

Crimes Against Humanity

Emergence of a law of humanity

-Mag. Jur. thesis -

Garðar Steinn Ólafsson

Faculty of Law

School of Social Sciences

Project Supervisor: Pétur Dam Leifsson

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1 Prologue

Edmund Burke almost certainly never said that all that was necessary for the triumph of evil was that good men did nothing. If he had been given the opportunity to observe the great crimes of the 20th century, however, he might have been excused if he had resorted to those very words in an attempt to make sense of them. When a reasonable man contemplates the organised butchery of a Talaat Pasha, Adolf Hitler, Josef Stalin, Mao Zedong, Pol Pot or Jean Kambanda; two questions must be uppermost in his mind. *How could they?* and *Why didn't anyone stop them?*

One of the most important functions of governmental authority is the protection of citizens from each other. Even the most ardent minarchist generally acknowledges that the promulgation and enforcement of a code of conduct whereby open aggression against other citizens is proscribed is at least one function where the levithian of state power comes into its own. The alternative is anarchy, where the strongest may impose their will on the weakest without any meaningful restrictions but their own sense of shame, which emotion has historically proved an insufficient check on invidious conduct.

This may appear fanciful, but the naked truth is that international relations have for most of human history been conducted on this very model. The absence of any power with the authority to proclaim law and enforce it has meant that success on the international stage has been self-legitimising. The use of armed force to secure desirable resources from those unable to defend them is termed highway robbery when conducted by private citizens, but merely sound foreign policy when engaged in by statesmen. Without loss of particularity, acts which in the individual sphere would be considered vicious crimes and prosecuted to the full extent of the law have by the expedient of being committed on an international basis acquired not only a patina of legality, but a positive glow of virtue.

We are, as a culture, long past the era when this state of affairs could exist without offending the sense of justice of the average person. With very few and increasingly regrettable exceptions among apologist historians, status as a head of state or high official does nothing to absolve a person from moral responsibility for their actions in the eyes of their fellow men. It should therefore not be surprising that extending legal responsibility for heinous crimes even to those who hide behind the veil of national sovereignty is widely supported by most modern people. Indeed, what may well be held to be the most surprising aspect of the whole business is how little headway international criminal law has made in the face of determined opposition from those who most flagrantly breach it.

A unified code of criminal law that binds all men, regardless of nationality or position, remains a naive dream. Indeed, the practical obstacles that stand in the way of any such pursuit are of so insurmountable an aspect that merely knowing where to begin baffles most proponents of universal justice. For the punishment of ordinary acts of murder, robbery and rape humanity is still entirely dependent on the idiosyncracies of specific national legal codes and the willingness of its administrators to apply it without reference to the status of the accused. In situations where the suspected malfeants belong to the ruling class of their sovereign polity; it has long been the reality that only a conquering army or such overwhelming force that they might conquer in short order should they so desire may threaten them with legal reprisals of any sort.

While no doubt irksome to those of an egalitarian disposition, this state of affairs more or less endured under the auspices of *realpolitik*, even as the rulers of liberal democracies lost the legal immunities of their royal predecessors. Even a Member of Parliament in a parliamentary democracy may find himself punished for driving under the influence and a President, even an executive president with a wide authority, cannot lie under oath without legal repercussions. The awesome power inherent in their offices does not extend to immunity from the legal consequences of their actions, as they wield only a part of the autocratic authority once concentrated in the hands of the Prince. In those parts of the world, regrettably still a vast majority in terms of number of polities or the population thereof, where the division of power is not so complete, the ruling class remains more or less above such petty concerns as the law.

Some crimes, however, are of such a nature and seriousness as to make immunity from prosecution for them no more than a mockery in the eyes of most citizens of the world. Under the umbrella term ‘crimes against humanity’, they represent offences so heinous and antithetical that they strike against the very root of humanity. The victims multiply beyond merely those directly trespassed against, unfortunate as they are, because such crimes attack the core values of all human beings. In a world where such offences are unpunished, the inherent dignity of humanity is lessened. Such, at any rate, is the argument for supranational or universal jurisdiction over crimes against humanity.

It is the intention in this thesis to examine the historical origin of the legal concept of crimes against humanity, its emergence into international criminal law and the institutions that apply the concept.

2 Crimes Against Humanity

The term ‘crimes against humanity’ appears to presuppose the existence of a universal law of humanity. By its very sound it loudly proclaims a naturalistic interpretation of law. Crimes against humanity are not crimes against some positivist fount of law, a prince, polity or legislature; they are *mala per se*, not *mala prohibitum*. Such is, at any rate, the initial impression conveyed by the constituent words that make up the term. Is such an impression justified or can there be reconciliation between positivist views of the law and a term invoking the common humanity of all men as a fount of its authority?

To answer that question it becomes necessary to examine not only the meaning of the term ‘crimes against humanity’ as evidenced by its usage, but also the substance of the legal concept of the same name. Is there a shared nucleus of meaning in both and does there exist a legal definition of the concept that meets the standards of law according to the strictest positivist doctrines?

2.1 Usage of the term in a cultural context

Since the introduction of the term ‘crimes against humanity’ into the popular lexicon by the trials at Nuremberg, there has elapsed almost a human lifetime. In that time, the concept has, perhaps predictably, come to loom large in international discourse. Instead of such poetic allusions as ‘The Ogre of Europe’ for their particular foes among rival statesmen, heads of state or their spokesmen now take recourse in accusing unfriendly polities or heads thereof of human rights violations and, in extremis, crimes against humanity.

The concept of crimes against humanity is cited as *ex post facto* justification for the American involvement in the European front of World War II, as justification for the dropping of the nuclear bombs on Imperial Japan, as the *casus belli* for war against the regime of Saddam Hussein in Iraq and as shrill criticism of Western powers by their own champagne-socialist college students.

In much the same manner as other such weighty legal concepts as ‘murder’, ‘torture’ or ‘cruel and unusual punishment’; ‘crimes against humanity’ may also be applied by the average person in a figurative manner. In such a way it may describe the musical stylings of Kim Kardashian, the latest coiffure of plastic goddess Cher or the continuing existence of baffling celebrity Snooki.

Eliminating examples of usage obviously calculated to achieve a rhetoric effect, the cultural conception of the term ‘crimes against humanity’ are confined to crimes of massive scope and shocking brutality. Someone who commits crimes against humanity places himself

outside the bounds of human conduct and becomes a sort of *homo sacer*, a *hostis humani generis*. As will later become apparent, this poses somewhat of a philosophical problem with the concept of a crime against humanity in from a criminal law perspective.

2.2 Crimes against humanity as a legal concept

Poetic or merely popular language enjoys the luxury of differing and even contradictory shades of meaning coexisting for the same term. In the sphere of legal thought; such imprecision cannot be tolerated with the same blasé laissez-faire. In order to have any legal relevance; a concept must be satisfactorily defined. This may be done through legislation or, ex post facto, by a duly constituted court of law saddled with the task of bringing clarity to chaos. For a statute in the field of criminal law, this clarity is even more important, due to the doctrine of *in dubio pro reo*.

‘Crimes against humanity’ is a concept which belongs simultaneously to public international law, international humanitarian law, international criminal law and national criminal law. The correspondence of the content of the concept between these fields may not be exact. In some cases, there may be a wide divergence. The intent here is to define the content of the concept as it relates to international criminal law.

2.2.1 Defining legal concepts in international law

International law differs from national law *inter alia* by the lack of a universally accepted fount of legislative authority. There being no law-making body, positive law, as such, is absent in international law. In place of promulgated law backed by national sovereignty, the three basic sources of international law are treaties, customary international law and *jus cogens*.

Treaty law may sometimes be referred to as conventional law, for the alternate term for treaties. Obligations under treaty law arise because state signatories have consented to be bound by explicit agreements having force under the basic principle of *pacta sunt servanda* them; state parties to treaties have to that extent voluntarily agreed to relinquish a measure of their sovereignty.

Customary international law consists of norms whose binding quality arises from state practice. More precisely, customary international law comes into force when state practice and state belief as to legal obligation converge. Mere state practice is insufficient to establish a rule as a customary norm, as it must be coupled with a state belief that legal obligation mandates acting in that particular way. This is referred to as the principle of *opinio juris sive necessitatis*. When most states act in a particular way and act that way because they believe

they are legally bound to do so, the norm that they respect becomes a rule of customary international law.

State consent underlies international law of treaties as well as customary international law. Regardless of prior consent or compliance with customary norms, states retain the power to denounce treaties or deviate from customary international law. Denouncing treaties withdraws the consent of the state party and reassert full sovereignty in the area covered by the treaty. Flouting customary norms will not cause them to lose their status as customary international law thereby, as there is no requirement for custom to be universal to be valid. On the other hand, should a state deliberately act in a manner inconsistent with customary norms and manifest its intention to begin setting a pattern of a new state practice, there is a possibility of their conduct being accepted by other states and maturing into a new, or modified, norm of customary international law. This process is known as *desuetude*.

Jus cogens, also known as peremptory norms or universal international law, is a category of customary norms so fundamental that all states are bound to respect and enforce them, regardless of state consent. The essential characteristic of a *jus cogens* norm is thus that it is inderogable. The existence of *jus cogens* norms is inconsistent with the principle of international law as a whole being contingent on state consent and strikes against the traditional view of state sovereignty. As a result, many positivist scholars contest whether *jus cogens* exists as a legitimate body of international law at all.¹ In the discipline of international criminal law the principle of *jus cogens* is affirmed in many of the treaties that form the sources of its law, not to mention by scholars, tribunals, courts and other authorities.²

The concept of crimes against humanity can therefore emerge from a treaty, customary law or it can have attained the status of *jus cogens*. At various times, it has been all of these things, and there is a case to be made that the content of crimes against humanity in international criminal law derives jointly from these three sources of law.

2.2.2 ICC definition

To begin with a statutory definition of some kind, turning to a recent treaty on the subject is perhaps advisable. The most comprehensive definition of crimes against humanity is the one put forth in Article 7 of the Rome Statute of the International Criminal Court:

¹ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 210-214.

² *Ibid*, p. 215-220.

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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

Under this definition, and indeed all previous definitions, crimes against humanity have by scholars been divided into two distinct categories. The first encompasses crimes of the murder type, that is, crimes where the act itself is of sufficient severity so that any systemic commission of these acts constitutes a crime against humanity, irrespective of the motive behind it. Under that fall murder, deportation, enslavement, rape, torture and the other specifically delineated offences that make up crimes against humanity. The second type is crimes of the persecution kind, where the motive behind the persecution forms a necessary part of the element of the crime.

As it stands, the definition in the first paragraph of the article would be considered too broad to be acceptable as a penal clause. It is furthermore bounded by various terms whose fixed meaning in customary international law is disputed. Article 7, consequently, also includes a list of concepts employed in the statute and the meaning ascribed to them by the state parties of the Rome Statute:

³ *The Rome Statute of The International Criminal Court*, Article 7.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.⁴

⁴ Ibid.

It is tempting to consider the above definition the codification of customary norms by the General Assembly of the United Nations and so binding international law, even to those who did not ratify the Rome Statue. Such a determination, however, demands that the norms in question enjoy a wide acceptance in practice, as well as evidence of *opinio juris*. Wide ratification of the statue alone can never suffice. As noted further below, establishing state practice, let alone *opinio juris*, for those aspects of the Rome Statue definition which rate as novelties is somewhat problematic. In any case, even were it established that ratification by 120 nations and the signatures of 19 more sufficed to elevate the principles set forth in the treaty to the status of customary norms, this would merely prove that some time after the 17th of July, 1998 and before today, customary norms in international criminal laws had evolved to match the substance of the Rome Statue. The laws that applied to acts committed before that time would remain those customary norms in effect before this modern codification, which substantially date from the Nuremberg trials and have certain legal peculiarities that result from that.

2.2.3 *Evolution of the customary norm and legal definition of crimes against humanity*

Despite the laudable efforts at adding specification to the contents of ‘crimes against humanity’ with the Rome Statue, with the above cited clarifications and narrowing of meaning of certain unduly broad and undefined concepts in the original definition, it cannot be denied that with the comprehensive enumeration of the categories of acts that fall under the legal concept of ‘crimes against humanity’, the term as it was set forth in the London Charter of the International Military Tribunal is subjected to a considerable broadening of scope. In the London Charter that formed the legal and procedural basis for the work of the IMT, ‘crimes against humanity’ are delineated in Article 6 (c) as follows:

CRIMES AGAINST HUMANITY: namely, 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.⁵

⁵ *Charter of the International Military Tribunal*, Article 6(c).

M. Cherif Bassiouni aptly divides the formulation of crimes against humanity into three phases.⁶ There is the “Nuremberg phase”, embodied by Article 6 (c) of the London Charter given above; the transitive “Security Council phase”, which finds its expression in the Security Council resolutions that created two ad-hoc courts to try crimes in connection with conflicts in former Yugoslavia and Rwanda, with the pertinent clauses being Article 5 of the ICTY Statue and Article 7 of the ICTR Statue, respectively; and finally, there is the “universally negotiated phase” embodied in the Rome Statue, most specifically Article 7 given above.

With each phase, the scope of crimes against humanity is increased in some way and protection afforded to some victim classes who may not have been specifically protected before. While desirable on the face of it that international criminal laws should protect everyone equally, it is nevertheless axiomatic that a definition cannot simultaneously be held to serve only the purpose of setting forth already accepted customary norms *and* to represent a step forward in victim protection. Any case where the new definition covers a case, hypothetical or otherwise, not clearly falling under the older definition of crimes against humanity, it must give rise to concerns over the principles of legality and the authority of the formulating body to act as a fount of international law.

It may be argued that in specifically mentioning imprisonment, torture, rape, enforced disappearance of persons and the crime of apartheid, no widening of the scope of crimes against humanity is intended. All of these acts can be construed as falling under the umbrella term ‘inhuman acts’ and the listing in the statue is merely meant to add to the specificity of the offence and therefore better meet the requirements imposed by the principles of legality and the rule of law regarding the specificity of penal law. In this case, the broadening of the scope of the concept crimes against humanity from the London Charter lies firstly in removing the requirement that the crime be connected to other crimes within the jurisdiction of the Tribunal, meaning war crimes or crimes against peace. Secondly, it lies in the wider range of possible grounds for crimes of the persecution kind. Thirdly, and perhaps most vitally, it lies in removing ‘state action or policy’ as an element of the crime and replacing it with ‘in pursuance of state or organisational policy’.

As for the removal of the link to crimes against peace or war crimes, this is a continuation of a trend in international criminal law. In order for crimes against humanity to have an independent meaning and not merely an existence on sufferance as an adjunct to war crimes,

⁶ M. Cheriff Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 290.

they have to be prosecutable even in cases where no recognised war is taking place. It goes against the stated justifications for all humanitarian law if there are no restrictions on the ability of a government to massacre or otherwise ill-treat its own subjects as long as they take great care not to do so while they are engaged in warfare. Even with this excellent philosophical justification for not so limiting the scope of application for crimes against humanity, there still remains the fact that a reasonable observer might conclude that the customary norm that held until the establishment of the ICC did indeed demand such a link. A case might therefore be made that its removal is less the acknowledgment of an existing norm than an attempt to reform unsatisfactory old precedents.

The intent of extending responsibility to certain non-state actors and protecting from persecution on a wider range of grounds, is no doubt to better equip the International Criminal Court to deal with such different violators as typified by the Interahamwe of Rwanda and the Vojska Republike Srpske (VRS) of Bosnia and Herzegovina, in addition to the organised militaries of genocidal regimes like Nazi Germany, as well as encompassing the vast range of possible motivations and justifications that may lie behind an act that meets the criteria for crime against humanity. It is, however, the consequence of this attempt to meet new legal challenges in the text of the Rome Statue that the concept as there defined has an unavoidable air of legislative novelty. While the primacy of the new Article 7 definition in any cases involving polities who have ratified the Rome Statue, covering acts post-dating such ratification, is unquestionable, this leaves a regrettable *lacunae* in the law for cases predating that or not involving a polity party to the Rome Statue.

Establishing the valid definition of crimes against humanity in those cases requires considerable historical research and even sifting through contrary precedents in different legal systems. While a duly constituted court might after careful review be able to reach a legally satisfactory conclusion in a case where such *lacunae* existed, it is questionable whether a legal layman, or even a non-specialised lawyer without experience in international criminal law, could be expected to know the definition of crimes against humanity that applied to him in that case. The implications for this in the sense of principles of legality and the rule of law in general may be significant. In any case, with the rejection of the universal application of the Rome Statue as a comprehensive elucidation of all existing customary norms as they relate to crimes against humanity, it becomes necessary to investigate the historical origins of the legal concept.

3 Origins of the concept

Scholars may argue over whether the London Charter merely codified what were already customary norms of international law or set forth crimes against humanity as a legislative novelty with retroactive effects. Regardless of where one comes down on that question⁷, it is beyond dispute that precursors of what was to become the act of ‘crimes against humanity’ existed in international law before the Second World War and the Nuremberg Trials.

Geographic limitations on the scope of law are not a universal constant in human history. At any period of time when the law was considered to embody the will of the gods or god, mere accidents of geography cannot reasonably be held to limit their authority. This holds true for unsophisticated tribal laws, usefully illustrated by the adventure novel standard of foreign strangers about to be executed for some violation of local religious laws, as well as it does for quite cosmopolitan cultures in history. The Romans did not hesitate to apply Roman law in lands that were neither their provinces nor ruled by their client kings. Memorable occasions include the application of *ius privatum* to contracts between the Pharaoh of Egypt and an expatriate Roman businessman, even when such contracts had been entered into and executed on Egyptian soil, and the trial of Acco of the Senones by Caesar under Roman *ius publicum*.

The strict geographical limitations of national legal codes are more or less artefacts of the Westphalian system of state sovereignty. Implicit in the definition of sovereignty is that no other source of law may be acknowledged over the sovereign. No foreign power could dictate legality to another, except as narrowly agreed upon in the form of a treaty between those powers. It is important to keep in mind, however, that even at the height of the supremacy of national sovereignty, important exceptions to the unbridled authority of each sovereign still held true in the form of certain normative prohibitions on the conduct of nations during wartime.

By virtue of its nature as the ultimate force majeure, war, that great leveller, may have rendered moot many of the articles of ordinary legislation and treaty obligations, but that did not mean that the practice of war was ever entirely devoid of rules. Those rules, then, were the first normative strictures that bound individuals not because they were promulgated by an accepted fount of law, but because it is held that membership in the human race brings with it certain minimal rights that must be protected even in times of war.

⁷ For this author’s answer, see section 5.5.3.

3.1 Sources in the law of armed conflicts

Few of the acts that are enumerated in the definition of crimes against humanity would have been considered legal before the London Charter. The novelty of that document did not lie in the nature of the acts it proscribed, but the nationality of those who could be victims. Previously, international law had demanded that all participants in an armed conflict recognise certain rights on behalf of their respective enemies' civilian populations, but it was notoriously quiet in regards to what a polity was allowed to do with its own civilian populace, whether in times of war or peace. Crimes against humanity were an innovation in the respect that they recognised that it was possible that a polity would use the awesome power and resources of a modern nation state to commit systematic atrocities against its own people.

Nothing in the statutory language of either the London Charter on the International Military Tribunal or the Rome Statute of the International Criminal Court limits crimes against humanity to offences committed against a polity's own nationals. Nevertheless, as acts that answer to the nature of crimes against humanity would, if committed by armed forces abroad against a foreign populace, also amount to war crimes; it is clear that the purest example of the legal concept exist when the victims are people under the political control of the perpetrators.

As the proscribed acts of crimes against humanity and the universal rights implied by these prescriptions are substantially derived from international law in the field of permissible conduct in conflict and what has been come to be termed war crimes, it is appropriate to begin the inquiry into the origins of the notion of crimes against humanity with a short overview of humanitarian law and the law of armed conflict, in particular those aspects of it that relate to the rights of non-combatants and even combatants in conflict that arise from their status as human beings.

3.2 Tempering man's inhumanity to man

The view that the right of warring factions to take any action that they perceive as being to their advantage is not unlimited is not a new one. Whether through religion, morality or convention, generals and warlords have believed their hands bound in some manner from ancient times onward. Strictly speaking, none of the above cited reasons to observe a certain code of conduct rises to the level of *opinio juris*. Even universal custom cannot be the basis for customary norms unless a majority of actors believes themselves to be legally bound to obey.

Even the most widespread custom is never universally followed. If such were the case, there would be no need for law or punitive measures, the mere existence of a norm would suffice to ensure behaviour in accordance with it. Such is manifestly not the case. In our imperfect world, the existence of rules is best demonstrated by pointing to examples of them being broken. Customs of war that lack legal backing are especially vulnerable to being set aside when expedient. It is difficult to conceive of a situation that more severely tests the rule-abiding nature of man than to be placed in a situation where compliance with a norm may result in death and defeat while acting contrary to it will bring no more severe censure than possible social disapproval.

3.2.1 *Ancient views*

No less an authority on the ruthless prosecution of war than Sun Tzu recognised the necessity of treating captives well and caring for them once they were in one's keeping. It is true that his reasons for so doing were utilitarian and not founded in a belief in any legal stricture to act in this way. Nevertheless, normative rules have often formed out of customary norms originally arising from practical concerns. If Sun Tzu was in favour of anything less than total ferocity in the prosecution of a war, under any circumstances, it ought not come as a surprise to anyone that few, if any, civilisations that have left written records at all have omitted to make some reference to the notion that there exist certain rules of warfare.

The ancient Indians had *Ramayana* and *Mahabharata*, epic poems of gods and heroes that nevertheless reflect social norms at the time of their writing. Both make reference to the rules of war and prohibit certain extremely destructive weapons as contrary to those rules. In the Book of Manu, these principles are set forth in the form of law that binds kings and princes in India. The laws of warfare in India arose from a sense of noblesse oblige and in that sense, were extremely similar to the later European ideal of chivalry.

In the Occidental world, in an example of convergent evolution of ideas, somewhat similar concepts arose in relation to warfare. Acts that were contrary to traditional usage or principles spontaneously enforced by the human conscience were deemed unlawful.⁸ No less an authority than Herodotus informs his reader that certain conduct is against the laws of the human race generally:

Then Xerxes answered with true greatness of soul "that he would not act like the Lacedaemonians, who, by killing the heralds, had broken the laws which all men hold in

⁸ M. Cheriff Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 49-50.

common. As he had blamed such conduct in them, he would never be guilty of it himself. And besides, he did not wish, by putting the two men to death, to free the Lacedaemonians from the stain of their former outrage."

Xerxes' reasoning here clearly suggests that the inviolate status of envoys is in his eyes a normative rule and not a chivalric ideal. It is not lack of chivalry of which he accuses the Lacedaemonians; it is a lack of respect for the laws which all men hold in common. Note also that the narrator's sympathies are here entirely with the foreign conqueror's position, which argues rather powerfully for him standing on a more or less universally acknowledged norm that the Greeks had failed to observe in this case. There exists at the very least a strong *prima facie* case for the norm in question meeting the *opinio juris* test.

While each Greek *polis* had separate legal systems, the Graeco-Roman world recognised the existence of a law higher than local legislation and ordinances. The Romans called it *jus genitus*, the natural law of man, and it bound not only citizens of their empire, but those of all countries and nations. *Inter alia*, *jus genitus* recognised the inviolability of envoys in warfare.

To state that there existed in the ancient world certain rules of warfare is not to imagine that these rules were in perfect accord with our modern sensibilities. One of the rules of armed conflict at the time was, indeed, *vae victis*, or woe to the vanquished. The total subjugation of a conquered people was the rule, not the exception, and the victor could take his pleasures from his spoils. Looting was expected, and, indeed, perfectly legal as long as the distribution of the loot was according to regimental practice and enslaving defeated soldiers and civilians was simply part of this legalised system of looting. At the discretion of the commander, a heroic foe might be treated with mercy and respect in defeat, but the unarmed populace of an enemy tribe or nation could rarely expect such largesse.

3.2.2 Judeo-Christian influence

It would be naive to assume that the mere introduction of Judeo-Christian ideals did much to alter this state of affairs. Anyone familiar with the Crusades would rightly scoff at the idea that Christian soldiers treated their defeated foes with greater mercy than their pagan forefathers did in centuries past. Yet it is a fact that the morality that several eminent philosophical authorities on the pursuit of war espoused in their writing was founded in the scripture of some or all of the Judeo-Christian Abrahamic religions, Judaism, Christianity or Islam.

