in the interests of the European Axis countries, whether as individuals or as members of organizations".\(^\text{11}\) It is true that the Allied Control Council Law remained silent on the matter but most of the individuals tried under it were governmental officials. It is to be noted that, in the cases of the German industrialists who took advantage of the Nazi policies, the American Courts adopted a looser standard and found defendants guilty based on their conduct towards the victims without requiring any connection with state policy.\(^\text{12}\)

The ILC's position on the matter seems not to have changed. Indeed, the 1954 Draft Code made state action highly relevant, and so did the 1996 Code which mentioned acts "instigated or directed by a government or by any organization or group".\(^\text{13}\) The Commission's own commentary expressly

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\(^\text{10}\) See Schwelb, Egon, 'Crimes Against Humanity', [1946] BYBIL 178-181. See also supra Introduction.

\(^\text{11}\) See Article 6 of the IMT Charter.

\(^\text{12}\) See generally Nuremberg Subsequent Proceedings.

\(^\text{13}\) Article 18, [1996] II (2) ILC Yearbook 47.
stated that this also involves private groups and criminal gangs committing systematic or mass human rights violations.

The case-law of the Yugoslavia Tribunal is interesting here as, in the *Tadic* case, the Trial Chamber clearly stated that the crime need not be associated with a formal state policy against a civilian population and held that proof of an informal policy carried out by non-state actors was sufficient.\(^\text{14}\) Subsequently, instead of requiring state action, the *Tadic* decision reached the quite reasonable conclusion that crimes against humanity can be committed by non-state entities in *de facto* control of a particular territory.\(^\text{15}\) While recognising that crimes against humanity can be committed only when there is a policy to commit such acts, the Trial Chamber specified that “it need not be the policy of a state”\(^\text{16}\) and that “such a policy need not be formalized and can be deduced from the way in which the acts occur”.\(^\text{17}\) Similarly, another Trial Chamber in the *Nikolic* case, while identifying “three distinct components” in the concept of crimes against humanity found that

> the crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone.\(^\text{18}\)

Interestingly, the Statute of the Rwanda Tribunal makes no reference to state action, certainly because many crimes were committed by persons not associated with a recognised state but who, according to the Security Council, had to be tried for crimes against humanity. Still, events in Rwanda proved that some form of organisation was needed in order to perpetrate the crime, such as propaganda through the media. The criminal factions in Rwanda clearly had *de facto* control over the country’s institutions and media.


\(^{15}\) Ibid., para. 654.

\(^{16}\) Ibid., para. 655.

\(^{17}\) Ibid., para. 653.

The Rome Statute of the ICC is in fact the first legal instrument to require a “state or organizational policy” in the definition of crimes against humanity.19 Such a requirement might contain the risk that massive human rights violations committed by non-state actors would fall outside the definitional scope of crimes against humanity. However, it may be argued that the use of the term “organizational” prevents such an absurd result from occurring.20 Still, the formulation of the Preparatory Commission in the ‘Elements of Crimes’ is in this respect all the more confusing. Indeed, the Commission interpreted “policy to commit such attack” as requiring “that the State or organization actively promote or encourage such an attack against a civilian population”,21 thus introducing a restriction which was absent from the Statutes of both International Criminal Tribunals. However, in a footnote attached to its interpretation of Article 7, the Commission provides that “[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack”.22 It is to be hoped that the ICC will ignore this contradiction and will follow the Tadic jurisprudence, according to which “if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not”.23

Such a requirement is not mentioned in the national legislations pre-cited. Nevertheless, the Supreme Court of Canada, in the Finta case, found that the national Statute implied the connection between crimes against humanity and governmental action.24

19 Article 7 (2) (a).
20 However, some authors held that the term “organizational” is ambiguous and contains the risk to limit prosecution to high level perpetrators if it is to be interpreted as a mens rea requirement, as culpability for crimes against humanity would then depend on the perpetrator’s knowledge that he or she is acting pursuant to a policy. See, e.g., McAuliffe deGuzman, Margaret, ‘The Road from Rome: The Developing Law of Crimes Against Humanity’, (2000) 22 HRQ 371.
22 Ibid.
If the requirement of state action seems totally justified considering the fact that crimes against humanity need the state apparatus for their commission, or, in other words, that only a state has the means and resources necessary to perpetrate such a crime, this requirement must however be considered in a cautious way. A perfect illustration of the danger of emphasising this requirement is given by the definition of crimes against humanity in French law and case-law. Indeed, in the Barbie case, by its decision of 20 December 1985, the Cour de Cassation limited the Nuremberg definition by adding a restrictive condition, namely that the crime be committed on behalf of a state practising a policy of ideological supremacy to be qualified as a crime against humanity. By referring to such an unclear notion, the Cour de Cassation enclosed the notion of crimes against humanity with a particular state policy and thus prevented subsequent complaints as to the crimes committed in Algeria by the French army in the 1950s and 1960s from being filed.

Similarly, in the Touvier case, the Cour de Cassation stated that the authors or accomplices of crimes against humanity were only punishable if they acted on the account of a European Axis powers, thus again linking crimes against humanity with the crimes committed by the Axis powers, while excluding the direct responsibility of the Vichy regime. Subsequently, the case was referred to the Cour d’Appel de Versailles which also held that a crime against humanity could only have been committed by a European Axis power, or in complicity with one of these powers. It thus stated that:

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25 See Bassiouni, M. Cherif, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, 1992, pp. 248-249: crimes against humanity are “collective crimes which cannot be committed unless they are part of a given state’s policy because their commission requires the use of the state’s institutions, personnel and resources in order to commit, or refrain from preventing the commission of, specific crimes described in Article 6 (c)”.


When the case came back before the Cour de Cassation in 1993, the Cour again made a strictly historical reading of the notion of crimes against humanity, and showed its complete unwillingness to deal with the question of the responsibility of Vichy's regime as a whole. It thus confirmed that only the policy of a European Axis power was liable to be incriminated with crimes against humanity and declared that Touvier's responsibility was engaged only because his personal acts, even if he was not himself national of a European Axis power, constitute crimes against humanity under Article 6 of the London Charter. Therefore, it was the personal complicity that was retained and not the complicity of a whole entity such as the French State. In fact, the French judges made a restrictive interpretation of the Nuremberg Charter which was completely wrong. Instead of referring themselves to the Nuremberg judgment, they referred themselves to the motivations of the drafters of the Charter and made of Nuremberg a law of circumstances, relative to the sole crimes committed by the European Axis powers during a precise period of time which was now over. In no case should the judges have based their decisions on a time limit, to a given conflict and to specific authors defined by their nationality as neither international nor domestic law impose such restrictions. This absurd case-law could have terrible consequences as no crimes committed today would be qualified as crimes against humanity because they obviously would be exterior, in time and circumstances, to the European Axis powers.

The outcome of this trial must be welcomed as a trend towards equal treatment of foreign and national war criminals by French courts. However, some questions remain, notably as regards the motivations of the judges who kept artificially modifying the notion of crimes against humanity, thus getting round the question whether Vichy could be held responsible as an autonomous author of crimes against humanity. As a result, the decision in

28 Arrêt de la chambre d'accusation de Versailles, 2 June 1993.
29 Touvier was found guilty and condemned to life imprisonment on 20 April 1994, cass. crim., 20 April 1994. He died in prison in July 1996.
the Touvier case was paradoxical: Touvier, main author of a French crime could be condemned because the Court decided, regardless of the historical truth, that he was an accomplice in a crime ordered by the Germans. Thus, it was a Nazi collaborator which was condemned and not a French member of Vichy’s Milice.

The requirement of state action as regards crimes against humanity is a relevant one and should be maintained within the definitional scope of this offence. However, in order to allow effective prosecution, the term ‘state’ ought to be understood in a wide way, and certainly should not be interpreted restrictively like the French courts did. The French courts emphasised state action but only as regards particular states. In other words, there could be no crimes against humanity without Axis powers. Fortunately, the 1994 French New Penal Code now provides for a broad definition of crimes against humanity which obviously would apply outside the particular context of the Second World War. Still, the notion of crimes against humanity cannot apply to acts committed between 1945 – that is, the end of the Second World War – and 1994 – the date of entry into force of the New Penal Code –, and this is clearly an inadmissible vide juridique.
B. Genocide as a State Crime

From the outset, it must be regretted here that the Genocide Convention does not deal properly with the crime of genocide as one committed by the state. Even though its Article IX expressly mentions “the responsibility of a State for genocide”, the whole approach of the Convention is that of individual crime and not of persecutions instigated by governments. Thus, genocide is not defined as a crime perpetrated by governments, while this is the case in all the situations. This is all the more surprising as the involvement of the state in the commission of genocide was recognised in Resolution 180 (II), in which the General Assembly stated that genocide was an international crime with national and international responsibilities for individuals as well as for states. Furthermore, during the drafting of the Convention itself and the debates in the Sixth Committee, the Belgian representative stated that genocide could not be committed without the collaboration or the connivence of the governments. Also, in the Kayishema and Ruzindana case, the Trial Chamber of the Rwanda Tribunal held that “it is virtually impossible for the crime of genocide to be committed without some direct involvement on the part of the state given the magnitude of this crime”.

According to Ago, former Special Rapporteur on state responsibility, the Genocide Convention “failed to do the very thing that needed to be done: namely, to make clear that genocide is a State crime and should result in sanctions against the State”. He thus regarded

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30 See Finch, George A., ‘The Genocide Convention’, (1949) 43 AJIL 733: the crime of genocide properly defined is “inherently one committed at the instigation or with the complicity of the States”.


32 Resolution 180 (II), 20 November 1947.


as totally inadequate to have made a Convention on a matter such as genocide at the end of World War II, in which all that is required for governments to punish those who actually carried out the acts of genocide. Can one really believe that, if a genocide has taken place on the territory of a given State, this has happened without the connivance of the higher authorities of that State? And can one expect that those authorities will be willing to punish the individuals or State agencies that carried out the genocide?35

For Horowitz, "genocide is always and everywhere an essentially political decision",36 which

must be conducted with the approval of, if not direct intervention by, the state apparatus. Genocide is mass destruction of a special sort, one that reflects some sort of political support base within a given ruling class or national grouping.37

In the same vein, Fein defines genocide as "organised state murder"38 and stresses that it is a "calculated crime",39 while Jonassohn and Chalk hold that "twentieth-century genocide was increasingly becoming a case of the state physically liquidating a group of its own citizens".40

The fact that the Genocide Convention gives jurisdiction to the ICJ necessarily implies state responsibility as this court only deals with states. Indeed, the International Court of Justice had to deal with the issue of genocide notably in the Application of the Genocide Convention case, where it "observe[d] that the reference in Article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III", does not exclude any form of State responsibility".41 It thus did not rule out the

39 Ibid.
possibility that a state could be held directly responsible for the crime of genocide.

At least until 1 July 2002, date of entry into force of the ICC Statute, the elimination of the principle of universal enforcement and the failure to establish an international criminal court meant that the Convention relied only on the states in the territories of which the crime has been committed to prosecute the crime of genocide. According to Fein,

[the Genocide Convention has an intrinsic disabling provision. By making the signatories responsible for punishing genocide (and incitement to genocide), it relied on the State — the organization which is most often the perpetrator of genocide — to sanction its own crime.]

Practice clearly showed that domestic enforcement was at best illusory: genocide, as a government policy, will not be subjected to the jurisdiction of any national court, at least while the offending government is in power. In the words of Schwarzenberger,

the whole convention is based on the assumption of virtuous governments and criminal individuals, a reversal of the truth [...] Thus, the Convention is unnecessary where it can be applied [...] and inapplicable where it may be necessary. Ultimately, because genocide is committed, as a general rule, by the State or with its

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42 Fein, Helen, supra n. 328, p. 3.

43 As regards Germany, it is interesting to note that, due to the prohibition of retroactive laws, Nazi crimes were prosecuted not as crimes against humanity or as genocide but as murder. Consequently, the punishment was not as severe as it should have been. For example, on the twenty individuals tried during the Auschwitz trial which opened in Frankfurt on 20 December 1963, only six were condemned to life imprisonment, while three others were acquitted. See Pendas, Devin O., “Auschwitz, Je ne savais pas ce que c’était”, Le Procès d’Auschwitz à Francfort et l’Opinion Publique Allemande, in Brayard, Florent (ed.), Le Génocide des Juifs entre Procès et Histoire, 1943-2000, Editions Complexe, 2000, pp. 79-111. However, it must also be stressed here that in the case of Rwanda, more than 120,000 alleged participants in the genocide were jailed after the Rwandan Patriotic Front came into power. It is true that many of the leaders escaped, but most of those who were indicted by the International Criminal Tribunal were apprehended. As a matter of fact, they could not obtain protection, let alone immunity, in their own country as they were defeated mainly by Tutsis from Uganda, the children of Rwandan refugees from previous massacres.

complicity, leaving genocide prosecution to the domestic courts may only ensure impunity.\textsuperscript{45}

Furthermore, because the Convention does not provide for any details nor definitions in its provisions, States Parties are left great discretion as to the definition of the crime and as to the scope of application of the Convention. As a result, the Convention, instead of creating a universal system of prevention and punishment of the crime of genocide, generated a heterogeneous system which varies from one country to another. As a matter of fact, Article V provides that:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

With this article, the obligation of states to enact relevant legislation is quite weak. The use of the term “necessary” leaves the states the power to decide whether they ought to enact legislation. Furthermore, it does not impose any time limit within which the legislation has to be put into effect, thus providing states with an excuse for endlessly postponing such an enactment. Many states, among them Canada, Norway and Australia, thought that their existing legislation was sufficient. Moreover, some states also believed that genocide was unlikely to occur on their own territory. Thus, Article V does not establish uniform measures to be taken by all the States Parties. In the words of Sibert, “Article V opens an “abyss” which threatens to wreck the whole value of the Convention”\textsuperscript{46}. Consequently, legislation on genocide varies, and so does the punishment of this crime. It is true that insufficient legislation or penalties could constitute violations of Article IX which deals with state responsibility. Until today, however, such a remedy has remained purely theoretical. As a result, the Convention has been almost totally ineffective in securing punishment of the crime. As Kuper notes,


the consequences are particularly absurd in the case of domestic [i.e. internal] genocide. The effect of the present procedures is that in most cases of domestic genocide, governments would be required to prosecute themselves.47

He further states that “the performance of national courts in the punishment of genocide is thus hardly impressive”.48 In this respect, it is also incomprehensible that the Genocide Convention does not even mention the question of reparation or redress...and thus completely omits and forgets the victims of this most terrible crime. It was argued during the drafting that responsibility other than criminal would be out of place in such a document.49 However, Article V could have expressly imposed on states an obligation to provide damages in the legislation. It must be noted that the Whitaker Report did recommend the inclusion of a provision for a state’s responsibility for genocide together with reparations.50 Ultimately,

whether one applies the test of the number of genocides that have run their seemingly uninhibited course since the adoption of the Convention, or the test of the prosecutions for genocide during the same period, it is impossible to escape the conclusion that the Convention has been quite ineffective.51

It is this ineffectiveness which is the basis for the proposal that the crime of genocide should be considered as a crime against humanity. If the crime of genocide is to be prevented and punished, changes in the actual legal regime need to be made. By including genocide within the definitional scope of crimes against humanity, the legal rules applicable to this particular crime will definitely start to be more effective.

48 Ibid., p. 174.
50 Whitaker Report, p.26, para. 54.
51 Kuper, Leo, supra n. 47, p.17.
C. Crimes Against Peace

As previously stated, the Nuremberg Charter was concerned exclusively with individual criminal responsibility. While it is clear that individual responsibility for involvement in aggressive war is contingent upon state action, the Nuremberg Charter made no attempt to explain the relationship between state and individual responsibility.\(^\text{52}\)

Subsequently, during the debates within the General Assembly on the definition of aggression, a Six-Power draft definition, proposed by Australia, Canada, Italy, Japan, the United Kingdom and the United States, stated that:

> Any act which would constitute aggression by or against a State likewise constitutes aggression when committed by a State or other political entity delimited by international boundaries or internationally agreed lines of demarcation against any State or other political entity so delimited and not subject to its authority.\(^\text{53}\)

The idea that crimes against peace are state crimes is further reinforced by the fact that a state is ‘responsible’, in the sense that it is obliged to make reparation, for injuries resulting from its unlawful engagement in hostilities, to other states and to individuals. By extension, if the launching of a war, aggressive or not, is the product of state action, the crimes committed during this war, and thus war crimes, are also a result of state action or policy. Indeed, it seems obvious that, similarly to the launching of a war, the conduct of a war also requires organisation, resources and structures which are similar to that of a state. As a matter of fact, in this context also, the law recognises the responsibility of the state as it is made responsible for injuries resulting from the violation of the laws of war by its armed forces. This is a well-recognised principle of customary international law which already figured in Article 3 of the 1907 Fourth Hague Convention.\(^\text{54}\) In this respect, Wright wrote that:

> The aggressor should make reparation for all losses of life and property resulting from its military operations, all of which were in violations of its obligations under international law, while states engaged in defense or enforcement action must make reparation only for injuries resulting from breaches of the law of war, including

\(^{52}\) See infra Chapter 5 (A) (2).

breaches by their armed forces. States engaged in enforcement action may, however, escape liability for certain acts in violation of the normal rules of war and neutrality in case these acts were authorized by the United Nations.\textsuperscript{55}

Thus, similarly to the other requirements analysed in the first part of this thesis, state action is not exclusive to crimes against humanity; it also applies to genocide, crimes against peace and war crimes respectively. The four definitional elements which are necessary for a crime against humanity to be qualified as such are also shared by the other ‘core crimes’ against international law. Nonetheless, the definitional scope of crimes against humanity remains wider than that of these other crimes and therefore offers broader prevention and protection while guaranteeing more effective prosecution and punishment. The following study of the legal regime which flows from the qualification of a crime as one against humanity will also highlight the striking similarities with the legal regimes applicable to the other ‘core crimes’. Furthermore, it will demonstrate that, here again, the regime of crimes against humanity should be the one applicable to the other international crimes. Not only would this new approach secure uniformity and legal harmonisation, but it would also increase the prevention and prosecution of these most heinous crimes.

\textsuperscript{54} 1907 Fourth Hague Convention, Article 3.

\textsuperscript{55} Wright, Quincy, ‘The Outlawry of War and the Law of War’, (1953) 47 AJIL 374.
Part II: The Legal Regime of Crimes Against Humanity: Individual Accountability

Les femmes d’Auschwitz les petits enfants juifs
Les terroristes à l’œil juste les otages
Ne pouvaient pas savoir par quel hideux miracle
La clémence serait ardemment invoquée.
Paul Eluard, 1945

The Nuremberg Trials are still considered as revolutionary as they were the first formulation of crimes against humanity as a new category of international crimes. They also paved the way for the elaboration of the legal regime of these crimes. The subsequent developments will thus focus on individual criminal responsibility for crimes against humanity, these being understood in the broad sense of ‘international core crimes’, as, clearly, the legal regime applicable to all these crimes is intrinsically the same. When the legal regime differs, this difference will be analysed in order to show how the use of the regime applicable to crimes against humanity should prevail.

In this part of the thesis, the mens rea of crimes against humanity, comprising both the intent to commit the crimes and the denial of such commission, will be studied. Subsequently, the focus will be on the responsibility regime applicable to crimes against humanity and the notions of superior and subordinate responsibility as well as that of complicity will be considered. However, as such a responsibility is obviously not synonymou with prosecution, the concept of ‘universal jurisdiction’, in the broadest sense of the term, will be dealt with in order to highlight the urgency to stop the impunity enjoyed by the majority of the perpetrators of the most atrocious crimes.

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Chapter 5: The Mental Element

The 'mental element' here refers to the psychological element which accompanies the commission of an international crime. Thus, this Chapter will deal with the intent required for international criminal law to be applicable and it will highlight that such a requirement varies with the crime's qualification. In other words, the level of intent needed differs from one crime to another. But this Chapter will also consider the issue of crime denial, and most precisely of 'genocide denial'. Indeed, denial is omnipresent each time a crime is committed, even in the case of a small robbery. However, in the case of genocide, and of crimes against humanity generally, such a denial acquires a completely different dimension: it is not a lie nor an excuse, it is a criminal act.
A. The Intent Requirement

As regards crimes against humanity, no specific intent is required. What is needed is knowledge that the crimes are committed within the context of a widespread or systematic attack against a civilian population. In fact, according to the case-law of the ICTY’s Appeals Chamber, as long as the accused knew that the crimes were related to an attack on a civilian population, such an act could qualify as a crime against humanity.1 The mental element within the context of war crimes is even looser. For instance, according to the ‘Elements of Crimes’ formulated by the Preparatory Commission “[t]here is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms ‘took place in the context of and was associated with’”.2 There is no need to prove that the perpetrator knew of the existence of an armed conflict, or of the international or non-international character of this conflict.3 However, the definition of the crime of genocide requires a much higher standard of proof of the mental element in the sense that a very specific intent to destroy the group as such must exist in order to qualify the crime as genocide. The mental element as regards crimes against peace also deserves closer attention, as the intent to commit such crimes seems to be limited to a restricted number of persons.

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2 Elements of Crimes, Article 8, Introduction.

3 Ibid.
1. Genocide

The different acts covered by the Genocide Convention constitute only one element of the crime of genocide, the other element is a very specific criminal intent: those acts constitute genocide only if committed with "the intent to destroy in whole or in part, a national, ethnical, racial, or religious groups, as such". The reference to "intent" in the Convention indicates that not only must the offender have meant to engage in the conduct or to cause the consequence, he must also have had a "specific intent" or dolus specialis. Indeed, it appears from the debates during the drafting of the text that the drafters chose the intent to destroy the group as the distinctive element in genocide. The drafters thus wanted to clearly distinguish "the international crime of genocide from the municipal crime of homicide". As a result, if such a specific intent is not established, the act remains punishable but not as genocide. Schabas believes that it may be classified as a crime against humanity. In fact, echoing the District Court of Jerusalem in the Eichmann case, the ILC also noted that, where the specific intent cannot be established, the crime may still meet the conditions to qualify as a crime against humanity, namely, that of persecution.

In the Akayesu case, Trial Chamber I of the ICTR pointed out that "intent is a mental factor which is difficult, even impossible, to determine", adding that, without confession of the accused, intent can only be "inferred from a

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4 Article II of the Genocide Convention. Emphasis added.
6 Ibid. In this respect, Robinson also points out that "from the viewpoint of the minority groups, which are or may be exposed to acts described in the Convention, it makes a great difference whether those who commit these acts against them are prosecuted on that basis or only on the basis of ordinary violations of the criminal code". See Robinson, Nehemiah, The Genocide Convention – A Commentary, Institute of Jewish Affairs – World Jewish Congress, 1960, pp. 33-34.
certain number of presumptions of fact”. Applying this to the case, the Trial Chamber found that it was possible to infer the genocidal intent of the accused.

The position of the ICTY seems however to be different and it may be pointed out here that the difficulties proving the genocidal intent as to the crimes committed in Kosovo led to the abandonment of the charge of genocide in the indictment of Milosevic. However, the indictment still lists, among the victims, a huge number of children who were murdered. It is submitted here that when children and babies are murdered, the genocidal intent should be automatically inferred as these facts clearly prove the intention of exterminating the group as such. Also, in the Jelisic case, the Prosecutor could not prove the intent beyond reasonable doubt and the accused had to be acquitted. Because he apparently helped some detainees while he was commanding the camp of Luka, the Chamber concluded that “Jelisic’s actions did not reveal a firm will to pursue the partial or total destruction of a group as such”. Such a ruling is of course unacceptable considering the fact that a commander of a camp such as that of Luka necessarily had the intention to murder the prisoners. The Chamber should have remembered that, in the Nazi camps, the S.S. also had power of life and death over the prisoners, and thus the power to choose who could live. This certainly does not mean that they were not criminals. This case illustrated the difficulty to prove that a given commander specifically intended to destroy a particular group. However, the principle of command responsibility might facilitate the prosecution of a commander when his subordinates have committed genocide. It is true that the Convention is silent on the subject but

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the ICC Statute clearly established the responsibility of commanders and other superiors in its Article 28.\textsuperscript{13}

It remains nevertheless true that, as Blakesley believes, “proving specific intent to kill is one thing; proving the specific invidious intent required for genocide is another”.\textsuperscript{14} In fact, such a difficulty is accentuated in the case of the extermination of a group by obedience to superior orders as the murderers could claim that no intention could be imputed to them. As the Convention is silent on this matter, it could be argued that such a defence is permissible in the case of genocide. However, the prohibition of the defence of superior orders has now been clearly established. Indeed, the ILC’s 1954 Draft Code of Offences excluded this defence in its Article 4, while its 1996 Draft Code of Crimes excluded it in its Article 5. Similarly, Article 7 (4) of the ICTY Statute and Article 6 (4) of the ICTR Statute rejected this defence, even if it still “may be considered in mitigation of punishment”. Finally, it was also rejected by the Rome Statute in its Article 33, even though this equivocal provision is far from being satisfying as it still lists circumstances in which the person accused might be relieved.\textsuperscript{15} Unfortunately, the ICTY seemed to have taken this approach in the \textit{Erdemovic} case, as it implied that superior orders might possibly be a defence where there was an absence of moral choice.\textsuperscript{16} As the Genocide Convention as well as the Statutes of the Ad Hoc Tribunals are silent on duress, the Tribunal was thus able to reach such a regrettable decision, to say the least. In matters of genocide, one always has the choice to commit or not to commit the crime.\textsuperscript{17} In any case, had the

\textsuperscript{13} Previously, Article 7(3) of the ICTY Statute and Article 6 (3) of the ICTR Statute had established the criminal responsibility of a superior. See \textit{infra} Chapter 6 (B).


\textsuperscript{15} Nevertheless, Article 33 (2) \textit{appears} to eliminate the defence of superior orders in cases of genocide. See \textit{infra} Chapter 6 (c) (1).


\textsuperscript{17} However, Article 31 (d) of the Rome Statute expressly recognises duress as a valid ground for excluding criminal responsibility.
Convention expressly excluded the intent requirement in the case of subordinates, their prosecution would have been greatly facilitated.

Yet, the Convention still requires for a specific intent, requirement which is shocking because if such an intent cannot be proved, the persecutors will have to be acquitted. States may thus easily deny the commission of genocide by simply arguing that the required intent to destroy a group in whole or in part is lacking and absent.\textsuperscript{18} It may be recalled here that, during the drafting of the Convention, France as well as the Soviet Union were both concerned about this issue and about the danger that the definition of the intentional element might be too narrow and might thus result in acquittals.\textsuperscript{19} Some scholars also identified this risk of acquittals: as Lane writes, “the requirement of intent adds a subjective factor to the definition and thus potentially provides an escape from responsibility for mass killing”.\textsuperscript{20} An example of this situation might be given by the case of Equatorial Guinea under Macias, in which the legal officer of the International Commission of Jurists challenged Macias’ conviction for genocide, notably due to the fact that, although mass murder occurred, the intentional destruction of national, ethnic, or religious groups in terms of the Convention was not established.\textsuperscript{21}

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\textsuperscript{18} For instance, in \textit{Genocide in Paraguay}, Arens provides great evidence that genocide was committed against the Aché Indians. However, the Paraguayan Government claimed that ther was no “intent to destroy” and that therefore genocide was not being committed. \textit{Cited in} LeBlanc, Lawrence J., ‘The intent to destroy groups in the Genocide Convention: The proposed U.S. understanding’, (1984) 78 AJIL 380.
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\textsuperscript{19} U.N. Doc. A/C.6/SR.73 (Chaumont, France; Morozov, Soviet Union).
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\textsuperscript{20} Lane, Eric, ‘Mass Killings by Governments: Lawful in the World Legal Order?’, (1979) 12 New York University International Law and Politics 262. He also refers to Drost who wrote that “measures resulting in the partial or total destruction of a group but taken without the intention of such purpose and result do not fall under the definition and therefore do not constitute acts of genocide under the Convention”. See Drost, Pieter N., \textit{The Crime of State – Penal Protection for Fundamental Freedoms of Persons and Peoples, Book II: Genocide – United Nations Regulation on International Criminal Law}, A.W. Sythoff, 1959, p. 82. Lane then illustrates his quotation by giving the example of Uganda “where it was sometimes claimed that the alleged mass killings were random and without particular design”. Id.
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To remedy this inextricable situation, a recognition of a crime of ‘negligent genocide’ or ‘genocide in the second degree’ has been proposed. Nevertheless, this solution is hardly satisfying as it is based on the completely incoherent proposal that genocide could be committed by negligence, carelessness or imprudence, and as it thus totally erases the fact that genocide is intentional per se. Instead of giving a solution to this problem, this suggestion would totally empty the notion of genocide of its meaning and purpose, and would render this horrendous crime somehow ridiculous and absurd. There cannot be mass killing without intention, this is just not possible. Thus, the Convention should not be criticised for not including unintentional or negligent genocide, as it does not exist. However, genocide being intentional per se, there is no need to require a specific intent, requirement which might then impede effective punishment.

It is true that genocidal intent is best revealed in initiatives that have genocidal results. As Bryant rightly points out,

unless the intent were express, [...] the intent to destroy the group could be difficult or impossible to prove, except in those instances where the mere number of people of the group affected was significant. Practically speaking, then, the number of victims may be of evidentiary value with respect to proving the necessary intent.

Indeed, intent can be inferred mainly from concrete results together producing the genocide. Thus, genocidal intent can be very difficult to

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23 See Chalk, Frank, ‘Definitions of Genocide and their Implications for Prediction and Prevention’, (1989) 4 Holocaust and Genocide Studies 189: “genocide is primarily a crime of state and empirically it has not been true that it appears without intent”.


25 In this respect, it might be noted that Article III of the Genocide Convention incriminates “conspiracy to commit genocide”, thus making punishable the anticipation of the crime of genocide itself. However, Article 6 of the ICC Statute
prove, even if it seems quite obvious that, in matters of genocide, there is nothing to prove as facts clearly speak for themselves. When hundreds, or even thousands – not to say millions – of victims are killed, it seems evident that genocide has been committed. Therefore, in order to avoid impunity due to the impossibility of proving genocide which has nonetheless been committed, the crime of genocide should obey to the same legal regime as that of crimes against humanity for which the mere knowledge that the crimes were committed as part of a widespread or systematic attack against a civilian population suffices. In other words, this would mean replacing the intent requirement by a knowledge requirement and thus avoiding acquittals while still acknowledging the criminal state of mind of the crime’s perpetrator.\textsuperscript{26} In fact, this proposal does have some basis in practice. Indeed, using the concept of ‘knowledge’, the ICTR stated that “the offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group”.\textsuperscript{27} Even if this has remained an isolated sentence, it is true that it could lead the way to the recognition of indirect means to prove the genocidal intent, by bringing together the notions of genocide and of crimes against humanity.

\textsuperscript{26} As opposed to the recognition of ‘reckless’ genocides.

\textsuperscript{27} Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, para. 519. Emphasis added.
2. Crimes Against Peace

The issue of intent is also highly relevant in the case of crimes against peace as it appears that such intent can only exist if the perpetrator of such a crime is in a superior position. It is true that Nuremberg still remains the only instance where the accused were charged with crimes against peace and that its case-law is thus the only valid precedent one can rely on. Article 6 (a) of the Nuremberg Charter categorised “planning” for, “preparation” for, or “participation” in a common plan or conspiracy for the accomplishment of a “war of aggression as a crimes against international peace”. It should be stressed here that this category of crimes carried criminal responsibility only for involvement in wars of aggression and not for participation in aggressive acts short of war. Therefore, while such acts could be described as threats of aggression, the Nuremberg Charter criminalised only those acts which could amount to threats to commit a war of aggression, and not mere threats to commit aggressive acts short of war.\(^\text{28}\)

Thus, at Nuremberg, emphasis was put on the preparation, initiation and waging of an aggressive war. However, the interpretation of the Nuremberg Tribunal

narrowed the meaning of the words “planning” and “preparation” to activities intended by the individual to contribute to the “initiation” of a war which he knows will be “aggressive”, and it narrowed the word “waging” to activities intended by the individual to win such a war. [...] The planning, preparation, initiation and waging must be related to an actual or concretely planned war which the individual believes has been, or is about to be, initiated for aggressive purposes in the sense that the hostilities do, or would, constitute the international delinquency of aggressive war [...] Even if this intent was aggressive, he would still be immune from liability if he acted in pursuance of a lawful act of State, that is if in fact the war was not aggressive. He is not guilty unless both in his intention and in international law the war was, or would be, aggressive.\(^\text{29}\)

As a matter of fact, the Tribunal found that Schacht’s financial and armament building activity, which he terminated in November 1937 when he discovered Hitler’s intention to resort to aggressive war, was not “preparation” of aggressive war. Thus, despite the facts that he was


\(^{29}\) Wright, Quincy, ‘The Law of the Nuremberg Trial’, AJIL 67.
responsible for the rapid rearmament of Germany after 1933 and that he “was in a peculiarly good position to understand the true significance of Hitler’s frantic rearmament, and to realise that the economic policy adopted was consistent only with war as its object”, the Tribunal found that rearment of itself is not criminal under the Charter. To be a crime against peace under article 6 it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars.

Similarly, the Tribunal also found that Fritzche’s propaganda activity to sustain morale after Germany was involved in war was not considered inconsistent with the defensive intent which these defendants claimed to have. It may here be noted that an American Tribunal, in the High Command case, found that “in the intent and purpose for which it [the war] is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness”, and that “[a]s long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong”.

In fact, the Nuremberg Subsequent Proceedings are all the more interesting here as, while focusing on the issue of criminal responsibility, they put the emphasis on the personality of the accused charged with crimes against peace. For instance, in the High Command case, the Tribunal ruled that the criminality of aggressive war attached only to “individuals at the policy-making level”, and was contingent on the actual power of the individual to “shape or influence” the war policy of his country. Similarly, in the I.G. Farben case, another Tribunal declared that only those individuals in the execution of policies are to be held liable for crimes against peace. Subsequently, the ILC stated that only “high-ranking military personnel and

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30 *Nuremberg Judgment* 106.
31 Ibid.
32 *United States v. Von Leeb et al.*, Case No. 12, Military Tribunal V, 10-11 *Nuremberg Subsequent Proceedings* 762.
33 Ibid., p. 486.
34 Ibid., pp. 488-489.
35 *United States v. Krauch et al.*, Case No. 6, Military Tribunal VI, 7-8 *Nuremberg Subsequent Proceedings* 1124-1125.
high State officials" could be guilty of waging war of aggression,\textsuperscript{36} while both its 1991 and 1996 Draft Codes also restricted the circle of potential perpetrators to leaders and organizers.\textsuperscript{37}

However, if the existence of such a limited "circle of potential perpetrators" was justifiable at the time due to the fact that only high-ranking individuals could launch an aggressive war, such a restriction now seems inappropriate. Indeed, the development of new and cheaper means of warfare gives the possibility to plain individuals, and not only to official policy-makers, to initiate an aggressive war and to "shape or influence" not only the war policy of their own country, but also that of many other states. The terrorist attacks of 11 September 2001 are a clear example of this new reality which international law ought to take into account. By including crimes against peace among crimes against humanity, the limitation as to the perpetrators of these crimes would disappear and, therefore, prosecution for crimes against peace might become possible.

\textsuperscript{36} ILC Report, Second Session, [1950] II \textit{ILC Yearbook} 376.

B. Denial

In the context of international crimes, the second aspect of the mental element, side by side with the intent to commit the crime, is the denial of this very same crime. This psychological aspect is one shared by all criminals. Astonishingly, the crime of genocide, no matter its width, is no exception, and genocide denial thus deserves a special development here. Indeed, genocide being one of the most atrocious crimes, genocide denial should be considered as an international crime, as ‘psychological genocide’.

In the words of Charny, “mankind is deeply limited in its readiness to experience and take action in response to genocidal disasters. Most events of genocide are marked by massive indifference, silence, and inactivity”. The whole event of genocide evolves around the notion of denial...denial of the right of existence, and ultimately denial of the right to die. Referring to Nazism, Perec wrote that the essential principle of the concentrationary system was denial: denial of life, denial of existence, denial of humanity, denial of dignity, denial of equality...The list is immense...We now ought to stop such a dreadful enumeration by stopping the denial of facts and truth.

Denial of genocide is the universal strategy of perpetrators who thus typically deny that the events took place, that they bear any responsibility for the destruction, or that the term ‘genocide’ is applicable to what occurred. Thus, “denial, unchecked, turns politically imposed death into a “non-event”: in place of words of recognition, indignation, and compassion, there is, with time, only silence.” Denial is therefore a defence mechanism for the

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perpetrator of the crime, a defence which is used in virtually all cases of genocide. In other words, “the denial of genocide is now routine”.

One of the main danger with genocide denial is that it may take very perverse forms. Thus, if fanatics, such as skinheads and other swastika-brandishing groups, are rather easy to dismiss as racists, some deniers pretend to be historians. Under this cover, the Revisionists deny the facts, notably by devictimising the survivors and by turning them into conspirators and opportunists motivated only by greed, and thus aim at confusing the future generations in order to convert them and to promote continued persecutions and xenophobia. Their common arguments are that the Nuremberg trials were held because of the Allies’ need for revenge and their desire to clear their names at the expenses of the defeated Germans, that there are no witnesses who can prove the existence of the gas chambers and the mass murders perpetrated in them. Of course, they also often raise the outrageous question “Did Six Million really Die?” and repeatedly call for proofs of the existence of homicidal gas chambers.

The purpose of this development is obviously not to discuss these points of view, and this for the simple reason that no discussion is possible, there can be no debate. As Lipstadt rightly states, there is no “other side” to this issue. Denying the Holocaust is not an opinion, it is a lie. And indeed, as Lipstadt wrote, “deniers misstate, misquote, falsify statistics, and falsely attribute conclusions to reliable sources”. In fact, it is arguable that, by

41 In this respect, one of the main methods used by perpetrators is euphemism. For instance, the Nazis employed “rules of language” (Sprachregelung) as regarded the “Final Solution”. Thus, “to kill” became “final solution”, “evacuation” (Aussiedlung), or “special treatment” Sonderbehandlung, while “deportation” was rebaptised “gathering” (Umsiedlung) or “labour in the East” (Arbeitseinsatz im Osten). Referring to such “rules”, Hannah Arendt rightly pointed out that, in ordinary language, these would be called a lie. See Arendt, Hannah, Eichmann a Jérusalem – Rapport sur la Banalité du Mal, Traduction de l’anglais par Anne Guérin, Gallimard, Collection Folio-Histoire, 1966 (reprint 1997), pp. 144-145.

42 Smith, Roger W., supra n. 40, p. 63.


doing so, deniers also commit a crime – that of psychological genocide – which, as the following development will show, fits perfectly even within the restrictive conventional definition of the crime of genocide itself.
1. Genocide Denial as Direct and Public Incitement to Commit Genocide

The Genocide Convention does not mention hate propaganda nor the disbanding of racist organisations, even if extensive proposals on the question were formulated during the drafting of the text. However, its Article III (c) does make punishable the “direct and public incitement to commit genocide”, and such a provision could indeed be interpreted as including cases of genocide denial.

The fact that genocide denial is a direct incitement to commit the crime is very well illustrated by the denial of the Shoah. Indeed, if the public can be convinced that the extermination of the Jewish people is a myth, then the revival of national-socialism could be a feasible option. Thus, some deniers clearly have a direct political objective, namely the rehabilitation of Nazism. The denial of such occurrences is not simply to rewrite the past. It is a deliberate effort “to control and shape the future”, and perhaps “the last victim of any genocide is truth”.

Similarly, the public aspect of genocide denial is obvious, the purpose of the deniers being to convince the maximum of people that a given genocide did not take place. Thus, they give conferences, publish books, create political parties, and so forth. Such publicity can be very harmful and cause extremely serious damages, notably because genocide denial takes a very perverted form and aims at being history. Thus, the danger also exists in what we could call ‘relativism’. A perfect example of this was the ‘historians’ debate’ which occurred in the middle of the 1980s in Germany. Some, notably defending the thesis of Nolte, stated that Nazism was only a crime among others in the history of the twentieth century and that all the great

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47 Another goal of the deniers is to deny the historical foundations of the State of Israel. The deniers want indeed to show that the Jews lied in order to make the West feel guilty and to allow the creation of their own State. Denial of the Shoah is thus the expression of radical antisemitism. See the very good study of Igounet, Valérie, *Histoire du Négationnisme en France*, Editions du Seuil, Collection XXème Siècle, 2000.

powers have had ‘their own Hitler periods’. Others, such as the sociologist Habermas, argued that the Nazi crimes had no equivalent. Thus, this debate opposed the upholders of the relativisation of Nazism by Stalinism and those of the uniqueness of the regime and of the crimes committed under Hitler. The danger here is that people might be led to think that, although one side is questionable, there are two sides to this question, that such a controversy opposes ‘revisionists’ to ‘established historians’, and that both are to be heard.

As Chamy stressed, to seek to impose denial on the world is an incitement of the masses. As a matter of fact, the Armenian case is highly illustrative of the fact that indifference towards genocide, and genocide denial, may easily turn into incitement. During the war, the lack of activity on the part of the Allies was interpreted by the Nazis as tacit agreement, and they therefore felt free to develop methods to increase their mass murders, and to ultimately commit one of the worst possible crimes in History. Thus, Law has a fundamental and universal mission. When there is no real sanction, the impunity of the perpetrators is nothing but incitement to repeat the crimes, against the same victim or against another one. And indeed, “Hitler’s infamous invocation of the impunity granted to the perpetrators of the Armenian genocide serves as a poignant reminder that the absence of international criminal justice encourages future injustices”.

49 It may be recalled here that the visit of President Reagan to the German military cemetery at Bitburg “is also symptomatic of the extent to which the Second World War was being remembered as a “normal” war”. See Hilberg Raoul, ‘Bitburg as Symbol’, in Hartman, Geoffrey (ed.), Bitburg in Moral and Political Perspective, Indiana University Press, 1986, pp. 16-23.


51 See McAuliffe deGuzman, Margaret, ‘The Road from Rome : The Developing Law of Crimes Against Humanity’, (2000) 22 HRQ 341. Hitler allegedly said: “Who after all is today speaking of the destruction of the Armenians?” in order to obtain support for his criminal intentions.
2. Genocide Denial as Mental Harm

In its Article II (b), the Genocide Convention lists the act of “causing serious bodily or mental harm to members of the group” among acts of genocide. Originally, the phrase “serious mental harm” was adopted at the instigation of China, so that the Convention could cover acts of genocide committed through the use of narcotics. Thus, according to Nehemiah Robinson, “mental harm” within the meaning of the Convention can be caused only by the use of narcotics. However, such an interpretation seems today much too narrow and restrictive. As a matter of fact, the Preparatory Commission for the ICC specified that “this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment”.

Clearly, the denial of genocides as well as the unlistened testimonies of witnesses can clearly be as serious a trauma than the initial event. In fact, even if the definition of “mental harm” was limited to the enumeration of acts listed by the Preparatory Commission, genocide denial could fit in the notions of torture and of inhuman and degrading treatment. Denial is indeed a denial of the people’s right to remember, it is a mockery of their sensibilities. It is another victimisation of the victim people. In the words of Charny, denial is nothing less than a “celebration of the destruction and of the deaths”, as well as a “celebration of renewed destructiveness in the future”.

The mental harm suffered by the victims of genocides, or their descendants, is well illustrated by the case of the Armenian Genocide. As the European powers failed in their duty to punish the perpetrators, the events,

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53 Elements of Crimes, Article 6 (b), n. 3.
widely recognised when they took place,\(^\text{56}\) sank into oblivion; Kuper described them as the “United Nations’ memory lapse”,\(^\text{57}\) while Housepian refers to them as the “unremembered genocide”,\(^\text{58}\) further explaining that “it is common practice to refuse to recognize the meaning of the Armenian fate”.\(^\text{59}\)

Furthermore, due to political considerations, Turkey’s denial has been generally effective. Indeed, other governments have aided and abetted Turkey in rewriting history and in hiding any knowledge of the genocide, in pursuit of what they have taken to be their national interests.\(^\text{60}\) The denial of the Armenian Genocide also reached international fora. For instance, Ruyashyankiko, the Special Rapporteur in 1971 of the Sub-Commission on the Protection and Promotion of Human Rights aimed at the preparation of a report on genocide, stated that if the Sub-Commission wanted to put the Armenian case in the final report, he “would need to have the necessary evidence”.\(^\text{61}\) It is true that only one member of the Sub-commission supported him, as well as the Turkish government’s observer, but the fact is that a U.N. Special Rapporteur went as far as denying the Armenian Genocide.


\(^{59}\) Ibid.


The denial of the Shoah is also extremely cruel and the pain felt by a survivor when hearing such atrocities is not imaginable. Some deniers indeed stated that the existence of gas chambers was not ‘a revealed truth that everyone has to believe’, that it was a ‘detail’ in the history of the Second World War,\textsuperscript{62} that Auschwitz was equipped with ‘all the luxuries of a country club’, including a swimming-pool, dance hall, and recreational facilities,\textsuperscript{63} or that the incarceration of people was ‘a gesture of compassion’.\textsuperscript{64} Moreover, one must not forget that denial of the Shoah is nothing less than a really pervert and hideous form of antisemitism, which states that the Jews created the myth of their own extermination in order to receive money. The literature of denial is thus based on the classic antisemitic stereotypes according to which Jews are international and greedy conspirators. Antisemitism, which Arendt referred to as “an outrage to common sense”,\textsuperscript{65} is clearly an offence and generates mental harm to the targeted people. Thus, not only does genocide denial falsify truth, it also insults the victims and harms the survivors. In the words of Smith, “genocide does not end with the last atrocity: aside from its physical consequences, its psychological, political, and moral effects may continue for generations. [...] [D]enial is a continued assault on life”.\textsuperscript{66} And assaulting one’s life clearly is a crime; in this particular case, it is also nothing less than the continuing of genocide itself.

\textsuperscript{64}Paul Rassinier, \textit{ibid.}, p. 54.
3. Genocide Denial as an Act of Genocide: The Psychological Genocide

Even if the provisions of the Genocide Convention previously studied could, and indeed should, apply to cases of genocide denial, it remains necessary to incriminate expressly such an attitude. Furthermore, the international prohibition of genocide denial would only confirm the existing domestic legislation in several states. As a matter of fact, Israel, France, Austria, Switzerland, Belgium, and Germany have adopted relevant legislation. Accordingly, an overview of national case-law shows that states are willing to punish genocide denial, even if it must be admitted that domestic legislations address mainly the issue of the Shoah.

A recent case in France showed that Universities and Research Institutes might be a cover for deniers. In April 1999, the trial of Jean Plantin started because of his antisemitic works. This trial which occurred in Lyon showed that the University of Lyon-III, which ironically is named after Jean Moulin, hero of the Résistance, allowed this person to be a historian by awarding him his diplomas while he was writing in his degree thesis that “the number of Jews dead during the war is, at the most, between one million and one million and a half”. Other French cases are related to Le Pen, leader of the Front National, who was condemned several times, on the basis that freedom of speech does have its limits, namely, some essential values and the respect of

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68 French Law No.90-615 of 13 July 1990 Concerning the Suppression of all Racist, Anti-Semitic or Xenophobic Acts.
70 Article 261b of the Penal Code.
71 Law of 23 March 1995 for the Repression of the denial of the genocide committed by the German National-Socialist regime during the Second World War.
72 Articles 130 (incitement to hatred), 131 (instigation of race hatred) and 185 (insult) of the West German Criminal Code.
the rights of others.\textsuperscript{74} Even in the countries where freedom of speech is nearly unlimited, Courts did condemn the denial of the Shoah. Thus, in the United Kingdom, in the case opposing Deborah Lipstadt to David Irving, Justice Gray ruled that the author was "an active Holocaust denier; that he is antisemitic and racist and that he associates with rightwing extremists who promote neo-Nazism".\textsuperscript{75} He also ruled that "no objective, fair-minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews".\textsuperscript{76} In the United States, in the case opposing the Institute for Historical Review to Mr. Mel Mermelstein, Judge Thomas T. Johnson made the following official statement: "This Court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland" and that this "is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonable indisputable accuracy. It is simply a fact".\textsuperscript{77}

In the case of Ernst Zundel, the Canadian judge also took judicial act of the Shoah\textsuperscript{78} and condemned him to nine months of imprisonment. However, in 1992, the Canadian Supreme Court declared that the provision of the Penal Code on the basis of which Zundel was condemned was unconstitutional. To illustrate its decision, the Supreme Court notably declared that such a law, by allowing a condemnation of ideas which contradict accepted truth, was comparable to the laws of totalitarian states such as the Nazi regime in

\textsuperscript{74} For instance, Le Pen was condemned after having referred to the Shoah as 'a point of detail' in History. See Tribunal de Grande Instance de Nanterres, 23 May 1990.

\textsuperscript{75} The Guardian, 12 April 2000.

\textsuperscript{76} Ibid.

\textsuperscript{77} Superior Court of the State of California for the County of Los Angeles, pre-trial hearings, 9 October 1981. See Lipstadt, Deborah, supra n. 63, p. 141.

Germany. Even if Canada still has a law incriminating incitement to hate, the position of the Supreme Court is nevertheless highly questionable.\(^ \text{79} \)

If genocide denial is clearly prohibited in the domestic laws of some countries, it still is incriminated nowhere in international legal instruments, and its prohibition is never explicit.\(^ \text{80} \) However, it can be inferred notably from the UDHR itself which provides, in its Article 29 (3), that “these rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations”. In its Article 30, it further states that “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth therein”. Thus, it may be argued that it prohibits genocide denial, even if only implicitly. Furthermore, denying a genocide clearly stands against the rights to equality and to dignity,\(^ \text{81} \) as well as the protection against degrading treatment.\(^ \text{82} \)

Fortunately, international case-law shows a condemnation of genocide denial. Indeed, the rulings of both the U.N. Human Rights Committee and the European Commission of Human Rights seem to be in favour of such restrictions to freedom of speech.\(^ \text{83} \) Most notably, the latter ruled that the


\(^{80}\) It must be noted however that the European Parliament adopted a Resolution on European and International Protection for Nazi Concentration Camps and Historical Monuments which declares that “it is the duty of the Commission, the Council and the European Parliament […] to combat […] any denial of the fact that extermination took place in the camps” (Resolution No.B3-208, 0218, 0219, 0228 and 0283/93, European Parliament, Minutes of the Proceedings of the Sitting of 11 February 1993, Item 3). It also adopted a Resolution on racism which demanded “the adoption by the Member States of appropriate legislation condemning any denial of the genocide perpetrated during the Second World War” (Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of Right-Wing Extremist Violence, No. A3-0127/93, European Parliament, Minutes of the Proceedings of the Sitting of 21 April 1993, Item 19).

\(^{81}\) Article 1 of the UDHR.

\(^{82}\) Article 5 of the UDHR.

families of survivors of the Holocaust continue to be entitled to a protection of their parents’ memory.84 Still, an international prohibition of genocide denial remains very much needed, not only because some states do not have proper legislation on the matter, but also because it has to be acknowledged that denial concerns all cases of genocides, and not only the Shoah.