In the Old Testament, common to all three religions, the honourable treatment of captives is emphasised in the Second Book of Kings:

And the king of Israel said unto Elisha, when he saw them, My father, shall I smite them? shall I smite them?

And he answered, Thou shalt not smite them: wouldest thou smite those whom thou hast taken captive with thy sword and with thy bow? set bread and water before them, that they may eat and drink, and go to their master.⁹

In obedience to the doctrines of the Qu'ran and the Sunna, Caliph Abu Bakr laid down strict rules for his warriors to follow that elucidated more clearly the established norms of Judeo-Christian conduct in warfare:

Stop, O people, that I may give you ten rules to keep by heart: Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives. You are likely, likewise, to find people who will present to you meals of many kinds. You may eat; but do not forget to mention the name of God.¹⁰

St. Thomas of Aquinas refers to the Roman concept of *jus gentium* as the justification for basic laws of humanity in the treatment of civilian populations, the wounded, captives and the sick. The heraldist Honoré Bonet, author of the Tree of Battles, accepts a code of conduct in warfare as binding on all sides. Later canonist writers who wrote on international law of warfare were influenced both by Roman law and by the writings of Muslim scholars. These include Franciscus de Vitoria, Francisco Suárez, Balthazar Ayala and Alberico Gentili.

While Judeo-Christian holy warriors may have honoured such admonitions more in the breach than in the observance; actual practice has surprisingly little influence on whether something can be held to have the force of customary norm. All that is really needed for a supposed custom to acquire the status of normative rule is for the majority of people to believe that other people are acting in a certain manner and that they themselves are bound in the same way. An exaggerated faith in the chivalry of former generations may easily substitute for actual chivalric behaviour on their part if this has the effect of causing future generations to feel bound by certain norms espoused as ideal.

⁹ King James Bible 2 Kings 6:21-22.

¹⁰ Quoted in M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 52.

William Shakespeare writes with an expectation that his audience will be familiar with the concept of laws of war. In the Life of Henry the Fifth, he has the King's Captain Fluellen react to an order to slay the prisoners at the Battle of Agincourt with shocked disbelief over the breach of the laws of battle:

Kill the poys and the luggage! 'tis expressly
against the law of arms: 'tis as arrant a piece of
knavery, mark you now, as can be offer't; in your
conscience, now, is it not?¹¹

Beyond the occasional accusation of knavery, however, there were little consequences to the breaking of the laws of warfare. Indeed, even publicly branding a malefactor a knave was problematic, as there was no universally accepted canon of the precise content of the laws of warfare. Each man was therefore, in practice, mostly bound by his own conscience and what he personally felt to be the substance of the laws of humanity for warfare. If a man wished to be chivalrous, he did his best to emulate the conduct of those admired for their chivalry and the morality propounded in Judeo-Christian religious doctrine provided some measure of commonality to what was regarded as proper behaviour.

This is not to say that there were absolutely no cases where men were called to account for their violations of the chivalric ideal. Peter von Hagenbach, knight and military governor of the Upper Rhine, including the two of occupied Breisach, was in 1474 tried by an ad hoc tribunal of judges from the Holy Roman Empire for murder, rape, perjury and other crimes.¹² The allegation was not that he had himself committed these acts, but that they had been committed by soldiers under his command and that he, as a knight, was bound to stop them.

This was in many ways a surprisingly modern legal case, with both the charges, attempted defences and the legal principles involved mirroring many 20th century cases at Nuremberg, the Tokyo Tribunal and the ICTY. In his defence, von Hagenbach claimed that by his actions, he was acting under lawful orders of his sovereign to subdue the captured town at all costs and thus not criminally responsible for his actions. The court rejected this argument and found von Hagenbach guilty on the principle that as a commander and a sworn knight, he bore a responsibility for the illegal and dishonourable acts of his men. Here the religious roots of knighthood appear to be held as a reason for a stricter interpretation of responsibility on the

¹¹ Henry V, Act 4, Scene 7.

¹² M. Cheriff Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 463.

part of the knight, not only for his own honour but for the honour of the men under his command. This principle is familiar to us as command responsibility, where the religious justification is absent, but the high position alone is used to justify added criminal responsibility.

Despite the chivalric ideal being a shared code of conduct that allowed for international trials like the tribunal that judged von Hagenbach without anyone questioning their jurisdiction or the source of their legal authority, deriving its authority from religious doctrine was not purely a benefit for international law of armed conflict. It is a particular weakness of religious justifications for the laws of armed conflict that such rules can hardly be held to apply in conflicts with nonbelievers. Indeed, Christian religious philosophers explicitly excluded wars against those of other faiths when they expounded on the common laws that applied in warfare. In a sense, therefore, the introduction of religious justifications for such laws in place of the Roman *jus gentium* served to narrow the jurisdiction of the laws of armed conflict, even as they emphasised their importance in this sphere.

3.2.3 Hugo Grotius

In the year 1625, the Dutch-born Hugo de Groot, more commonly known as Hugo Grotius, laid the foundations for modern international law. He did this with the publication of his book, *De jure belli ac pacis*, or, *On the law of War and Peace*. That is not to state that everything that appears in Grotius' seminal work is necessarily a novelty or even that most of it is. Grotius owes a considerable debt to the Catholic scholars who preceded him, de Vitoria, Suárez, Gentilis, et al.

Grotius' claim to fame lay in two major accomplishments. First was collecting in one place all the norms that were considered to apply to the conduct of warfare and advancing arguments in favour of them. This ensured that regardless of where a future scholar came down on the validity of all of Grotius' views, he could hardly escape setting them down as a commentary or answer on the seminal *De jure belli ac pacis*. The second accomplishment of Hugo Grotius lay in his insistence that the rules of armed conflict did not merely bind Christians as Christians and did not merely apply in war between co-religionists.

This was not a new concept, of course. As noted earlier, the Roman concept of universal law was not jurisdictionally restricted by religion. Nevertheless, with this successful marriage of the Judeo-Christian values of his contemporaries with the Roman concept of the *jus gentium*, Grotius had created a scholarly foundation for universal laws of armed conflict. After his day, the scholarly arguments over laws of armed conflicts generally revolved around the

specific substance of such laws, not whether or not they ought to be considered as having any binding force. The idea that the laws of warfare bind all participants, regardless of whether the war was legally entered into or what the religious convictions of belligerents are, is still central to the field of international humanitarian law. Grotius' principles of *jus in bellum* were conceived of from the very start as constituting *jus cogens* or peremptory norms.

It would be some time, however, until international practice caught up with Grotius' fine principles. The great military innovator Gustavus Adolphus was ahead of his contemporaries in his concern for the laws of war as well as tactics and technology. In 1621 he promulgated his 'Articles of Military Lawwes to be Observed in the Warres', where he, *inter alia*, forbade his commanders to give orders to their soldiers that they engage in unlawful conduct and indicated that any who did would be punished in accordance with the law. The Treaty of Westphalia¹³ led to increased attempts between states to regulate their relations, in both war and peace, and several treaties on the care of wounded in war were concluded between combatants ranging from the Duchy of Brandenburg, the League of Augsburg, the French and the British in the 17th and 18th century.¹⁴

Ironically, however, the Treaty of Westphalia and the inviolable sovereignty of states asserted in it would be one of the principal stumbling blocks for a common law of humanity in the future. The principle of universal international law is not compatible with a model of international law founded only in the consent of states.

3.3 Birth of humanitarian law

In light of the influence of Judeo-Christian thought on the war of armed conflicts it is perhaps ironic to note that it was the emergence of individualistic, humanistic systems of thought that were traditionally opposed to organised religion that true humanitarian law may be said to have begun. While the republicans who insisted that humanity would not know happiness until the last aristocrat had been hung with the guts of the last priest were not noted for conducting their warfare with any greater reverence for the rights of the civilian populace than others, the seeds of humanitarian law may still be said to have been sown in the works of the social philosophers whose individualistic and liberal doctrines led to political doctrines that culminated in the revolution of the American colonies and the consequent waves of liberalisation that swept Europe in the immediate aftermath and again in the year of 1848.

¹³ M. Cheriff Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 54.

¹⁴ Leslie C. Green: *Essays on the Modern Law of War*, p. 86.

Jean-Jacques Rousseau argued in *Le Contrat Social* that as war was a relation between states, not individuals, there existed no right to take the lives of those not currently under arms in defence of the state. As soon as soldiers surrendered, they ceased to be enemies and became once more men, with all the rights concomitant upon that status.¹⁵

At first sight, this does not appear to be a new view in the law of armed conflict, as the treatment of captives is an old theme and familiar one. If the character of the reasoning is examined, however, one will observe that it is peculiar in that it is founded *in the rights of man*. Not in the utilitarian calculus of mutual fair dealings between belligerents, or the prescriptive ethics of religious thought or even the noblesse oblige of chivalry. All those who are caught in the maelstrom of war without being active participants have certain rights by virtue of their status as human beings, rights founded in reason.

The birth of humanitarian law is linked with these rights being acknowledged in international treaties that are widely ratified and often interpreted to express peremptory norms that bind even those who have not ratified them.

3.3.1 *Souvenirs of Solferino*

When the Swiss-born banker Henry Durant happened to come across the aftermath of the Italian battle of Solferino in 1859, he was shocked and appalled by the conditions he found. Some thirty-eight thousand wounded men of both sides were scattered around the battlefield and no one appeared to be providing any effective aid to them. Durant immediately set to organising some relief for the poor men, successfully managing to gain the cooperation of local people for an effort which provided relief regardless of the nationality of the wounded, under the slogan “*Tutti fratelli*”, which might be loosely translated as ‘all men are brothers’.

When Durant got back to his native Geneva, he wrote an influential book, *Un souvenir du Solferino*, and published it at his own expense in 1862. In it, he proposed the establishment of a voluntary agency that provided humanitarian relief in times of war and a treaty that internationally recognised the existence of such an agency and allowed for it to provide assistance in war zones without interference from the belligerents. His idea for an association of volunteers who provide humanitarian assistance in wartime came to fruition in the foundation of the International Committee of the Red Cross. The international treaty that recognised this association was the first Geneva Convention, for the Amelioration of the Condition of the Wounded in Armies in the Field, signed in 1864 by twelve European nations.

¹⁵ Jean-Jacques Rousseau: *Le Contrat Social* (bæta).

The First Geneva Convention, also known as the Red Cross Convention, mandated the humane treatment of wounded and sick soldiers and from this basic tenet, it ensures that providers of medical aid are not molested in the course of military operations and that such aid shall be provided in an impartial manner to all combatants. While it may be said to have only codified charitable impulses and humane theory that were widely held among European civilians of the day, it nevertheless did lead to an incredible advance in actual practice among belligerents, as it brought the routine violation of these norms into the public awareness. The novelty of the First Geneva Convention is not the idea that wounded and sick soldiers deserve protection, but the use of an international treaty to hold nations to that ideal even when they are under arms. It was the first such treaty, but it would not be the last. Over the next one hundred and fifty years, more than a hundred treaties primarily or tangentially about the law of armed conflicts or *jus in bellum* would come into existence.¹⁶

3.3.2 *The United States and the War Between the States*

The new nation of the United States of America was founded in the heady brew of philosophical humanism and its corollaries in political philosophy; government by consent of the governed and the inalienable rights of man. It is not surprising that this nation should recognise the potential of warfare to infringe upon these inalienable rights and take steps to manage that risk. In 1775, the new nation promulgated its first Articles of War and in 1806, it issued new Articles of War, further strengthening the protections provided by the former. Civilians, the wounded and the sick, prisoners of war and others are given protections and the laws explicitly provide for punishment of officers who fail to hold their soldiers to these articles.¹⁷

The first wars of the infant state were conducted in accordance with these principles and the extensive customary norms that had grown up around the pursuance of modern war when the European nations made war upon each other. At times, the gallantry and punctilio reached almost absurd lengths, such as during the War of 1812, when the frigate HMS Shannon sent all potential reinforcements away and then cordially invited the frigate USS Chesapeake to come out and do battle with it, on equal terms. Despite being unwritten in the greatest part, such norms were usually keenly observed by all belligerents.

When the Southern states of the United States of America attempted to secede from the nation in 1861, the government of the United States declared war in order to preserve the

¹⁶ M. Cheriff Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 56, see also *infra* note 48 on the same page.

¹⁷ M. Cheriff Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 58.

Union. As a war fought with the tactics of the previous era combined with weaponry of a new kind, rifled artillery and handguns especially, the casualties were enormous. It soon became clear that this kind of war, taking place as it did among the homes and fields of the nations own citizens, demanded a far more detailed code of law for soldiers to follow.

In 1863, the Instructions for the Government of the Armies of the United States in the Field By Order of the Secretary of War was issued. It was written by the German-American jurist Francis Lieber and thus became known as the Lieber Code. Article 15 of the Code is illustrative about not only some of the norms that held in war between European nations and the new United States, but also the justification for them:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.¹⁸

The Lieber Code includes many norms now a familiar part of the law of armed conflicts. There is an attempt to define what constitutes the state of war, what the status of occupied territories should be and the nature of states and sovereignties. It furthermore classes insurrections, rebellions, and wars as different varieties of conflict. The rights and duties of prisoners of war and of capturing forces are spelled out. This includes a requirement for ethical and humane treatment of populations in occupied areas.

The Lieber Code sets forth the ends of war and discusses permissible and impermissible means to attain those ends. Impermissible are such practices as torture to extract confessions, poison as a weapon of war and the act of giving no quarter to the enemy, i.e. executing surrendering enemies, except in certain narrowly defined exceptional cases where the survival

¹⁸ *Lieber Code*, Article 15.

of the military force to which they surrender would be threatened by attempting to hold prisoners.

The new nation of the United States of America was not only leading in the codification of the laws of armed conflict. It also conducted a humanitarian intervention in Cuba, in the year of 1898, declaring war on Spain because its oppressive colonial regime in Cuba “shocked the moral sense of the people of the United States”¹⁹. While it would be disingenuous to suppose that no reasons of national interest contributed to the United States invasion of Cuba, it remains a fact that American statesmen of the period operated under an assumption of a system of international morality which could even, in extremis, impose obligations of action upon other nations. Certainly Theodore Roosevelt’s articulation for the duty to interfere in the affairs of other nations when confronted with crimes of a certain scale and severity could be read as a call for the International Criminal Court as well as it could be read as a justification for invading Cuba:

“... there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it... in extreme cases action may be justifiable and proper. What form the action shall take must depend upon the circumstances of the case; that is, upon the degree of the atrocity and upon our power to remedy it. The cases in which we could interfere by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. Yet... it is inevitable that such a nation should desire eagerly to give expression to its horror on an occasion like that of the massacre of the Jews in Kishenev, or when it witnesses such systematic and long-extended cruelty and oppression of which the Americans have been victims, and of which have won for them the indignant pity of the civilized world...”²⁰

3.3.3 *From St. Petersburg to the Hague*

The principles formed on the battlefields of America were quickly introduced to the international arena. In St. Petersburg, an eponymous Declaration was signed in 1868 which forbade the use of explosive projectiles weighing less than 400 grains and the use of projectiles charged with fulminating or inflammable substances. This proved a precursor to a far more ambitious effort to prevent war and at least regulate its conduct if it could not be

¹⁹ Geoffrey Robertson: *Crimes Against Humanity*, p. 14.

²⁰ Theodore Roosevelt, “On Human Rights in Foreign Policy, State of the Union Message 1904”

prevented by any means. That effort, spearheaded by no less a personage than the Russian Tsar Nicholas II, was a conference of great powers in the Netherlands, at The Hague.

The Hague Convention of 1899 resulted in the signing of four main sections and three additional declarations²¹. The effect of these were to proscribe, *inter alia*, the use of aircraft to launch bombs, poisonous gasses as a weapon of war and the use of bullets that expand or flatten easily in human flesh. It is perhaps a sad commentary on human nature that the only one of these to survive contact with the enemy in a war in which the outcome was in doubt was the one that might be said to minimise suffering rather than increase it. A more epoch-making aspect of the Convention from an international law standpoint was the codification of current customary norms that held in warfare.

The necessity that any military force be commanded by an officer responsible for his subordinates, the use of uniforms of some sort, the humane treatment of prisoners of war and the sick and wounded, the idea that the rights of belligerents to adopt means to injure the enemy is not unlimited and the proscription on looting from prisoners and civilians were all customary at the time, but the act of codifying them transformed them from courtesies performed at the pleasure of the belligerent into a code of behaviour that bound the signatories and theoretically could form the basis for prosecution of violators. In addition, despite the impressive array of protections, the Convention did not rule out that it might fail to provide a necessary degree of legal coverage for an area that could come up in a future war. This is the reason for the following much-cited clause, usually called the Martens Clause after its originator:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.²²

In 1907, a second Hague Convention was signed, a more comprehensive document that further defined and complemented the norms that governed lawful conduct in times of

²¹ For one reason or another, the first additional declaration exactly mimics the text of the last main section. Far be it from the author to malign such important personages as signed these conventions, but there is a slight chance that someone might have blundered.

²² *Laws and Customs of War on Land (Hague II)*, Preamble.

conflict. It retained the Martens Clause. Further attempts to define the customary norms of *jus in bellum* were rudely interrupted by the breakout of war.

3.4 The War of the World

From 1914-1918 the principal Western nations of the world and their colonies, satellites and subject nations descended into a maelstrom of warfare that cost more than 17 million people their lives. Certain aspects of the warfare were conducted according to strict rules agreed upon by the engaged powers beforehand, but other conventions were ignored with shocking regularity.

All major combatants made heavy use of chemical weapons and the technological progress of new methods to kill was at a historic peak. The entire organisational might of modern technological states was mobilised in the pursuit of warfare and the results were catastrophic. Technology was at a stage where static defence trumped mobile offence and as a result, entrenched positions were assaulted with massive loss of men without much of a chance of shifting the defenders from their fortifications.

3.4.1 Attempts at prosecutions after WWI, disappointment at Leipzig

The victorious Entente powers considered the German nation and the Kaiser specifically responsible for the beginning of the war and to have committed grave war crimes during it. The Treaty of Versailles that ended the war, ratified in 1919, contained a clause about the personal responsibility of the Kaiser in Article 227 and a proviso for the prosecution of German officers for war crimes in its Article 228²³:

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

²³ M. Cheriff Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 518.

The right of the Entente powers to set up war crime tribunals to try German officers is provided in Article 229 of the Treaty. In any case, Germany refused to extradite any of its nationals and the Kaiser fled to the Netherlands, whose government considered the proposed charges against him for crimes against peace political charges and refused to extradite him. The Entente powers nevertheless prepared a landmark document in international criminal law, the *1919 Report of the Commission on the Responsibilities of the Authors of War and the Enforcement of Penalties for Violations of the Laws and Customs of War*. Along with it, they submitted a list of 895²⁴ war criminals to the German authorities. Due to the previously mentioned German refusal to extradite any of them, as well as the United States and Japan not accepting the report of the Commission on the Responsibilities of the Authors of War and the Enforcement of Penalties for Violations of the Laws and Customs of War, this list eventually dwindled to 54 and the Germans were given authority to try the named war criminals themselves.

By the time the Leipzig trials commenced in front of seven German judges, two and a half year had passed since the Armistice. German public opinion was strongly against the trials and the Entente powers had little leverage or influence with Germany. In the event, the German government proved unable to find many defendants and less than enthusiastic about punishing the rest. Out of an initial list of 895, twelve were tried at Leipzig. Six were convicted and the punishments ranged between six months and two years. As a remedy for such fundamental violations of the law of humanity as were represented by jus in bellum, domestic courts of the former belligerent to which the accused belong had been tried and they had been found wanting.

3.4.2 *The annihilation of the Armenians*

The historical record remains unclear on whether Adolf Hitler did or not ask who still remembered the annihilation of the Armenians. According to the infamous L-3 document, on the 22nd of August 1939, Hitler delivered a speech to high-ranking Wehrmacht commanders at his Oberzalsberg home, which included the following words:

Unsere Stärke ist unsere Schnelligkeit und unsere Brutalität. Dschingis Khan hat Millionen Frauen und Kinder in den Tod gejagt, bewußt und fröhlichen Herzens. Die Geschichte sieht in ihm nur den großen Staatengründer. Was die schwache westeuropäische Zivilisation über mich

²⁴ There is some dispute about the precise number. M. Cherif Bassiouni, in *Crimes Against Humanity in International Criminal Law*, p. 520, maintains the above number, but Telford Taylor: *The Anatomy of the Nuremberg Trials*, p. 17, prefers 854 and other authors have estimated it as high as 901.

behauptet, ist gleichgültig. Ich habe den Befehl gegeben — und ich lasse jeden füsilieren, der auch nur ein Wort der Kritik äußert — daß das Kriegsziel nicht im Erreichen von bestimmten Linien, sondern in der physischen Vernichtung des Gegners besteht. So habe ich, einstweilen nur im Osten, meine Totenkopfverbände bereitgestellt mit dem Befehl, unbarmherzig und mitleidslos Mann, Weib und Kind polnischer Abstammung und Sprache in den Tod zu schicken. Nur so gewinnen wir den Lebensraum, den wir brauchen. Wer redet heute noch von der Vernichtung der Armenier?²⁵

Translated into English, this might be expressed as:

Our strength consists in our speed and in our brutality. Genghis Khan led millions of women and children to slaughter—with premeditation and a happy heart. History sees in him solely the founder of a state. It's a matter of indifference to me what a weak western European civilization will say about me. I have issued the command—and I'll have anybody who utters but one word of criticism executed by a firing squad—that our war aim does not consist in reaching certain lines, but in the physical destruction of the enemy. Accordingly, I have placed my death-head formation in readiness—for the present only in the East—with orders to them to send to death mercilessly and without compassion, men, women, and children of Polish derivation and language. Only thus shall we gain the living space (Lebensraum) which we need. Who, after all, speaks to-day of the annihilation of the Armenians?²⁶

While orthodox historians as well as the jurists of the IMT at Nuremberg have been unable to ascertain whether the above is a faithful transcription of Hitler's words²⁷ or a latter-day forgery, a modern jurist might be able to provide an answer for the query at the end. Students of humanitarian law and international criminal law not only remember the annihilation of the Armenians, they date the beginning of their discipline, certainly in the modern form, to the abortive attempt to bring the architects of that crime to justice.

²⁵ Image of the original L-3 (US-28) document turned over by Lochner to the IMT, as it appears in Richard Albrecht: *"Wer redet heute noch von der Vernichtung der Armenier?"*, p. 90-92.

²⁶ Louis Paul Lochner: *What about Germany?*, p. 11-12.

²⁷ See M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, infra note 107 at p. 68, for an overview of traditional scholarly views about the authenticity of the quote. For recent scholarship where the original document is subjected to forensic analysis, see generally Richard Albrecht: *"Wer redet heute noch von der Vernichtung der Armenier?"*. Albrecht's conclusion is that not only is the document authentic, but that it is more representative of Hitler's actual speech that day than the three documents accepted into evidence at Nuremberg, 798-PS, 1014 PS, and Raeder-27. Albrecht maintains that the L-3 document is key document in the history of the 20th century, lending support, as it does, to the idea that Hitler was encouraged in his genocidal efforts by the lack of effective enforcement in the case of the Armenian genocide.

During the First World War, Ottoman Turkey was on the side of the Triple Alliance, comprising principally Austria-Hungary and Germany.²⁸ While the 'Sick man of Europe' had lost Greece and most of its Balkan possessions, it still retained Armenia. The Christian population of certain of its provinces was a perennial thorn in the side of the Sublime Porte, viewed as source of religious and nationalistic dissent and as a potential Fifth Column loyal to Russia. Both devout Muslims and Turkish nationalists also had deep problems with acknowledging the Armenians as equal citizens. These tensions flared up in what the Turkish government still insists were uncoordinated local instances of violence against Armenians.