It is here argued that genocide denial should not be protected by freedom of expression.85 It is not even an offence, it is a crime. As such, it should be punished under the specific charge of psychological genocide. As a matter of fact, genocide is a crime aimed at the destruction of a group, but not necessarily involving the physical destruction of the group per se. It could thus apply to the psychological destruction of a group, to what Lemkin referred to as “moral debasement”.86 Clearly denial is about inciting people to hate, xenophobia, racism, antisemitism…and thus genocide. Denial “kills” the victims a second time by “destroying the world’s memory of them”.87 Denial is nothing less than the continuation of genocide: it is part of genocide, it is genocide…Genocide on Truth, on Memory, on Human Dignity and on History. And in any case, such an incitement to hatred can only generate the commission of the actual, physical crime.

It is true that Law does have its shortcomings, that trying deniers might turn them into victims which are denied freedom of speech, that a trial might

84 Request 9777/82 v. Belgium, Decision of 14 July 1983. Nevertheless, the position of the European Court of Human Rights in Lehideux et Isorni v. France (No. 55/1997/839/1045, 23 September 1998) is very questionable. The Court stated that the actions of Maréchal Pétain during the Second World War were still subject to debate among historians. It also went as far as to rule that forty years after the facts, the same severity should not apply, thus implying that the passing of time may diminish crimes of collaboration with Nazi Germany.

85 For an opposite view, see Neier, Aryeh, War Crimes – Brutality, Genocide, Terror and the Struggle for Justice, Times Books, 1998, p. 206: “the best chance of preventing the message of the Nazis from being translated into reality was in making certain that freedom prevailed, even when that meant extending the benefits of freedom to the enemies of freedom”.


87 Ibid., p. xvii.
be a great way to advertise their ideas,\textsuperscript{88} and that a courtroom is not a historical forum...But it is also true that measures such as adequate legislation against hate and discrimination, trials against deniers, the barring of entry rights to them\textsuperscript{89} are measures which can, if not stop the propagation of their ideas, then at least cast opprobrium on them and show an international and general respect for the victims. Deniers should not be enabled to invoke human rights in order to better destroy them. As Roth rightly writes, this “obscene historical deceit should not be practiced with impunity”.\textsuperscript{90} Denial kills truth and recorded human history, human consciousness and evolution. Denial is nothing less than falsification of history. In the words of Vidal-Naquet, it is an attempt of extermination on paper which takes over from the real extermination.\textsuperscript{91} Therefore, genocide denial should be qualified, and thus prosecuted, as genocide and, ultimately, as a crime against humanity.

\textsuperscript{88} Ernst Zundel, referring to his own trials in Toronto, said that they were an advertising worth a million dollars.

\textsuperscript{89} David Irving has been barred from Germany, Italy, and Canada.


Chapter 6: Individual Criminal Responsibility

Responsibility for international crimes has been a very debated issue during the elaboration of international criminal law. The main cause of controversy was the recognition – or non-recognition – of possible defences and excuses impeding responsibility for the perpetration of international crimes. The following developments will therefore focus on the admitted and prohibited defences in this field. Also the notions of command responsibility, obedience to superior orders and of complicity will be considered.
A. Defences

From the outset, the responsibility of the victim should be definitely ruled out. Astonishingly, the judges at Nuremberg were frequently faced with the defence of ‘consent of the victim’. Obviously, there is no room for consent as a defence when international crimes are being dealt with. When a victim cooperates to avoid the worst fate, voluntariness, the core element of consent, is of course absent, and to invoke this defence is nothing but utter cynicism. Still, some defences are admitted, even in the case of the most heinous crimes. If the principle of legality is a defence which is now completely obsolete, other arguments are available to serve as an excuse for the commission of the crimes perpetrated.
1. The Principle of Legality

One of the defences which was invoked at Nuremberg and which led to fierce and fervent debates during and after the trials was the principle of legality as regards prosecution for crimes against humanity as well as for crimes against peace. The *nullum crimen, nulla poena sine lege praevia* principle, according to which there is no crime without pre-existing law, was invoked by the defendants who claimed that these crimes contravened this principle and that these trials were therefore illegal. As Bassiouni rightly observes,

[i]t is ironic that the search for justice in accordance with a fair legal process led to the type of criticism which would not have occurred had such a process been eschewed in favor of summary court martial judgment and swift punishment.¹

However, this defence is definitely obsolete today and it might even be argued that this was in fact already the case at Nuremberg. Firstly, as regards crimes against humanity, the Treaty of Sevres of 10 August 1920, even if it never came into force, was a clear proof that states condemned such crimes against humanity and that there existed some general principles applicable to all states, including Nazi Germany. Furthermore, if some authors maintain that the maxim *nullum crimen, nulla poena sine lege praevia* is a procedural safeguard against injustice, it may be argued that it is not a rule of law. Thus, in the words of Woetzel, “since it is an ethical principle rather than a rule of law, it may be set aside if considerations of justice demand it”.² Similarly, Stone pointed out that “[w]here it has been adopted into a legal system, it is usually with exceptions and qualifications; and in many countries, including most British countries, it is not a rule of law at all”.³ Today, such arguments are reinforced by the fact the European Convention on Human Rights itself specifically provides that exceptions are possible to this maxim and its Article 7 (2) states:

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This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Kelsen also maintained that an act may be punished as a crime if it was clearly *illegal in character* at the time of its commission.\(^4\) It is obvious that the crimes perpetrated by the Nazis, which prompted the legal birth of the notion of crimes against humanity, were illegal *per se*. It is perfectly true that the law of the Nuremberg Charter was driven by the facts. It is also perfectly true that pre-existing law did not explicitly condemn such acts, but how could it? How could a law foresee the unspeakable? In the words of Bassiouni, "[t]his was truly a situation so extreme that no law, however prescient, could have fantasized the horrors that occurred. It was truly a case so maximal that it was beyond foreseeability".\(^5\)

As regards crimes against peace, the idea of charging the Nazis with the crime of starting World War II was controversial at the time and has remained so ever since. For the Americans, crimes against peace were the chief offence of the Nazis, and the criminality of aggressive war needed to be enshrined in international law. But starting a war had not been regarded as criminal up to that time. The Kellogg-Briand Pact of 1928, which outlawed war, only rendered aggression an *illegal* act for states, not a *criminal* act for which *individuals* could be tried. Nonetheless, even if the French resisted the concept for this reason, while the Soviets were concerned about criminalising aggressive war due to their invasion of Finland and annexation of parts of Poland, the American view prevailed – though the Tribunal’s jurisdiction was

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4 Kelsen, Hans, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law ?’, (1947) 1 ILQ 165. It may also be noted here that in the *Llandovery Castle* case, the German Supreme Court at Leipzig ruled that an individual may be punished for violations of international law which may not have been defined as crimes, but which were clearly illegal in character. See Woetzel, Robert K., *The Nuremberg Trials in International Law With a Postlude on the Eichmann Case*, Stevens & Sons Limited, 1962, p. 114.

limited to Axis aggression – leading to the conviction of high-ranking Nazis for crimes against peace. As the Tribunal famously stated:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.⁶

The Tribunal also held that article 6 (a) of the London Charter, which dealt with crimes against peace, was declaratory of modern international law, which regards war of aggression as a grave crime,⁷ and that:

The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.⁸

This pronouncement instigated much criticism at the time, but, in the words of Dinstein, “it is virtually irrefutable that present-day international law reflects the Judgment”.⁹ Also, even if the Tribunal unequivocally stated that, due to the criminalisation of crimes against peace in the Charter, it was “not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement”,¹⁰ it still relied on several relevant instruments, namely, the 1899 Hague Convention, the 1907 Convention for Pacific Settlement of International Disputes and the accompanying Convention Relative to Opening of Hostilities, the Versailles Treaty, the Treaties of Mutual Guarantees, Arbitration, and Non-Aggression entered into by Germany and Conventions of Arbitration and Conciliation also entered into by Germany, and, most importantly, the 1928 Kellogg-Briand Pact. Indeed, the Tribunal quoted the text of the Pact, binding sixty-three nations, including Germany, Italy, and Japan at the outbreak of the war.

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⁶ Nuremberg Judgment 186.
⁷ Ibid., pp. 219-223.
⁸ Ibid., p. 189. Emphasis added.
¹⁰ Nuremberg Judgment 190.
in 1939, and referred to the analogous situation of the Hague Convention, violation of which created individual criminal liability, in order to find that the result was to make the waging of aggressive war illegal and those committing the act criminally liable. The Tribunal also cited various draft treaties, and resolutions of the League of Nations and the Pan-American Organization declaring aggressive war a crime and added that:

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal places upon the Pact of Paris that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of Pacts and Treaties to which the Tribunal has just referred.

As regards the Pact, it found that:

The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.

The Judgment argued that, even if the Pact did not expressly state that such wars were crimes and did not appoint any courts for the trial of the aggressor,

it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.

The Nuremberg Subsequent Proceedings confirmed the position of the IMT that crimes against peace had a basis in international law. Thus, the

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11 Ibid., pp. 218-219.
14 Ibid., p. 221. Emphasis added.
court, in the Ministries case stated that “aggressive wars and invasions have since time immemorial, been a violation of international law, even though specific sanctions were not provided”.\footnote{United States v. Von Weizsaecker et al., Case No. 11, Military Tribunal IV, 12-14 Nuremberg Subsequent Proceedings 319.} The same court also found the main legal basis for the crime against peace in the Kellogg-Briand Pact. As far as individual liability for the crime against peace was concerned, the court declared that:

> Those who plan, prepare, initiate, and wage aggressive wars and invasions, and those who knowingly, consciously, and responsibly participate therein violated international law and may be tried, convicted, and punished for their acts.\footnote{Ibid., pp. 321-322. See also United States v. Von Leeb et al., Case No. 12, Military Tribunal V, 10-11 Nuremberg Subsequent Proceedings 487-491.}

As a concluding remark of this overview of the position of the Nuremberg Tribunal on the issue of crimes against peace and of the respect of the principle of legality, it might be suggested that the arguments brought in favour of the emergence of crimes against humanity could also be raised here. In the words of Röling,

> [t]he dreadfulness of World War II made us realize the necessity of preventing wars in the future. […] [T]he conviction was carried that to plan and initiate aggressive war was a crime. This conviction signified a revolution in legal thought. It introduced in international law the concept of individual criminal responsibility for the maintenance of a minimum standard of human behavior, as formulated in some essential rules of the law of nations.\footnote{Röling, Bert V.A., ‘The Nuremberg and the Tokyo Trials in Retrospect’, in Bassiouni, M. Cherif and Nanda, Ved P. (eds), A Treatise on International Criminal Law, Volume I: Crimes and Punishment, Charles C. Thomas Publisher, 1973, p. 603.}

Thus, even if it is perfectly true that criminal individual responsibility for crimes against peace was a ‘creation’ of Nuremberg, it obviously may be argued that this was perfectly legitimate. Furthermore, it is to be admitted that the findings of the Nuremberg Tribunal and the new principles it established were nothing less than the logical consequence of the efforts made during the interwar period and of the favourable climate towards outlawry of war. Ultimately, as Baxter rightly states,

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\footnote{United States v. Von Weizsaecker et al., Case No. 11, Military Tribunal IV, 12-14 Nuremberg Subsequent Proceedings 319.}

\footnote{Ibid., pp. 321-322. See also United States v. Von Leeb et al., Case No. 12, Military Tribunal V, 10-11 Nuremberg Subsequent Proceedings 487-491.}

the very fact that it [the Tribunal] has declared that the Pact is evidence of customary international law gives that proposition all the force commanded by a pronouncement of an international tribunal – whether right or wrong.\textsuperscript{18}

In any case, these considerations did not prevent the Tribunal from charging – and punishing – the war criminals with crimes against peace as it held that:

In the first place, it is to be observed that the maxim \textit{nullum crimen sine lege} is not a limitation of sovereignty, but is \textit{in general} a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances, the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.\textsuperscript{19}

With this holding, the Tribunal unequivocally established the principle of individual criminal responsibility for crimes against peace. Like in the case of crimes against humanity, Justice required that such offences were tried and punished.

\begin{flushright}
\textsuperscript{19} Nuremberg Judgment 219. Emphasis added.
\end{flushright}
2. Reprisals, *Tu Quoque*, and Mistakes

Individuals may incur criminal responsibility for reprisals, that is the retributive practices of a state against another state or its nationals in order to force it to respect the international regulation of armed conflicts. These measures became more limited as they indiscriminately punish persons on a collective basis and are obviously never admitted in the case of crimes against humanity and, by extension, of genocide. Nevertheless, the situation is less clear as regards war crimes and crimes against peace as "armed reprisals are prohibited unless they qualify as an exercise of self defence under Article 51" of the U.N. Charter.\(^\text{20}\) Therefore, here again, the legal rules applicable to crimes against humanity should be extended to these latter crimes. Also, it may be recalled here that the defence of military necessity is still accepted as a justification of acts which could easily be qualified as war crimes. For instance, this defence is admitted even in the cases of "extensive destruction and appropriation of property",\(^\text{21}\) as well as of "wanton destruction of cities, towns or villages, or devastation".\(^\text{22}\) Also, Article 31 (1) (c) of the ICC Statute establishes a highly questionable principle, namely, that, in the case of war crimes, self-defence may be a cause of exoneration of responsibility when used to defend property. Not only does this provision extends the notion of self-defence to the protection of property, but it also artificially distinguishes between war crimes on one side and crimes against humanity and genocide on the other, for which protection of property can never be invoked as a defence. According to Professor David, this provision is "a Pandora's box that is rigorously incompatible with the law of armed conflict".\(^\text{23}\) He believes that it is nothing less than a violation of *jus cogens*

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\(^\text{21}\) Article 2 (d) of the ICTY Statute and Article 8 (2) (a) (iv) of the ICC Statute.

\(^\text{22}\) Article 3 (b) of the ICTY Statute.

which is accordingly null and void pursuant to the Vienna Convention on the
Law of Treaties.\textsuperscript{24}

Another defence involving a violation of international law is that of \textit{tu quoque}, which aims at justifying the unlawful conduct of a state on the
grounds that the state upon which the harm was caused has engaged in a
similar conduct. In fact, it may be seen as a modern interpretation of the Old
Testament's 'an eye for an eye, and a tooth for a tooth'. As regards this
defence, however, the legal situation is unequivocal. Indeed, at Nuremberg,
the Tribunal rejected all the defendants' references to the Allies' violations of
the law of armed conflicts by maintaining that their breaches were absolutely
not comparable to the Nazis' atrocious crimes. Nonetheless, according to
Woetzel, such an argument could be a defence, even if not absolute:

Only if there is sufficient evidence to conclude that the act is practised with impunity
by a large number of other persons, would it be justified to assume that it was not a
crime, since international custom and general practice condoned it. On these grounds,
the International Military Tribunal at Nuremberg decided not to assess in the sentence
of Doenitz certain charges of unrestricted submarine warfare in violation of
international treaties.\textsuperscript{25}

However, this position appears to be incorrect as to rely on impunity to
prove legality is wrong. As matter of fact, as regards international crimes,
impunity is the rule, and punishment the exception, so if the law relies on
impunity as a criteria for criminalisation, no offence would actually be
punished. It is not because some commit a crime in complete impunity that
all offenders should go free.

Finally, as regards the defence of 'mistake', it can be pointed out here that
the mistake of fact – \textit{ignorantia facti excusat} – exculpates, if the criminal
intent is missing. Accordingly, the Rome Statute provides that "[a] mistake of
fact shall be a ground for excluding criminal responsibility only if it negates
the mental element required by the crime".\textsuperscript{26}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{24} Ibid.
\item\textsuperscript{25} Woetzel, Robert K., \textit{The Nuremberg Trials in International Law With a Postlude
on the Eichmann Case}, Stevens & Sons Limited, 1962, pp. 120-121.
\item\textsuperscript{26} Article 32 (1) of the ICC Statute.
\end{enumerate}
\end{footnotesize}
However, the situation is less clear as regards mistake of law which is clearly rejected as a defence in national law\textsuperscript{27} – \textit{ignorantia juris non excusat} – even when there is no criminal intent. However, more often than not, domestic courts have considered international criminal law as being rather technical and have thus tended to admit this defence in this case.\textsuperscript{28}

As regards the international scene, it may be noted that the Rome Statute admits this defence and accordingly provides that:

\begin{quote}
A mistake of law [...] shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.\textsuperscript{29}
\end{quote}

This provision seems to be rather far-reaching as it appears that, to exonerate, only the mental element needs to be missing, thus enabling the defendant to invoke his/her good faith. Also, this provision emphasises the link between this defence and that of superior orders, admitting the defence of mistake of law when the defendant “did not know that the order was unlawful” and when “[t]he order was not manifestly unlawful”.\textsuperscript{30} As Article 33 (2) then provides that “orders to commit genocide or crimes against humanity are manifestly unlawful”, it may be concluded that the defence of mistake of law can never be invoked by a subordinate who followed superior orders and thereby committed genocide or crimes against humanity. Thus, it seems that, if the principle is the rejection of the defence of mistake of law, there are however some exceptions, namely, the lack of criminal intent and the unmanifestly unlawful order, exception which is more questionable as its scope is limited to crimes against peace and war crimes only. This exception can indeed never be met in the cases of crimes against humanity and of genocide. In other words, the Statute here draws an artificial distinction between international crimes, and the regime applicable to crimes against peace and war crimes finds itself unduly restricted.

\textsuperscript{27} See e.g. Article 122-3 of the French Nouveau Code Pénal.
\textsuperscript{28} See Schabas, William A., \textit{supra} n. 23, p. 91.
\textsuperscript{29} Article 32 (2) of the ICC Statute.
\textsuperscript{30} Article 33 (1) of the ICC Statute.
Furthermore, the admissibility of mistake of law as a defence is inconsistent with the absolute rejection of the defence of obedience to domestic law. Indeed, in the case of individuals held responsible for having obeyed national legislation in violation of international law, the court clearly stated in the *High Command* case:

> International Common Law must be superior to and, where it conflicts with, take precedence over national law or directives issued by any national governmental authority. A directive to violate international criminal common law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.\(^\text{31}\)

Finally, as regards hierarchical superiors, it is here argued that they should obviously be presumed to know the law and should thus not be allowed to claim such a defence. Furthermore, if the knowledge of the accused as regards specific norms of international law cannot be ascertained by direct evidence, objective criteria, such as the manifest illegality of the order, could be used. It thus remains to be seen how the ICC will consider such a defence, and it is to be hoped that it will interpret the provisions of its Statute so as not to admit it.

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\(^{31}\) *United States v. Von Leeb et al.* , Case No. 12, Military Tribunal V, 10-11 *Nuremberg Subsequent Proceedings* 508.
B. Responsibility of the Hierarchical Superior (command responsibility)

Command responsibility has been defined as "the other side of the coin of superior orders", as "[t]he military commander is held responsible under international law, for the crimes of his subordinates if he knew or had reason to know of those activities, and he was in a position to prevent or mitigate them". In practical terms, command responsibility is generally confined to officers who have some meaningful supervisory capacity. From the outset, it may be pointed out here that the principle of command responsibility is applicable to the four ‘core crimes’ against international law, thus reinforcing the proposal that these crimes share the same legal regime.

The issue of command responsibility was extensively dealt with in the Nuremberg Subsequent Proceedings conducted under Control Council Law No.10 as well as in the trials held in Tokyo by the IMTFE. In the Von Leeb case, the court seems to have stated that, in the case of the commander issuing illegal orders, a commander, to be criminally liable, must have knowledge of the commission of patently criminal offences or offences he/she personally knows to be illegal and must either acquiesce in, participate in, or be criminally negligent in regard to the offences. Other cases seem to fit into a general rule that the commander can be held criminally responsible if he/she knew or should have known of troop conduct in violation of the law of war, and, then, took no reasonable corrective action. According to Paust, many of these basis for prosecutions “are interrelated and are tied to dereliction of duty in the general sense of the phrase “failure to take reasonable corrective commander action””.

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33 *United States v. Von Leeb et al.*, Case No. 12, Military Tribunal V, 10-11 Nuremberg Subsequent Proceedings 543-547.

The failure to control troops was dealt with notably in the trial of General Matsui in which the court considered that the orders issued to his troops to stop the crimes “were of no effect as is now known and as he must have known”. In the trial of Kimura, the court also stated that the duty of an army commander

is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.

The Tokyo Tribunal also dealt with the issue of disregard of troop conduct. In the trial of Hata, atrocities had been committed on such a large scale by troops under his command that the commander either knew of them and took no corrective action, or he was “indifferent and made no provision for learning whether orders […] were being obeyed”. In the trial of Koiso, the Tribunal considered that the atrocities committed were so numerous that it is improbable that a man in his position would not have been well-informed. He knew that the treatment of prisoners “left much to be desired” and had asked for full inquiry, but he did not resign from office nor act more affirmatively to stop illegal activity. He was thus punished for “deliberate disregard of his duty”.

Failure to investigate incidents was considered in the Von List case in which the convictions were based on the duty of a general to investigate incidents and the failure “to take effective steps to prevent their execution or recurrence”. Failure to prosecute troops who violate the law was dealt with in the Yamashita case in which the United States Supreme Court stated that the commander had an affirmative duty to take such measures as were within

36 [1948] II Judgment of the IMTFE 1175-1176
37 Ibid., p. 1155.
38 Ibid., p. 1179.
39 United States v. Von List et al., Case No. 7, Military Tribunal V, 11 Nuremberg Subsequent Proceedings 1256.
his power and appropriate in the circumstances to protect prisoners of war and the civilian population.\textsuperscript{40} It also stated that

\begin{quote}
it is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose [...] would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.\textsuperscript{41}
\end{quote}

The crimes committed by Japanese forces were so widespread, so “extensive”, and so “methodically supervised” by lower-ranking Japanese officers that it was considered that they had to be either “wilfully permitted” by General Yamashita or “secretly ordered” by him.\textsuperscript{42} This case was nonetheless surrounded with controversy as Yamashita was considered to have failed in his duty to stop the crimes committed despite the fact that he allegedly had lost all communication with his subordinates. Furthermore, when a superior of Yamashita was tried in Tokyo before an American court martial in the early 1950s, he was acquitted even though he had participated in the same events and thus had probably a greater responsibility than Yamashita.\textsuperscript{43} However, it must be noted here that, in Tokyo, many leaders were not indicted. Thus, the Emperor, who had been involved in all the key decisions of the Japanese military and government was not indicted, and neither were the leaders of Japan’s Kempeitai (Japan’s Gestapo), those of Japan’s Zaibatsu (Japan’s financial and industrial combines) and those of Japan’s Ultrapatriotic secret societies.\textsuperscript{44}

The issue of dereliction of duty was considered by the Court in the Von Leeb case: according to the court, a chief of staff is not criminally responsible, unless he/she participated in giving or executing criminal orders,

\begin{itemize}
\item\textsuperscript{41} Ibid.
\item\textsuperscript{42} See generally Paust, Jordan J., \textit{supra} n. 34, pp. 232-233.
\item\textsuperscript{43} See Cassese, A. (ed.), \textit{Röling, B.V.A. – The Tokyo Trial and Beyond, Reflections of a Peacemonger}, pp. 73-74.
\item\textsuperscript{44} See Ball, Howard, \textit{Prosecuting War Crimes and Genocide – The Twentieth-Century Experience}, University Press of Kansas, 1999, p. 78.
\end{itemize}
since he/she has no command authority and can only call matters to the attention of his/her superiors.\footnote{United States v. Von Leeb et al., Case No. 12, Military Tribunal V, 10-11 Nuremberg Subsequent Proceedings 543-544.}

More recently, command responsibility has also been dealt with by the ICTY. In his Report concerning the Tribunal, the U.N. Secretary-General stated that:

A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.\footnote{Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 and Annex (3 May 1993).}

In the \textit{Blaskic} case, Trial Chamber I of the ICTY defined the superior as “a person exercising “effective control” over his subordinates”\footnote{Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, Trial Chamber I, 3 March 2000, para. 335.} and also extended this definition by stating that “a commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them”.\footnote{Ibid., para. 301. Emphasis added.} It also gave a high standard of responsibility as regards the superior as it drew very specific obligations for the superior from the ‘knew or should have known’ test. Indeed, it stressed that

the obligation to “prevent or punish” does not provide the accused with two alternative and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.\footnote{Ibid., para. 301. Emphasis added.}

However, despite the customary law status of the principle of command responsibility, the Trial Chambers of the ICTY applied different standards of \textit{mens rea} and reached opposite findings on the ‘had reason to know’ test. For
instance, in the *Celebici* case, Trial Chamber II held that Article 86 (2) of Additional Protocol I to the 1949 Geneva Conventions created a higher standard of knowledge which required that information was available to a superior in order to hold him liable:

An interpretation of the terms of this provision in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the travaux préparatoires, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates.\(^{50}\)

Nonetheless, in the *Blaskic* case, Trial Chamber I held that the adoption of Additional Protocol I did not change customary law and that the Nuremberg precedent was still valid:

If a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be committed, such lack of knowledge cannot be held against him. However taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties.\(^{51}\)

Subsequently, the *Celebici* Appeals Chamber put an end to these divergences by concurring with Trial Chamber II:

The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard “had reason to know”, that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offence charged in the indictment.\(^{52}\)

This finding is unsatisfactory as it is inconsistent with the principle of superior responsibility. By applying a stricter standard of knowledge, based on actual knowledge rather than on negligence, the ICTY here unduly


restricts command responsibility. However, in the recent Krstic and Kvocka cases, Trial Chamber I, while recalling that according to the case-law three conditions had to be met to hold a person liable under the principle of superior responsibility, did not mention the requirement of ‘available information’. It merely stated that there had to be the existence of a superior-subordinate relationship, that the superior must have known or have had reason to know that the criminal act was about to be or had been committed, and that the superior must have failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof. It also stated that:

The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7 (1) and Article 7 (3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime through his subordinates, by “planning”, “instigating” or “ordering” the commission of the crime, any responsibility under Article 7 (3) is subsumed under Article 7 (1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.

In this particular case, the Trial Chamber applied the ‘effective control’ test and found that “General Krstic exercised “effective control” over Drina Corps troops and assets throughout the territory on which the detentions, executions and burials were taking place”. Most importantly, the Trial Chamber considered the high-ranking position of the accused as an aggravating factor:

Direct criminal participation under Article 7 (1), if linked to a high-rank position of command, may be invoked as an aggravating factor. In determining a sentence, both

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56 Likewise, Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, Trial Chamber I, 3 March 2000, para. 337.

57 Prosecutor v. Krstic, Case No.IT-98-33, Judgment, Trial Chamber I, 2 August 2001, para. 605.

58 Ibid., para. 631.
Tribunals have mentioned the three most direct forms of participation, "planning, ordering, instigating", as possible aggravating circumstances in the case of a highly placed accused.\textsuperscript{59} So it is in the case of genocide. Because an accused can commit genocide without the aid and co-operation of others, provided he has the requisite intent, a one-man genocidal agent could be viewed differently from the commander of an army or the president of a State, who has enlisted the resources of an army or a nation to carry out his genocidal effort. The Trial Chamber finds that the direct participation of a high level superior in a crime is an aggravating circumstance, although to what degrees depends on the actual level of authority and the form of direct participation.\textsuperscript{60}

Thus, despite the possible restrictions as regards the standard of \textit{mens rea} to be applied, in some other aspects, command responsibility is interpreted widely by the ICTY. For instance, in the \textit{Kunarac} case, Trial Chamber II insisted on the irrelevance of the number of subordinates who committed the acts:

Depending on the circumstances, a commander with superior responsibility under Article 7 (3) may be a colonel commanding a brigade, a corporal commanding a platoon or even a rankless individual commanding a small group of men.\textsuperscript{61}

In the same case, it also considered as irrelevant, in order to apply the principle of command responsibility, the permanent or temporary feature of the military unit that committed the acts:

Both those permanently under an individual's command and those who are so only temporarily or on an \textit{ad hoc} basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an \textit{ad hoc} or temporary basis, it must be shown that, \textit{at the time when the acts charged in the Indictment were committed}, these persons were under the effective control of that particular individual.\textsuperscript{62}


\textsuperscript{61} \textit{Prosecutor v. Kunarac et al.}, Case No. IT-96-23 and IT-96-23/1, Judgment, Trial Chamber II, 22 February 2001, para. 398.

\textsuperscript{62} Ibid., para. 399. See also \textit{Prosecutor v. Delalic et al.}, Case No. IT-96-21, Judgment, Appeals Chamber, 20 February 2001, paras 197-198 and para. 256.
Finally, it might be pointed out here that Article 28 of the Rome Statute which deals with command responsibility does not mention this new requirement of ‘available information’ in order to hold a superior accountable for the acts of his/her subordinates. It thus remains to be seen if the finding of the ICTY Appeals Chamber on this issue will stay an isolated instance or if the Chamber here paved the way for a higher standard of responsibility. In any case, its decision on the matter is highly questionable.

Clearly, the responsibility of hierarchical superior has been extensively addressed in the case-law. Putting aside the decision of the Celebici Trial and Appeals Chambers, the different courts which dealt with this particular issue, by applying either the ‘knew or should have known’ or the ‘effective control’ tests, broadened the scope of prosecution and punishment as they admitted what could be referred to as ‘the absent’s direct responsibility’. Indeed, the different cases overwhelmingly show the willingness of the courts to try and punish the commanders, even when they themselves did not actually commit the crime, but ordered or ignored it.

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63 It may be noted here that Article 28 is far-reaching as regards the responsibility of military superiors. Indeed, it provides for their criminal responsibility when they failed to exercise the necessary command and control. Moreover, by referring to the “knew or should have known” test, Article 28 (a) (i) also covers responsibility for negligence of military superiors for crimes committed by their subordinates.

64 See also Article 28 (1) of the ICC Statute which relies on the ‘effective control’ and the ‘knew or should have known’ tests.
C. Responsibility of the Subordinate

Triste, mais vrai: l'infidélité peut être une vertu.
Günther Anders

1. Obedience to Superior Orders (Respondeat Superior)

This defence is mainly related to military law which is based on a hierarchical system where discipline and obedience to superior orders, which are supposedly legitimate and lawfully executed, are values to be preserved. Therefore, criminal responsibility attaches to the commanding officer who takes the decisions and not to the subordinates who merely execute the orders. As Dinstein rightly observes,

respondeat superior is based on the demands of military discipline, on the one hand, and on the elements of mistake of law and compulsion, on the other. It removes the responsibility from the shoulders of one person, the recipient of the order, and places it on the shoulders of another, the superior who issued the order.

However, the law of crimes against humanity is here less lenient as, in the case of such crimes, this regime of responsibility would amount to a reduction of their prosecution. Indeed, by definition, crimes against humanity involve a large number of persons and, if some decision-makers are of course responsible, these crimes could not occur without the execution of their orders by numerous subordinates who must also be held responsible. In fact, it might here again be argued that the wider scope of responsibility applicable as regards crimes against humanity, and by extension, genocide should also concern war crimes and crimes against peace. As previously seen, these crimes are also always committed as part of a widespread or systematic attack and thus equally involve a large number of perpetrators.

The issue of this defence became of international concern after World War I during the drafting of the Paris Peace Treaties. In its report to the Preliminary Peace Conference, the Commission on Responsibility stated that

67 See supra Chapter 2.
civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged with responsibility.68

Furthermore, Articles 227 and following of the 1919 Versailles Treaty, even if they failed to mention such a defence, included criminal provisions to punish war crimes committed by nationals of the Central Powers. Also, during the war crimes trials held after World War One, this defence was only recognised in a restrictive way. In the Llandovery Castle case,69 the Court admitted that it was a relevant factor for mitigation of punishment but held that German military law did not excuse subordinates who exceeded orders or who carried out orders that they knew were illegal.70

In the Nuremberg Charter, this defence could mitigate punishment “if the Tribunal determines that justice so requires”.71 At Nuremberg, all the defendants invoked the Führerprinzip72 and claimed that they acted according to superior orders and that they were thus not accountable. In light of the atrocities committed, the Tribunal expressly rejected this claim73 and stated that the true test “is not the existence of the order, but whether a moral choice was in fact possible”.74 It also unequivocally affirmed that:

69 Judgment in Case of Lieutenants Dithmar and Boldt, Hospital Ship “Llandovery Castle”, Leipzig Supreme Court (German War Trials), 16 July 1921. Reprinted in (1922) 16 AJIL 708-724.
70 For an excellent analysis of the historical development of the defence of superior orders, see Lippman, Matthew, ‘Conundrums Of Armed Conflict: Criminal Defenses To Violations Of The Humanitarian law of War’, (1996) 15 Dickinson Journal of International Law 1-111.
71 Article 8 of the IMT Charter. According to Dinstein, “the proper meaning of this provision is that the fact of obedience to superior orders must not play any role at all in the evaluation of criminal responsibility (in connection with any defence whatever), and it is only relevant in the assessment of punishment”. See Dinstein, Yoram, ‘The Distinctions between War Crimes and Crimes Against Peace’, in Dinstein, Yoram and Tabory, Mala (eds), War Crimes in International Law, Martinus Nijhoff Publishers, 1996, pp. 12-14.
72 It means the supremacy of the Fuhrer’s orders.
73 Before Nuremberg, neither conventional nor customary international law specifically prohibited this defence.
74 Nuremberg Judgment 224.
Superior orders, even to a soldier, cannot be considered in mitigation when crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification.75

And that:

It was [...] submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders [...] The provisions of [...] Article [8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment.76

This finding clearly demonstrated the refusal of the Tribunal to admit the leadership principle for defence purposes. As Finch rightly stated, had the contention that the defendants

acted upon the orders of Hitler been accepted as a valid defense, the rule respondeat superior would have served merely as reductio ad absurdum for the purpose of frustrating the law. Upon such a theory it would have been impossible to punish anyone for the crimes of this war.77

At Nuremberg, this plea also took the form of a conflict of interests which the accused invoked as a defence. As Eser explained,

[d]uring the Nuremberg trials, it was quite common for military commanders to defend themselves by referring to a conflict of interests: Patriotic duty required them to stay at their posts, and in order to prevent the worst, they bowed to higher orders. The Nuremberg judgments bluntly rejected conflict of interests as a defence by reasoning that remaining in office conveyed moral support of Hitler’s violent regime.78

In any case, the fact that they obeyed orders in order to ‘prevent the worst’ was obviously an extremely cynical defence. Clearly, the worst was not prevented at all...One cannot believe that the Nazi crimes were the ‘lesser evil’.

Similarly to the Nuremberg Charter, Article II (4) (b) of the Allied Control Council Law No.10 dealt with the issue and stated that

75 Ibid., pp. 223-224.
76 Ibid.
the fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.\textsuperscript{79}

It is interesting to note that, although this provision is similar to that of the Nuremberg Charter, the phrase "if the Tribunal determines that justice so requires" had here been deleted. Furthermore, the new words "for a crime" were added, thus making it clear that in the case of crimes, discharge of responsibility was completely and totally excluded. The trials held pursuant to this law are of a particular interest here as the judgments helped setting the basic rules for the admissibility of this defence. Thus, such a defence may be considered as a mitigating circumstance when the illegality of the received order was not manifest,\textsuperscript{80} or when the recipient of the order did not really have the choice between obeying and disobeying as his/her refusal to obey could have endangered his/her life or caused him/her serious damage.\textsuperscript{81} The opinion of the IMT as regards this issue was thus upheld by the courts during these Subsequent Proceedings. Accordingly, in the Einsatzgruppen case, the Court stated that:

The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offence. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order. If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate under orders killed a person known to be innocent, because by not obeying it he himself would risk a few days of confinement. Not if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases.\textsuperscript{82}

In that same case, the Court also stated that "the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does

\textsuperscript{79} Emphasis added.

\textsuperscript{80} United States v. Ohlendorf et al., Case No. 9, Military Tribunal II, 4 Nuremberg Subsequent Proceedings 666.

\textsuperscript{81} United States v. Flick et al., Case No. 5, Military Tribunal IV, 6 Nuremberg Subsequent Proceedings 1213; United States v. Krauch et al., case No. 6, Military Tribunal VI, 7-8 Nuremberg Subsequent Proceedings.

\textsuperscript{82} United States v. Ohlendorf et al., Case No. 9, Military Tribunal II, 4 Nuremberg Subsequent Proceedings 470-471.
not respond, and is not expected to respond, like a piece of machinery" \cite{83} and, in the case of Field Marshall Milch, the Court found that “the defendant had his opportunity to join those who refused to do the evil bidding of an evil master, but he cast it aside”. \cite{84} The other courts also maintained that obedience must be granted to lawful orders only, according to international law. \cite{85}

The national courts after World War Two all seem to have rejected the plea of obedience to superior orders. However, Dinstein tells about “one unique case, and it seems to be an anomalous phenomenon and an historical anachronism, which does not fall into line with all the other post-Second World War cases”. \cite{86} This was the case of Luger, Gauleiter and civil governor of Alsace during Nazi occupation. In his case, the French Military Tribunal at Strasbourg held that he had only obeyed Wagner’s orders and acquitted him. \cite{87} This exception and “historical anachronism” could however be explained by the will of French Courts to discharge subordinates under German orders in Alsace. As a matter of fact, one has to recall that the Nazi army in Alsace was composed of German and French soldiers: the Court here probably set the precedent which would subsequently lead to the acquittal of most French soldiers from Alsace who served in the Nazi army. One terrible example of this policy was the acquittal of the criminals responsible for the massacre of Oradour-sur-Glane. \cite{88}

\begin{itemize}
\item \cite{83} Ibid., p. 470.
\item \cite{84} United States v. Milch et al., Case No. 2, Military Tribunal II, 2 Nuremberg Subsequent Proceedings 42.
\item \cite{85} United States v. Greifelt et al., Case No. 8, Military Tribunal I, 5 Nuremberg Subsequent Proceedings 153-154; United States v. Von Leeb et al., Case No. 12, Military Tribunal V, 10-11 Nuremberg Subsequent Proceedings 507-509; United States v. Von List et al., Case No. 7, Military Tribunal , 11 Nuremberg Subsequent Proceedings 1236-1238; United States v. Milch et al., Case No. 2, Military Tribunal II, 2 Nuremberg Subsequent Proceedings 791.
\item \cite{86} Dinstein, Yoram, The Defence of ‘Obedience to Superior Orders’ in International Law, A.W. Sijthoff, 1965, pp. 194-196.
\item \cite{87} (1947-49) 3 Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission 23. Cited in Dinstein, Yoram, supra n. 86.
\end{itemize}
The case of Adolf Eichmann, who based his whole defence on the claim that all he did was to obey to superior orders, is of particular interest here. The District Court of Jerusalem followed the Nuremberg courts and maintained that an order cannot be obeyed blindly, but must be questioned by conscience. It thus held that “[s]ince the order was manifestly unlawful, it cannot be used as an excuse”. Ultimately, it also found that “the accused acted in accordance with general directives from his superiors, but there still remained to him wide powers of discretion which extended also to the planning of operations on his own initiative”. Accordingly, it completely rejected the plea of obedience to superior orders.

In this respect, the Barbie case also deserves a close attention. During his trial, Klaus Barbie, while being charged of crimes against humanity, argued that the Court deprived him of the benefit of Article 8 of the Nuremberg Charter as regards mitigation and, thus, committed a prejudicial error. In response, the Court made it clear that Article 8 was never meant to be an excuse nor a mandatory mitigating circumstance.

However, departing from these two cases, the Supreme Court of Canada ruled in the Finta case, in which the accused stood trial for the supervision of the deportation of 8617 Jews to mass extermination camps, that the superior order defence was available to defendants charged with war crimes and crimes against humanity.

Several international instruments now address the issue of the ‘superior orders’ defence and all of them greatly limit its scope. Indeed, the 1946 U.N. Resolution on the Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal expressly recognised the validity of Article 8 while the 1950 ILC’s Report on the Nuremberg Principles declared that

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89 *Attorney-General of the Government of Israel v. Eichmann*, 36 ILR 5 (Israel District Court – Jerusalem, 1961). The Court also stated that “Since he [Eichmann] was neither insane nor incapable of distinguishing between right and wrong, he must have known that his actions were crimes judged by standards of civilised behaviour, regardless of whether he was acting under orders”.

90 Ibid.

the fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under International Law provided a moral choice was in fact possible to him.\footnote{[1950] II ILC Yearbook, Principle IV.}

Also, in its 1996 Draft Code of Crimes, the ILC reaffirmed

the existing rule of international law under which the mere fact that an individual committed a crime while acting pursuant to the order of his Government or his superior will not shield him from criminal responsibility for his conduct but may constitute a mitigating factor in certain situations when justice so requires.\footnote{Article 5, [1996] II (2) ILC Yearbook 23.}

Finally, the 1984 Torture Convention clearly states that “an order from a superior officer or a public authority may not be invoked as a justification of torture”.\footnote{Article 2 (3).} However, the issue is only indirectly mentioned in the Apartheid Convention\footnote{Article II only states that “international criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State”.

while it is absent from the Genocide Convention as well as from the 1949 four Geneva Conventions and their Additional Protocols.

The issue of superior orders was central to the sentencing debate before the ICTY in the \textit{Erdemovic} case. After considering the fact that the IMT had not accepted superior orders as a mitigating factor in the case of the major war criminals, Trial Chamber I was able to find that such a defence could nonetheless be accepted for “low-ranking accused”, or in other words ‘minor war criminals’, and this finding is obviously far from satisfying:

The rejection by the Nuremberg Tribunal of the defence of superior orders, raised in order to obtain a reduction of the penalty imposed on the accused, is explained by their position of superior authority and, consequently, the precedent setting value of the judgment in this respect is diminished for low-ranking accused.\footnote{[157]}
obedience to superior orders, Article 33 of the Rome Statute adopts the conditional liability approach and thus departs from customary international law, and this without any justifiable reasons. As a matter of fact, unlike other legal instruments, it does not exclude categorically this defence. Furthermore, this disposition draws a distinction between crimes against peace and war crimes on one side and crimes against humanity and genocide on the other. If it expressly states that “orders to commit genocide or crimes against humanity are manifestly unlawful”, it nonetheless allows for the possibility that orders to commit crimes against peace and war crimes, as opposed to crimes against humanity and genocide, are not always manifestly unlawful. Thus, if the person “was under a legal obligation to obey orders of the Government or the superior in question”, if he/she “did not know that the order was unlawful”, and if “[t]he order was not manifestly unlawful”, he/she will be relieved of criminal responsibility.

Thus, what Article 33 implies is that orders to commit crimes against peace and war crimes may not be manifestly unlawful, while Article 8 of the Statute, which gives an exhaustive list of war crimes, clearly covers acts which are undoubtedly crimes. How can an order to commit such acts not be manifestly unlawful? As Cassese rightly recalls, according to customary international law, any order to commit an international crime – regardless of its classification – is illegal and thus may not be urged in defence. He further considers that:


97 According to Gaeta, this new approach is due to the concern of the United States to protect their servicemen on the battlefield from international criminal responsibility if they obey orders in order to carry out military operations. See Gaeta, Paola, ‘The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law’, (1999) 10 EJIL 189.

98 Article 33 (2) of the ICC Statute.

99 Article 33 (1) (a) of the ICC Statute.

100 Article 33 (1) (b) of the ICC Statute.

101 Article 33 (1) (c) of the ICC Statute.

Given the specificity of Article 8, one fails to see under what circumstances the order to commit one of the crimes listed therein may be regarded as not manifestly unlawful, i.e. if nothing else, it would be ‘manifest’ in the text of the Rome Statute itself [...] On this score [...] Article 33 must be faulted as marking a retrogression with respect to existing customary law.103

As a concluding remark, the position of Dinstein on this issue may be stated. He indeed believes that

[the correct legal position is that the fact that a defendant acted in obedience to superior orders cannot constitute a defence per se, but is a factual element which may be taken into account – in conjunction with other circumstances – within the compass of an admissible defence based on lack of mens rea (specifically, duress or mistake).]104

However, as it will now be studied, these “other circumstances”, and most particularly compulsion, need to be understood restrictively so as not to impede effective prosecution and punishment.

103 Ibid. See also Gaeta, Paola, supra n. 97, pp. 172-191.

2. Compulsion

Compulsion corresponds either to the notions of duress and coercion insofar as it is brought about by an individual against another or to the one of necessity if it takes the shape of natural causes putting someone in danger. As Schabas explains,

[the defence of necessity is closely related to duress, in that the accused argues that the material act was committed under circumstances where there was an absence of moral choice. In the case of duress, the exterior pressure comes from an individual; in the case of necessity, it results from natural causes.]

In any case, compulsion forces a person to act in a criminal way and to harm another in order to avoid a greater or equal personal harm. For moral and ethical reasons, positive international law recognises these defences only in a limited way as compulsion can not be an excuse for excessive harm done to many others. Furthermore, the defence of necessity is rejected in the case of international crimes as there can never be unforeseeable natural forces obliging an individual to commit such an act. In the words of Eser, "it is very difficult to imagine a factual situation in which a soldier is able to avert personal danger by simply committing a war crime". This of course also applies to crimes against humanity, genocide and crimes against peace.

As previously stated, according to the IMT, the “true test” of criminal responsibility is “whether moral choice was in fact possible”. In the words of Dinstein,

lack of moral choice means that the accused had no alternative if he wanted to save his own life or the life of a person near and dear to him, or if he wanted to avoid grave injury.

This defence must be based on firm evidence that the accused was genuinely unwilling to commit the war crime with which he/she is charged,

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107 Nuremberg Judgment 224. See supra Chapter 6 (C) (1).
and that he/she would have avoided action but for the duress. In the *Krupp* trial, the court stated that if the will of the accused was not overpowered but actually coincided with the will of those who allegedly compelled him to act, the defence is insupportable.\(^\text{109}\) In the *Einsatzgruppen* case, the court also stated that one cannot have recourse to this defence if the war crime was committed after the duress has ended.\(^\text{110}\) Furthermore, it found that this defence was inadmissible if it was proved that the actual harm caused by the war crime was disproportionately greater than the potential harm to the accused, or to his close ones, which would have ensued had he abstained from committing the offence.\(^\text{111}\) However, it questionably held that, in the context of mass killings of Jews by Nazi extermination squads, "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns".\(^\text{112}\) This whole legal thesis was sharply criticised, and rightly so as clearly

no degree of duress can justify murder, let alone genocide. It can scarcely be contested today that atrocities, and even plain murder, cannot be exonerated on the ground of duress under international criminal law.\(^\text{113}\)

More recently, the issue of duress was dealt with by the Yugoslavia Tribunal. In the *Erdemovic* case, it stated that it is not enough for the accused to establish a subordinate position in order to validly invoke this defence. The accused must indeed demonstrate that superior orders did in fact influence his/her behaviour:

If the order had no influence on the unlawful behavior because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.\(^\text{114}\)

\(^{108}\) Dinstein, Yoram, ‘The Distinctions between War Crimes and Crimes Against Peace’, in Dinstein, Yoram and Tabory, Mala (eds), *supra* n. 106, pp. 9-11


\(^{110}\) *United States v. Ohlendorf et al.*, Case No. 9, Military Tribunal II, 4 *Nuremberg Subsequent Proceedings* 471.

\(^{111}\) Ibid.

\(^{112}\) Ibid., p. 480.

\(^{113}\) Dinstein, Yoram, *supra* n. 108, pp. 9-11
In this particular case, the Trial Chamber found insufficient evidence to accept the duress agreement, although it accepted as relevant the fact that the offender had followed orders and that he held a subordinate position in the military hierarchy.115 Subsequently, the majority of the Appeals Chamber found “that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings”,116 even if it may still be considered as a mitigating circumstance. Thus, according to Trial Chamber I in the Blaskic case:

Duress, where established, does mitigate the criminal responsibility of the accused when he had no choice or moral freedom in committing the crime. This must consequently entail the passing of a lighter sentence if he cannot be completely exonerated of responsibility.117

As a final remark on this issue, it might be pointed out that the Rome Statute accepts the defence of duress as a valid ground for excluding criminal responsibility when:

The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
(i) Made by other persons; or
(ii) Constituted by other circumstances beyond that person’s control.118

The wording of this provision is nonetheless problematic. As a matter of fact, if the admission of duress as a possible defence and not merely as a

115 Ibid., paras 91-95.
118 Article 31 (1) (d) of the ICC Statute. Emphasis added. It may be pointed out here that Article 31 also deals with insanity and intoxication as grounds for excluding criminal responsibility. However, such defences will scarcely arise in practice. See
mitigating circumstance is indeed debatable, the real question here arises with the use of the expression "other circumstances beyond that person's control", which implies that the defence of necessity is also admitted. As previously stated, such a defence has always been rejected in the case of international crimes as no unforeseeable natural event can force an individual to commit a crime. Thus, this unclear provision of the Rome Statute is highly questionable and it is to be hoped that the Court will not use it to admit necessity as a ground for excluding criminal responsibility.

D. Complicity in International Crimes

One of the main problems linked to the notion of 'complicity' relates to the uncertainty of its scope of application. Thus, if in the Akayesu case, the ICTR made it clear that "the same person could certainly not be both the principal perpetrator of, and accomplice to, the same offence"; in the Kambanda case, the defendant was found guilty of both "complicity in genocide" and acts of genocide. This finding was possible because the complicitous acts were not the same acts which supported the conviction for genocide. In other words, an individual can be simultaneously convicted of genocide against a particular group and of complicity in genocide against the same particular group even though he definitely had the required genocidal intent. Clearly, such a legal situation – not to say absurdity – is far from being satisfying.

In the Akayesu case, Trial Chamber I of the ICTR held that complicity implies "borrowed criminality":

By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator.

Therefore, for complicity in genocide to be recognised, genocide must have been committed. However, this does not imply that a conviction for genocide is previously needed:

all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.

Clearly, this last finding reveals a legal incongruity as it suggests that complicity in genocide may be legally admitted even in cases where the main perpetrator of the crime could not be found guilty of genocide.

120 Ibid., para. 528.
121 Ibid., para. 530.
Another weakness of the distinction between main perpetrator and accomplice relates to the notion of ‘intent’. In the words of Paust, “[c]ompli...
perpetrators. [...] The question comes down to whether, on the face of the case, a participant in the criminal enterprise may be most accurately characterised as a direct or principal perpetrator or as a secondary figure in the traditional role of an accomplice.\textsuperscript{126}

It is not very clear what the Chamber meant by “secondary form of participation”. In matters as serious as international crimes, either there is participation either there is not, but every participant is a principal offender. The crimes are too grave to tolerate the existence of the notion of ‘complicity’. In fact, a distinction between ‘main author’ and ‘accomplice’ is totally absent from the Nuremberg Charter which only mentions the term “accomplice” in order to designate all the participants to the crimes. Thus, it must not be understood as distinct from a ‘main author’ but as referring to all the liable individuals, whether they took part in the elaboration of the crimes or in their execution.