Disturbing reports about this sectarian violence and the degree to which it was condoned and even organised by official government figures of Ottoman Turkey were dispatched from the American ambassador on the scene, Henry Morgenthau Sr., and quickly reached the governments of the Western powers. On the 24th of May in 1915, the Triple Entente powers requested that the American embassy in Constantinople deliver the following message to the Turkish government:

For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April at Erzerum, Dertchun, Eguine, Akn, Bitlis, Mush, Sassun, Zeitun, and throughout Cilicia. Inhabitants of about one hundred villages near Van were all murdered. In that city [the] Armenian quarter is besieged by Kurds. At the same time in Constantinople Ottoman Government ill-treats inoffensive Armenian population. In view of those new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.²⁹

This communiqué is a landmark in international criminal law in that it represents the first time that one government accuses another of crimes against humanity in an official manner. It would not be the last. Nor were the words meant as mere meaningless posturing. During the Paris Peace Conference of 1919, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Paris Commission) was set up to work on indicting and trying those responsible for, *inter alia*, crimes against the Armenians.

²⁸ The provisos of Italy's secret agreement with France effectively neutralised their allegiance with Germany and thus their participation in the Triple Alliance.

²⁹ Find please.

The work of the Paris Commission ended in disagreement over the inclusion of crimes against humanity. The Paris Commission Report charged that individuals, including high government officers, would be held criminally responsible for committing offenses against the laws of humanity. A majority on the Paris Commission concluded that the Central powers illegitimately instigated and executed the war in violation of the elementary laws of humanity. While the American representatives agreed that such acts were morally reprehensible, they refused to accept that offenses under this description were legally justiciable. Raising a *nullum crimen sine lege* objection, the Americans rejected the idea that inhuman acts could attract legal punishment if such acts were consistent with the laws and customs of war.

Further, the Americans challenged the basing of criminality on the laws or principles of humanity because such principles varied by arbiter, time, place, and circumstance, and therefore could not be adjudicated fairly. Owing to this irreconcilable divide, the Treaty of Versailles contained no reference to crimes against humanity. Because the Americans had not declared war on Ottoman Turkey, however, they took no part in signing the Treaty of Sevrés, which contained in addition to the provisions dealing with violations of the laws and customs of war, Articles 226-228 corresponding to Articles 228-230 of the Treaty of Versailles, a further provision.

This was Article 230, by which the Turkish Government undertook to hand over to the Allied Powers the persons responsible for the massacres committed during the war on Turkish territory. The relevant parts of this article read as follows:

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914.

[...]

The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such Tribunal.

[...]

In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such Tribunal, and the Turkish Government undertakes equally to recognize such Tribunal.³⁰

³⁰ *The Treaty of Peace between the Allied and Associated Powers and Turkey*, Article 260.

The provisions of Article 230 of the Peace Treaty of Sevres were obviously intended to cover, in conformity with the Allied note of 1915 referred to in the preceding section, offenses which had been committed on Turkish territory against persons of Turkish citizenship, though of Armenian or Greek race. This article constitutes therefore a precedent for Articles 6c and 5c of the Nuremberg and Tokyo Charters, and offers an example of one of the categories of crimes against humanity as understood by these enactments.

The Treaty of Sévres was, however, overtaken by events when the Turkish war of liberation broke out. It was not ratified and did not come into force. It was replaced by the Treaty of Lausanne, signed on the 24th of July 1923, which did not contain provisions respecting the punishment of war crimes, but was accompanied by a Declaration of Amnesty for all offenses committed between the 1st of August 1914 and the 20th of November 1922. These Declarations of Amnesty were very necessary, because the Turkish forces, if anything stepped up their campaign of annihilation against the Armenians and Greeks.

3.4.3 *League of Nations*

Few wars have resulted in such bumper crops of convinced pacifists as the First World War, or as contemporaries inevitably simply referred to it, The Great War. The importance of avoiding large-scale warfare needed no elucidation for those who could look over the poppy-strewn fields of Belgium and France and remember the generation of youth who had either grown up there or would never leave them.

Championed by the idealistic American President, Woodrow Wilson, the new League of Nations, an international forum for the association of sovereign polities and the resolution of any conflict which might arise among them, was supposed to ensure peace. Not peace in our time; but peace for all time. While Wilson got his wish in that such a League of Nations was indeed founded, the United States of America tragically remained outside it, because Wilson was unable to secure the approval of Congress for ratification.

Ironically, the widespread desire and belief in a peaceful future that reigned in Europe and the world after WWI, combined with a healthy optimism about the role of the League of Nations, might have been responsible for the lack of enthusiasm for formalised mechanisms for prosecuting crimes committed during armed conflicts.³¹ In a world of peace, there would be no need for laws about war or methods of punishing war criminals. This may have contributed to the relatively low levels of popular support enjoyed by the efforts of the

³¹ M. Cherif Bassiouni, in *Crimes Against Humanity in International Criminal Law*, p. 525-525.

private *Association Internationale de Droit Pénal*³². People were tired of war and tired of thinking or talking about war. No one wanted to prepare for the punishment of the next criminals against peace or humanity, people wanted to get on with living their peaceful lives, secure in the knowledge that after such a powerful object lesson, surely the new League of Nations would be able to keep the world's peace.

The trust in the League of Nations, of course, proved entirely unfounded. It did not keep the peace because there were no significant consequences to ignoring it. Italy was able to invade Abyssinia and gas the native inhabitants without the League being able to do anything about it. The Soviet Union and Germany interfered in the Spanish Civil War with shipments of materiel, advisors and trainers; supporting factions guilty of atrocious crimes against humanity. The League did nothing; the League could do nothing. An attempt by Haiti to get it to consider the matter of guaranteeing the human rights of ethnic in 1934 was swiftly squashed by the colonial powers of Great Britain and France.³³

Even the 'minorities clauses', inserted into peace treaties or made a condition of admission to the League of Nations for certain nations with problematic records in the matter of the treatment of minorities (Albania, Latvia, Iraq, etc.), proved toothless. Even though they were overseen by the Council of the League of Nations and under the compulsory jurisdiction of the Permanent Court of International Justice, they lacked the ability to penetrate the shield of state sovereignty. When the first victim of Nazism, Franz Bernheim, complained in 1933 that his termination of employment for reasons of Jewishness contravened the minorities clause for Upper Silesia, he was duly awarded compensation. Germany responded by withdrawing from the League of Nations and paying not one Reichsmark.³⁴

Considering the impotence of the League of Nations and the near total indifference of the major powers in any change to the status quo, it is not surprising that the somewhat abortive efforts to punish German and Turkish war criminals after WWI marked the high-point of international criminal law up until the trials at Nuremberg, where their modern incarnation would come into being.

3.4.4 *The Rights of Man*

Despite or perhaps because of, the terrible experience of the Great War and the evident weakness of the League of Nations, legal scholars and statesmen were curiously silent on the

³² Ibid.

³³ Geoffrey Robertson: *Crimes Against Humanity*, p. 21.

³⁴ Ibid, p. 16-17.

subject of humanitarian law in the 1920s and 1930s.³⁵ Statesmen were concerned *with jus ad bellum*, believing that if they could prevent war, laws of conduct during it would be of no importance. This culminated in the 1928 General Treaty for the Renunciation of War, generally known as the Kellogg-Briand Pact. While prohibiting the practice of war as an instrument of national policy, the Pact contained no provisos for punishment for violations, and proved equally ineffective as a treaty to prevent war as it was to prove as a basis for a penal clause in international criminal war.³⁶

About the only advance in the field of *jus in bellum* was the 1929 revising of the Geneva Convention of 1864, providing a much needed update in light of the changing nature of warfare. The most influential and prescient treatment of the subject of universal rights and the law of humanity did not come from an eminent jurist or even a political philosopher, it came from the pen of British science-fiction novelist H.G. Wells and a group of his Socialist friends, including fellow author A. A. Milne, of Winnie the Pooh fame.³⁷

In nine short and readable principles they named the Declaration on the Rights of Man, Wells and his friends elucidate their vision for a universal system of rights for all humanity. Simply and modestly, the principles assert that “since a man comes into this world through no fault of his own” he is in justice entitled:

Without distinction of race or colour to nourishment, housing, covering, medical care and attention sufficient to realize his full possibilities of physical and mental development and to keep him in a state of health from his birth to his death.

Sufficient education to make him a useful and interested citizen, easy access to information upon all matters of common knowledge throughout his life, in the course of which he would enjoy the utmost freedom of discussion.

That he and his personal property lawfully acquired are entitled to police and legal protection from private violence, deprivation, compulsion and intimidation...³⁸

While some of the specific rights reflect the idiosyncratic political beliefs of the framers and the unworldly authors offered no insight as regards implementation, the basic idea of a universal bill of rights for humanity was a timely and popular one. Among those who were

³⁵ Geoffrey Robertson: *Crimes Against Humanity*, p. 20-21.

³⁶ See generally section 6 of this thesis, specifically 6.1.3 and 6.5.4.

³⁷ Ibid, p. 21-24.

³⁸ Herbert George Wells: *The Rights of Man*; quoted in Geoffrey Robertson: *Crimes Against Humanity*, p. 22.

influenced by its understated rhetoric was American President Franklin Dwight Roosevelt. It may have influenced his famous speech in 1941, where he called for a world formed upon four essential freedoms, the freedom of speech and worship, and the freedom from fear and want.³⁹ It may even have contributed to the Declaration by the United Nations of the 1st of January 1942:

...Being convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world...

Human rights were officially a war aim of the Allied powers and the introduction of an international bill of rights found its way onto the agendas of governmental legal experts in the United Kingdom of Great Britain and the United States of America.

³⁹ Geoffrey Robertson: *Crimes Against Humanity*, p. 23.

4 Law of Humanity

While the short overview of the history of laws of armed conflict as they related to protecting human lives and values in a time of war might give an indication about the evolving norms of rule-bound warfare, it cannot in itself serve as evidence for the existence of any similar norms regarding the treatment of domestic populations. Simply put, it is possible to argue for the necessity to bind the conduct of warfare with certain rules without acknowledging that such rules must derive from inalienable rights of non-combatants or anyone else.

If the philosophical justifications behind laws of warfare were confined to utilitarian benefits derived therefrom and the principle of reciprocity, i.e. that humane treatment of the enemy will tend to lead to humane treatment of your own men, there would be little reason to expect any of these principles to bind princes in relation to their own civilian populace. The same might be said for laws of warfare derived from ideals of chivalry, for the appropriate treatment of an honourable foe might differ in important particulars from acceptable methods of ruling one's own people. It is true that religious prescriptions might apply in both peace and war, but as a source of modern law, the stone tablet or burning bush lacks a certain *je ne sais quoi*.

In order for it to be possible to speak of a common law of humanity, therefore, it is necessary to find a philosophical justification for the prescriptive norms that make up those laws and in modern jurisprudence are termed war crimes and crimes against humanity. This justification must be broader in application than reciprocity between nations and sounder in logical basis than an appeal to divine authority.

4.1 Human rights

Having rejected as unverifiable and unfalsifiable all claims of a natural law that derives from a divine plan or was laid down by a Creator, the next source to examine is humanity. Could a hypothesis of the nature that there exists a law of humanity that derives from some essential quality of humans be supported rationally? Extending the hypothesis, the law of humanity could be that all humans, by virtue of their common humanity, have certain rights.

4.1.1 Ethical grounds of human rights

That field of philosophy concerned with morality, right and wrong and the justifications therefore, is usually termed ethics. Major ethical theories vary not only by what they posit as moral goods, but also by whether the morality of acts is inherent in their nature or accrues from consequences. Ethical systems where certain acts are inherently immoral and proscribed

are known as deontological theories and those where the consequences determine the rightness of acts are known as teleological theories.

The idea that man has certain rights, not because he has magnanimously been granted them by a political system, but *qua* his very humanity, is today widely accepted by ethicists, the majority of whom instead differ on the content of those rights and the proper method for solving conflicts among them. While there are ethical theories from which any human rights are entirely absent, such as Nietzsche's rejection of herd morality⁴⁰ and, in particular, its interpretation by laymen, and the idea that rights accrue to other species in equal measure with humans, such as Peter Singer would assert⁴¹, these may safely be said to represent the fringe of the field of ethics.

The basis for the idea of human rights varies by ethical systems, but on the face of it, appears to belong among that spectrum of ethical theories termed deontological. From axioms asserting that man has an inalienable right to life or liberty, one may naturally derive rules absolutely forbidding murder and enslavement. Indeed, from Kant⁴² through Kamm⁴³ and Nagel⁴⁴, the rights of man have been justified with such deontological theories. Indeed, in the absence of appeal to supernatural authority, the idea that certain acts are in themselves wrong must in some way be founded in the idea that there exist natural rights not to be subjected to those acts. To be sure, this can only be a justification for negative rights, i.e. the right not to be subjected to certain conduct, but as the rights implied by humanitarian law and the laws of armed conduct are negative rights, this does not weaken the deontological case for proscribing any acts that would fall under the definition of crimes against humanity.

This is not to say that a political theory of human rights as a common law of humanity cannot be derived from teleological ethics. The end may not always justify the means; but it is the only thing which can. Any system of ethics where the moral good is the good of individuals, their happiness or their pursuit thereof, may be construed in such a way as to lead to individuals having certain rights. Even utilitarian ethics, often considered to be antithetical to peremptory moral norms, were conceived of by John Stuart Mill⁴⁵ and later theorists as leading to certain basic human rights, such as freedom of speech and belief. Criticism of utilitarian ethics on the basis that the system might lead to horrendous treatment of

⁴⁰ See generally Friedrich Nietzsche: *Beyond Good and Evil*.

⁴¹ See generally Peter Singer: *Animal Liberation*.

⁴² See generally Immanuel Kant: *The Metaphysics of Morals*.

⁴³ Frances M. Kamm: "Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status", p. 385-389.

⁴⁴ Thomas Nagel: "Personal Rights and Public Space", p. 85-93 and 96-107.

⁴⁵ See generally John Stuart Mill: The basic writings of John Stuart Mill : *On liberty, The subjection of women, and Utilitarianism*.

individuals in order to serve collective happiness, such as that advanced by John Rawls⁴⁶, are directed toward a naïve strawman caricature of the ethical theory of utilitarianism.

In the absence of such perfect knowledge of the future as possessed by Laplace's demon⁴⁷, the only practical way to utilise teleological ethics is by reference to outcomes most likely to produce consequences that are in line with what the theory posits as a moral good. Thus, in a world where rational actors possess imperfect knowledge and are aware of their own fallibility, utilitarian ethics cannot rationally be practised in isolation for each moral quandary, on the assumption that a perfect solution for each individual case not only exists, but can be arrived at with any degree of certainty. Every act has consequences far beyond the immediately visible ones and predicting them all is axiomatically impossible. The potential for invisible harm must always be kept in mind when making any judgment about ethics.

From this follows that whether or not a perfect solution for an individual case exists; such human limitations as the inability to perceive all ends ensures that it is not a practical goal for ethical decision-making. Indeed, the very fallibility of human judgment means admitting any human authority over another is ethically questionable. Any use of that authority, even were it intended only for the best purposes, is likely to lead to harm because of a failure to foresee the consequences. The only valid justification for making a moral choice at all, then, with due consideration for the risk of being wrong, is that failure to act may be reasonably considered to pose a greater threat to whatever moral good the ethical theory posits. Far from being confined to artificial ethical dilemmas; 'damned if you do and damned if you don't' choices in fact make up the majority of real-world moral choices. All resources that must be allocated are scarce and any action that has the potential to help one is liable to cause harm to someone else.

The best that can be hoped for is a system of moral norms that are calculated to maximise moral good, which, in the case of utilitarianism, is human happiness. Among the norms calculated to increase the sum of human happiness is freedom from fear and uncertainty, from which it may be inferred that enabling predictability in personal relations and proscribing arbitrary actions contrary to the interests of others is in line with the precepts of utilitarianism. This means that the only philosophically sound argument for utilitarianism is for rule-bound utilitarianism. To act morally, one must adopt as a general rule that which is most likely to increase the sum of human happiness and one must make that rule publically known so that

⁴⁶ See John Rawls: *A Theory of Justice*, p. 138-139.

⁴⁷ For which thought-experiment, see generally Pierre Simon, marquis de Laplace: *A philosophical essay on probabilities*.

others may be aware of its contents and, consequently, what to expect. Consequences are still the yardstick of morality, but instead of the impossible yardstick of each individual calculating the complete future consequences of each action at the time of decision, they instead become a method for justifying norms which hold for society as a whole.

Of course, the fact that shared norms are calculated to provide a benefit in terms of human happiness does not impose an unconditional duty on anyone to obey all norms accepted by other members of his society. Even when such norms are carefully considered with the best intentions and meant to maximise happiness, there will inevitably be circumstances where violating a norm will lead to a greater increase in human happiness than adherence to it. In that case, the harm that is likely to accrue from breaking it must be carefully balanced against the good.

An often forgotten element of artificial moral dilemmas is the damage to the peace of mind and freedom from fear to everyone living in a society when its norms are violated, even if it should be only in extreme cases. Far from being a logically problematic paradox of rule-bound utilitarianism, it is central tenet of the theory that following a norm in such a way that a sub-optimal outcome of an individual moral dilemma results can nevertheless be the duty of someone living by utilitarian principles. All that it demands is that the good that is likely to come from certain norms being universally observed, and the harm that would result from violating those norms, outweighs the probable good such a violation would grant in an individual case.

If this is held to be always true, one would arrive at Robert Nozick's justification for his utilitarianism with side-constraints⁴⁸. If it is held to be true in the vast majority of cases, but that certain extreme cases justify violations of norms, a theory similar to Amartya Sen's⁴⁹ 'capabilities approach' may emerge. Whether one is a proponent of deontological or teleological ethics, as long as one acknowledges that humanity is either a moral good or a condition for a moral good, the conclusion of universal human rights is consistent with the premises of a wide variety of ethical theories.

On the other hand, no theory that asserts it as a right for one group of human beings to cause harm to others for can stand on logical grounds, without recourse to unprovable statements. All justifications for harming, in the widest possible sense, other human beings other than doing so in order to prevent greater harm can be ruled out as logically invalid. It may thus be concluded that the right of human beings to be free from harm can be proven, not

⁴⁸ See generally Robert Nozick: *Anarchy, State and Utopia*.

⁴⁹ See, for example, Amartya Sen: *Development as Freedom* and Amartya Sen: *On Ethics and Economics*.

by means of positive proof, but negative. Men thus have the right to be free from harm; limited only by the right of others for the same thing.

This universal rights and the myriad of rights derived from it, then, form the basis of what might be called the common law of humanity, the minimum standards of behaviour that must be observed toward other humans. Declaring that humans have rights, however, is a far cry from having established what those rights are, how they ought to be interpreted or what to do in cases where they conflict. While a broad consensus of philosophers of ethics may have identified the desirability for a common law of humanity to protect the common rights of humans, it is outside their purview to write these laws or establish the political structures that administer them. These tasks and the problem of how to enforce and protect human rights on a worldwide scale, the right method of governance with respect to them and in general proper application of such rights to human societies is the province of political philosophy and jurisprudence.

4.1.2 Political philosophy and universal rights

John Locke⁵⁰, Jean-Jaques Rousseau⁵¹ and Thomas Paine⁵² all eloquently expounded the natural rights of man in their writings of political theory. Their central argument, that government existed to secure these rights and that a government which did not was no lawful authority, but a tyranny in a cloak of law, forms the foundation of modern Western democracy. The idea of the state as the servant of the people and not the other way around lies at the root of politics in the industrialised West. It is so basic and fundamental to those raised and educated in a liberal democracy that it is often forgotten that this state of affairs is not normal and inevitable in our world, but happens to be the birthright of a privileged few. The majority of the world's population is still born into one state or another where the interests of a tyrant, political or military oligarchy or the abstract entity of the state outweigh his own. His rights, if any, are subordinate to the rights of the polity where he happens to reside.

It is not consistent with the writings of the philosophers mentioned above that it should be so. The arguments for the political rights of man are nowhere confined to men of one nation or of one race, colour, creed or political system. If man has natural rights at all, if the true *raison d'être* of government is the good of all mankind and its justification the consent of the governed, then these rights do not carry an implicit geographical limitation. As a matter of ethics and political philosophy, Americans, Englishmen or Icelanders do not have rights by

⁵⁰ Cite his Treatise.

⁵¹ Cite something.

⁵² Cite Common Sense and something else.

virtue of their nationality, but by virtue of some other quality, one shared by all men in common.

It is logically indefensible that the rights of man cited in the support of the American Revolution, the rights that rang out so unforgettably with the 1776 Declaration of Independence and found culmination in the Constitution of the United States in 1789, the rights behind the ideals of the French Revolution so nobly begun with the Déclaration des droits de l'Homme et du Citoyen in 1789 and so ignobly perverted by the Committee for Public Safety, the rights of man, whether endowed by his Creator or granted by his ownership and exercise of his faculty for reason, should be limited by *any* human construction, be that the political creature of the state or its servant, the laws. If one accepts these rights at all, it is impossible with sound logic to advocate an interpretation of them that is inconsistent with the equality asserted as one of the rights and, thus, to maintain that they apply only to some, but not to all.

4.2 Universal rights, *desiratum* or *obligatio ergo omnes*?

In 1920, United States Secretary of State Lansing said the following:

This realization compels the conviction that the entire human race ought to be considered, and in fact is, a single community, which awaits the further development of modern civilization and make of all mankind a great, universal political state. *There is, therefore, sufficient ground for an examination of sovereignty from this standpoint; and it will be found that, though there has been no formal recognition of the existence of such sovereignty, the great states of the civilized world have recognized, perhaps unconsciously, its existence in the applied law of nations, just as they have recognized it in the sphere of morals by giving binding effect to the principles of humanity.* [emphasis added].

It has been seen... that law arising through the decrees of judicial tribunals, when not interpreting enacted laws, is based upon the rational presumption that the sovereign of the state is persistently desirous of directing human conduct in accordance with the principles of natural justice. Thus, although a case may be entirely novel, it is assumed by a municipal court, in the absence of enacted laws applicable to such case, that the sovereign will is in harmony with the principles of natural justice, and the court applying those principles as it understands them renders a decision, and by that act

makes known the will of the sovereign and announces the law, since the passive acquiescence of the sovereign is equivalent to a command. The point to be noted is, that the law existed without formal enactment, the court being merely the agent for its announcement in terms.⁵³

4.2.1 *Problems with an international law of humanity*

The problem with any law of humanity is in actual practice, humans often adopt values violently in opposition to one another. Any universal theory of human rights is subject to criticism that it reflects only the value system of the drafter, not any underlying truth. Cultural and moral relativism explicitly rejects the idea that any system of values is superior to others.

While no amount of logic can convince moral relativists of the ethical value of anything, adopting a minimalistic ethical justification can reduce the clashes between different values. The premise that harming others is not justified is unless to prevent worse harm can be proven by negative proof and from that premise the negative rights of humans derive naturally. Confining the conception of the law of humanity to the lowest common denominator of human rights prevents the imposition of personal, cultural, religious or political beliefs on others by having them masquerading as genuine rights. This leaves the right to life, liberty and the pursuit of happiness in whatever way one thinks best, rights that the vast majority of religions, cultures and creeds have come to accept in actual practice as valid.

Even with the acknowledgement that certain rights are universal, it does not necessarily follow that this should lead directly to universal adoption of the legal protections provided by humanitarian laws and specifically the proscription of the conduct termed crimes against humanity becoming *jus cogens*. Two arguments may be advanced against that conclusion.

While parallels between the acts proscribed by statutes of crimes against humanity and proscribed acts in domestic laws do exist, such parallels are not exact and it is conceivable that some crimes against humanity might not be domestic crimes, even in a state which undertakes to guarantee all the individual rights of its citizens. The rights of Paine, of the Constitution of the United States of America and consequently the constitutions of most liberal democracies, are very much individual rights, rights that limit the absolute dominion of the machinery of the state over each individual. It may reasonably be questioned whether such individual rights necessarily extend to providing protection of groups, in the manner of the humanitarian laws of armed conflict and the proscription of crimes against humanity.

⁵³ Quoted in M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 214.

To do so, however, is to commit a category error. An identifiable group or collectivity in the sense of the definition of crimes against humanity is not some unique and discrete phenomenon for which specific rights have to be separately argued. The reality is that groups of humans consist of individuals and thus have all rights that the individuals within them have. Even adhering strictly to the humanist doctrine by which legal fiction and conventional categorical sorting may not add a single right to an artificial creation that is not already a natural property of the individuals that make up the group, we must still reach the conclusion that as individuals have a right to be protected from violence and persecutions, so too do groups of individuals, no matter their size.