In the national fora, the case of Maurice Papon appears to be the best illustration of the inconsistencies of the notion of complicity in the case of crimes against humanity. Papon had been a high civil servant both during and after the war, and, by means of political connections, he seemed to have evaded prosecution until 1997 when, as the former General Secretary of the Préfecture of the Gironde from 1942 to 1945, he was accused of helping in the deportation of Jews from the French town of Bordeaux. Consequently, he was charged with crimes against humanity, and notably with complicity in illegal arrests and confinements, as well as in premeditated murders or attempted murders.

Even if he was accused of having organised, as part of his functions,\textsuperscript{127} the confinement, internment and deportation of more than 1500 Jews between July 1942 and August 1944 on behalf of the Nazis, Papon never stopped claiming that he was unaware of the final solution. Because no element could establish beyond doubt his direct and intentional complicity with the Nazis,

\textsuperscript{126} Prosecutor v. Krstic, Case No. IT-98-33, Judgment, Trial Chamber I, 2 August 2001, para. 643. Emphasis added.

\textsuperscript{127} Maurice Papon indeed assisted the Prefect in the accomplishment of all its missions, including the direct supervision of strategic sectors such as the Service of Jewish Affairs.
the Cour de Cassation did not hesitate to reverse its case-law\textsuperscript{128} and decided that the Nuremberg Charter did not require that the accomplice of crimes against humanity supported the hegemonic political ideology of the main authors nor that he belonged to one of the organisations declared criminal by the Nuremberg Tribunal.\textsuperscript{129} The Cour de Cassation gave a false interpretation of the London Charter by stating that it imposes a distinction between the main author and the accomplice, who would thus be prosecuted differently.\textsuperscript{130}

This finding leads to the absurd result where the criminal intent is not required to charge the accomplice with crimes against humanity. According to many commentators, the Cour de Cassation thereby rendered a legally unfounded decision which condemned Papon for the acts he was charged with while not recognising that he was aware of the Nazis’ final solution and that he was personally willing to become a Nazi agent. As a result, Papon was acquitted of the charge of complicity in murders because he was unaware of the Nazi plan, but was still condemned for complicity in arrests and confinements because he knew that these were part of the Nazi plan! As Professor Delmas Saint-Hilaire stated

\begin{quote}
Le renvoi en cour d'assises de l'ancien secrétaire général de la préfecture de la Gironde supposait réunies des charges suffisantes susceptibles d'établir l'existence chez celui-ci de la volonté de se faire personnellement l'agent de la politique nazie d'extermination de la communauté juive: en ne l'exigeant pas, la Cour de cassation a rendu, à notre avis, une décision contestable et d'autant plus critiquable que, procédant par voie d'affirmation, elle ne comporte pas de motivation.\textsuperscript{131}
\end{quote}

Thus, not only was this decision legally absurd, it was also highly immoral as the Cour de Cassation acceded to Papon’s claim that he knew nothing of the final solution. It can be admitted that he was not aware of the industrialisation of Death as it occurred in the concentration camps, and it is probable that no one could have ever imagined such horror. However, everybody knew the death which was awaiting the people who were

\textsuperscript{128} See Touvier case, arrêt de la chambre d'accusation de Versailles, 2 juin 1993. See supra Chapter 4 (A).

\textsuperscript{129} cass. crim., 23 janvier 1997.

deported. In the words of Lord Russell of Liverpool, “there were many who did not know what went on behind those barbed wire fences but few who could not guess”. Nonetheless, the Court acted as if Papon, who had authority over the Service of Jewish Affairs, was not aware of this. Facts are here, horror is here and a man who arrested children, men and women, and who ordered their deportation to Drancy knew or should have guessed. To paraphrase Justice Jackson, the knowledge is not what people may say on what they knew or ignored, but what, considering the circumstance, they should have known.

If the ruling in the Papon case is to remain, Vichy would then only be responsible of ‘complicity of arrests and confinements’. Of course, such an assertion is completely false as Vichy was not forced by Germany to adopt its 1940 antisemitic laws, nor was it obliged to deport children. These terrible acts were spontaneous ones committed by Vichy on its own. Such a decision was thus a great step backwards considering the historical knowledge on the Occupation by the Nazis. It would also be a decline as regards the political acquis due to the essential speech given by Jacques Chirac on 16 July 1995, in which he stated that France was responsible for the crimes committed by Vichy’s regime and recognised the direct participation of the French State in the deportation of Jews. If this verdict ever acquires a symbolic value, this would highly lighten Vichy’s responsibility.

The debates in the court room during the Papon case led to the question whether a distinction should be made between those, like Barbie, who definitely had a criminal intent and impulsion and those, like Papon, whose participation would not have been given in other circumstances. Accordingly,

131 Ibid., p. 254, para. 30. Emphasis in original.
Maître Lévy asked whether the life of a Jewish child deported from Bordeaux was less sacred than the life of a Jewish child deported from Lyon. He rightly answered by the negative, stating that it was definitely the same crime.\textsuperscript{135} It is most probable that Papon lacked the antisemitic hatred or the murderous intent normally required in the case of crimes against humanity but he still accepted to participate in the Nazi extermination policy, and this participation is definitely a crime against humanity in itself.\textsuperscript{136}

This case is thus highly relevant to the issue of complicity in the case of crimes against humanity. As previously stated, crimes against humanity are collective crimes which require actions from numerous participants. All of these participants are thus entirely individually responsible for the commission of the crimes, and it is completely artificial to establish a distinction between main perpetrators and accomplices. In such matters as crimes against humanity, there is no such thing as complicity, the two concepts being totally incompatible. Either an individual committed a crime against humanity, either he did not, but he cannot be a mere accomplice charged with a ‘lesser crime against humanity’, a ‘second-class crime against humanity’.


Chapter 7: Immunity versus Universal Jurisdiction

*Fiat justitia ne pereat mundus.*

Hegel, 1821

Universal jurisdiction should clearly be the one and only jurisdiction principle applicable in the case of international crimes. It may be noted from the outset that the term ‘universal’ is here understood widely in the sense that it does not merely refer to the principle of universality as opposed to that of territoriality. Rather, it concerns as well personal and functional universality, meaning that international criminal law should apply irrespective of who stands accused of committing international crimes and of the sovereign status of the acts perpetrated. Similarly, the passage of time should have no influence whatsoever over the possibility of prosecuting international crimes, and this is what is referred to as ‘temporal universality’. Ultimately, it is here submitted that universal jurisdiction for universal ‘core crimes’, when not mandatory by way of treaty, is a principle pertaining to international customary law.

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1 “Let justice be done, or the world will perish”.
A. Personal Immunity: Responsibility of Heads of States

The issue here is that of the responsibility of Heads of States and it might be recalled that the first removal of this immunity concerned the crime of aggression and appeared in the treaty of Versailles, but it did not go any further than its mere inclusion in the Treaty as the Kaiser was not tried. The Nuremberg Charter also provided for the principle of Heads of States’ responsibility for crimes against peace, war crimes and crimes against humanity but, by the time the trials took place, both Hitler and Mussolini had died and, thus, no prosecutions in this regard could occur. However, it may be noted that the Tokyo Charter was silent on the responsibility of Emperor Hirohito.

Subsequently, in the Nuremberg Principles, the ILC clearly stated that:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.3

In its 1996 Draft Code of Crimes, the Commission maintained this position and Article 7 reads as follows:

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.4

The post-Charter legal developments all proceed to the removal of this immunity, but it may be noted here that the Genocide Convention does not expressly exclude it. Following the rule that monarchs could not be prosecuted under the basic laws of the respective countries, the drafters only rejected the immunity of “constitutionally responsible rulers, public officials or private individuals”.5 This intentional omission has impeded effective

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2 Article 227 of the Versailles Treaty.
3 Nuremberg Principles, Principle III.
5 Article IV of the Genocide Convention. However, both Statutes of the Ad Hoc Tribunals and the ICC Statute excluded this immunity. See Article 7 (2) of the ICTY Statute, Article 6 (2) of the ICTR Statute, and Article 27 of the ICC Statute.
prosecution. Indeed, since the adoption of the Convention, there have only been two domestic prosecutions of Heads of States for the crime of genocide, that of Pol Pot and his deputy prime minister in Cambodia,\(^6\) and that of Macias and some of his collaborators in Equatorial Guinea\(^7\) in August and September 1979 respectively. Moreover, if one could argue that a dictator would certainly be considered as a “responsible ruler” and could thus be prosecuted under the Convention, one must not forget that states are entitled to formulate reservations as regards Article IV.\(^8\)

Fortunately, other international instruments are less equivocal and reject such an immunity. Still, practice in this respect remains extremely rare even if, clearly, international tribunals seem to be more willing to prosecute Heads of States than national courts. As a matter of fact, the ICTY did not hesitate to indict Milosevic for the crimes perpetrated by the Serbs in Kosovo,\(^9\) Croatia\(^10\) and Bosnia-Herzegovina.\(^11\) For the first time, a Head of State in exercise was accused of crimes against humanity, grave breaches of the Geneva Conventions, violations of the laws or customs of war, and, for Bosnia-Herzegovina, of genocide against the Bosnian Muslim and the Bosnian Croat populations. In other words, the ICTY found no legal obstacle

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\(^6\) Both were found guilty in abstantia by a people’s revolutionary tribunal. See generally Kiernan, Ben (ed.), *Genocide and Democracy in Cambodia – The Khmer Rouge, the United Nations and the International Community*, Monograph Series 41 / Yale University Southeast Asia Studies, 1993.


\(^8\) As a matter of fact, the Philippines formulated such a reservation: “the Philippine Government does not consider the said article, therefore, as overriding the existing immunities from judicial processes guaranteed to certain public officials by the Constitution of the Philippines”. See Ruhashyankiko Report, p. 40. It must be noted that, on accession, Finland had also made a reservation regarding Article IV, but it withdrew it on 5 January 1998.


impeding the indictment for the most serious international crimes of Milosevic, President of the Federal Republic of Yugoslavia.

However, the position of the ICJ is much more ambiguous on the matter as it recently ruled that, in the absence of relevant treaty provisions, a Minister for Foreign Affairs enjoys complete immunity from criminal jurisdiction as a matter of custom and

accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.\(^\text{12}\)

It is true that this case concerned a Minister for Foreign Affairs and not a Head of State but it still interesting here as the Court clearly proceeded “from a mere analogy with immunities for diplomatic agents and Heads of State”.\(^\text{13}\) This case had its origins in an international arrest warrant issued \textit{in absentia} in April 2000, by a Belgian investigating judge, against the then Minister for Foreign Affairs of the Congo, Mr. Yerodia Ndombasi. This warrant accused him of having made public speeches which incited to racial hatred, and thus charged him with grave breaches of the 1949 Geneva Conventions and of the Additional Protocols, as well as with crimes against humanity. In its Application instituting proceedings, the Congo asked the Court to declare that Belgium should annul that warrant. It contended that the investigating judge was not entitled to hold himself competent in respect of the offences in question by relying on a universal jurisdiction not recognised by international law. It also argued that the charges had been brought in defiance of the immunities enjoyed by incumbent Ministers for Foreign Affairs.\(^\text{14}\) It is however to be deplored that, in the subsequent proceedings, the Congo relied only on the second argument and that, accordingly, the Court did not rule on the first one.\(^\text{15}\)

\(^{12}\) \textit{Arrest Warrant} case, ICJ, General List No. 121, 14 February 2002, para. 54.

\(^{13}\) Ibid., Dissenting Opinion of Judge Van Den Wyngaert, para. 14.

\(^{14}\) See \textit{Arrest Warrant} case, ICJ, General List No. 121, 14 February 2002, para. 17.

\(^{15}\) Ibid., para. 21.
Despite the fact that, from mid-April 2001, Mr. Yerodia Ndombasi no longer held any ministerial office, the Court rejected Belgium’s objection that there was no longer a “concrete case”, and recalled that its jurisdiction was determined at the time that the act instituting proceedings was filed, that is 17 October 2000. The Court then concluded that a Minister of Foreign Affairs enjoyed “full immunity from criminal jurisdiction and inviolability”, and found, by a majority of thirteen to three, that the circulation of the warrant against Mr. Yerodia Ndombasi constituted a violation of an obligations of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

This finding is highly questionable, if not totally wrong in law, as “there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution”. The Court here missed an opportunity to follow the increasing trend of recognising universal jurisdiction, even in the national fora. This is to be regretted because the Belgian law should clearly serve as a model for all states to follow in order to achieve accountability for the most serious crimes. However, it should be pointed out that the Court listed a series of exceptions to the immunity enjoyed by incumbent or former Minister for Foreign Affairs, thus suggesting that this immunity is not absolute.

As regards national fora, national courts draw a distinction between Heads of States in office, who enjoy complete immunity, and former Heads of States, who do not. The Pinochet case is a perfect illustration of this situation. In October 1998, General Pinochet was arrested in London following an extradition request by Spanish authorities regarding the human rights violations committed under his military government during the period 1973-

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16 Ibid., para. 24.
17 Ibid., paras 26-28.
18 Ibid., para. 54.
19 Ibid., para. 71.
20 Ibid., Dissenting Opinion of Judge Van Den Wyngaert, para. 10.
1990. Subsequently, even if they found that a former Head of State could not invoke immunity for the crime of torture, the Law Lords concluded that a serving Head of State would have enjoyed immunity *ratione personae* even for the commission of international crimes.\textsuperscript{22}

Thus, even if this case might have seem a "political farce"\textsuperscript{23} due to the fact that Pinochet was subsequently released and taken back to Chile, while the extradition requests made by Spain, France, Switzerland and Belgium were rejected due to his supposedly poor health and medical condition, it still is that former Heads of States do not enjoy immunity from criminal prosecution. However, the main shortcoming of the *Pinochet* case is obviously the fact that immunity of Heads of State in office remains absolute,\textsuperscript{24} and, clearly, this seems to be a valid precedent.\textsuperscript{25}

Even if it still could be maintained that, because he represented his state, a Head of State should benefit from immunity, such an immunity has absolutely no legal nor moral foundation. As previously stated, international instruments now all exclude such an immunity, even if they do not expressly address the issue of whether prosecution is function of the Head of State still being in exercise or not. The *Milosevic* case seems to suggest that such a distinction was not made by the Yugoslavia Tribunal. In any case, such immunity has certainly no moral justification: why can someone, by virtue of his functions, be allowed to commit international crimes in complete legality?

As the Nuremberg Tribunal rightly stated:

\begin{itemize}
\item \textsuperscript{21} *Arrest Warrant* case, ICJ, General List No. 121, 14 February 2002, para. 61.
\item \textsuperscript{25} For instance, in November 1998, the French government turned down the request for action against Kabila. Charles Josselin, the French minister in charge of African relations, explained that, unlike Pinochet, Kabila was invited as the chief of State of Democratic Congo and he thus benefited from the immunity accorded to chiefs of state while in office.
\end{itemize}
The principle of international law which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.26

It is very hard to understand why Heads of States are considered differently from other hierarchical superiors, let alone other individuals. It is now time to realise once and for all that international crimes are more often than not committed by a state, and thus by a Head of State... If Heads of State are to be immune from prosecution, the whole concept of ‘struggle against impunity’ will fall apart. Fortunately, it seems that immunity claims, even *ratione personae*, will not impede the jurisdiction of the ICC, at least as regards nationals of States Parties.27 Indeed, under Article 98 (1) of the Rome Statute, only nationals of a non-State Party will be able to invoke Head of State or diplomatic immunity, as it provides that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

It is therefore to be hoped that the ratification of the Rome Statute will continue so that immunity of Heads of States will definitely become an obsolete and outdated practice.

26 *Nuremberg Judgment* 223.

27 Article 27 (2) of the ICC Statute.
B. Functional Immunity: The Exercise of Sovereign Authority

C'est en vain que l'on tentera de transformer un ordre visant à l'extermination de millions d'innocents en un acte d'Etat afin de décharger de leur crime ceux qui ont donné l'ordre et ceux qui l'ont exécuté. Léon Poliakov

As we have previously seen, the immunity of Heads of States operates *ratione personae* which means by reason of the person concerned: in other words, by virtue of being a Head of State, the person in question is inviolable. However, when the person ceases to be Head of State, the principle *ratione personae* no longer applies to this individual. Immunity is then claimed *ratione materiae*, by reason of the subject matter involved. Practically, this means that immunity will then apply only to acts committed in the exercise of the official functions. Thus, the applicable test is whether the individual acted to promote the interests of the state or to pursue purely individual goals and personal gratification and benefit, while the real question here is how international crimes will be qualified. While it appears that international tribunals follow the Nuremberg legacy and reject any immunity for the commission of international crimes, the situation in the domestic fora is rather ambiguous, even if it seems that there is an increasing trend to recognise international crimes as exceptions to the immunity principle.

The case of General Noriega is here interesting as, even though he was tried for non-sovereign acts, it was the first time that a United States jury had convicted a serving foreign Head of State of criminal charges, namely, cocaine trafficking, and money laundering. In his case, the Court held that “General Noriega was not recognised as a head of state and that his drug-related activities did not involve the exercise of public or sovereign authority”. With this finding, the court made clear that Heads of States in office could be held criminally liable, at least for non-sovereign acts.

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As regards sovereign acts, the situation appears to be undergoing a crucial evolution as there is a clear trend towards recognition that international crimes, even if committed as part of official functions, are not subject to immunity. For instance, in the *Pinochet* case, the defendant's claim of sovereign immunity was unequivocally rejected by the Law Lords:

> International law has made plain that certain types of conduct [...] are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else. The contrary conclusion would make a mockery of international law.31

The Law Lords subsequently found that torture was an incrimination belonging to *jus cogens*, and that it was therefore a peremptory norm of international law. Accordingly, they concluded, by six to one, that General Pinochet was not immune for the acts of torture committed while he was Head of State, and that, therefore, he could be extradited and tried.32 It is true that this finding is limited to the crime of torture, and that it could therefore be argued that this reasoning does not apply to other international crimes. Furthermore, it was founded exclusively on the 1984 Torture Convention, and was thus limited to the States Parties to this Convention. There was also a limit *ratione temporis* attached to the Law Lords' reasoning as the limitation of immunity was only justified by the entry into force of this particular Convention. Practically, this means that Pinochet could only be tried for acts perpetrated after 8 December 1988, date on which Great Britain, in the Criminal Justice Act, made torture committed in another state a crime punishable in Great Britain. In any case, notwithstanding the intrinsic limitations of the Law Lords' finding, this case still showed that acts of Heads of States in office are not necessarily protected by immunity.

Also, in the recent French case brought against Mouammar Ghaddafi, who had been charged with murder for his complicity in a terrorist action, the

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French Cour de Cassation, even if, relying on Head of State immunity, acquitted the defendant, still issued an extremely interesting decision which suggests that such immunity is not without exception:

\[\text{[E]n l’état du droit international, le crime dénoncé, quelle qu’en soit la gravité, ne relève pas des exceptions au principe de l’immunité de juridiction des chefs d’Etats étrangers en exercice.}\]

In other words, the Court found that, even if complicity in acts of terrorism is not among them, there are international crimes which are not subject to immunity from jurisdiction of Heads of States in office. Thus, the Cour de Cassation expressly recognised that there are exceptions to this immunity, namely, international crimes. It is true that it did not define which crimes constituted such exceptions but it is most probable that crimes against humanity and genocide were here referred to. Also, it might be argued that, since the terrorist attacks on America, acts of terrorism would also be included among these exceptions.

However, the recent decision of the ICJ in the *Arrest Warrant* case seems to be a step backwards on this issue. Indeed, the Court found that a Minister for Foreign Affairs will no longer enjoy immunity for “acts committed prior or subsequent to his or her period of office”, and that, for acts committed during that period of office, immunity is only lifted “for acts committed during that period of office in a private capacity”. It accordingly emphasised that,

the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for

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33 Cour de Cassation, No. 1414, 13 mars 2001, p. 3.


certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.\footnote{Ibid., para. 60.}

The legacy of such a decision is one of uncertainty as the Court found that a former Minister for Foreign Affairs of one state could be subjected to the criminal jurisdiction of another state only for acts carried out in private capacity. Such a finding seems to exclude international crimes, as it seems very unlikely that they could ever be considered as committed in a private capacity.\footnote{See \textit{supra} Chapter 4.} Thus, according to the Court, immunity \textit{ratione materiae} is valid even in the case of international crimes. On a practical basis, this means that Minister for Foreign Affairs will enjoy full immunity even for the perpetration of international criminal acts. Such a finding seems in contradiction with the increasing trend in international law not to recognise immunity \textit{ratione materiae} as available in the case of prosecution for ‘core crimes’ against international law. As the ICTY stated in the \textit{Blaskic} case:

The general rule under discussion is well established in international law and is based on the sovereign equality of States (\textit{par in parem non habet imperium}) [...] \footnote{Prosecutor \textit{v. Blaskic}, Case No. IT-95-14-A, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997, para. 41.} Exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.\footnote{Ibid., para. 60.}

Fortunately, the drafters of the Rome Statute followed this path, and, in its Article 27 (2), the Rome Statute unequivocally excludes the validity of claims based on immunity \textit{ratione materiae}:

\begin{quote}
Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.
\end{quote}
C. Temporal Immunity: Statutory Limitations

The issue here is that of the applicability of statutes of limitations to international crimes. The U.N. Convention on Statutory Limitations is a self-explanatory treaty which assumes both that there is a duty to punish such offences and that this duty cannot be attenuated by the passage of time. However, this Convention, which entered into force on 11 November 1970, has only 44 States Parties and it is noticeable that France, Germany, the United Kingdom, China and the United States are not among them. It is also striking that no South American country is a party to this Convention, while these states are well-known refuges for former Nazis. In fact, any demand of extradition in the Eichmann case would have failed, Argentina not being a party to this Convention and crimes against humanity there being subject to statutory limitations. According to Ratner and Abrams:

In light of the UN Convention's limited acceptance and the extensive range of domestic legal approaches on the issue, it is difficult to conclude that mandatory non-applicability of statutes of limitations has yet entered the realm of custom. The willingness of many states to eliminate such prescription and the negotiation of the 1968 Convention do, however, support the view that international law at least permits states to eliminate statutes of limitations for crimes against humanity and war crimes.

Domestic legislation on the matter differs widely. For instance, The 1993 Belgian law provides for universal jurisdiction and non-prescriptibility for war crimes, crimes against humanity and genocide. However, in Germany, the application of statutory limitations is prohibited for genocide and murder but not for war crimes, while, in France, crimes against humanity are the only crimes not submitted to statutory limitations. These statutes of limitations may have dramatic consequences in practice as their

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39 It might be noted here that the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, adopted by the Council of Europe on 25 January 1974, never entered into force.


41 Loi relative à la répression des violations graves du droit international humanitaire, 10 February 1999.

42 German Penal Code, as modified in 1979, Section 78.
application might lead to the impunity of the perpetrators of the most terrible crimes. As a matter of fact, in August 1996, an Italian court acquitted Priebke, a former S.S. captain responsible for the massacre of 335 civilians in Italy in 1944, based on the Italian Penal Code which provides that statutes of limitations apply, unless the crimes lead to life imprisonment sentences.44

The temporal issue is highly relevant in the case of war crimes, due to the more frequent application of statutes of limitations to them rather than to crimes against humanity. Thus, in this respect also, considering war crimes as crimes against humanity would be of great interest and this may be perfectly illustrated by the case of France. As previously mentioned, crimes against humanity are the only crimes in French legislation not subject to statutory limitations.45 This issue was crucial in the *Barbie* case and the Cour de Cassation fortunately managed to avoid forced acquittal for his crimes by extending the notion of crimes against humanity to comprise the crimes committed against the *Résistants*. Furthermore, this matter regained actuality through the debates surrounding the crimes committed in Algeria during the war of decolonisation and the possibility to prosecute them.46 However, it seems that the tortures committed are to be considered as war crimes, which means that their perpetrators will escape prosecution and punishment and such an impunity is not admissible. Had the tortures committed in Algeria been qualified of crimes against humanity, this would not have happened. Of course, one has to admit that there were other major obstacles to the prosecution of these crimes and notably the 1968 law of amnesty as well as the fact that the actual definition of crimes against humanity does not apply to crimes committed before 1994, date of entry of the New Penal Code, unless

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43 See Article 213.5 of the Nouveau Code Pénal.

44 Article 157 of the Italian Penal Code. See Military Court of Rome, 1 August 1996. Subsequently, the Court of Cassation held that the principle of non-applicability of statutory limitations to war crimes and crimes against humanity was a *jus cogens* norm. The Appellate Military Court confirmed this judgment on appeal and Priebke was sentenced to life imprisonment.

45 Article 213-5 of the Nouveau Code Pénal reads: “L'action publique reältive aux crimes prévs par le présent titre [crimes contre l'humanité], ainsi que les peines prononcéées sont imprescriptibles”.

they are related to the Second World War. However, to consider such crimes as crimes against humanity would be a start in opening a door for prosecution. It would also acknowledge the historical truth, that is, the systematic and planned actions of torture as well as the massive killing of civilians. Indeed, this legal situation may be easily explained by political considerations as France is fully aware of the atrocities committed during the decolonisation conflicts by the French army and wants to avoid recognising its responsibility.

As regards the particular case of the crime of genocide, it must be recalled here that Article V of the Genocide Convention is silent on statutory limitations, thus implying that they are admitted in the case of genocide. It is true that, subsequently, the 1968 U.N. Convention prohibited the application such limitations to the crime of genocide in its Article I (b). Still, considering the fact that this Convention entered into force only in 1970, it means that, during nineteen years, there was uncertainty as to the non-applicability of statutory limitations to genocide.