The central tenet of the individual rights theorist is that the rights of the few, or even the one, cannot be abrogated for any reason. A little considered, but logically true, corollary of this must be that the rights of the many cannot be abrogated either, because any such action would inevitably result in a curtailment of individual rights.

For a more concrete example of a political theorist arguing from individual rights to a common law of humanity, one might look at Rousseau. In his *Contrat*, he argued that in warfare, non-combatants and even those combatants who had laid down their arms or been rendered hors d'combat, were inviolable. Rousseau believed that because of their reason, their capacity for rational thought, human beings had a right not to be harmed at the hands of each other.

If circumstances are nevertheless such that human beings have no recourse but to resort to force against their fellow man, to protect their own rights, for example, there still exists a duty to exert the minimum amount of force necessary to accomplish their just purpose. It therefore follows that for the same reason that laws against murder in domestic legislation are justified and exceptions in the form of legal self-defence are to be narrowly interpreted, the lives and well-being of all human beings are to be protected in international law.

Rousseau's argument posits warfare as an exceptional state of affairs that momentarily interferes with the ordinary sanctity of human life and well-being. It follows directly from it that such sanctity must, in the absence of warfare, be equally important. If wanton savagery against a civilian population is not permissible in times of war, still less is it justifiable in times of peace. If foreign populations are deserving of protection because of their common status as human beings, so, inevitably, must the domestic population be.

Having thus disposed of the idea that the rights of the individual may effectively be safeguarded without proscribing the acts which rise to the status of crimes against humanity, there remains the second philosophical objection to treating them as *jus cogens*, or

peremptory norms of international laws, enforceable by other nations or supranatural organisations.

In light of the idea that any lawful authority derives its legitimacy from the consent of those over whom it exercises its power, there exists a philosophical problem with allowing a state or organisation, to which an individual does not belong and therefore can hardly be presumed to rule with his consent, the authority to judge and sentence him. This is compounded when the laws under which he is tried emanate from an unclear source such as customary international norms and he can have had no say in their making. How can this be consistent with the concept of inalienable individual rights of man in the tradition of Locke, Rousseau, Paine and the Founding Fathers of the United States?

This is a cogent criticism of international criminal law in general. To some extent, the authority of the state to punish and coerce must stand in natural opposition to the idea of inalienable rights. A man executed by the state has had his inalienable right to life abrogated and a man imprisoned by it is denied his inalienable right to liberty, along with a host of other rights his confined state makes him unable to exercise. In the case of national law, this is justified by the social contract between man and state and the opportunity for the participation of the individual in the political process from which the laws under which he is tried derive. No such justification applies in international law. In fact, under international laws, the accused is denied important elements of due process as most citizens of liberal countries would understand it.

Principles of legality as they apply to international criminal law have been considered less strict than in most national legal systems. While the norm of *nulla crime sine lege* is a general principle of international criminal law as it is a general principle of all criminal law, derived rules in favour of the defendant do not have the same force under international criminal law. The concept of *nulla poena sine lege* does not exist in international criminal law, as neither the nebulous concept of customary norm nor the somewhat sparse formulations found in treaties have ever defined punishments for crimes against humanity.

One of the primary weaknesses of peremptory customs as sources of law or even just as guidelines to their interpretation is that few people who are not international law scholars may be safely assumed to have a working knowledge of the status of customary norms in a given field. It is therefore far from trivial for anyone but professional lawyers to determine what rules truly hold in a given field of public international law. While this does not cause undue problems in more traditional fields of international laws, touching on the conduct of politics in their relations with each other, as the parties responsible for diplomatic intercourse may be assumed to have access to the services of scholars of international law, it has a special

application in international criminal law, involving, as it does, the possibility of individuals appearing as defendants.

It is a truism of United States constitutional law, there styled the void for vagueness doctrine, and existing as a general principle in most legal systems, that as a corollary of the principle that all doubt be interpreted in favour of the defendant, *in dubio pro reo*, a statute of law that is incomprehensible to the average person bound by it is to be interpreted as unenforceable.

4.2.2 *No right without remedy*

Hard cases make for bad laws. The conduct that the law of humanity makes criminal is, thankfully, not so common that it can be termed the rule. In fact, a characteristic of crimes against humanity is that they are intended to apply only in the most extreme of cases, cases which the world proved unable to foresee. It is a fact that any case where rights collide produces ungainly compromises. The ethics of the real world and their application by means of jurisprudence is a balancing act between various inalienable rights and inderogable norms, where something must inevitably give. The least objectionable outcome is most often the best that can be hoped for. In a case where an action taken to ensure certain rights also strikes at those rights, no outcome is less than objectionable.

It is a truism of law that there exists no right without remedy. Few illustrations of that truism could be as telling as the endless parade of victims throughout history. In the 20th century alone, at least 167,000,000 people⁵⁴; Armenians, Greeks, Jews, Roma and a countless others, lost their lives to organised violence. Their most basic rights were disregarded with impunity, often because their humanity was denied. While extending a remedy to the dispossessed and threatened of the world risks violating other rights, no conceivable misuse of the legal concept of a law of humanity could ever have such horrible consequence as the lack thereof.

4.3 Customary norms before WWII

As a matter of morality and common sense, there should have been a law of humanity from the day that man first learned to reason about law. As a matter of practical jurisprudence, the preponderance of evidence is that only war crimes had attained a status as customary norms in international law before the outbreak of hostilities in the Second World War. Outlawing crimes against peace and crimes against humanity were a *desiratum* for some farsighted people, but in no way can norms making acts falling under the heading of either said to have been evident in state practice as *opino juris*.

⁵⁴ Niall Fergusson: *War of the World*, p. 649.

5 Judgment at Nuremberg

In 1939, Germany invaded Poland. This invasion of territory that Britain and France had pledged themselves to protect, combined with an already extant war in the Asian Pacific, soon led to a general world war, involving every great power of the world at that time and as their allies, satellites and colonies, a significant part of the world as a whole. The Axis comprised Nazi Germany, Italy and Japan, in addition to their conquered territories. On the Allied side the most important belligerents were Great Britain and France, eventually joined by the Soviet Union and the United States of America.

The massive human inferno of the Second World War dwarfed even the carnage of the Great War and made a mockery of the hopes and dreams of all those who had hoped that after experiencing four years of slaughter in the trenches, civilised man could never bring himself to go to war again. The casualties amounted to more than fifty million, perhaps even more than seventy million people.

That is not counting such incidental victims as those whose general state of health was detrimentally affected by the exigencies of wartime and who died shortly after the war or those in wartorn countries who found that ordinary medical services and the supply of food were insufficient to the military needs and thus all but unavailable to civilians. This is merely deaths as a direct result of the warfare in WWII. To put this enormous number into some kind of perspective, it means that one in every fifty or one in every forty of the world's population at the time were slain in a paroxysm of violence directed with modern technology and organisation.⁵⁵

After a hard-fought victory against the Axis powers, the Allied leaders were confronted with evidence of a systematic attempt to eliminate by means of murder all those declared to be enemies of the people, including at least two entire races of people. The scale of this criminality was such as to beggar belief, at least by those among the Allied leaders who were not busily attempting to better it.⁵⁶ Motivated variously by public outcry, a desire for justice, thirst for vengeance or political concerns (or some combination thereof), the Allied leadership prepared to punish those of the leadership of the Axis powers deemed responsible.

5.1 London Charter

The foundational document that established the Nuremberg Tribunals was the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal, generally simply referred to as the London Charter. The primary functions of the London Charter were to stipulate that prosecutions for

⁵⁵ See generally Zbigniew Brzezinski: *Out of Control: Global Turmoil on the Eve of the Twenty-first Century*.

⁵⁶ See section [stalin] of this thesis.

crimes committed during the war would be possible, define the crimes for which representatives of the European Axis powers could be prosecuted, removing the defence of having held an official position at the time of the commission of such crimes, restricting the defence of obedience to orders at the discretion of the Tribunal and then setting down a procedure for prosecutions for the three types of offences enumerated in the London Charter.

The three types of crimes recognised by the London Charter were war crimes, crimes against peace and crimes against humanity. Of these, the first were well-established in international law, but the other two might have been considered innovations.

5.1.1 The aim to prosecute and the origin of the Charter

As soon as the Allied leadership began to see a realistic prospect of victory over Germany, the problem of what to do with the German leadership must have occurred to them. Of the deliberations of the Allied leadership in the early stages of the war the historical record is sparse. On the subject of private conversations behind closed doors, reliable history remains silent. What is attested in the historical record is that on the 24th of October 1941, United States President Franklin Dwight Roosevelt, then the leader of a neutral country, issued a rousing condemnation of German war crimes, specically the practice of hostage-taking and exacting reprisal on civilians. *Inter alia*, his press release stated: "The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily, under the Nazi heel revolts a world already inured to suffering and brutality."⁵⁷ [sic]

On the same date, British Prime Minister Winston Churchill responded to the United States Presidential press release with the following statement:

"His Majesty's Government associate themselves fully with the sentiments of horror and condemnation expressed by the President of the United States upon the Nazi butcheries in France. These cold-blooded executions of innocent people will only recoil upon the savages who order and execute them. The butcheries in France are an example of what Hitler's Nazis are doing in many other countries under their yoke. The atrocities in Poland, in Yugoslavia, in Norway, in Holland, in Belgium and above all behind the German fronts in Russia surpass anything that has been known since the darkest and most bestial ages of mankind. They are but a foretaste of what Hitler would inflict upon the British and American peoples if only he could get the power. Retribution for these crimes must henceforward take its place among the major purposes of the war."⁵⁸ [emphasis added]

⁵⁷ *Foreign Relations of the United States, 1941*, p. 446.

⁵⁸ *Ibid*, p. 447.

On the 14th of January 1942, representatives of Belgium, Netherlands, Yugoslavia, Norway, Greece, Luxembourg, Poland, Czechoslovakia, and the Free French; met in St. James Palace, London. All nine of these nations were occupied by Germany and the governments-in-exile were allied to Great Britain in the war. The representatives of these occupied nations styled themselves the Inter-Allied Conference. Taking note of the statements made by President Roosevelt and Prime Minister Churchill, the Conference issued the Inter-Allied Resolution on German War Crimes. In that document, the German occupation is termed a “regime of terror characterized amongst other things by imprisonments, mass expulsions, the execution of hostages and massacres”⁵⁹. The signatories committed themselves to seeing those who were guilty or responsible for these crimes punished through channels of organised justice.

An unofficial body of jurists who represented the views of the European Allies began work in London at this time. The London International Assembly (LIA) did much to shape the Allied view of legal proceedings subsequent to the war.⁶⁰ One of its recommendations was that “a comprehensive view should be taken, including not only the customary violations of the laws of war . . . but any other serious crime against the local law, committed in time of war, the perpetrator of which has not been visited by appropriate punishment”.⁶¹ That this was intended, *inter alia*, to refer to Nazi crimes against Jews, including their own citizens, is indicated by the insistence “that punishment should be imposed not only when the victims were Allied Jews, but even when the crimes had been committed against stateless Jews or any other Jews in Germany or elsewhere”.⁶²

The justification that the LIA gives for such prosecutions deserves note. It clearly draws upon the idea of a common law of humanity that has the status of *jus cogens* and imposes *obligatio ergo omnes*. The LIA believed that this type of prosecution would be a “matter of recognition of the fundamental principles the upholding of which is the concern of mankind, because they are necessary to the very existence of humanity.”⁶³

The successor to the LIA was the United Nations Commission for the Investigation of War Crimes, later renamed United Nations War Crimes Commission (UNWCC). This body was established on the 20th of October 1943 by a meeting at the Foreign Office in London

⁵⁹ *Inter-Allied Resolution on German War Crimes*, paragraph 1.

⁶⁰ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 72.

⁶¹ *The punishment of war criminals*, p. 7.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 8.

attended by seventeen of the major Allies, excluding only the Soviet Union.⁶⁴ Its work during the war would be the blueprint for the war crimes prosecutions of the International Military Tribunals at Nuremberg and Tokyo, as well as other Allied proceedings for war crimes and crimes against humanity.⁶⁵ The modern conception of crimes against humanity is set forth eloquently by the UNWCC when it holds that:

“[There exists] a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of people and individual persons, that is inhuman acts, constitute international crimes not only in time of war, but also, in certain circumstances, in time of peace.”⁶⁶

It was on October the 30th 1943, in Moscow that the leaders of the primary Allied nations promulgated their first joint public announcement about the future fates of the German leadership. Winston Churchill, Theodore Roosevelt and Josef Stalin signed the Moscow Declaration on that date. The last section, entitled Statement on Atrocities, runs as follows:

Signed by President Roosevelt, Prime Minister Churchill and Premier Stalin.

The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled. The brutalities of Nazi domination are no new thing, and all peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of the territories are now being redeemed by the advancing armies of the advancing armies of the liberating powers, and that in their desperation the recoiling Hitlerites and Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes on the territory of the Soviet Union which is being liberated from Hitlerites, and on French and Italian territory.

Accordingly, the aforesaid three Allied powers, speaking in the interest of the thirty-two United Nations, hereby solemnly declare and give full warning of their declaration as follows:

⁶⁴ *United Nations War Crimes Commission 1943-1949*, p. 1.

⁶⁵ *Ibid.*

⁶⁶ *History of the United Nations War Crimes Commission*, p. 192-193.

At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will 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 these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy.

Thus, Germans who take part in wholesale shooting of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages of Cretan peasants, or who have shared in slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.

Let those who have hitherto not imbued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.⁶⁷

The principal drafter of this statement was Winston Churchill. While the tone is ominous, the precise legal import of the statement is wide open to interpretation. Little suggests that the interpretation of Churchill or Roosevelt was ever in accord with the understanding of Josef Stalin. Indeed, during the Tehran Conference, Stalin introduced the idea that the Allies ought to execute 50,000-100,000 German military officers after the war. While Roosevelt was pleased to joke that perhaps 49,000 might be enough, Churchill responded with high dudgeon and proclaimed himself rather prepared to be taken outside and shot than to participate in any such summary executions of men who had fought for their country. Only Stalin's insistence that he was not serious induced Churchill to continue the meeting at all and he made clear that

⁶⁷ *Declaration of the Four Nations on General Security, Statement on Atrocities.*

while he believed that war criminals must be punished, in accordance with the Moscow Declaration, he was utterly opposed to executions to serve political ends.⁶⁸

It must have been the politics, and not the executions, to which Churchill objected. As revealed by recently declassified minutes of War Cabinet meetings from as early as 1942, Churchill initially advocated summary executions for Nazi leaders, with Acts of Attainders to circumvent any legal obstacles. He quipped that an electric chair for Hitler would no doubt be available through the Lend-Lease program from the Americans; "Contemplate tht. if Hitler falls into our hands we shall certainly put him to death. Not a Sovereign who cd be said to be in hands of Ministers, like Kaiser. This man is the mainspring of evil. Instrument - electric chair, for gangsters no doubt available on lend-lease."⁶⁹ [sic]

The principled stand of US Secretary for War Henry Stimson against summary executions and for an international tribunal had much to do with changing Churchill's mind.⁷⁰ No doubt, so did Premier Stalin's uncharacteristic insistence on a legal solution⁷¹. It is, however, far from certain that Churchill could have been won around to agreeing to try the German leaders at all had not President Roosevelt, who vacillated between Churchill's position and that of his Secretary of War, died and been replaced with Harry S. Truman, a dedicated opponent of summary executions.⁷² Churchill feared that defeated Nazi leaders would use a trial as an opportunity to justify their acts, grandstand and call into question the moral authority of the victorious Allies.⁷³

It was with these fears firmly in mind that the planning for a post-war Germany and treatment of the captured leadership continued. In 1944, President Roosevelt asked his War Department to devise a plan for bringing war criminals to justice. It was as a result of that planning that Robert H. Jackson was approached and asked to become the chief prosecutor for the United States in a trial against the principal war criminals in Europe.⁷⁴ This would be under a different president than the one who had started the planning, for former Vice President Harry S. Truman had replaced Franklin Dwight Roosevelt when he died on the 12th of April, 1945, and Jackson was as yet chief prosecutor in a court that didn't exist.

Jackson turned in a report to his President, the 6th of June 1945, examining the feasibility of a trial over the leaders of the German war machine. His argument for holding public trials,

⁶⁸ Charles E. Bohlen: *Bohlen Minutes: Tripartite Dinner Meeting*.

⁶⁹ Sir Norman Brook: *Cabinet Secretary's Notebooks*, July 6th 1942.

⁷⁰ Geoffrey Robertson: *Crimes Against Humanity*, p. 212.

⁷¹ See section X of this thesis.

⁷² Geoffrey Robertson: *Crimes Against Humanity*, p.212-213.

⁷³ Sir Norman Brook: *Cabinet Secretary's Notebooks*, April 12th 1945.

⁷⁴ Geoffrey Robertson: *Crimes Against Humanity*, p.212-213.

which was approved by Truman and became the guiding light of United States policy toward suspected German war criminals and those accused of crimes against humanity, bears repetition for its cogent articulation of the clash between positive law and universal morality to which flagrant violations of the law of humanity give rise, and the common-sensical solution advocated:

To free them without trial would mock the dead and make cynics of the living. On the other hand, we could execute them or otherwise punish them without a hearing. But indiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and not sit easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we dealt with will permit, and upon a record that will leave our reasons and our motives clear.⁷⁵

5.1.2 *Creation of the Charter*

The Allies prepared to enforce their somewhat divergent will in a post-war world by means of international bodies involved in frantic staff work and planning while the war was still being fought. As one of the consequences of the Moscow Declaration, the European Advisory Commission (EAC) came into existence and drew up a plan for a partition of Germany between the three largest Allies, the United States, Great Britain and the Soviet Union. At the Yalta Conference of February 1945, France was added to that list. It was under the auspices of the EAC that representatives of the four powers; Sir David Maxwell Fyfe for the United Kingdom of Great Britain and Ireland, Robert H. Jackson for the United States of America, Robert Falco for the Provisional Government of the French Republic, and Iona Nikitchenko for the Union of Soviet Socialist Republics; drew up the London Charter of the International Military Tribunal on the 8th of August 1945.⁷⁶

The four-power Allied Control Council (ACC) that came into existence on the 5th of June 1945 with the unconditional surrender of Germany was also the result of the planning work done by the EAC. In addition to functioning as the effective government of occupied Germany, that organ was the one given the task of carrying out the provisos of the London

⁷⁵ *Letter from Robert Jackson to Harry S. Truman, June 6, 1945*, p. 8. Note that Geoffrey Robertson cites it on p. 213 of *Crimes Against Humanity*, but fails to track down the original source. As a result, he gives the wrong date for the letter and incorrectly attributes the segment to the closing of the report, when it is fact part of Justice Jackson's peroration.

⁷⁶ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 6, *infra* note 10.

Agreement to prosecute European war criminals. The legal basis for the competence of the ACC to carry out this vital task was embodied in its Directive no. 9, issued on the 30th of August, 1945.⁷⁷ Any conflict of law issues with regard to German law were swept away when all German laws were repealed with ACC Law no. 1 (CC1) on the 30th of September 1945.⁷⁸

5.1.3 Article 6 and the (c) section

Prosecution of perceived German crimes against the law of humanity and customary norms of international law had been made a war aim of the the majority of Allied nations. What those crimes were was a matter of some dispute. In the end, the vast range of objectionable conduct that individuals from the European Axis nations were alleged to have engaged in were condensed into three categories, each a criminal statue intended to form the basis for prosecution.

The three crimes that the International Military Tribunal was authorised to try were enumerated in Article 6 of the Charter:

The Tribunal established by the Agreement referred to [in] Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

⁷⁷ *Directive no. 9: Developing Measures and Procedures Regarding Major War Criminals of European Axis.*

⁷⁸ *Law no. 1 - Repealing of Nazi Laws.*

(c) CRIMES AGAINST HUMANITY: namely, 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.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.⁷⁹

Of these, the (a) section is reminiscent of the proposed charges against the Kaiser after WWI.⁸⁰ In light of the refusal of the Dutch to extradite at that time as well as their cited rationale for such refusal (that the crime was political in nature), it would be hard to maintain that customary state practice and the doctrine of *opinio juris sive necessitates* provided sufficient grounds to affirm a proscription against aggressive war as a part of customary international law at all before WWII. Maintaining that it had attained the level of a *jus cogens* norm and imposed *ergo omnes* duties or that it could lead to individual criminal responsibility was simply not justified from a jurisprudential point of view at the time of the Nuremberg trials. It must in truth be considered a new crime introduced by the legislative authority of the Allies and as penal law; it undeniably runs afoul of the principles of legality, *inter alia* the principle against ex post facto legislation and *nulla poene sine lege*.⁸¹

The proscription of war crimes according to section (b) had much longer history as a state practice⁸² and the jurisdiction of those was comparatively unproblematic. The individual criminal responsibility of instigators and accomplices might be questioned from the standpoint of customary norms in international law, but even that criticism lacks force when the weight of evidence for state practice is examined.

What is of primary concern here is the (c) section. As argued above⁸³, binding international law of humanity and the principle of criminal punishment for deviations from it had not before the advent of WWII attained such worldwide acceptance, as evidenced by state practice, as to constitute a customary norm under international law. At the time of its

⁷⁹ *Charter of the International Military Tribunal*, Article 6.

⁸⁰ See section 4.4 of this thesis.

⁸¹ Robert Cryer: *Prosecuting international crimes: selectivity and the international criminal*, p. 40; see also Geoffrey Robertson: *Crimes Against Humanity*, p. 214.

⁸² See section 4 and 5 of this thesis.

⁸³ See section 5.3 of this thesis.

introduction, this section too must be considered in the light of legislative innovation, subject to similar considerations as crimes against peace above.

Unlike the crime of peace, however, an argument might be made that acts proscribed under the crimes against humanity statute were already considered crimes in international law as war crimes and that an extension of the class of victims to include those of the perpetrator's own nationality does not constitute *ex post facto* legislation, but instead falls under the heading of statutory analogy. The exclusion of domestic population as victims of war crimes would be considered *lacunae* in the law and it would be unreasonable to expect the law to exalt an accidental legal fiction over a holistic interpretation of war crimes as one aspect of a wider law of humanity.

The mandatory link between crimes against humanity and the other two crimes under the jurisdiction of the tribunal would make such an argument more plausible. As both crimes against peace and war crimes are by definition committed in connection with a war, this has the effect of limiting the application of the statute covering crimes against humanity to exactly analogous situations as those where the same acts would be war crimes if committed against foreign victims.

Notwithstanding the philosophical appeal of this position, managing, as it does, to reconcile the deep-seated division between legalism and morality which existed at the time, it must reluctantly be rejected as a sufficient basis for a penal statute. Not only the principles of legality and respect for the right of the accused in what is after all a capital case stand in the way of this otherwise attractive interpretation, but also the paucity of state practice. Analogy in cases of criminal law is alien to the legal systems of both Great Britain and the United States, the two Allies whose legal systems had the greatest impact on the proceedings at Nuremberg, and in those legal systems which do practice statutory analogy in criminal law, the latitude for use in cases contrary to the interest of the defendant is sharply limited. It is fitting, therefore, to borrow from Justice Jackson's closing in front of the Tribunal to dispose of the idea:

The doctrine of punishment by analogy was introduced to enable conviction for acts which no statute forbade. Minister of Justice Guertner explained that National Socialism considered every violation of the goals of life which the community set up for itself to be a wrong per se, and that the acts could be punished even though it was not contrary to existing "formal law".⁸⁴

⁸⁴ *Trial of the German Major War Criminals*, Vol. XIX, p. 385.

5.1.4 *The fateful semi-colon*

The original English and French text of Article 6(c) differed subtly from the Soviet one. The French and English texts had a semi-colon after the word ‘war’ and before the words ‘or persecutions’. In the Russian text, the punctuation at the equivalent place in the text is a comma. While this may seem innocuous, it may be construed so as to transform the meaning of the statute in two important ways.

First, as relates to the irrelevancy of the *lex loci* principle, or the rule contained in the words ‘whether or not in violation of the domestic law of the country where perpetrated’. Second, the link with other crimes under the jurisdiction contained in the words ‘in execution of or in connection with any crime within the jurisdiction of the Tribunal’. The issue is whether these rules apply to the statute as a whole or only to that part of it which continues from the semi-colon. Ordinary English grammar would suggest the latter interpretation.