Today, the problem seems solved as Article 29 of the Rome Statute eliminated all doubts by unequivocally affirming that “the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”. It is thus to be hoped that this will pave the way for the recognition of a new international legal rule as well as for harmonisation among the different national systems.
D. Geographical Immunity: Territorial Jurisdiction

Ces innombrables morts, ces massacrés, ces torturés, ces piétinés, ces offensés sont notre affaire à nous
Vladimir Jankélévitch

In its classical meaning, ‘universal jurisdiction’ is a geographical concept defined by opposition to ‘territorial jurisdiction’. Practically, it refers to the competence of states to prosecute or to extradite perpetrators of international crimes. According to Paust,

it is the customary duty of states to initiate prosecution or to extradite those reasonably accused of international crime. This duty derived from a formula developed by Hugo Grotius calling for “aut dedere...aut punire”.

It may be noted here that Professor Bassiouni amended that maxim to aut dedere aut judicare since the goal of adjudication is to prosecute and not merely to punish. Thus, the universality principle allows any state jurisdiction under international law to provide criminal or civil sanctions for violations of international law. According to Paust, “[u]niversal jurisdiction is thus technically jurisdiction to enforce, and the enforcement is actually made on behalf of the international community”. For Meron, “the true meaning of universal jurisdiction is that international law permits any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim”. The question

50 Paust, Jordan J. et al., supra n. 48, p. 9.
52 Paust, Jordan J. et al., supra n. 48, p. 158.
here is thus whether, in the case of international crimes, international law
merely *allows* states to exercise universal jurisdiction or if it *obliges* them to
do so. In other words, is universal jurisdiction over international crimes
optional or mandatory? The law on this issue underwent an evolution and it
might therefore be argued that such a duty to prosecute or extradite is now
part of customary international law.
1. Universal Jurisdiction over International Crimes in International Law

The concept of universal jurisdiction can be said to have emerged in positive international law at the end of the Second World War with the idea that crimes against humanity were not a domestic affair and that other states than that where they were perpetrated had jurisdiction over them. Thanks to the Nuremberg legacy, crimes against humanity are thus today subject to universal jurisdiction, which means that a state may exercise jurisdiction over offenders regardless of any nexus it may have with them, their offence or the victim. The notion behind this principle is that the nature of these crimes dictates that all states have an interest in prosecuting them. In fact, the universality principle aims at eliminating sources of refuge for offenders by permitting trials to take place even outside the state where the atrocities were committed. Thus, criminal accountability is possible even in the absence of an international court or of an effective judicial system in the state of commission. Clearly, if accountability for the most serious crimes is to be achieved, the exercise of such a jurisdiction should be made mandatory. In the words Beres,

the Nuremberg international legal order obligates States to recognize universal jurisdiction in punishing crimes against humanity. Such punishment directly concerns each State since fundamental Human Rights have been consecrated by International Law as an imperious postulate for the general community of humankind. By acting in compliance with this postulate, each State protects the interests of this entire community at the same time as it safeguards its own interests.\(^{54}\)

a. Mandatory Universal Jurisdiction

In some cases, states have an explicit treaty obligation to penalise certain offences under domestic law and thus to have appropriate domestic criminal law statutes implementing this obligation, or a domestic law system allowing for prosecutions directly under international law. If not, they are violating their international legal commitments.\(^ {55}\) For instance, under the 1949 Geneva


Conventions, States Parties are under an obligation to prosecute or extradite for the purpose of prosecution individuals present in their territory who are accused of grave breaches.\textsuperscript{56} Also, the Genocide Convention,\textsuperscript{57} the Torture Convention\textsuperscript{58} and the Apartheid Convention\textsuperscript{59} contain a similar obligation as regards the crimes they deal with respectively.

There are also some instruments which impose on states a duty – even if only implicit – to punish perpetrators of international crimes.\textsuperscript{60} Indeed, states are under an obligation to take action to investigate and impose punishment on persons responsible for gross violations of the ICCPR,\textsuperscript{61} the ECHR,\textsuperscript{62} or the American Convention on Human Rights.\textsuperscript{63} This duty derives from the obligation to ensure the rights contained in these instruments and to provide a remedy for their violations. Finally, it might be pointed out here that several anti-terrorist conventions prohibit amnesties, thus implying a duty to prosecute. Furthermore, these conventions all seek to suppress international terrorism by establishing a framework for international co-operation among states.\textsuperscript{64} As their most important goal is to ensure prosecution of the accused,


\textsuperscript{56} Articles 49-50/51/129-130/146-147 of the Geneva Conventions and Articles 85-86 of Additional Protocol I.

\textsuperscript{57} Even if the Genocide Convention does not impose any general duty to prosecute or extradite comparable to that contained in the Geneva Conventions, it might still be argued that “the combination of articles I, IV, V, VI and VII might be read to imply such an obligation”. Schabas, William A., \textit{Genocide in International Law – The Crimes of Crimes}, Cambridge University Press, 2000, p. 404.

\textsuperscript{58} Article 7 (1).

\textsuperscript{59} Article IV (b).

\textsuperscript{60} Scharf, Michael P., \textit{supra} n. 55.

\textsuperscript{61} Article 2.

\textsuperscript{62} Article 1.

\textsuperscript{63} Articles 1 and 2.

one of their key features is the requirement that a state party that apprehends an alleged offender in its territory either extradite or prosecute him. Strictly speaking, none of these conventions creates an obligation to extradite, rather they contain an inducement to extradite. However, following the terrorist attacks on America, Security Council's Resolution 1368 called on states "to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks" and stressed that "those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable".

It might be noted here that, on this issue, the law of war crimes seems more complete than that of crimes against humanity as the 1949 Geneva Conventions provide for mandatory universal jurisdiction over grave breaches of their provisions. However, it must be stressed here that, more than fifty years on, only a very small number of States Parties to the Conventions have established universal jurisdiction over grave breaches. Furthermore, the 'grave breaches' system created by the Conventions is hardly satisfying as it contains some serious loopholes. Indeed, these instruments draw a distinction between 'grave breaches', which are listed and individually defined, and other breaches, which consist of any conduct contrary to their provisions. Thus, it is only in the case of the former that the States Parties have a duty to prosecute. In the words of Draper,

[t]he system for the repression of breaches of the Conventions, with the fundamental division between "grave" and other breaches, does not satisfy. In their anxiety to

67 See Articles 49-50/50-51/129-130/146-147 of the Geneva Conventions and Articles 85-86 of Additional Protocol I. Also, common Article 1 requires States Parties to respect and ensure respect for the provisions of the Conventions and "[t]he use of the words "and to ensure respect" was deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties". Commentary to Geneva Convention I 26.
avoid the term “crimes”, the redactors have opened a vista of uncertainty in the application of criminal justice.69

Practically, this means that not every violation of the laws of warfare is a punishable act,70 even if it might be recalled here that, in this respect, the ICTR Statute and the ICTY case-law were great steps forward as they imposed individual criminal responsibility even for acts which were not ‘grave breaches’ but breaches of common Article 3 of the Geneva Conventions and of Additional Protocol II.71

As a concluding remark, it might be interesting to note that, here again, the scope of protection granted by the notion of crimes against humanity is wider than that of war crimes as it seems that there is a general consensus to recognise compulsory universal jurisdiction in the case of the former. As the final report of the Commission of Experts for the Former Yugoslavia established by the Security Council unequivocally stated:

the only offences committed in internal armed conflict for which universal jurisdiction exists are “crimes against humanity” and genocide.72

b. Universal Jurisdiction as a Customary Law Duty

Apart from the explicit treaty obligations requiring that states exercise universal jurisdiction over international crimes, several other instruments

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70 Indeed while Article 85 (5) of Additional Protocol I states that grave breaches of both the Conventions and the Protocol “shall be regarded as war crimes”, Dinstein rightly recalls that “[t]he enumeration of grave breaches in the Geneva Conventions and Protocol I need not be regarded as co-terminus with an exhaustive roster of war crimes. But clearly, not every ordinary breach of these instruments can be viewed as a war crime”. Dinstein, Yoram, ‘The Distinctions between War Crimes and Crimes Against Peace’, in Dinstein, Yoram and Tabory, Mala (eds), supra n. 69, pp. 3-4. Still, it might be recalled here that States Parties have an obligation “to take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches”. Articles 49 (3)/50 (3)/ 129 (3)/146 (3). Thus, “[t]he Contracting Parties should at least insert in their legislation a general clause providing for the punishment of other breaches”. See Commentary to Geneva Convention III 624.

71 See supra Chapter 2 (c) (2).

stress that all states should prosecute or extradite for the purpose of prosecution individuals accused of war crimes or crimes against humanity under customary international law, thus suggesting that the exercise of such a jurisdiction is a norm of customary international law. Reinforcing this proposition is the legal status of amnesties which now seem to be prohibited in the case of international crimes.

**United Nations Resolutions**

Several U.N. Resolutions indicate that there is an obligation to exercise universal jurisdiction. Even if such Resolutions are not binding, their adoption is still clear evidence of state opinion on a particular subject. For instance, at its very first session, the General Assembly unanimously adopted a Resolution recommending

> that Members of the United Nations forthwith take all necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries; [and calling upon] the governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries.

Notwithstanding the use of the expression “war criminals”, it is arguable that this Resolution, dealing with perpetrators of “abominable deeds”, also applied to ‘criminals against humanity’. Furthermore, in 1967, another Resolution urged states not to grant asylum to anyone seriously suspected of having committed crimes against humanity, because such suspects should be

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returned to face trial in their own countries,\textsuperscript{75} while a 1971 Resolution demanded the prosecution by all states of all war criminals and persons guilty of crimes against humanity. This resolution, passed two days after Pakistan troops surrendered to the commander of the joint India-Bangladesh forces in Bangladesh, unequivocally stated that

\begin{quote}
refusal by states to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.\textsuperscript{76}
\end{quote}

Also, in 1973, the General Assembly adopted a Resolution which laid down principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. Its Principle I read as follows:

\begin{quote}
[Cr]imes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.\textsuperscript{77}
\end{quote}

It is true that these resolutions had little practical effect on the customs and practices of states as no national case relied upon nor cited any of them, but they still are evidence of states' understanding of the law. It may also be recalled here that Article 9 of the 1996 Draft Code of Crimes also contains an obligation to extradite or prosecute:

\begin{quote}
Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found \textit{shall} extradite or prosecute that individual.\textsuperscript{78}
\end{quote}

Finally, it might be noted that the ICTY also emphasised the need for universal jurisdiction and for prosecution of human rights violators. Thus, the Appeals Chamber stated that

\textsuperscript{75} U.N. Doc. A/6716 (1967).
it would be travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.79

Therefore, there is some evidence in international law that there now exists a customary law duty to exercise universal jurisdiction over international crimes. According to Bassiouni,

[b]ecause these many conventions have set forth such a duty, it could be argued that the duty to prosecute or extradite, irrespective of the specific binding affect of these instruments, has become part of customary international law.80

The Problem of Amnesties

Amnesties may certainly be seen as a legal impediment to the prosecution of international crimes as they operate an extinction of the offence itself. As Scharf recalls,

the term “amnesty” is derived from the Greek word “amnestia” -- meaning forgetfulness or oblivion. In the present context, amnesty is an act of sovereign power immunizing persons from criminal prosecution for past offenses.81

However, as Roht-Arriaza noted, “[t]here is an increasing trend in international human rights bodies explicitly to condemn amnesties for certain particularly grave offenses, even those granted by successor regimes”.82 Indeed, it is now more and more acknowledged that the granting of amnesty

79 Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 58. The Appeals Chamber agreed that the Tribunal may issue binding orders to states, since it must be able to take such steps to effectively investigate crimes, collect evidence, summon witnesses, and have indictees arrested and surrendered to the Hague. Furthermore, such authority does not apply solely to the states of the former Yugoslavia. See also Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, Trial Chamber I, 3 March 2000.
82 Roht-Arriaza, Naomi, ‘Special problems of a Duty to Prosecute : Derogation, Amnesties, Statutes of Limitation, and Superior Orders’, in Roht-Arriaza, Naomi,
is either totally prohibited where universal jurisdiction is mandatory, or inappropriate where there is a customary international law duty to prosecute or extradite. In any case, amnesty is not a recommended measure in the case of international crimes and, despite the existence of inconsistent state practice, there are strong jurisprudential reasons suggesting their incompatibility with international law. In fact, the notion of granting amnesty for crimes against humanity would be inconsistent with the principles of individual criminal responsibility recognised in the Nuremberg Charter and Judgment. According to Cassese,

the validity of such amnesty [to persons responsible of grave breaches of international humanitarian law and mass violations of human rights] is doubtful. Arguably, the prohibition of such crimes and the consequent obligation of states to prosecute and punish their authors should be considered a peremptory norm of international law (jus cogens): hence, states should not be allowed to enter into international agreements or pass national legislation foregoing punishment of those crimes.

In the same vein, the Human Rights Committee held that:

Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy including compensation and such full rehabilitation as may be possible.

Also, it is worth noting here that, during the signature of the Lome Peace Agreement for Sierra Leone, the U.N. Secretary-General had formulated a reservation to the general amnesty provided for in the Agreement, recalling that amnesty was not applicable to international crimes, crimes against humanity, war crimes or serious violations of the laws and customs of war. Subsequently, the Sierra Leone Government accepted this position and the
Statute of the Special Tribunal for Sierra Leone\(^{86}\) thus provides that amnesty will not impede legal action as regards such crimes.\(^{87}\)

Finally, the Preamble of the Rome Statute also implies that deferring a prosecution because of the existence of a national amnesty would be incompatible with the purpose of the Court, which is to ensure criminal prosecution of persons who commit serious international crimes. Thus, the Preamble

Affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured [...] Recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. Emphasize[s] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction.\(^{88}\)

Notwithstanding the importance of the Preamble,\(^{89}\) it must here be pointed out that some provisions of the Statute seem to allow the Court to recognise amnesty in certain given circumstances. According to Scharf,

[...]he apparent conflict between these Articles and the Preamble reflect the schizophrenic nature of the negotiations at Rome: the preambular language and the procedural provisions were negotiated by entirely different drafting groups, and in the rush of the closing days of the Rome Conference, the Drafting Committee never fully integrated and reconciled the separate portions of the Statute.\(^{90}\)

Thus, Article 16 of the Statute provides that the Court would be required to defer to a national amnesty if the Security Council has requested that it respects an amnesty-for-peace deal and thereby to terminate a prosecution. Still, it might be argued that such an amnesty would be in direct violation of the 1949 Geneva Conventions and of the 1948 Genocide Convention, which,

\(^{86}\) Statute signed on 16 January 2002.


\(^{88}\) See Preamble of the ICC Statute. Emphasis added.

\(^{89}\) See Article 31 (1) of the Vienna Convention on the Law of Treaties. The Preamble may indeed serve as a source of interpretation of the treaty as it indicates both the context as well as the object and the purpose of the treaty.

as previously stated, impose a duty to prosecute.\footnote{See Article 49 of Geneva Convention I and Article V of the Genocide Convention. As Scharf however notes, "[a] counter argument can be made [...] that the Rome Statute codifies only the substantive provisions of the 1949 Geneva Conventions and the Genocide Convention, and does not incorporate those procedural aspects of the Conventions that require prosecution. Accordingly, the nature of the charges might constitute a significant factor to be considered, but would not necessarily be a bar to recognizing an amnesty". Scharf, Michael P., \textit{supra} n. 90, p. 524.} Furthermore, a safety net is here provided by Article 17 (1) of the Statute which does not mention amnesty among the causes of inadmissibility of a particular case.

As a concluding remark on this issue, it might be asserted that, although there is uncertainty surrounding this matter, there are strong legal reasons to believe that amnesties are invalid in the case of international crimes. Furthermore, there are also important moral arguments suggesting the total inadequacy of such measures when applied to international ‘core crimes’. As a matter of fact, in the words of Neier,

\begin{quote}
the state, acting on behalf of all, should demonstrate respect for sufferers from crime, and its seriousness about its own proscriptions against criminality, by punishing the transgressors. The victims count on the state not to overlook or forgive their victimization. They reserve this right to themselves.\footnote{Neier, Aryeh, \textit{War Crimes – Brutality, Genocide, Terror, and the Struggle for Justice}, Times Books, 1998, p. 61.}
\end{quote}

Ultimately, one must never forget that

\begin{quote}
[a]ccountability is the antithesis of impunity, which occurs either de facto or through amnesties. But amnesty is essentially a form of forgiveness, granted by governments, for crimes committed against a public interest. How, though, can governments forgive themselves for crimes they committed against others? And how can governments forgive crimes committed by some against others? The power to forgive, forget or overlook in the cases of genocide, crimes against humanity, war crimes and torture, is not that of the governments, but of the victims\footnote{Bassiouni, M. Cherif, ‘The Need for International Accountability’, in Bassiouni, M. Cherif (ed.), \textit{International Criminal Law, Volume III: Enforcement}, Transnational Publishers, Inc., Second Edition, 1999, p. 22.}
\end{quote}

...and of the victims only.
2. The Particular Case of Genocide

Genocide is the only international crime not submitted to universal jurisdiction. Indeed, while war crimes, crimes against humanity, as well as the so-called delicta juris gentium - such as slavery, trade in children or piracy - are subject to the principle of universal repression, the crime of genocide remains under territorial jurisdiction. While the original draft of the Genocide Convention adopted the principle of universal jurisdiction, thus allowing any state to prosecute perpetrators of genocide regardless of the nationality of the perpetrator or of the victim and of the place of commission of the crime, the Convention finally provided for territorial jurisdiction, most probably in order to protect state sovereignty. It was indeed argued that the principle of universal repression could cause international tension as the courts of one state would become the judge of the conduct of another state.

As a result, the principle of universal jurisdiction was unfortunately deleted from the text, with the risk of allowing impunity for perpetrators of genocide. Indeed, it seems obvious that the state of commission of the crime is very unlikely to be willing to try the perpetrators, either because they are still in power or influence, or because the reconstruction of society is based on forgetting the past. As Stern rightly states:

The necessity to develop universal jurisdiction is even more important if one considers that quite often offenses like war crimes, crimes against humanity, or genocide have links with the state in which they were perpetrated. Without effective universal jurisdiction, the state that has normally jurisdiction over those acts is quite unlikely to prosecute them correctly, if at all. All perpetrators of international crime should know that they are “accountable” for them, in all states throughout the world. 94

Also, Article VI of the Convention, which deals with individual criminal responsibility, does not provide for punishment by the state of its own citizens who committed genocide abroad and found asylum in their own country. As states usually fail to extradite their own citizens, it is very likely

that these criminals will never be punished...and this in complete respect of the Convention.

Finally, the principle of territorial jurisdiction raises the question of the definition of the place where the crime was actually committed. If mass murder is easy to locate, the scenes of commission of other acts of genocide might prove difficult to determine. Indeed, it may well be that conspiracy to commit genocide, or incitement to commit genocide, does not actually occur at the place of the crime.

In any case, such shortcomings have been acknowledged and it may be noted here that Ruhashyankiko, the Special Rapporteur on the question of Genocide, felt that “the question of universal punishment should be reconsidered”. Also, it might be recalled that the final report of the Commission of Experts for the Former Yugoslavia unequivocally stated that

the only offences committed in internal armed conflict for which universal jurisdiction exists are “crimes against humanity” and genocide.96

Fortunately, the Rome Statute followed this path and clearly established the principle of universal jurisdiction over the crimes falling within the jurisdiction of the Court, thus including genocide. Ultimately, one must not forget that universal jurisdiction, by permitting effective prosecution, is necessary from the victims’ perspective. In the words of Orentlicher,

[b]y not having a trial and not punishing Pol Pot and the Khmer Rouge over the past two decades we have, in effect, told the Cambodians that what happened wasn’t a crime [...] If there was no punishment, there was no crime.97

95 Ruhashyankiko Report, p. 56.
3. Application of the Universality Principle in the National Fora

Although the international legal process has elaborated a corpus of law providing for international criminal responsibility for human rights violations, domestic legal systems still remain the primary fora for the application of international criminal law. Indeed, both conventional and customary international law envisage national courts as the primary arena for the trials of perpetrators of international crimes. However, national prosecutions will be effective only if the judicial system is fair and impartial and this is not always the case. Moreover, states have proven very reluctant in exercising such jurisdiction, certainly due to the fact that several violations of human rights or humanitarian law are committed on behalf or with the complicity of the state itself. Bassiouni is entirely correct when he qualifies national prosecutions as being a system of “selective enforcement”. It is true that many individuals have been held responsible under domestic criminal laws, but there have also been a lot of cases where no prosecution took place. Such was notably the case for the Stalin’s purges or for the mass killings in Cambodia. Furthermore, the great majority of domestic prosecutions for international crimes, since the Second World War, have concerned crimes linked to the war and the Axis powers and the charges were usually brought for war crimes or common crimes under national laws rather than for crimes against humanity per se.

The Eichmann and Barbie cases are of interest here as they illustrate the application of the universal jurisdiction principle in the case of crimes against humanity. Adolf Eichmann was arrested by Israeli secret services in Argentina, and in its Judgment, the Israeli District Court explicitly held that:

> These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offenses against the law of nations (“delicta juris gentium”). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an international court, the

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99 However, it might here be noted that a tribunal has been set up in Cambodia to prosecute crimes committed by the Khmer Rouge. See Pejic, Jelena, ‘Accountability for international crimes: From conjecture to reality’, [2002] International Review of the Red Cross 17-18.
international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminal to trial.\(^{100}\)

Subsequently, the Israeli Supreme Court found that “[t]he authority and jurisdiction to try crimes under international law are universal”,\(^{101}\) and that the “power to try and punish a person […] is vested in every State regardless of the fact that the offense was committed outside its territory by a person who did not belong to it”.\(^{102}\) By invoking the ‘protective principle’, which gives the victim nation the right to try any who assault its existence,\(^{103}\) the Court here acknowledged the universality principle.

Klaus Barbie, after having been tried in absentia and condemned to death twice in France for war crimes, was arrested in Bolivia in 1983 and extradited to France. On this occasion, the Cour de Cassation held that:

En raison de leur nature, les crimes contre l'humanité […] ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères.\(^{104}\)

The Demjanjuk case\(^{105}\) is also of a particular interest here as it recognised that crimes against humanity are offences for which there is universal jurisdiction. The United States Circuit Court of Appeals ruled that, based on the right to exercise universal jurisdiction over offences against the law of nations and against humanity, the United States could extradite an alleged Nazi concentration camp guard to Israel or any other nation. The court recognised that the acts committed by the Nazi and Nazi collaborators were “crimes universally recognised and condemned by the community of nations” and that these “crimes [were] offences against the law of nations and against


\(^{102}\) Ibid., 36 ILR 298.

\(^{103}\) Ibid.


\(^{105}\) Demjanjuk v. Petrovsky, 776 F. 2d 571, 582 (6th Circ. 1985), 79 ILR 545-6.
humanity and the prosecuting nation is acting for all nations". The Court thereby recognised the principle of universality for crimes against humanity.

Recently, acting under the principle of universal jurisdiction, prosecutions took place for crimes committed in the context of the former Yugoslavia conflicts or of the genocide in Rwanda. For suspects in the Yugoslavia conflict, trials did lead to convictions, and thus to affirmative findings of jurisdiction, in Denmark, Germany and the Netherlands. Other trials led to acquittals but still to affirmative findings of jurisdiction in Austria and Switzerland. In the respect, the finding of lack of jurisdiction by a French court is all the most disturbing, notably because, due to the fact that France has never adopted any specific legislation that provides for universal jurisdiction for grave breaches of the Geneva Conventions, things stand as if France had not even ratified them.

As regards the Rwanda genocide, it may also be noted that trials have led to convictions in Switzerland and in Belgium, but, again, not in France. Thus, Belgium has prosecuted Rwandans accused of crimes committed in Rwanda against other Rwandans. Similarly, Switzerland tried and convicted Niyonteze for murder, incitement to commit murder and war crimes, but not for genocide as Switzerland had not ratified the Genocide Convention at the time of the commission of the acts. Still, this conviction is extremely important as it is the first conviction following the exercise by a municipal

106 Ibid., 79 ILR 535.
107 Saric case, Danish High Court, 1994.
109 Knesevic, Case No.3717, Netherlands Supreme Court, 1997.
110 Cveticaovic case, Austria Regional Court at Saklzburg, 1995.
111 G. case, Swiss Military Tribunal, Division I.
113 Ntezimana et al. case, Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capitale, 8 June 2001.
court of universal jurisdiction under the 1949 Geneva Conventions.\textsuperscript{115} In the 
\textit{Munyeshyaka} case,\textsuperscript{116} the French Cour de Cassation ruled that French courts 
could only exercise universal jurisdiction over international crimes where the 
accused was actually present in France. It is only on the basis of the passive 
personality principle, i.e. for crimes committed against French nationals, that 
French courts have initiated proceedings in the absence of the accused. Two 
examples are that of Aloïs Bruner who was tried \textit{in absentia} for crimes 
against humanity, found guilty and condemned to life imprisonment,\textsuperscript{117} and 
of General Pinochet for whom France had requested extradition.

Finally, it may be noted that, in the United States, under the 1789 Alien 
Tort Claims Act\textsuperscript{118} and the 1991 Torture Victim Protection Act,\textsuperscript{119} several 
cases upheld the right of victims of gross violations of international law to 
sue in United States courts whenever the perpetrator can be found in the 
United States. The first such case was \textit{Filartiga v. Pena-Irala}.\textsuperscript{120} Since, about 
two dozen cases have been filed alleging human rights abuses in countries 
such as Argentina, the Philippines, Guatemala, Ethiopia, Haiti, Rwanda, 
China and East Timor. Recently, two cases were brought against former 
Bosnian Serb leader Radovan Karadzic and the circuit court of appeals found 
that Karadzic could be found liable for genocide, war crimes, and crimes 
against humanity.\textsuperscript{121} Subsequently, in both cases, the victims were awarded

\begin{thebibliography}{99}
RGDIP 825. See Stern, Brigitte, \textit{‘Universal jurisdiction over crimes against 
\bibitem{note117} Cour d’assises de Paris, 2 March 2001. It may be noted here that, immediately 
after the Second World War, Aloïs Brunner was tried twice \textit{in absentia} before a 
French military tribunal but he was then charged with war crimes and not crimes 
against humanity.
\bibitem{note118} 28 U.S.C. § 1350 (1994). It provides for a civil action in American courts by an 
alien “for a tort only, committed in violation of the law of nations or a treaty of the 
United States”.
\bibitem{note119} 28 U.S.C. § 1350 note (1994). It provides for a civil action in American courts by 
American nationals “against an individual who, under actual or apparent authority, 
or color of law, of any foren nation”, subjects another individual to torture or 
extrajudicial killing.
\bibitem{note120} \textit{Filartiga v. Pena-Irala}, 630F.2d 876 (2d Circ. 1980).
\end{thebibliography}
large financial compensation. However, it may here be pointed out that the American courts have not allowed such claims to bypass the immunity of Heads of States and the protection of sovereign immunity in order to sue a foreign government or a serving foreign leader directly under the Alien Tort Claims Act. In the cases brought against Karadzic, the defendant was not entitled to such immunity as, even though he was the president of the self-proclaimed Republic of Srpska in Bosnia-Herzegovina, the United States had never recognised the legitimacy of this State. However, in 1994, a federal court held that Aristide, then Head of State of Haiti, was immune from suits involving a political assassination.

Ultimately, the issue of universal jurisdiction remains highly political. As an American District Court recently held, the purpose of Head of State and diplomatic immunity is not to protect human rights abusers or to condone their wrongs. Rather, “it is in the interest of comity among nations – to safeguard friendly relations among sovereign states”. It is because of such considerations that states have proven very reluctant to exercise such a jurisdiction. However, there is an increasing trend towards compulsory universal jurisdiction over international crimes and state practice is starting to show evidence of such a duty. Furthermore, the non-application of universal jurisdiction, leading directly to impunity, is highly immoral. In the words of Justice Jackson, “to free [major war criminals] without a trial would mock the dead and make cynics of the living”.


[t]he very phrase “crimes against humanity” connotes that it is not only a particular group that has been injured but the entire human race. Accordingly, all have a responsibility to see that justice is done. A prosecution before an international tribunal is “Humanity vs. Radovan Karadzic” or “The World vs. Radovan Karadzic”.  

Thus, to paraphrase Vladimir Jankélévitch,

\[\text{Ces innombrables morts, ces massacres, ces tortures, ces piétinés, ces offensés sont} \]

\[\text{notre affaire à tous.}\]


Conclusion: The Inadequacy of Existing Instruments

The first part of this thesis on the elements of the crimes showed that the elements required for a crime against humanity to be qualified as such are also present in the crime of genocide, crimes against peace and war crimes. Thus, it appears that there are no legal obstacles to impede all these crimes to be considered as crimes against humanity. In other words, if they share the same elements, they correspond to the same crimes. The second part of this work focused on the legal regime applicable to the four ‘core crimes’, while highlighting their striking similarities. When differences arose, it has also been shown that harmonisation through the application of the crimes against humanity regime was the most desirable solution. To complete this study, the conclusion will focus on the inadequacy of the instruments which exist as regards genocide, crimes against peace and war crimes respectively. Thus, if the elements of the crimes are the same, if the legal regime is, or should be, the same, and if the existing instruments are hardly satisfying, there is no legal reason not to include the other ‘core crimes’ within the broader definitional scope of crimes against humanity.

However, it should be stressed here that such a proposal does not presuppose that the definitions of international crimes are malleable, and the purpose here is certainly not to stretch the definition of crimes against humanity in order for it to encompass a wider array of offences. Rather, this proposal is based on the assumption that prosecutions for international crimes have remain much too rare, and that, accordingly, change and improvement are necessary. Thus, even if the definition of crimes against humanity could still be seen as not definitely settled, it is here argued that, compared to the other ‘core crimes’ against international law, they are sufficiently well-defined, their scope of application is wider, and they therefore afford more guarantees of effective punishment.

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1 Indeed, if under different instruments, the definition of crimes against humanity may vary, it has been shown throughout this work that these definitional differences have only little consequences in practice.
As Kader rightly states, "the existence of law-on-paper rights does not mean they exist in reality". Indeed, the impunity that has been accorded to genocide perpetrators reveals the impotence of the international community. The purpose of this thesis is thus to give meaning to the prohibition of international crimes by proposing a solution in order to ensure application of the Law. It is thus argued that the multiplication of relevant instruments and dispositions is hardly satisfying as such a situation can only complicate existing rules and thus impede their adequate and effective application. In order to be respected, international law needs to be simplified. Considering the ‘core crimes’ against international law as species of crimes against humanity is thus aimed at a better respect of international legal norms. Therefore, the conclusion of this thesis will highlight the defects of the existing instruments applicable to genocide, crimes against peace and war crimes respectively, while showing how the concept of ‘crimes against humanity’ would remedy to such inadequacies.

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A. Filling in the Gaps of the Genocide Convention

The whole thesis has highlighted the failures of the Genocide Convention. It indeed contains some serious shortcomings and, due to its very narrow sphere of protection, its application in practice is extremely limited. The question which thus arises is whether a convention on genocide was itself desirable. Far from being a new one, this question had already been raised during the drafting of the Genocide Convention. As a matter of fact, on 20 November 1947, the Sixth Committee adopted a draft resolution on genocide which made a recommendation to the Economic and Social Council to study this question. During the drafting in the Sixth Committee, this point was also debated as the representative of the Union of South Africa doubted whether a convention, as contemplated, would be practicable and effective. Sir Shawcross, the representative of the United Kingdom, was also very critical of the idea of a convention and stated that

it was a complete delusion to suppose that the adoption of a convention of the type proposed, even if generally adhered to, would give people generally a greater sense of security or would diminish the dangers that at present existed of persecution on racial, religious, or national grounds.

He further noted that genocide was already a crime under international law, as a consequence of the IMT Judgment, and thus believed that a convention would defeat the purpose it sought to achieve because the failure to ratify by some states would undermine the claim that it stood for universally accepted principles.

On the other hand, some expressed the view that the crime of genocide was to be dealt with in a convention as, "under the Nuremberg law, genocide is not an international crime if not committed in connection with or during war". If this was true at the time, this argument is now completely obsolete,

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7 Tillott, Charles W., Chairman of the Section of International and Comparative Law of the American Bar Association. Cited in Robinson, Nehemiah, The Genocide
the required nexus between war and crimes against humanity having been abolished, and the crime of genocide having been recognised in time of war as well as in time of peace.

One of the biggest problems caused by a convention is that its application depends on ratification. As a matter of fact, the Convention, adopted on 9 December 1948, entered into force three years later, on 12 January 1951. A convention will indeed only apply to the states which have ratified it, international agreements being only binding for the parties to them. Thus, assuming that such a convention was enforceable, such enforcement could only be directed against contracting parties. Still today, the Genocide Convention has one hundred and thirty-two States parties, "a rather unimpressive statistic when compared with the other major human rights treaties of the United Nations system which, while considerably younger, have managed to approach a more general degree of support by the nations of the world".

Furthermore, the application of the Convention may vary from one state to another, depending on when a particular state has ratified it. For instance, the United States of America became a party to the Convention only on 25 November 1988...forty years after its adoption! The United Kingdom also waited for as long as 22 years to finally accede to the Genocide Convention, as it felt that every aspect of the crime was already covered by domestic laws. Also, it may be noted here that the French Penal Code does not include the Genocide Convention. As a result, some judges declared

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8 See supra Chapter 1.
9 Article I of the Genocide Convention.
11 The United Kingdom became a party to the Convention on 30 January 1970.
themselves incompetent as regards crimes committed in Rwanda. However, crimes against humanity are included in the Penal Code, and to consider genocide as crimes against humanity would have allowed prosecution.

Thus, the punishment of the crime of genocide depends on whether the perpetrator state has ratified the Convention or not. It is true that the outlawing of genocide is now part of international customary law, and that, as such, its provisions should apply to non-parties to the Genocide Convention. Similarly, it might well be argued that article VIII of the Genocide Convention applies to both States Parties and non-parties, as it states that:

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

As Professor Kunz notes, “although only Contracting Parties can invoke [Article VIII] of the Convention, United Nations are called to intervene”. However, this does not render the Convention binding upon non-parties as Article VIII is merely a reminder of the powers of the United Nations to act, and, so far, international practice has shown that such an allegation has remained purely theoretical.

A convention raises another serious problem, that of the reservations and understandings which undermine the scope of the ratifying states’ obligations under this convention. As regards the Genocide Convention, this problem is

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13 It must be noted here than Myanmar formulated a reservation as regards Article VIII and excluded its application to the Union of Burma.
15 On the 132 States parties to the Convention, 29 have formulated reservations, but ten of these have since been withdrawn. Still, it might be noted here that the United States attached an understanding to their instrument of ratification which provides that “the term “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group as such by the acts specified in article II”. Emphasis added. See the reservations to the Genocide Convention: <www.unhchr.ch/html/menu3/b/treaty1gen.htm>. According to LeBlanc, because the understanding contradicts the ordinary meaning of the phrase, it “thus takes on the character of a reservation, which could lead to
further aggravated by the complete silence of the Convention on that matter. Furthermore, the *travaux préparatoires* are not very explicit on the subject neither. Consequently, the question of the permissibility of reservations was submitted to the ICJ for an Advisory Opinion. In its opinion of 21 May 1951, the Court laid down a new principle, namely, that of compatibility of the reservation with the object and purpose of the treaty.\(^{16}\) Subsequently, the General Assembly passed Resolution 598 (VI) which recommended that States Parties be guided by the Court’s Advisory Opinion.\(^{17}\) As Nehemiah Robinson rightly points out, the difficulty with the Advisory Opinion is that “it leaves the “decision” concerning the compatibility to the various parties”.\(^{18}\) Furthermore, the Advisory Opinion does not provide for any means of reconciliation in case a reservation generates different views as to its compatibility with the Convention.\(^{19}\) It merely states that

> if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention.\(^{20}\)

Such a statement can have very dangerous results as many states may consider that one or more states are in fact not parties to the Convention, which, in the crucial matter of genocide, could be catastrophic. It seems that some states reacted by not officially objecting to a reservation, which is probably the only solution, even if it is certainly not satisfying.\(^{21}\)

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\(^{17}\) Resolution of 12 January 1952.


\(^{19}\) See ibid.


\(^{21}\) Robinson, Nehemiah, *supra* n. 18. Robinson illustrates this point by reference to the Canadian position concerning the reservations of the Communist States. Being aware of the fact that, even if Canada objected to these reservations, some States will still maintain that they were compatible with the Convention, Canada ratified the Convention without reference to the reservations, which legally means that it accepted them.
In any case, it is here submitted that, despite the position of the ICJ, reservations should not be allowed in such crucial matters as genocide. In the words of Judge Alvarez, in a dissenting opinion urging that the Genocide Convention cannot admit any reservations, such conventions as that on genocide

by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.  

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1. The Prohibition of Genocide as a Peremptory Norm of International Law (Jus Cogens)

The outlawing of genocide has frequently been qualified as a universal and peremptory norm of international law. In the words of Judge Elihu Lauterpacht,

the prohibition of genocide [...] has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*.24

Clearly, the prohibition of genocide as embodied in the Genocide Convention is widely accepted, and it has been indeed reproduced in several authoritative instruments. Thus, it seems that it is the conventional outlawing of genocide which is part of *jus cogens*. Nevertheless, it may also be argued that a broader *jus cogens* prohibition of genocide existed prior to the adoption of the Genocide Convention, and that the latter has in fact replaced, and is inconsistent with, the broader *jus cogens* norm. The problem here is that, with the Convention, the outlawing of genocide finds itself unduly restricted. This restriction of an existing peremptory norm is highly questionable, and it may thus be ascertained that it is this previous norm which should apply. As Van Schaack rightly argues,

[the] Genocide Convention is not the sole authority on the crime of genocide. Rather, a higher law exists. The prohibition of genocide represents the paradigmatic *jus cogens* norm, a customary and peremptory norm of international law from which no derogation is permitted.26

The prohibition of genocide can indeed be traced back prior to the adoption of the Convention27 and to the Nuremberg trial when, in the

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25 See Article Article 4 of the ICTY Statute, Article 2 of the ICTR Statute, Article 6 of the ICC Statute.


27 It might be recalled here that, in Article I of the Convention, “The Contracting Parties confirm that genocide […] is a crime under international law”, thus implying
reference to the extermination of any civilian population, genocide was included among crimes against humanity. For instance, already in October 1933, at the Fifth International Conference for the Unification of Penal Law held in Madrid, Lemkin had identified the crime of barbarity which would amount to the actual notion of genocide and he defined it as “oppressive and destructive actions directed against individuals as members of a national, religious, or racial group”. The fact is, genocide has always been illegal, genocide is illegal per se, it did not become illegal thanks to the ratification of a Convention, it is illegal in itself. As Beres rightly notes, “[g]enocide is a modern word for an old crime”. So much so that, already in 1947, Lemkin had noted that “no great difficulties are involved in this field [legislation on genocide] since genocide is a composite crime and consist of acts which are themselves punishable by most existing legislation”. As pointed out in the report of the Committee on Peace and Law through the United Nations, what is left of the Convention “is a code of domestic crimes which are already denominated in all countries as common law crimes”. But if the outlawing of genocide is definitely a jus cogens norm, it does not mean that such a norm is embodied in the Genocide Convention nor that this Convention is of a peremptory character.

Firstly, as the rather small number of States Parties to the Convention suggests, it is far from certain that this instrument has acquired value of jus
cogens. In this respect, Sir Hartley Shawcross was completely correct when he expressed the fear that a convention would defeat the purpose it sought to achieve, because the failure to ratify by some states would undermine the claim that it stood for universally accepted principles.\(^{32}\) Similarly, Lane points out that to consider the Genocide Convention as international common law is a position which “must be regarded skeptically in light of the reaction of many States which, despite the Convention’s compelling motivation and unassuming legal nature, have refused to ratify it. This refusal is inconsistent with the international common law characterization”.\(^{33}\)

Secondly, it must be recalled here that the Convention is not a permanent one and it is thus arguable that the drafters of the Convention did not intend to generate a *jus cogens* norm. Indeed, the Convention was concluded for a period of ten years with the provision that “it shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it”.\(^{34}\) Also, the Convention contains a highly unusual provision for a multilateral convention in its Article XV. As a matter of fact, if, as a result of denunciations, the number of parties to the Convention should become less than sixteen, the whole convention shall cease to be into force. Thus, the Convention’s existence could be easily challenged, while it should have been an authoritative and permanent instrument of protection of human rights. In the words of Drost:

> It shocks the juristic conscience to realize that under the positive law of the Convention genocide is conceived an international crime for an indefinite and uncertain period yet delimited in definite and certain terms of time. The legislators established genocide as a crime under the law of nations on a temporary basis. Under the Convention genocide is considered a crime for the time being. Admittedly, this notion does not refer to the moral nature of the act but, legally speaking, this “old


crime under a new name" may possibly disappear from the international statute book.35

Thirdly, the fact that reservations to the Convention are permitted might indicate that its provisions are not customary law. As a matter of fact, in the *North Sea Continental Shelf* cases, the ICJ noted that speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by anyone of them in its own favour.36

Thus the Court concluded that where customary law figures in a convention, it will generally be among the provisions where the right of unilateral reservation is not conferred or is excluded.37 Clearly, this is not the case of the Genocide Convention as, even if the Convention is silent on the matter, the ICJ itself found that reservations were permissible.38

Ultimately, as the ICJ ruled in the *Military and Paramilitary activities in and against Nicaragua* case, the fact that principles “have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions”.39 As a matter of fact, already during the drafting of the Convention, the U.N. Secretariat addressed the issue of the interplay between the *jus cogens* prohibition of genocide and the Convention and stated that “common law retains its full force for the States which have not signed the convention”.40 Considering the fact that the *jus cogens*

36 *North Sea Continental Shelf* cases, Judgment, [1969] ICJ Reports 38-39, para. 63 (20 February).
37 Ibid., p. 39, para. 63.
prohibition of genocide is broader than the conventional one, this might lead to the absurd situation where a non-ratifying state has in fact more obligations and duties than the States Parties to the Convention.

Prior to the adoption of the Genocide Convention, the General Assembly had adopted Resolution 96 (I), which reads as follows:

Genocide is a denial of the right to existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern. 41

Because the definition of genocide is here broader than the one embodied in the Convention, the question arises as to the value of the Resolution and of the prohibition it contains. As it is a resolution of the General Assembly, Resolution 96 (I) is not a source of binding law. However, it seems that Resolution 96 (I) did nothing less than codify an existing peremptory norm of international law. As the ICJ held in 1996:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the condition of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule. 42

Thus, the General Assembly Resolution 96 (I) can reflect the opinio juris of states, especially as it was adopted unanimously and without debate. It is widely acknowledged now that the way states vote in the General Assembly constitutes evidence of state practice and of state understanding of the law. Furthermore, it could also be asserted that, as regards General Assembly Resolutions adopted unanimously, "no question arises as to the legal validity and obligatory nature of General Assembly resolutions, for each State casting

a vote could be regarded as bound by that expression of opinion". Moreover, it has been cited frequently in subsequent instruments and judicial decisions, thus reinforcing the claim that it codifies a customary principle. For example, the United States Military Tribunal cited General Assembly Resolution 96 (I) on four occasions and stated that: "The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion". The significance of Resolution 96 (I) was also enhanced by the statement of the ICJ in its Advisory Opinion in the Reservations to the Genocide Convention case:

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.

This statement illustrates the fact that the Convention is not necessarily the decisive element in the outlawing of genocide, as it seems clear that the "principles underlying the Convention [...] which are binding on States" are these very principles found in Resolution 96 (I). Thus, the Court's statement supports the idea that it is the crime of genocide as defined in the Resolution which is outlawed as a matter of custom. This does not imply that the General Assembly has legislative power nor that the Resolution is a source of international law because it only put in a written form the pre-existing peremptory norm. It is indeed arguable that, with the Nuremberg precedent which dealt with genocide as a crime against humanity, "the prohibition of genocide was already an established principle of international law". Thus, while for many writers, treaties constitute the most important sources of

44 United States v. Alstoetter et al., Case No. 3, Military Tribunal III, 3 Nuremberg Subsequent Proceedings 983.
international law as they require the express consent of the contracting parties, it seems that the Court, on its reasoning on the legal prohibition of genocide, did not only rely on the positive element of recognition by states, but also on the underlying moral considerations of the prohibition. The fact is here that states unanimously gave their consent to Resolution 96 (I), and, as the representative of Czechoslovakia, Mr. Zourek, stated during the drafting of the Convention,

although the General Assembly could not by a resolution adopt new rules of law, its resolutions could nevertheless reaffirm already existing laws; as such they would be binding upon the Members, particularly if they were unanimously adopted.47

Some would argue that the resolution was adopted hastily and that there is little recorded debate on some important questions, such as the inclusion of political groups within the definition. Furthermore, some important issues were reconsidered and revised during the debates on the Convention in 1947 and 1948. Thus, a part of the doctrine believes that “much caution is advised with respect to claims that resolution 96 (I) constitutes a codification of customary law”.48 On the contrary, it may also be argued that the fact that there is little recorded debate on the inclusion of political groups means that there was no debate on the question, that it appeared logical to protect them, and that their deletion from the Convention was purely due to political considerations which were clearly out of place considering such a crucial issue. Furthermore, it appears that, on this particular point, a considerable number of states took the approach of Resolution 96 (I) in their domestic legislation.49 It is thus probable that, compared to the Genocide Convention, Resolution 96 (I) resembles more domestic provisions on the prohibition of genocide and therefore provides clear evidence of state opinion and practice.

49 See supra Chapter 2 (B).
Similarly, it may be argued that the modifications in the Convention were also made because of political arrangements. Such modifications would then be contrary to the concept of *jus cogens*. In the *Reservations to the Genocide Convention* case, the ICJ identified one of the accepted meanings of *jus cogens* seen as a “public order of the international community” made up of principles and rules of “such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force”.

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

Verdross also wrote that the criterion for rules having the character of *jus cogens* “consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community”. However, it is most likely that, in defining and writing *jus cogens* norms, states have interpreted “international community” as ‘international community of states’ rather than as ‘mankind’. As Bull rightly points out, “agreements reached among States are notoriously the product of bargaining and compromise rather than of any consideration of the interests of mankind as a whole”. Clearly, the Genocide Convention was a political compromise which considered the interests of states and the protection of

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50 Mosler, Hermann, ‘The International Society as a Legal Community’, [1974] IV RCADI 34. In this respect, see article 53 of the 1969 Vienna Convention on the Law of Treaties according to which a treaty which is contrary to an existing rule of *jus cogens* is void ab initio.


52 Verdross, Alfred, *‘Jus Dispositivum and Jus Cogens in International Law’*, (1966) 60 AJIL 55.
state sovereignty rather than the overriding interests of humanity as a whole.

With the Convention, there is a risk of a “weakened international law” or of an international law “enfeebled by its own norms”.54 The obvious illustration of this is the difference between General Assembly Resolution 96 (I) and the Convention itself, and it is most probable that the prohibition of genocide as following from natural law was reproduced in Resolution 96 (I) of the General Assembly,55 the Genocide Convention being in fact inconsistent with the broader *jus cogens* norm.

Thus, it is not the Convention-based prohibition but the one embodied in Resolution 96(I) which should apply.56 Then, and only then, will the peremptory norm be respected and will the definition of the crime of genocide be satisfying. Indeed, as a result of the application of the broader *jus cogens* norm, political and other groups would be recognised as possible targets of genocide and the principle of universal jurisdiction, which also seemed to have been the intention of Resolution 96 (I), would cease to raise any doubts. In fact, the ILC, in its 1996 Report on the Draft Code of Crimes, had already acknowledged “the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law”.57 As its work is evidence of state practice and as its drafts may constitute evidence of custom, this clearly indicates the importance and relevance of Resolution 96 (I).

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56 See Article 53 of the 1969 Vienna Convention on the Law of Treaties. In fact, it is arguable that, because the Genocide Convention unduly restricts the *jus cogens* norm, it is in fact contrary to it. As a result, the Convention could be considered void.

Applying the broader *jus cogens* norm would remedy to the most important shortcomings of the Genocide Convention. However, we are fully aware that a written norm is essential in the prevention and punishment of Human Rights violations. The arguments raised against the Nuremberg trials are indeed a constant reminder of the necessity to respect the *nulla crimen sine lege* principle in order to avoid criticism, no matter how inappropriate, to say the least, it was. As we have argued, such a norm was put down on paper in Resolution 96 (I), but it might still be maintained that General Assembly Resolutions have no binding force even if they are declaratory of international law. Therefore, the best way of securing prevention and punishment of genocide would be to include its outlawing in the broader concept of 'crimes against humanity'. The *jus cogens* prohibition of genocide would then apply but would still be enshrined in international instruments which authority is not disputed.
2. Genocide as a Crime Against Humanity

The first Special Rapporteur on genocide believed that “the 1948 Convention can only be considered a point of departure in the adoption of effective international measures to prevent and punish genocide”; he thus proposed “to examine the possibility of fresh international measures for effective prevention and punishment of genocide”.58 Similarly, in its report on genocide, Whitaker acknowledged the fact that “certainly in its present form, the Convention must be judged to be not enough. Further evolution of international measures against genocide are necessary and indeed overdue”.59 Sibert went even further when he wrote that if effectiveness is preferred to spectacular text, it will be necessary “to start again right from the beginning a work which is no more than the first step on an arduous road leading to absolute respect for the most sacred rights of mankind”.60

Such a step could be the re-qualification, or rather the return to the qualification,61 of genocide as a crime against humanity. This is certainly not revolutionary, genocide being generally acknowledged as a species, a particular form, of crimes against humanity. In fact, it must not be forgotten that it is the concept of crimes against humanity which led to the adoption of the Genocide Convention.62 In the words of Professor Clark,

the establishment of the doctrine of crimes against humanity [...] paved the way for subsequent development of other offences of international concern. It led directly to the definitions of genocide and the crime of apartheid and less directly to the development of a whole package of international crimes.63

58 Ruhashyankiko Report, p. 120, para. 440.
60 Sibert, Marcel, Traité de Droit International Public, Volume I, Librairie Dalloz, 1951, pp. 445-446.
61 As previously recalled, the Nuremberg Judgment dealt with genocide as a crime against humanity.
As a matter of fact, already in preparation for the debate on the Secretariat’s draft, France circulated a memorandum “on the subject of genocide and crimes against humanity” which challenged the use of the term “genocide”, calling it a useless and even dangerous neologism. France preferred to approach the problem of extermination of racial, social, political, or religious groups from the standpoint of crimes against humanity.\(^{64}\) During the second session of the General Assembly, the heart of the issue was whether to consider genocide as a variety of crime against humanity, or to treat it as a distinct form of criminal behaviour. During the debates in the *Ad Hoc* Committee, France was the most insistent about the linkage between genocide and crimes against humanity, while others firmly believed that the concepts had to be made distinct and separate. France had urged that the preamble described genocide as “a crime against humanity”,\(^{65}\) but this was rejected by the *Ad Hoc* Committee, which chose instead to characterise it as “a crime against mankind”.\(^{66}\) According to the final report of the Committee, its members “categorically opposed the expression “crimes against humanity” because, in their opinion, it had acquired a well-defined legal meaning in the Charter of the Nuremberg Tribunal”.\(^{67}\)

It is true that crimes against humanity were still widely believed to be crimes that could only be committed during armed conflict, a consequence of the Nuremberg jurisprudence. Taking an opposite approach, the drafters of the Convention proceeded to the “equalization of acts committed in peace or war”\(^{68}\) in Article I, and this constituted at the time a major innovation. However, it is now admitted that crimes against humanity also occur in time of peace, and thus a distinction between genocide and crimes against

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\(^{64}\) U.N. Doc. A/AC.20/29.  
\(^{67}\) Ibid., p. 3.  
humanity cannot be made from the standpoint of “time of war or time of peace”.  