The potential in confusion is multiplied by there being legitimately two categories of crimes against humanity elucidated in the statute. Before the semi-colon, there are crimes of the murder type, which are exactly analogous to war crimes in nature, other than the nationality of the victim, and, additionally, have a fairly strong correspondence with national legislation in that acts criminal under it would also be criminal in a preponderance of legal systems. After the semi-colon, however, there are crimes of the persecution kind, or acts which are not as clearly analogous to war crimes and evidence of a wide acceptance of which as criminal behaviour is more difficult to find in state practice. The difference in kind between the acts proscribed by the two parts of the statute separated by the semi-colon makes it defensible to apply either or both of these rules only to one of them.

To illustrate the problem, in the reprint of the statute below, the original semi-colon is retained and crimes of the murder type are underlined while crimes of the persecution type are in italics:

(c) CRIMES AGAINST HUMANITY: namely, 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.

The first potential alternate interpretation, i.e. that the removal of the principle of *lex loci* as a defence is intended only to apply to crimes of the persecution type, has little to

recommend it. Not only would it make it impossible to try to leaders and legislators of Germany, the prosecution of whom was the *raison d'être* of the London Charter, but it would also weaken the jurisdiction of the statute over those acts of which condemnation is closer to being a peremptory norm in international law and thus far less likely to be in violation of the principles of legality. An interpretation where behaviour almost universally accepted to be reprehensible is less subject to punishment than behaviour which violates a less accepted norm must be rejected on grounds of common sense.⁸⁵

The second interpretation, however, is not subject to such prompt dismissal. If taken as new legislation rather than an attempt to codify customary norms or an attempt of statutory analogy, there is no obvious reason why crimes of the persecution kind could require a link to war crimes or crimes against peace while crimes of the murder kind were punishable regardless of such a link. The philosophical justification for the criminality of crimes against humanity is not hampered by any link to war, but makes conduct falling under that description a violation of *jus cogens* norms in times of peace as well as war.

In the event, however, the Allies quietly rejected both interpretations when the English and French texts were changed with the Protocol of October 6, 1945, to conform with the Russian text and remove the potential for alternate interpretations. While there were no public discussions about that change, it is probable that the intention of the drafters never extended to such a far-reaching change to international law as would have resulted from removing the link with armed conflict from crimes against humanity.⁸⁶

5.2 Tokyo Charter

The atrocities of the Pacific front were eclipsed in the popular imagination by the focus on the Holocaust. To the discerning student of crimes against humanity, Imperial Japan nevertheless provided a wealth of material and the victorious Allied forces, in the Pacific Theatre represented principally by the United States at the end of the war, could hardly ignore the torrent of reports from China, Indochina, Indonesia, the Philippines and a range of other locations in South-east Asia.

After the unconditional surrender of Japan, an International Military Tribunal – Far East was established to try Japanese war criminals. The International Military Tribunal for the Far

⁸⁵ See also M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 25-29.

⁸⁶ *Ibid.*, p. 29.

East Charter is based on the London Charter and legal analysis of the former applies to the IMTFE, *mutatis mutandis*.⁸⁷

The International Military Tribunal for the Far East had authority over the same crimes as granted by the London Charter and defines them in much the same way. The definition of crimes against humanity is set forth in the Article 5(c) of the Charter of the International Military Tribunal for the Far East, which as is evident, is substantially identical to Article 6(c) of the London Charter:

Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Only minor differences in punctuation, none with the potential for adventurous interpretation as the semi-colon of Article 6(c)⁸⁸, the inclusion of the next paragraph as part of section (c) rather than letting it stand independently and the elimination of religious motivation for crimes of the persecution kind stand in the way of it being an exact copy of the London Charter statute. The lack of religion as an identifying characteristic of victims was due to the fact that Nazi crimes against Jews had no counterpart in the Pacific theatre and it was not considered necessary.⁸⁹

5.2.1 *Unilateral declaration*

The most important distinction between the London Charter and the Tokyo Charter from the perspective of international law is that while the London Charter is an international treaty pursuant to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed by the principal Allies at the Conference of London, the Tokyo Charter is the unilateral promulgation of US General Douglas MacArthur in his capacity as the Supreme Allied Commander of the Pacific Theatre.⁹⁰ Distrust of the Soviet forces newly

⁸⁷ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 1.; see also section 6.1 of this thesis.

⁸⁸ For which, see section 6.1.4 of this thesis.

⁸⁹ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 33.

⁹⁰ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 32.

engaged in the theatre, but not part of MacArthur's command had much to do with this decision.⁹¹

Eleven Allied nations in the Pacific theatre took part in staffing the Tribunal, but the primacy of the United States position was unmistakable. While there were judges and prosecutors from all eleven, they were appointed directly by Supreme Allied Power Commander Douglas MacAdams and not their parent countries. Furthermore, the prosecution was directed by one Chief Counsel, the American Joseph Heenan. This allowed the United States nearly uninterrupted control of the proceedings.⁹²

5.2.2 *Vital differences from Nuremberg*

Procedurally, the Tokyo Charter included substantial improvements in fairness to the defendants in comparison with the London Charter. The defendants were provided with American counsel and allowed to challenge the validity of the courts constituted against them on the basis of the *ex post facto* criminality of the charges and allege that the Tribunal represented victors' justice.⁹³

The enduring flaw of the Tokyo proceedings lies not in the substance of the Charter it is carried out under, but in the decision by the prosecution, on orders from Gen. MacArthur, to exclude Emperor Hirohito from criminal responsibility. To this end, the evidence was edited to eliminate all references to the guilt of the Emperor and the testimony of the defendants' stage managed by Chief Counsel Joseph Heenan.⁹⁴

5.3 **Trial of the Major War Criminals**

In lay discourse, the phrase 'the Nuremberg trials' nearly inevitably refers to the Trial of the Major War Criminals. The International Military Tribunal indicted and tried the highest ranking German leaders who could be found after the war in the historic Nazi shrine of Nuremberg. The defendants included figures whose authority, power or influence in wartime Germany had been in the political arena, the high command of the military, the sphere of business or industry and even influential people from the media. The absence of such leading figures as Adolf Hitler, Heinrich Himmler, Joseph Goebbels, Reinhard Heydrich and Adolf Eichmann from the proceedings was keenly felt; but among the defendants there were men who had been close to the heights of power in Nazi Germany, such as Hermann Göring, Martin Bormann (tried *in absentia*) and Alfred Rosenberg.

⁹¹ Geoffrey Robertson: *Crimes Against Humanity*, p. 222; 224.

⁹² Ibid, p. 223-224.

⁹³ Ibid.

⁹⁴ Ibid; 224.

The opening session of the International Military Tribunal was held at Berlin on the 18th of October 1945, where the judges were sworn in and the indictment against the defendants was received. The tribunal first convened in the Palace of Justice at Nuremberg on the 14th of November 1945.

A full list of the defendants in front of the tribunal is Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Ketel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Saukel, Alfred Jodl, Arthur Seyss-Inquart, Albert Speer, Constantin von Neurath, Martin Bormann, Hjalmar Schacht, Franz von Papen and Hans Fritzsche.⁹⁵

5.3.1 Structure of the court

The need to strike a balance between the somewhat divergent goals of the Allies for the proceedings as well as marry the different legal systems involved meant that establishing some kind of structure around the International Military Tribunal was a challenging task. The judges, prosecutors, defence attorneys and defendants came from different countries, with different languages and legal systems.

The source of law and the foundation of the authority of the tribunal was the Charter of the International Military Tribunal; promulgated by the Allies pursuant to their inherent legislative powers over conquered European Axis powers. The unconditional surrender of these nations led to the occupying Allies severally and jointly possessing the unqualified right to legislate over the former territories of European Axis nations. From this was derived the rule that neither the defense nor the prosecution was permitted to challenge the legal, political, or military authority of the court.⁹⁶ This also served to allay fears that the defeated Nazis would use the tribunal as a forum for self-aggrandisement and justifications for their racist ideology while decrying it as a vehicle for victors' justice.

To meet the challenge of the polyglot nature of the proceedings, the court appointed interpreters to translate the proceedings into four languages: French, German, Russian, and English. Written evidence submitted by the prosecution was translated into the native language of each defendant. The need for simultaneous translation, volume of documentary evidence as well as the pace of the proceedings posed unique technical challenges in the field of forensic translation, which owes much to the great advances made at the IMT, often with translators without formal education in the field.

⁹⁵ *Indictment*, p. 1.

⁹⁶ *Charter of the International Military Tribunal*, Article 3.

One of the most important departures from Anglo-American trial procedures was the absence of a jury. The cases would be heard in front of four judges instead, one nominated by each of the four major Allies; the United Kingdom of Great Britain, the United States of America, France and the Soviet Union. In addition to the main judge from each Ally, each nation was required to assign an alternate judge.

For the Soviet Union, the main judge was Major General Iona Nikitchenko and the alternate judge Lieutenant Colonel Alexander Volchkov. From France, Professor Henri Donnedieu de Vabres was the main judge and Robert Falco, one of the drafters of the London Charter, was the alternate judge. The United States contingent comprised Francis Biddle as the main judge and John J. Parker as the alternate judge. The President of the Tribunal and the main judge from Great Britain was Colonel Sir Geoffrey Lawrence and he was accompanied by Sir Norman Birkett as the British alternate. The IMT made all of its decisions by a majority vote of the four judges. On issues that divided the judges equally, the president of the court, Lord Justice Geoffrey Lawrence from Great Britain, was endowed with the deciding vote. All decisions made by the tribunal, including any rulings, judgments, or sentences, were final and could not be appealed.

The rights of the defendants were a composite of those available under the legal systems of the Allied powers. Each defendant accused of a war crime was afforded the right to be represented by an attorney of his choice. The accused war criminals were to be presumed innocent by the tribunal and could not be convicted until their guilt was proven beyond a reasonable doubt. Defendants were also guaranteed the right to challenge incriminating evidence, cross-examine adverse witnesses and introduce exculpatory evidence of their own. Anglo-American technical rules of evidence for the admissibility of particular documents or testimony did not bind the tribunal, which in deference to standards of Soviet and Romanist-Civilist legal systems retained discretion to evaluate hearsay and other forms of evidence inadmissible under the legal systems of the United States and Great Britain.

The defence counsel were mainly German lawyers, often relying on translators to follow the sequence of events in the courtroom as well as having to learn a new system of criminal law as their clients were on trial.

In addition to appointing judges, every major Ally sent a prosecution team to Nuremberg. In pursuance with Truman's previous appointment, Supreme Court Justice Robert H. Jackson appeared as the Chief Prosecutor for the United States. The Chief Prosecutor for Great Britain was Attorney General Sir Hartley Shawcross. Lieutenant-General Roman Andreyevich

Rudenko appeared as Chief Prosecutor for the Soviet Union. For France the Chief Prosecutor was François de Menthon.⁹⁷

Four main counts of charges were set forth with the indictment received by the Tribunal on the 18th of October 1945. These were conspiracies to commit crimes against peace, under Article 6(a); individual responsibility for crimes against peace, under Article 6(a); war crimes, under Article 6(b), and crimes against humanity under Article 6(c).⁹⁸ Some defendants were eventually charged with crimes under all four counts, others only with crimes corresponding to one or more of them.

The prosecution teams divided the responsibility for the prosecutions by national lines. The United States tried charges under the first count, or conspiracy to commit crimes against peace, Great Britain tried crimes against peace or the second count, the Soviet Union had the duty of war crimes under the third count and France prosecuted crimes against humanity under the fourth count. In practice, due to evidentiary considerations and the fact that war crimes were also considered to be crimes against humanity, France inherited the responsibility of prosecuting those incidents of war crimes on the Western Front that came in front of the IMT.⁹⁹

5.3.2 *Result of the trial*

The International Military Tribunal concluded its business with the passing of judgment on twenty-two out of twenty-four defendants on the 1st of October 1946. Defendant Robert Ley committed suicide before the beginning of the trial and defendant Gustav Krupp was declared *non compos mentis*.¹⁰⁰ Three defendants, Hjalmar Schacht¹⁰¹, Franz von Papen¹⁰² and Hans Fritzsche¹⁰³ were found not guilty of the charges. None of them had been charged with crimes against humanity under count four of the indictment, however. Two defendants, Baldur von Schirach¹⁰⁴ and Julius Streicher¹⁰⁵, were found guilty only of crimes against humanity. In both cases, they were charged with conspiracy to commit crimes against peace and crimes against humanity and convicted only of the second charge.

⁹⁷ Ibid.

⁹⁸ See generally *Indictment*.

⁹⁹ Robert Cryer: *Prosecuting international crimes: selectivity and the international criminal*, p. 39.

¹⁰⁰ Robert Cryer: *Prosecuting international crimes: selectivity and the international criminal*, p. 39.

¹⁰¹ *Trial of the German Major War Criminals*, Judgment, p. 104-106.

¹⁰² Ibid, p. 116-120.

¹⁰³ Ibid, p. 127-128.

¹⁰⁴ Ibid, p. 112-114.

¹⁰⁵ Ibid, p. 100-102.

Baldur von Shirach had been the Reichsleiter of Youth in Germany, a position which included leadership of the Hitler Jugend, from 1933 to 1945. He resigned his position as head of the Hitler Jugend in 1940, but retained his position as Reichsleiter with control over Youth Education. He served as Gauleiter of Vienna 1940–1945. In his capacity as Reichsleiter, a Reich Cabinet post, he was not found to have been involved in the conspiracy to plan aggressive war. He was, however, guilty of having acquiesced when the Hitler Jugend participated in transporting from Soviet-captured areas 50,000 children and youths between the ages of 10 and 20 to Germany to use as labour and auxiliaries in the armed forces.

After taking the position of Gauleiter of Vienna, von Shirach continued the policy of deportation of Jews from his territory, with full knowledge of the consequences. Since Austria was part of Germany during WWII, von Shirach's activities there could not fall under the heading of war crimes. He was therefore charged with and found guilty of crimes against humanity and sentenced to twenty years in prison.¹⁰⁶

Julius Streicher had also been a Gauleiter, of Franconia, but no connection was established between that position and crimes under the London Charter. Instead, he was convicted based on having been the editor of the weekly newspaper *Der Stürmer*, in which capacity he took every opportunity to rail against Jews and agitate for violence against them. In the words of the judgment of the Tribunal "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War crimes, as defined by the Charter, and constitutes a Crime against Humanity."¹⁰⁷ Julius Streicher was sentenced to death.¹⁰⁸

5.4 Other trials

While the Trial of the Major German War Criminals was unquestionably the best known of the trials of individuals from the defeated Axis nations after WWII, it was a mere fraction of the massive judicial effort exerted by the Allies. Thousands of Germans, Japanese, Austrians and citizens of other Axis nations were tried under a variety of laws. Most were tried in traditional military tribunals at or near the scene of their crimes, in accordance to treaties and established customary norms for war crimes. Others were tried in Nuremberg or in the other occupied zones of Germany under legislation emanating from the Allied Control Council.

¹⁰⁶ Ibid, p. 131.

¹⁰⁷ Ibid, p. 102.

¹⁰⁸ Ibid, p. 131.

5.4.1 CC10

On the 20th of December 1945, the Allied Control Council issued Law. No. 10 which empowered the commanding officers of the four allied zones of occupation to conduct criminal trials on charges of aggression, war crimes, crimes against humanity and membership of an organisation aiming at such crimes. In a like manner as the IMTFE Charter, this was based on the London Charter and the same legal issues that pertain to the Charter apply to CC10.¹⁰⁹

Unlike the London or Tokyo Charters, however, CC10 is explicitly enacted as German national law, pursuant to the legislative authority of the Allies in Germany after the unconditional surrender of that nation.¹¹⁰

Article II(c) corresponds to Article 6(c) of the London Charter:

(a) Crimes against Humanity. Atrocities and offenses, 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.¹¹¹
[sic]

Apart from the irrelevant typographical error where the (c) section is subtitled (a), easily detected by reference to the position of the section in relation to the other sections, there is a vital difference between the CC10 statute for crimes against humanity and the London and Tokyo Charters. The required link between crimes against humanity and other crimes under the jurisdiction of the Tribunal is entirely missing and thus the link between armed conflict and crimes against humanity. The statute could thus apply as easily in a time of peace as in a time of war.

5.4.2 Nuremberg Military Tribunals

The Nuremberg Military Tribunals (NMT) or 'subsequent proceedings' were tried by the United States in pursuance of CC10. Pursuant to President Truman's decision, the Office of the United States Government for Germany (OMGUS) prosecuted over one hundred and seventy other Germans than those who had appeared in front of the IMT. Evidence was

¹⁰⁹ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 1.; see also section 6.1 of this thesis.

¹¹⁰ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 33-36.

¹¹¹ *Law no. 10 - Punishment of Persons Guilty of War Crimes.*

provided by the Office of the US Chief Counsel and its chief counsel, Joseph T. McNary, established six US military tribunals which conducted the twelve trials held before the NMT.

The subsequent proceedings ran from the 26th of October 1946 to the 14th of April 1949 and the defendants included high-ranking officials, among them cabinet ministers, diplomats, military and SS leaders, industrialists, physicians who had been involved in medical crimes, as well as middle-ranking SS officers who were implicated in crimes at concentration camps or in genocide in German occupied areas. Although the trials were military, they were conducted before American civilian judges, on indictments filed by Brigadier General Telford Taylor, United States Chief of Counsel for War Crimes.

While the popular perception usually links the International Military Tribunal with prosecutions for the European Holocaust, in actual fact, the focus in those proceedings was on those alleged to be guilty for starting the war. The counts prosecuted by the British and American prosecutors, conspiracy to wage aggressive war and crimes against peace occupied most of the IMT's time. Relatively little of the vast mass of evidence for Nazi atrocities against minorities came to light at the first Nuremberg trial. It was in the Subsequent Proceedings at Nuremberg that many of the worst abuses were entered into evidence.

It was in the front of Nuremberg Military Tribunals that there appeared Nazi doctors who were accused of having carried out medical experiments on human subjects against their will, *inter alia* in concentration camps. The trial of the German judges, immortalised in the film *Judgment at Nuremberg*, was conducted under CC10 and saw sixteen defendants charged with war crimes and crimes against humanity through abuse of the judicial process and the administration of justice. The high command of the military and commander of Einsatzgruppen on the Eastern front were also tried at the Subsequent Proceedings at Nuremberg.

5.5 The flaws of Allied justice

Considered in light of the situation in which they took place, the Allied trials were mostly models of justice, fairness and probity. The problem was that this situation was a case where the defendants were citizens of defeated nations tried in courts constituted, organised and staffed by their victorious and vengeful enemies, under foreign and novel laws written by their prosecutors with the intent of convicting them and as part of a policy to bring home to the newly occupied countries their collective guilt for the war. The leaders of the Allies whose legislative authority created the laws under which the defendants were tried and whose hand

picked the courts which interpreted them had publicly declared the guilt of the defendants, collectively and in the case of men like Hess and Göring, specifically by name.

The very concept of a fair trial for war criminals is oxymoronic. Once defendants have been labelled criminals *a priori*, particularly criminals of such a vicious type as is suggested by the terms ‘war criminal’ and ‘perpetrator of crimes against humanity’, the founding principle of fair criminal trials, the presumption of innocence, has been irretrievably lost.

When all this is considered, the remarkable thing about the prosecutions of Axis suspects after WWII of crimes against peace, war crimes and crimes against humanity is not the myriad of jurisprudential flaws that mar the judicial proceedings, but the degree to which the principles of justice shone through the legal and procedural anomalies.

5.5.1 Fairness

Apart from the general objections that may be raised to any trial of the defeated by the victors, the judicial procedures at Nuremberg, Tokyo *et al* are subject to two specific criticisms in respect of fairness. These include the unavailability of *tu quoque* as a defence, and for all those not tried under the Tokyo Charter, the lack of defence counsel from the victors’ party.

The rejection of the *tu quoque* defence by the International Military Tribunal and other courts was legally and morally indefensible¹¹², although it made excellent political sense. Without introducing evidence related to *tu quoque* allegations, the defence is denied the opportunity to prove state practice and thus establish the existence of a customary norm in international law or lack thereof.

In consideration of the contention that the London Charter was an expression of customary norms in international law and thus a contribution to it, furthermore, with reference to the broad definition of the specific crimes under the Charter which necessitated that their content be fixed with reference to customary international law, this was highly relevant to, *inter alia*; establishing conspiracy to wage aggressive war and crimes against peace as not meeting the *opinio juris* test in state practice, including that of the Allies *qua* Versailles Treaty; determining whether a given mode or method of warfare was justified by military necessity or so beyond the common pale as to constitute a war crime; and in cases of *prima facie* crimes against humanity to define limits between conduct which while perhaps condemned in political rhetoric is condoned in state practice and acts which with reference to

¹¹² Geoffrey Robertson: *Crimes Against Humanity*, p. 215.

customary norms can be established to fall under the crimes against humanity statute with sufficient certainty to satisfy the requirement for specificity in criminal law.¹¹³

The collapse of adversarial ethics after the war left the defendants in Europe represented mostly with German counsel. This resulted in defence counsel unfamiliar with the procedural elements of the Anglo-American adversarial trials that informed the structure of the proceedings. Even had the short time allotted to the defence allowed for an attempt to learn more about the legal systems on which the tribunals were based, the jurisprudential tradition of the judges and prosecutors was written in languages mostly unfamiliar to the defence attorneys.

The prosecution and judges belonged to the same fraternity of foreign occupying troops in Nuremberg, from which the German counsel were effectively excluded. The facilities of the defence and access to evidence did not compare to the prosecution and delays in getting vital documents occasioned by the need to translate were frequent. In addition to the weakness of their position in comparison to the prosecution, German counsel were hampered by the need to disassociate themselves from the former regime, or face possible reprisals or even legal consequences. Several provincial Bar organisations in Germany later took punitive action against their members who were felt to have defended Nazis “too vigorously” at Nuremberg.¹¹⁴

5.5.2 *Victor's justice*

The Allied nations had absolute power over not only Germany, but if considered collectively, the world. No other power could have stood against the combined military power of the Allied at the end of the war. While the *de jure* authority of the Conference of London to create international law might conceivably be doubted, the *de facto* authority was unlimited. Furthermore, after six years of bitter warfare, the very idea of impartial judges was unrealistic. National enmities still simmered and even had the judges been from neutral countries, they would have effectively have been of the victors' party, under their power and subject to their will while in the conquered territory.¹¹⁵

As evidenced above¹¹⁶, the leaders of the major Allied nations considered the guilt of the Nazi leaders a foregone conclusion and merely discussed the manner in which their punishment ought to be determined. Josef Stalin was an early supporter of trials for the

¹¹³ Geoffrey Robertson: *Crimes Against Humanity*, p. 213-220.

¹¹⁴ Ibid, p. 214.

¹¹⁵ Ibid, p. 218-220.

¹¹⁶ Section 6.1 and 6.2 of this thesis.

principal leaders of Nazi Germany. Such dedication to the course of justice may appear out of character, but his interest was not in the principles of legality or the pursuit of truth. Stalin saw an opportunity to preside over magnificent show-trials like the ones he had orchestrated during his political purges at home. Indeed, when he selected his team for the Nuremberg trials, Stalin called the band back together. He sent as his primary judge the infamous Iona Timofeevich Nikitchenko of show-trial fame and responsible for the Soviet preparations of evidence was the even more infamous Andrey Januaryevich Vyshinsky, whose very name is a byword for farcical show-trials. When Vyshinsky visited the Palace of Justice, he proposed a toast to the judges; to the speedy conviction and execution of the criminals. To their everlasting shame, they drank.

5.5.3 *Rewriting history*

An important motivation for Stalin in desiring public trials rather than summary executions was the opportunity to affect public opinion and focus attention on Nazi atrocities. He wished to make sure that the judgment of history for the blood-drenched years of the 1930s and 40s was the one he wrote. In particular, he was anxious that the Germans should be blamed for all the war crimes committed on the Eastern Front, whether they were actually responsible for them or not. Infamously, the Soviet prosecutor, Roman Rudenko, actually indicted German officers for the murders of Polish prisoners of war in the Katyn Forest, a massacre that the Soviets had committed themselves.