Another major dissimilarity, it is argued, between genocide and crimes against humanity is that genocide requires a specific intent to destroy a group as such, while crimes against humanity do not necessarily involve offences or persecutions against groups. However, cases of crimes against humanity clearly show that these crimes too are committed against individuals because of their belonging to a targeted group. As a matter of fact, the case-law of the International Tribunals seems to suggest that the distinction between these two crimes is vanishing, notably due to the facts that ‘persecutions’, which are crimes against humanity, require the same ‘specific intent’ than the crime of genocide. Thus, in the Kupreskic case, Trial Chamber II of the ICTY held that:

[Persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. […] From the viewpoint of mens rea, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.]

It also found that:

Persecution is one of the most vicious of all crimes against humanity […] Persecution is only one step away from genocide – the most abhorrent crime against humanity – for in genocide the persecutory intent is pushed to its uttermost limits through the pursuit of the physical annihilation of the group or of members of the group

In this respect, Glaser considers it indisputable that crimes against humanity and genocide

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69 Ruhashyankiko Report, p.107, para. 392. See supra Chapter 1.
70 Prosecutor v. Kupreskic et al., Case No. IT-95-16, Judgment, Trial Chamber II, 14 January 2000, para. 636.
71 Ibid., para. 751. Emphasis added. See also Prosecutor v. Krstic, Case No. IT-98-33, Judgment, Trial Chamber I, 2 August 2001, para. 684; Prosecutor v. Nikolic, Case No. IT-94-2, Initial Indictment, 4 November 1994, para. 24. See also Article 17 of the ILC 1996 Draft Code, in the commentary of which the ILC stated that genocide as currently defined corresponds to the second category of crimes against humanity established under Article 6 (c) of the Nuremberg Tribunal’s Statute, namely the crimes of persecution. [1996] II (2) ILC Yearbook 44.
fall within the same category, or, in other words, belong to the one and the same class of acts [...] The essential differences between crimes against humanity and genocide is not so much objective as subjective, in that it relates to the motives of the perpetrator. The same act – for example, murder – may be, or rather may be described as, either a crime against humanity or an act of genocide, depending on the motives of the person committing it; if his aim is to eliminate the victim because of the latter’s race, religion or political beliefs, with no other intent, his act constitutes a crime against humanity, whereas if committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, it will be qualified as genocide. It follows that genocide, too, is by its nature simply a crime against humanity, and indeed an aggravated crime against humanity. Accordingly, it would seem more correct from the standpoint both of logic and of method to regard genocide as simply an aggravated case of crimes against humanity. The aggravation lies simply in the additional intent which is characteristic of genocide.72

Similarly, Drost affirmed that these two offences “do overlap to a great extent and, generally speaking, the two crimes as comprehensively understood correspond completely with each other”.73

The purpose of eliminating the distinction between genocide and crimes against humanity is certainly not to erase the specificity of the crime of genocide. Rather, it is aimed at strengthening its universal prohibition.74 For instance, a lot of the crimes listed among the crimes against humanity, such as enslavement, torture or apartheid, are also embodied in separate conventions, and the fact of being acknowledged as crimes against humanity did not weaken their value. In fact, it may be argued that it is the notion of crimes against humanity itself which has been trivialised. In order to ‘preserve’ the notion of genocide, several scholars have adopted the view that elements which were not embodied in the Genocide Convention could

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72 Glaser, Stefan, *Droit International Pénal Conventionnel*, 1970, p. 109. Emphasis in original. See also Destexhe, Alain, *Rwanda and Genocide in the Twentieth Century*, Translated by Alison Marschner, Pluto Press, 1995, p. 4: “genocide is a crime on a different scale to all other crimes against humanity and implies an intention to completely exterminate the chosen group. Genocide is therefore both the gravest and the greatest of the crimes against humanity”.


nevertheless be considered as crimes against humanity.\textsuperscript{75} Clearly, such a proposal would transform the notion of crimes against humanity into a ‘catch-all’ category where everything that does not fit in the Convention would fall in. This is of course a very inappropriate way of dealing with international crimes and of finding effective solutions for prevention and punishment as the whole system would then lack credibility. Thus, the purpose of the previous development was to give meaning to the prohibition of the crime of genocide by proposing a solution in order to ensure the effective prevention and prosecution of such a crime.

B. Defining Crimes Against Peace

In the spring of 1945, the delegates of 49 states met in San Francisco to draft the Charter of the United Nations. In this Charter, these delegates pledged their determination “to save succeeding generations from the scourge of war, which twice in [their] lifetime [had] brought untold sorrow to mankind”. From then on, the struggle to achieve peace worldwide has been the essential purpose of the United Nations. However, facts clearly show that international peace has remained utopian and thus suggest a need for change and improvement, notably due to the fact that the existing instruments on the issue fall short of satisfactorily defining the crime itself. Indeed, if the U.N. Charter provides for a general prohibition of the use of force, it nonetheless fails to define the term “aggression”, thus raising a lot of unanswered questions, and notably whether only wars of aggression are seen as international crimes, or if this incrimination also covers acts of aggression. So far, the main achievement on the issue was made by the General Assembly which, after a twenty-year project to define aggression, finally completed its task in Resolution 3314. According to the General Assembly, “[a] war of aggression is a crime against international peace”, and, unlike other acts of aggression short of war, is an international crime. However, the Resolution was intended as a guide for the Security Council and not as a definition for judicial use. As a result, it deals only with aggression by states, and not with the crimes of individuals. Thus, there is still no legally binding definition of aggression for the purpose of determining individual criminal responsibility. It is therefore to be highly deplored that the drafters of the ICC Statute missed this opportunity to fill in this gap as the Rome Statute only mentions “aggression” with absolutely no precision whatsoever.

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76 See Preamble of the U.N. Charter.
77 Article 2 (4) of the U.N. Charter.
79 Resolution on the Definition of Aggression 1974, adopted without a vote, 14 December 1974, GAOR, 29th Session, Supp. 21. Its Article 1 defines “aggression” as “the use of armed force against the sovereignty, territorial integrity or political independence of another State".
As a matter of fact, one of the important compromises at Rome was the decision to include the crime of aggression within the subject-matter jurisdiction of the Court. Indeed, as it is the international crime which, by its very nature, is the most political, states never wanted to be bound by a definition, in order to keep a power of appreciation on a case by case basis regarding the political opportunity to qualify an aggressor as such.

Not surprisingly, the inclusion of the crime of aggression in the Rome Statute has been a contentious issue since the beginning of the process. States opposed to the inclusion of aggression emphasised that there is no legally binding definition of that crime for the purpose of determining individual criminal responsibility.\(^81\) Thus, the Statute provides for the Court’s jurisdiction over crimes against peace only if and when states formally amend that Statute to add a definition of the crime and the conditions for the exercise of jurisdiction. Still, Article 5 (2) of the Statute is a reminiscence of the willingness of states not to be subjected to the Court’s jurisdiction:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.\(^82\)

By making a direct reference to Articles 121 and 123, this Article provides that it is only after a period of seven years from the date of entry into force of the Statute, that an Assembly of States Parties or a Review Conference will be able to adopt an amendment providing for the definition of the crime of aggression. Also, such an amendment will only, according to Article 121 (5), “enter into force for those States Parties which have accepted the amendment”. It is thus probable that, if an amendment is ever adopted, its scope of application will be rather limited: states just have to refuse the

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\(^80\) Article 5 (2) of the Resolution.


\(^82\) Article 5 (2) of the ICC Statute. Emphasis added.
amendment to prevent the Court from exercising its jurisdiction over this crime.

Furthermore, by emphasising the importance of the U.N. Charter, this Article is a reminder that the Security Council remains the responsible organ to “determine the existence of any threat to the peace, breach of the peace, or act of aggression”. The problem here is that, due to the absence of definition of the crime, the Security Council remains free as to whom is to be qualified as an ‘aggressor’. Indeed, the Charter leaves the determination of aggression to the Security Council in each case as it arises, and provides no criteria for reaching decisions, over which the Permanent Members have a right of veto. In other words, it is most probable that these Permanent Members have here reaffirmed their willingness to be able to interfere in — and thus, if necessary, to prevent — any qualification of aggression. As a result, it is doubtful that individuals who occupy leadership positions in the administration of a Permanent Member will be tried. With this provision, Security Council leaders, and most probably their nationals, are here afforded immunity for the commission of the crime of aggression. As Schwebel rightly argued:

If a body like the Security Council has complete freedom of action in its determination of an act of aggression, it is liable to take arbitrary action, responsive to political rather than legal considerations.

Clearly, the Rome Statute gives a preponderant role to the Security Council, and this role might greatly impede the independence of the Court by unduly restricting its jurisdiction over the crime of aggression. Indeed, “[i]f the Security Council is the arbiter of situations of aggression, would this mean that the Court can only prosecute aggression once the Council has pronounced on the subject?”

83 Article 39 of the U.N. Charter.
85 On the preponderant role of the Security Council, see also Article 16 of the ICC Statute.
Thus, there is a real risk that, if the ICC ever has jurisdiction over crimes against peace, such jurisdiction will remain purely theoretical. If such crimes were generally be considered as crimes against humanity, this risk would be avoided, the Court having a clearly established jurisdiction over the latter. Furthermore, this re-qualification would remedy to the problem inherent to the notion of crimes against peace, namely, their lack of definition due to the impossibility of a definition...which ultimately resulted in the disappearance of prosecutions for such crimes since the World War II trials.

Indeed, one has to remember that the "definition of aggression is one of the most politically oriented operations in a field where politics always plays some role". Thus, every single definition, or proposal in order to define, the crime of aggression will clearly be influenced by political considerations. Furthermore, the determination of aggression rests on the facts and motives of the particular case, thus rendering undesirable a definition. In the words of Sir Gerald Fitzmaurice,

one and the same act may be aggression or may be the reverse if committed from different motives and in different circumstances [...] An enumerated definition could...do little more than list a number of acts which are fairly obvious cases of aggression, if committed without adequate justification [...] The whole problem is to determine when certain acts are justified and, therefore, are not aggressive, and when they are not justified, and therefore, are aggressive [...] This determination [...] cannot be achieved by a priori rules laid down in advance.

He also pointed out that

an incomplete list would be extremely dangerous because it would almost inevitably imply that other acts not listed did not constitute aggression. States would thus be encouraged to commit the acts not listed, because, prima facie at any rate, they would not be regarded as acts of aggression. In addition, the existence of an incomplete list would show potential aggressors how to accomplish their aims without actually being branded as aggressors, for they would keep their acts within the precise letter of the definition and then claim that they were technically justified.

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87 Hazard, John N., 'Why try again to define aggression?', (1968) 62 AJIL 703.
Thus, if from a purely legal point of view a definition would be desirable in order to fulfil the requirements of the principle of legality, and thus to avoid criticism if prosecution for such crimes were to occur, it however appears that, on practical grounds, such a definition could have some major side-effects. In any case, it can be reasonably asserted that, in the light of the impossibility to reach a consensus on a definition during the drafting of the Rome Statute, the likelihood of a definition is very doubtful. On the other hand, this situation of complete impunity for criminals against peace cannot continue. If crimes against peace were generally seen as a sub-category of crimes against humanity, the problem of defining the crime would be avoided and prosecution would be possible.

In this respect, it might also be pointed out that the confusion and uncertainty as to the definition of crimes against peace was well illustrated by the legal discussions following the terrorist attacks of 11 September 2001. For instance, several authors have argued that these attacks were not acts of war, but, if this is not the case, then what is an act of war? This confusion could clearly be avoided if crimes against peace were considered as crimes against humanity as this would at least provide them with a legal definition. Furthermore, considering terrorism as a crime against humanity would also

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91 Suggesting that these acts amounted to an ‘armed attack’ was NATO’s reaction which invoked Article 5 of the Washington Treaty which states that an armed attack against one or more allies in Europe or North America shall be considered as an attack against all. NATO, Article 5, Treaty of Washington, 4 April 1949, reprinted in 34 UNTS 243.

prevent the debates on how to qualify the particular acts.\textsuperscript{93} It may be pointed out here that it is the lack of definition of the crime of terrorism which impeded its inclusion in the Rome Statute, even if, through the adoption of an amendment, its future incorporation has not been ruled out. However, it might here be argued that an easier way to actually make terrorism a crime under the Statute without having to resort to amendments which always take time and which are also more often than not the result of compromises, not always beneficial in terms of prosecution an punishment of a crime, would be to consider terrorism as a crime against humanity.\textsuperscript{94} Clearly, the attacks of 11 September 2001 were nothing less:

In view of their advance planning, large-scale nature and intentionally targeting of thousands of innocent civilians, there can be little doubt indeed that these attacks meet the description of 'widespread or systematic attack against any civilian population' in the \textit{chapeau} of Article 7 of the Rome Statute and carry the features of 'murder', 'extermination' or 'other inhumane acts', as included in the list of crimes within the purview of crimes against humanity.\textsuperscript{95}

Thus, this re-categorisation of crimes against peace – including terrorism – as crimes against humanity would not be a legal incongruity as, not only do these crimes share the same definitional elements, but their embodiment within the concept of crimes against humanity would remedy to the numerous lacunae of the definitions – or non-definitions – of these crimes. In the words of Warren R. Austin, Chief Delegate of the United States, in his opening address to the U.N. General Assembly on 30 October 1946:

\begin{quote}
Besides being bound by the law of the United Nations Charter, twenty-three nations, members of this Assembly, including the United States, Soviet Russia, the United Kingdom and France, are also bound by the law of the Charter of the Nuremberg Tribunal. That makes \textit{planning or waging a war of aggression} a crime against humanity.
\end{quote}

\textsuperscript{93} The crime of terrorism share with that of aggression the fact that, for years, the international community has tried unsuccessfully to arrive at a common definition of terrorism, notably due to obvious political issues. See generally Paust, Jordan J. et al, 'Terrorism', \textit{International Criminal Law, Cases and Materials}, Carolina Academic Press, Second Edition, 2000, pp. 995-1012.

\textsuperscript{94} During the drafting of the Rome Statute, some states, and notably, Algeria, India, Sri Lanka and Turkey proposed that terrorism be considered as a crime against humanity. See A/CONF.183/C.1/L.27.

humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished.  

C. Re-Visiting War Crimes

Like the crime of genocide, which is embodied in one main instrument, and crimes against peace, which have so far remained undefined, war crimes constitute the object of numerous different instruments. Bassiouni has indeed found that

[the category of war crimes contains seventy-one relevant instruments dating from 1854 to 1998. There are also thirty-five other applicable instruments from 1868 to 1998 that have been classified, in accordance with the methodology employed, under other categories of crimes.98]

Nonetheless, it is arguable that this enormous amount of legal norms has some major side-effects. As a matter of fact, the multiplication of provisions certainly creates complications as to the rules to be applied to a particular case, and ultimately might impede effective prosecution. To avoid such a risk, it is here submitted that war crimes should be considered as crimes against humanity, and this in order to have a more comprehensive body of international law, in which no crimes go unpunished. This proposal would not be incoherent nor would it contradict existing international law, notably as the two crimes prohibit the same type of acts. As a matter of fact, the Nuremberg Charter and Judgment highlighted the extreme similarities between war crimes and crimes against humanity. Indeed, the Judgment unequivocally noted that "from the beginning of the War in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity".99 As Schwelb rightly pointed out,

99 Nuremberg Judgment 254.
under the [Nuremberg] Charter the notions of ‘war crimes’ and ‘crimes against humanity’ overlap and most war crimes are also crimes against humanity, while many crimes against humanity are simultaneously war crimes.¹⁰⁰

The broad approach adopted by the Nuremberg Tribunal definition allowed it to generally avoid distinguishing between these two types of crimes.¹⁰¹ According to Bassiouni:

The confusion between war crimes and crimes against humanity could also be seen in the Tribunal’s judgment which did not distinguish between war crimes and crimes against humanity. The assumption was that they saw no need to do so because crimes against humanity included war crimes committed against civilian populations. [According to article 6 (c), crimes against humanity could be committed against “any civilian populations”, and by the terms of article 6 (b), war crimes could be committed against “civilian populations of or in occupied territory”. The latter population is included in the former]. This was reflected in the case of the sixteen defendants who were charged with and tried for both the commission of war crimes and crimes against humanity; each was found guilty of both charges or innocent of both charges.¹⁰²

Subsequently, the 1949 Geneva Conventions and their Additional Protocols did “incorporate certain components of crimes against humanity by including them among activities prohibited to belligerents in conflicts of an international character”.\(^{103}\) Such an overlap between the two notions can easily be explained by the facts that these two crimes share the same roots and that both were generated by the wider concept of ‘laws of humanity’, which is omnipresent in international humanitarian law.\(^{104}\) As Bassiouni rightly recalled,

the seeds of the Charter’s “Crimes Against Humanity” provision were planted in the Preambles of the First Hague Convention of 1899 on the Laws and Customs of War and expanded in the Fourth Hague Convention of 1907, and in their annexed Regulations Respecting the Laws and Customs of War on Land. The Preamble of the two conventions used the term “laws of humanity” and they based their normative prescriptions on these unarticulated values.\(^{105}\)

The fact that international humanitarian law and crimes against humanity apply to the same types of acts has also been acknowledged by the Commission of Experts for Yugoslavia:

In the context of crimes against humanity, it is relevant to observe that the same kind of prohibited acts listed in common article 3 (relevant conflicts not of an international character) in the four Geneva Conventions of 1949, and in Protocol II to the Geneva Conventions are mere codifications of elementary dictates of humanity.\(^{106}\)

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\(^{103}\) Bassiouni, M. Cherif, ‘Crimes Against Humanity’, in Bassiouni, M. Cherif (ed.), \textit{supra} n. 98, p. 575. See e.g. common Articles 50, 51, 130 and 147 of the Four 1949 Geneva Conventions. However, these provisions apply only to certain contexts and to certain protected persons.


Most recently, this overlap appeared within the provisions of the Rome Statute, in which there are strong similarities between crimes against humanity and war crimes. As Dinstein noted:

Some offences (like rape) are simply duplicated in both definitions of war crimes and crimes against humanity, and at one point (forced pregnancy) there is a cross-reference from one definition to another. One can therefore anticipate a dramatic increase in the number of instances in which the same set of circumstances will be categorized simultaneously as a war crime and a crime against humanity.107

Thus, it seems that the legal frontiers between war crimes and crimes against humanity is vanishing, due to the fact that these two qualifications cover the same prohibited acts. There should therefore be no legal obstacle impeding the re-qualification of war crimes as crimes against humanity. In fact, such a proposal has already been made by Green as regards ‘grave breaches’, as he suggested that they should be qualified as crimes against humanity:

In so far as grave breaches under the Conventions and Protocol I are concerned, [...] all of these fall within the general umbrella of crimes against humanity, with the greater including the lesser. To employ this term rather than ‘grave breaches’ overcomes any difficulty arising from the fact that a particular offences charge does not fall within the Convention definition. Moreover, while Article 3 common to the Conventions makes no reference to enforcement or punishment, since the offences listed clearly amount to crimes against humanity it is entirely proper to define them as such. Defining them as crimes against humanity overcomes any difficulty which may be raised on behalf of a defendant contending that, as the Article is silent and the offence charged is not listed in the grave breaches Article, there is no means of proceeding against him, despite the gravity of his offences.108

In a response to Green, Fenrick considered that such a theory was premature because “the content of the crimes against humanity concept is as yet too skeletal to provide a satisfactory replacement”.109 He also argued that:

Attacks which are directed against legitimate military objectives and which do not cause excessive incidental civilian casualties cannot be crimes against humanity because they do not meet the requirement that they be directed against the civilian population. Lawful, but regrettable, incidental, but not disproportionate, civilian casualties caused in the course of an attack directed against a legitimate military

objective should not be converted into the victim group of crimes against humanity charge by creative recategorization.\textsuperscript{110}

However, the new features of war have certainly changed the fact that civilian casualties should be seen as a necessary corollary of war. Indeed, armed forces do now have extremely precise weapons which should greatly reduce the cost of civilian lives. If an attack is directed against a military objective harm and kill civilians, it is arguable that it is not purely ‘incidental’.

Ultimately, to consider war crimes as crimes against humanity would not empty them of their significance. On the contrary, it would uphold their value and prevent such rulings as that of Trial Chamber I of the ICTR in the \textit{Kambanda} case, where it held that:

The Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as \textit{lesser crimes} than genocide or crimes against humanity.\textsuperscript{111}

The debate of the gravity over war crimes as compared to that of crimes against humanity also occurred within the ICTY where the judges are divided on whether crimes against humanity are more serious than war crimes, and on whether the same criminal conduct should entail a heavier penalty if characterised as a crime against humanity. This issue arose in the \textit{Erdemovic} case in which the defendant, accused of participating in the killing of civilians, pleaded guilty to the charge of murder as a crime against humanity, but dismissed the alternative charge of murder as a war crime. He was sentenced to ten years of imprisonment and immediately appealed on the ground that his guilty plea was not informed. He then re-pleaded guilty but to the charge of murder as a war crime and saw his sentence reduced to five years of imprisonment.\textsuperscript{112} In his separate and dissenting opinion, Judge Li

\textsuperscript{110} Ibid.


rightly questioned such an assertion that a crime against humanity is necessarily more serious than a war crime and wrote that:

the gravity of a criminal act, and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and by its classification under one category or another. Take the present case: the Appellant killed seventy to one hundred innocent civilians. Whether his criminal act is classified under crimes against humanity or war crimes, the harm done to individuals and society is exactly the same, neither an iota more nor less. Then, why should he be punished more severely if his criminal act is subsumed under crimes against humanity and not war crimes?113

The issue had, in fact, already arisen in the Tadic case when Trial Chamber II found that

A prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.114

However, in this case, the Appeals Chamber departed from its previous position adopted in the Erdemovic case and took “the view that there is no legal distinction between the seriousness of a crime against humanity and that of a war crime”.115 According to Judge Shahabuddeen:

Under existing law, which the Tribunal has to apply, there is no principle that, all things being equal, a crime against humanity is more serious than a war crime and that the same act charged as the former has to be punished more severely than if charged as the latter. Today’s judgment is in conformity with existing law: it does not recognise such a principle.116

113 Ibid. See Separate and Dissenting Opinion of Judge Li, para. 19.
In fact, the Rome Statute also seems to consider war crimes as less significant than genocide or crimes against humanity. As a matter of fact, unlike crimes against humanity and genocide which would always be considered as serious enough to trigger the jurisdiction of the Court, some war crimes could be seen as falling outside its competence, notably if they were not “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.  

Furthermore, in order to satisfy some states, and notably France, which required more protection for their military forces against possible prosecutions, Article 124 allows any state to decline the Court’s jurisdiction over war crimes for seven years renewable. In other words, the Statute here explicitly provides for the possible exclusion of the Court’s jurisdiction over war crimes, and this for an unlimited period of time. This real ‘licence to kill’ in complete impunity is all the most shocking, and, here again, it shows the utility of considering war crimes as crimes against humanity, as, in their case, there is no ‘opt-out’ clause with respect to the jurisdiction of the Court.

Therefore, by re-qualifying war crimes as crimes against humanity, such impediments to the prosecution of war crimes would cease to exist. Indeed, this new approach would allow for effective punishment, the provisions specifically applicable to war crimes being clearly defective.

As a final remark, it should be stressed that this re-qualification of war crimes as crimes against humanity would not mean a necessary equalisation

Judgment, Trial Chamber II, 11 November 1999, Separate Opinion of Judge Robinson. For an opposite view, see ibid., Separate Opinion of Judge Cassese.

117 Article 8 of the ICC Statute. But see supra Chapter 2 (C) where it is submitted that war crimes are always committed as part of a widespread attack, and Chapter 4 in which it is argued that they are also always perpetrated as part of a plan or policy.


119 It might also be recalled here that Articles 31 (1) (c) and 33 (2) of the ICC Statute also suggest that war crimes are less serious than crimes against humanity and genocide as they respectively allow the defences of self-defence for the protection of property and of superior orders in the case of war crimes only. See supra Chapter 6 (A) (2) and 6 (C).
of the crimes, as both do have their own specific features. Rather, it would mean ensuring better prevention and effective punishment, while still acknowledging the specificity of each crime, in order to respect the specificity of each victim. As Frossard so poignantly wrote,

L’opposant arrêté allait seul à Dachau. Seul avec sa grandeur, avec sa noblesse.
Le petit garçon marqué de l’étoile jaune allait à Auschwitz avec sa famille […]
Non, ce n’est pas la même violence de traquer le résistant et l’enfant d’Izieu, qui n’est encore qu’espérance et promesse de vie.
Le combattant clandestin savait à quoi il s’exposait.
L’enfant d’Izieu ne savait pas qu’il était de trop sur la terre où il avait eu, quelque temps, la permission de jouer […]
L’opposant pouvait cesser de s’opposer.
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