5.5.4 *Principles of legality*

The *ex post facto* nature of the London Charter inevitably meant that it would be vulnerable to criticism on the basis of *nulla crime sine lege*. The counts of conspiracy to wage aggressive war and crimes against peace were legally nonsensical. Apart from the fact that the Kellogg-Briand Treaty outlaws war in general as a tool of national policy, which would tend to discredit the idea that it represented customary norms of any kind, as actual state practice was not notably peaceful, it was an instrument of public international law without provisions for personal criminal responsibility. While the argument for the legal validity of crimes against humanity is stronger, ultimately, it rests on the contention that a universal law of humanity, criminalising violations, was a customary norm before WWII. Rhetoric and abortive attempts do not constitute customary norms.

5.5.5 *The choice between legalistic impunity and flawed justice*

When finding fault with the legal issues of the Allied judgment, it is easy to overlook the alternative. The choice was not between a legal trial and an illegal one. From a jurisprudential point of view, it was a choice between stretching a point of law to the breaking point and perhaps beyond or to admit the impunity of the leaders of the Axis because of a point of legality. As M. Cherif Bassiouni says:

Before the London Charter was promulgated in the 1945, in the pronouncements and declarations of the Allies' between 1942 and 1944 revealed a consensus that many Nazi atrocities including the "deportation" of civilians to concentration camps and their "enslavement," constituted "crimes against humanity" under "general principles of law," and that these crimes were punishable on the basis of the same basis as war crimes. The logic of that jurisdictional extension is clear: conduct which constitutes punishable war crimes when the victims and violators are not of the same nationality cannot be deemed lawful only because the nationality of victims and violators is the same. To claim that such a jurisdictional legal fiction is a bar to criminal responsibility in light of the contrary positions expressed by so many civilizations over such a long period of time would be to empty international law of its value content.¹¹⁷

From a strictly positivist point of view, law is already empty of moral content. And the superior morality of a given outcome at law does not make it any more legal. Nevertheless, while the Allied act may have violated the principles of legality, it was in tune with the principles of morality and good sense. Given a choice, it is easy to see why legality is sacrificed.

5.6 **Legacy of Nuremberg**

5.6.1 *Truth and condemnation*

There can be no doubt that the choice of public trials to determine the guilt and punishment of Axis leaders had a profound effect, in politics, in law and in all other fields of human endeavour. Swift and summary executions might have assuaged the public's need for vengeance, but it would not have driven home the scale and horror of the crimes of the Axis leadership in quite the same way.

The greatest fear of the Allied leadership was that some of the defeated leaders would use the Tribunals as forums to grandstand and justify their racist ideology. These fears proved to

¹¹⁷ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 74-75.

have been exaggerated. Few Nazi leaders attempted to justify the wholesale murder in concentration camps. In the event that some would have tried, it may be suggested that it would have brought home even further the enormity of the offence. To illustrate, these words that General Matsui said in his defence before he was convicted for the Rape of Nanking, perhaps the worst single atrocity of the war, might be instructive:

The struggle between Japan and China always a fight between brothers within the 'Asian family'... It has been my belief during all these years that we must regard this struggle as a method of making the Chinese undergo self-reflection. We do not do this because we hate them, but on the contrary because we love them too much.¹¹⁸

5.6.2 *Never again*

Not only for international Jewry, but also for many of the liberal democracies that felt responsible for the near-success of the Nazi genocide against the Jewish people, the watchword derived from the salutary lesson of the judgments at Nuremberg has been 'Never again'. Unfortunately, that watchword has all too often been interpreted as 'never again shall we allow the German National Socialist Party to commit wholesale slaughter against European Jews in the World War that took place 1939-1945'.

While Communist regimes worldwide persecuted anyone marked as disloyal to the state and racked up death counts more than an order of magnitude higher than Nazi Germany managed; while great steps were taken in a decentralised grass-roots approach to genocide in the midst of internecine strife in Africa and Asia; the so-called 'civilised' world made solemn noises in Holocaust museums and occasionally hauled an old and broken-down alleged former Nazi into court for decade-old offences to show how dedicated it was to the law of humanity.

¹¹⁸ Niall Ferguson: *The War of the World*, p. 480.

6 A Post-Nuremberg World

After the judgments at Nuremberg, public international law had undergone a fundamental change. Not even the strictest positivists could maintain any longer as representative of reality the theory that international law could only be binding upon nation-states and other polities in their dealings with each other. The practice had caught up with the theory of the law of humanity, after several centuries of mostly abortive attempts to punish war criminals shielded behind the cloak of state sovereignty and a refusal to extradite. Now there truly was an area where international law could be applied to bring individual malefactors to criminal justice. The recourse to criminal remedy in cases of violation brought human rights to life as more than rhetoric or theory.

6.1 Hopes for global justice

The brutality of the two World Wars, as well as the incontrovertible evidence of organised crimes on a massive scale publicised by the Nuremberg trials had brought it home to the people of the world that if there was not some form of common law of humanity already, there ought to be such a law.¹¹⁹ Impunity for murderers who killed on a scale of thousands or millions not only revolted the conscience of the average person, it was also far too likely to encourage new butchers to rise to the challenge.

The trial and punishment of the Nazi leaders at Nuremberg, and perhaps, more importantly, the evident legalism of the proceedings, awoke in the hearts of many observers the hope that in the future justice might truly have a global reach.

The London Charter provided a blueprint for laws which proscribed at least the absolute worst offences imaginable. The Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948 (Genocide Convention) was the result of parallel evolution, in that the definition of genocide found there was developed by Raphael Lemkin concurrently with the work of the Allied legal experts preparing the London Charter, and intended to serve much the same purpose. Neither the London Charter nor the Genocide Convention contained provisos to punish every villain shielded by the patchwork of national legislations and state sovereignty. Focusing instead on what the drafters had considered the absolute worst offences, as well as perpetrators uniquely able to flout or change national law, these two foundational documents of the law of humanity were formulated to meet the formidable legal challenge of prosecuting genocidal madmen in charge of sovereign states.

¹¹⁹ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 557.

The Charter and the Convention were indisputably international law, treaties approved by the vast majority of the most powerful nations in the world. They were perhaps not perfect, but they might serve. What was lacking at the time, however, was courts with the jurisdiction, capability and willingness to enforce the nucleus of the law of humanity that had emerged.

The International Military Tribunals ran their course, punishing their tens, and the military tribunals that followed them punished their hundreds. The Allies began to dismantle the enormous military machine that they had built and their soldiers returned to civilian lives. Even had there been will to continue the trials, the international situation that allowed for them was rapidly becoming the stuff of history. The Allied were allied no more and the hungry Soviet colossus faced a patchwork of economically devastated European states cowering under the looming American giant. The idea of a common court of criminal justice for the world had come, but the time when it was practical had not.

6.1.1 Geneva conventions in 1949

From the 21st of April to the 12th of August, representatives from 64 countries met at Geneva to affirm and evolve the norms that governed armed conflict. During a Diplomatic Conference lasting from the 21st of April to the 12th of August 1949, they agreed on four separate treaties; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention relative to the Treatment of Prisoners of War and the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

These conventions reaffirmed the norms established with the previous Hague and Geneva Conventions and added materially to the protection of civilians in the field. With due deference to the horrors of the last years, total war was forbidden and grave breaches of the convention were considered international crimes.

6.1.2 Universal Declaration of Human Rights

On the 15th of February 1946, a nine-man committee informally known as the “Nuclear Committee” was charged with making preparations for the establishment of a permanent commission on human rights under the auspices of the United Nations. Members included Eleanor Roosevelt, René Cassin and Dag Hammarskjöld. The Nuclear Committee first met on the 29th of April that same year and the UNCHR was formally established on the 10th of December 1946 at the first meeting of ECOSOC.

The inaugural task of the UNCHR may also have been its most enduring legacy. It was to draft the Universal Declaration of Human Rights, accepted by the General Assembly of the United Nations on the 10th of December 1948. This declaration, combined with the International Covenants on Human Rights and the Optional Protocol, form the basis of the International Bill of Rights and therefore the foundation for international human rights as an institutionalised concept.

The Declaration was far from perfect, however. By conflating negative and positive rights, without a clear distinction, the UNCHR created an unenforceable and internally inconsistent framework for international human rights. As positive rights demand that someone supply goods, services or other things of value, such rights inevitably conflict with negative rights. In essence, positive rights may be held to grant a right *to* other people, their time, their possessions, even their lives.

The failure to limit the Universal Declaration to the lowest common denominator of rights, which could be embraced by parties of all political views, also left the Declaration upon to the charge, often advanced by nations with poor human rights records, that the supposed universal human rights in fact reflect Western liberal democratic values, transient as political systems and creeds will often be. While such arguments are more often smokescreens for genuine unwillingness to allow any outsider to criticise their internal matters, the fact is that had the UDHR and the later Conventions based on it been based on the lowest common denominator of human rights, rights that all (or almost all) religions, cultures and creeds have come to accept as valid, it would be far harder to muddy the well with accusations of cultural imperialism. Regardless of personal views on the jurisprudential value of positive rights existing by governmental or supragovernmental fiat outside of voluntary contracts, sensible prioritisation would suggest that safeguarding the rights to life, liberty and the pursuit of happiness takes precedence over safeguarding the right to paid vacation.

6.2 The role of nation states and universal jurisdiction

In the absence of international courts, some other means of enforcing the emerging law of humanity would have to be found. One obvious way was to use the national courts. Both the London Charter and the Genocide Convention, as well later treaties that advanced the common law of humanity, were incorporated into national legal codes in many countries. Countries that consistently incorporated ratified treaties on the law of humanity into their national codes were massively outnumbered by those who did not, however, either because

they adhered to the idea that international law automatically superseded national law or for other reasons.

Nations most likely to harbour the worst violators of the law of humanity were also the least likely to have conscientiously kept their national legislation in step with the international consensus on the law of humanity and even if they did, the Leipzig trials provided a painful memory of the efficiency of trying violators war crimes in their own courts. To some, the answer to this dilemma was the principle of universal jurisdiction over certain crimes.

While the notion of subjecting the leaders of criminal regimes to legal sanctions might have been a new one in WWII, universal jurisdiction was not. Pirates and slavers had, in previous centuries, been accorded the status of *hostis humani generis* and been tried by any agents of any legal system that could get their hands on them. A possible argument was that regardless of high hopes for international courts or even international enforcement, the state of affairs at the end of WWII was that the only courts competent to handle prosecutions for war crimes and crimes against humanity were national courts.

While the ideal may have been that there existed an international court with jurisdiction over international crimes, in practice, perhaps, awaiting the existence of such a thing may be to allow the perfect to become an enemy of good. Indeed, Hannah Arendt was an early advocate of universal jurisdiction of national courts over crimes against humanity, precisely by analogy from earlier *hostis humani generis*.

Four traditional principles which can be used to establish jurisdiction are recognised in international law. These are territoriality, nationality or active personality, passive personality, and the protection or effects principle. In order, they refer to geographic location, the identity of the accused, the identity of the victim and effects on vital interests. The principle of universal jurisdiction is more controversial under international law than the four traditional principles. It exists in two separate, but related forms.

Permissive universal jurisdiction is the ability of the court of any state to investigate and try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. The principle of universal jurisdiction for certain crimes is held to be part of customary international law. Such a principle can be seen in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. The theory of universal jurisdiction is that when a national court is exercising jurisdiction over conduct amounting to crimes under

international law the court acts as an agent of the international community enforcing international law.

The related *aut dedere aut judicare* rule necessarily includes universal jurisdiction, but places the further obligation on states that they may not shield a person suspected of certain categories of crimes. Instead, it is required either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.

The potential problems that attend national trials for crimes against humanity and war crimes are, however, very real. Universal jurisdiction gives states the right to try and punish at their discretion. Even when *aut dedere aut judicare* applies, it ensures that the court which prosecutes will do so as a choice, not a duty. It effectively places a voluntary power in the hands of national courts. The danger, as always, is that the ones who wish for power are the ones least equipped to handle it. States that have a political reason to grandstand with a public show trial are equally able to make use of the universality doctrine for their purposes as national courts dedicated to the ideal of justice, as well as, perhaps, rather more likely to contemplate the expense and effort involved.

Since WWII, there have been investigations or prosecutions of crimes under international law based on universal jurisdiction in the courts of at least 17 nation states, including; Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom and the United States.

6.2.1 *Germany*

German suspects of crimes against humanity and war crimes clearly had a nexus of connection to the the polity that took over the rights and responsibilities of the German government after the unconditional surrender in 1945. The jurisdiction of German courts over anyone suspected of such crimes was therefore incontrovertible. The expense and effort of continuing prosecutions against suspected Nazi war criminals and those guilty of crimes against humanity had begun to weight on the Allies early on, particularly with the lowering of public interest at home.

Subsequent to the Allied military tribunals in occupied Germany, the three German civilian governments in the occupation zones under the Western Allies were authorised to try a great number of former officials of the wartime regime in 545 civilian courts named

Spruchkammern. This was a part of the so-called de-Nazification programme, under a 1946 law called The Law for Liberation from National Socialism and Militarism¹²⁰. Many Germans had to fill in a background form and were given over to one of the courts for classification into one of the following categories:

- V. Exonerated, or non-incriminated persons (German: Entlastete)
- IV. Followers, or Fellow Travelers (German: Mitläufer)
- III. Less incriminated (German: Minderbelastete)
- II. Activists, Militants, and Profiteers, or Incriminated Persons (German: Belastete)
- I. Major Offenders (German: Hauptschuldige)¹²¹

A widely held view at the time was that measures of de-Nazification punished the guilty and the innocent alike. Employment was often conditional on having received a certification of exoneration and suspicion was therefore enough to bar a man from his right to gainful employment. The policy of de-Nazification came to be considered by the American conquerors a “counterproductive witch hunt” and abandoned and even reversed in 1951.¹²²

For the first years after the war, German prosecutions focused on those who had committed crimes against other Germans. In part, this was due to the limited jurisdiction of German courts imposed upon them by Allied rules immediately after the war. For years to come, this limited jurisdiction did not allow German courts to try crimes committed against victims who had been citizens of the Allied states.

After the end of the occupation and on their own authority, the Federal Republic of Germany took up the investigation of Nazi atrocities. West German authorities established in 1958 the Zentralen Stelle der Landesjustizverwaltungen in Ludwigsburg with the mandate to uncover any available information on Nazi crimes and to initiate criminal proceedings against those responsible.

To date, the Federal Republic of Germany has tried over 90,000 individuals and meted out over 6,400 severe sentences. The heroic efforts of the German courts to extirpate the guilt of the Nazi war criminals deserve credit¹²³, in that this accounts for the bulk of prosecutions for Nazi crimes during WWII. The 2011 conviction of 91-year-old John Demanjuk on 27,900

¹²⁰ Thomas Adam: *Germany and the Americas*, p. 274.

¹²¹ Ibid, p. 275.

¹²² Thomas Adam: *Germany and the Americas*, p. 275.

¹²³ Geoffrey Robertson: *Crimes Against Humanity*, p. 226.

counts of accessory to murder for his part as a guard at Sobibor was not a high point of German jurisprudence, however.

Germany incorporated the Genocide Convention and Torture Convention into domestic law and claimed universal jurisdiction over crimes committed under them in accordance with international customary law. On the 26th of September 1997, the Oberlandesgericht Düsseldorf, after finding that it could exercise universal jurisdiction, convicted Nikola Jorgić, a Bosnian Serb, of 11 counts of genocide and ordinary crimes under the Criminal Code. The conviction and sentence were confirmed on appeal by the Federal Court of Justice. The judgment was upheld in 2001 by the Federal Constitutional Court, which rejected a constitutional challenge contending that customary international law and Article VI of the Genocide Convention prohibited the exercise of universal jurisdiction over genocide. Nicola Jorgic was sentenced to four terms of life imprisonment.¹²⁴

A very broad formulation of the principle of universal jurisdiction currently exists in German law in the form of the German Code of Crimes against International Law (CCAIL), which entered into force on the 30th of June 2002. Intended to incorporate provisions of international criminal law into German legislation pursuant to the complementarity jurisdiction provisions of the Rome Statute. The crimes contained in the CCAIL largely reflect the crimes contained in the ICC Statute. These include genocide, crimes against humanity and war crimes.

The CCAIL provides for the prosecution of crimes committed anywhere in the world, regardless of the nationality of the perpetrator or the victim. To avoid an unfortunate clash with its principle of mandatory prosecution, which does not allow for prosecutorial discretion if there is sufficient evidence to warrant a prosecution, the Code of Criminal Procedure (CCP) was amended to allow for discretion in cases where the accused is not present in Germany and such presence is not to be anticipated or where neither the accused nor the victim is German or where criminal proceedings have been instituted outside of Germany and the accused can be extradited or surrendered to that country.

At the time of writing, trial proceedings against Ignace Murwanashyaka, a Rwandan Hutu, the alleged leader of the Democratic Forces for the Liberation of Rwanda, are ongoing on Germany. Murwanashyaka is accused of war crimes and crimes against humanity and is the first individual tried for the CCAIL definition of crimes against humanity in Germany. The trial started the 4th of May 2011 at the Oberlandesgericht of Stuttgart.

¹²⁴ ECHR, *Jorgic v. Germany*, 12th of July 2007 (74613/01).

6.2.2 *The United States of America*

The United States proceedings subsequent to the Trial of the Major War Criminals at Nuremberg are referenced above¹²⁵. In addition to these, which saw the trials of 1,814 suspects and the execution of 450 of them, the United States also conducted trials at Dachau against those who had committed war crimes against US personnel. A further 1,672 were tried there and the vast majority of them were convicted, or 1,416 of them.¹²⁶

The Dachau trials were not conducted under the authority of the London Charter and CC10, but rather customary norms of international law, embodied *inter alia* in the Hague Conventions of 1899 and 1907, which permitted belligerents to try suspected war criminals who fell into their hands. Despite being thus immune to criticism on the basis of principles of legality and the *ex post facto* grounds levelled at the Nuremberg proceedings, they were nevertheless controversial at the time, primarily due to the demagogical conduct of Senator Joseph McCarthy.¹²⁷

In addition to the work of the IMTFE, the United States set up Military Commissions in the Philippines and military tribunals in Yokohama to try Japanese officers for war crimes. Some 1,229 Japanese were convicted of such offences by the United States. Several procedural challenges of the US proceedings in the Far East, *inter alia* a petition for a writ of habeas corpus in the cases of Generals Yamahita and Homma¹²⁸, were appealed to the United States Supreme Court. All were denied.

In the three score and six years since Nuremberg, US courts have been reluctant to concede either that the law of humanity enjoys *jus cogens* status or that such status accords its courts universal jurisdiction over crimes against humanity. In the *Demjanjuk v. Petrovsky* case, the US Court of Appeals for the Sixth Circuit referred to the doctrine of universal jurisdiction in its *obiter dictum*, but the decision to extradite to Israel was founded on a domestic Israeli law and the theory of passive personality.¹²⁹

The disinclination to rely on the principle of universal jurisdiction is still present in the modern case of *United States v. Roy M. Belfast*. The central issue of that case was the constitutionality of extraterritorial jurisdiction in accordance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States and adopted into the domestic legal system with the legislation of the US

¹²⁵ See section 5.4 of this thesis.

¹²⁶ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 533.

¹²⁷ *Ibid.*, p. 534.

¹²⁸ *Ibid.*

¹²⁹ M. Cherif Bassiouni: "Universal Jurisdiction over International Crimes", p. 987.

Torture Act of 2000 18 U.S.C. §§ 2340. The United States District Court (Southern District of Florida) sidestepped that issue by finding that Mr. Belfast's place of birth, Boston, sufficed to establish jurisdiction over him on the doctrine of active personality. This was despite some doubt attaching to his US citizenship over allegations that he had served in the armed forces of a foreign nation.¹³⁰

In the case of Mr. Belfast, the *ratio decidendi* being founded in the customary and incontrovertible doctrine of the active personality, even when there was some doubt over the facts, clearly suggests a deep-seated reluctance in American jurisprudence to admit the universal jurisdiction of *jus cogens* norms, even when such norms have been made part of the national legal system through the incorporation of international treaties into domestic legislation.

6.2.3 Great Britain

As one of the four large Allied powers who exercised authority over an occupation zone of defeated Germany, the United Kingdom of Great Britain had already tried 1,085 alleged war criminals or suspect of crimes against humanity in the time immediately after WWII and executed 240 of them¹³¹.

Great Britain incorporated international criminal law into its domestic law with, *inter alia*, the Geneva Conventions Act 1957, the Genocide Act 1969, the Taking of Hostages Act 1982, the Criminal Justice Act 1988, s. 134 and the War Crimes Act 1991. The International Criminal Court Act 2001 mostly replaces the older Acts. The only successful UK prosecution for Nazi-era war crimes was in 1999 against Anthony Sawoniuk under the War Crimes Act 1991. That same Act was also used to investigate Szymon Serafinowicz.¹³²

The Criminal Justice Act 1988, s. 134, incorporating the 1984 Torture Convention was instrumental in the dramatic case of Senator Auguste Pinochet Ugarte. The former dictator of Chile was in London for medical reasons when a Spanish extradition request was sent to the British authorities. Pinochet was arrested from a hospital bed in London and placed under house arrest. The warrant of the British police was initially based upon Spanish extradition request charging him with murder and genocide (as defined in Spanish law). As neither crime gives rise to universal jurisdiction, the warrant was subsequently amended to substitute the offences of hostage-taking and torture in order to activate the universal jurisdiction clauses of the relevant Conventions.

¹³⁰ Matt Sherman and Meagan Lee: "Universal Jurisdiction: United States v Roy M. Belfast", p. 4-8.

¹³¹ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 532.

¹³² M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 5, note infra 9.

Pinochet's immunity as a former chief of state and current Senator were both rejected and Pinochet was held potentially liable to extradition. At the last moment, the Home Secretary nonetheless chose to refuse extradition on grounds of the aged Pinochet's mental incompetence. Despite this result, the case galvanised interest in the universal jurisdiction principle. Previously obscure, it had suddenly become a legal and political hot button item.

6.2.4 *France*

In connection to its authority over the occupied zone of Germany after WWII, France tried 2,107 Germans suspected of war crimes or crimes against humanity and executed 109 of them.¹³³ Later French trials for crimes against humanity that have become well known include the cases of Barbie, Touvier and Pappon.¹³⁴

French law has incorporated universal jurisdiction based on treaty obligations in respect of certain offences with Article 689 of the French Code of Criminal Procedure. Article 689 provides jurisdiction over perpetrators and accomplices for certain acts committed outside the territory of France under specific conditions, including when an international Convention gives jurisdiction to French courts to deal with the offence. Article 689-1 grants jurisdiction to French courts over persons present in France, regardless of their nationality, who have committed offences provided for in a series of international conventions. Article 689-2 implements the 1984 Torture Convention.

Absolute universal jurisdiction based on customary international law has not been established in French law. As such, universal jurisdiction cannot generally be exercised in French courts in respect of certain jus cogens crimes, including crimes against humanity and crimes of genocide. Limited exceptions are provided in relation to international crimes committed in Yugoslavia and Rwanda respectively, enacted in order to adapt French law to the requirements of UN Resolutions 827 and 955, establishing the two ad hoc International Criminal Tribunals.¹³⁵

6.2.5 *Israel*

It ought not come as a surprise to anyone that the role of Israel in the enforcement of international criminal law, specifically punishment for crimes against humanity, has been a leading one. Few nations had better cause to remember the crimes committed in WWII or to desire that justice be done on any perpetrators who had escaped it at Nuremberg.

¹³³ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 532.

¹³⁴ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 5, note infra 9.

¹³⁵ For which, see section 7.7 and 7.8 of this thesis.

The Eichmann trial was instrumental in setting the modern precedent for the principle of universal jurisdiction. Nazi war criminal Adolf Eichmann had been apprehended in Argentina by Israeli intelligence agents and brought to trial in Israel. In a detailed opinion the court appealed to the idea of the natural law to find universal jurisdiction applied. It found the crime of genocide against the Jewish people to be unequivocally to be a crime against generally accepted international law. The court did not rest its assertion of jurisdiction over the case solely upon ground of a *jus cogens* norm of international law and universal jurisdiction arising from that. The court also cited Israeli law as a basis for its jurisdiction.

John Demanjuk, extradited to Israel from the United States and accused of being the camp guard Ivan the Terrible, was subjected to a trial which did no credit to the Israeli court. Fortunately, incontrovertible evidence that he was not present at the Treblinka camp sufficed to allow the Israeli Supreme Court to overturn the conviction.

6.2.6 *Spain*

Until 2009, Spanish law did not include a provision for jurisdiction under the doctrine of passive persons. As a consequence, several cases which might otherwise have been decided in light of that doctrine were formally opened under a claim of universal jurisdiction for certain crimes.

The request for the extradition of Chilean ex-dictator Auguste Pinochet to the United Kingdom was originally supported by the contention that he was guilty of the murder of several Spanish citizens. A later amendment to the request based it instead on the universal jurisdiction doctrine. The adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in both the United Kingdom and Spain fulfilled the standard of double criminality (that the act be criminal under Spanish law as well as United Kingdom law).¹³⁶ As noted above¹³⁷, other factors led to Senator Pinochet escaping extradition.

Spain has also requested extradition for other South American military dictators and suspected human rights violators. In 1999, Nobel peace prize winner Rigoberta Menchú brought a case against the Guatemalan military leadership in a Spanish court. This eventually led to a ruling by the Spanish Constitutional Court that the principle of universal jurisdiction prevails over the existence of national interests and that Spain could try genocide cases even when no victims were Spanish. Unfortunately, the six officials named in the Spanish

¹³⁶ Diane Woodhouse: "Introduction: The Extradition of Pinochet", p. 11-12.

¹³⁷ See section 6.2.5 of this thesis.

indictments were not extradited by Guatemalan courts (indeed, one won a seat in Congress after the indictment), but this led to a considerable increase in indictments for human rights violations in Spanish courts.

In June 2003, Ricardo Miguel Cavallo, alleged to be a former officer in the military junta that ruled Argentina from 1976 to 1983, was extradited from Mexico to Spain to answer for torture, murder and crimes against humanity. He thus became only the second individual extradited to a foreign country to answer crimes against humanity allegedly committed in a third country. After considerable wrangling caused by the willingness of Argentina to prosecute and the primacy of their jurisdiction, Cavallo was extradited again to Argentina and tried there. He was found guilty by the Argentinian Supreme Court on the 26th of October 2011 and sentenced to life imprisonment for murder and torture.

6.2.7 Belgium

One of the most infamous and misunderstood statutes granting universal jurisdiction is the Loi du 16 Juin of 1993 and the 1999 revision of it. This Statute granted Belgian courts jurisdiction over war crimes, expressed as ‘grave breaches of the 1949 Geneva Conventions’. The legislation was revised in 1999 to include genocide and crimes against humanity. After the revision, it effectively granted Belgian courts jurisdiction over war crimes, crimes against humanity, and genocide, regardless of where in the world such crimes took place and whether there was any nexus of connection with Belgium at all.

In 2001 a Belgian court convicted four Rwandans in their custody for their roles in the genocide in that country¹³⁸. Belgium ran into some problems when the courts tried to issue a warrant on the incumbent Foreign Minister of the Democratic Republic of Congo. The case was brought for the International Court of Justice and the ICJ found the Belgium arrest warrant invalid in light of immunity *ratio personae*.¹³⁹ The ICJ did not rule on the issue of universal jurisdiction itself, although dissenting opinions ran the gamut of possible opinions.

At first, the Belgian courts were not certain themselves about the extent of their jurisdiction. A Belgian appeal court *in re* Ariel Sharon et al ruled that the defendants not being present led to the case not being admissible.¹⁴⁰ This led to immediate attempts to reform the statute to extend the jurisdiction, but before new legislation could be promulgated, Belgium's highest court overturned the decision on inadmissibility and ruled that the case

¹³⁸ Diane F. Orentlicher: *Universal Jurisdiction After Pinochet*, p. 3.

¹³⁹ *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3

¹⁴⁰ Diane F. Orentlicher: *Universal Jurisdiction After Pinochet*, p. 6-7.

could go forward once he no longer enjoys the immunity of his office.¹⁴¹ The United States response to that eventually led to the 2003 revision of the statute. This sharply limited the scope of the Belgian universal jurisdiction doctrine by limiting it to cases where they were required by a treaty to exercise jurisdiction or where the principles of active or passive personality applied.

6.2.8 Regional organisations?

There is ample scope for regional organisations such as the European Union to take an active role in the enforcement of a law of humanity. No instruments for such a role have been developed at present, however. Judicial bodies such as the European Court of Human Rights or the Inter-American Court of Human Rights are designed for a different, if complementary role. The court is not a criminal tribunal existing as an alternative to impunity for certain criminals, but instead a court of recourse for individuals when their government violates their rights. While enforcement focuses on perpetrators, regional human rights courts may direct their focus toward victims.

The power of the European Court of Human Rights to review and reverse national decisions is calculated to bring attempts by European nations to enforce the law of humanity by means of the doctrine of universal jurisdiction under scrutiny by the court. To date, there has been at least one case where the issue of universal jurisdiction, crimes against humanity and genocide and universal jurisdiction has passed to the European Court of Human Rights. Nikola Jorgić, mentioned above, was convicted for genocide and other crimes alleged to have been committed in Bosnia and Herzegovina under the German Criminal Code on the basis of universal jurisdiction. In consequence, he applied to the European Court of Human Rights, alleging, *inter alia*, that the German court had lacked jurisdiction to try him. On the 12th of July 2007, the ECHR found against the complaint and held that Germany had possessed such jurisdiction, citing, *inter alia*, Germany's ratification of the Genocide Convention and its compliance with international customary norms in interpreting statutes based on it.¹⁴²

6.3 The role for the United Nations

The noble experiment of the League of Nations failed conclusively. It did not prevent war and it did not protect minorities. Nevertheless, when the war-weary Allies began to contemplate the shape of the world after eventual victory and the necessity for some method of preventing a repeat of the war in another generation, it was to the League of Nations model that they turned. It was a strengthened and more robust version of the League, to be sure, but the same

¹⁴¹ Diane F. Orentlicher: *Universal Jurisdiction After Pinochet*, p. 7.

¹⁴² ECHR, *Jorgic v. Germany*, 12th of July 2007 (74613/01).

kind of treaty-based voluntary association of sovereign states, without much in the way of enforcement mechanisms other than having member states declare war on the party in violation of its norms.

A four-power conference at Dumbarton Oaks at the end of 1944 eventually led to 50 nations signing the Charter of the United Nations in San Francisco on the 26th of June 1945. The original plan of the 'Great Powers' had been to stress the new organisation's role as the keeper of the peace and leave any progressive humanitarian aims as merely incidental features of the United Nations. Political pressure at home by NGOs such as the American Jewish Congress (AJCongress) and the National Association for the Advancement of Coloured People (NAACP) convinced the United States to elevate fundamental human rights to a position of primary importance. Taking their cue from the United States of America, the other fifty signatories agreed upon a Charter where the safeguarding of human rights and the law of humanity was made a high priority.¹⁴³

The purpose of the United Nations is set forth in the Preamble to the United Nations Charter:

We the peoples of the United Nations determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, And for these ends: to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, Have resolved to combine our efforts to accomplish these aims: Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.¹⁴⁴

¹⁴³ Geoffrey Robertson: *Crimes Against Humanity*, p. 24.

¹⁴⁴ *Charter of the United Nations*, Preamble.

The commitment of the United Nations to human rights and the law of humanity is further stressed by Article 1 of the Charter:

The Purposes of the United Nations are:

1.To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2.To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3.To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4.To be a centre for harmonizing the actions of nations in the attainment of these common ends.¹⁴⁵

In consideration of these avowed principles under which the United Nations were founded, it would be surprising if the impetus and leadership in defining and enforcing a common law of humanity did not come from that organisation.

In respect to a universal law, there was a poisonous pill in the Charter, however, in Article 2:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1.The Organization is based on the principle of the sovereign equality of all its Members.

2.All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

¹⁴⁵ Ibid, Article 1.

3.All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4.All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5.All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6.The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7.Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁴⁶

6.3.1 *The International Law Commission*

In the heady days after the war, the United Nations made a strong start toward a new world where justice truly was global. As early as 1947 the General Assembly requested the International Law Commission to formulate a Draft Code of Crimes Against the Peace and Security of Mankind. The ILC proposed the International Criminal Court as early as December 1948, but it was to take a long time before either initiative saw fruition.¹⁴⁷

6.3.2 *General Assembly*

The General Assembly of the United Nations, as a body comprising nearly every state in Earth, has been well situated to promulgate international law in the form of treaties or conventions which then come to represent customary norms in their fields.

Votes in the General Assembly might be considered indicative of state belief on the legality of norms set forth in treaty law there and in cases where a treaty is subsequently signed, even ratified by a majority of states; it has an excellent *prima facie* case as embodying customary norms, with the caveat that state practice has to match state rhetoric. Voting for or signing a treaty can at most amount to a statement of belief in the legal status of a certain

¹⁴⁶ Ibid, Article 2.

¹⁴⁷ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 179-185.

norm, which is insufficient without actual state practice confirming the existence of said norm.

A vital step in both international humanitarian law and international criminal law was the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948¹⁴⁸. The Convention entered into force on the 12th of January 1951 and was primarily the result of years of tireless research, jurisprudence, diplomacy, campaigning and plain badgering by unsung hero Raphael Lemkin.¹⁴⁹

Pursuant to the Universal Declaration of Human Rights, two Covenants containing discrete rights derived from the Declaration and intended to be ratified as binding treaties, were drafted under the auspices of the UNCHR. These were the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These Covenants, as well as their Optional Protocols, were opened for signatures on the 16th of December 1966 at the General Assembly of the United Nations and all came into effect at different dates in 1976.

Specifically relevant to international criminal rights were such the International Convention on the Suppression and Punishment of the Crime of Apartheid treaties opened for signature and ratification on the 30th of November 1973 and the United Nations Convention Against Torture (Torture Convention), adopted 1984 and entering into force that same year.

6.3.3 *UN Subsidiary Bodies for Human Rights*

The UNCHR was created under Article 68 of the UN Charter as one of two functioning commissions within the framework of the UN. It was a subsidiary body of the United Nations Economic and Social Council (ECOSOC) and member states were elected from among the members of that council. The mandate of the UNCHR was twofold, first to examine, monitor and publicly report on human rights situations in specific countries or territories and second, to carry out the same functions with regard to major phenomena of human rights violations worldwide.

Over the years, several treaty-specific monitoring bodies collectively known as Conventional Mechanisms have joined the UNCHR as UN watchdogs for human rights, but until the establishment of the Office of the High Commissioner for Human Rights (OHCHR) in 1993, the Commission was by far the most visible and important one. For the initial twenty years of its existence, a strict adherence to the Westphalian principles of sovereignty restricted

¹⁴⁸ See section 7.1 of this thesis.

¹⁴⁹ Samantha Power: *A Problem From Hell*, p. 17-30; 37-45; 47-73.

the UNCHR to promoting the cause of human rights without being so forward as to actually condemn any violators.

This changed with the winds of decolonisation. In 1967, the Commission took upon itself to appoint experts with a geographic mandates in areas of especial concern, known as country mechanisms. From humble beginnings, the UNCHR began to raise its voice from time to time, if it became aware of particularly egregious violations in an area where no member state had important interests. In 1980, a working group on disappearances in Argentina was the first of what later became known as thematic mechanisms, experts or groups of experts appointed not exclusively to monitor a specific country, but to study a specific theme of human rights violations. These later became more numerous and frequently had worldwide remits.

To carry out its mandate, the UNCHR had an eclectic array of options. Of major importance was its subsidiary body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, composed of 26 experts selected with regard to equitable geographic distributions whose role was to study and report to the UNCHR on the protection of racial, national, religious and linguistic minorities and to prevent all sort of discrimination relating to fundamental freedoms and human rights, with special reference to the UDHR.

In addition to this permanent sub-commission, the UNCHR could appoint special rapporteurs, representatives or experts, either independent or part of working groups designated to cover a specific mandate, thematic or geographic. It established around 20 with a geographic focus, called country mechanisms or country mandates, and about 30 with a thematic focus, such as; Extrajudicial, summary or arbitrary executions or Human rights and extreme poverty; answering variously to the UNCHR, the Sub-Commission or the Secretary-General. On the 20th of December 1993, the Office of the High Commissioner for Human Rights (OHCHR) was established. The OHCHR not only provided the UNCHR with considerable administrative support and additional personnel, it also gave international human rights a face. The High Commissioner was supposed to be the voice of victims everywhere. Finally, in 2006, the UNCHR was replaced by the United Nations Human Rights Council (UNHRC).

6.3.4 Security Council

As the only body capable of overriding the sovereignty of member states, the Security Council in extreme cases took the initiative and issued resolutions for special tribunals to try crimes against humanity. These included the International Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Special Court for Lebanon.

6.4 International Criminal Tribunal for Former Yugoslavia

The end of the Cold War did not galvanise the United Nations sufficiently for its peacekeepers to keep the peace or stop atrocities as they were happening in Srebrenica. However, punishing the guilty might have become a possible goal once more. On the 25th of May 1993, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia, frequently referred to as the Hague Tribunal. The purpose of the Tribunal was the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.

The Tribunal is an international court operating in The Hague and staffed with judges, prosecutors and specialised staff from around the world.

6.4.1 Sources of law

As the UN Security Council is the only body empowered to violate state sovereignty, with a Chapter VII resolution, the ICTY is established under its authority. UN Security Council Resolution 827 adopted a statute for the Tribunal. The resolution empowers the Tribunal to prosecute grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity.

Other sources of law, *inter alia*, were the Hague Conventions of 1899 and 1907, the 1949 Geneva Conventions, the two Protocols to the Geneva Conventions adopted in 1977, and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the 1984 Convention Against Torture (Torture Convention).

6.4.2 Contribution to the emerging law of humanity

Some of the important contributions that have come from the work of the ICTY are in the field of customary norms. The Tribunal has found that most of their core terms have become part of customary international law, applicable to all kinds of armed conflict. Under the caselaw of the ICTY, provisions of international humanitarian law traditionally reserved for international armed conflicts also are potentially applicable to insurgencies. The court also has integrated customary law derived from the Geneva Conventions with human rights law regulating the conduct of states vis-a-vis persons found within any state's territory. Its operation does not depend on the existence or non-existence of a war.

The statute also adopted an expansive understanding of the concept of individual criminal responsibility to include two species of vicarious liability. This was firstly liability for planning, instigating, ordering, committing or otherwise aiding and abetting in planning, preparing or execution of a crime. Secondly, it was liability on superiors for acts committed

by subordinates when the superior knew or had reason to know that the subordinate was about to commit crimes or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The Tribunal found that as general principles of international law, human rights continue to exist in armed conflicts. In light of subsequent development and serious issues with its application to asymmetric warfare, its conclusion that the norms of the several sources of international human rights law should be applied as part of customary international law to internal armed conflicts may have only limited impact. Customary international law is inherently malleable and the data on guerrilla practice is scant, making it extremely questionable to make declarations about customary norms in an insurgency context.

6.5 International Criminal Tribunal for Rwanda

The horrific genocide in Rwanda encouraged the United Nations to respond. The response was significantly too late to save the victims, but it might manage to punish a few perpetrators. The International Criminal Tribunal for Rwanda was established with the purpose of trying

The Tribunal is an international court operating in the Arusha and staffed with judges, prosecutors and specialised staff from around the world.

6.5.1 Sources of law

Recognizing that serious violations of humanitarian law were committed in Rwanda, UN Security Council Resolution 955 established the ICTR to prosecute serious violations of international humanitarian law committed between the 1st of January 1994 and the 31st of December 1994.

Other sources of law, *inter alia*, were the Hague Conventions of 1899 and 1907, the 1949 Geneva Conventions, the two Protocols to the Geneva Conventions adopted in 1977, and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the 1984 Convention Against Torture (Torture Convention).

6.5.2 Contribution to the emerging law on humanity

Recognising that the content of ‘crimes against humanity’ is valueless if systematic attacks against civilian populations in a time of peace are less culpable than those in a time of war, the required link between armed conflict and crimes against humanity is removed in the law of the Tribunal. It is replaced with a requirement for a connection with a widespread or systemic attack against a civilian population. The underlying logic is sound, sounder, indeed,

than a connection with armed conflict. It is the nexus to a broader attack that elevates an otherwise ordinary crime to the level of international regulation.

The Rwanda Tribunal also made history when it saw the first head of state convicted of genocide and crimes against humanity when Jean Kambanda received a 20 year sentence for his role in the genocide against Tutsis. This means that it was the first court to thus eliminate governmental immunity as a defence for heads of state.

6.6 Other UN tribunals

6.6.1 Sierra Leone

The Special Court for Sierra Leone was established jointly by the Government of Sierra Leone and the United Nations to handle serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since the 30th of November 1996. The UN Security Council adopted Resolution 1315 on the 14th of August 2000, requesting the UN Secretary General to start negotiations to create a Special Court. Subsequently, an agreement establishing the Special Court was signed between the Government of Sierra Leone and the United Nations on the 16th of January 2002.

6.6.2 The Extraordinary Chambers of the Courts of Cambodia

After the horrors of the Khmer Rouge in Cambodia, not one court could be found willing to prosecute Pol Pot. Not willing to allow his lieutenants to share in his impunity, the government of Cambodia requested in 1997 that the United Nations (UN) assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge for serious crimes committed during the Khmer Rouge regime 1975-1979. The weakness of the Cambodian legal system and the international nature of the crimes made it exceedingly difficult for Cambodia alone to try the cases in accordance with any acceptable standards of justice.

United Nations Assistance to the Khmer Rouge Trials (UNAKRT) came into existence subsequent to the 2003 agreement between the UN and Cambodia. It provides technical assistance to the Extraordinary Chambers in the Courts of Cambodia (ECCC), which constitute domestic courts supported with international staff, established in accordance with Cambodian law. The Extraordinary Chambers are empowered to try the crime of genocide as defined in the Genocide Convention, crimes against humanity as defined in the Rome Statue and grave breaches of the Geneva Conventions.

6.6.3 Special Tribunal for Lebanon

After former Lebanese Prime Minister Rafiq Hariri and 22 others were killed in Beirut on the 14th of February 2005, the Government of the Republic of Lebanon requested the United Nations to establish a tribunal of an international character to try all those who are alleged responsible for the attack. Pursuant to Security Council resolution 1664, the United Nations and the Lebanese Republic negotiated an agreement on the establishment of the Special Tribunal for Lebanon. The Tribunal was established with Security Council Resolution 1757, including the provisions of the document annexed to it and the Statute of the Special Tribunal attached thereto. The Statute of the Special Tribunal entered into force on the 10th of June 2007.

7 The International Criminal Court

Fifty five years after the ILC was asked to begin work on the Draft Code and some fifty four after it was asked to investigate the feasibility for an International Criminal Court,

7.1 Sources of law

The International Criminal Court was established at the United Nations with the Rome Statue of the International Criminal Court. In addition to its founding Statue, the Court is the heir to a formidable body of international criminal law, in the form of treaties, customary law and *jus cogens*.¹⁵⁰

7.1.1 Historical sources

Over the century since the 1899 Hague Convention, the Martens Clause of the Preamble has evolved into a general principle of international humanitarian law. The close historical relationship between international humanitarian law and the evolution of the other crimes under the authority of the International Criminal Court is such that elements of this principle inevitably bleed over into the establishment of the legal content of such crimes. Customary norms of warfare and even customary norms of international conduct are not only valid sources of law, but a necessary complement to the Rome Statue.

While the Statue is a noble effort to codify the definitions of the crimes and strengthen their viability under the principles of legality and statutory clarity, not only the legal content of crimes under international criminal law, but the very principles of law under which to interpret and apply them still depend on a range of treaties and the accumulated custom and precedent of their interpretation, international customary law and *jus cogens*.

Important conventional sources of law for the Court include, *inter alia*, Geneva Conventions of 1949 and their Additional Protocol I; the 1899 Hague Declaration, the 1907 Regulations annexed to the Hague Convention No. IV, the 1925 Geneva Protocol, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its protocols, Additional Protocol II of 1977 to the Geneva Conventions of 1949, 1948 Genocide Convention, 1966 International Covenant on Civil and Political Rights, 1969 Vienna Convention on the Law of Treaties, 1984 Torture Convention, the 1989 Convention on the Rights of the Child, the 1994 Convention on the Safety of United Nations and Associated Personnel, the 1999 Optional Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Statutes of the International

¹⁵⁰ See section 4-7 of this thesis, inclusive.

Criminal Tribunals for Rwanda and the former Yugoslavia, and the Statute of the Special Court for Sierra Leone.

This list is far from comprehensive. M. Cherif Bassiouni identifies 322 instruments of international criminal law in existence before 1996.¹⁵¹ As they relate to customary norms or have attained a *jus cogens* status, any of them could form a source of law for the Court.

7.1.2 *Rome Statue*

After a frenetic five-week session designed to produce an agreement in time for the scheduled photo-op on the 17th of July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court voted to adopt the Rome Statue of the International Criminal Court, the legal basis for establishing the permanent International Criminal Court. One hundred and twenty states voted in favour of the treaty, twenty-one abstained and only seven were opposed to it.¹⁵²

The treaty was designed to enter into force once it had been ratified by 60 states. On the 11th of April 2002, 66 states had deposited their instruments of ratification. In accordance with its terms, therefore, the Rome Statute entered into force on the 1st of July 2002.¹⁵³

7.1.3 *Subsequent sources*

The Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was passing resolution F. This resolution established the Preparatory Commission for the Establishment of an International Criminal Court, with a mandate to, *inter alia*, prepare draft texts of Rules of Procedure and Evidence and the Elements of Crimes. The Preparatory Commission reported to the Assembly of States Parties, the management oversight and legislative body of the Court.¹⁵⁴ Irrespective of signatory or ratification status, all member states of the United Nations were invited to participate in the Preparatory Commission.

Among its achievements, the Preparatory Commission reached consensus on the Rules of Procedure and Evidence and the Elements of Crimes. These two texts were subsequently adopted by the Assembly of States Parties and the Regulations of the Court adopted by the judges.

¹⁵¹ M. Cherif Bassiouni: *Crimes Against Humanity in International Criminal Law*, p. 143.

¹⁵² Geoffrey Robertson: *Crimes Against Humanity*, p. 324.

¹⁵³ M. Cherif Bassiouni: "The Universal Model: The International Criminal Court", p. 813.

¹⁵⁴ M. Cherif Bassiouni: "The Universal Model: The International Criminal Court", p. 816-817.

Thus, in addition to the Rome Statute of the International Criminal Court above; the Rules of Procedure and Evidence, the Elements of Crimes and the Regulations of the Court jointly comprise the Court's basic legal texts, setting out its structure, jurisdiction and functions.

7.2 Jurisdiction

The International Criminal Court is considered to have a complementary jurisdiction arising from the treaty obligations of state parties. The International Criminal Court may exercise jurisdiction in three cases. Firstly according to the principle of active personality or nationality as extended by the consent of a state, i.e. the accused is a national of a state party or a state otherwise accepting the jurisdiction of the Court. Secondly according to the principle of territoriality subject to the same extension, i.e. the crime took place on the territory of a state party or a State otherwise accepting the jurisdiction of the Court. Thirdly, the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

Territorial jurisdiction

While the jurisdiction of the Court is not global in nature, it can extend to the territories of the 120 state parties collectively. That is all of South America, very nearly all Europe and half of Africa. In addition, any state can choose to accept the jurisdiction of the Court.

Jurisdiction being established on the basis of territoriality usually renders the nationality of any accused person moot, the jurisdiction being an extension of the jurisdiction of the territory they currently occupy. Whether or not the nation of which the accused is a citizen has ratified the Rome Statue or accepted the jurisdiction of the Court has no bearing on the jurisdiction of the Court over him on the basis of territoriality. An exception exists which prohibits the Court from requesting the surrender of a person to the Court if to do so would require the state to act inconsistently with its obligations under international law or international agreements unless the state or the third-party state waives the immunity or grants cooperation.¹⁵⁵

If jurisdiction is established on the basis of active personality or a referral from the UN Security Council, the location of the accused is irrelevant.

7.2.1 Temporal jurisdiction

The nature of the Rome Statue as an international treaty valid by the consent of state parties places sharp limitations on the temporal jurisdiction of the Court. The Court has jurisdiction

¹⁵⁵ *The Rome Statute of The International Criminal Court*, Article 98.

only over acts falling under its Statute if they took place after the 1st of July 2002. Jurisdiction over state parties that ratified the Rome Statute later than that date shall be limited to the date on which the the Statute entered into force for that State. Such a state may nonetheless accept the jurisdiction of the Court for the period before the entry into force of the Rome Statute. However, in no case can the Court exercise jurisdiction over events before the 1st of July 2002.

7.2.2 Complementary nature of ICC jurisdiction

The court is intended to be a court of last recourse. The principle of complementarity means that the jurisdiction of the Court is contingent on a lack of national jurisdiction, competence or will. Should a state party with jurisdiction over the case be willing and able to prosecute and investigate a case, the Court will generally not act. Such a case may, however, be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution. For example, a case would be admissible if national proceedings were undertaken for the purpose of shielding the person from criminal responsibility. Even where the Court has jurisdiction, it will not take proceed if the case is not of sufficient gravity to justify further action by the Court.

7.3 Crimes under ICC jurisdiction

The International Criminal Court is constituted with the purpose of ending the impunity of those who commit the most severe crimes. As a consequence, the jurisdiction is limited to few crimes and only those crimes the recognition of which as criminal under international law enjoys a wide consensus. By the Rome Statute, the ICC is thus given the authority to prosecute and punish crimes against humanity in the wider sense, including genocide, war crimes and aggression among other crimes against humanity. In Article 5 of the Rome Statute, it is worded as follows:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.¹⁵⁶

¹⁵⁶ *The Rome Statute of The International Criminal Court*, Article 5, paragraph 1.

7.3.1 *Crime of genocide*

The proscription of genocide is often cited as the archetype of a *jus cogens* norm in international law, one that carries with it *obligatio ergo omnes*. The ICJ has found that:

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 (Resolution 96(I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles, which are recognised by civilised nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the Cupertino required 'in order to liberate mankind from such an odious scourge'.¹⁵⁷

While it is difficult to imagine an act of genocide that does not also rise to the level of crimes against humanity in the sense of the Rome Statute, the greater acceptance of the norm proscribing genocide as a *jus cogens* rule in international law imposing an *ergo omnes* obligation argues for retaining the distinction by listing genocide as a separate crime instead of folding it into crimes against humanity.

Genocide is defined as follows in the Rome Statute:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁵⁸

7.3.2 *Crimes against humanity*

With the adoption of the Rome Statute, crimes against humanity were finally defined with some precision and given much needed specificity. Unlike war crimes and genocide, there

¹⁵⁷ *Reservation to the Convention on Genocide Case*, p. 23.

¹⁵⁸ *The Rome Statute of The International Criminal Court*, Article 6.

exists no dedicated Covenant or Convention on crimes against humanity and the precise content of a customary norm proscribing crimes against humanity therefore open to dispute.¹⁵⁹

Should the ICC succeed in applying its definition of crimes against humanity in an open, forthright and scrupulously fair manner, without opposition from the international community, it is likely that the Rome Statue formulation will replace any former customary norms of crimes against humanity resulting from the Nuremberg proceedings.¹⁶⁰

Crimes against humanity are defined in the Rome Statue as follows:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

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

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

¹⁵⁹ See sections 3-7 and section 9 of this thesis.

¹⁶⁰ See section 3.2.1 and 3.2.2 of this thesis.

- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.¹⁶¹

7.3.3 *War crimes*

The International Criminal Court has jurisdiction over a comprehensive list of war crimes that draws from norms established by the Geneva Conventions of 1949 and their Additional

¹⁶¹ *The Rome Statute of The International Criminal Court*, Article 7.

Protocol I; the 1899 Hague Declaration, the 1907 Regulations annexed to the Hague Convention No. IV, the 1925 Geneva Protocol, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its protocols, Additional Protocol II of 1977 to the Geneva Conventions of 1949, the 1989 Convention on the Rights of the Child, the 1994 Convention on the Safety of United Nations and Associated Personnel, the 1999 Optional Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, and the Statute of the Special Court for Sierra Leone.¹⁶²

These are war crimes as defined by the ICC:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

¹⁶² *War Crimes under the Rome Statute of the International Criminal Court and their source in International Humanitarian Law.*

- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;

- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.¹⁶³

7.3.4 *Crime of aggression*

The crime of aggression was initially not defined in the Rome Statute and the intention was that it should not become active until at such a time that it could be satisfactorily defined. On the 11th of June 2010, at the Review Conference of the International Criminal Court Statute in Kampala, Uganda, an amendment to the Rome Statute of the International Criminal Court was adopted. It concerns the crime of aggression, which is defined in the amended Rome Statute as:

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

¹⁶³ *The Rome Statute of The International Criminal Court*, Article 8.

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁶⁴

Despite the adoption of this definition, the Court will not have jurisdiction over the crime of aggression until one year after 30 state parties have ratified the amendment or the 1st of January 2017, whichever is later.

7.4 Organisation

The International Criminal Court is situated in the Hague. It operates under a hybrid legal system incorporating elements from the Continental and Commonlaw traditions, as well as the laws and customs developed in international criminal law. English or French are the working languages of the International Criminal Court.¹⁶⁵ Arabic, Chinese, Russian and Spanish are also official languages of the ICC.¹⁶⁶ The Court can also authorise the use of other languages, provided that a party to a proceeding or a state allowed to intervene in such a proceeding so requests and the Court considers such authorisation to be adequately justified.¹⁶⁷

¹⁶⁴ *RC/Res.6. The crime of aggression*, Article 8 bis.

¹⁶⁵ *The Rome Statute of The International Criminal Court*, Article 50, paragraph 2.

¹⁶⁶ *Ibid*, paragraph 1.

¹⁶⁷ *Ibid*, paragraph 3.

The typical judicial process of the Court from beginning to end is as follows:

- Preliminary Analysis
- Opening an investigation
- Conducting the investigation
- Presenting evidence to the judges and requesting a summons to appear or arrest warrants.
- Summonses or arrest warrants (judicial action based on the Prosecutor's evidence)
- Appearance of the named individuals (third party action)
- Confirmation of charges
- Trial
- Possible appeal
- Sentencing¹⁶⁸

The four organs of the International Criminal Court are the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry. The Judicial Divisions are further divided into the Pre-Trial Division, the Trial Division and the Appeals Division.

7.4.1 The Presidency

The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute. The Presidency is composed of three judges of the Court, elected to the Presidency by their fellow judges, for a term of three years. The President of the Court is Judge Sang-Hyun Song. Judge Fatoumata Dembele Diarra is the First Vice-President and Judge Hans-Peter Kaul the Second Vice-President.¹⁶⁹

7.4.2 Pre-Trial Division

The Pre-Trial Division provides judges that form the Pre-Trial Chamber. The Pre-Trial Division shall be composed of at least six judges of predominantly criminal trial experience.¹⁷⁰ They may number more if the President of the Court considers that efficient management of the Court so requires¹⁷¹. The judicial functions of the Pre-Trial Division are carried out by Chambers.¹⁷² There are currently four Pre-Trial Chambers active concurrently.¹⁷³ Chamber plays an important role in the first phase of judicial proceedings

¹⁶⁸ International Criminal Court homepage, <http://www.icc-cpi.int/Menus/ICC/Home>.

¹⁶⁹ Ibid.

¹⁷⁰ *The Rome Statute of The International Criminal Court*, Article 39, paragraph 1.

¹⁷¹ Ibid, paragraph 4.

¹⁷² Ibid, paragraph 2(a).

¹⁷³ International Criminal Court homepage, <http://www.icc-cpi.int/Menus/ICC/Home>.

until the confirmation of charges upon which the Prosecutor intends to seek trial against the person charged. The functions and powers of the Pre-Trial Chamber are as follows:

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
 - (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
 - (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;
 - (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.
 - (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.¹⁷⁴

¹⁷⁴ *The Rome Statute of The International Criminal Court*, Article 58.

The Prosecutor receiving information on crimes within the jurisdiction of the Court shall analyse its seriousness and may also receive written or oral testimony at the seat of the Court. In accordance with rules 47 and 104 of the Rules of Procedure and Evidence, the Pre-Trial Chamber may, at the request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of such testimony in order to protect the rights of the defence, if there is a serious risk that it might not be possible for such testimony to be taken subsequently.

In case the Prosecutor intends to initiate an investigation on his or her own motion (*proprio motu*), he or she must first submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. The Pre-Trial Chamber shall authorize the commencement of the investigation if it considers that there is a reasonable basis to proceed with the investigation and that the case appears to fall within the jurisdiction of the Court, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. If the Pre-Trial Chamber determines that the criterion of the reasonable basis is not met, the Prosecutor may either decide not to proceed with an investigation or to present a further request based on new facts or evidence regarding the same situation.

Where a situation has been referred by a State or the Prosecutor has initiated an investigation on his own motion, the Pre-Trial Chamber may be asked by the Prosecutor for authorization to continue investigating when one or more States have asked him to defer to the State's investigation. Moreover, the Pre-Trial Chamber may at any time during the investigation be seized with a challenge to the jurisdiction of the Court or the admissibility of a case by a State as set out in article 19 of the Rome Statute or by an accused or a person for whom a warrant of arrest or a summons to appear has been issued, which, if successful, ends the proceedings against that person before the Court. The Rome Statute further provides that the Pre-Trial Chamber may also review a decision of the Prosecutor not to proceed with an investigation either on its own initiative, or at the request of the State making a referral under article 14 of the Rome Statute, or the United Nations Security Council under article 13 (b) of the Rome Statute.

The Pre-Trial Chamber must ensure the overall integrity of the proceedings during the investigation. The first concern in this respect is upholding the rights of the defence during the investigation phase. In this regard, when a unique investigative opportunity arises, the Pre-Trial Chamber must be so informed by the Prosecutor and may, upon the request of the latter

take all such measures as may be necessary to ensure the efficiency and integrity of the proceedings. These measures may include, inter alia, appointing an expert or authorizing a counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence. In addition, the Pre-Trial Chamber may authorize the Prosecutor to take specific investigative steps within the territory of a State Party, without having secured its cooperation when the State is unable to comply with the request due to the unavailability of any authority competent to execute the request for cooperation.

During the entire pre-trial phase, the Pre-Trial Chamber is also concerned with safeguarding the interests of victims and witnesses and especially protecting their safety, physical and psychological well-being, as well as their dignity and privacy. For this purpose, the Pre-Trial Chamber may issue such orders as are necessary and take any other measure as may be required, taking into account the rights of the defence. The Pre-Trial Chamber may also seek the cooperation of States to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of the victims, where a warrant of arrest or summons to appear has already been issued.

Finally, the Pre-Trial Chamber is at all times responsible for protecting national security information of concerned States. At any time after the initiation of an investigation, the Prosecutor may apply to the Pre-Trial Chamber for the issuance of a warrant of arrest or a summons to appear. The Pre-Trial Chamber shall issue a warrant of arrest or a summons to appear if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. In the event a person has been arrested or has appeared pursuant to a summons, the Pre-Trial Chamber may, upon request of said person, issue orders or seek the cooperation of States as may be necessary to assist the person in the preparation of his or her defence. Moreover, after the initial appearance of the person concerned before the Court, the Pre-Trial Chamber must also ensure that the person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.

A person subject to a warrant of arrest may apply for interim release pending trial which is periodically reviewed by the Pre-Trial Chamber. Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber holds a hearing in the presence of the Prosecutor, the person charged and his/her counsel to decide on the confirmation of charges before trial. At the hearing the Prosecutor has to support the charges with sufficient evidence to establish substantial grounds to believe that the person

committed the crime charged. The person has the right to object to the charges, challenge the evidence presented by the Prosecutor and present evidence. Based on its determination, the Pre-Trial Chamber either confirms the charges or declines to confirm the charges if it determines that there is insufficient evidence, or it may also adjourn the hearing and request the Prosecutor to consider to either provide further evidence or conduct further investigations or amend a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

7.4.3 Trial Division

Upon the preliminary decision on the admissibility of a case and after the confirmation of the charges by the Pre-Trial Chamber, the Presidency constitutes a Trial Chamber responsible for the conduct of subsequent proceedings.¹⁷⁵

Three judges of the Division carry out the judicial functions of the Trial Chamber (Article 39 (2)(b)(ii) of the Rome Statute). The major role of the Trial Chamber, expressed in article 64 of the Rome Statute, is adopting all the necessary procedures to ensure that a trial is fair and expeditious, and is conducted with full respect for the rights of the accused with regard for the protection of victims and witnesses.

As with the Pre-Trial Division, The Trial Division is composed predominantly of judges with criminal trial experience. They shall serve in this Division for a period of three years, and thereafter until the completion of any case if the hearing has already started. The judges assigned to the Trial Division are; Judge Sir Adrian Fulford, President of Division; Judge Fatoumata Dembele Diarra, Judge Elizabeth Odio Benito , Judge Bruno Cotte, Judge Joyce Aluoch, Judge Christine Van den Wyngaert, Judge Kuniko Ozaki and Judge René Blattmann .

The Presidency can decide to attach temporarily to the Trial Division a judge assigned to the Pre Trial Division if the efficient management of the Court's workload so requires, but a judge who has participated in the pre-trial phase of a case can not, under any circumstances, be eligible to sit on the Trial Chamber hearing that case.

The Trial Chamber determines the innocence or guilt of the accused. Once the Trial Chamber deliberates that the accused is guilty, it can impose imprisonment for a specified number of years, which may not exceed a maximum of thirty years or a term of life imprisonment. Financial penalties can be imposed (Article 77). The Trial Chamber can also order a convicted person to pay money for compensation, restitution or rehabilitation for victims (Article 75 (2)). Trial must be held in public hearings, unless special circumstances require that certain proceedings be in closed session to protect confidential or sensitive information to be given in evidence, and victims and witnesses as provided in article 68.

¹⁷⁵ *The Rome Statute of The International Criminal Court*, Article 61, paragraph 11.

7.4.4 Appeals Division

The Appeals Division is composed of the President of the Court and four other judges. In addition to Judge Sang-Hyun Song, President of the Court, they are at present; Judge Anita Ušacka, President of Division, Judge Akua Kuenyehia, Judge Erkki Kourula and Judge Daniel David Ntanda Nsereko. The Appeals Chamber is composed of all five judges assigned to the Appeals Division.

The Prosecutor may appeal a decision of conviction or acquittal on grounds of procedural error, error of fact or error of law. A convicted person, or the Prosecutor on that person's behalf, may appeal a conviction on the above grounds or on any other ground that affects the fairness or reliability of the proceedings or decision. The Prosecutor or the convicted person may appeal the sentence imposed on the ground of disproportion between the crime and the sentence.

The Appeals Chamber may decide to reverse or amend the decision or sentence or order a new trial before a different Trial Chamber. On appeal against sentence, if the Appeals Chamber is of the opinion that there are grounds on which the conviction might be set aside, the Appeals Chamber may invite the Prosecutor and the convicted person to submit grounds of appeal and may thereafter render a decision on conviction. Likewise, on appeal against conviction, the Appeals Chamber if it considers that there are grounds to reduce the sentence may invite the Prosecutor and the convicted person to submit such grounds and may render thereafter a decision on the issue.

Other decisions made during the course of proceedings by the Pre-Trial and Trial Chamber may also be appealed by either party, including decisions with respect to jurisdiction and admissibility. In addition, there is provision for appeals against orders for reparations. A convicted person, or other specified persons on that person's behalf, may also apply to the Appeals Chamber to revise a final judgement of conviction or sentence when new evidence has been discovered which, if available at the time of trial, would have been likely to have resulted in a different verdict.

Among the other grounds for revision is the discovery that decisive evidence was false, forged or falsified or that there was serious misconduct by a participating judge. The Appeals Chamber is also responsible for the review of sentence, i.e. to determine whether, after the person has served two thirds of the sentence or 25 years in the case of life imprisonment, the sentence should be reduced. If not reduced, the Appeals Chamber shall thereafter review the question of reduction of sentence at least every three years. Furthermore, the Appeals Chamber is the body responsible for deciding questions relating to the disqualification of the Prosecutor or a Deputy Prosecutor.

7.4.5 *Office of the Prosecutor*

The Office of the Prosecutor (OTP) is one of the four organs of the International Criminal Court. It has the responsibility for carrying out investigations and conducting prosecutions in front of the ICC. The OTP is composed of three Divisions. These are the Prosecutions Division, in the charge of Fatou Bensouda who also holds the title of Deputy Prosecutor; the Investigations Division under Michel de Smedt and the Jurisdiction, Complementarity and Cooperation Division under Phakiso Mochochoko. In addition to the operational areas represented by the three divisions, the work of the OTP is supported by the Legal Advisory Section and Public Information Unit and receives technical services from the Language Unit, the Information and Evidence Unit and the Knowledge Base Unit.

The Prosecution Division is where the traditional work of a prosecutor's office takes place. It is staffed with trial and appeals lawyers and has the task of presenting cases before the judges of the Judicial Divisions of the ICC. The Investigation Division is made up of a group of lawyers, investigators and analysts who work together in teams on specific investigations. The Jurisdiction, Complementarity and Cooperation Division (JCCD) includes analysts, international Cooperation Experts and lawyers providing advice to the Prosecutor on issues of jurisdiction and admissibility, which are essential prerequisites for any investigations and prosecutions. Without its own police and other agencies to rely upon, the Office must build networks of international cooperation. JCCD is responsible for ensuring necessary agreements and arrangements are in place to secure full cooperation of states and international organizations and maintaining dialogue with the OTP's stakeholders, including civil society.

The Office of the Prosecutor is headed by the Chief Prosecutor chosen by election in the Assembly of States Parties. He is assisted by one or more Deputy Prosecutors. There is currently one Deputy Prosecutor, Fatou Bensouda, who as noted above also heads the Prosecutions Division. The First Chief Prosecutor, Luis Moreno-Ocampo, took office on the 16th of June 2003. At the tenth session of the Assembly of States Parties, Deputy Prosecutor Fatou Bensouda of Gambia was elected as the new Prosecutor on the 12th of December 2011¹⁷⁶. She is scheduled to take her office on the 16th of June 2012.

7.4.6 *The Registry*

The administrative work of the ICC is the function of the Registry. Any non-judicial aspects of the administration and servicing of the Court fall under the purview of the Registry. Such functions include, *inter alia*, the administration of legal aid matters, court management,

¹⁷⁶ ICC-ASP/10/38 Election of the Prosecutor of the International Criminal Court.

victims and witnesses matters, defence counsel, detention unit, and the traditional services provided by administrations in international organisations, such as finance, translation, building management, procurement and personnel.¹⁷⁷

The official head of the Registry carries the title of Registrar. The judges of the Court elect the Registrar for a five-year term. The current Registrar is Silvana Arbia, who was elected on the 28th of February 2009.¹⁷⁸

7.4.7 Assembly of the States Parties

Assembly of States Parties to the Rome Statute of the International Criminal Court (ASP), created by the Rome Statute, continues the work of the Rome Conference in establishing the Court. The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of the States that have ratified and acceded to the Rome Statute. Each State Party is represented by a representative who is proposed to the Credential Committee by the Head Of State of government or the Minister of Foreign Affairs (Chapter IV of the Rules of Procedure of the Assembly of States Parties).

The Assembly of States Parties has a Bureau, consisting of a President, two Vice Presidents and 18 members elected by the Assembly for a three-year term, taking into consideration principles of equitable geographic distribution and adequate representation of the principal legal systems of the world. According to article 112 (7), each State Party has one vote and every effort has to be made to reach decisions by consensus both in the Assembly and the Bureau. If consensus cannot be reached, decisions are taken by vote.

7.5 Enforcement

For enforcement of its decisions and, indeed, protection of witnesses and the serving of warrants, the International Criminal Court is at the mercy of state parties. In the light of the opposition of China, the United States, Russia and India to the Court, this is a severe weakness. These four nations include two of the most populous nations in the world, two of the richest and three of the most militarily powerful among them. No enforcement will be very effective in the absence at least tacit support from those nations.

¹⁷⁷ International Criminal Court homepage, <http://www.icc-cpi.int/Menus/ICC/Home>.

¹⁷⁸ Ibid.

7.6 Cases

To date, the Court has opened investigations into seven situations in Africa: the Democratic Republic of the Congo; Uganda; the Central African Republic; Darfur, Sudan; the Republic of Kenya; the Libyan Arab Jamahiriya and the Republic of Côte d'Ivoire. Of these seven, three were referred to the Court by the states parties (Uganda, Democratic Republic of the Congo and the Central African Republic), two were referred by the United Nations Security Council (Darfur and Libya) and two were begun *proprio motu* by the Prosecutor (Kenya and Côte d'Ivoire).

The International Criminal Court has publicly indicted 27 people, proceedings against 23 of whom are ongoing. It has issued arrest warrants for 18 individuals and summonses to nine others. Five individuals are in custody and are being tried while eight individuals remain at large as fugitives. Additionally, two individuals have been arrested by national authorities, but have not yet been transferred to the Court; the national authorities have indicated to be willing to try the suspects themselves. Proceedings against four individuals have finished following the death of two and the dismissal of charges against the other two.

As of December 2011, the Lubanga trial regarding the Democratic Republic of the Congo has been concluded with the judgment pending. There are two trials ongoing against three people, the Katanga-Chui trial regarding the DR Congo and the Bemba trial regarding the Central African Republic. A fourth trial, the Banda-Jerbo trial in the situation of Darfur, Sudan, is anticipated to begin in 2012. The confirmation of charges in the Mbarushimana case in the situation of the DR Congo was declined. On 23 December 2011, Mbarushimana became the first indictee to be released from the ICC custody. Two confirmation of charges hearings against Ruto et al. and Muthaura in the situation of Kenya have concluded with the confirmation of charges pending. The confirmation of charges hearing in the Gbagbo case in the Côte d'Ivoire situation is scheduled to take place in mid-2012.

8 Conclusions

In order for there to be crimes against humanity, there has to be a law of humanity. The emergence of this law of humanity as a customary norm in international law has been elucidated above. While there are precursors into the dawn of time, only elements of the law of armed conflicts can be said to have the status of customary norms in international law before the Nuremberg proceedings, which introduced into positive international law many of the concepts that make up law of humanity. Making up elements in that law or deriving from it in whole or in part is the corpus of international humanitarian law, law of armed conflicts or *jus in bello*; *jus ad bello*; international human rights law and lastly the various norms that make up crimes against humanity in a wider sense.

While the application of such a nebulous concept as a source of punishment conflicts seriously with the principles of legality, the alternative may in many cases be impunity. The weaknesses of the concept of crimes against humanity as a source of criminal law have been substantially rectified with the Rome Statue and the International Criminal Court. The problem lies now in enforcement. Criminals ought to be arrested the moment they commit a crime, not once they have graciously relinquished power or lost a war. Global justice demands global enforcement. Why should not a phalanx of armed policemen descend from helicopters to arrest dictators who are still in power while holding arrest warrants from the Court?

While the UN remains a paper tiger, hobbled by superpower veto and conservative interpretations of the doctrine of sovereignty, it is folly to expect the claws to be able to inflict anything but paper cuts. If the world's most powerful and influential nations, the United States of America chief among them, jealously guard their jurisdictional monopolies within their own borders and react with fury toward all good faith attempts for a truly global justice, they should not be surprised at the results. No court or tribunal can solve the problems of the world, but an International Criminal Court could provide a realistic alternative in cases where impunity is currently the status quo.

For the Court to work, it will have to be supported by the world's most powerful and influential nations. These nations have to have the courage and fortitude to use force in the pursuit of justice. Just as the local police sometimes has to break down the doors of the domestic abuser before he does irreparable harm to his family, invading countries in the process of genocide or serious crimes against humanity is perfectly justified.

The United Nations cannot take the initiative in proactively seeking justice. The Security Council is at the mercy of power politics among superpowers while the General Assembly

remains mostly composed of non-democratic countries, with every dictator having a vote that is equal to the votes of all the free people of a democracy. No General Assembly which numbers more dictatorships and oligarchies than democracies will ever truly favour justice with a global reach, because no tyrant is ever easy in his conscience.

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